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THE CIVIL COURT MANUAL
(IMPERIAL ACTS)

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THE CIVIL COURT MANUAL
(IMPERIAL ACTS)

[VOLUME III]

THE NATIVE COINAGE ACT (IX OF 1876).[1]

Year.	No.	Short title.	Amendment.
1876	IX	Native Coinage Act.	Repealed in part, Act X of 1914.

[*N. B.*—Throughout this Act for 'Native State' and 'Native States,' the words 'Indian State' and 'Indian States' have been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

[28*th March*, 1876.

An Act to enable the Government of India to declare certain coins of [*Indian States*] *to be a legal tender in British India.*

WHEREAS it is expedient to enable the Governor-General in Council to declare that a tender of payment of money, if made in certain coins made for or issued by [Indian States], shall be a legal tender in British India ; It is hereby enacted as follows :—

Preamble.

Short title.

1. This Act may be called THE NATIVE COINAGE ACT, 1876.

Local extent

It extends to the whole of British Inda ;

[2][* * * *]

2. [*Interpretation clause*]. *Rep. by A.O.*, 1937.

Power to declare that the coins of an Indian State shall be legal tender.

3. Subject to the provisions of section 4, the Central Government may, from time to time, by notification in the Official Gazette, declare that a tender of payment of money, if made in the coins, or the coins of any specified metal, made under this Act, for any [Indian State], shall be a legal tender in British India ;[3]

LEG. REF.

[1] For the Statement of Objects and Reasons, see *Gazette of India*, 1876, Pt. V, p. 36 ; for Proceedings in Council, see *ibid*, (Supplement), pp. 178, 192 and 405.

[2] The words " and it shall come into force at once " were repealed by Act X of 1914, Sch. II.

[3] For notifications issued under this section in respect of certain coins of—

(1) the Alwar State, see *Gazette of India*, 1877, Pt. I, p. 644 ;

(2) the Bikanir State, see *Gazette of India*, 1893, Pt. I, pp. 213, 428 and 517 and *ibid.*, 1894, Pt. I, p. 187;

(3) the Dhar State, see *Gazette of India*, 1888, Pt. I, p. 18.

As to Bhopal Coinage see the Bhopal Coinage Act, (XI of 1897).

and the provisions of the Indian Coinage Act, 1870,[1] shall apply to the coins to which such notification refers, so far as such provisions are applicable thereto, and save as expressly provided by such notification.

When such power may be exercised.

4. The power conferred by the first clause of section 3 shall be exercisable only when the coins referred to in such notification comply with the following conditions (that is to say)—

in the case of coins of gold, silver or bronze,

(*a*) their fineness is identical with that for the time being prescribed by law for coins of the Central Government of the same metal ;

in the case of coins whether of gold, silver, bronze or copper,

(*b*) they are identical in weight with some coins of the Central Government of the same metal, which may for the time being be legally coined at any Mint of the Central Government, or bear such relation thereto as is approved by the Central Government ;

(*c*) the devices upon their obverse and reverse differ from the devices on coins now made or issued by any such [Indian State], and have been approved by the Central Government ;

(*d*) upon each of such coins its value in money of the Central Government is inscribed in the English language ;

(*e*) the [Indian State] for which they are coined has undertaken to abstain during a term of not less than thirty years from the date of the notification, from coining in its own Mint gold, silver, bronze, or copper, as the case may be, and has also undertaken that no coins resembling coins for the time being a legal tender in British India, shall, after the expiration of the said term, be struck under its authority or with its permission at any place within or without its jurisdiction ;

(*f*) such State has formerly declared that a tender of payment of money, if made in coins of the Central Government of the same metal, shall, in the territories subject to such State, be a legal tender in the cases in which payment made in such coins would, under the law for the time being in force, be a legal tender in British India ;

(*g*) such State has also agreed that the law and rules for the time being in force respecting the cutting and breaking of coin of the Central Government reduced in weight by reasonable wearing or otherwise, or counterfeit, or called in by proclamation, shall apply to the coins made for such State under this Act, and that it will defray the cost of cutting and breaking them ; and

(*h*) such State has also agreed not to issue the same coins below their nominal value, and not to allow any discount or other advantage to any person in order to bring them into circulation.

[Indian] States authorized to send metal to British India Mint for coinage.

5. It shall be lawful for any such State to send to any Mint in British India metal to be made into coin under this Act ; and, subject to the Mint Rules for the time being in force, and to the provisions hereinafter contained, the Mint-master shall receive such metal and convert it into coin, provided that it be fit for coinage.

Nothing herein contained shall be deemed to entitle any such State to have coins made under this Act at any Mint of the Central Government of any metal which is not for the time being legally coined at such Mint.

Power to impose a charge for coinage.

6. The Central Government may impose on any metal sent to a Mint for coinage under this Act the duty (if any) leviable on the same metal under the Indian Coinage Act, 1870[1], and also a charge sufficient to defray the expenses of

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LEG. REF.

[1] *See* now the Indian Coinage Act (III of 1906).

coinage over and above the expenses of assay and refining; and the Mint-master shall coin such metal at the charge so imposed.

7. The Central Government may, from time to time, with reference to the reasonable requirements of the population of any [Indian State], fix the maximum number of any coins of any particular metal that shall be coined under this Act.

Power to limit number of coins to be made under this Act for any Indian State.

THE NATIVE CONVERTS' MARRIAGE DISSOLUTION ACT (XXI OF 1866).

PREFATORY NOTE.—The following is the Statement of Objects and Reasons annexed to the Bill :—

"The object of this Act was to legalize under certain circumstances the re-marriage of native converts to Christianity whose wives or husbands have deserted or repudiated them exclusively on religious grounds.

The present Act was passed to solve the difficulty by an interposition of the secular power, leaving missionaries of religion to act on their own views of duty in re-marrying their converts.

The persons entitled to relief under the Act are defined as 'Native husbands' and 'Native wives.' The expression 'Native husbands' is defined to mean a married man domiciled in British India, who shall have completed the age of sixteen years, and shall not be a Christian, a Mahomedan nor a Jew. 'Native wife' is defined to mean a married woman domiciled in British India who shall have completed the age of thirteen years, and shall not be a Christian, a Mahomedan nor a Jewess.

The mode of relief is by suit for conjugal society. In the course of the suit, many separate interrogatories are to be addressed to the Native wife by the Judge for the purpose of conclusively ascertaining her refusal to join her husband and the grounds therefor, and various private interviews are provided as means of conciliation. It is only after all these efforts to overcome the wife's distaste have failed, that the Judge may make a decree permitting the husband to re-marry.

The desertion or repudiation must have continued for six months before the commencement of the suit."

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THE NATIVE CONVERTS' MARRIAGE DISSOLUTION ACT (XXI OF 1866).

Year.	No.	Short title.	Amendments.
1866	XXI	The Native Converts' Marriage Dissolution Act.	Repealed in Part, VII of 1807; XVI of 1874; XII of 1891; X of 1914.

[*2nd April*, 1866.

An Act to legalize, under certain circumstances, the dissolution of marriages of Native Converts to Christianity.

WHEREAS it is expedient to legalize, under certain circumstances, the dissolution of marriages of Native Converts to Christianity deserted or repudiated on religious grounds by their wives or husbands; It is enacted as follows :—

Preamble.

Short title.

1. This Act may be cited as THE NATIVE CONVERTS' MARRIAGE DISSOLUTION ACT, 1866.

2. [*Commencement of Act.*] *Repealed by the Repealing Act* (*XVI of* 1874).

Interpretation clause.

3. In this Act—

"Native husband."

"Native husband" shall mean a married man domiciled in British India, who shall have completed the age of sixteen years, and shall not be a Christian, a Muhammadan nor a Jew;

"Native wife."

"Native wife" shall mean a married woman domiciled in British India, who shall have completed the age of thirteen years, and shall not be a Christian, a Muhammadan nor a Jewess :

"Native law."

"Native law" shall mean any law, or custom having the force of law, of any persons domiciled in British India other than Christians, Muhammadans and Jews :

"Month" and "year."

"month" and "year" shall respectively mean month and year according to the British calendar;

[2][* * * * * *]

When convert deserted by his wife may sue for conjugal society.

4. If a Native husband change his religion for Christianity, and if in consequence of such change his Native wife for the space of six continuous months, desert or repudiate him, he may sue her for conjugal society.

When convert deserted by her husband may sue.

5. If a Native wife change her religion for Christianity, and if in consequence of such change her Native husband for the space of six continuous months, desert or repudiate her, she may sue him for conjugal society.

LEG. REF.

[1] For Statement of Objects and Reasons to the Bill which was passed into law as Act XXI of 1866, see *Gazette of India*, 1865, p. 59; for the Report of the Select Committee, see *ibid.*, 1866, p. 163, and for discussions on the Bill, see *ibid.*, 1865, Supplement, p. 5 and 1866, Supplement, p. 201.

This Act has been declared to be in force in the whole of British India except as regards the Scheduled Districts, by the Laws Local Extent, Act (XV of 1874), S. 3.

It has been declared in force in the Sonthal Parganas by the Sonthal Parganas Settlement Regulation (III of 1872), Ben. Code, Vol. I, and in the Arakan Hill District except so much as relates to a stamp, by the Arakan Hill District Laws Regulation (IX of 1874), Bur. Code.

[2] The paragraph relating to number was repealed by Act X of 1914 and the definition of High Court by A.O., 1937.

NOTES.

Sec. 1.—*See* 18 C. 252; 20 I.C. 557; 9 N.L.R 102.

Sec. 3.—*See* 44 P.R. 1871.

Sec. 4.—*See* 46 M. 839=45 M.L.J. 208.

6. If the respondent, at the time of commencement of such suit, reside within the local limits of the ordinary original civil jurisdiction of any of the High Courts of Judicature the suit shall be commenced in such Court; otherwise it shall be commenced in the principal Civil Court of original jurisdiction of the district in which the defendant shall reside at the commencement of the suit.

Court in which suit shall be brought.

7. The suit shall be commenced by a petition in the form in the first schedule to this Act, or as near thereto as the circumstances of the case will allow.

Suit to be commenced by verified petition.

The statements made in the petition shall be verified by the petitioner in the manner required by law for the verification of plaints; and the petition [1][* * *] may be amended by permission of the Court.

8. A copy of the petition shall be served upon the respondent, and the Court shall thereupon issue a citation under the seal of the Court and signed by the Judge.

On service of petition, citation to respondent.

9. In ordinary cases the citations shall be in the form in the second schedule to this Act, or as near thereto as the circumstances of the case will allow.

Form of citation.

But where the respondent is exempt by law from personal appearance in Court, or where the Judge shall so direct, the citation shall be in the form in the third schedule to this Act, or as near thereto as the circumstances of the case will allow.

10. A copy of the citation sealed with the seal of the Court shall be served on the respondent; and the provisions of the Code of Civil Procedure, as to the service and endorsement of summonses shall apply, *mutatis mutandis*, to citations under this Act.

Service of citation.

11. If the respondent shall not obey such citation and comply with every other requirement made upon her or him under the provisions of this Act, she or he shall be liable to punishment under section 174 of the Indian Penal Code.

Penalty on respondent not obeying citation.

12. On the day fixed in the citation the petitioner shall appear in Court, and the following points shall be proved—

Points to be proved on appearance of petitioner.

(1) the identity of the parties:

(2) the marriage between the petitioner and the respondent:

(3) that the male party to the suit has completed the age of sixteen years, and that the female party to the suit has completed the age of thirteen years:

(4) the desertion or repudiation of the petitioner by the respondent:

(5) that such desertion or repudiation was in consequence of the petitioner's change of religion:

(6) and that such desertion or repudiation had continued for the six months immediately before the commencement of the suit.

13. The respondent, if such points be proved to the satisfaction of the Judge, shall thereupon be asked whether she or he refuses to cohabit with the petitioner, and, if so, what is the ground of such refusal.

First interrogation of respondent.

In ordinary cases such interrogation and every other interrogation prescribed by this Act shall be made by the Judge, but when the respondent is exempt by law from personal appearance in Court, or when the Judge shall in his discretion excuse the respondent from such appearance, the interrogation shall be made by commissioners acting under such commission as hereinafter mentioned.

LEG. REF.

[1] The words "shall bear a stamp of two rupees, and," were repealed by the Court-Fees Act (VII of 1870), Sch. III.

NOTES.

Sec. 6.—*See* 44 P.R. 1871.

Interrogations by Judge may be public or private.

14. Every interrogation mentioned in this Act and made by the Judge may, at the discretion of the Judge, take place in open Court or in his private room.

If any such interrogation take place in open Court, the Judge may, so long as it shall continue, exclude from the Court all such persons as he shall think fit to exclude.

Procedure when female respondent refuses to cohabit with petitioner.

15. If the respondent be a female and in answer to the interrogatories of the Judge or commissioners, as case may be, shall refuse to cohabit with the petitioner, the Judge, if upon consideration of the respondent's answers and of the facts which may have been proved by the petitioner he shall be of opinion that the ground for such refusal is the petitioner's change of religion, shall make an order adjourning the case for a year, and directing that, in the interim the parties shall, at such place and time as he shall deem convenient, have an interview of such length as the Judge shall direct, and in the presence of such person or persons (who may be a female or females) as the Judge shall select with the view of ascertaining whether or not the respondent freely and voluntarily persists in such refusal.

Adjournment for a year.

Interview.

Procedure on expiration of adjournment.

16. At the expiration of such adjournment the petitioner shall again appear in Court and shall prove that the said desertion or repudiation had continued up to the time last hereinbefore referred to, and if the points mentioned in section 12 and this section of this Act shall be proved to the satisfaction of the Judge, and if the respondent on being interrogated by the Judge or commissioners, as the case may be, again refuse to cohabit with the petitioner, the respondent shall be taken to have finally deserted or repudiated the petitioner ;

Interrogation of respondent.

and the Judge shall, by a decree under his hand and sealed with the seal of his Court, declare that the marriage between the parties is dissolved.

Decree.

Decree in case of male respondent refusing to cohabit on grounds of petitioner's change of religion.

17. If the respondent be a male and in answer to the interrogatories of the Judge or commissioners, as the case may be, shall refuse to cohabit with the petitioner the Judge, if upon consideration of the respondent's answers and of the facts which may have been proved by the petitioner he shall be of opinion that the ground for such refusal is the petitioner's change of religion, shall adjourn the case for a year.

At the expiration of such adjournment, the petitioner shall again appear in Court ; and if the respondent on being interrogated by the Judge or commissioners as the case may be, again refuse to cohabit with the petitioner, the Judge shall thereupon pass such a decree as last aforesaid ;

Proviso.

Provided that if the petitioner shall so desire (but not otherwise), the proceedings in the suit shall, *mutatis mutandis*, be the same as in the case of a female respondent.

Decree if respondents so refuse in case of unconsummated marriage, either party being *impubes* at time of marriage.

18. Notwithstanding anything hereinbefore contained, if it shall appear at any stage of the suit that both or either of the parties had not attained puberty at the date of their marriage, and that such marriage has not been consummated, and if, in answer to the interrogatories made pursuant to section 13 of this Act, the respondent shall refuse to cohabit with the petitioner, and allege, as the ground

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NOTES.

Sec. 16.—Except as provided by this Act no Civil Court in British India has any matrimonial jurisdiction over Hindus and a decree for dissolution of marriage between a Hindu husband and wife passed by any such Court is *ultra vires* and a mere nullity. 20 I.C. 55=9 N.L.R. 102.

for such refusal, that the petitioner has changed his or her religion, the Judge shall thereupon pass such a decree as last aforesaid.

Liberty to parties to marry again.

19. When any decree dissolving a marriage shall have been passed under the provisions of this Act, it shall be as lawful for the respective parties thereto to marry again as if the prior marriage had been dissolved by death, and the issue of any such re-marriage shall be legitimate, any Native law to the contrary notwithstanding :

Provided always that no minister of religion shall be compelled to solemnize the marriage of any person whose former marriage may have been dissolved under this Act, or shall be liable to any suit or penalty for refuing to solemnize the marriage of any such person.

Judge to order commission to issue for examination o exempted persons.

20. In suits instituted under this Act, the Judge shall order a commission to issue to such persons, whether males or females, or both, as he shall think fit, for the examination on interrogatories or otherwise of any persons so exempt as aforesaid.

The provisions of the Code of Civil Procedure shall, so far as practicable, apply to commissions issued under this section.

Proof of marriage and desertion or repudiation of petitioner in consequence of conversion.

21. At any stage of a suit instituted under this Act, cohabitation as man and wife shall be sufficient presumptive evidence of the marriage of the parties, and proof of the respondent's refusal or voluntary neglect to cohabit with the petitioner after his or her change of religion and after knowledge thereof by the respondent, shall be sufficient evidence of the respondent's desertion or repudiation of the petitioner, and shall also be sufficient evidence that such desertion or repudiation was in consequence of the petitioner's change of religion, unless some other sufficient cause for such desertion or repudiation be proved by the respondent.

Civil Procedure Code a plied.

22. The provisions of the Code of Civil Procedure as to the summoning and examination of witnesses shall apply in suits instituted under this Act.

Dismissal of suit if either party under age required by Act, or if parties cohabiting, or, respondent willing to cohabit.

23. If at any stage of the suit it be proved that the male party to the suit is or was at the institution thereof under the age of sixteen years, or that the female party to the suit is or was at the same time under the age of thirteen years, or that the petitioner and the respondent are cohabiting as man and wife, or the Court is satisfied by the evidence adduced that the respondent is ready and willing so to cohabit with the petitioner, the Court shall pass a decree dismissing the suit and stating the ground of such dismissal.

Revival of suit after such dismissal.

24. If, at any time within twelve months after a decree dismissing the suit upon any of the grounds mentioned in the last preceding section, the respondent again desert or repudiate the petitioner upon the ground of his or her change of religion, the suit may be revived by summoning the respondent ; and, upon proof of the former decree and of such renewed repudiation or desertion, the suit shall re-commence at the stage at which it had arrived immediately before the passing of such decree ; and after the proofs, interrogations, interview and adjournment which may then be requisite under the provisions hereinbefore contained, the Judge shall pass a decree of the nature mentioned in section 16 of this Act.

Petitioner's cruelty or adultery to bar suit.

25. If at any stage of the suit it be proved that the respondent has deserted or repudiated the petitioner solely or partly in consequence of the petitioner's cruelty or adultery, the Court shall pass a decree dismissing the suit and stating the ground of such dismissal.

A suit dismissed under this section shall not be revived.

Male petitioner's cohabitation with one of several wives to bar suit.

26. If the petitioner, being a male, has at the time of the institution of the suit two or more wives, he shall make them all respondents; and if at any stage of the suit it be proved that he is cohabiting with one of such wives as man and wife, or that any one of such wives is ready and willing so to cohabit with him, the Court shall pass a decree dismissing the suit and stating the ground of such dismissal.

The provisions as to revival contained in section 24 of this Act shall apply, *mutatis mutandis*, to a suit dismissed under this section.

Dissolution of marriage not to affect status or right of children.

27. A dissolution of marriage under the provisions of this Act shall not operate to deprive the respondent's children (if any) by the petitioner of their status as legitimate children or of any right or interest which they would have had, according to the Native law applicable to them, by way of maintenance, inheritance or otherwise, in case the marriage had not been so dissolved as aforesaid.

Power to Court to award alimony.

28. If a suit be commenced under the provisions of this Act, and it appear to the Court that the wife has not sufficient separate property to enable her to maintain herself suitably to her station in life and to prosecute or defend the suit, the Court may, pending the suit, order the husband to furnish the wife with sufficient funds to enable her to prosecute or defend the suit and also for her maintenance pending the suit.

If the suit be brought by a husband against a wife, the Court may by the decree order the husband to make such allowance to his wife for her maintenance during the remainder of her life as the Court shall think just, and having regard to the condition and station in life of the parties.

Any allowance so ordered shall cease from the time of any subsequent marriage of the wife.

No appeal under Act, but Judge may state case raising question whether conversion has dissolved marriage.

29. No appeal shall lie against any order or decree made or passed by any Court in any suit instituted under this Act; but if, at any stage of the suit, the respondent shall allege by way of defence that the marriage between the parties has been dissolved by the conversion of the petitioner, and that consequently the petitioner is not a Native husband or a Native wife (as the case may be) within the meaning of this Act, the Judge, if he shall entertain any doubt as to the validity of such defence, shall either of his own motion or on the application of the respondent, state the case and submit it with his own opinion thereon for the decision of the High Court.

Case to state necessary facts and documents, and suit to be stayed.

30. Every such case shall concisely set forth such facts and documents as may be necessary to enable the High Court to decide the questions raised thereby, and the suit shall be stayed until the judgment of such Court shall have been received as hereinafter provided.

Case to be decided by three Judges.

31. Every such case shall be decided by at least three Judges of the High Court, if such Court be the High Court at any of the presidency-towns; and the petitioner and respondent may appear and be heard in the High Court in person or by advocate or vakil.

High Court may refer case to Judge for additions or alterations.

32. If the High Court shall not be satisfied that the statements contained in the case are sufficient to enable it to determine the questions raised thereby, the High Court may refer the case back to the Judge by whom it was stated, to make such additions thereto or alterations therein as the High Court may direct in that behalf.

High Court may decide question raised, and Judge shall dispose of case accordingly.

33. It shall be lawful for the High Court, upon the hearing of any such case, to decide the questions raised thereby, and to deliver its judgment thereon containing the grounds on which such decision is founded ;

and it shall send to the Judge by whom the case was stated a copy of such judgment under the seal of the Court and the signature of the Registrar, and the Judge shall, on receiving the same, dispose of the case conformably to such judgment.

Saving of Roman Catholic marriages.

34. Nothing contained in this Act [1][* * * *] shall be taken to render invalid any marriage of a Native convert to Roman Catholicism if celebrated in accordance with the rules, rites, ceremonies and customs of the Roman Catholic Church [1][* * *].

Extent of Act.

35. This Act shall extend to all the territories that are or shall become vested in Her Majesty or Her Successors by the [2]Statute 21 and 22 Vict., cap. 106, entitled "An Act for the better Government of India," [3][* * * *].

THE FIRST SCHEDULE.

[*See section* 7.]

FORM OF PETITION.

Stamp. [4][* *]

To the Judge of the Civil Court of

The day of 18

The petition of *A. B.* of

Sheweth :—

1. That your petitioner was born on or about the day of 18 .

2. That your petitioner was on the day of in the year 18 lawfully married to *C. D.* at .

3. That the said *C. D.* is now of the age of years or thereabouts.

4. That after his said marriage, your petitioner lived and cohabited with his said wife at aforesaid until the day of 18 .

5. That previous to the day of 18 your petitioner changed his religion for Christianity, and that on such day he was baptised and became a member of the Curch of .

6. That on the day of 18 [*at least six months prior to the date of the petition*], the said *C. D.* deserted your petitioner, and has not since resumed cohabitation with him.

7. That such desertion was in consequence of your petitioner's said change of religion.

8. That there is no collusion nor connivance between your petitioner and the said *C. D.*

Your petitioner therefore prays that Your Honour will order the said *C. D.* to live and cohabit with your petitioner, or declare that your petitioner's marriage is dissolved.

A. B.

Form of verification.

I, *A, B.*, the petitioner named in the above petition, do declare that what is stated therein is true to the best of my information and belief.

THE SECOND SCHEDULE.

[*See section* 9.]

FORM OF CITATION IN ORDINARY CASES.

To *C. D.*, of

WHEREAS *A. B.* of , claiming to have been lawfully married to you, the said *C. D.*, has filed his [*or* her] petition against you in the Civil Court of , alleging

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LEG. REF.

[1] The words and figures, "or in Acts Nos. XXV of 1864 and V of 1865" and the words "and no Clergyman of such Church shall be liable to any suit or penalty under the provisions of either of the two Acts last hereinbefore mentioned, for solemnizing any such marriage," were repealed by the Repealing Act (XVI of 1874).

[2] The Government of India Act, 1858 (21 and 22 Vic., c. 106), is now repealed except s. 4, *see* Coll. Stats. Ind., Vol. II. *See* now the Government of India Act, 1935.

[3] The remainder of this section, dealing with the power of the Governor-General in Council to extend the Act, etc., was repealed by the Repealing Act (XVI of 1874) and Act XII of 1891.

[4] The words "Rs. two" printed below the word "stamp" were repealed by the Amending Act (XII of 1891).

that you, the said *C. D.*, have deserted him [*or* her] for six months in consequence of his [*or* her] having changed his [*or* her] religion for Christianity and praying that, unless you consent to live and cohabit with him [*or* her], it may be declared that his [*or* her] marriage is dissolved : Now this is to command you that, at the expiration of days [*at least one month*] from the date of the service of this on you, you do appear in the said Court then and there to make answer to the said petition, a copy whereof, sealed with the seal of the said Court, is herewith served upon you.

And take notice that, in default of your so appearing, you will be liable to punishment under section 174 of the Indian Penal Code.

Dated the day of 18 .

(Sd.) *E. F.*,
Judge of the Civil Court of

(*Indorsement to be made after service.*)

This citation was duly served by *G. H.* on the within-named *C. D.* of at on the day of 18 .

(Sd.) *G. H.*

THE THIRD SCHEDULE.

[*See section* 9.]

FORM OF CITATION IN CASE OF RESPONDENT EXEMPT FROM APPEARANCE IN COURT.

To *C. D.*, of

WHEREAS *A. B.*, of , claiming to have been lawfully married to you, the said *C. D.* has filed his [*or* her] petition against you in the Civil Court of , alleging that you, the said *C. D.*, have deserted him [*or* her] for six months in consequence of his [*or* her] having changed his [*or* her] religion for Christianity, and praying that, unless you consent to cohabit with him [*or* her], it may be declared that his [*or* her] marriage is dissolved : Now this is to command you that, at the expiration of days [*at least one month*] from the service of this on you, you do hold yourself in readiness to answer and do answer such interrogatories as may be put to you by commissioners duly authorised in that behalf under a commission issued by this Court in reference to the said petition, a copy whereof, sealed with the seal of the said Court, is herewith served upon you.

And take notice that, in default of your so holding yourself in readiness and answering such interrogatories, you will be liable to punishment under section 174 of the Indian Penal Code.

Dated the day of 18 .

(Sd.) *E. F.*,
Judge of the Civil Court of

(*Indorsement to be made after service.*)

This citation was duly served by *G. H.* on the within-named *C. D.* of at on the day of 18 .

(Sd.) *G. H.*

THE NATURALIZATION ACT (VII OF 1926).

N. B.—Throughout this Act, save as otherwise provided, for "a Local Government", or "the Local Government," or "such Local Government" the words "the Central Government" have been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

Year.	No.	Short title.	Amendments.
1926	VII	The Indian Naturalization Act, 1926.	Repealed in part, XII of 1927. Amended, I of 1935.

PREFATORY NOTE.—The following is the Statement of Objects and Reasons annexed to the Bill (*Fort St. George Gazette*, Part III. dated 22nd September, 1925, p. 307).

"A certificate of naturalization issued under the British Nationality and Status of Aliens Acts, 1914, entitles the holder to the privileges of a British subject throughout the British Empire. A certificate of naturalization under the Naturalization Act, 1852, entitles the holder to similar privilege in British India only. The necessity of continuing the issue of local naturalization certificates under the latter Act has for some time been under the consideration of the Government of India. The objection to their discontinuance is that the British Act provides as one of the conditions precedent to the grant of a certificate of naturalization the possession of an adequate knowledge of English or, alternatively, of any language which is recognised as on an equality with the English language. There is no single vernacular in India which can, for the purpose of British Act, be regarded as on an equality with English. This constitutes a strong argument for the retention of the Indian Act, so as to provide for the requirements of persons resident in India, who do not possess the language quali-

fication prescribed by the British Act, but who possess an adequate knowledge of the principal vernacular of a province. The Indian Naturalization Act, 1852, has, however, become obsolete in view of the recent developments in the law of naturalization, and the Government of India decided, after consulting Local Governments, that it should be repealed and replaced by a new and consolidated enactment on the general lines of the British Nationality and Status of Aliens Act, 1914, but embodying certain specific provisions to suit the special conditions existing in India. An Indian Naturalization Bill was introduced in the Legislative Assembly on 2nd July, 1923 and was reported on by a Select Committee in the same month. No further progress was made with that Bill. The present Bill reproduces the Bill as amended by the Select Committee with the exception that clause 10 (*i*) (*a*) has been omitted."

[26*th February*, 1926.

An Act to consolidate and amend the law relating to the naturalization in British India of aliens resident therein.

WHEREAS it is expedient to consolidate and amend the law relating to the naturalization in British India of aliens resident therein ; It is hereby enacted as follows :—

Short title, extent and commencement.

1. (1) This Act may be called THE INDIAN NATURALIZATION ACT, 1926.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,

(*a*) "British subject" means a British subject as defined in section 27 of the British Nationality and Status of Aliens Act, 1914 ;

NOTE.

Sec. 1.—It cannot be held that the Naturalization Act of 1870 applies to the Punjab, and even if it does, the Maharaja of Faridkot cannot by any stretch of language be said to be an alien. 10 L. 447=1929 L. 1.

Sec. 2 (*a*).—The expressions "British subject" and "natural-born British subject" are defined in Ss. 27 and 1, respectively, of the British Nationality and Status of Aliens Act, 1914 (4 and 5, Geo, 5, Ch. 17), as follows:

"27. * * * The expression 'British subject' means a person who is a natural-born British subject or a person to whom a certificate of naturalization has been granted or a person who has become a subject of His Majesty by reason of any annexation of territory."

"1. (1) The following persons shall be deemed to be natural-born British subjects, namely :—

(*a*) any person born within His Majesty's dominions and allegiance ; and

(*b*) any person born out of His Majesty's dominions whose father was, at the time of that person's birth, a British subject, and who fulfills any of the following conditions, that is to say, if either—

(i) his father was born within His Majesty's allegiance ; or

(ii) his father was a person to whom a certificate of naturalization had been granted ; or

(iii) his father had become a British subject by reason of any annexation of territory ; or

(iv) his father was at the time of that person's birth in the service of the Crown ; or

(v) his birth was registered at a British consulate within one year or in special circumstances, with the consent of the Secretary of State, two years after its occurrence, or in the case of a person born on or after the first day of January, nineteen hundred and fifteen, who would have been a British subject if born before that date, within twelve months after the first day of August, nineteen hundred and twenty-two ; and

(*c*) any person born on board a British ship whether in foreign territorial waters or not :

Provided that the child of a British subject, whether that child was born before or after the passing of this Act, shall be deemed to have been born within His Majesty's allegiance if born in a place where by treaty, capitulation, grant, usage, sufferance, or other lawful means, His Majesty exercises jurisdiction over British subjects;

Provided also that any person whose British nationality is conditional upon registration at a British consulate shall cease to be a British subject, unless within one year after he attains the age of twenty-one, or within such extended period as may be authorised in special cases by regulations made under this Act—

(i) he asserts his British nationality by a declaration of retention of British nationality, registered in such manner as may be prescribed by regulations made under this Act ; and

(ii) if he is a subject or citizen of a foreign country under the law of which he can, at the time of asserting his British nationality, dives himself of the nationality of that foreign country by making a declaration of alienage or otherwise he divests himself of such nationality accordingly.

(2) A person born on board a foreign ship

(*b*) "certificate of naturalization" means a certificate of naturalization granted under this Act ; and

(*c*) "minor" means any person subject to the Indian Majority Act, 1875, who has not attained his majority within the meaning of that Act, or any other person who has not attained the age of eighteen years.

Grant of certificate of naturalization.

3. (1) The Central Government may grant a certificate of naturalization to any person who makes an application in this behalf and satisfies the Central Government—

(*a*) that he is not a minor ;

(*b*) that he is neither a British subject nor a subject of any state in Europe or America or of any state of which an Indian British subject is prevented by or under any law from becoming a subject by naturalization ;

(*c*) that he has, during a period of not less than five years immediately preceding the date of the application, either resided in British India or been in the service of the Crown [1][in India] ;

(*d*) that he is of good character ;

(*e*) that he has an adequate knowledge of a language which has been declared by the Central Government, by notification in the Official Gazette, to be [2][one of the principal vernaculars of British India] ; and

(*f*) that he intends, if the application is granted, to reside in British India or to enter or continue in the service of the Crown [1][In India] ;

Provided that nothing in clause (*c*) or clause (*f*) shall apply in the case of a woman who was a British subject previously to her marriage to a person not a British subject and whose husband has died or whose marriage has been dissolved.

(2) Nothing in this section shall be deemed to prevent the grant of a certificate of naturalization to any person to whom a certificate of naturalization has been issued under the Indian Naturalization Act, 1852.

Contents and form of application.

4. (1) Every application for a certificate of naturalization shall be in writing and shall state, to the best of the knowledge and belief of the applicant,—

(*a*) his age ;

(*b*) his place of birth ;

(*c*) his place of residence ;

(*d*) his profession, trade or occupation ;

(*e*) full particulars regarding his qualifications in respect of the matters referred to in clauses (*a*) to (*f*) of sub-section (1) of section 3 ;

(*f*) whether he has at any time previously applied for the grant of a certificate of naturalization under the British Nationality and Status of Aliens Act, 1914, or the Indian Naturalization Act, 1852, or this Act ;

(*g*) whether any such application has been rejected ;

(*h*) whether any such certificate has been granted to him ; and

(*i*) whether any such certificate granted to him has been revoked.

LEG. REF.

[1] Substituted by A.O., 1937, for 'under the Government.'

[2] Substituted for 'a principal vernacular of the province' by A.O., 1937.

NOTES.

shall not be deemed to be a British subject by reason only that the ship was in British territorial waters at the time of birth.

(3) Nothing in this section shall, except as otherwise expressly provided, affect the status of any person born before the commencement of this Act.

(4) The certificate of a Secretary of State that a person was at any date in the service of the Crown, shall for the purposes of this section, be conclusive."

(2) Every such application shall be signed by the applicant and shall be accompanied by an affidavit sworn by him verifying that the statements contained therein are true to the best of his knowledge and belief.

(3) The Central Government shall satisfy itself as to the truth of the statements contained in the application, and for this purpose may cause to be made such further inquiry, if any, and may require such further evidence, if any, either by affidavit or otherwise, as it thinks necessary.

Grant of certificate.

5. (1) If the Central Government is satisfied that the applicant is qualified under section 3 for the grant of a certificate of naturalization and is otherwise a fit person for the grant of such certificate, it may grant a certificate reciting the qualifications of the applicant for such grant and conferring upon him all the rights, privileges and capacities of naturalization under this Act, except such rights, privileges, or capacities, if any, as may specifically be withheld by the certificate.

(2) Any such certificate may, if the applicant so requests, include the name of any minor child of the applicant, not being by birth a British subject, who was born before the date of the certificate and is for the time being resident in British India and under the control of the applicant; and shall grant to any child so included all the rights, privileges and capacities of naturalization under this Act, except such rights, privileges or capacities, if any, as may specifically be withheld by the certificate.

(3) The grant of a certificate of naturalization shall be in the absolute discretion of the Central Government, and no appeal shall lie from any refusal to grant any such certificate or to include in any such grant any particular right, privilege or capacity.

Oath of allegiance.

6. Every person to whom a certificate of naturalization has been granted shall, within thirty days from the date of the grant thereof, take and subscribe the following oath, namely:—

"I, *A. B.*, of
do hereby swear (*or* affirm) that I will be faithful and bear true allegiance to His Majesty the King, Emperor of India, His heirs and Successors":

Provided that the Central Government may extend the time allowed under this section in any case in which it is satisfied that failure to take and subscribe the oath within that time was due to sufficient cause.

Effect of grant of certificate and taking of oath.

7. (1) No certificate of naturalization shall have effect until the person to whom it is granted has taken and subscribed the oath prescribed by section 6, but upon the taking and subscribing of such oath such person, [1][* * *], and any child of any such person who has been included in the certificate under subsection (2) of section 5, shall, when in British India, be deemed to be British subjects and be entitled to all the rights, privileges and capacities of a British subject born within British India, except such rights, privileges or capacities, if any, as may have been withheld from them respectively by the certificate, and shall within British India be subject to all the obligations, duties and liabilities of a British subject; [2][and the wife of any such person to whom a certificate of naturalization is granted after the commencement of the Indian Naturalization (Amendment) Act 1935, shall, if not already a British subject, in like manner be so deemed and be so entitled and so subject, if within one year, or such longer period as the Central Government may in special circumstances, allow from the date of the taking and subscribing of such oath by her husband, she makes to the Central Government a declaration that she desires to be deemed to be a British subject].

LEG. REF.

[1] The words "the wife of any such person" omitted by Act I of 1935.

[2] Added by Act I of 1935.

(2) When the person to whom a certificate of naturalization has been granted has taken and subscribed the oath prescribed by section 6, any wife thereafter married by, and any child thereafter born to, such person shall, if she or he is not a British subject and if such person aforesaid at the date of the marriage or birth, as the case may be, retains any rights, privileges or capacities of a British subject under this Act, be entitled to the same rights, privileges and capacities, and be subject to the same obligations, duties and liabilities, to which such person aforesaid was at that date entitled and subject.

Revocation of certificate.

8. (1) [1][Where the Central Government is satisfied that a certificate of naturalization granted under this Act, or the Indian Naturalization Act, 1852], was obtained by false representation or fraud or by concealment of material circumstances, or that the person to whom the certificate has been granted has shown himself by act or speech to be disaffected or disloyal to His Majesty, the Central Government shall, by order in writing, revoke the certificate.

(2) Without prejudice to the foregoing provisions, the Central Government shall, by order in writing, revoke such a certificate of naturalization as aforesaid in any case in which it is satisfied that the person to whom the certificate was granted—

(*a*) has, during any war in which His Majesty is engaged unlawfully traded or communicated with the enemy or with a subject of an enemy state, or been engaged in, or associated with, any business which is to his knowledge carried on in such a manner as to assist the enemy in such war ; or

(*b*) has, within five years of the date of the grant of the certificate, been sentenced by any Court in His Majesty's dominions to transportation or to penal servitude, or to imprisonment for a term of not less than twelve months, or to pay a fine of not less than one thousand rupees ; or

(*c*) was not of good character at the date of the grant of the certificate ; or

(*d*) has since the date of the grant of the certificate been, for a period of not less than seven years, ordinarily resident out of His Majesty's dominions otherwise than as a representative of a British subject, firm or company carrying on business, or of an institution established, in His Majesty's dominions, or in the service of the Crown, and has not maintained substantial connection with His Majesty's dominions ; or

(*e*) remains, according to the law of a state at war with His Majesty, a subject of that state ;

and that the continuance of the certificate is not conducive to the public good.

[2][* * * *]

(4) The Central Government may, if it thinks fit, before making an order under this section, refer the case for such inquiry as is hereinafter specified, and, in any case to which sub-section (1) or clause (*a*), clause (*c*) or clause (*e*) of sub-section (2) applies, the Central Government shall, by notice given to, or sent by post to the last known address of, the holder of the certificate, give him an opportunity of claiming that the case be referred for such inquiry, and, if the holder so claims in accordance with the notice, the Central Government shall refer the case for inquiry accordingly.

(5) An inquiry under this section shall be held by such person or persons and in such manner as the Central Government may direct in each case.

(6) Where a certificate is revoked under this section, the revocation shall have effect from such date as may be directed by the Central Government, and

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LEG. REF.

[1] Substituted by A.O., 1937.

[2] Sub-section (3) omitted by A.O., 1937.

thereupon the certificate shall be given up and cancelled ; and any person who, without reasonable cause the burden of proving which shall lie upon him, fails to give up his certificate within one month from the aforesaid date, shall be punishable with fine, which may extend to one thousand rupees.

(7) For the purposes of this section, any person who has acquired any of the rights, privileges or capacities of naturalization under sub-section (2) of section 5 or sub-section (2) of section 7 by reason of the grant to his parent of a certificate of naturalization, may, after he has attained majority, be deemed to be a person to whom a certificate of naturalization has been granted.

Effect of revocation of certificate.

9. (1) Where a certificate is revoked under section 8, the former holder thereof shall cease to be deemed to be a British subject.

(2) On such revocation, the Central Government may, by order in writing, direct that the wife and minor children (or any of them) of the person whose certificate is revoked shall cease to be deemed to be British subjects ; but where no such direction is made, the status of the wife and minor children of the person whose certificate is revoked shall not be affected by the revocation :

[1][Provided that no such order shall be made in the case of a wife unless by reason of the acquisition by her husband of a new nationality she has also acquired that nationality] :

Provided [1][further] that, in the case of a wife who was at birth a British subject, no such order as aforesaid shall be made, unless the Central Government is satisfied that, if she had held a certificate of naturalization in her own right, the certificate could properly have been revoked under section 8, and the provisions of that section as to referring cases for inquiry shall apply to the making of any such order as they apply to the revocation of a certificate.

Declaration of alienage.

10. (1) A declaration of alienage in such manner as may be prescribed by rules made under this Act may be made,—

(*a*) within one year of his attaining majority, by any child who has acquired any of the rights, privileges or capacities of naturalization under sub-section (2) of section 5, or sub-section (2) of section 7 ; or

(*b*) within six months from the date of the revocation of a certificate under section 8, or of the death of, or of the dissolution of her marriage with, the holder of any such certificate as is therein referred to, by the wife of the person whose certificate has been revoked, or who has died, or whose marriage to her has been dissolved, as the case may be.

(2) Where a declaration of alienage has been made in the manner aforesaid, the person making the same, and the wife of any such person, and any children of any such person who are minors and are not by birth British subjects, shall cease to be deemed to be British subjects;

[1][Provided that the wife of any such person shall not cease to be deemed to be a British Subject under this sub-section, unless by reason of the acquisition by her husband of a new nationality she has also acquired that nationality.]

Inquiries.

11. Every person making an inquiry under the orders of the Central Government under sub-section (3) of section 4, and every person appointed to hold an inquiry under sub-section

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LEG. REF.

[1] Added by Act I of 1935.

(5) of section 8, shall be deemed to be a public servant within the meaning of the Indian Penal Code, and shall for the purposes of such inquiry have the same powers as are vested in a Court under the Code of Civil Procedure, 1908, when trying a suit, in respect of the following matters ;—

(*i*) enforcing the attendance of any person and examining him on oath ;

(*ii*) compelling the production of documents and material objects ; and

(*iii*) issuing commissions for the examination of witnesses ;

and every such inquiry shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code.

Oaths and affidavits.

12. (1) All oaths and affidavits for the purposes of this Act shall be sworn before a Magistrate or such other person as may be appointed in this behalf by the Central Government.

(2) The Magistrate or other person by whom an oath of alleigance is administered under section 6 shall grant to the person making the same a certificate in writing of his having taken and subscribed such oath and of the date of his taking and subscribing the same, and shall forward to the Central Government the oath so taken and subscribed, together with a copy of such certificate.

Power to make rules.

13. (1) The Central Government may [1][* * * *] by notification in the Official Gazette, make rules to give effect to the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely :—

(*a*) the form or forms in which certificates of naturalization shall be granted, and the manner in which they shall be recorded ;

(*b*) the manner in which declarations of alienage shall be made and recorded ;

(*c*) the recording of oaths of allegiance ; and

(*d*) the fees which may be imposed for the issue of any certificate, whether of naturalization or otherwise, granted under this Act.

Limitation to the grant of naturalization under this Act.

14. Nothing contained in this Act shall be deemed to entitle to any of the rights, privileges or capacities of a British subject the child of any person who is himself so entitled by reason only of the inclusion of his name in a certificate of naturalization under sub-section (2) of section 5 or of the grant of a certificate of naturalization to his parent.

Application to certificates granted before separation of Burma and Aden.

[2][14-A. The provisions of this Act shall, after the separation[3] of Burma and Aden from India, continue to apply, as respects British India, to certificates granted under this Act, or the Indian Naturalization Act, 1852, before the said separation by the Local Governments of Burma and Aden and any such certificates may after the said separation be revoked as respects British India accordingly.]

15. [*Repeals.—Rep. by the Repealing Act (XII of* 1927), *S.* 2 *and Sch.*]

THE SCHEDULE.

[ENACTMENTS REPEALED.]

Repealed by the Repealing Act (XII of 1927), *S.* 2 *and Sch.*

LEG. REF.

[1] Words " with the previous sanction of the Governor-General in Council " omitted by A.O., 1937.

[2] Inserted by A.O., 1937.

[3] *I.e.*, the 1st April, 1937.

THE NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881).

N.B.—Throughout this Act for 'Local Government' the words 'Central Government' have been substituted by Government of India (Adaptation of Indian Laws) Order, 1937.

Year.	No.	Short title.	Amendments.
1881	XXVI	The Negotiable Iustruments Act.	Repealed in part, XII of 1891. Repealed in part and amended, II of of 1885. Amended, VI of 1897; IV and V of 1914; see XIV of 1916; VIII of 1919; XXV of 1920; XII of 1921; XVIII of 1922; XXX of 1926; XXV of 1930; XVII of 1934.

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THE NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881).[1]

[*9th December*, 1881.

An Act to define and amend the law relating to Promissory Notes, Bills of Exchange and Cheques.

Preamble.

WHEREAS it is expedient to define and amend the law relating to promissory notes, bills of exchange and cheques; It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Short title.

1. This Act may be called THE NEGOTIABLE INSTRUMENTS ACT, 1881.

LEG. REF.

[1] For summary procedure on negotiable instruments, *see* the Code of Civil Procedure, 1908 (Act V of 1908), Sch. I, Order XXXVII.

NOTES.

Secs. 1 and 2: SCOPE OF THE ACT.—49 I. C. 388=21 Bom.L.R. 1. *See also* 18 C.W.N. 494=22 I.C. 500; 58 I.C. 313. The Contract Act is a general statute dealing with contracts. The Negotiable Instruments Act is a statute dealing with a particular form of contract, and the law laid down for special cases must always overrule the provisions of a general character. 1933 R. 131=144 I.C. 866. Act is based on the principles of English Law, and Courts can construe conformably to the provisions of the English Law. 52 I.C. 370=10 L. W. 39. There must be no reasonable possibility of ambiguity in the construction of a negotiable security which is meant to pass from hand to hand; its meaning should be instantly recognisable and not after an elaborate analysis. 1936 N. 252. The Act does not apply to hundis. 1932 L. 582=13 L. 800. Hundi drawn payable to bearer on demand is illegal, even though drawn in an oriental language. 58 I.C. 508=12 L.W. 12. Mercantile usage, however extensive, should not be recognized if contrary to the provisions of statute. 49 I.C. 388=21 Bom.L.R. 1. *See also* 15 W.R. 501; 23 I.C. 29; 144 I.C. 914=1933 N. 389; 16 Bom. L.R. 434; 12 L.W. 12. Where any local usage is relied on, it should be alleged and established by the party who relies on it. 26 M. 526=13 M.L.J. 252 (F.B.). Where a purchaser of a hundi by payment of cash fails to discharge his obligations under the contract represented by the hundi and loses his right to enforce the hundi, he cannot fall back upon his original consideration. 1936 N. 260. If a buyer of goods gives a cheque for the price to the seller who endorses it for value to a third party, the original debt cannot be said to be still outstanding and unpaid while the cheque is oustanding in the hands of that third party. Therefore, an action for the prize by the seller, or if he has since been adjudicated insolvent, by the transferee of his assets from the Official Assignee, will not lie even after dishonour of the cheque, if at the date of the commencement of the action the cheque is still outstanding in the hands of the third party. I.L.R. (1941) 2 Cal. 103. In a suit on a negotiable instrument, it is open to the plaintiff to frame his case in an alternative and to sue both on the instrument and alternatively on the consideration. 46 C. 663=36

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It extends to the whole of British India; but nothing herein contained affects the Indian Paper Currency Act, 1871, section 21, or affects any local usage relating to any instrument in an Oriental language: Provided that such usages may be excluded by any words in the body of the instrument which indicate an intention that the legal relations of the parties thereto shall be governed by this Act; and it shall come into force on the first day of March, 1882.

Local extent. Saving of usages relating to hundis, etc.

Commencement.

2. [*Repeal of enactments.*] *Repealed by the Amending Act* 1891 (*XII of* 1891).

NOTES.

M.L.J. 429 (P.C.). *See also* 51 I.C. 945=29 C. L.J. 508; 1936 Pesh. 143. But where the suit is based wholly on a contract consisting of an inadmissible promissory note or hundi, it must fail because the note cannot be produced and the claim cannot be proved *aliunde*. 1936 Pesh. 143. If a person frames his suit alternatively on the promissory note executed by a Hindu father or on the consideration which passed, he can obtain a decree against the father and sons, but not if the suit is only on the promissory note. In the latter case, he can only obtain a personal decree against the father and a decree against the sons to the extent of their interest in the joint family properties. 138 I.C. 168= 15 N.L.J. 5. A contract of simple money debt is not required by law to be in writing. It may offer better evidence, but it is not necessary for the validity of the contract. It is on this principle that, when the promissory notes or other negotiable instruments are found unenforceable for defective stamp and other reasons, the creditor is permitted to fall back on his contract of loan, and oral evidence is admitted to prove the contract independently of the promissory notes. 26 N.L.R. 320=1930 N. 298. A suit on the original consideration after the dismsssal of the suit on the note on account of material alteration is maintainable. 18 C.W.N. 617=41 I.A. 142 (P.C.). Decree on original consideration was given in 29 C.L.J. 508; 4 L. 198; 60 I.C. 107. In cases of negotiable instruments all equities which have to be pleaded should generally arise out of the very transaction itself and must not arise out of the transactions which are either collateral or independent in character. 1938 Mad. 897. A principal can sue on a pro-note executed in favour of his agent without obtaining an assignment from him. 21 L.W. 696=90 I.C. 1047. A common manager of the estate of a deceased person appointed under S. 301 of Succession Act represents the estate for all intents and purposes, and he is entitled to file a suit on a promissory note on behalf of the estate. 22 Pat.L.T. 569 =1941 Pat. 403. *See also* 1941 Nag. 207; 7 Cut. L.T. 77. A plea of *benami* is only a plea in the nature of a resulting trust and there is nothing in the Act which justifies a payee, who is in the position of a trustee, insisting that the beneficiary should be precluded from proving that he is only a trustee. It is one thing to say that the promisor cannot, in a suit on a promissory note, plead that somebody other than the payee is the person entitled to sue, nor plead discharge by payment to the alleged real owner, and a wholly different thing to say that, as between the payee named in the instrument and persons other than the promisor there is any rule which precludes the admissibility of evidence to show that the payee was only a *benamidar* for another. 1935 M. 181=58 M. 693=68 M.L.J. 81 (F.B.). *See also* 1939 Pat. 347; 1940 Pat. 377=19 Pat. 404; 1936 Pesh. 143; 41 C.W.N. 1283; 44 A. 290; 123 I.C. 395; 27 N.L.R. 327. It is not correct to say that no person who is not named in the note can ever sue. There is no reason why the real owner should not be entitled to sue provided he is in a position to obtain a good discharge for the defendant. The Court must of course always be careful to see that the position of the defendant is fully safeguarded, but if that is done there is no reason for any further difficulty if the 'holder' and the real owner are agreed between themselves. A person not a holder cannot of course claim the privileges of a 'holder' but that does not disentitle him from suing. 1941 N.L.J. 263=1941 Nag. 207. Where in a suit on a pro-note, the note is not admissible in evidence, the plaintiff may prove his case by other evidence. 60 I.C. 652=2 P. L.T. 184. *See also* 9 R. 56=134 I.C. 737= 1931 R 139; 27 N.L.R. 56; 29 N.L.R. 131; 9 Mys.L.J. 476; 9 Mys.L.J. 438; 134 I.C. 254= 1931 A.L.J. 522; 9 O.W.N. 585; 9 O.W.N. 961; 1933 A. 280=144 I.C. 150. But *see* 34 Bom.L.R. 643=1932 B. 394; 1933 R. 161; 1933 N. 57 (2)=29 N. L. R. 131. Where the debt and the execution of the promissory note, are contemporaneous, the debt can be proved only by the note and where it is sufficiently stamped, the plaintiff cannot apply by amendment to convert the suit into one on the original consideration. 139 I.C. 361=36 L.W. 432=1932 M. 687. *See also* 40 C.W.N. 696; 40 C.W.N. 473; 41 C.W.N. 537. In a suit on a promissory note the defendant admitted execution in his written statement and pleaded discharge but raised the objection that the note was inadmissible in evidence. *Held*, that having regard to S. 58 of the Evidence Act the plaintiff was entitled to maintain the suit. *Held, further*, that having regard to S. 36 of the Stamp Act, the admissibility of the document could not be reopened on account of the document not having been duly stamped. 1932 M. 693 =63 M.L.J. 303. *See also* 64 M.L.J. 79=1933 M. 117. There is no bar under any law preventing the Court from using a promissory note which is stamped with an one anna stamp instead of two annas stamp as a piece of evidence supporting the plaintiff's case as to loan.

Interpretation clause.

"Banker."

"Notary public."

3. In this Act—

"banker" includes also persons or a corporation or company acting as bankers; and

"notary public" includes also any person appointed by the [1][Central Government] to perform the functions of a notary public under this Act.

CHAPTER II.

OF NOTES, BILLS AND CHEQUES.

"Promissory note."

4. A "promissory note" is an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument.

LEG. REF.

[1]Substituted by A.O., 1937, for "Local Government" which had been substituted for "Governor-General in Council" by Act IV of 1914, S. 2 and Sch., Pt. I.

NOTES.

Where such a document has been received in evidence in the trial Court without objection on the part of the defendant, the appellate Court will not interfere. 134 I.C. 575=53 C. L.J. 253=1931 C. 480. A promissory note stamped with quarter anna postage stamps is a document bearing stamps of improper description and can be validated by the Collector under R. 18 of the Government of India Stamp Rules. 55 M. 627=1932 M. 390=62 M.L.J. 538 (F.B.). Hundi substituted for hundi on unstamped paper—Liability under former not put an end to, 1923 L. 396. Once the execution of a bond was admitted, the onus of proving total or partial failure of consideration lies on the defendant. 4 L.L.J. 199. The words '*payable on demand*' have a legal meaning and sense which convey that the amount is payable on the date of execution and no demand is necessary prior to suit. If, however, the words were "*after demand*" then a demand is necessary before a suit is instituted. 2 P.L.J. 451=40 I.C. 350. *See also* 1931 A.L.J. 230=1931 A. 302. Where a hundi is silent as to interest but there is a custom allowing interest if the hundi is not met within a certain time, the drawer is liable to pay interest. 62 I. C. 315. If in a suit based on a hundi, the defendant admits its execution, the burden of proof that it was got without consideration heavily lies on him. 187 I.C. 225. No doubt when a suit is based wholly on a contract consisting of an inadmissible promissory note or Hundi, it must fail because the note cannot be produced and the claim cannot be proved *aliunde*. But where it is possible to find for a creditor a cause of action apart from the inadmissible security, it would be contrary to the elementary principles of justice to deprive the creditor of his money. 1936 Pesh 143. A hundi is a Bill of Exchange drawn by one person who is called a drawer, on another person who is called a drawee, who is ordered to pay the amount thereof to a third person who is the holder. Thus three persons are parties to it and due to this very nature it is negotiable. A document which is only bilateral cannot be called a hundi. If, therefore, a hundi is drawn by a person on his own firm ordering the amount thereof to be paid to a creditor after certain days, the transaction virtually is that one person borrows money and passes a hundi drawn on himself as security for the debt to the creditor. It is thus a clear case of an execution of a promissory note pure and simple. 187 I.C. 225. Where a purchaser of a hundi by payment of cash fails to discharge his obligations under the contract represented by the hundi and loses his right to enforce the hundi, he cannot fall back upon his original consideration. 167 I.C. 907=9 R.N. 230=1936 Nag. 260. A document recited that the executant had a certain sum of money belonging to another and the former agreed to pay interest at a certain rate, *held*, it was not a promissory note, though there is an acknowledgment of a debt. 1924 L. 684. A promissory note given for reducing a liability only operates as a conditional discharge for the liability. (21 M.L.J. 432; 26 M. 526, Ref. to.) 1930 M. 874=59 M.L.J. 513. The drawee of a *Shahjog hundi* who pays the amount to a *Shah* is not absolved from liability to the owner, if the *Shah* has no title to the hundi (*i.e.*), when the endorsement is forged. 36 Bom.L.R. 929=59 B. 97=1934 B. 400 (F.B.). *See also* 36 Bom. L.R. 941=1934 B. 402=59 B. 252.

Sec. 3.—For case-law, *see* 29 A. 773; 13 B. 388; 31 C. 519; 18 M. 390.

Sec. 4—One of the most essential characteristics of a promissory note is certainty—certainty both as regards the person by whom and to whom payment is to be made. Any uncertainty in such matters would tend to restrict credit and to hamper commerce. 35 C. W.N. 53; 118 I.C. 673=1929 N. 274. There must be no reasonable possibility of ambiguity in the construction of a negotiable security which is meant to pass from hand to hand; its meaning should be instantly recognisable and not after an elaborate analysis in three Courts. 1936 Nag. 252. Where a document merely acknowledges that certain items of money mentioned therein have been borrowed and that the executant has to repay them on demand, it is not a promissory note because it does not contain an unconditional undertaking to pay. There is no promise to pay but only an

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admission of liability to pay, and, hence it is only an acknowledgment. 1938 A.L.J. 907=1938 A. 619. A document which acknowledges the receipt of a certain amount by cheque and contains a promise to pay that amount with interest at a certain rate after a certain specified time, is not a promissory note, as it is clearly not intended to be a negotiable instrument. 40 Bom.L.R 1053=42 C.W.N. 989 =1938 P.C. 121 (P.C.) *See also* I.L.R. (1939) Kar. 632=1939 Sind 281. There is an essential antithesis between the legal position of a surety and that of the executant of a promissory note and so a person who executes a promissory note cannot be held in law to have the position of a surety. 27 A.L.J. 1137=1929 A. 664. One *C* paid money to *A* whom *B* wished to be accommodated. *A* passed promissory note to *B* who endorsed it to *C*. *Held*, that *B* was in the position of surety and the endorsement was for consideration as *A* was accommodated. 191 I.C. 56=1940 Sind 146. Where there is no mention in document of the person to whom the money is payable on demand, it is not a negotiable instrument. 116 I.C. 111 (1)=1929 S. 164 (1); 177 I.C. 889=1938 Nag. 464; 1941 Nag. 1=192 I.C. 513. An instrument which contains the words "I am liable to pay" without any undertaking to pay is not a promissory note. 1934 M. 220=66 M.L.J. 315. A document alleged to be a promissory note contained the following terms. This (one) receipt is hereby executed by *H* and *A*, residents of Hoti, for Rs. 43,900, half of which amount comes to Rs. 21,950, received from the firm of *L*, for and on behalf of *M* of Hoti. This amount to be payable after two years. Interest at the rate of Rs. 5-4-0 per cent. per year to be charged. Dated 1st April 1917. Stamp has been duly affixed.

(Sd.) *H*.
(Sd.) *A*.

The document was not drawn on a paper with an impressed stamp, and a stamp which was sufficient, if the document was a receipt, was affixed. *Held*, that the document was not a promissory note but was merely a receipt containing the terms on which the amount was to be refunded. Being primarily a receipt, even if coupled with the promise to pay, it was not a promissory note. As the document did not record or purport to record all the terms of the contract between the parties and as there was nothing in the document explaining how the money came to be received, the parties were not prevented from showing that it was paid by way of loan or deposit or for some other purpose. (8 C. 645, Overr.) 63 I.A. 279=17 L. 557=40 C.W.N. 997=71 M.L.J. 712 (P.C.). The nature of a document must be determined by its contents, and the description of it given in the plaint cannot change its character or legal effect. A person wrote to another that he would be liable for payment of principal amount with interest due on promissory notes executed by his brother to the latter that he would pay the whole amount on demand after certain period and that his brother should not be asked for the amount. *Held*, that the letter was only a proposal and not a promissory note. 148 I.C. 964=1934 L. 93. The mere fact that a pro-note is addressed to a person of a particular place does not show that it is implied that payment is to be made at the place. I.L.R. (1940) 1 Cal. 323=44 C.W.N. 609=1940 Cal. 443. Where an instrument clearly indicates the promisor and the promisee, and contains a definite promise to pay, it amounts to a promissory note. There is no rule laying down in which part of the document the payee is to be named or by what kind of language. A signed letter which is in the following terms, namely, "30th, Panguni Siddhatri-Kallal A. T. N. A. T. credit, the same place R. M. M. R. M. debt for two hundis taken by me and sent for Penang Firm on the 13th idem of Rs. 9,500 at Rs. 55 (exchange rate) 3 months Thavanai 11 annas interest, rings 10,000, for these 10,000 rings adding from Thavanai, Thavanai interest and principal will be paid and this letter taken back by me" is a promissory note. 1935 M. 23=67 M.L.J. 595. Attestation by witnesses does not make a pronote a bond. 14 Luck. 438=1939 O.W.N. 168=1939 Oudh 107. *Unconditional undertaking* or unconditional personal liability means that the liability mentioned in the note should not be made contingent on some event. But a pro-note is not the less unconditional, simply because when the matter goes to a Court of law and the defendant raises some defence, the plaintiff has got to establish certain facts, and in the case of a note by a guardian, the transaction is for the benefit of of the minor, before he can succeed against the minor. That fact does not make the liability a conditional liability. 41 L.W. 514=68 M.L.J. 540 (F.B.). Under S. 4, a promissory note payable to the manager of a Bank is payable to a "certain person." 5 Pat.L.J. 536=58 I.C. 265. Promissory note payable through another is good. 54 I.C. 976=148 P.R. 1919. Whether a promissory note or negotiable instrument can be executed in the name of a community, *see* 44 M.L.J. 240=1923 M. 434. Pro-note executed prior to 1914 payable in the alternative to one of several payees is not a promissory note within S. 4. 59 I.C. 943=39 M.L.J. 273. A suit is maintainable on a promissory note by a real promisee, even though a wrong name is mentioned on the note, if he is able to show that the wrong name was entered by mistake. 13 I.C. 95=22 M.L.J. 121. A man may sign a promissory note by getting some one to write his name for him. 9 R. 92=132 I.C. 707=1931 R. 131. A promissory note executed by a person under the authority of marksman is valid, even though the marksman has not affixed his mark thereto. 44 I.C. 813=40 M. 1171. Distinction between promissory note and bill of exchange—Hundi. 58 I.C. 313. *Shahjog hundi* is not a bill of exchange, nor a promissory note. 22 C.L.J. 239=23 I.C. 250. *See also* 59 B. 91=36 Bom.L.R. 929=1934 B. 400 (F.B.); 36 Bom.L.R. 941=1934 B. 402=59 B. 252. Promissory note—Request to pay—Effect of. 1924 P. 96=4 Pat.L.T. 577. An indorsee of a promissory note for collection must be held to be an agent for collecting the money due on the note. He is not authorised

Illustrations.

A signs instruments in the following terms:

(*a*) "I promise to pay *B* or order Rs. 500."

(*b*) "I acknowledge myself to be indebted to *B* in Rs. 1,000, to be paid on demand, for value received.

(*c*) "Mr. *B*, I O U Rs. 1,000."

(*d*) "I promise to pay *B* Rs. 500 and all other sums which shall be due to him."

(*e*) "I promise to pay *B* Rs. 500, first deducting thereout any money which he may owe me."

(*f*) "I promise to pay *B* Rs. 500 seven days after my marriage with *C*."

(*g*) "I promise to pay *B* Rs. 500 on *D's* death, provided *D* leaves me enough to pay that sum."

(*h*) "I promise to pay *B* Rs. 500 and to deliver to him my black horse on 1st January next."

The instruments respectively marked (*a*) and (*b*) are promissory notes. The instruments respectively marked (*c*), (*d*), (*e*), (*f*), (*g*) and (*h*) are not promissory notes.

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to negotiate the note to any other person. Any indorsement and negotiation by him would be beyond his power and would confer no right on the indorsee to maintain a suit on the instrument. 1939 M.W.N. 1017=50 L.W. 606=1940 Mad. 27. Where a promissory note executed by the manager of a joint Hindu family is endorsed over by the payee, stating *inter alia*: "I have assigned this promissory note in your favour," the endorsement is no more than an endorsement of the note. There is no assignment of the debt in such a case to the endorsee. In a suit by the endorsee on the note, he is entitled to succeed only against the executant of the note and not against the other members of the same family of which the executant is the manager. 189 I.C. 775=50 L.W. 797=1939 M.W.N. 1243=1940 Mad. 174. Promissory note purporting to be executed jointly by two persons *A* and *B* —Execution only by one (*A* alone)—Suit on—Liability of person actually executing—Test—Burden of proof. *Held*, (1) that as there was no execution by *B* or by a person authorised to execute on his behalf, *B* was not liable on the instrument; (2) that in the absence of evidence one way or the other as to whether or not *A* executed only on the faith that *B* would also execute. *A* was liable on the instrument; (3) that the question whether the instrument was signed by *A* on the faith that *B* would also sign is a question of fact, which must be proved not by the plaintiff who sought to impose liability upon the actual executant, but by the executant who has signed the instrument, who has the burden on him to establish it as a ground of defence. 52 L.W. 360=1940 Mad. 874=(1940) 2 M.L.J. 384.

Sec. 4, Ill. (b).—A pro-note payable to a particular person, not containing words prohibiting transfer, is an instrument payable to order. 27 N.L.R. 327.

PROMISSORY NOTE—ASSIGNMENT OF.—Although the proper mode of assignment is by endorsement only, yet in Punjab there can be an oral assignment of promissory note. (1932 Lah. 30 and 29 P.R. 1919, Rel. on.) 1936 Lah. 547. An assignment of a promissory note is possible without an endorsement of transfer on the note. A written assignment of a premissory note is valid and under the general law, such assignment gives to the assignee the right of suit upon the note. 13 Luck. 373=1937 O.W.N. 820=1937 Oudh 405.

CONDITION FOR PRO-NOTE.—A promissory note having been given, consideration is to be presumed. The question then is not, whether the plaintiff has formally and sufficiently proved that there was a stipulation for a fresh advance, but whether it is sufficiently shown by the other side that there was no consideration for the promissory note. I.L.R. (1938) Mad. 646=42 C.W.N. 565=1938 P.C. 123=(1938) 1 M.L.J. 597 (P.C.). It cannot be said that the consideration for a promissory note is always the amount stated to be payable in the note. 189 I.C. 384=1940 Rang. 152. Where it is proved that the executant of promissory note did not receive any consideration for it, the instrument does not create any obligation between the holder and the executant. 167 I.C. 301=1936 Cal. 315. Where in a suit on a promissory note it appears that the note was executed for the amount of rent due by the defendant to the plaintiff, there is good consideration for the transaction and the suit should be decreed. The mere circumstance that in the body of the promissory note it was stated that the amount was advanced in cash is sufficient to justify a dismissal of the suit. 41 P.L.R. 49.

PROMISSORY NOTE—STAMP ACT.—A document which contains a promise to pay on a contingency will not be treated as a promissory note for the purposes of the Negotiable Instruments Act, but it may be regarded as such for the purposes of the Stamp Act. To determine whether a document is a promissory note or not the main question to be considered is not whether the instrument is negotiable or not though ordinarily negotiability of an instrument is a good test for that purpose, but to consider whether in substance and in primary intention of the parties the document was or was not a promissory note and whether it was intended to record a different kind of transaction altogether. A reference in the promissory note to a pre-existing account between the parties, made with a view to state the consideration for the note, does neither make the liability under the note a contingent one, nor the instrument any the less a promissory note. I.L.R. (1941) All. 264=1941 A.L.J. 36=1941 All. 158. Promissory note —Executed abroad—Suit in British India—Need for affixing and cancellation of stamp. *See* (1941) 2 M.L.J. 301.

PROMISSORY NOTE INSUFFICIENTLY OR IMPROPERLY STAMPED.—Though a promissory note is not

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sufficiently stamped and hence inadmissible in evidence, a suit could be instituted on the original loan, which is always the cause of action, the promissory note being at the best evidence of the loan. A suit or the note can be amended into one on the debt and relief be granted. 1939 A.M.L.J. 123. *See also* 43 L.W. 48 ; 1936 Nag. 225 ; 1936 Cal. 170=40 C.W.N. 473 ; 1936 Nag. 225. If a promissory note is not admissible in evidence on account of its being insufficiently stamped, the plaintiff is entitled to sue on a cause of action which is independent of promissory note. It is not necessary that there should be an independent express contract prior to the execution of such a promissory note. The fact that the money has been lent implies a promise to repay it, and the plaintiff in such a case has a cause of action on the implied promise, which is indopendent of the promissory note. (39 C.W.N. 1235, Foll.) 40 C.W.N. 696=1936 Cal. 127. In a suit on a promissory note, if the note is found to be insufficiently stamped and so inadmissible in evidence, he is entitled to a decree if he has a cause of action independent of the promissory note. As soon as the plaintiff in such a case proves that he paid to the defendant a sum of money by way of a loan, he is entitled to get a decree for the money lent and it is not necessary that he should prove an independent express contract by the defendant to repay prior to the execution of the note. 62 C.L.J. 289=40 C.W.N. 473=1936 Cal. 170. Although a promissory note is inadmissible in evidence being insufficiently stamped, the creditor is entitled to sue on the basis of a separate contemporaneous agreement to pay. 1940 N.L.J. 658=1940 Nag. 215. *See also* 1940 N.L.J. 601=1941 Nag. 1. A promissory note which is insufficiently stamped cannot be used as an acknowledgment or for any other purpose. 1940 N.L.J. 658=1940 Nag. 215. A decree cannot be passed on the basis of a pronote which is inadmissible in evidence for want of cancellation of the stamps even if the defendant admitted liability on it. 41 P.L.R. 356=1939 Lah. 31. A promissory note executed on 28th March, 1934, was affixed with revenue stamps, the use of which was made compulsory by the Government only from 1st April, 1934. *Held*, that these stamps must have been available before 1st April, 1934, and that a suit on the promissory note should not be dismissed merely on this ground especially when the defendant had admitted his liability. 1937 P.W.N. 663=1937 Pat. 560.

ORIGINAL CAUSE OF ACTION—HAND NOTE NOT DULY STAMPED.—Where in a suit on a hand note, the hand note is found to be inadmissible in evidence as not being duly stamped, oral evidence can be given of the original loan and the suit can be converted into a suit on the original loan. 172 I.C. 744=1937 Pat. 656. *See also* 1938 A.L.J. 773=1938 All. 504 ; 1936 Mad. 179=70 M.L.J. 267 (F.B.) ; 1939 Lah. 31. Where the loan is independent of the hand note and the taking of the loan is completed before the execution of the hand note, a suit can lie on the original consideration when the hand note which evidences the loan is found to be inadmissible by reason of certain provisions of the statute. 41 C.W.N. 537=65 C.L.J. 151=1937 Cal. 241. *See also* 1940 Lah. 329. It is open to a creditor, in spite of the fact that the promissory note is not admissible in evidence, to recover his money by proving orally the advance of that loan. It would not, however, be open to him having regard to S. 91 of the Evidence Act to prove the terms or the rate of interest entered in the promissory note. 1940 O.W.N. 581=1940 Oudh 308. Where a promissory note is taken in the name of a benamidar, a suit by the true owner based, not on the note but on the original consideration namely, the loan, is not maintainable, inasmuch as the liability of the maker under the note to the holder thereof is kept in fact. I.L.R. (1938) 1 Cal. 450=41 C.W.N. 1283=1937 Cal. 753.

PLACE OF PAYMENT—PRESUMPTION—PRONOTE NOT SPECIFYING ANY PLACE.—If a pronote does not specify any place where payment is to be made, the presumption is that payment should be made at the place of residence or business of the creditor. 181 I.C. 396=40 P.L.R. 975=1939 Lah. 18. *See also* 44 C.W.N. 609.

RIGHT TO SUE—ONE OF SEVERAL PROMISEES—IF CAN SUE ALONE.—One of several promisees under a promissory note is not entitled to sue alone without joining the other promisees, either as plaintiffs or defendants. 1938 O.W.N. 148=1938 Oudh 61. *See also* 1936 Pat. 274. Where in the case of a jointly executed promissory note one of the executants makes certain payment and the promisee agrees to discharge him from his liability only reserving his right to sue the co-executant for the balance, the co-executant is liable for the balance subject of course to his right to sue his other co-executant for contribution. 171 I.C. 622=1937 Rang. 137. In case where the plaintiff sues the *legal representative of a deceased person* upon a promissory note and there is no proof of any independent acknowledgment by the deceased of the existence of the debt, the Court should scrutinize the claim with the greatest care. In particular, where the plaintiff is not called and the Court has to depend on other evidence the onus of proof on the plaintiff is not lightly discharged, and the validity and due execution of the promissory note must be proved with strictness. 1936 Rang. 399.

Secs. 4 and 5.—As to distinction between promissory note and bill of exchange or hundi, *see* 1936 N. 260. A document containing a promise to pay a certain sum of money to a certain person after a certain date was executed on a paper on which was engraved the form of a stamp. The upper part of the stamp bore the word "hundi". The executant wrote the word "accepted" across the document over his signature. *Held*, that the document was a promissory note and not a bill of exchange, and that the words "hundi" and "accepted" in the document did not determine its character, which must be determined by looking to the provisions of the document itself. I.L.R. (1941) 2 Cal. 107=45 C.W.N. 609=1941 Cal. 498 (F.B.). A pro-note promising to pay on demand a certain sum with interest at 10 per cent. per annum *with quarterly rests* is for a "*sum certain*" and is therefore a negotiable instrument. 7 P.

5. A "bill of exchange" is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument.

"Bill of exchange."

A promise or order to pay is not "conditional," within the meaning of this section and section 4, by reason of the time for payment of the amount or any instalment thereof being expressed to be on the lapse of a certain period after the occurrence of a specified event which, according to the ordinary expectation of mankind, is certain to happen, although the time of its happening may be uncertain.

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41. Promissory note expressing promise to pay on demand a certain sum with interest with quarterly rests—Whether negotiable instrument. 1929 P. 136=7 P. 41. A promissory note executed in favour of the "Mohathameem Sahib Garu of Gadwal Samasthanam" is one in favour of a "certain person" within the meaning of S. 4, read with the last part of S. 5 of the Negotiable Instruments Act. 53 M. 968 =59 M.L.J. 548. The mere fact that a person chooses to give a certain title to a document by no means makes it that document. Where document described as promissory note does not amount to it. 1931 A.L.J. 230=1931 A. 302. Where a document sets out the fact of the amount of debt being owing from the father of the executant and then states that the amount will be paid in four instalments on dates fixed in four years with interest at a certain rate, it amounts to an unconditional promise to pay and therefore the document is a promissory note within the meaning of S. 4 of the Act. 1935 A.L.J. 651=1935 A. 410.

Secs. 4, 9 and 13.—Certain debentures of the City of Bombay Improvement Trust, belonging to the appellants were entrusted by them to one *F* for collection of interest thereon. By means of forged endorsement in his own favour, *F* pledged the debentures with the Alliance Bank, endorsing them over to that Bank as security for debts owing by him to the Bank, subsequently, the Alliance Bank surrendered the debentures to the Improvement Trustees, who issued in lieu thereof fresh debentures in the name of the Alliance Bank, the transaction being described in the present proceedings as a 'renewal' of the old debentures. Thereafter, the Alliance Bank, acting on *F's* instructions, endorsed over the new debentures in favour of the present respondents, the Mercantile Bank, to whom *F* has transferred his Loan Account. In a suit by the appellants, claiming as owners of these new debentures, delivery and transfer to them of these instruments by the respondents, the Mercantile Bank debentures were held to be promissory notes as defined in S. 4 and so negotiable instruments under S. 13 of the Negotiable Instruments Act; it was also held the new debentures issued by the Trustees in exchange for the old ones though called "renewals," were in form and substance new and independent obligations and constituted in effect new contracts; that the respondents, the Mercantile Bank, having no reason to believe that there was any defect in the title of the transferors, the Alliance Bank, were holders in due course against whom the appellants had no right of action. (24 B. 65, Overr.) 58 I.A. 54=56 B. 1=54 C.L.J. 419=61 M.L.J. 837 (P.C.).

Secs. 4, 20 and 78.—There is no force in the contention that S. 20 does not authorise the person to whom a stamped and signed paper is delivered to insert in it as payee the name of any one but himself. There is nothing in S. 4 of the Act which in any way curtails the general authority conferred by S. 20 on the person to whom a stamped and signed paper is delivered to convert it into a negotiable instrument payable to any specified person; where the promissory note contains a promise to pay unconditionally the sum mentioned to a certain person signing a bill or a hand note in blank without the name of the payee is an authority to a *bona fide* holder to insert a name, the name of a third person and it is not open to the executant (defendant) in a suit on it by the payee to plead that the person to whom he handed it describing it as a hand note had no authority to insert the name of the payee mentioned in it. The instrument being a negotiable instrument, the defendant cannot be heard to say that the holder, the payee, is not the person entitled to recover on it. Nor can he plead that payments have been made to some one else, *i.e.*, the person to whom he handed the signed paper in view of S. 78 of the Act. 19 Pat. 404=21 Pat. L.T. 845. *See also* 1931 Pat. 504.

Sec. 5.—An instrument is not taken out of the definition of a bill of exchange simply for the reason that the drawer and the drawee are the same persons. 9 P. 717=127 I.C. 575= 1930 P. 239. Although under S. 5, where the drawer and the drawee are the same person, that person is not entitled to treat the instrument as a bill of exchange, still the holder of the bill may treat it as a bill of exchange. 9 P. 717=1930 P. 239. Where a document written on hundi paper was treated by the parties as hundi but it contained no promise to pay to the order of any person or to bearer, and the drawer and the drawee were the same person, *held*, that the document was a bond and fell within the purview of S. 2 (5) (*b*) of the Stamp Act. 32 P.L.R. 753=1932 L. 22. A hundi payable to bearer but not on demand does not contravene the provisions of S. 25 of the Paper Currency Act. 101 I. C. 641=1927 A. 463=49 A. 457. Hundi insufficiently stamped is not admissible in evidence. 49 All. 457; 40 C.W.N. 696. A hundi may be written in more papers than one; but the aggregate value of the stamp papers used should represent the correct value of the stamp to

The sum payable may be "certain" within the meaning of this section and section 4, although it includes future interest or is payable at an indicated rate of exchange, or is according to the course of exchange, and although the instrument provides that, on default of payment of an instalment, the balance unpaid shall become due.

The person to whom it is clear that the direction is given or that payment is to be made may be a "certain person", within the meaning of this section and section 4, although he is misnamed or designated by description only.

"Cheque."

5. A "cheque" is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand.

"Drawer," "Drawee."

7. The maker of a bill of exchange or cheque is called the "drawer;" the person thereby directed to pay is called the "dawee.'

"Drawee in case of need."

When in the bill or in any indorsement thereon the name of any person is given in addition to the drawee to be resorted to in case of need, such person is called a "drawee in case of need."

"Acceptor."

After the drawee of a bill has signed his assent upon the bill, or, if there are more parts thereof than one, upon one of such parts, and delivered the same, or given notice of such signing to the holder or to some person on his behalf, he is called the "acceptor."

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which such hundi is liable. 23 C.W.N. 534=51 I.C. 88 ; 58 I.C. 313. A bill of exchange may include a hundi, but it does not follow that hundi includes a bill of exchange. 23 C.W.N. 534. *See also* 57 C. 695=1930 C. 697.

WHETHER FOLLOWING ARE BILLS OF EXCHANGE.—*Shahjog Hundi*—Nature of. *See* 33 I. C. 247=22 C.L.J. 22 ; 19 C.W.N. 1326=33 I. C. 250 ; 28 Bom.L.R. 897=1926 B. 471 ; 1932 L. 312. It is not a bill of exchange. 1936 A. L.J. 246=1936 A. 396. But it is a negotiable instrument independently of the provisions of this Act. (*Ibid.*) *Mate's receipt*, see 41 C. 670 (P.C.). Bank deposit receipt, 38 B. 618 ; *Railway receipt*, 38 B. 669 ; *Delivery order*, 38 C. 127 ; 40 I.C. 86. Although there is no provision in the Negotiable Instruments Act specifically allowing *post-dated cheques*, there is nothing forbidding them, and the second paragraph of S. 5 contemplates (as indeed it must) the making of a bill of exchange payable at a future date. A post-dated cheque is therefore a cheque in proper form and therefore a bill of exchange within the meaning of the Act on the day on which it is drawn. It becomes on the date it bears a bill of exchange payable on demand and so a cheque. 46 C.W.N. 645. A Shah Jog hundi is not a bill of exchange as defined in the Negotiable Instruments Act. 58 All. 858 =1936 A.L.J. 246=1936 All. 396.

Secs. 5 and 17.—An instrument, called a "hundi" but in the form of a promissory note, becomes a bill of exchange, on the acceptance of a third party, though the bill is not addressed to him and he is not named as drawee, provided his acceptance is not inconsistent with the address. No party can be made liable as acceptor of a bill addressed to another but where no party is named in the address, the acceptor may be deemed, by his endorsement of acceptance, to have admitted himself to be the party addressed. 57 C. 695=1930 C. 697.

Sec. 6 : POST-DATED CHEQUES are cheques and after the due dates may be sued upon as cheques. 52 C. 677=90 I.C. 59. A cheque is a bill of exchange and as such it is negotiable. The mere fact that the date of payment of a cheque is postponed to a future date does not make the cheque payable "otherwise than on demand." It is payable on demand after the due date. Therefore, a person who is holder in due course of a cheque without notice of any defect, is entitled to payment from the drawer. 1934 A.L.J. 892=1934 A. 695 (1).

Sec. 7.—The definition of "drawer" in S. 7 is not exhaustive and the maker of a promissory note can also be called a drawer. 152 I.C. 1006 =36 Cr.L.J. 217=1935 L. 153. The makers of a promissory note cannot raise the plea that no consideration passed for the transfer of the note to a third party. Where the transferee sues on the note, he is entitled to recover what is payable to the original promisee. 138 I.C. 876=1932 A. 648. Oral acceptance of *hundi* is not sufficient. 1924 A. 129. *See also* 51 I.C. 250=29 P.R. 1919. It does not make the so-called acceptor liable to the holder of the bill. 1930 L. 471. Mere writing of figures on the hundi cannot amount to the signing of assent by the drawee unless it can be proved that it amounted to acceptance according to the mercantile usage of the locality. 1930 L. 471. Although in the normal course a cheque is not accepted by the drawee banker, there is nothing in the law that forbids him to accept it in which case he becomes liable to a holder in due course in the same way as any other acceptor. The certification of a cheque by the drawee bank is acceptance of the cheque within the meaning of

[1][When a bill of exchange has been noted or protested for non-acceptance or for better security,] and any person accepts it *supra protest* for honour of the drawer or of any one of the indorsers, such person is called an "acceptor for honour."

"Acceptor for honour."

The person named in the instrument, to whom or to whose order the money is by the instrument directed to be paid, is called the "payee".

"Payee."

8. The "holder" of a promissory note, bill of exchange or cheque means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto.

"Holder."

Where the note, bill or cheque is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction.

LEG. REF.

[1] Substituted for "When acceptance is refused and the bill is protested for non-acceptance," by Act II of 1885, S. 2.

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the Act. The signature of a certifying banker is an acceptance. 1941 Cal. 372. The certification or making of a cheque as "good" by the drawee bank is equivalent to acceptance and the bank will be liable to the holder of the cheque accordingly, provided the nature of the making or certifying and the accompanying circumstances warrant it. 46 C.W.N. 645. As to what constitutes acceptance of hundi, *see* 13 L. 31=1932 L. 274.

Sec. 8: SCOPE AND EFFECT OF SECTION.—This section prevents a person suing on a negotiable instrument, who is not named as a payee nor entitled as endorsee or assignee. 56 I.C. 259=19 I.C. 88.

ILLUSTRATIVE CASES.—An alleged *beneficial owner* of a promissory note, whose name does not appear on the face of the instrument cannot sue on it. 29 I.C. 988=13 A.L.J. 695; nor in a suit on the note payment to beneficial owner a good defence. 49 A. 457=25 A.L.J. 402=1927 A. 962; 44 A. 290=20 A.L.J. 126=1922 A. 70. *See also* 153 I.C. 944=1935 M. 181=68 M. L.J. 81 (F.B.); 27 N.L.R. 327; 12 L.W. 532; 123 I.C. 395. As to *principal* suing on pronote in favour of *agent*, see 21 L.W. 696=90 I.C. 1047. It is not open to the defendant to plead that the payee is only a benamidar and therefore is not entitled to recover the amount due under it. 28 I.C. 501=1915 M.W.N. 227. A suit on a negotiable instrument by one of the heirs of the promisee alone is not maintainable. 12 L.W. 532. *See also* 44 A. 290=1922 A. 70; 1930 R. 243. No one can maintain a suit on a promissory note except the holder thereof. The fact that the holder has been made a party and has admitted that he is only the plaintiff's benamidar makes no difference. 1939 Pat. 347; 1939 S. 144; 12 L.W. 532. *See also* 123 I.C. 395. It may be that the suit can be proceeded with, if it had been based on the consideration and not on the note. 35 C.W.N. 53. Benamidar is a holder within the meaning of S. 8 and is entitled to sue on promissory note. 1930 R. 243. In India benami transactions are recognised. The real owner can institute a suit on a promissory note executed in the name of his benamidar, if the benamidar, admits that he is the benamidar for the real owner. 123 I.C. 395. On a pro-note executed in the name of one of the *partners*, a suit can be maintained by the *partnership* itself. 105 I.C. 549=55 C. 551 =1928 C. 148. An *insolvent* can sue on a pronote in his favour, if the Official Assignee does not interfere and object. 19 I.C. 88. A receiver appointed in a partition suit is entitled, when permitted by the Court, to maintain a suit on a promissory note which forms part of the assets of the joint family. The receiver can be said to be the holder of the promissory note under S. 8. 41 C.W.N. 697.

JOINT HINDU FAMILY.—A member of a Hindu family, to whose share, on a partition in the family, a debt evidenced by a promissory note is allotted is entitled to sue to recover the amount due under the promissory note without either an endorsement of the note or an assignment under S. 130 of the T. P. Act. A suit by that member must be regarded as a suit on the origial debt irrespective of the promissory note. 1937 M.W.N. 134. Where a promissory note executed in favour of a Hindu joint family firm, is allotted at a subsequent partition among the members constituting that firm to some of them, the latter to whose share the instrument is allotted are entitled to bring a suit on the note against the executant impleading the other members of the family also as plaintiffs. The plaintiffs who constituted the firm are competent to sue on the note as holders of the instrument. It is open to all the partners constituting the firm to bring a suit on a promissory note passed to that firm. The fact that there is no endorsement of the note in favour of the plaintiffs does not make the suit incompetent. 41 Bom.L.R. 219=1939 Bom. 147. In the case of a promissory note executed in the name of the manager of a Hindu joint family, the other coparceners are not "holders" of the instrument as defined by S. 8 of the Act, and they cannot therefore sue on the note *qua* coparceners. Although the debt may be coparcenary property, the promissory note is not such and does not devolve by survivorship but by succession. The right of the holder to sue on the note is personal to him, and no other person can be said to have an interest in it merely by birth or by being a member of the coparcenary though the coparceners might sue to recover the debt apart from the promissory

9. "Holder in due course" means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer,

"Holder in due course."

or the payee or indorsee thereof, if [1][payable to order,] before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.

LEG. REF.

[1] Substituted for "payable to or, to the order of a payee" by Act VIII of 1919.

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note. If the holder dies, a succession certificate may be granted to his heirs, and they may then recover upon the promissory note as his legal representatives. 40 Bom.L.R. 964=1938 Bom. 451. Hindu coparceners governed by the Mitakshara law, carrying on a joint family business, can institute in their individual names a suit to recover a debt on a promissory note obtained in the name of the family firm. The coparcenary can be described as the holder of a promissory note made in its collective name or business name, and such an instrument is made in its own name within the meaning of S. 8. A suit on the note brought by all the adult coparceners who are capable in law of giving a satisfactory discharge, to recover the debt on the promissory note executed in their trade name is maintainable. I.L.R. (1940) Bom. 153=42 Bom.L.R. 248=1940 Bom. 164.

Secs. 8 and 78: PROMISSORY NOTE—ASSIGNMENT—ASSIGNEE'S RIGHT TO SUE IN HIS OWN NAME, WITHOUT ENDORSEMENT.—A promissory note is a written acknowledgment of debt with a promise to repay. It is also a memorandum of contract and evidence of a chose in action. Thus, it may be transferred by assignment and the assignee thereby will get such title as the assignor had in the note and in addition, the right to have the endorsement of the assignor, and this includes the right to sue on the assignment in his own name and recover the amount due under the note from the parties liable. A promissory note is also a negotiable instrument and under the Negotiable Instruments Act, it is transferable merely by endorsement and delivery. As such, it is clothed with certain incidents intended to facilitate the business of merchants. The Negotiable Instruments Act has not affected the transferability of a promissory note by assignment as a chose in action, apart from endorsement. 61 C. 425=38 C.W.N. 465=1934 C. 549. *See also* 1935 O.W.N. 295=1935 O. 264. A payee named in a promissory note is the only person who can institute a suit upon it, and it is not open to a defendant in that suit to plead that the payee is a mere benamidar. 1939 P.W.N. 178=1939 Pat. 347. *See also* 19 Pat. 404=1940 Pat. 377. A person who is not the holder or endorsee of a promissory note but who only claims to be the surviving coparcener of the holder of the note is not entitled to sue on it. It would, however, be different if the suit is based on the debt itself. I.L.R. (1939) Kar. 405=1939 Sind 144.

Sec. 9.—Whether a promissory note payable on demand does not become payable until a demand is actually made. 1923 L. 631. *See also* 47 C. 861. But *see* 2 P.L.J. 451=40 I.C. 350. When a negotiable instrument of any sort is handed over by a debtor to his creditor in discharge of a pre-existing debt the creditor becomes a holder in due course. 19 I.C. 786=15 Bom.L.R. 353.

"HOLDER IN DUE COURSE."—Where in a partition a promissory note is simply allotted to a person, but which note never comes into his possession, and the note is payable to a third person and not to bearer, the former person cannot be a holder in due course; that being so, he cannot make his assignees by a release deed holders in due course. 22 I.C. 345=1930 M. 197. The right of the real owner is not affected by the Act, if his name be disclosed to the maker of the instrument and if the maker does not make any payment to the holder and get a discharge from him. 1930 S. 4. No one can sue on a negotiable instrument as holder, unless he is named therein as the payee, or unless he becomes entitled to it as endorsee or bearer. 122 I.C. 345=1930 M. 197. Unless a person proves that he is a holder in due course within the meaning of S. 9, he cannot have any higher or superior rights against the drawer than the intermediate holders themselves would have, and the fact that the person knows of the defect of title of the intermediate holders is enough to disentitle that person to the benefits of a holder in due course. 123 I.C. 596=1930 M. 141. *See also* 1938 Mad. 599=(1938) 1 M.L.J. 757. Where the defendant in a suit on a promissory note admits that something is still due on the pronote the plaintiff is entitled to recover the same whether he sues as "holder in due course" or on the footing that he is a holder. 1940 Rang.170. Holder in due course —Indorsee from payee of pro-note prohibited from collecting by Court's order, effect of. 46 M. 415=44 M.L.J. 206. As to who is holder in due course, *see also* 14 I.C. 813; 1923 L. 638. A promissory note payable on demand cannot be regarded as having matured on the date on which it comes into existence. The date of maturity would depend on the circumstances of each case. The test is to ascertain if a demand has been made and refused. 48 L.W. 480=1938 M. 911=(1938) 2 M.L.J. 523. *See also* 1940 Rang. 170. If the payee of a promissory note executed by two persons agrees to hold one of them alone liable and relinquishes his claim as against the other executant, and assigns the note to another who takes the assignment with knowledge of this arrangement, the assignee has no better title than his assignor and he can therefore enforce the instrument only against one of the executants and not against both. The assignee is not a holder in due course. 47

10. "Payment in due course" means payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned.

"Payment in due course."

11. A promissory note, bill of exchange or cheque drawn or made in British India, and made payable in, or drawn upon any person resident in, British India, shall be deemed to be an inland instrument.

Inland instrument.

12. Any such instrument not so drawn, made or made payable shall be deemed to be a foreign instrument.

Foreign instrument.

13. [1][(1) A 'negotiable instrument' means a promissory note, bill of exchange or cheque payable either to order or to bearer.

Negotiable Instrument.

LEG. REF.

[1] Substituted by Act VIII of 1919, S. 3 for original sub-section.

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L.W. 663=1938 M. 599=(1938) 1 M.L.J. 757. *Holder of a stale cheque*, whether holder in due course. *See* 25 A.L.J. 1091. Where no consideration exists either for the pro-note or for the transfer, the endorsee is not a holder in due course. 9 I.C. 79=8 M.L.T. 463; 1940 Rang. 170. A person cannot sue upon a promissory note which has not been endorsed to him. 32 I.C. 821=3 L.W. 171. A person holding a bill for collection with a lien on the bill is a holder of the bill for consideration. 49 B. 273=87 I. C. 982. Cheque—Indorsee—Suit by—Presumption of consideration—Holder in due course. 80 I.C. 572=1924 P. 521. *See also* 1940 Rang. 170. Promissory note—Minor payee—Endorsement by guardian not purporting to be by guardian on minor's behalf—Right of endorsee to sue. 19 L.W. 580=80 I.C. 567. Payments entered on back of pro-note. effect of. 4 L.W. 34=35 I.C. 591. As to the effect of forged endorsements, *see* 30 Bom.L.R. 1210=1928 B. 407; 30 Bom. L.R. 1222; 30 Bom.L.R. 1225.

Secs. 9 and 13.—Improvement Trust—Debentures as negotiable instruments—Forged endorsement—Effect—Subsequent endorsee obtaining substituted debentures—Holder in due course—Owner's suit to recover substituted debentures—Maintainability. *See* 52 B. 792=114 I.C. 389. On appeal, *see also* 61 M.L.J. 857 (P.C.); 52 B. 810=112 I.C. 824; 52 B. 807 =114 I.C. 389. Where it is not shown that payment was ever applied for, a promissory note is not to be treated as overdue merely because it is payable on demand and bears date some time back. If a negotiable instrument remains current, even though it has been paid, there is nothing to prevent a person to whom it has been indorsed for value, without knowledge that it has been paid, from suing. In the case of a promissory note which is payable on demand it does not become payable until demand is made. Where the maker of a promissory note payable on demand pays the amount of the note to the payee before the latter makes any demand, and leaves the instrument in the hands of the payee without insisting on its return or without obtaining from the payee a guarantee he acts at his own risk. If the payee subsequently indorses the instrument over to a third person who pays value and has no knowledge of the payment by the maker, the indorsee, as a holder in due course, is entitled to a decree for the amount in a suit against the maker. I.L.R. (1940) Mad. 382=51 L.W. 69=1940 Mad. 631.

Secs. 9, 50 and 59.—Scope—Promissory note payable on demand—Date of maturity—Test to decide—Notice of demand by holder giving time for payment—Transfer to another before expiry of time—Transferee is holder in due course. 48 L.W. 480=1938 M. 911=(1938) 2 M.L.J. 523. The endorsee of an overdue bill or promissory note does not take it subject to claims arising out of collateral matters such as a set-off, and the endorsement of an overdue bill in order to defeat a prospective claim on a set-off would not amount to a fraud. The only circumstance in which the transferee of an overdue bill would be fixed with liability to allow a set-off in respect of a claim due from the transferor is the circumstance which would justify an inference of an agreement to set off by both parties of which the transferee has notice. 54 L.W. 716= 1941 M.W.N. 775. *See also* 1942 M. 302.

Secs. 9 and 118 (g).—Where an endorsee of a promissory note payable on demand is not aware that the note has been discharged or that any demand was made for payment of the debt due thereunder, he must be deemed to be a "holder in due course", even if, as a matter of fact, the endorsement in his favour was made after such discharge or demand. He must be presumed to have had no knowledge of the discharge or demand, where there is no evidence as to his having had such knowledge. 44 L.W. 456=1936 M. 879=71 M.L.J. 473. *See also* 1940 Rang. 170.

Secs. 11 and 12.—A bill drawn upon a resident in British India is an inland bill as defined in S. 13 of the Act, wherever it may have been drawn, in or out of British India. 57 C. 730=1930 C. 692.

Sec. 13.—The Act does not purport to deal with all kinds of negotiable instruments. Whenever a question arises as to whether or not a document in an oriental language is a negotiable instrument, the point will have to be

Explanation (*i*).—A promissory note, bill of exchange or cheque is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable.

Explanation (*ii*).—A promissory note, bill of exchange or cheque is payable to bearer which is expressed to be so payable or on which the only or last indorsement is an indorsement in blank.

Explanation (*iii*).—Where a promissory note, bill of exchange or cheque, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.]

[1][(2) A negotiable instrument may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees.]

LEG. REF.

[2] Inserted by Act V of 1914, S. 2.

NOTES.

decided, not by looking to its definition in the Act, but independently of its provisions. The Courts will find out how such an instrument has been treated in the past, and if it appears that, according to usage or custom, such instruments have been treated as negotiable instruments, then they will be treated as such. 1936 A.W.R. 369=1936 A.L.J. 246=1936 A. 396. The amendment of the Negotiable Instruments Act contained in Expl. (*i*) to S. 13 (1) of the Act cannot be read into the definition of the bond as contained in S. 2 (5) (*b*), Stamp Act, so as to make an instrument, which on the face of it is not payable to order, one payable to order by virtue of the said explanation and thus to take it out of the said definition. 168 I.C. 349=1937 N. 61.

NEGOTIABLE INSTRUMENT.—Negotiable instrument—Test of—Transferable by delivery—Right of holder to sue *pro-tempore*. 46 C. 331=48 I. C. 936; 1923 L. 388.

GOVERNMENT PROMISSOY NOTES.—Whether negotiable instrument. *See* 8 I.C. 796=12 C. L.J. 470. *Shah jog Hundi*—Incidents of. 58 I. C. 982=1 L. 429. *See also* 43 M.L.J. 480.

WHAT ARE NEGOTIABLE INSTRUMENTS.—An instrument, in order to be negotiable must fulfil the following conditions:—(1) it must be in a form capaple of being sued on by the holder thereof *pro-tempore* in his own name; (2) it must by the custom of trade be transferable like cash by delivery. A 'pahunch' is a writing merely chronicling the fact that a certain amount is received by the person signing it from another person. It is an ordinary receipt. Neither expressly nor impliedly does it create any obligation on the part of any one to pay the amount mentioned therein. It is neither a Bill of Exchange as defined by the Negotiable Instruments Act, nor a hundi, nor any such document entitling or purporting to entitle any person to payment by any other person of any stated sum of money, and is consequently not negotiable. 32 S.L.R. 640=1938 Sind 24. A promissory note payable to a specified person or order is a negotiable instrument and the transfer must be by an endorsement and delivery. A verbal assignment of such a note is not recognized by law. 55 I.C. 718=10 L.B.R. 96. But in Punjab, where the T. P. Act is not in force, an oral assignment of the note is valid. 134 I.C. 121 (L.). *Shah Jog Hundis* are negotiable instruments payable alternatively to one of several payees. 43 M.L.J. 480=16 L.W. 608. *See also* 58 I.C. 982=1 L. 429. A cheque from which the word 'bearer' is struck out without substitution of the word 'order' is not negotiable. 49 I.C. 388=21 Bom.L.R. 1. *Share certificate* with blank transfer deeds enclosed are not negotiable instrument. 46 C. 331=48 I.C. 966. Where a hundi drawn in favour of payee or bearer is endorsed by the payee to a named person, it ceases to be a bearer hundi and it can be paid only to the endorsee named. 27 Bom.L.R. 34=80 I.C. 118.

DHANIJOGE HUNDIES payable to bearer are negotiable instruments. 1928 A. 549. They come under S. 13—Holder, therefore, is entitled to benefit of S. 22. 9 P. 717=127 I.C. 575=1930 P. 239.

ENDORSEMENT.—A promissory note payable to a particular person, is, in the absence of words prohibiting transfer or indicating an intention that it shall not be transferable, a negotiable instrument. Where such an instrument is not signed on the back either by the maker or by the holder, there is no endorsement. 76 I.C. 282=1925 S. 9. As to the *effect of forged endorsement*, *see* 30 Bom.L.R. 1210 =1928 B. 407; 30 Bom.L.R. 1222; 30 Bom.L. R. 1225; 36 Bom.L.R. 929=1934 B. 440. *See also* 1925 B. 173.

Sec. 13 (1).—A bill payable to a particular person and not to bearer or order is nonetheless a negotiable instrument by virtue of Expl. 1 to S. 13. 9 P. 717=1930 P. 239.

Secs. 13 (1), Expl. and 48: PROMISSORY NOTE—RIGHT OF SUIT ON—ALLOTMENT OF NGTE IN PARTITION—RIGHT OF ALLOTTEE TO SUE ON.—The payee of a promissory note is the only person who can sue on it; a person claiming to be owner thereof cannot sue on it in the absence of an indorsement in his favour by the holder. A person to whose share a promissory note in another's name is allotted on a partition cannot sue on it in the absence of an endorsement in his favour by the person in

14. When a promissory note, bill of exchange or cheque is transferred to any person, so as to constitute that person the holder thereof, the instrument is said to be negotiated.

Negotiation.

15. When the maker or holder of a negotiable instrument signs the same, otherwise than as such maker, for the purpose of negotiation, on the back or face thereof or on a slip of paper annexed thereto, or so signs for the same purpose a stamped paper intended to be completed as a negotiable instrument, he is said to indorse the same, and is called the "indorser."

Indorsement.

16. [1][(1)] If the indorsor signs his name only, the indorsement is said to be "in blank", and if he adds a direction to pay the amount mentioned in the instrument to, or to the order of, a specified person, the indorsement is said to be "in full", and the person so specified is called the "indorsee" of the instrument.

Indorsement "in blank" and "in full."
"Indorsee."

[1][(2) The provisions of this Act relating to a payee shall apply with the necessary modifications to an indorsee.]

LEG. REF.

[1] Inserted by Act V of 1914, S. 3.

NOTES.

whose name it is executed. The partition does not operate as an assignment by operation of law. 36 Bom.L.R. 807=1934 B. 356.

Sec. 14.—A document is negotiable, if, by the custom of the money market, it is transferable like cash and the *bona fide* transferee obtains a good title although his transferor might have stolen it. A *delivery order* may or may not be negotiable: the question depends upon the conditions attached to it and the usage of trade under which it issued. 40 I.C. 86. *See also* 38 C. 127.

Sec. 15.—For an exception to S. 15 in the case of Government securities, *see* the Indian Securities Act, 1886 (XIII of 1886), S. 6. Where an endorser gets another person to write his name for him, it is validly 'signed' within the meaning of this section. 161 I.C. 528=1936 R. 27 (40 M. 1171, Rel. on.) A negotiable instrument may be *transferred otherwise than by endorsement* alone. It may be otherwise assigned, and the assignee may sue in his own name, the only difference being that the assignee will have only the right, title and interest of the assignor while the indorsee will have all the rights of a holder in due course. 51 I.C. 250. A promissory note can be transferred like any other chose in action. It can be effected by a deed without endorsement. 138 I.C. 262=35 L.W. 755. A mere written acknowledgment of the receipt of money due under a pronote signed by the payee, does not by itself amount to an indorsement within S. 15. Nor does it amount to a transfer of an actionable claim under S. 130 of the T. P. Act in the absence of words of transfer. 59 I.C. 943=39 M.L.J. 273. Whether a suit can be filed on an endorsement made by a stranger on the back of a note, who does not satisfy the definition of an indorser, *see* 45 I.C. 186.

PROMISSORY NOTE IN FAVOUR OF PERSON AS AGENT—ENDORSEMENT BY PRINCIPAL.—Where upon a true construction of a promissory note itself, it is plain that the payee's name is mentioned therein as a payee in his capacity as agent of his firm and not in his personal capacity, the proprietor of that firm is really the true payee and can therefore endorse the promissory note under the provisions of S. 15 of the Act. 1934 R. 289. *See also* 68 C.L.J. 405=1939 Cal. 256 (pronote in favour of managing agents of a bank).

Sec. 16.—If an endorsement contains a direction to pay, though it may not contain actual words of direction, it contains a direction to pay within the meaning of the section. 19 I.C. 410=24 M.L.J. 296. The words on the back of a promissory note which were relied on as an indorsement were "Received the amount from T. K. A. (Sd.) K.A., Proprietor, A.N. Brothers". *Held*, that these words did not constitute an indorsement within the meaning of S. 16 of the Negotiable Instruments Act, as there was no direction to pay the amount of the note to a specified person and as the alleged indorsement did not consist only of the signature of the indorsee's name. Nor did the words constitute an assignment, because there were no words of assignment nor did they convey an expression of intention to transfer. 43 L.W. 371=1936 M. 417=70 M.L.J. 467. As to endorsement, before pronote becomes due, *see* 33 M. 34=3 I.C. 428=19 M.L.J. 509. An endorsement while it transfers the property in the note to the endorsee as the new holder, does not operate as an assignment to the endorsee of the debt due by the maker to the original payee. 1934 M. 350=67 M.L.J. 393. Where a person in whose favour a promissory note is executed makes an endorsement to the effect that he has sold the promissory note for a certain amount to the person named by him and that he has no further interest left in it, the endorsement is a perfectly good one, although it does not bear the words that the person named will be entitled to realise the amount by bringing a suit against the maker. S. 16 of the Act does not lay down any specific form or words which are necessary for an endorsement. 1935 O.W.N. 295=1935 O. 264.

Sec. 16 (2).—*See* 50 B. 118=1926 B. 262=28 Bom.L.R. 226.

17. Where an instrument may be construed either as a promissory note or bill of exchange, the holder may at his election treat it as either, and the instrument shall be thenceforward treated accordingly.

Ambiguous instruments.

18. If the amount undertaken or ordered to be paid is stated differently in figures and in words, the amount stated in words shall be the amount undertaken or ordered to be paid.

Where amount is stated differently in figures and words.

19. A promissory note or bill of exchange, in which no time for payment is specified, and a cheque, are payable on demand.

Instruments payable on demand.

20. Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in British India, and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives *prima facie* authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount: provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder.

Inchoate stamped instruments.

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Sec. 17.—A hundi is sometimes a pronote and sometimes a bill of exchange. 58 I.C. 513. The right of election given by S. 17 of the Negotiable Instruments Act to the holder of an instrument to treat it as a promissory note or as a bill of exchange is a privilege which he must have the full advantage of and that benefit should not be taken away by anything contained in the Stamp Act. S. 17 should in effect be read as a proviso to S. 6 of the Stamp Act. 1932 M. 765=63 M.L.J. 548. Transfer of pronote for collection—Burden of proof. *See* 39 L.W. 486=1934 M. 292.

Sec. 19.—A bill of exchange is payable on demand though the demand cannot be made on the day when the bill is drawn. 45 I.C. 22=8 L.W. 501. A note which does not fix any date for payment is payable on demand. (*Ibid.*)

Sec. 20.—S. 20 gives general authority to a person to whom a stamped and signed paper is delivered to convert it into a negotiable instrument payable to any specified person; it is open to a person who receives a blank inchoate instrument to complete it in favour of any person besides himself. A hand note is a negotiable instrument, but if it is found as a fact that it was never negotiated, that would alter the position. 1941 P.W.N. 563=1941 P. 504. *See also* 1936 Nag. 260. S. 20 does not apply to cheques as a cheque does not require any stamp. Where therefore a blank cheque drawn by a person is dishonoured by the Bank, the "holder in due course" of such cheque cannot hold the drawer thereof liable for the amount stated therein on the dishonour of such a cheque, inasmuch as the cheque is not an inchoate stamped instrument. 40 P.L.R. 77=1937 Lah. 816. The document, whose stamp has not been crossed by the signature, might still come under S. 20 if the stamp had been cancelled in accordance with S. 12 of the Stamp Act. 34 I.C. 315=38 A. 430. The delivery of a hundi paper signed, but left blank, cannot be taken to give *prima facie* authority to make thereon a negotiable instrument outside the maximum value covered by the stamp by attaching thereto other stamps. 54 I.C. 3. So long as the amount of a pronote can be found out from the instrument itself without extraneous aid, the omission to state it in the body of the pronote does not vitiate its character as such. 1923 R. 97. Though a payee can fill in a blank in an inchoate instrument and sue on it himself or endorse it to some one else, no decree can be passed on such a blank instrument if it does not contain the name of the payee. Such an instrument is not negotiable. 17 I.C. 915. *See also* 13 Pat.L.T. 506=1932 P. 324; 19 Pat. 404=21 P.L.T. 845=1940 Pat. 377 cited under Sec. 4 *supra*.

Secs. 20 and 118.—If the plaintiff sues on a promissory note, and the defendant admits, or has had proved against him conclusively his signature and/or his thumb impression on the promissory note, but the defendant asserts that he did not sign the promissory note in the condition in which it is filed, the burden of proof lies on the defendant to show that the promissory note was not in its existing form at the time that he executed it. 1939 Rang.L.R. 397 =1939 Rang. 334 (F.B.).

21. In a promissory note or bill of exchange the expressions "at sight" and "on presentment" mean on demand. The expression "after sight" means, in a promissory note, after presentment for sight, and, in a bill of exchange, after acceptance, or noting for non-acceptance or protest for non-acceptance.

"At sight," "On presentment," "After sight."

22. The maturity of a promissory note or bill of exchange is the date at which it falls due.

"Maturity."

Every promissory note or bill of exchange which is not expressed to be payable on demand, at sight or on presentment is at maturity on the third day after the day on which it is expressed to be payable.

Days of grace.

23. In calculating the date at which a promissory note or bill of exchange, made payable a stated number of months after date or after sight, or after a certain event, is at maturity, the period stated shall be held to terminate on the day of the month which corresponds with the day on which the instrument is dated, or presented for acceptance or sight, or noted for non-acceptance, or protested for non-acceptance, or the event happens, or, where the instrument is a bill of exchange made payable a stated number of months after sight and has been accepted for honour, with the day on which it was so accepted. If the month in which the period would terminate has no corresponding day, the period shall be held to terminate on the last day of such month.

Calculating maturity of bill or note payable so many months after date or sight.

Illustrations.

(*a*) A negotiable instrument, dated 29th January, 1878, is made payable at one month after date. The instrument is at maturity on the third day after the 28th February, 1878.

(*b*) A negotiable instrument, dated 30th August, 1878, is made payable three months after date. The instrument is at maturity on the 3rd December, 1878.

(*c*) A promissory note or bill of exchange, dated 31st August, 1878, is made payable three months after date. The instrument is at maturity on the 3rd December, 1878.

24. In calculating the date at which a promissory note or bill of exchange made payable a certain number of days after date or after sight or after a certain event is at maturity, the day of the date, or of presentment for acceptance or sight, or of protest for non-acceptance, or on which the event happens, shall be excluded.

Calculating maturity of bill or note payable so many days after date or sight.

25. When the day on which a promissory note or bill of exchange is at maturity is a public holiday, the instrument shall be deemed to be due on the next preceding business day.

When day of maturity is a holiday.

[1]*Explanation.*—The expression "public holiday" includes Sundays, New Year's Day, Christmas Day: if either of such days falls on a Sunday, the next

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LEG. REF.

[1]The powers of a Local Government under this explanation have been delegated to the Commissioner in Sind by the Government of Bombay under S. 2 of Act V of 1868, *see Bombay Gazette*, 1903, Pt. I, p. 449.

NOTES.

Sec. 22.—The term "maturity" used in this section can have no application to a promissory note payable on demand. 1930 M.W.N. 1232. Time of presenting hundi for payment. 39 A. 86=37 I.C. 656. Hundi—Contract dispensing with days of grace—Whether permissible. 23 I.C. 437=26 M.L.J. 494. The provision in S. 22 giving three days of grace affects only instruments which are not written in an oriental language. The instruments written in oriental languages will be governed by any local usage which may be proved in the case. Where it is admitted in the plaint that the hundi in question fell due on a certain date in accordance with the local usage or custom, the operation of S. 22 is excluded, and therefore the three days of grace which are allowed in the case of instruments not expressed in an oriental language cannot be added in such case for computing limitation for a suit on that negotiable instrument. 186 I.C. 693=1940 Lah. 14.

Sec. 23.—*See* 49 I.C. 191.

following Monday: Good Friday; and any other day declared by the [1][Central Government] by notification in the Official Gazette, to be a public holiday.

CHAPTER III.

PARTIES TO NOTES, BILLS AND CHEQUES.

Capacity to make, etc., promissory notes, etc.

26. Every person capable of contracting, according to the law to which he is subject, may bind himself and be bound by the making, drawing, acceptance, indorsement, delivery and negotiation of a promissory note, bill of exchange or cheque.

Minor.

A minor may draw, indorse, deliver and negotiate such instrument so as to bind all parties except himself.

Nothing herein contained shall be deemed to empower a corporation to make, indorse or accept such instruments except in cases in which, under the law for the time being in force, they are so empowered.

Agency.

27. Every person capable of binding himself or of being bound, as mentioned in section 26, may so bind himself or be bound by a duly authorized agent acting in his name.

A general authority to transact business and to receive and discharge debts does not confer upon an agent the power of accepting or indorsing bills of exchange so as to bind his principal.

An authority to draw bills of exchange does not of itself import an authority to indorse.

LEG. REF.

[3] Substituted by A.O., 1937, for "Local Government".

NOTES.

Secs. 26 and 27.—Hundi signed by managing proprietor of firm—Personal liability. *See* 30 Bom.L.R. 1300. Pronote executed by two out of three partners—Executants merely signing their names—Liability of the firm otherwise disclosed in the note—Partners not joining in the execution are also liable. 1928 M. 1196=55 M.L.J. 574. A negotiable instrument drawn by a manager of a Hindu joint family is binding on other members provided it was made for family purposes. 44 A. 393=1922 A. 116. Promissory note executed by karta of a joint Hindu family and signed by him alone—Liability of other family members on the note and on the original debt. 88 I.C. 1025=41 C.L.J. 535. When the manager of a joint Hindu family incurs a debt and gives a promissory note therefor, the creditor may sue him upon the note and make him personally liable, but he cannot make the other members of the family liable by suing on the note. 32 Bom.L.R. 1035=1930 B. 424. *See also* 115 I.C. 400. A *minor* can draw a bill or issue a cheque on the banker. A *minor* is not incompetent to be a payee. 40 M. 308=31 M.L.J. 575 (F.B.); 41 M. 815=35 M.L.J. 90. A person is not precluded under S. 120 of the Act from denying the validity of the note on the ground that he was a minor on the date of the note, as the specific provision in S. 120 is subject to the general rule enacted in S. 26. 117 I.C. 133.

Secs. 26, 27 and 28: ACTION ON PROMISSORY NOTE—LIABILITY OF UNDISCLOSED PRINCIPALS.—In an action on a promissory note against a person whose name properly appears as party to the instrument, it is not open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal. The sections of the Contract Act relating to the liability of an undisclosed principal do not override Ss. 26 to 28 of the Negotiable Instruments Act. 32 L.W. 551=66 M.L.J. 671. An objection by an endorser of a negotiable instrument that the signature of the endorser does not appear on face of the negotiable instrument, as it is signed by his agent without any mention being made that he is acting on behalf of his principal, cannot be upheld, when on a fair interpretation of the document, the name of the person liable is disclosed and the evidence shows that the agent signed the negotiable instrument under the implied directions and with the explicit knowledge of his principal. It is only when there is some doubt regarding the identity of the drawer that the matter can be agitated before the Courts. 187 I.C. 650=1939 Lah. 225. Promissory note by guardian of minor—Note not disclosing borrowing on behalf of minor—Debt incurred for purposes binding on minor—Liability of latter's estate. *See* 50 L.W. 374.

Sec. 27.—Where a partner of a firm executes a promissory note in his individual capacity and not on behalf of the firm, the executant alone is liable under the note. 142 I.C. 837=35 Bom.L.R. 68=1933 B. 101. The name of a person or firm to be charged upon a negotiable instrument must be clearly stated on the face or the back of the instru-

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ment, so that the responsibility is made plain and can be instantly recognised. The mere fact that the name is disclosed in "some way" is not sufficient. Consequently, the mere fact that a person executes a promissory note describing himself as the proprietor of a firm or writes on a newspaper with the name and description of a firm printed on it, cannot be held to be sufficient to hold the firm liable on the promissory note. 35 P.L.R. 590=1934 L. 815. Where the intention is to make a firm liable it is not necessary that the name of the firm should be written immediately above the signature of the person signing instrument. A hundi purported to come from a firm; on the instrument were words purporting to show the drawer as the firm. After giving compliments of the firm it proceeded "further we have drawn on you one receipt for Rs. 1,000." The signature of the partner of the firm who signed the hundi was preceded by the word "dustkhat". *Held*, that the prefixing of "dustkhat" to the signature denoted that the person incurred no personal liability on the instrument. It was the firm which was to be liable on the instrument and not the partner. 1930 S. 4. The effect of S. 27 is that the principal can only be made liable through his agent on a negotiable instrument, when the agent acts in his principal's name, that is, when he signs as agent and that an undisclosed principal cannot be sued on a negotiable instrument. 118 I.C. 673=1929 N. 274. *See also* 144 I.C. 866=1933 R. 131. Promissory note signed by managing agent of company—Articles of Association not permitting agent to sign—Company whether liable. *See* 1930 A.L.J. 1052. *See also* 171 I.C. 412=1938 Lah. 41 (general authority to transact business of a firm does not include power to execute promissory note on behalf of firm). Suit based on a promissory note executed by manager of joint Hindu family, if maintainable against other members of the joint family. *See* 144 I.C. 411=22 N.L.R. 312=1933 N. 160; 1933 Lah. 494. *See also* 1925 C. 1153=41 C.L.J. 535; 1928 Lah. 722; 46 C. 663=36 M.L.J. 429 (P.C.); 45 A. 534. An indorsee of a promissory note executed by the managing member of a Hindu joint family is limited to his remedy on the note, unless the indorsement is so worded as to transfer the debt as well and the stamp law is complied with, and, therefore, in the case of an ordinary indorsement the indorsee cannot sue the non-executant coparceners on the ground of their liability under the Hindu Law. It is a fundamental principle of the law relating to negotiable instruments that no one whose name does not appear on the instrument can be held liable thereon. I.L.R. (1938) Mad. 568=47 L.W. 309=1938 Mad. 377=(1938) 1 M.L.J. 378 (F.B.). *See also* 20 Pat.L.T. 321=1939 P.W.N. 305=1939 Pat. 490. Where the original debt was borrowed by the defendant for the benefit of the family and a pronote executed for it and it is renewed by the execution of a fresh pronote by the elder brother of the defendant and a suit is brought on it against the defendant after the death of the executant, S. 27 of the Act can have no application and the defendant would be liable on the new pronote. 1941 O.W.N. 1112=1941 O.A. 827.

Secs. 27 and 28: APPLICATION OF.—S. 28 applies both to instruments in English as well as in vernacular. 14 M.L.T. 502=21 I.C. 650. The principle of S. 28 applies also to the case of a payee. 40 I.C. 347=5 L. W. 721. S. 28 does not apply where the suit is brought not on the pronote but on the consideration. In such a case the suit can be maintained against the principal as well. 27 N.L.R. 324; 1936 O.W.N. 1008=165 I.C. 578 (2)=1937 O. 65 (Case of execution by servant). When deciding whether the maker of a promissory note has executed it as the agent or the representative of another, the Court cannot look into the surrounding circumstances. It cannot look beyond what is stated in the instrument. In India, where a person executing an instrument in an Indian language, after giving his own description, adds that he is the agent of another, it means that he is acting as the other's agent in the matter of the execution of the document, and it is sufficient to exclude his personal responsibility. I.L.R. (1941) Mad. 513=1941 Mad. 417=(1941) 1 M.L.J. 441 (F.B.).

ILLUSTRATIVE CASES.—"Agent" in Ss. 27 and 28 means the agent of a person capable of contracting within the meaning of S. 26; and where the agent is not liable the principal is. 41 Mad. 815=35 M.L.J. 90; 40 M. 1171. Liability of partners executing promissory note as principals. *See* 4 R. 551. In a promissory note, the name of a person or firm to be charged should be clearly stated so that the responsibility is made plain and the name can be instantly recognised. [46 C. 663 (P.C.), Rel. on.] 138 I.C. 168=15 N.L.J. 5; 1933 R. 131. A promissory note ran as follows: "On demand I the undersigned promise to pay *B* or order the sum of Rupees.....with interest." The note was signed by the executant and thereafter he was described as agent and attorney of another. *Held*, that the executant was personally liable and the words as agent and attorney were merely descriptive. 37 C.W.N. 296. So also in the case of "a common manager" under the Bengal Tenancy Act. 40 C.W.N. 92=164 I.C. 728. Hundi signed by the *managing proprietor* of firm—Personal liability. *See* 30 Bom.L.R. 1300. *See also* 70 C.L.J. 307=1940 Cal. 177 (executant signing himself as director of company; 43 C.W.N. 399 (undisclosed principal—Suit on original consideration). In order to make a person liable as principal on a hundi executed by his agent, it is not sufficient that the name is disclosed in such a way that on any fair interpretation of the instrument his name is the name of the person really liable. 46 C. 663=36 M.L.J. 429 (P.C.). *See also* 92 I.C. 94=1926 O. 248. In an action on a bill of exchange or promissory note against a person whose name properly appears as party to the instrument, it is not open by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal. 46 Cal. 663. *Agent of Natukottai Chetty*—Signature with vilasam of principal—Liability of agent excluded. 51 I.C. 386=8 L. W. 622; 43 C.W.N. 399 (undisclosed principal). *See also* 1923 A. 407. Where the body of a promissory note executed by a trustee of a temple binds the executant and

28. An agent who signs his name to a promissory note, bill of exchange or cheque without indicating thereon that he signs as agent, or that he does not intend thereby to incur personal responsibility, is liable personally on the instrument, except to those who induced him to sign upon the belief that the principal only would be held liable.

Liability of agent signing.

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not the temple, the mere fact that the executant is described at the beginning of the note and after the signature as "adalthedar" or trustee, would not be a sufficient ground for excluding the liability of the maker on the note. It is clearly impossible to go outside the note to find out whether the maker intended to pledge his credit or intended to find the temple. 55 L.W. 258=(1942) 1 M.L.J. 535. Temple manager—Promissory note by—Suit on—Liability of temple. *See* (1941) 2 M.L.J. 568. Where a promissory note is executed by the mahant of a Math, describing himself as mahant but not as a shebait or any kind of agent of the deity of the Math, and there is nothing on the face of the note to suggest that he is contradicting in such a way as to bind the deity, the deity cannot be made liable in a suit on the promissory note only the executant can be held liable. 8 Cut.L.T. 10. Hundi—Effect of signing as *munim*. *See* 75 I.C. 609. In a suit on promissory note executed by a trustee of an executor, who does not however sign as trustee or executor, there can only be a personal decree against the executant, or, if the executant is dead, against his or her legal heirs and there cannot be a decree against the trust estate or the testator's heirs. 33 M.L.J. 631 =43 I.C. 760. *See also* 41 Mad. 815=35 M.L.J. 90. Promissory note—executed and signed by the guardian—Money spent for purposes binding on minor—Minor's estate, if liable. 39 Mad. 915=30 I.C. 574; 1926 Mad. 390=92 I.C. 805 =50 M.L.J. 125. *See also* 64 I.C. 742. Where the maker of a note describes himself as agent in the body of the pronote, but his promise to pay as well as his signature were unqualified by any reference to his alleged principal he could not evade his personal liability. 38 Mad. 482=25 M.L.J. 425; 28 I.C. 93; 2 L.W. 188; 39 Mad. 915=30 I.C. 574. Pronote by *manager of Hindu joint family*—Suit against other members—Maintainability. 1933 L. 494; 1933 P. 263; 1933 N. 160; 1939 Pat. 490; (1938) 1 M.L.J. 378=1938 Mad. 377 (F.B.); 1937 Mad. 437 (Karnavan of Malabar Tarwad); (1937) 1 M.L.J. 224. Pronote—Description in the body and signature of executant as chairman of Co-operative Society—No exclusion of personal liability. 34 Bom.L.R. 1327. Pronote by guardian *de facto*—Test to find whether the same was executed in his personal capacity or only as guardian. 1927 M. 1018=53 M.L.J. 814; 1926 M. 390=50 M.L.J. 125. Note signed by member of joint family firm—Liability of firm. *See* 10 R. 257=139 I.C. 460=1932 R. 97; 1936 N. 252.

SEC. 28: SCOPE OF.—This section is an exception to S. 230 of the Contract Act as regards the liability of agent. 18 Pat.L.T. 337= 1937 P.W.N. 344. Where a person executing a promissory note alleges that he executed it on behalf of a firm of which he is a partner, unless the responsibility of the firm is made plain and can instantly be recognised as the instrument passes from hand to hand, ordinarily the person signing alone will be liable. 1936 N. 252. Where a promissory note is executed by a servant for a loan advanced to his master, and the name of the master does not appear as a party on the face of the promissory note, the master cannot be held liable under the instrument. 1936 O.W.N. 1008=1937 O. 65. The essence of a tripartite arrangement between a third person, promisor not an agent of the third person and promisee, was to conceal third person's indebtedness from the promisee and to make him believe that the promisor was the debtor. The promisor lent himself to the scheme fully understanding that its object was the deception of the promisee. *Held*, that the promisor was not induced by the promisee to believe that he would not be held liable upon his promissory notes within the meaning of S. 28. 34 C.W.N. 145=1929 P.C. 297.

HINDU MINORS—PRONOTE BY MOTHER AS GUARDIAN—NO DESCRIPTION AS GUARDIAN IN SIGNATURE.—Plaintiff instituted a suit on a promissory note executed to him by the mother and guardian of two Hindu minors. The note which was in renewal of a prior note by her (which itself was in renewal of an earlier one executed by the father of the minors) described the minors in the body of the note "as represented by their mother and guardian", but he signed the note without any such description attached to her name. *Held*, that the intention of the maker, which could be inferred from the surrounding circumstances, the debt being one incurred by the father originally, was to exclude her own personal liability and to make the wards (minors) liable; that the liability of the minors under the Hindu Law was not affected by the mere fact that the promissory note evidencing the debt was by a guardian; and consequently the plaintiff was entitled to a decree against the minors. 155 I.C. 581=68 M.L.J. 540 (F.B.).

PROMISSORY NOTE—EXECUTANT SIGNING HIS OWN NAME AND ALSO SIGNING AS GUARDIAN—PERSONAL LIABILITY.—The material part of the promissory note was as follows: "The balance is Rs. four hundred. This sum of rupees four hundred we have agreed to pay you and so we owe you. On demand we promise to pay you or your order this sum with interest thereon at one anna per mensem and get this returned. To this effect is the promissory note executed with our consent and in the handwriting of T. V. S., the guardian." Then defendant 2 (T.V.S.) signed his name alone across the stamp and again below the stamp as guardian for minor S. *Held*, that the guardian also made himself personally liable. 154 I.C. 582=1935 M. 160. *See also* 1936 M. 417=70 M.L.J. 467 (case of principal and agent). *See also* 18 Pat.L.T. 337;

29. A legal representative of a deceased person who signs his name to a promissory note, bill of exchange or cheque is liable personally thereon unless he expressly limits his liability to the extent of the assets received by him as such.

Liability of legal representative signing.

30. The drawer of a bill of exchange or cheque is bound, in case of dishonour by the drawee or acceptor thereof, to compensate the holder, provided due notice of dishonour has been given to, or received by, the drawer as hereinafter provided.

Liability of drawer.

31. The drawee of a cheque having sufficient funds of the drawer in his hands properly applicable to the payment of such cheque must pay the cheque when duly required so to do, and, in default of such payment, must compensate the drawer for any loss or damage caused by such default.

Liability of drawee of cheque.

32. In the absence of a contract to the contrary, the maker of a promissory note and the acceptor before maturity of a bill of exchange are bound to pay the amount thereof at maturity according to the apparent tenor of the note or acceptance respectively, and the acceptor of a bill of exchange at or after maturity is bound to pay the amount thereof to the holder on demand.

In default of such payment as aforesaid, such maker or acceptor is bound to compensate any party to the note or bill for any loss or damage sustained by him and caused by such default.

Liability of maker of note and acceptor of bill.

33. No person except the drawee of a bill of exchange, or all or some of several drawees, or a person named therein as a drawee in case of need, or an acceptor for honour, can bind himself by an acceptance.

Only drawee can be acceptor except in need or for honour.

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1936 M. 984=71 M.L.J. 738 (case of partnership).

Secs. 28 and 29.—Difference between Ss. 28 and 29. *See* 1926 M. 390=50 M.L.J. 125.

Sec. 29.—Executor—Guardian—Pronote by —Personal liability under it and when excluded —Note for debt binding on estate or minor's estate if decisive. 85 I.C. 457. As to what constitutes "express limitation of liability," *see* 146 I.C. 979=35 Bom.L.R. 969=1933 Bom. 444. *See also* 47 M.L.J. 765.

Sec. 30.—*See* 116 I.C. 187=1929 Lah. 577; 18 M.L.J. 216. (*See also* note under S. 64 *infra*.) The drawer of the bill of exchange is liable as surety till the acceptor pays the balance after his set-off. 35 I.C. 628=18 Bom. L.R. 689. The drawer of a hundi is not liable if due notice of dishonour is not given. 13 I.C. 255. The drawer of a bill of exchange or cheque cannot set up a collateral agreement as a defence to a claim under S. 30. *See* 30 I.C. 35=9 S.L.R. 32. Liability of a drawer of a bill of exchange to reimburse holder for value on dishonour by acceptor. 54 I.A. 317=1927 P.C. 195=53 M.L.J. 42 (P.C.). Effect of D-A draft (documents against acceptance). 53 M. L.J. 42 (P.C.).

Secs. 30, 37 and 38.—The drawer of hundi is not a surety for acceptance because the drawee does not become liable until he accepts. Therefore unless and until he does that there is no debt for which he can be held responsible. It follows that there is no principal for whom the drawer can stand surety. Therefore when there is no acceptance the liability of the drawer is as principal debtor under an implied contract of indemnity. His undertaking is conditional only and his liability does not arise unless the instrument is dishonoured, either by non-acceptance or by non-payment. 182 I.C. 842=1938 Nag. 262.

Sec. 31: LIABILITY OF DRAWEE.—A drawee is not liable as such on a hundi till he has accepted the same. The burden of proof is therefore on the holder to show that drawee had accepted the liability to pay the hundis on behalf of his firm. 122 I.C. 406=1930 A. 106.

Sec. 32.—Government—Liability of maker and acceptor—Burden of proof. 36 I.C. 996. Pronote executed in the absence and without the knowledge of the payee to help a friend of the maker to raise money on it and money is subsequently advanced on such instrument to a third party, it must be deemed to have been executed for consideration. 36 I.C. 996. Bills of exchange—Acceptance before war—Government proclamation allowing British subject to obtain goods in enemy steamer in neutral port—Effect of. 41 B. 566=37 I.C. 258. *See also* 34 P.L.R. 645. The fact that the maker of a pronote is a partner of the payee is no defence to a suit on the note unless the instrument is treated as an escrow or a nullity. 49 I.C. 191. Seller and buyer—Endorsement of bills through bank—Right as endorsee superseding right as seller. *See* 1932 A.L.J. 1055.

Sec. 33.—Where a person against whom a

Acceptance by several drawees not partners.

34. Where there are several drawees of a bill of exchange who are not partners, each of them can accept it for himself, but none of them can accept it for another without his authority.

Liability of indorser.

35. In the absence of a contract to the contrary, whoever indorses and delivers a negotiable instrument before maturity, without, in such indorsement expressly excluding or making conditional his own liability, is bound thereby to every subsequent holder in case of dishonour by the drawee, acceptor or maker to compensate such holder for any loss or damage caused to him by such dishonour, provided due notice of dishonour has been given to, or received by, such indorser as hereinafter provided.

Every indorser after dishonour is liable as upon an instrument payable on demand.

Liability of prior parties to holder in due course.

36. Every prior party to a negotiable instrument is liable thereon to a holder in due course until the instrument is duly satisfied.

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bill of exchange is drawn by name, accepts the bill for or on behalf of a *corporation*, of which he is a member there is no valid acceptance of the bill. 27 Bom.L.R. 283=87 I.C. 485. On this section, *see also* 16 I.C. 796. Endorser is liable as a surety for the maker, but he is also, in the absence of a contract to the contrary, liable as principal to his endorsee. 17 I.C. 951. The fact of the bill of exchange having been dishonoured and of its intimation to the endorser must be proved before the endorser is made liable. 18 A.L.J. 981=59 I.C. 675.

Sec. 35.—The section does not apply to a promissory note payable on demand. 1930 M.W.N. 1232. The last paragraph of the section cannot be taken to mean that the indorser is liable even without a notice of dishonour being given to him by the indorsee, since that would be in conflict with the mandatory provisions of S. 93. It only means that after dishonour, the indorser is liable as upon an instrument payable on demand, that liability is akin to that of the maker but the liability is subject to the condition fixed in the proviso embodied in the first part of the section. 1930 M.W.N. 1232. The rule is subject to any 'contract to the contrary, by which although the indorsement is *ex facie* unrestricted, the indorser as between himself and the indorsee, by agreement either express or to be inferred from the nature of the transaction excluded his personal liability. 63 M.L.J. 880=36 L.W. 777. Where a person who is entrusted with moneys by another for being invested on the security of immovable property, lends it out to others on promissory notes taken in his own name without any security, and endorses the notes to the owner of the moneys and also assures him that the moneys are safe and that he would go to the owner with the executants of the notes and clear the loan, he is liable to the indorsee as indorser under S. 35 of the Act. It cannot be said that the endorsements are without consideration within the meaning of S. 43 of the Act. Since the endorsements are part and parcel of the same transaction, the consideration for the same is the money received by him from the owner of the money. Further, the fact that he has taken the instruments in his own name shows his intention to share the liability and his undertaking to go with the makers to the endorsee and clear the loan makes him a guarantor and liable as such. 1939 M.W.N. 496=1939 Mad. 848=(1939) 1 M.L.J. 897. Where at a partition of family properties a promissory note executed by a third party in favour of the father was indorsed by him in favour of his adult son as part of the assets allotted to the latter, *held*, that the lower Court was justified in drawing an inference from the nature of the transaction that the father intended to exclude his personal liability as endorser and that the son had no right of recourse against the father on default by the maker. 63 M.L.J. 880. A *transferee* by delivery of a negotiable instrument is not liable on the instrument to a subsequent holder under S.35, nor is he entitled, in the event of dishonour, to enforce liability on the instrument against a prior party to it. 1932 M. 323=62 M.L.J. 239. Promissory note signed by *executor*—Promisee suing executant as executor—Personal relief claimed at subsequent stage—Sustainability. *See* 112 I.C. 740.

LOST OR STOLEN HUNDI.—Genuineness—*Liability of indorser*—English Law. 39 B. 513=26 I.C. 896. *See also* 1940 Bom. 82. Suit by endorsee on a hundi against the drawee and endorser—Presentment to drawee not proved—Endorser's liability when arises. 21 L.W. 210=86 I.C. 576. Applicability of section to an endorser of pronote payable on demand—Liability of endorser when begins—Presentation for payment—Notice of dishonour—Cause of action—Limitation. 1925 M. 132=47 M.L.J. 475. Payment by maker of a note of a portion—Effect—Unreasonable delay in presenting for payment will discharge endorser—Notice within reasonable time of dishonour is also necessary. 47 M.L.J. 475.

37. The maker of a promissory note or cheque, the drawer of a bill of exchange until acceptance, and the acceptor are, in the absence of a contract to the contrary, respectively liable thereon as principal debtors, and the other parties thereto are liable thereon as sureties for the maker, drawer or acceptor, as the case may be.

Maker, drawer and acceptor principals.

38. As between the parties so liable as sureties, each prior party is, in the absence of a contract to the contrary, also liable thereon as a principal debtor in respect of each subsequent party.

Prior party a principal in respect of each subsequent party.

Illustration.

A draws a bill payable to his own order on *B* who accepts. *A* afterwards indorses the bill to *C*, *C* to *D*, and *D* to *E*. As between *E* and *B*, *B* is the principal debtor, and *A*, *C* and *D* are his sureties. As between *E* and *A*, *A* is the principal debtor, and *C* and *D* are his sureties. As between *E* and *C*, *C* is the principal debtor and *D* is his surety.

39. When the holder of an accepted bill of exchange enters into any contract with the acceptor which, under section 134 or 135 of the Indian Contract Act, 1872, would discharge the other parties, the holder may expressly reserve his right to charge the other parties, and in such case, they are not discharged.

Suretyship.

40. When the holder of a negotiable instrument, without the consent of the indorser, destroys or impairs the indorser's remedy against a prior party, the indorser is discharged from liability to the holder to the same extent as if the instrument had been paid at maturity.

Discharge of indorser's liability.

Illustration.

A is the holder of a bill of exchange made payable to the order of *B*, which contains the following indorsements in blank:—

First indorsement, "*B*".

NOTES.

Sec. 37.—PROMISSORY NOTE EXECUTED WITHOUT CONSIDERATION—LIABILITY OF MAKER TO ITS PURCHASER.—Under S. 37 the maker of a promissory note is liable to its purchaser, who is a holder within the meaning of S. 8 of the Act. A holder who has paid consideration for the note can recover the amount due on it even if it was originally made without consideration. 1935 O.W.N. 295=1935 Oudh 264.

ACCOMMODATION NOTE.—If the holder of an accommodation note having no notice of its true character at the time of his taking the note but after notice thereof gives indulgence to the payee (the party accommodated), he does not thereby discharge the maker (the accommodation party). Mere knowledge on the part of the endorsee of the fact that the bill or note is one for accommodation whether the knowledge is at the time of the endorsement or afterwards, appears to be absolutely irrelevant under S. 37 unless there is "a contract to the contrary". 57 M. 482=66 M.L.J. 180. On this section, *see also* 41 Bom.L.R. 1237=1940 Bom. 82.

Secs. 37 and 38.—The maker of a promissory note is liable to the holder of it who pays consideration for it, even if the instrument was originally made without consideration. 19 I.C. 637=11 A.L.J. 481. The drawer of a bill of exchange is entitled to claim set-off from the payee for the amount due to the acceptor of the bill from the payee. 35 I.C. 628=18 Bom.L.R. 689. S. 37 regards as principal debtors those who execute a pronote when there is no other mutual understanding to the contrary. It is not open to one of the executants to prove by oral evidence that he was a surety. 29 I.C. 760. Where the cheque is payable to the bearer, the person to whom the payment is made is a holder and thus a surety under Ss. 37 and 38. He can therefore be made a party with the principal person. 148 I.C. 851 (1)=1934 Pesh. 10.

Sec. 39: ACCOMMODATION NOTE—INDULGENCE GRANTED TO MAKER—SURETY NOT DISCHARGED.—Entering into an agreement with the principal debtor granting him time will not discharge the surety if the right against the surety is reserved. The mere fact that S. 39 provides in respect of a bill of exchange for such reservation does not show that the main principle recognised as part of the law of contracts does not apply to other Negotiable Instruments. S. 39 would appear to be a provision inserted *ex abundanti cautela*. In the case of a promissory note for accommodation, the endorsee does not lose his rights against the maker-surety by reason of an indulgence to the payee (principal debtor) if the rights of the endorsee have been expressly reserved as against the surety. 57 M. 482=66 M.L.J. 180.

Second indorsement, "Peter Williams".
Third indorsement, "Wright & Co".
Fourth indorsement, "John Rozario".
This bill *A* puts in suit against John Rozario and strikes out, without John Rozario's consent, the indorsements by Peter Williams and Wright & Co. *A* is not entitled to recover anything from John Rozario.

Acceptor bound although indorsement forged.

41. An acceptor of a bill of exchange already indorsed is not relieved from liability by reason that such indorsement is forged, if he knew or had reason to believe the indorsement to be forged when he accepted the bill.

Acceptance of bill drawn in fictitious name.

42. An acceptor of a bill of exchange drawn in a fictitious name and payable to the drawer's order is not, by reason that such name is fictitious, relieved from liability to any holder in due course claiming under an indorsement by the same hand as the drawer's signature, and purporting to be made by the drawer.

Negotiable instrument made, etc., without consideration.

43. A negotiable instrument made, drawn, accepted, indorsed or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction. But if any such party has transferred the instrument with or without indorsement to a holder for consideration, such holder, and every subsequent holder deriving title from him, may recover the amount due on such instrument from the transferor for consideration or any prior party thereto.

Exception I.—No party for whose accommodation a negotiable instrument has been made, drawn, accepted or indorsed can, if he have paid the amount thereof, recover thereon such amount from any person who became a party to such instrument for his accommodation.

Exception II.—No party to the instrument who has induced any other party to make, draw, accept, indorse or transfer the same to him for a consideration which he has failed to pay or perform in full shall recover thereon an amount exceeding the value of the consideration (if any) which he has actually paid or performed.

Partial absence or failure of money consideration.

44. When the consideration for which a person signed a promissory note, bill of exchange or cheque consisted of money, and was originally absent in part or has subsequently failed in part, the sum which a holder standing in

NOTES.

Sec. 43.—S. 43 must be read subject to S. 59 in all cases in which the latter applies. Where the instrument is acquired by the holder after maturity, S. 59 applies and the holder has, as against other parties, only the rights thereon of his transferor. I.L.R. (1937) Nag. 159=165 I.C. 926=1937 Nag. 267. Where a promissory note is given in renewal of a former note and where the maker dispenses with the delivery of the former note or where it is made clear that the parties understand that the claim n the former note is extinguished, the renewed note is not without consideration. 40 C.W.N. 130. *See also* (1939) 1 M.L.J. 897=1939 Mad. 848. Failure of consideration—No obligation created. 1923 R. 127 (2); 27 I.C. 362=16 Bom.L.R. 743; 5 I.C. 757=20 M.L.J. 144; 18 Bom.L.R. 521; 29 M. 336. A transferee under a sale-deed of a promissory note, without any endorsement on the note itself, is not a holder thereof within the meaning of S. 8 of the Act and as such cannot enforce the rights conferred on the holder by S. 43 of the Act. I. L.R. (1939) All. 419=1939 A.L.J. 206=1939 All. 279.

Ss. 43 and 44: 'PARTIES TO THE TRANSACTION'—MEANING — MAKER AMD PAYEE.—'Parties to the transaction' in S. 43, denotes persons standing in immediate relation to each other within the meaning of S. 44. The maker and payee of a cheque must come under parties to the transaction and if it is so they are certainly under the Act, in immediate relation to each other. When the consideration for a cheque fails, according to S. 43, there is no obligation of payment between the drawer and payee. 1941 A.M.L.J. 44. *Hire purchase agreement*—Vendor cancelling contract—*Liability of hirer* for stopping payment of cheque. 1933 L. 470=144 I.C. 484.

Sec. 44.—*See* 36 I.C. 996. Where the original hand note in which only simple interest was reserved, was renewed for the amount of the

immediate relation with such signer is entitled to receive from him is proportionally reduced.

Explanation.—The drawer of a bill of exchange stands in immediate relation with the acceptor. The maker of a promissory note, bill of exchange or cheque stands in immediate relation with the payee, and the indorser with his indorsee. Other signers may by agreement stand in immediate relation with a holder.

Illustration.

A draws a bill on *B* for Rs. 500 payable to the order of *A*. *B* accepts the bill, but subsequently dishonours it by non-payment. *A* sues *B* on the bill. *B* proves that it was accepted for value as to Rs. 400, and as an accommodation to the plaintiff as to the residue. *A* can only recover Rs. 400.

Partial failure of consideration not consisting of money.

45. Where a part of the consideration for which a person signed a promissory note, bill of exchange or cheque, though not consisting of money, is ascertainable in money without collateral enquiry, and there has been a failure of that part, the sum which a holder standing in immediate relation with such signer is entitled to receive from him is proportionally reduced.

Holder's right to duplicate of lost bill.

[1][45-A. Where a bill of exchange has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer, if required, to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again.

If the drawer on request as aforesaid refuses to give such duplicate bill, he may be compelled to do so.]

CHAPTER IV.

OF NEGOTIATION.

Delivery.

46. The making, acceptance or endorsement of a promissory note, bill of exchange or cheque is completed by delivery, actual or constructive.

LEG. REF.

[1] Inserted by the Act II of 1885, S. 3.

NOTES.

principal and interest calculated on the basis of compound interest, and the same method was adopted in respect of two later renewals, on a plea that the consideration for each renewal had failed to the extent of the difference between simple and compound interest. *Held*, that the plea was unsustainable. The consideration for the renewals was the forbearance to sue and in return compound interest agreed to be paid. 174 I.C. 197=1938 Pat. 324. A suit on a pronote having been instituted, the defendant executed a fresh note to the plaintiff for the amount due and full costs of the suit, and the suit was withdrawn. In a suit on the renewed note, it was found, that the defendant had paid plaintiff Rs. 1000 which was not given credit to in the settlement of the figure arrived at when the fresh note was executed, and defendant claimed that his liability under the renewed note should be proportionately reduced. *Held*, that the case fell under S. 44 and though the payment could not be pleaded in "discharge" of the renewed note, the plea of partial failure of consideration was well founded and that the defendant's liability under the renewed note should be reduced *prot tanto*. 40 I.W. 706=67 M.L.J. 650.

Secs. 44 and 45.—Where a person pleads that he has signed a promise to pay a large amount by reason of getting two benefits, one a small cash payment and the other the cancellation of an old promissory note, S. 44 does not apply to such case. Nor does S. 45 apply because the consideration is not "ascertainable in money without collateral enquiry." 189 I. C. 384=1940 Rang. 152.

Sec. 45.—S. 45 is based on the English law which is stated by Chalmers in his book on Bills of Exchange as follows:—"Partial failure of consideration is a defence *pro tanto* against an immediate party when the failure is an ascertained and liquidated amount but not otherwise," that is, when a collateral enquiry becomes necessary for the purpose. 22 L.W. 265=49 M. L.J. 530.

Sec. 46.—It is open to the executant of a promissory note to show that there was no presently operative contract between the parties as is embodied in the note that it was delivered only conditionally or for a special purpose only and not for the purpose of transferring absolu-

As between parties standing in immediate relation, delivery to be effectual must be made by the party making, accepting or indorsing the instrument or by a person authorized by him in that behalf.

As between such parties and any holder of the instrument other than a holder in due course, it may be shown that the instrument was delivered conditionally or for a special purpose only, and not for the purpose of transferring absolutely the property therein.

A promissory note, bill of exchange or cheque payable to bearer is negotiable by the delivery thereof.

A promissory note, bill of exchange or cheque payable to order is negotiabale by the holder by indorsement and delivery thereof.

Negotiation by delivery.

47. Subject to the provisions of section 58, a promissory note, bill of exchange or cheque payable to bearer is negotiable by delivery thereof.

Exception.—A promissory note, bill of exchange or cheque delivered on condition that it is not to take effect except in a certain event is not negotiable (except in the hands of a holder for value without notice of the condition) unless such event happens.

Illustrations.

(*a*) *A*, the holder of a negotiable instrument payable to bearer, delivers it to *B's* agent to keep for *B*. The instrument has been negotiated.

(*b*) *A*, the holder of a negotiable instrument payable to bearer, which is in the hands of *A's* banker, who is at the time the banker of *B*, directs the banker to transfer the instrument to *B's* credit in the banker's account with *B*. The banker does so, and accordingly now possesses the instrument as *B's* agent. The instrument has been negotiated and *B* has become the holder of it.

48. Subject to the provisions of section 58, a promissory note, bill of

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NOTES.

tely property therein. 1939 P.W.N. 200=20 Pat.L.T. 514=1939 Pat. 495. Delivery under S. 46 need not be to the person whose name is given in the instrument as payee or to any agent authorised by him in that behalf. There must no doubt be a delivery by the maker, or by some one authorised in that behalf. So long as there is a delivery with the intention of completing the transaction to the person who actually advanced the money under the instrument, that is sufficient to complete the transaction. The maker cannot, in a suit by an indorsee from the payee, question the title of the indorsee or the payee on the ground that the payee was only a benamidar, or on the ground that there was no delivery to the person whose name appears as payee. 50 L.W. 357=1939 Mad. 858=(1939) 2 M.L.J. 501.

Sec. 46, para. (3).—The words "*as between such parties and any holder of the instrument other than a holder in due course*" mean "as between the maker and the payee or the endorser and the endorsee or the endorsee and any holder other than a holder in due course or as between any one of such parties and any other." 26 A.L.J. 696=1928 A. 289. *See also* 115 I.C. 771.

Secs. 46 and 50.—Endorsement alone is not sufficient to transfer the property in a negotiable instrument to the indorsee but the indorsement must be followed by delivery. 6 L.L.J. 230=79 I.C. 461. But if the instrument is delivered conditionally or for a specific purpose only, and not for the purpose of transferring property therein, the property does not pass to the endorsee. The endorser may limit the right of the endorsee by express words. Where the endorsement contains no explicit words limiting the rights of the endorsee or is a blank endorsement, it is open to the endorser to lead evidence to show that it was really a conditional endorsement for a specific purpose only, namely, that of collection. 38 P.L.R. 918=164 I.C. 833=1936 Pesh. 181 (1924 L. 640 and 5 I. C. 435 Foll.; 30 M. 441 and 1930 L. 248, Expl.) Hundi—Indorsement by holder—Hundi sent by post to indorsee—Hundi taken by stranger—Payment to forged endorsement—Rights of plaintiff. 25 Bom.L.R. 604=87 I.C. 226. *See also* 36 C. 239=1 I.C. 929; 28 Bom.L.R. 226=50 B. 118=1926 B. 262. As to endorsement for collection and the *effect of death of endorser*, see 8 I.C. 967. As to transfer otherwise than by endorsement, *see* 14 I.C. 720=16 C.W.N. 666. On this section, *see also* 15 I.C. 250; 14 I.C. 720; 10 M.L.T. 79.

Sec. 47.—A transferee by delivery of a negotiable instrument is not liable on the instrument to a subsequent holder under S. 35 of the Act, nor is he entitled, in the event of dishonour, to enforce liability on the instrument against a prior party to it. 35 L.W. 269=1932 M. 323=62 M.L.J. 239.

Sec. 48.—S. 48 does not restrict the transfer of a negotiable instrument to the operation of endorsement. 16 P. 74=1937 P. 100 (F.B.). Where a promissory note is transferred or assigned by means of a registered instrument, such a transfer is valid and is not prohibited by S. 137 of the Transfer of Property Act. 1937

Negotiation by indorsement.

exchange or cheque [1][payable to order] is negotiable by the holder by indorsement and delivery thereof.

Conversion of indorsement in blank into indorsement in full.

49. The holder of a negotiable instrument indorsed in blank may, without signing his own name, by writing above the indorser's signature a direction to pay to any other person as indorsee, convert the indorsement in blank into an indorsement in full; and the holder does not thereby incur the responsibility of an indorser.

Effect of indorsement.

50. The indorsement of a negotiable instrument followed by delivery transfers to the indorsee the property therein with the right of further negotiation; but the indorsement may, by express words, restrict or exclude such right, or may merely constitute the indorsee an agent to indorse the instrument or to receive its contents for the indorser, or for some other specified person.

Illustrations.

B signs the following indorsements on different negotiable instruments payable to bearer:—

(*a*) "Pay the contents to *C* only."
(*b*) "Pay *C* for my use."
(*c*) "Pay *C* or order for the account of *B*."
(*d*) "The within must be credited to *C*."

These indorsements exclude the right of further negotiation by *C*.

(*e*) "Pay *C*."
(*f*) "Pay *C* value in account with the Oriental Bank."

LEG. REF.

[1]The words "payable to order" were substituted for the words "payable to the order of a specified person, or to a specified person, or order" by Act VIII of 1919.

NOTES.

Pat. 100. Promissory note payable to order—Delivery without endorsement—Transfer not effected. 18 C.W.N. 494=22 I.C. 500. *See also* 14 I.C. 720=16 C.W.N. 666. A written assignment of a promissory note in the shape of a separate document confers on the assignee a title to sue on the note. 66 I.C. 501. There can be an oral assigment of a pro-note in the Punjab at least as a chose in action. 1932 L. 30 (2).

Secs. 48 and 13 (1) Expl. : PRO-NOTE—RIGHT OF SUIT ON.—A suit on a pro-note can only be maintained by the person named as the payee; and none claiming to be the owner thereof can sue on it without an endorsement by the payee. Therefore. a person to whose share a pro-note in another's name is allotted on partition cannot sue on it without an endorsement by the original payee, as the partition does not transfer the pro-note to the allottee by operation of law. 36 Bom.L.R. 807=1934 B. 356.

Sec. 50.—The endorsee of a pro-note stands in the shoes of the endorser unless his rights are specifically restricted. 32 M.L.J. 354=38 I.C. 339. *See also* 41 L.W. 177=1935 M. 240. Indorsee cannot sue on original consideration. 66 I.C. 584. *See also* 41 L.W. 177=1935 M. 240. S. 50 is not limited to negotiable instruments payable to order. It applies to any negotiable instrument whether it is payable in the first instance to order or to bearer. 27 Bom. L.R. 34=86 I.C. 118. Where one of three endorsees of a pro-note for collection endorsed it in blank and handed it over to the other two for collection and the other two later indorsed the note also in blank and delivered it to the plaintiff, the plaintiff gets a good title to the note. 1922 M.W.N; 263=1922 M. 210. Where *A* issues a cheque in favour of *B* who endorses it in favour of *C* who again, in his turn, endorses the said cheque in favour of *D* by an unrestricted endorsement, a suit brought by *C* against *A* to recover the amount on the cheque being dishonoured is liable to be dismissed. 122 I.C. 101=1930 L. 248. A transferee of a hundi for no consideration has got the rights of the transferor and can sue the maker but he cannot have rights of a holder in due course, 35 P.L.R. 884 (2)=1933 L. 1014.

In a suit by an indorsee of a promissory note based upon the promissory note, which has been executed by a Hindu coparcener, neither the son nor the father of the executant can be made liable directly on the instrument in which neither of them is mentioned when the indorsement is not so worded as to transfer the debt itself and when no stamp duty has been paid on the indorsement. When what is transferred by the indorsement is only the property in the promissory note and nothing else, S. 8 of the Transfer of Property Act cannot apply and is of no avail to the indorsee. 50 L.W. 336=1939 Mad. 846=(1939) 2 M.L.J. 531.

Ss. 50 and 117.—Scope—Promissory note by manager of Hindu joint family for money borrowed for family business—Endorsement of note without transfer of debt also—Remedy of endorsee—Decree against maker alone in suit based on note—Executability against other members of family. *See* (1941) 2 M.L.J. 816.

(*g*) "Pay the contents to *C*, being part of the consideration in a certain deed of assignment executed by *C* to the indorser and others."

These indorsements do not exclude the right of further negotiation by *C*.

Who may negotiate.

51. Every sole maker, drawer, payee or indorsee, or all of several joint makers, drawers, payees or indorsees, of a negotiable instrument may, if the negotiability of such instrument has not been restricted or excluded as mentioned in section 50, indorse and negotiate the same.

Explanation.—Nothing in this section enables a maker or drawer to indorse or negotiate an instrument, unless he is in lawful possession or is holder thereof; or enables a payee or indorsee to indorse or negotiate an instrument unless he is holder thereof.

Illustration.

A bill is drawn payable to *A* or order. *A* indorses it to *B*, the indorsement not containing the words "or order" or any equivalent words. *B* may negotiate the instrument.

Indorser who excludes his own liability or makes it conditional.

52. The indorser of a negotiable instrument may, by express words in the indorsement, exclude his own liability thereon, or make such liability or the right of the indorsee to receive the amount due thereon depend upon the happening of a specified event, although such event may never happen.

Where an indorser so excludes his liability and afterwards becomes the holder of the instrument, all intermediate indorsers are liable to him.

Illustrations.

(*a*) The indorser of a negotiable instrument signs his name adding the words—"Without recourse."

Upon this indorsement he incurs no liability.

(*b*) *A* is the payee and holder of a negotiable instrument. Excluding personal liability by an indorsement "without recourse," he transfers the instrument to *B*, and *B* indorses it to *C*, who indorses it to *A*. *A* is not only reinstated in his former rights, but has the rights of an indorsee against *B* and *C*.

Holder deriving title from holder in due course.

53. A holder of a negotiable instrument who derives title from a holder in due course has the rights thereon of that holder in due course.

Instrument indorsed in blank.

54. Subject to the provisions hereinafter contained as to crossed cheques, a negotiable instrument indorsed in blank is payable to the bearer thereof even although originally payable to order.

Conversion of indorsement in blank into indorsement in full.

55. If a negotiable instrument, after having been indorsed in blank, is indorsed in full, the amount of it cannot be claimed from the indorser in full, except by the person to whom it has been indorsed in full, or by one who derives title through such person.

Indorsement for part of sum due.

56. No writing on a negotiable instrument is valid for the purpose of negotiation if such writing purports to transfer only a part of the amount appearing to be due on the instrument, but, where such amount has been partly paid, a note to that effect may be indorsed on the instrument, which may then be negotiated for the balance.

NOTES.

Sec. 56.—S. 56 does not prohibit the transfer of the balance due under a promissory note. It only prohibits a transfer of a portion only of the sum due upon it. 44 I.C. 264.

Legal representative cannot by delivery only negotiate instrument indorsed by deceased.

57. The legal representative of a deceased person cannot negotiate by delivery only a promissory note, bill of exchange or cheque payable to order and indorsed by the deceased but not delivered.

Instrument obtained by unlawful means or for unlawful consideration.

58. When a negotiable instrument has been lost or has been obtained from any maker, acceptor or holder thereof by means of an offence or fraud, or for an unlawful consideration, no possessor or indorsee who claims through the person who found or so obtained the instrument is entitled to receive the amount due thereon from such maker, acceptor or holder, or from any party prior to such holder, unless such possessor or indorsee is, or some person through whom he claims was, a holder thereof in due course.

Instrument acquired after dishonour or when overdue.

59. The holder of a negotiable instrument, who has acquired it after dishonour, whether by non-acceptance or non-payment, with notice thereof, or after maturity, has only, as against the other parties, the rights thereon of his transferor:

Accommodation note or bill.

Provided that any person who, in good faith and for consideration becomes the holder, after maturity, of a promissory note or bill of exchange made, drawn or accepted without consideration, for the purpose of enabling some party thereto to raise money thereon, may recover the amount of the note or bill from any prior party.

Illustration.

The acceptor of a bill of exchange, when he accepted it, deposited with the drawer certain goods as a collateral security for the payment of the bill, with power to the drawer to sell the goods and apply the proceeds in discharge of the bill if it were not paid at maturity. The bill not having been paid at maturity, the drawer sold the goods and retained the proceeds but indorsed the bill to *A*. *A's* title is subject to the same objection as the drawer's title.

Instrument negotiable till payment or satisfaction.

60. A negotiable instrument may be negotiated (except by the maker, drawee or acceptor after maturity) until payment or satisfaction thereof by the maker, drawee or acceptor at or after maturity, but not after such payment or satisfaction.

NOTES.

Sec. 57.—Promissory note in favour of executor—Suit by legatee without indorsement—Not maintainable. 44 M.L.J. 510=17 L.W. 676. Succeeding trustee can sue on pro-note to predecessor without assignment or endorsement. 41 M. 353=33 M.L.J. 627.

Sec. 58.—S. 58 which protects a holder in due course where a negotiable instrument has been obtained by means of an offence does not apply to a case of forgery. 25 Bom.L.R. 604=87 I.C. 226. *See also* 39 B. 513=26 I.C. 896. Antedating endorsement by holder does not amount to obtaining a pro-note by means of an offence or fraud within the meaning of this section. *See* 98 I.C. 308=1926 M. 1154. A person forging a name in a hundi and getting payment is guilty of a conversion of the hundi and the proceeds of the hundi received by him are the moneys of the true owner. 25 Bom.L.R. 604=1924 B. 205. A plaintiff who comes to Court with tampered hand-notes is not entitled to any decree. 11 P. 782=1932 P. 352.

Sec. 59.—Where an endorsee of a promissory note is not proved to be a holder in due course, he is entitled only to such rights as the endorser of the note had. 173 I.C. 147=1937 Mad. 438. Transferee of tainted pro-note—Its holder in due course—Burden of proof. 1928 M.W.N. 680. If a surety pays the amount of a dishonoured hundi, he can recover the amount from the drawer. 39 M. 965=30 M.L.J. 369. Cheque payable on demand—Who is holder in due course—Holder of a State cheque whether can sue drawer. *See* 50 A. 309=108 I.C. 144=1928 A. 68. The proviso to the section applies only to cases of accommodation bills. I.L.R. 1937 Nag. 159=165 I.C. 926=1937 Nag. 267.

Sec. 60.—On payment of satisfaction of a promissory note at or after maturity by the maker of a promissory note, it ceases to be negotiable. If it subsequently comes into the hands of a holder in due course, he acquires no right of action on the instrument. 1933 M. 300=64 M.L.J. 241. Where in spite of satisfaction of the promissory note at maturity, the

CHAPTER V.

OF PRESENTMENT.

Presentment for acceptance.

61. A bill of exchange payable after sight must, if no time or place is specified therein for presentment, be presented to the drawee thereof for acceptance, if he can, after reasonable search, be found, by a person entitled to demand acceptance, within a reasonable time after it is drawn, and in business hours on a business day. In default of such presentment, no party thereto is liable thereon to the person making such default.

If the drawee cannot, after reasonable search, be found, the bill is dishonoured.

If the bill is directed to the drawee at a particular place, it must be presented at that place; and if at the due date for presentment he cannot, after reasonable search, be found there, the bill is dishonoured.

[1][Where authorized by agreement or usage, a presentment through the post office by means of a registered letter is sufficient.]

Presentment of promissory note for sight.

62. A promissory note, payable at a certain period after sight, must be presented to the maker thereof for sight (if he can, after reasonable search, be found) by a person entitled to demand payment, within a reasonable time after it is made and in business hours on a business day. In default of such presentment, no party thereto is liable thereon to the person making such default.

Drawee's time for deliberation.

63. The holder must, if so required by the drawee of a bill of exchange presented to him for acceptance, allow the drawee [2][forty-eight] hours (exclusive of public holidays) to consider whether he will accept it.

Presentment for payment.

64. Promissory notes, bills of exchange and cheques must be presented for payment to the maker, acceptor or drawee thereof respectively, by or on behalf of the holder as hereinafter provided. In default of such presentment, the other parties thereto are not liable thereon to such holder.

[1][Where authorized by agreement or usage, a presentment through the post office by means of a registered letter is sufficient.]

Exception.—Where a promissory note is payable on demand and is not payable at a specified place, no presentment is necessary in order to charge the maker thereof.

LEG. REF.

[1] This paragraph was added by the Negotiable Instruments Act (II of 1885). S. 4.

[2] The words "forty-eight" were substituted for the words "twenty-four" by Act XII of 1921.

NOTES.

note was not returned to the maker and was wrongfully retained by the wife of the payee who, after the payee's death, endorsed it to another person, the holder in whose favour "the waste paper" was endorsed was not entitled to succeed on the basis of the ruling in *Lickbarrow* v. *Mason* (*viz.*, of two innocent persons, he who occasioned the third party's fraud must suffer), because the payee could not be said to have facilitated his wife's wrong doing. 1933 M. 300=64 M.L.J. 241. The liability of the acceptor, maker or drawee of a hundi is not affected by the fact that the hundi was not presented for payment on the due date 1933 L. 176=34 P.L.R. 505.

Sec. 63.—Ss. 63 and 83 of the Negotiable Instruments Act regulate the condition under which a presentment for acceptance is valid and consequences of complying with these conditions, and have no application to hundi payable on demand. 1923 A. 345. Even bankruptcy or death of the party or the loss of the bill or the note does not excuse non-presentment. Power to obtain duplicate in case of loss is a part of the mercantile laws of countries and ample scope is given to it by Court of Equity in England both on bills lost before and after maturity and on notes as well. 1924 L. 198.

Sec. 64.—S. 64 should be given its plain meaning and the exception to it must be read as more or less an independent rule of law. *Held*, that under S. 64 the result of non-presentment of hundis for payment is not the

Hours for presentment.

65. Presentment for payment must be made during the usual hours of business, and, if at a banker's within banking hours.

Presentment for payment of instrument payable after date or sight.

66. A promissory note or bill of exchange made payable at a specified period after date or sight thereof, must be presented for payment at maturity.

NOTES.

exemption of the acceptor from liability but the exemption of other parties to the hundis. 1930 A.L.J. 818=1930 A. 648. Presentment for payment is necessary to make the indorser of a promissory note payable on demand liable to the indorsee. 1930 M.W.N. 1232. S. 64 absolves from liability all parties except the maker of a promissory note, acceptor of bill of exchange and drawee of a cheque. One of the parties so absolved is the drawer of the bill of exchange. The principle on which this distinction is based is merely that "the maker, accepter or drawee" are the principal debtors, whereas the others are only sureties. On non-presentation of the hundi to the drawee for payment, the drawer is absolved from liability to the holder of the hundi. If the original is lost it is the holder's duty to present the duplicate of the hundi for payment. The loss of a bill or note does not absolve the party who lost it from making an application for payment when it becomes due and to give notice of dishonour to all parties. On default in presentment, the holder of a hundi is bound to lose his remedy against the drawer as well as the endorser. The holder therefore cannot urge the loss as any excuse for non-presentment of the duplicate of the hundi and still claim his remedy against the drawer. 167 I.C. 907= 1936 Nag. 260. A discharge of the principal is a discharge of the surety; the contract or engagement of the surety being but an accessory to the principal's agreement must terminate with it. When as a result of non-presentment of a Hundi to the drawee, the principal debtor, is relieved of his obligation, so will the surety, the drawer of the liability. 167 I.C. 907=1936 Nag. 260. "*Other parties*" in S. 64 mean parties other than the holder. 59 I.C. 604. In the case of a promissory note the words "the other parties thereto" do not mean parties other than the maker of the promissory note, for in S. 69, Negotiable Instruments Act, it is specifically laid down that a promissory note made payable at a specified place must, in order to charge the maker thereof, be presented for payment at that place. 1935 Pesh. 132. Under the exception to S. 64, where the promissory note is payable on demand and at a specified place presentment is necessary in order to charge the promisor, but where the promisor makes a part-payment on account of the amount due such presentment is not necessary. 1933 L. 133=34 P.L.R. 804; 1935 Pesh. 132. In a case where the drawee and drawer of a hundi are the same, presentation for payment is not necessary, for no question of damage can arise as the facts are all known to the person drawing it. 44 A. 554=20 A.L.J. 437. (*See also* 8 Lah.L.J. 604, cited under S. 76.) A mere demand for the money does not amount to presentment of the note; the holder must exhibit the note and offer to hand it over on receiving payment. 1935 Pesh. 132. No dishonour can possibly occur unless the instrument is presented for payment by the holder to the drawee as required by the first part of S. 64 which is mandatory. The second part of the section provides the penalty for non-presentment by stating in unequivocal terms that in default of such presentment the other parties thereto are not liable thereon to such holder. 28 N.L.R. 134. Where the holder of hundi sues the drawer and the other parties to it without however having made any presentment of the hundi the *onus* is on him to prove that the drawer could not suffer damage by such non-presentation. 39 A. 364=39 I.C. 649. *See also* 1935 L. 623; 48 I.C. 364=41 A. 40; 8 N.L.R. 134.

"SPECIFIED PLACE."—A small town which is sufficient to indicate the address of the maker of a promissory note is a "specified place". 1936 Pesh. 202. Where a promissory note is made payable at a place which is the residential site of a revenue estate where the lender lives, the note is payable at a specified place. 38 P.L.R. 498=164 I.C. 1033=1936 L. 799.

Secs. 64 and 66.—Though the parties to a promissory note (payable three months after date) other than the maker are discharged from their liability by reason of default in making presentment for payment, the maker is nevertheless liable except when the note is payable at a specified place. 10 L. 755=1929 L. 240. *See also* 1931 L. 758; 1936 Nag. 260.

Secs. 64 and 69.—In view of the provisions of Ss. 64 and 69, presentment is necessary to charge the maker of a promissory note payable on demand, only if the note is payable at a specified place. 1937 L. 259=39 P. L.R. 958=18 Lah. 580.

Secs. 64 and 76 (d): BILL OF EXCHANGE—DRAWER AND DRAWEE SAME PERSON—NO PRESENTATION NECESSARY.—By reason of the word "respectively" used in S. 64 of the Act, the world "maker" has reference to promisory notes, the word "acceptor" to bills of exchange and the word "drawee" to cheques. If this view is correct, no presentation is necessary in the case of a bill of exchange if there is no acceptor of the bill. Even assuming that S. 64 applies to the case of a drawee of a bill of exchange, where the same person is the drawer as well as the drawee, S. 76 (*d*) can be invoked to dispense with the necessity of presentment for payment as against the drawer, as, from the nature of the case, the drawer could not suffer damage from the want of such presentment. 148 I.C. 1167=11 O.W.N, 660=1934 O. 254. *See also* 1935 L. 623.

Sec. 66.—Under this section, a bill of exchange made payable at a specified period after

67. A promissory note payable by instalments must be presented for payment on the third day after the date fixed for payment of each instalment; and non-payment on such presentment has the same effect as non-payment of a note at maturity.

Presentment for payment of promissory note payable by instalments.

68. A promissory note, bill of exchange or cheque made, drawn or accepted payable at a specified place and not elsewhere must, in order to charge any party thereto, be presented for payment at that place.

Presentment for payment of instrument payable at specified place and not elsewhere.

69. A promissory note or bill of exchange made, drawn or accepted payable at a specified place must, in order to charge the maker or drawer thereof, be presented for payment at that place.

Instrument payable at specified place.

70. A promissory note or bill of exchange not made payable as mentioned in sections 68 and 69, must be presented for payment at the place of business (if any), or at the usual residence, of the maker, drawee or acceptor thereof, as the case may be.

Presentment where no exclusive place specified.

NOTES.

date must be presented for payment at maturity, and the want of presentment exempts the endorser. 122 I.C. 406=1930 A. 106. *See also* 10 L. 755=1929 L. 240. Where a hundi which is not made payable at a specified period after date or sight thereof but purports to have been drawn on a certain day and is made payable on the same day, the hundi is not governed by S. 66 and must be presented to the drawee within reasonable time. 40 P.L.R. 578=1938 Lah. 183. Where the drawer of a hundi is also the drawee, presentment for payment is unnecessary. This rule however does not apply in the case of the indorser of a hundi. 1932 N. 55. *See also* 1926 L. 328; 99 I.C. 875=1927 L. 72.

Sec. 67.—Promissory note—Plea of *material alteration*. 25 I.C. 590=1914 M.W.N. 705.

Sec. 68.—No presentment is valid unless it is made after the bill had matured. 87 I.C. 488=47 A. 572.

Secs. 68 and 69.—S. 69 discharges the maker of a pro-note, if a proper presentment is not made to him at the place specified in the pro-note, unless S. 76 (*d*) comes in to relieve the holder against the effect of S. 69, and if no damage could have occurred by the non-presentment. It is open, however, to the maker to prove that damage had been caused to him by the non-presentment and that consequently the holder is not entitled to take advantage of the provisions of S. 76 (*d*) (1935 Pesh. 132, Foll.) 1936 Pesh. 202. "Specified place" in S. 69 of the Negotiable Instruments Act means a place so particularised that the promisee can know where he must present the instrument for payment. A promissory note which provides for the money under it being paid "at Poona, Bombay or elsewhere" is not a note falling under S. 69; it is not one payable at a "specified place", and so no presentment for payment is necessary. 60 B. 796=38 Bom.L.R. 395=1936 B. 218. But *see* 1937 L. 259. A city, town or village at large may be taken to be a specified place within the meaning of Ss. 64 and 69, but its presentment is only necessary, or indeed reasonably possible, if the maker has his residence or place of business there. In the absence of such residence or place of business the mere possession of the promissory note by the promisee in the city, town or village mentioned would be sufficient. 18 Lah. 580=39 P.L.R. 958=1937 Lah. 259. *See also* 39 P.L.R. 765=1937 Lah. 892. "Place" includes "places"—Absence of presentment, effect of—Jurisdiction to sue, if determined by place for presentment. 94 I.C. 384=1926 M. 792=50 M L.J. 242. (*See also* notes under S. 86, *supra*).

Secs. 69 and 76.—S. 69 discharges the maker of a hundi if a proper presentment is not made to him at the place specified in the hundi unless S. 76 (*d*) comes in to relieve the holder against the effect of S. 69 and if no damage could have occurred by the non-presentment. It is open however to the maker to prove that damage had been caused to him by the non-presentment and that consequently the holder is not entitled to take advantage of the provisions of S. 76 (*d*). Where the drawer and the drawee are one and the same person, no question of damage to the drawer arises on account of the non-presentation on the due date. 195 I.C. 185=1941 Pesh. 45. *See also* 1939 Lah. 225.

Sec. 70.—The general principle that a debtor must find out the creditor and make the payment due to him as the latter's place of business or residence is not applicable to the case of a negotiable instrument. The place where the maker of a promissory note resides or carries on business is the only place where a suit on the note can be instituted. 155 I.C. 953=1935 N. 144.

Secs. 70 and 64.—No presentment is necessary in the case of a promissory note which is not payable at a specified place, when the suit

71. If the maker, drawee or acceptor of a negotiable instrument has no known place of business or fixed residence, and no place is specified in the instrument for presentment for acceptance or payment, such presentment may be made to him in person wherever he can be found.

Presentment when maker, etc., has no known place of business or residence.

72. [1][Subject to the provisions of section 84], a cheque must, in order to charge the drawer, be presented at the bank upon which it is drawn before the relation between the drawer and his banker has been altered to the prejudice of the drawer.

Presentment of cheque to charge drawer.

73. A cheque must, in order to charge any person except the drawer, be presented within a reasonable time after delivery thereof by such person.

Presentment of cheque to charge any other person.

74. Subject to the provisions of section 31, a negotiable instrument payable on demand must be presented for payment within a reasonable time after it is received by the holder.

Presentment of instrument payable on demand.

75. Presentment for acceptance or payment may be made to the duly authorised agent of the drawee, maker or acceptor, as the case may be, or, where the drawee, maker or acceptor has died, to his legal representative, or, where he has been declared an insolvent, to his assignee.

Presentment by or to agent, representative of deceased or assignee of insolvent.

[2][75-A. Delay in presentment [2][for acceptance or payment] is excused if the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made within a reasonable time.]

Excuse for delay in presentment for acceptance or payment.

76. No presentment for payment is necessary, and the instrument is dishonoured at the due date for presentment, in any of the following cases:—

When presentment unnecessary.

(*a*) if the maker, drawee or acceptor intentionally prevents the presentment of the instrument, or

if the instrument being payable at his place of business, he closes such place on a business day during the usual business hours, or

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LEG. REF.

[1]These words and figures were inserted by the Negotiable Instruments (Amendment) Act (VI of 1897), S. 2.

[2]S. 75-A inserted by Act XXV of 1920 and the words "for acceptance or payment" were substituted for the words "for payment" by Act XII of 1921.

NOTES.

is against the maker of the promissory note. 40 P.L.R. 975=1939 Lah. 18.

Sec. 74.—S. 74 should not be applied with extreme stringency with respect to an instrument intended to be a continuing security. 39 I.C. 205=2 C.W.N. 479. Where, in a suit on a promissory note, the executant pleads that payment has been made, the drawer cannot suffer damage from want of presentation of the note as required by S. 74, and therefore no presentation for payment is necessary under S. 76 (*d*). 39 P.L.R. 138=1937 L. 58.

Sec. 76.—[*See also* cases under S. 64, *supra*.] Presentment of hundi is not necessary, where the drawee has no residence or place of business or a known address at the place at which the hundi is due and on the date on which the hundi is due, nor is he to be found personally present there on that date. So also, presentment is not necessary under S. 76 (*b*) as against the party sought to be charged therewith, if he has engaged to pay notwithstanding non-presentment. 187 I.C. 650=1939 Lah. 225. The acceptor of a bill of exchange is entitled to set-off on the due date against the payee and pay only the balance. 35 I.C. 628=18 Bom.L.R. 689. A mere demand of money does not amount to a presentment for payment. In order to comply with the law the holder must exhibit the bill to the person from whom he demands payment and offer to deliver it on payment. 55 I.C. 610=1 L. 262. Even parol promise on the part of the endorser to pay the note is sufficient to constitute an

if the instrument being payable at some other specified place, neither he nor any person authorised to pay it attends at such place during the usual business hours, or

if the instrument not being payable at any specified place, he cannot after due search be found;

(*b*) as against any party sought to be charged therewith, if he has engaged to pay notwithstanding non-presentment;

(*c*) as against any party if, after maturity, with knowledge that the instrument has not been presented—

he makes a part-payment on account of the amount due on the instrument, or promises to pay the amount due thereon in whole or in part;

or otherwise waives his right to take advantage of any default in presentment for payment;

(*d*) as against the drawer, if the drawer could not suffer damage from the want of such presentment.

Liability of banker for negligently dealing with bill presented for payment.

77. When a bill of exchange accepted payable at a specified bank has been duly presented there for payment and dishonoured, if the banker so negligently or improperly keeps, deals with or delivers back such bill as to cause loss to the holder, he must compensate the holder for such loss.

NOTES.

engagement to pay notwithstanding non-presentment: 87 I.C. 488=47 A. 572.

Sec. 76 (b).—A promise to pay within the meaning of S. 76 (*b*) need not be expressed so long as it is clearly deducible from the language employed by the parties or their conduct. 187 I.C. 650=1939 Lah. 225. An endorsement by the notary public on a negotiable instrument to the effect that "Endorsers state if drawer does not pay will pay at the request of the manager" imports a promise to pay by the endorser within the meaning of S. 76 (*b*). 187 I.C. 650=1939 Lah. 225.

Sec. 76 (c).—*See* 34 P.L.R. 804=1933 L. 133.

Sec. 76 (d).—Throughout the Act, a clear distinction has been made between the words "maker" and "drawer", the former word being used in a more general sense as applying to promissory notes, negotiable instruments and cheques, while the word "drawer" is restricted to bills of exchange or cheques only, and is nowhere used in connection with promissory notes. Therefore the operation of cl. (*d*) of S. 76 is limited to bills of exchange and cheques only and does not extend to promissory notes. 1937 L. 259=18 L. 580=1937 L. 259; 1937 L. 892; 1936 Pesh. 202; 1941 Pesh. 45. Though the plaintiff in a suit on a hundi fails to prove presentation as alleged by him, he could nevertheless show that the case was one in which no presentation was necessary. 1922 A. 422. *See also* 44 A. 554; 145 I.C. 208 =1933 L. 97. S. 76 (*d*) applies to a case where the drawer has no funds with the drawee at the time the bill is being drawn or when it should have been presented, as also to a case where the drawer has no reasonable expectation that the drawee will accept for his accommodation. 1935 L. 413. Presentation on the exact date of the maturity of the hundi is not necessary when the drawer and the drawee are one and the same person. In such a case, no question of damage arises on account of the non-presentation on the due date. 8 Lah.L.J. 604=28 Punj.L.R. 24; 27 Punj.L.R. 75=1926 L. 328; 99 I.C. 875=1927 L. 72. *See also* 1932 N. 55. Where the drawer and drawee are the same person no presentment on due date is necessary, because the drawer cannot suffer damage for want of presentation. No presentment is therefore necessary in the case of a hundi drawn on self in a shahjog form and payable to a respectable person at a particular place. 187 I.C. 650=1939 Lah. 225. *See also* 1941 Pesh 45. Where no hardship is shown in the case of a note which has not passed into other hands but is still in the hands of the drawee, it is not open to the drawer to contend that he would suffer damage for want of presentation, especially when drawer admits execution of the note, and acknowledges that the money has passed, 1936 C. 489=166 I.C. 747. *See also* 1939 Lah. 225. The word "drawer" in S. 76 (*d*) includes the maker of a promiseory note and the definition of "drawer" in S. 7 is not exhaustive. 37 P.L.R. 31=1935 Lah. 153; 1936 Pesh. 202. But *see* 1937 L. 892, *infra*. The word 'drawer' as used in Cl. (*d*) of sec. 76, does not include the 'maker' of a pronote. 39 P.L.R. 765=1937 L 892.

CHAPTER VI.

OF PAYMENT AND INTEREST.

78. Subject to the provisions of section 82, clause (*c*), payment of the amount due on a promissory note, bill of exchange or cheque must, in order to discharge the maker or acceptor, be made to the holder of the instrument.

To whom payment should be made.

NOTES.

Secs. 76 (c) and 64, Excep.—Under the exception to S. 64, where the promissory note is payable on demand and at a specified place, presentment is neeessary in order to charge the promisor, but where the promisor makes a part-payment on account of the amount due, such presentment is not necessary. 1933 L. 133. *See qlso* 148 I.C. 1167=11 O.W.N. 660=1934 O. 254 (noted under S. 64 and 76, *supra*).

Sec. 78: RIGHT TO SUE ON PROMISSORY NOTE.—No one can maintain a suit on a promissory note except the holder thereof. 35 C.W.N. 53. *See also* 15 N.L.J. 45. It may be that the suit can be maintained by the real payee if it had been based on the consideration and not on the note. 35 C.W.N. 53. *See also* 123 I.C. 395. Where promissory note is executed in favour of one person in lieu of consideration advanced by another, the promisor cannot pay money to the latter and be rid of his liability. 1930 A.L.J. 1509; 1935 O.W.N. 269=1935 O. 278; 149 I.C. 1210=39 L.W. 520=1934 M. 391. S. 78 of the Negotiable Instruments Act should be strictly construed, and a valid discharge of promissory note can be given only by the payee thereof or the holder of the note. There is no such thing for this purpose as a *benami* promissory note taken in the name of one person but really meant for the benefit of another. No decree on a promissory note can be passed in favour of a person on the ground that he is the beneficial owner of the amount due under a promissory note, when he is neither the payee nor the holder of the promissory note in question. 50 L.W. 917=1940 M. 90=(1939) 2 M.L.J. 812. The object of S. 78 of the Act is to secure a valid discharge to the maker of the note. If the person who is ostensibly the holder of the promissory note is made a party to the suit and in his presence it is alleged that the plaintiff is the real beneficiary and that the ostensible holder was not the real holder of the instrument and he can prove his allegation by evidence or by the admission of the ostensible holder of the instrument, there is no reason why such a suit should not be maintained. 11 Pat.L.T. 255=1930 P. 313; 147 I.C. 726=15 Pat.L.T. 102=1934 P. 85. *See also* 140 I.C. 572=11 P. 616=1932 P. 346. But see *contra* 35 C.W.N. 53; 41 L.W. 281=1935 M. 312=68 M.L.J. 713. *See also* 1930 A.L.J. 1509. When an indorsement bears out no accountability, it is not an indorsement for collection merely and the holder alone can sue on the note. 23 I.C. 545. Each payee of promissory note is not entitled to bring a separate suit for the recovery of his own share. But one or more payee or payees can give a discharge without the concurrence of the others. 36 M. 544=24 M.L.J. 333 (F.B.). The holder in the section must be taken to mean all the payees jointly and not one or more of them. 36 M, 544. *See also* 1937 Rang.L.R. 1=1937 Rang. 227 (F.B.). Although under S. 78 payments must be made to the holder of the promissory note, yet if the holder who is the manager of a firm elects to treat the payment to his firm as the payment to himself, the payment is payment to the holder within the meaning of S. 78 and the debtor is discharged from the liability under the promissory note. 1936 C. 315. Where a promissory note was executed in the name of one of the partners of a partnership, a suit on the promissory note is maintainable by the partnership itself. 105 I.C. 549. The holder of a pronote is entitled to realise the debt, although the consideration had really come from a firm of which the holder was a member, for the consideration need not come from the promisee. 1932 L. 620 (2). A promissory note can only be discharged by payment to the holder of the note. The Court should not allow evidence to show that the promissory note was not really executed in the plaintiff's favour or evidence that the note has been discharged by payment to the person really interested. 49 A. 457=100 I.C. 703=1927 A. 463. But *see* 105 I.C. 549=1928 C. 148.

PROMISSORY NOTE EXECUTED IN FAVOUR OF ONE PARTNER—RIGHT OF ANOTHER PARTNER TO SUE.—The holder of a promissory note is the only man who can give a valid discharge within the meaning of S. 78 of the Act. Therefore, one partner cannot sue on a promissory note which was executed in favour of another partner. 152 I.C. 410=1934 R. 280.

PROMISSORY NOTE ALLOTTED TO SHARE OF PERSON BY AWARD—RIGHT OF SUCH PERSON TO SUE ON NOTE WITHOUT ENDORSEMENT.—A promissory note was allotted to the share of a person in a partition by an award. There was a further provision that the promisee was to endorse and hand over the note to the person. *Held*, that the award operated as a transfer *inter alia*, of the promissory note and as such he was entitled to maintain a suit on it, even though it was not endorsed. The further provision did not operate so as to make the transfer conditional on such endorsement or postpone the effect of the transfer till such endorsement was actually made. This provision was an additional and a further provision made with the object mentioned therein, namely, in order to facilitate the collection of the amount due under the promissory note. 156 I.C. 335=1935 M. 473.

Secs. 78 and 80: PROMISSORY NOTE—ASSIGNMENT—ASSIGNEE'S RIGHT TO SUE IN HIS OWN NAME, WITHOUT ENDORSEMENT.—*See* 61 C. 425=38 C.W.N. 465=1934 C. 549 (noted under S. 8, *supra*).

Secs. 78 and 32: BENAMI ASSIGNMENT OF PRONOTE—RELEASE OF MAKER BY REAL OWNER—ASSIGNEE NOT ENTITLED TO SUE ON NOTE.—Negotiable instruments can be enforced by an assignee only when the assignment has been effected in accordance with the provisions of the

79. When interest at a specified rate is expressly made payable on a promissory note or bill of exchange, interest shall be calculated at the rate specified, on the amount of the principal money due thereon, from the date of the instrument, until tender or realization of such amount, or until such date after the institution of a suit to recover such amount as the Court directs.

Interest when rate specified.

80. When no rate of interest is specified in the instrument, interest on the amount due thereon shall, [1][notwithstanding any agreement relating to interest between any parties to the instrument], be calculated at the rate of six per centum per annum from the date at which the same ought to have been paid by the party charged until tender or realization of the amount due thereon, or until such date after the institution of a suit to recover such amount as the Court directs.

Interest when no rate specified.

Explanation.—When the party charged is the indorser of an instrument dishonoured by non-payment, he is liable to pay interest only from the time that he receives notice of the dishonour.

LEG. REF.

[1] Substituted for "except in cases provided for by the Code of Civil Procedure, S. 352" by Act XXX of 1926, S. 2.

NOTES.

Act, and transfer of the rights of a party under a note to order to some one else, unless effected by operation of law, must be effected by indorsement and delivery and not otherwise. Where, therefore, a pronote is assigned by the real owner and the benamidar executes an acknowledgment admitting that he was merely a benamidar and the assignor was real beneficiary, the assignee is not entitled to sue on the pronote, specially when the payee of the note has expressly released the maker. No consideration is required for such a release and the fact that it was collusive is immaterial. 13 P. 655=15 P. 576=1934 Pat. 382.

Sec. 79: SCOPE.—In a suit on a promissory note, which expressly specifies the rate of interest payable, the Court cannot reduce such rate to be paid up to a date fixed by it after the institution of the suit, unless it is exorbitant or penal or otherwise offends against the law. At the same time, it is not necessary that the Court should allow the stipulated rate up to the date of realisation. The requirements of S. 79 of the Negotiable Instruments Act are sufficiently complied with, if interest at the rate specified is allowed up to the date of decree of the trial Court and thereafter at 6 per cent. per annum up to the date of realisation. 154 I.C. 470. Where a promissory note mentions specific rate of interest evidence is not admissible to prove an agreement to pay a different rate of interest. S. 79 provides that when a rate is provided, interest should be calculated at the rate specified. No question of awarding interest by way of damages can arise. 1941 N.L.J. 388=1941 Nag. 271.

Secs. 79 and 80.—This Act must be read with other enactments passed subsequent thereto. If under the Usurious Loans Act which was passed after this Act but before the suit promissory note was executed, the Court has a discretion to reduce interest in a proper case, there is nothing in S. 79 of this Act which excludes such a discretion. 1931 A. L.J. 645. The operation of S. 80 of the Act is not excluded by O. 37, R. 2 of the C. P. Code. On the other hand, O. 37, R. 2 makes S. 79 or 80, as the case may be, specifically applicable to a case filed under O. 37 of the C. P. Code. 56 M. 398=64 M.L.J. 117. Plaintiff is entitled to interest at the stipulated rate from the date of the institution of the suit till the date fixed for payment. 17 I.C. 309. *See also* 11 I.C. 891. A contract to pay interest made simultaneously with the execution of a promissory note, but not embodied therein is valid, and will be enforced between the parties to such contracts. 32 I.C. 238. (29 A. 33, Foll.; 6 A.L.J. 233, Diss.) S. 80 does not bar the recovery of the interest which the debtor subsequent to the execution of the promissory note agrees to pay in consideration of the creditor not pressing his demand immediately. 5 Pat.L.J. 536=58 I.C. 265. *See also* 35 I.C. 431=1 Pat.L.J. 71. Where no rate of interest is mentioned in the hundi sued upon, the plaintiff is entitled to interest at 6 per cent. per annum. 35 I.C. 431=1 Pat.L.J. 71. *See also* 2 Pat.L.T. 451=40 I.C. 350; 63 I.C. 296. Where a person claimed in the plaint 33½ per cent. interest on instruments of debt which contained no agreement as to the exact rate of interest. *Held*, interest should be awarded at the rate of 6 per cent. from the date of hundis to the date of decree and subsequent interest also at the same rate thereafter. 56 M. 398=1933 M. 299=64 M.L.J. 117.

Sec. 80.—Once it is held that a document is not a promissory note the provisions of S. 80 cease to be applicable. 13 L. 516. Where a pronote payable on demand is silent as to interest, interest is claimable at 6 per cent. from date of the pronote. 107 I.C. 753; 52 B. 88=1928 B. 35 (F.B.); 154 I.C. 523=1935 A. L.J. 333=1935 A. 451. *See also* 50 B. 266=94 I.C. 21=1926 B. 241; 34 I.C. 121 (L.); 1932 L. 30 (2); 56 M. 398=1933 M. 299=64 M.L. J. 117; 1936 O.W.N. 876=1937 Oudh 9; 1935 O. 518=1935 O.W.N. 971. The Act does not apply to hundis and it is therefore permissible to the plaintiff to set up and prove a usage for the payment of interest at a rate

81. Any person liable to pay, and called upon by the holder thereof to pay, the amount due on a promissory note, bill of exchange or cheque is before payment entitled to have it shown, and is on payment entitled to have it delivered up, to him, or, if the instrument is lost or cannot be produced, to be indemnified against any further claim thereon against him.

Delivery of instrument on payment or indemnity in case of loss.

CHAPTER VII.

OF DISCHARGE FROM LIABILITY ON NOTES, BILLLS AND CHEQUES.

Discharge from liability.

82. The maker, acceptor or indorser respectively of a negotiable instrument is discharged from liability thereon—

(*a*) to a holder thereof who cancels such acceptor's or indorser's name with intent to discharge him and to all parties claiming under such holder; by cancellation;

(*b*) to a holder thereof who otherwise discharges such maker, acceptor or indorser, and to all parties deriving title under such holder after notice of such discharge; by release;

(*c*) to all parties thereto, if the instrument is payable to bearer, or has been indorsed in blank, and such maker, acceptor or indorser makes payment in due course of the amount due thereon. by payment;

Discharge by allowing drawee more than forty-eight hours to accept.

83. If the holder of a bill of exchange allows the drawee more than [1][forty-eight] hours, exclusive of public holidays, to consider whether he will accept the same, all previous parties not consenting to such allowance are thereby discharged from liability to such holder.

When cheque not duly presented and drawer damaged thereby.

[2][84. (1) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or person on whose account it is drawn had the right, at the time when presentment ought to have been made, as between himself and the banker, to have the cheque paid

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LEG. REF.

[1] Substituted for "twenty-four" by Act XII of 1921, S. 2.

[2] Substituted for the original section by Act VI of 1897, S. 3.

NOTES.

exceeding 6 per cent. per annum, notwithstanding the provisions of S. 80. 1932 L. 582. Interest on those instruments to which S. 80 applies is payable from the date of execution, or from maturity or from presentation or from demand or from service of summons according to the circumstances of each case. Where the promissory note contained no stipulation for interest and no demand was made prior to suit, *held*, that interest at 6 per cent. should be calculated from the date of service of summons. 58 C. 290=1931 C. 140. Hundi not mentioning interest—Payee under it selling it with endorsement undertaking to pay interest—Presentation of Hundi—Right of vendee to interest. 1937 P. 319.

Sec. 82.—*See* 51 I.C. 577; 35 I.C. 591=4 L. W. 34; 1937 Rang. 521. *Prima facie* the giving of a new instrument in place of an existing one has the effect not of discharging the instrument then existing, but of being a conditional satisfaction of it, so that if the new instrument is duly paid at maturity, the first instrument is discharged; but if not, then the dormant rights on the first instrument are revived. 49 A. 257 =1927 A. 236. Extension of time by consent of parties, whether discharges bill. *See* 1927 B. 13=50 B. 656.

Sec. 82 (c): PAYMENT MADE TO THE ENDORSEE'S AGENT and received by him in his capacity as an agent is good discharge of the hundis. 119 I.C. 759=1929 L. 634.

Sec. 83.—The words "all previous parties" in S. 83 includes the drawer. 10 I.C. 133. Ordinary hundi does not require presentation for acceptance. 10 I.C. 133. S. 83 does not apply to cases of hundis payable at sight for they are presented not for acceptance but for payment. 47 I.C. 683. *See also* 48 I.C. 423; 10 I.C. 133.

Secs. 83 and 86.—Ss. 83 and 86, only deal with cases of documents which have to be presented for acceptance, that is to say documents payable after sight. There is no such provision with regard to the hundis payable on presentment. 172 I.C. 598=1937 Pesh. 103.

and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of the banker to a larger amount than he would have been if such cheque had been paid.

(2) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.

(3) The holder of the cheque as to which such drawer or person is so discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge and entitled to recover the amount from him.]

Illustrations.

(*a*) *A* draws a cheque for Rs. 1,000, and, when the cheque ought to be presented, has funds at the bank to meet it. The bank fails before the cheque is presented. The drawer is discharged, but the holder can prove against the bank for the amount of the cheque.

(*b*) *A* draws a cheque at Umballa on a bank in Calcutta. The bank fails before the cheque could be presented in ordinary course. *A* is not discharged, for he has not suflered actual damage through any delay in presenting the cheque.

Cheque payable to order.

85. [1][(1)] Where a cheque payable to order purports to be endorsed by or on behalf of the payee, the drawee is discharged by payment in due course.

[1][(2) Where a cheque is originally expressed to be payable to bearer, the drawee is discharged by payment in due course to the bearer thereof, notwithstanding any endorsement whether in full or in blank appearing thereon, and notwithstanding that any such endorsement purports to restrict or exclude further negotiation].

Drafts drawn by one branch of a bank on another payable to order.

[2][85-A. Where any draft, that is, an order to pay money, drawn by one office of a bank upon another office of the same bank for a sum of money payable to order on demand, purports to be endorsed by or on behalf of the payee, the bank is discharged by payment in due course.]

LEG. REF.

[1] Original S. 85 was numbered as sub-S. (1) and sub-S. (2) inserted by Act XVII of 1934, S. 2. The original section was as follows :—"When the holder of a cheque fails to present it for payment within a reasonable time and the drawer thereof sustains loss or damage from such failure, he is discharged from liability to the holder."

[2] Inserted by Act XXV of 1930 S. 2.

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Sec. 85.—*See* 50 B. 118=28 Bom.L.R. 226=1926 B. 262. The duty and authority of a Bank to pay a cheque drawn on it by its customer are determined by countermand of payment. If the Bank negligently pays the amount of the cheque thereafter, it cannot debit the customer's account with that amount. Such payment is not a payment made in due course, so as to discharge the Bank. The Bank is not protected by its current account rule which states that "the Bank will register instructions from the drawer regarding cheques lost, stolen, etc., but cannot guarantee constituents against loss in such cases in event of a cheque being paid." The rule is intended, to apply to events happening prior to the time when a cheque reaches the Bank and is presented for payment, not to negligence committed by the Bank after presentation. I.L.R. (1940) 2 Cal. 578=1941 Cal. 110. Where owing to the negligence of the employees of a Bank payment was made in respect of a forged cheque, the Bank cannot escape the liability to make good the amount, by relying on the circumstance that the customer was negligent in leaving his cheque book at a place to which others had access. It was the duty of the Bank to verify the signature of its customers. I.L.R. (1938) All. 634=1938 A.L.J. 504=1938 All. 374.

Secs. 85-A, 10 and 16 : PAYMENT IN DUE COURSE—WHAT AMOUNTS TO.—Under S. 16 if the endorser signs his name only, the endorsement is said to be in blank and such an endorsement makes the negotiable instrument payable to the bearer. The endorsement must however be a genuine and valid endorsement. A bank issued a draft drawn on its branch for payment of certain sum to *H* and *G*. *H* alone appeared at the branch of the bank for the first time and presented the draft for payment. At that time the draft purported to be endorsed in blank on reverse by both *H* and *G*. The manager of the branch at first refused to cash the draft as he did not know *H*. Subsequently however he paid the amount when one *L* who had an account with the bank identified *H* and *H* guaranteed the signature of *G*. The manager took no steps to have the signature of *G* confirmed or identified by any one. *Held*, that in these circumstances the payment of the draft could not be

86. If the holder of a bill of exchange acquiesces in a qualified acceptance, or one limited to part of the sum mentioned in the bill, or which substitutes a different place or time for payment, or which, where the drawees are not partners, is not signed by all the drawees, all previous parties whose consent is not obtained to such acceptance are discharged as against the holder and those claiming under him, unless on notice given by the holder they assent to such acceptance.

Parties not consenting discharged by qualified or limited acceptance.

Explanation.—An acceptance is qualified—

(*a*) where it is conditional, declaring the payment to be dependent on the happening of an event therein stated;

(*b*) where it undertakes the payment of part only of the sum ordered to be paid;

(*c*) where, no place of payment being specified on the order, it undertakes the payment at a specified place, and not otherwise or elsewhere; or where, a place of payment being specified in the order, it undertakes the payment at some other place and not otherwise or elsewhere;

(*d*) where it undertakes the payment at a time other than that at which under the order it would be legally due.

87. Any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties;

Effect of material alteration.

and any such alteration, if made by an indorsee, discharges his indorser from all liability to him in respect of the consideration thereof.

Alteration by indorsee.

The provisions of this section are subject to those of sections 20, 49, 86 and 125.

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said to have been made in good faith and without negligence. The payment therefore was not in due course within the meaning of Ss. 85-A and 10 and the bank was liable for the payment. 40 P.L.R. 863=1938 Lah. 520.

Sec. 86 (b).—*See* 35 I.C. 628.

Sec. 87: MATERIAL ALTERATION.—The question whether the alteration is a material one depends on whether it changes in any way the rights and liabilities of the parties thereto. It is immaterial whether the change is prejudicial or beneficial. And an endorsement postponing the payment which was payable on demand and altering the rate of interest constitutes material alteration. In such cases the actual position of the words written is immaterial. 162 I.C. 358=1936 R. 136. Where the instrument appears to be altered, it is incumbent upon the person suing on the instrument to show that the alteration was not improperly made. 41 P.L.R. 356=1939 Lah. 31. Where it was the common intention of parties that interest was to be paid, but owing to an accidental omission the *Sarkhat* did not contain any such provision, an alteration to that effect made without reference to the debtors does not make the instrument void, oral evidence to prove the existence of agreement to pay interest is admissible, for proviso (2) to S. 92 of the Evidence Act makes any separate oral agreement as to any matter on which the document is silent, capable of proof and there is no prohibition in that respect. Further S. 87 itself postulates the possibility of such an agreement being proved by oral evidence. 1939 A.L.J. 46=1939 All. 248. The alteration referred to in S. 87 refers to a deliberate alteration by a party to the instrument or by one on whom his interest had devolved and not by a stranger, particularly when no conduct can be imputed to the party in whose favour the alteration has been effected or from which either his complicity, laches or negligence may be inferred. A subsequent alteration by a stranger would not deprive the person who had advanced the money or to whom the money had become payable subsequently on account of the promisee's death, of his remedy to bring a suit for the money advanced to the maker by way of loan. S. 87 would not therefore stand in the way of a minor plaintiff, who was a minor on the date of the alteration in question, getting relief on the original cause of action. 50 L. W. 746=1940 Mad. 62=(1939) 2 M.L.J. 686. S. 87 would only apply to cases of fraudulent alteration by a party and to cases where due to his negligence it becomes possible for a stranger to make the alteration. The holder of a promissory note is not affected by a material alteration in the instrument when it has been made by a meddlesome or maliciously minded stranger and there has been no fraud or laches on the

Acceptor or indorser bound notwithstanding previous alteration.

88. An acceptor or indorser of a negotiable instrument is bound by his acceptance or indorsement notwithstanding any previous alteration of the instrument.

Payment of instrument on which alteration is not apparent.

89. Where a promissory note, bill of exchange or cheque has been materially altered but does not appear to have been so altered,

or where a cheque is presented for payment which does not at the time of presentation appear to be crossed or to have had a crossing which has been obliterated,

payment thereof by a person or banker liable to pay, and paying the same according to the apparent tenor thereof at the time of payment and otherwise in due course, shall discharge such person or banker from all liability thereon; and such payment shall not be questioned by reason of the instrument having been altered or the cheque crossed.

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part of the holder. I.L.R. (1941) Mad. 295=1941 Mad. 383=(1941) 1 M.L.J. 153. When the plaintiff in a suit upon a promissory note is proved to have materially altered it, the Court would not grant him a decree even for the amount admitted by the defendant to be due. 25 I.C. 667; 1927 B. 13. *See also* 55 I.C. 610=1 L. 262. Under S. 87, a negotiable instrument is void if there is any material alteration, without the consent of the party against whom it is sought to be enforced, unless the alteration was made, to carry out the common intention of the original parties. 21 L.W. 532=87 I.C. 48. *See also* 44 C. 154=35 I.C. 182; 160 I.C. 996=1936 M. 154. Any alteration in the bill which changes the identity of the contract therein must be regarded as a material alteration. 55 I.C. 610=1 L. 262. The rule has now been well established that any alteration or change in an instrument which "causes it to speak a different language in legal effect from that which it originally spoke, which changes the legal identity or the character of the instrument either in its terms or the relation of the parties to it," is a material alteration or change. An alteration in the date of the instrument is a material alteration within the meaning of S. 87. Where the date of execution of a promissory note and the date of endorsement of a payment made by the maker are altered, the alteration of the dates is a material alteration. 50 L.W. 746=1940 Mad. 62=(1939) 2 M.L.J. 686. *Addition of two attesting witnesses* made subsequent to the execution of an improperly stamped promissory note in order to convert it into bond and thereby opening up the possibility of suing upon it on payment of penalty is tantamount to material alteration which invalidates the instrument and destroys the right of action on it. 1930 L. 959. *Pronote torn in a material portion* affecting its validity in the place of origin, amounted to a material alteration invalidating the note. 38 M. 746=25 M.L.J. 572. An alteration of the name of the payee is a material alteration. 20 A.L.J. 987 (2)=1923 A. 123. Adding "*with interest*" when the date was already specified is not material alteration. 86 I.C. 552=49 M.L.J. 132 (P.C.). A forged endorsement on a promissory note purporting to be a receipt of the amount due under the note, which is outside the body of the note and the signature, *prima facie* does not form part of the note and is not a material alteration. 163 I.C. 803=1936 M.W.N. 451=43 L.W. 665=1936 M. 616. *Interpolation of interest in a note*, when amounts to material alteration. 23 A.L.J. 253=87 I.C. 796 (2). Alteration of rate of interest from Re. 0-8-0 to Rs. 1-8-0 is material alteration. 1937 A.W.R. 232=1937 A.L.J. 235=1937 All. 439. *Alteration of due date of payment*, effect of. 99 I.C. 489=1927 B. 13=50 B. 656. Suit on a pronote executed by two persons—One alone executing, the mark of the other having been affixed to the note without her permission—Enforceability against the real executant alone. 21 L.W. 532=87 I.C. 48, doubted in 1928 M.W.N. 591=1928 M. 1092. *See* 1914 M.W.N. 250. As to *burden of proof in cases of material alteration* in pronote, *see* 98 I.C. 721=28 Bom.L.R. 944=1926 B. 491; 1939 Lah. 31. *See also* 14 Rang. 29. Where a party sues on an instrument which, on the face of it, appears to have been altered, it is for him to show that the alteration has not been improperly made. 1935 R. 131. Where below the signatures of the executants of a promissory note, the *name of another person is forged by or at the instance of the payee* without the consent of the real executants, and the addition of the new name is not made in order to carry out the common intention of the original parties, the promissory note is void even as against the real executants who are not consenting parties to the material alteration made in the promissory note. 156 I.C. 17=1935 O.W.N. 661. *See also* 1936 Mad. 154. The law requires a fresh stamp when a material alteration is made, as the alteration makes the instrument a new one. 162 I.C. 358=1936 R. 136. Where it is found that a hand note sued on had been fraudulently altered, the plaintiff should not be granted any relief. A person who has altered an instrument is not entitled to succeed on the basis of the original consideration and to rely upon the altered instrument as embodying an acknowledgment or admission. 1939 Pat. 255. *See also* 16 Pat. 527=18 Pat.L.T. 640=1937 Pat. 572.

Sec. 89.—*See* 52 A. 883=128 I.C. 758=1930 A. 778.

Extinguishment of rights of action on bill in acceptors hands.

90. If a bill of exchange which has been negotiated is at or after maturity, held by the acceptor in his own right, all rights of action thereon are extinguished.

CHAPTER VIII.

OF NOTICE OF DISHONOUR.

Dishonour by non-acceptance.

91. A bill of exchange is said to be dishonoured by non-acceptance when the drawee, or one of several drawees not being partners, makes default in acceptance upon being duly required to accept the bill, or where presentment is excused and the bill is not accepted.

Where the drawee is incompetent to contract, or the acceptance is qualified, the bill may be treated as dishonoured.

Dishonour by non-payment.

92. A promissory note, bill of exchange or cheque is said to be dishonoured by non-payment when the maker of the note, acceptor of the bill or drawee of the cheque makes default in payment upon being duly required to pay the same.

By and to whom notice should be given.

93. When a promissory note, bill of exchange or cheque is dishonoured by non-acceptance or non-payment, the holder thereof, or some party thereto who remains liable thereon, must give notice that the instrument has been so dishonoured to all other parties whom the holder seeks to make severally liable thereon, and to some one of several parties whom he seeks to make jointly liable thereon.

Nothing in this section renders it necessary to give notice to the maker of the dishonoured promissory note or the drawee or acceptor of the dishonoured bill of exchange or cheque.

Mode in which notice may be given.

94. Notice of dishonour may be given to a duly authorized agent of the person to whom it is required to be given, or, where he has died, to his legal representative, or, where he has been declared an insolvent, to his assignee; may be oral or written; may, if written, be sent by post; and may be in any form; but it must inform the party to whom it is given, either in express terms or by reasonable intendment, that the instrument has been dishonoured, and in what

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Sec. 91.—Where there is no allegation that the presentment was excused, the plaintiff must prove that the drawee was required to accept the bill and that he dishonoured it by non-acceptance. 21 L.W. 210=86 I.C. 576. *See also* 86 I.C. 357.

Sec. 92.—The provisions of Ss. 91, 92 and 93 dealing with dishonour by non-payment are applicable to bills of exchange payable at sight or on demand. 10 L.W. 39=52 I.C. 370. In absence of notice of dishonour, the endorsee of a promissory note is not liable unless a special contract to the contrary is proved. 152 I.C. 129=40 L.W. 666.

Sec. 93.—Notice of dishonour should be given to the indorser of a promissory note payable on demand in order to make him liable on the instrument. 1930 M.W.N. 1232. Where a cheque is dishonoured, it is incumbent on the endorsee to serve the endorser with notice of such dishonour and the failure to do so discharges the endorser from all liability, and the endorsee could not sue even on the original consideration. 38 P.L.R. 240=1936 L. 796. There is no provision in the Negotiable Instruments Act making the notice of dishonour compulsory where a hundi payable at sight has been dishonoured. 1937 Pesh. 103.

Secs. 93 and 98.—The rule as to notice of dishonour does not admit of any departure except in the cases enumerated in S. 98. 1 L. 262=55 I.C. 610.

Sec. 93 and 95.—Where the payee of a promissory note practises fraud in endorsing it over to another after it has become barred by limitation, fabricating an endorsement of payment so as to make it appear that it is not barred, he is not entitled to plead in defence to a suit against him that he is entitled to notice of dishonour. There is no necessity for notice of dishonour in such a case. 50 L.W. 649=1940 Mad. 85=(1939) 2 M.L.J. 760.

way, and that he will be held liable thereon; and it must be given within a reasonable time after dishonour, at the place of business or (in case such party has no place of business) at the residence of the party for whom it is intended.

If the notice is duly directed and sent by post and miscarries, such miscarriage does not render the notice invalid.

Party receiving must transmit notice of dishonour.

95. Any party receiving notice of dishonour must, in order to render any prior party liable to himself, give notice of dishonour to such party within a reasonable time, unless such party otherwise receives due notice as provided by section 93.

Agent for presentment.

96. When the instrument is deposited with an agent for presentment, the agent is entitled to the same time to give notice to his principal as if he were the holder giving notice of dishonour, and the principal is entitled to a further like period to give notice of dishonour.

When party to whom notice given is dead.

97. When the party to whom notice of dishonour is despatched is dead, but the party despatching the notice is ignorant of his death, the notice is sufficient.

When notice of dishonour is unnecessary.

98. No notice of dishonour is necessary—

(*a*) when it is dispensed with by the party entitled thereto;

(*b*) in order to charge the drawer when he has countermanded payment;

(*c*) when the party charged could not suffer damage for want of notice;

(*d*) when the party entitled to notice cannot after due search be found; or the party bound to give notice is, for any other reason, unable without any fault of his own to give it;

(*e*) to charge the drawers when the acceptor is also a drawer;

(*f*) in the case of a promissory note which is not negotiable;

(*g*) when the party entitled to notice, knowing the facts, promises unconditionally to pay the amount due on the instrument.

CHAPTER IX.

OF NOTING AND PROTEST.

Noting..

99. When a promissory note or bill of exchange has been dishonoured by non-acceptance or non-payment, the holder may cause such dishonour to be noted by a notary public upon the instrument, or upon a paper attached thereto, or partly upon each.

Such note must be made within a reasonable time after dishonour, and must specify the date of dishonour, the reason, if any, assigned for such dishonour, or, if the instrument has not been expressly dishonoured, the reason why the holder treats it as dishonoured, and the notary's charges.

NOTES.

Sec. 98.—This section contains the exceptions to the general rule requiring notice of dishonour and the person relying upon any such exception must establish all the requirements thereof. 1 L. 262=55 I.C. 610. Undue omission to give due notice of dishonour discharges the persons entitled to such a notice. 116 I.C. 887=1929 L. 577. Notice of dishonour—Failure to give—No damage—*Onus* of proof. 1932 N. 55.

Sec. 98 (b).—It is not necessary that the actual words "countermanding payment" should be used; it is sufficient if the words used clearly show that the drawer does not want payment to be made in accordance with the tenor of the hundi. The question of countermanding payment is a question of fact. 163 I. C. 743=1936 M. 506.

Sec. 98 (e)—The use of the singular, "drawer" followed by the plural "drawers" in S. 98 shows that if the acceptor is one of the drawers, both the drawers would be liable, even though no notice of dishonour has been given. 51 A. 530=1929 A. 254.

100. When the promissory note or bill of exchange has been dishonoured by non-acceptance or non-payment, the holder may, within a reasonable time, cause such dishonour to be noted and certified by a notary public. Such certificate is called a protest.

Protest.

When the acceptor of a bill of exchange has become insolvent, or his credit has been publicly impeached, before the maturity of the bill, the holder may, within a reasonable time, cause a notary public to demand better security of the acceptor, and on its being refused may, within a reasonable time, cause such facts to be noted and certified as aforesaid. Such certificate is called a protest for better security.

Protest for better security.

101. A protest under section 100 must contain—

Contents of protest.

(*a*) either the instrument itself, or a literal transcript of the instrument and of everyhing written or printed thereupon;

(*b*) the name of the person for whom and against whom the instrument has been protested;

(*c*) a statement that payment or acceptance, or better security, as the case may be, has been demanded of such person by the notary public; the terms of his answer, if any, or a statement that he gave no answer or that he could not be found;

(*d*) when the note or bill has been dishonoured, the place and time of dishonour, and, when better security has been refused, the place and time of refusal;

(*e*) the subscription of the notary public making the protest;

(*f*) in the event of an acceptance for honour or of a payment for honour, the name of the person by whom, of the person for whom, and the manner in which, such acceptance or payment was offered and effected.

[1][A notary public may make the demand mentioned in clause (*c*) of this section either in person or by his clerk or, where authorized by agreement or usage, by registered letter.]

102. When a promissory note or bill of exchange is required by law to be protested, notice of such protest must be given instead of notice of dishonour, in the same manner and subject to the same conditions; but the notice may be given by the notary public who makes the protest.

Notice of protest.

103. All bills of exchange drawn payable at some other place than the place mentioned as the residence of the drawee, and which are dishonoured by non-acceptance may, without further presentment to the drawee, be protested for non-payment in the place specified for payment, unless paid before or at maturity.

Protest for non-payment after dishonour by non-acceptance.

104. Foreign bills of exchange must be protested for dishonour when such protest is required by the law of the place where they are drawn.

Protest of foreign bills.

[2][104-A. For the purposes of this Act, where a bill or note is required to be protested within a specified time or before some further proceedings is taken, it is sufficient that the bill has been noted for protest before the expiration of

When noting equivalent to protest.

LEG. REF.

[1]Last paragraph of S. 101 was added by the Negotiable instruments Act (II of 1885), S. 5.

[2]S. 104-A was inserted by the Negotiable Instruments Act (II of 1885), S. 6.

NOTES.

Sec. 104—A bill drawn upon a resident in British India is an inland bill for which no protest is necessary. The fact that the bill was drawn out of British India (in England) does not make it a foreign bill. 57 C. 730=129 I. C. 190=1930 C. 692.

the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting.]

CHAPTER X.

OF REASONABLE TIME.

Reasonable time.

105. In determining what is a reasonable time for presentment for acceptance or payment, for giving notice of dishonour and for noting, regard shall be had to the nature of the instrument and the usual course of dealing with respect to similar instruments; and, in calculating such time, public holidays shall be excluded.

Reasonable time of giving notice of dishonour.

106. If the holder and the party to whom notice of dishonour is given carry on business or live (as the case may be) in different places, such notice is given within a reasonable time if it is despatched by the next post or on the day next after the day of dishonour.

If the said parties carry on business or live in the same place, such notice is given within a reasonable time if it is despatched in time to reach its destination on the day next after the day of dishonour.

Reasonable time for transmitting such notice.

107. A party receiving notice of dishonur, who seeks to enforce his right against a prior party, transmits the notice within a reasonable time if he transmits it within the same time after its receipt as he would have had to give notice if he had been the holder.

CHAPTER XI.

OF ACCEPTANCE AND PAYMENT FOR HONOUR AND REFERENCE IN CASE OF NEED.

Acceptance for honour.

108. When a bill of exchange has been noted or protested for non-acceptance or for better security, any person not being a party already liable thereon may, with the consent of the holder, by writing on the bill, accept the same for the honour of any party thereto. [1][* * *]

How acceptance for honour must be made.

109. A person desiring to accept for honour must [2][by writing on the bill under his hand], declare that he accepts under protest the protested bill for the honour of the drawer or of a particular indorser whom he names, or generally for honour. [3][* * *]

LEG. REF.

[1]Portion repealed by the Negotiable Instruments Act (II of 1885), S. 7, was as follows;—

"Unless the person who intends to accept *supra protest* first declares, in the presence of a notary, that he does it for honour and as such declaration duly recorded in the notarial register at the time, his acceptance shall be a nullity."

[2]These words were substituted for the words "in the presence of a notary public subscribe the bill with his own hand and" by the Negotiable Instruments Act (II of 1885), S. 8.

[3]The words "and such declaration must be recorded by the notary in his register" were repealed by the Negotiable Instruments Act (II of 1885), S. 8.

NOTES.

Sec. 105.—In considering the question of reasonable time, facts such as the distance at which persons live from each other, the course of dealings with respect to similar instruments, the nature of the instrument and all such other circumstances applicable to the case ought to be considered. But when these facts have been ascertained, the reasonableness of the time becomes a mixed question of law and fact. 116 I.C. 887=1929 L. 557=11 L. 34.

Sec. 106.—A perusal of S. 106 of the Act leaves no doubt that the notice of dishonour should be given as soon as the bill is dishonoured. It is the duty of the holder to prove that the notice was given, and if not given, he was excused from doing so for any of the reasons specified in S. 98. The omission to give due notice of dishonour has the effect of discharging the persons who are entitled to such notice. 11 L. 34=116 I.C. 887=1929 L. 577. A delay of 27 days in giving notice of dishonour is unreasonable delay which has the effect of absolving the drawers from liability. 1929 Lah. 577.

Acceptance not satisfying for whose honour it is made.

110. Where the acceptance does not express for whose honour it is made, it shall be deemed to be made for the honour of the drawer.

Liability of acceptor for honour.

111. An acceptor for honour binds himself to all parties subsequent to the party for whose honour he accepts to pay the amount of the bill if the drawee do not: and such party and all prior parties are liable in their respective capacities to compensate the acceptor for honour for all loss or damage sustained by him in consequence of such acceptance.

But an acceptor for honour is not liable to the holder of the bill unless it is presented (or in case the address given by such acceptor on the bill is a place other than the place where the bill is made payable), forwarded for presentment, not later than the day next after the day of its maturity.

When acceptor for honour cay be charged.

112. An acceptor for honour cannot be charged unless the bill has at its maturity been presented to the drawee for payment, and has been dishonoured by him, and noted or protested for such dishonour.

Payment for honour.

113. When a bill of exchange has been noted or protested for non-payment, any person may pay the same for the honour of any party liable to pay the same: provided that the person so paying [1][or his agent in that behalf] has previously declared before a notary public the party for whose honour he pays, and that such declaration has been recorded by such notary public.

Right of payer for honour.

[1]14. Any person so paying is entitled to all the rights, in respect of the bill, of the holder at the time of such payment, and may recover from the party for whose honour he pays all sums so paid with interest thereon and with all expenses properly incurred in making such payment.

Drawee in case of need.

115. Where a drawee in case of need is named in a bill of exchange, or in any indorsement thereon, the bill is not dishonoured until it has been dishonoured by such drawee.

Acceptance and payment without protest.

116. A drawee in case of need may accept and pay the bill of exchange without previous protest.

LEG. REF.

[1]These words were inserted by the Negaotible Instruments Act (II of 1885), S. 9.

NOTES.

Secs. 113 and 115.—S. 113 does not apply to a "drawee in case of need" in a bill of exchange. Where the vendor takes a bill of exchange to his own order, the property in the goods cannot pass to the purchaser until he accepts the bill and meets it on presentation. But when the purchaser accepts the bill and dishonours it on presentation the contract between him and the vendor comes to an end and thereafter when the bill is accepted and met on presentation by the "drawee in case of need" the property in the goods passes to the "drawee in case of need" unless the purchaser can show some new contract between him and the vendor. 1941 Rang. 270.

Sec. 115. NON-PRESENTMENT TO DRAWEE IN CASE OF NEED ABSOLVES DRAWER FROM LIABILITY. —S. 115 makes the presentment to the drawee in case of need obligatory on the holder, and the non-presentment of the bill to him absolves the drawer from liability. 116 I.C. 887=1929 L. 577.

Secs. 115 and 116.—The drawee in case of need of a bill of exchange cannot be made liable upon a bill which has never been accepted by him. When a bill of exchange has been duly accepted by the drawee in the first instance but is dishonoured by him when presented for payment at maturity, the holder cannot make the drawee in case of need, liable upon the bill unless he has previously presented the bill for acceptance to the drawee in case of need. 177 I.C. 484=40 Bom.L.R. 473=1938 Bom. 364.

CHAPTER XII.
OF COMPENSATION.

Rules as to compensation.

117. The compensation payable in case of dishonour of a promissory note, bill of exchange or cheque, by any party liable to the holder or any indorsee, shall [1][* * *] be determined by the following rules:—

(*a*) the holder is entitled to the amount due upon the instrument, together wih the expenses properly incurred in presenting, noting and protesting it;

(*b*) when the person charged resides at a place different from that at which the instrument was payable, the holder is entitled to receive such sum at the current rate of exchange between the two places;

(*c*) an indorser who, being liable, has paid the amount due on the same is entitled to the amount so paid with interest at per centum per annum from the date of payment until tender or realization thereof, together with all expenses caused by the dishonour and payment;

(*d*) when the person charged and such indorser reside at different places, the indorser is entitled to receive such sum at the current rate of exchange between the two places;

(*e*) the party entitled to compensation may draw a bill upon the party liable to compensate him, payable at sight or on demand, for the amount due to him, together with all expenses properly incurred by him. Such bill must be accompanied by the instrument dishonoured and the protest thereof (if any. If such bill is dishonoured) the party dishonouring the same is liable to make compensation thereof in the same manner as in the case of the original bill.

CHAPTER XIII.
SPECIAL RULES OF EVIDENCE.

Presumptions as to negotiable instruments—

118. Until the contrary is proved, the following presumptions shall be made:—

LEG. REF.

[1]The words and brackets "(except in cases provided for by the Code of Civil Procedure, S. 532)" have been omitted by Act XXX of 1926, S. 3.

NOTES.

Sec. 117: SPECIAL RULES OF EVIDENCE—SCOPE AND EFFECT OF—GENERAL LAW—HOW FAR MODIFIED.—The Act lays down certain special rules of evidence and certain presumptions and precludes certain pleas being raised in particular cases; but it cannot be said that beyond the scope of such rules or necessary implications therefrom, the applicability of the general principles of law or the ordinary rules of evidence is excluded. 1935 M. 181=68 M.L.J. 81 (F.B.)

Sec. 118: GENERAL.—The special rules of evidence laid down in S. 118 are intended to apply as between the parties to the instrument or those claiming under them. In other cases, the presumption can only be in terms enacted in S. 114 of the Evidence Act, ill. (*c*) which leaves it to the Court to apply the presumption or not according to circumstances. A suit instituted against the undivided sons of a Hindu promisor governed by the Mitakshara law, on a promissory note executed by him cannot be regarded as one against the *heirs* or representatives of the promisor, because it only seeks to enforce the Hindu Law theory of pious obligation, in respect of property which the sons have taken by survivorship, since the pious obligation can arise only on the assumption of the existence of a *debt* due by the father, the onus of proving the existence of the debt is on the creditor. He must therefore prove that the promissory note was supported by consideration; and he cannot invoke S. 118 to throw the onus on the sons. I.L.R. (1937) M. 299=1937 M. 182=(1937) 1 M.L.J. 543. Even the onus under S. 118 of the Negotiable Instruments Act need not always be discharged by direct evidence. (1937) 1 M.L.J. 543. The provisions of S. 118 do not affect the question with regard to the admissibility in evidence of a document which depends entirely upon the document as it stands. 90 I.C. 685=27 Bom.L.R. 1122. On this section, *see* 9 I.C. 79; 8 I.C. 796=12 C.L.J. 470; 5 I.C. 891; 20 B. 367; 2 I.C. 539; 1938 Pat. 612. The presumption as to receipt of full consideration arising from a debtor's signature on a promissory note can only be available against the debtor *personally* and cannot be invoked against the *official receiver* or a creditor in insolvency proceedings. 108 I.C. 147=1928 A. 380. Where the promissory note sued upon is not a negotiable instrument, there is no presumption under S. 118 that

(*a*) that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, endorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

of consideration.

NOTES.

it was made for consideration. 84 I.C. 866=6 L.L.J. 542; 13 P.L.T. 506=1932 P. 324. *See also* 146 I.C. 709=10 O.W.N. 839=1933 O. 394. It is true that under S. 118 there is a presumption of consideration for a promissory note, while in a suit to recover a debt it is for the plaintiff to prove the consideration. But in a suit on the debt. if a promissory note is evidence of the debt, the presumption would still arise. I.L.R. (1940) Kar. 342=1940 Sind 217. Holder—Consideration — Presumption — Transferred from payee. 80 I.C. 741. *Transferee of a tainted pro-note*, if holder in due course—Burden of proof. 1928 M.W.N. 680. In a suit on a promissory note, the defendants contended that they had affixed their signature to a blank paper, that there was no cash consideration and that they had induced plaintiff to give evidence in a case by affixing their signature to the note. The Court thereupon cast the burden of proving consideration on the plaintiff. *Held*, that the Court erred in not taking into account the presumption under S. 118, Negotiable Instruments Act and in casting the onus on the plaintiff. 54 A. 375=1932 A. 164. A mere admission that the actual consideration was different from that described in the contract does not shift the burden of introducing evidence on to the payee. (1924 A. 256 and 15 C.P.L.R. 24, Foll.) I.L.R. 1936 N. 142=1936 N. 130.

Sec. 118, Cl. (a) : PRESUMPTION AS TO CONSIDERATION—SCOPE AND EXTENT.—It is no doubt true that the ordinary rule is that every negotiable instrument is to be presumed to be for consideration and the burden of proof rests on the defendant admitting execution to prove that it was not for consideration, but in a case where the parties go to trial on the question of want of consideration and the trial Court which hears the evidence and notes the demeanour of the witnesses forms an opinion against the plaintiff, the question as to any presumption of consideration passing under the instrument does not arise. Further, if the defence is minority at the time of the execution of the instrument and there are other suspicious circumstances, *viz.*, the fact that the plaintiff has failed to produce his account books, although he admits that he keeps regular accounts, the presumption cannot be availed of. 11 O.W.N. 1589=1935 O. 41. *See also* 1935 A. 154. S. 118 is imperative and the Court is bound to draw the initial presumption that every negotiable instrument was made for consideration, when its execution is admitted. Where the plaintiff has led evidence in the first instance to prove the consideration for a promissory note and has failed to establish the passing of consideration, he can fall back on the initial presumption in his favour. But when the Court has after a consideration of the entire evidence recorded a clear finding one way or the other, then the finding is based not on a mere presumption but on the evidence, and has to be accepted in second appeal. 57 A 835=1935 A. 509 Under S. 118 the only presumption that can be raised is that a promissory note has been executed for consideration, *i.e.*, that the amount for which it is executed was advanced. But the section does not raise the further presumption that the amount was advanced for legal necessity. The burden of proving legal necessity for the loan is on the payee. 155 I. C. 607=1935 N. 127. S. 118 (*a*) does not limit the presumption as to the passing of consideration only to cases of consideration as stated in the negotiable instrument. Where the instrument itself mentions cash payment as the consideration for it and that is also the case of the plaintiff at the hearing, it must not be taken to be without consideration within the meaning of S. 43 of the Act simply because the defendant has succeeded in demolishing the plaintiff's case, when it appears from the evidence on record that there was consideration in a different form. 46 C. W. N. 340. In suits on simple loans it is open to a Court to determine in every case whether person who denies consideration has succeeded in supporting his denial by such direct or circumstantial evidence which may be sufficient in itself to rebut the presumption laid down in S. 118 of the Act. Merely because the debtor is a profligate young man and the creditor is a money-lender, the presumption under S. 118 is not rebutted so as to shift the burden of proof on to the creditor. 1935 L. 599. Sec. 118 and Evidence Act, S. 114 Ill. (*c*) Explanation —Scope and effect of—Presumption as to consideration. *See* 1935 L. 599. The presumption that a pro-note was for consideration will not necessarily apply in a criminal trial. 59 I.C. 198=18 A.L.J. 1151. The initial presumption of consideration arising under S. 118, can be rebutted even by circumstantial evidence. 124 I. C. 717=1930 A. 568. Under S. 118 (*a*) if a pro-note is genuine, there is a presumption that there has been consideration and the onus of proving want of consideration is on the party who pleads want of consideration. 1934 M. 702=67 M.L.J. 658. It must be presumed that consideration passes when a hundi is drawn, unless evidence is given to the contrary. But if the plaintiff chose to open the case and lead evidence as to the passing of consideration which was disbelieved by the Court, no such presumption arises. 28 I. C. 390=13 A. L. J. 322. The mere existence of an antecedent debt is consideration within the meaning of S. 118. 19 I.C. 789=15 Bom.L.R. 333. There is a statutory presumption that every negotiable instrument was made or drawn for consideration. This throws the burden of proving failure of consideration upon the maker of the instrument and the burden is not shifted by the mere fact that part of the consideration is shown not to have been paid in cash as represented in the promissory note. 122 I.C. 383=1930 N. 187. The *onus* of

as to date.

as to time of acceptance;

before the maturity;

as to time of transfer;

as to order of indorsements,

as to stamp;

(*b*) that every negotiable instrument bearing a date was made or drawn on such date;

(*c*) that every accepted bill of exchange was accepted within a reasonable time after its date and

(*d*) that every transfer of a negotiable instrument was made before its maturity;

(*e*) that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(*f*) that a lost promissory note, bill of exchange or cheque was duly stamped;

(*g*) that the holder of a negotiable instrument is a holder in due course: Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud,

that holder is a holder in due course.

or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

119. In a suit upon an instrument which has been dishonoured, the Court

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NOTES.

proving want of consideration for a hundi is on the drawer, for there is a statutory presumption in favour of the passing of consideration of hundi. 58 I. C. 982=1 L. 429. Where the executant of a pro-note appeared to be a boy just emerged from minority without any ready money but with large expectation, the payee of the note should show that consideration passed. 31 I. C. 739 (20 B. 367; 29 M.L.J. 23, Foll.). The circumstances showing that the plaintiff did not pay the whole of consideration money of the promissory note shifts on him the burden of proving that the consideration money was paid in full. 30 I.C. 971=29 M. L. J. 236. *See also* 1933 L. 1029. Notwithstanding S. 118 of the Act, the burden of proving consideration for a promissory note executed by the insolvent is on the insolvent and not the Official Assignee. 26 S. L. R. 279 =1932 S. 197. A debtor who desires to show that there is nothing due on a promissory note executed by him, which is in the creditor's possession with no mark on it showing that it has been discharged, has a very heavy burden of proof. Even if there are a series of transactions between the same parties, if one of them sues upon a promissory note, as a rule it is no answer for the defendant to say that the claim is a matter of account. 151 I. C. 582= 1934 R. 358. If a hand-note mentions one kind of consideration, but it is found that there is a consideration of a different nature, the suit is not liable to be dismissed for this reason. 165 I.C. 809=1936 P. 498. It cannot be said that when there is a denial of execution of a promissory note, the plaintiff is bound to prove not only execution but also the consideration. Once the document is proved the presumption provided by S. 118 applies. 193 I.C. 863=1941 O.W.N. 613. Where a defendant to a suit on promissory note admits the thumb-impression on the note but sets up fraud which he does not substantiate and there is no evidence for the defence, the Court is bound under S. 118, to draw a presumption that the note was for consideration. It is wrong to place the burden of proving the passing of consideration on the plaintiff in such a case and he is not bound to produce any such evidence. 1941 O.W.N. 1161.

Sec. 118, Cl. (b).—If a promissory note is shown to be ante-dated, no presumption arises that it was executed on the date it bears on its face. 34 I.C. 617.

Cl. (d).—Assignment of pro-note—Presumption as to consideration. 1927 L. 864.

Cl. (e).—When there is no satisfactory evidence as to the order of indorsements, the statutory presumption that they were made in the order in which they appear thereon will prevail. 45 I.C. 186.

Cl. (f).—Where a hundi has been lost, a presumption arises under S. 118 (*f*) that the hundi was duly stamped and the stamp was duly cancelled. 1930 S. 4.

Cl. (g).—An endorsee from the payee of a hundi is presumed until the contrary is proved to be a holder in due course and is unaffected by the absence or failure of consideration as between the drawer and the payee. 27 I.C. 362=15 Bom. L.R. 743. *See also* 71 M.L. J. 473. So also in the case of an endorsement of a promissory note which has been discharged. 1936 M. 879=71 M.L. J. 473. In order to place the burden of proof on the holder, the defendant must first prove that the circumstances specified in S. 118 (*g*) exist. When these facts are proved, the holder must prove that he became such in due course; in this *onus* will include proof that value was given. 101 I.C. 325=1927 L. 137. Transferee of tainted pro-note—Holder in due course—*Onus* of proof—Remedy against transferor. *See* 113 I.C. 456. *See also* 1933 A.L.J. 1241=1933 A. 754; 57 I.C. 304; 28 Punj.L. R. 295=102 I.C. 42.

Sec. 119.—Under S. 119 Court is entitled to presume dishonour if there is a proper protest. 10 L.W. 39=52 I.C. 370.

Presumption on proof of protest.

shall, on proof of the protest, presume the fact of dishonour, unless and until such fact is disproved.

Estoppel against denying original validity of instrument.

120. No maker of a promissory note, and no drawer of a bill of exchange or cheque, and no acceptor of a bill of exchange for the honour of the drawer, shall, in a suit thereon by a holder in due course, be permitted to deny the validity of the instrument as originally made or drawn.

Estoppel against denying capacity of payee to indorse.

121. No maker of a promissory note and no acceptor of a bill of exchange [1][payable to order] shall, in a suit thereon by a holder in due course, be permitted to deny the payee's capacity, at the date of the note or bill, to indorse the same.

Estoppel against denying signature or capacity of prior party.

122. No indorser of a negotiable instrument shall, in a suit thereon by a subsequent holder, be permitted to deny the signature or capacity to contract of any prior party to the instrument.

LEG, REF.

[1] The words "payable to order" were substituted for the words "payable to, or to the order of a specified person" by Act VIII of 1919.

NOTES.

Sec. 120.—The specific provision in S. 120 is subject to the general rule enacted in S. 26. 117 I.C. 133. The fact that no consideration actually passed between the drawer of a cheque and the payee when the cheque was drawn, will not affect the right of the plaintiff who is a *bona fide* endorsee of the cheque to sue for the recovery of his money as a holder in due course. 12 Luck. 139=1936 O.W.N. 377=1937 Oudh 158. Though S. 120 precludes the maker of promissory note from denying the validity of the note, where money is not advanced as a simple loan unconditionally upon the promissory note, but is advanced after the note had been executed and on certain conditions previously agreed upon, the promisor is entitled to prove circumstances in repudiation of his liability. 34 P.L.R. 470=1933 L. 456. The payee of a negotiable instrument to bearer is not a "*holder in due course*". 24 I.C. 721. *See also* 27 A.L.J. 729 (F.B.). The *condition precedent* to the application of S. 120 is that there must be a properly stamped bill of exchange before the Court at which the Court is entitled to look. 48 A. 332=93 I.C. 63=1926 A. 359. *See also* 26 A.L.J. 729 (F.B,). As to whether "*holder in due course*" includes bearer of a promissory note who is made payee, *see* 26 A.L.J. 729 (F.B.).

Ss. 120 and 121—APPLICABILITY—APPLICATION UNDER S. 19, MADRAS AGRICULTURISTS' RELIEF ACT.—Ss. 120 and 121 do not apply to applications under S. 19 of the Madras Agriculturists' Relief Act for relief of debtors who are agriculturists. The words "suit thereon" in Ss. 120 and 121 clearly show that the proceeding intended to be denoted by those words is a proceeding initiated by some one who is entitled to sue or take legal steps to recover the money due on a negotiable instrument, *viz.*, by the promisee or payee; and they cannot apply to proceedings initiated by the maker or promisor for relief under a special Act like the Madras Act IV of 1938. There is consequently no estoppel in the way of an applicant under S. 19 of Madras Act IV of 1938, which prevents him from establishing that a debt evidenced by a negotiable instrument executed after 1932, was really one incurred before 1932, by showing that the instrument was in renewal of an earlier instrument executed prior to 1932. So far as Madras Act IV of 1938 is concerned there is no justification for regarding a debt incurred under a promissory note in a different way from other debts, as the object of the Act is to give relief to agriculturist debtors, whether the original debt was incurred under a negotiable instrument or otherwise. 50 L.W. 587=1940 Mad. 52=(1939) 2 M.L.J. 658. In a suit on a promissory note by the endorsee thereof, the maker or defendant (debtor) is not barred by S. 120 os the Negotiable Instruments Act from pleading or setting up any defence open to the promisor uuder Madras Act IV of 1938. The section only prevents the maker of the note from denying the validity of the instrument as originally made or drawn. It does not bar any defence which is independent of a plea that the instrument as originally made or drawn was invalid. 54 L.W. 577=(1941) 2 M.L.J. 808.

Secs. 120 and 122.—An endorser of a negotiable instrument is estopped as against the endorsee from setting up the invalidity of the instrument. 42 M. 470=36 M.L.J. 301. The fact that no consideration actually passed between the drawer of a cheque and the payee when the cheque was drawn, will not affect the right of the plaintiff who is a *bona fide* endorsee of the cheque to sue for the recovery of his money as a holder in due course. 161 I.C. 818=1936 O.W.N. 377.

CHAPTER XIV.

OF CROSSED CHEQUES.

Cheque crossed generally.

123. Where a cheque bears across its face an addition of the words "and company" or any abbreviation thereof, between two parallel transverse lines, or of two parallel transverse lines simply, either with or without the words "not negotiable", that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed generally.

Cheque crossed specially.

124. Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable", that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed specially, and to be crossed to that banker.

Crossing after issue.

125. Where a cheque is uncrossed, the holder may cross it generally or specially.

Where a cheque is crossed generally, the holder may cross it specially.

Where a cheque is crossed generally or specially, the holder may add the words "not negotiable."

Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker, his agent, for collection.

Payment of cheque crossed generally.

126. Where a cheque is crossed generally, the banker on whom it is drawn shall not pay it otherwise than to a banker.

Payment of cheque crossed specially.

Where a cheque is crossed specially the banker on whom it is drawn shall not pay it otherwise than to the banker to whom it is crossed, or his agent for collection.

Payment of cheque crossed specially more thon once,

127. Where a cheque is crossed specially to more than one banker, except when crossed to an agent for the purpose of collection, the banker on whom it is drawn shall refuse payment thereof.

Payment in due course of crossed cheque.

128. Where the banker on whom a crossed cheque is drawn has paid the same in due course, the banker paying the cheque, and (in case such cheque has come to the hands of the payee) the drawer thereof, shall respectively be entitled to the same rights, and be placed in the same position in all respects, as they would respectively be entitled to and placed in if the amount of the cheque had been paid to and received by the true owner thereof.

Payment of crossed cheque out of due course.

129. Any banker paying a cheque crossed generally otherwise than to a banker, or a cheque crossed specially otherwise than to the banker to whom the same is crossed, or his agent for collection, being a banker, shall be liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

Cheque bearing "not negotiable".

130. A person taking a cheque crossed generally or specially, bearing in either case the words "not negotiable" shall not have and shall not be capable of giving, a better title to the cheque than that which the person from whom he took it had.

131. A banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment.

Non-liability of banker receiving payment of cheque.

[1][*Explanation*.—A banker receives payment of a crossed cheque for a customer within the meaning of this section notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof.]

CHAPTER XV.

OF BILLS IN SETS.

132. Bills of exchange may be drawn in parts, each part being numbered and containing a provision that it shall continue payable only so long as the others remain unpaid. All the parts together make a set; but the whole set continues only one bill, and is extinguished when one of the parts, if a separate bill, would be extinguished.

Set of bills.

Exception.—When a person accepts or indorses different parts of the bill in favour of different persons, he and the subsequent indorsers of each part are liable on such part as if it were a separate bill.

133. As between holders in due course of different parts of the same set he who first acquired title to his part is entitled to the other parts and the money represented by the bill.

Holder of first acquired part entitled to all.

CHAPTER XVI.

OF INTERNATIONAL LAW.

134. In the absence of a contract to the contrary, the liability of the maker or drawer of a foreign promissory note, bill of exchange or cheque is regulated in all essential matters by the law of the place where he made the instrument, and the respective liabilities of the acceptor and indorser by the law of the place where the instrument is made payable.

Law governing liability of maker, acceptor or indorser of foreign instrument.

Illustration.

A bill of exchange was drawn by *A* in California, where the rate of interest is 25 per cent., and accepted by *B*, payable in Washington, where the rate of interest is 6 per cent. The bill is indorsed in British India, and is dishonoured. An action on the bill is brought against *B*, in British India. He is liable to pay interest at the rate of 6 per cent. only; but if *A* is charged as drawer, *A* is liable to pay interest at the rate of 25 per cent.

LEG. REF.

[1]Inserted by Act XVIII of 1922, S. 2.

NOTES.

Sec. 131.—In considering the liability of a collecting bank in receiving payment on behalf of a customer of a cheque, the title to which is defective, the test of negligence is whether the transaction of paying in any given cheque coupled with circumstances antecedent and present was so out of the ordinary course that it ought to have aroused doubts in the banker's mind and caused him to make inquiry. 9 R. 585.

Secs. 134 and 137.—A suit was brought upon certain promissory notes executed by the defendant in the Nizam's Dominions. Not having been stamped, they were not admissible in evidence even on payment of a penalty under the law in force in the Nizam's Dominions. It was contended by the defendant in the suit that the documents were void and unenforceable. *Held*, the result of the provision in the foreign statute was only to make them inadmissible in evidenee in the Nizam's Courts and not void and that they could be sued upon in British India. 53 M. 968=1930 M. 1004 =59 M.L.J. 548.

135. Where a promissory note, bill of exchange or cheque is made payable in a different place from that in which it is made or indorsed, the law of the place where it is made payable determines what constitutes dishonour and what notice of dishonour is sufficient.

Law of place of payment governs dishonour.

Illustration.

A bill of exchange drawn and indorsed in British India, but accepted payable in France, is dishonoured. The indorsee causes it to be protested for such dishonour, and gives notice thereof in accordance with the law of France, though not in accordance with the rules herein contained in respect of bills which are not foreign. The notice is sufficient.

136. If a negotiable instrument is made, drawn, accepted or indorsed out of British India, but in accordance with the law of British India, the circumstance that any agreement evidenced by such instrument is invalid according to the law of the country wherein it was entered into does not invalidate any subsequent acceptance or indorsement made thereon in British India.

Instrument made, etc., out of British India, but in accordance with its law.

137. The law of any foreign country regarding promissory notes, bills of exchange and cheques shall be presumed to be the same as that of British India, unless and until the contrary is proved.

Presumption as to foreign law.

[1]CHAPTER XVII.

NOTARIES PUBLIC.

138. The [2][Central Government] may, from time to time, by notification in the Official Gazette, appoint[3] any person, by name or by virtue of his office, to be a notary public under this Act and to exercise his functions as such within any local area, and may, by like notification, remove from office any notary public appointed under this Act.

Power to appoint notaries public.

139. The [1][Central Government] may, from time to time, by notification in the Official Gazette, make rules consistent with this Act for the guidance and control of notaries public appointed under this Act, and may, by such rules[4] (among other matters), fix the fees payable to such notaries.

Power to make rules for notaries public.

SCHEDULE.

[ENACTMENTS REPEALED.]

Rep. by the Amending Act, 1891 (*XII of* 1891).

LEG. REF.

[1] Ch. XVII was added by the Act II of 1885, S. 10.

[2] Substituted by A.O., 1937, for "Local Government."

[3] For appointment of notaries public within dirtricts and sub-districts of the Madras Presidency, *see* Mad. R. and O.; *Gazette of India*, 1904, Pt. I, p. 824; in Bombay, *see* Bom. R. and O.

[4] For rules under this section, *see* Notification No. 1433, dated 30th September, 1886 *Gazette of India*, 1886, Pt. I, p. 548. On the extension of the Act to Upper Burma similar rules were framed with respect to that Province, *see* Notification No. 489, dated 11th May, 1894, *Burma Gazette*, Pt. II, p. 109, Bur. R.M.

NOTES.

Sec. 135.—Bills of exchange—*Foreign bills* dishonour, notice of—Acceptance—Custom of trade. 58 I.C. 541=46 C. 584. The mere fact that the bills were left with the drawees for more than the customary time could not bar the plaintiffs from recovering on the bills. 46 C. 584. On this section, *see also* 47 B. 493=72 I.C. 246.

Sec. 136.—*See* 22 M. 337; 4 M.H.C.R. 14

THE NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881).

Rules relating to Notaries Public.

No. 1433, dated 30th September, 1886.—In exercise of the power conferred by section 139 of the Negotiable Instruments Act XXVI of 1881 (as amended by Act II of 1885), the Governor-General in Council is pleased to make the following Rules for the guidance and control of Notaries Public appointed under that Act, and fixing the fees payable to those Notaries:—

1. Notaries Public shall, in transacting business under the Act, use the forms set forth in the Appendix to this Notification. (*Forms omitted.*)

2. Besides recording declarations of payment for honour (section 113), Notaries Public shall, following the practice existing in the Presidency-towns, also register notings and protests made by them. No particular form of register is necessary for these purposes, but Notaries Public shall keep a substantial blank book in which to enter copies of all the letters which they may write presenting bills for acceptance or payment or better security; of all bills[1] noted, or protested, or paid for honour, together with all endorsements thereon (including that made by themselves, to the effect that the bill has been noted or protested for non-acceptance or non-payment or want of better security); and of all protests made by themselves and of all declarations made by payers for honour. Notaries Public shall further, after examination of each entry in the book, affix their signature thereto, and, where demand of acceptance or payment or better security was made by a clerk, shall cause him to affix his signature also to the entry relating to the demand.

3. The book shall be known as the Notarial Register, and the pages thereof shall be numbered consecutively.

4. Every Notary Public shall permit the District Judge or such officer as the Local Government from time to time appoints in this behalf to inspect his register at such times, not oftener than twice a year, as the District Judge or officer may fix.

5. When the original instrument is an Oriental language, any noting or protest or entry in his register which has to be made in respect of the instrument, by a Notary Public may be made either in that language or in English.

6. In making presentments of bills or notes, Notaries Public shall observe the provisions of Chapter V of the Act:

Provided that it shall not be necessary for a Notary Public to allow the drawee of a bill of exchange time for deliberation as provided by section 63.

7. Every Notary Public shall use a plain circular seal bearing if he has been appointed by name, his name and the name of the local area within which he has been appointed to exercise his functions and the circumscription "Notary Public", and, if he has been appointed by virtue of his office, the name of his office and of the local area within which he has been appointed to exercise his functions and the circumscription "Notary Public".

8. Every Notary Public shall have an office at such place within the local area for which he has been appointed as may be approved in this behalf by the District Judge.

9. Notaries Public shall charge fees at the rates mentioned below, namely:—

(1) For noting an instrument—

				Rs.
If the amount of the instrument does not exceed			Rs.	1,000	2[2]
If it exceeds Rs.	1,000	but does not exceed		5,000	3
Do.	5,000	do.		20,000	5
Do.	20,000	do.		30,000	6
Do.	30,000	do.		50,000	7
Do.	50,000				8

(2) For protesting an instrument—

If the amount of the instrument does not exceed			1,000	6
If it exceeds Rs.	1,000	but does not exceed	5,000	7
Do.	5,000	do.	20,000	10
Do.	20,000	do.	30,000	11
Do.	30,000	do.	40,000	12
Do.	40,000	do.	50,000	13
Do.	50,000	do.	60,000	14
Do.	60,000	do.	70,000	15
Do.	70,000	do.	80,000	16

LEG. REF.

[1] In cases where the language of the bill is unknown to the Notary Public, and where it is impossible to find any one acquainted with the language of the bill to copy it into the register, an entry in the register of an abstract of the bill will be sufficient.

[2] In addition to the above fees, travelling allowance, at the rate of three annas a mile by rail and eight annas a mile by road, may be charged when the Notary Public is required to attend at any place more than one mile from his office.

Do.	80,000	do.	90,000	17
Do.	90,000	do.	100,000	18
Do.	1,00,000	do.		22

(3) For recording a declaration of payment of honour, Rs. 2—8
(4) Duplicate protests,—half the charge for the original.
10. These rules shall come into force on the first day of January, 1887.

THE NEGOTIABLE INSTRUMENTS (INTEREST) ACT (XXX OF 1926).

[*Repealed by Act I of* 1938.]

THE INDIAN OATHS ACT (X OF 1873).[1]

Year.	No.	Short title.	Amendments.
1873	X	The Indian Oaths Act.	Repealed in part, XII of 1873; XII of 1876; VI of 1900, S. 48; I of 1938; amended. VI of 1919, S. 2; X of 1927; XXXVX of 1934; XXXIX of 1939.

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SCHEDULE.—[*Repealed.*]

LEG. REF.

[1] For the Statement of Objects and Reasons, *see* Gazette of India, 1873, Pt. V, p. 17; for proceedings in Council, see *ibid.*, 1872, Supplement, p. 889; *ibid.*, 1873, Supplement, pp. 3, 233, 235 to 246, 281, 395 and 410; *ibid.*, 1873, Extra Supplement, pp. 1 to 8.

For civil rules of practice made by the High Court of Madras under this Act, the Code of Civil Procedure (Act XIV of 1882) and certain other Acts, for observance by subordinate Civil Courts in that presidency except the Small Cause Court at Madras, *see* Fort St. George Gazette, 1905, Supplement, p. 1.

Act X of 1873 has been declared in force in—

the Sonthal Parganas by the Sonthal Parganas Settlement Regulation (III of 1872), S. 3, as amended by the Sonthal Parganas Justice and Laws Regulation, 1899 (III of 1899), B. and O. Code, Vol. I;

the Arakan Hill District by the Arakan Hill District Laws Regulation, 1916 (I of 1916), S. 2, Bur. Code, Vol. I;

Upper Burma generally (except the Shan States) by the Burma Laws Act, 1898 (XIII of 1898), S. 4 (1) and Sch. I, Bur. Code, Vol. I;

British Baluchistan by the British Baluchistan Laws Regulation, 1913 (II of 1913), S. 3, Bal. Code:

Angul District (with an exception) by the Angul Laws Regulation, 1913 (III of 1913), S. 3, B. and O. Code, Vol. I;

Pargana of Manpur by the Manpur Laws Regulation, 1926 (II of 1926), S. 2.

It has further been declared, by notification under S. 3 (*a*) of the Scheduled Districts Act, 1874 (XIV of 1874), to be in force in the following Scheduled Districts, namely:—

The Districts of Hazaribagh, Lohardaga and Manbhum and Pargana Dhalbhum and the Kolhan in the District of Singbhum (The District of Lohardaga then included the Palamau District, separated in 1894; Lohardaga is now called the Ranchi District, *see* Calcutta Gazette, (1899, Pt. I, p. 44)—*See* Gazette or India, 1891, Pt. I, p. 504.

The North-Western Provinces Tarai—*See* Gazette of India, 1876, Pt. I, p. 505.

[*8th April*, 1873.

An Act to consolidate the law relating to judicial oaths, and for other purposes.

WHEREAS it is expedient to consolidate the law relating to judicial oaths, affirmations and declarations, and to repeal the law relating to official oaths, affirmations and declarations;

Preamble.

It is hereby enacted as follows:—

I.—Preliminary.

Short title.

1. This Act may be called THE INDIAN OATHS ACT, 1873.

Local extent.

It extends to the whole of British India, and, so far as regards [1][British subjects to all Indian States].

[*Commencement.*] *Repealed by the Repealing Act*, 1876 (*XII of* 1876).

2. [*Repeal of enactments.*] *Repealed by the Repealing Act*, 1873 (*XII of* 1873).

Saving of certain oaths and affirmations.

3. Nothing herein contained applies to proceedings before Courts Martial, or to oaths, affirmations or declarations prescribed [2][by or under any Instruction under the Royal Sign Manual of His Majesty or] by any law which [3][no legislature or authority in British India has power to repeal].

II.—Authority to administer Oaths and Affirmations.

Authority to administer oaths and affirmations.

4. The following Courts and persons are authorized to administer, by themselves or by an officer empowered by them in this behalf, oaths and affirmations in discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law:—

LEG. REF.

The Scheduled Districts in Ganjam and Vizagapatam—*See* Fort St. George Cazette, 1898, Pt. I, p. 666 and Gazette of India, 1898, Pt. I, p. 869.

It has been extended, by notification under S. 5 of the same Act, to the Scheduled District of Coorg.—*See* Gazette of India, 1876, Pt. I, p. 417.

[1] Substituted for "subjects of Her Majesty to the territories of Native Princes and States in alliance with Her Majesty" by A.O. 1937.

[2] Inserted by the Act VI of 1919, S. 2 *See* the Indian Articles of War Act (V of 1869); the Indian Volunteers Act (XX of 1869); and the Indian Marine Act (XIV of 1887).

[3] Substituted by A.O., 1937, for "under the provisions of the Indian Councils Aet, 1861, the Governor-General in Council has not power to repeal."

NOTES.

Sec. 1.—Oaths Act cannot abrogate the provisions of the Evidence Act. 1926 N. 194; 90 I.C. 378. Form of oath—When binding. *See* L.R. 5 A. 147 (Rev.). Power of Court to go into evidence when party agrees to abide by opponent's oath. 1924 A. 126. An application for an oath under the Act must be one without any conditions, such as if the Court does not hold the evidence to be sufficient then defendants should take an oath. It is not open to a party to ask the Court to adjudicate and if the Court adjudicates against them then ask the Court to start a separate proceeding under the Oaths Act. 138 I.C. 606=1932 A.L.J. 481=1932 A. 404. Evidence given under special oath is conclusive only as against the person who offers to be bound by it. 82 I.C. 359=26 Bom.L.R. 713=25 Cr.L.J. 1287=1924 Bom. 511. Oath affecting third person—Whether admissible—Failure to take oath on the day fixed—Decision by Court without calling for further evidence. 88 I.C. 448=23 A.L.J. 513. Where the complainant offers to be bound by the statement made by the accused, if he made the statement after walking several steps towards the Ganges and the accused made the statement under these conditions, the statement being made on oath was conclusive proof of the facts set forth in it. L.R. 5 A. 147 (Rev.). A party may have a perfectly true case and yet for peculiar reasons be unwilling to bind his conscience by a particular form of oath. The refusal to take the oath in such cases can be considered merely as a piece of evidence and as not proving the falsity of that party's claim. (22 B. 680, relied on). 32 P.L.R. 716. Agreement by parties to abide by the statement of the referee—Re-examination of referee proper. *See* 48 A. 276=1926 A. 266.

Sec. 4: CASE-LAW.—All Courts are authorized to administer oaths and affirmation. 34 P.R. 1916 (Cr.); 36 I.C. 171. Though the Act extends to the *territories of Native Princes and States* in alliance with His Majesty so far as regards the subject of His Majesty, the Vyara Court in the Baroda State cannot be treated as

(*a*) all Courts and persons having by law or consent of parties authority to receive evidence;

(*b*) the Commanding officer of any military [1][naval], [2][or air force] station [1][or ship] occupied by troops in the service of Her Majesty:

Provided—

(1) that the oath or affirmation be administered within the limits of the station, and

(2) that the oath or affirmation be such as a Justice of the Peace is competent to administer in British India.

III.—Persons by whom Oaths or Affirmations must be made.

Oaths or affirmations to be made by—

5. Oaths or affirmations shall be made by the following persons:—

witnesses;

(*a*) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence;

interpreters;

(*b*) interpreters of questions put to, and evidence given by, witnesses; and

jurors.

(*c*) jurors.

[3][Provided that where the witness is a child under twelve years of age, and the Court or person having authority to examine such witness is of opinion that, though he understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of section 6 shall not apply to such witness, but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth.]

Nothing herein contained shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person, or necessary to administer to the official interpreter of any Court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.

LEG. REF.

[1] Inserted by Act XXXV of 1934, S. 2 and Sch.

[2] Inserted by Act X of 1927, S. 2 and Sch.

[3] Inserted by Act XXXIX of 1939, S. 2.

NOTES.

a Court within the meanings of Ss. 4 and 14 of the Act, in relation to proceedings which were held before that Court entirely under the law of that State, and which had nothing to do with any proceedings in British India or under the law in force in British India. 47 Bom. 907=25 Bom.L.R. 772=25 Cr.L.J. 333=1924 Bom. 51.

Sec. 5: APPLICABILITY.—S. 5 was intended to apply to an accused person while he is under trial. 101 I.C. 657=54 C. 52=28 Cr.L.J. 481=1927 C. 307.

SCOPE OF SECTION.—Court deliberately abstaining from administering an oath or affirmation to the only eye-witness to the murder on the ground that she was only 6 to 7 years of age. 6 P.L.J. 147=61 I.C. 705.

EFFECT OF.—In every case where a witness is a competent witness, the provisions of Ss. 5 and 6 should be complied with. 6 P.L.J. 147. Under S. 5, the omission to take any oath or any other irregularity in the form in which it is administered does not invalidate the proceedings. The High Court declined to interfere with the order of a Municipal Commissioner who was the editor of a newspaper, who had, prior to the disposal of the case, made very strong remarks on the case in the newspaper of which he was editor, holding that there was nothing illegal in his order, though he would have exercised a wise discretion if he had refused to sit as one of the Cemmissioners in the case. 21 W.R. (Cr.) 31; 25 W.R. (Cr.) 6.

CHILD.—A child of tender years should be examined as a witness only after the Court has satisfied itself that the child is intellectually sufficiently developed to enable it to understand sufficiently what it has seen and afterwards inform the Court thereof. If the Court is satisfied that the child has such intelligence, it should comply with the provisions of S. 6. 120 I.C. 514=31 Cr.L.J. 114. *See also* 6 P.L.J. 147=61 I.C. 705. Child's evidence is not inadmissible merely because no oath was administered to it. Although S. 5 is imperative, still S. 13 governs cases of this sort. 22 I.C. 737. *See also* 47 L.W. 161=1938 M. 490=(1938) 1 M.L.J. 289; 1941 O.W.N. 1246; 1939 Rang. 402=1939 Rang.

Affirmation by natives or by persons objecting to oaths.

6. Where the witness, interpreter or juror is a Hindu or Muhammadan,

or has an objection to making an oath,

he shall, instead of making an oath, make an affirmation.

In every other case the witness, interpreter or juror shall make an oath.

IV.—Forms of Oaths and Affirmations.

Forms of oaths and affirmations.

7. All oaths and affirmations made under section 5 shall be administered according to such forms as the High Court may from time to time prescribe.

And until any such forms are prescribed by the High Court, such oaths and affirmations shall be administered according to the forms now in use.

[1][* * * *]

Power of Court to tender certain oaths.

8. If any party to, or witness in, any judicial proceeding offers to give evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of the race or persuasion to which he belongs, and not repugnant to justice or decency, and not purporting to affect any third person, the Court may, if it thinks fit, notwithstanding anything hereinbefore contained, tender such oath or affirmation to him.

LEG. REF.

[1] Expl. to S. 7 rep. by Act VI of 1900, S. 48 and Sch. II.

NOTES.

L.R. 104 ; 1937 A.M.L.J. 134 ; 1935 A.L.J. 618=1935 A. 579 ; 38 A. 49=16 Cr.L.J. 829 : 13 C.W.N. 942=36 C. 808 ; 6 P.L.J. 147 ; 2 I.C. 697 ; 11 A. 183 ; 10 A. 207 ; 16 M. 105 ; 1 Weir 823 : 30 M. 222 ; 6 Cr.L.J. 130.

Secs. 5 and 6.—If a Court thinks that a child, though of tender years, is capable of informing the Court of what it has seen or heard, it is obligatory on it to administer oath to the child as in the case of any other witness. Where the Court fails to do so on the ground that the child is not capable of realising the significance of an oath, the defect would be cured by S. 13 of the Oaths Act. 1935 A.L.J. 618=1935 A. 579. *See also* 1938 Mad. 490=(1938) 1 M.L.J. 289 ; 1939 Rang. 402.

Secs. 5, 6 and 13.—Every person who is examined as a witness shall make an oath or affirmation and there is no exception in the case of a child of tender years. Therefore if a child is adjudged to be a competent witness, an oath or affirmation must be administered to him before he is examined ; but an omission whether deliberate or inadverdent to do so does not render his evidence absolutely inadmissible. But it is for the Court to decide what weight may be given to such unsworn testimony of the child whose evidence must always be received with great caution. 1940 Rang.L.R. 104 =1939 Rang. 402. *See* now Amending Act XXXIX of 1934. Where on account of her youth, neither an oath nor affirmation was administered to a witness that does not render the evidence of such a witness inadmissible. (*See* Act XXXIX of 1939.) 1937 A.M.L.J. 134 ; 120 I.C. 514=31 Cr.L.J. 114, noted under S. 5, *supra*.

Sec. 6.—*See* 19 C. 355 ; 1939 Rang. 402= 1940 Rang.L.R. 104 ; 38 A. 49=13 A.L.J. 1072=31 I.C. 1005 ; 20 P.R. 1902 (Cr.)=47 P. L.R. 1902 ; 11 A. 183 ; 10 A. 207 ; 16 M. 105 ; 1 Weir. 823. Witnesses, interpreters and jurors, who are Hindus or Muhammadans are exempt from taking oath. As repeating of the Kalma, by a Muhammadan witness, is not in accordance with the form prescribed by Chief Court under S. 7, his refusal to do so cannot be punished under S. 173, I. P. Code. 20 P.R. 1912 (Cr.). The offence of giving false evidence may be committed, although the person giving evidence has been neither sworn nor affirmed. 19 C. 355. The provisions of S. 8-11 of the Act do not apply to criminal proceeding. 5 S.L.R. 129= 13 I.C. 215=13 Cr.L.J. 23. Nor to proceedings before a Village Police Patel under Ss. 14 and 15 of the Bombay Village Police Act, 1867. 58 I.C. 147=45 B. 96=21 Cr.L.J. 723. A person appointed as Local Commissioner for recording evidence in a case cannot administer oath to one of the parties in the circumstances referred to in Ss. 8, 9 and 10 because under the Act a Local Commissioner is not a Court. 89 P.R. 1909=3 I.C. 621. Where the oath dictated by the plaintiff was in these terms : "If I lie in saying that I did not strike the balance and had paid the debt may my wife be considered to have been divorced from me." *Held*, that the oath was repugnant to decency and affected a third person and was obviously in contravention of S. 8. 66 P.R. 1910=7 I.C. 479.

Secs. 8 and 11 : SCOPE OF.—*See* 1937 All. 701 ; 1938 Bom. 465.

Sec. 8.—*See* 13 B. 389=13 Cr.L.J. 23=13 I. C. 215 ; 5 S.L.R. 129. The word 'affect' in S. 8 should be taken to mean 'to re-act upon in any way'. An oath in the name of a third person does not necessarily 'affect' that person. An oath in the form 'I swear by my children' is not one which is prohibited by S. 8. 1937 A.M.L.J. 94. The "oath or solemn affirmation" referred to in S. 8 *et seq* is in its nature

9. If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as is mentioned in section 8, if such oath or affirmation is made by the other party to, or by any witness in, such proceeding, the Court may, if it thinks fit, ask such party or witness, or cause him to be asked, whether or not he will make the oath or affirmation.

Court may ask party or witness whether he will make oath proposed by opposite party.

Provided that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question.

NOTES.

and essence quite distinct from the oaths and affirmations contemplated by S. 5. Under S. 8 the oath or solemn affirmation may be as infinite alike in form and contents as racial custom or the dictates of any religious persuasion may sanction or require. Neither an invocation nor an oath or affirmation in the technical sense of these words is in any way an essential part of the so-called oath or solemn affirmation referred to in S. 8 of the Act. 54 I.A. 301=2 Luck. 316=1927 P.C. 165=53 M. L.J. 1 (P.C.) Under S. 8 of the Oaths Act, for an oath to be administered by the Court it is necessary that it should not be against decency and that it should not affect the rights of a third party. Where during the trial the defendant offered to abide by the oath on *talak* of one of the witnesses for the plaintiff and that witness agreed to take the oath, but the defendant resiled from the offer later on. *Held*, that divorcing one's wife was not a very respectable form of oath and militated with decency and that it had also the effect of divorcing the wife who was a third party and that in the circumstances the refusal of the defendant to give an illegal oath did not affect the case at all. 189 I.C. 687=1940 Pesh. 26. Under S. 8 the initative should come from the parties and not from the Court. The dismissal of a suit was accordingly set aside on the ground that the lower Court might have been influenced by the refusal of the plaintiff to swear touching sacred books. 139 I.C. 836 (1) =56 C.L.J. 77=36 C.W.N. 786. Form of oath —Denial before deity—Purpose of oath is not to call the attention of God to the witness, but the attention of the witness to God. 84 I.C. 314=1924 Oudh 442. All that is necessary for an oath is an appeal to the Supreme Being and thinking Him as the rewarder of truth and the avenger of falsehood. 1924 Oudh 442. *See also* 84 I.C. 314=1924 B. 511; 52 B. 295=30 Bom. L.R. 447; 26 A.L.J. 7 (P.C.).

Secs. 8 and 9.—The parties to the suit stated that they constituted a third person *J*, as a *Munhasir Ilahi* and that they would be bound by his decision but before he was examined, the plaintiff stated that he would not be bound unless a special kind of oath was administered to *J*. That request was refused, *J's* statement recorded and in accordance therewith the plaintiff's suit dismissed. *Held*, that it was open to the plaintiff to resile from the agreement before the statement of *J* was recorded without assigning any reasons, S. 8 not being applicable on the ground that the parties had (in the first instance never intended to administer any oath at all to *J*. 146 I.C. 569=1933 A.L.J. 69=1933 A. 184. *See also* 1931 A.L.J. 393. Where the *mukhtarnamah* gave the *mukhtar* authority to make a compromise, confess judgment or make a reference to arbitration. *Held*, that the powers were sufficiently wide to include authority to take action under Ss. 8, 9 and 10 of the Oaths Act. 8 O.W.N. 880=1931 Oudh 350.

Secs. 8 and 11.—Where defendant agrees to abide by plaintiff's statement in the witness box but not in the form of any special oath as is referred to in S. 8, the agreement is binding on him even apart from S. 11, and he cannot be allowed to resile from it. 164 I. C. 1116=1936 O.W.N. 841. The evidence given by a person to whom the special oath is administered at the instance of a party to a suit is, when the party offering to be bound by the special oath, is suing in a representative capacity, conclusive not only as against him but also the persons whom he is properly representing in that litigation, and the decree following the taking of the special oath would, therefore, clearly operate as *res judicata* against the representatives as well in the absence of allegation and proof that the party acting in a representative capacity has been guilty of fraud or collusion or other vitiating circumstances. 40 Bom.L.R 1005=1938 Bom. 465.

Sec. 9.—*See* 13 B. 389; 13 I.C. 215; 65 I. C. 700; 22 M. 234; 17 M.L.J. 99; 17 M.L.J. 536; 18 A. 46; 20 A. 49; 45 B. 96=22 Bom. L.R. 898; 31 A. 315=2 I.C. 201; 1 Weir. 822. The Act gives the Court a discretion to administer the oath or not and if a party after agreeing to an oath satisfies the Court that there is good ground for retracting, the Court would exercise a wise discretion in refusing to administer the oath but when a party puts forward frivolous reasons for retracting, the Court would be justified in administering the oath notwithstanding the retraction. 49 A. 388=100 I.C. 473=1927 A. 590. *See also* 1933 A.L.J. 69 =1933 A. 184; 35 C.W.N. 130. Where the plaintiff proposed one form of oath for the defendant and the defendant accepted it the plaintiff cannot insist on another form. 7 M.L.T. 197=5 I.C. 939. *See also* 1928 M. 488. Where a party agrees that he would be bound by the oath of a witness, though the other parties do not agree to be so bound, he will be bound and the case must be tried only as against the others. 27 A.L.J. 1095=118 I. C. 188 (1)=1929 A. 759 (1). Per *Guha*, *J.*—The principle that an offer can be withdrawn before it is accepted is applicable to an offer made under the Oaths Act. 35 C.W.N. 130= =132 I. C. 682=1931 C. 549; 1933 A.L.J. 69=1933 A. 184. It cannot be withdrawn after acceptance. 1933 A.L.J. 588=1933 A.

10. If such party or witness agrees to make such oath or affirmation, the Court may proceed to administer it, or, if it is of such a nature that it may be more conveniently made out of Court, the Court may issue a commission to any person to administer it, and authorise him to take the evidence of the person to be sworn or affirmed and return it to the Court.

Administration of oath if accepted.

NOTES.

463. Even if a party resiled from taking oaths, in matters to be proved by oaths, it is not equivalent of its proof. No decree can be passed under the circumstances against the resiling party. The Court then can proceed with the suit in the ordinary manner drawing inference from the defaulter's conduct and can impose upon him appropriate costs. 1912 M. W.N. 361=15 I.C. 195. (But *see* 65 I.C. 700). *See also* 27 O.C. 217. Where in a suit on a promissory note evidence had been recorded before an agreement to abide by the defendant's oath was entered into by plaintiff. *Held*, that it was competent to the Court to decide the suit on the evidence already on record. 4 L.W. 258=36 I.C. 1001. An agreement to an oath contained a provision that if owing to the challenger's failure to pay the cost of taking the oath, the same was not taken it should be treated as equivalent to the oath having been taken. *Held*, that the provision introduced a method of decision which the law did not authorize and can have no legal consequence. (31 M. 1, Ref.) 52 I.C. 619. Where the agreement was to take the oath on a particular day but the oath was taken on a later day the burden lies on the person who relies on oath to show that time was not the essence of the contract. 10 L.W. 140=52 I.C. 619. A duly authorized agent holding a special power of attorney enabling him to conduct the suit in a manner he may deem fit and in particular to withdraw or compromise, can make an offer under S. 9 to be bound by the oath, of the other party and to have the case decided in accordance therewith. 38 A. 131=32 I.C. 348. "Party" as including duly authorized representative — Pleader making offer—Client bound. *See* 114 I.C. 759=1929 Oudh 56; 8 O.W.N. 880=1931 Oudh 350. Guardian *ad litem*—Power to consent to offer of special oath—Leave of Court not obtained—Absence of fraud or negligence—Minor if bound. 34 C.W.N. 310. The expression "any party to any judicial proceeding" in S. 9 must be interpreted as including the pleader representing him in the case. If a pleader is authorised by the *Vakalatnama* in his favour to do all proper *pairvi* in the case and to represent his client in a litigation and to present all sorts of applications which may become necessary even though no express power to compromise the case on his behalf may have been conferred upon the pleader, still the pleader being a duly authorised person to represent the client would be fully entitled to bind the client by offering to abide by the special oath of the opposite party. For the purposes of S. 9 all that is necessary is that the pleader or the agent should be considered a duly authorised agent on behalf of his party to conduct the case. 1940 O.W.N. 662=1940 Oudh 314=15 Luck. 686. Where the pleader appearing for the defendants made an offer that the suit might be decided on the oath of the opposite party and it appeared that the pleader acted under instructions from one of the defendants who presumably had been authorized by the rest to take the necessary steps. *Held*, that the parties could not resile from the offer made by the pleader. 34 C.W.N. 310=129 I.C. 408=1930 C. 463. *See also* 132 I.C. 682=35 C.W.N. 130=1931 Cal. 549. If a pleader has been expressly authorized to make an offer on behalf of his client to be bound by the oath of the other party his action in that respect would be binding on the client. 137 I.C. 810 (2)=33 P.L.R. 470=1932 L. 414. The statement made by one of several defendants in pursuance of an agreement made under the Act is binding as against the parties who had offered to be so bound. Where however the rights and liabilities of the defendants in a particular case are inseparable a decree can be passed even against the defendant, who was not a party to the agreement. 8 O.W.N. 880=1931 O. 350. Where the plaintiff does not offer to be bound by the statement on oath made by the defendant then the plaintiff's application to offer a special oath to the defendant would not come within the terms of S. 9 and the Act would not apply. 138 I.C. 606=1932 A.L.J. 481=1932 A. 404. *See also* 26 A. L.J. 7 (P.C.).

Secs. 9 and 11.—Offers to be bound by oath when can be resiled from. *See* 1926 L. 240; 4 Mys.L.J. 217; 35 C.W.N. 130; 1933 A. 463. A party offering to be bound by oath of the other party is entitled to resile at any time before the statement on oath as taken and it is not necessary that the Court should be satisfied that the party had good reasons for resiling. 1935 A.L.J. 212=1935 All. 276. But *see* 55 All. 298=144 I.C. 719=1933 All. 463; 171 I.C. 12=1937 Nag. 212; 38 P.L.R. 1171 =163 I.C. 513.

Sec. 10.—*See* 13 B. 389; 5 S.L.R. 129; 13 Cr.L.J. 23=15 I.C. 215; 1 Weir 822. Unless specially authorized a vakil cannot agree to a decision, on the oath of the opposite party in a particular form. 20 M.L.J. 386=5 I.C. 514. *See also* 1940 O.W.N. 662=1940 Oudh 314. Agreement to take oath must specify form of oath and place where the oath has to be administered. 21 M.L.J. 618=9 I.C. 260. Oath should be taken in the presence of parties to be bound by it. 17 I.C. 930. Where the necessary procedure, preliminary to the agreement is not adopted the oath is not binding. The provisions of the Act must be strictly followed. 1919 M.W.N. 272=6 I.C. 604. "Oath or solemn affirmation" may be sufficiently "administered" to a witness within the meaning of S. 10 when a statement is made by him in the presence of a deity. 54 I.A. 301=2 Luck. 316=1927 P.C. 165=53 M.

Evidence conclusive as against person offering to be bound.

11. The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated.

NOTES.

L.J. 1 (P.C.). A party cannot revoke an offer to abide by the oath of another after the offer is accepted by the other side although the oath is not actually taken. 55 All. 298=144 I.C. 719=1933 A.L.J. 588=1933 A. 463; 43 P.L.R. 38=1941 Lah. 173. But *see* 153 I.C. 686=1935 A.W.R. 78=1934 A.L.J. 212=1935 All. 276. The offer by a party to a suit as to being bound by a statement on oath of his opponent, on being accepted by the latter, is in the nature of a binding contract. The person who makes the offer cannot, therefore resile from the contract. 1941 Lah. 173. Where defendant agrees to a decree being passed against him in case plaintiff takes oath in presence of six specified persons but only five of such persons are present, he is entitled to object to the administration of the oath in the absence of the sixth person. And the objection being perfectly valid one, no inferences can be drawn against the defendant. 1933 L. 452=145 I.C. 704.

Sec. 11.—The provisions of S. 11 can only be attracted after the oath has been taken in accordance with the agreement arrived at between parties as mentioned in Ss. 9 and 10. (1938) 1 M.L.J. 368=47 L.W. 453=1938 Mad. 385. Also it is necessary that the statement given by a reference should amount to evidence of the fact in dispute between the parties. 103 I.C. 348=1927 A. 676. *See* 1 Weir 822; 31 A. 315=6 A.L.J. 244=2 I.C. 201; 45 B. 96=22 Bom.L.R. 898=58 I.C. 147; 21 Cr.L.J. 723; 13 B. 389; 5 S.L.R. 129=13 Cr.L.J. 23 =13 I.C. 225; 19 A.L.J. 911; 118 P.R. 1919 =29 P.W.R. 1919=49 I.C. 1005. All that is necessary to an oath is an appeal to the Supreme Being and, thinking Him as the rewarder of truth and the avenger of falsehood. The form of oath is immaterial provided it involves in the mind of the witness the bringing to bear in the witness's mind this apprehension of punishment. 84 I.C, 314=1924 O. 442; 54 I.A. 301=53 M.L.J. 1 (P.C.). Where the party agreeing to abide by the oath of his opponent imposes fresh conditions at the time of taking the oath, the party taking the oath has the right to enforce the agreement originally entered into and if he takes the oath according to the original agreement the evidence will be conclusive against the other party. 12 M.L.T. 613=17 I.C. 339; 98 I.C. 864=1927 L. 99; 49 A. 318 =1927 A. 590. *See also* 1937 Oudh 67; 1933 All. 861; 38 P.L.R. 1171; 1937 Nag. 212. The parties to a suit can validly agree, even apart from the Act, that they will abide by the statement of a witness, including one who is a party to the suit; and they can leave the decision of all points including costs arising in the case to be made according to the statement. 146 I.C. 84=1933 A.L.J. 1127= 1933 A. 861 (F.B.). Where the plaintiff after agreeing to abide by the oath of a third person subsequently declined to abide by it, the Court has no power to dismiss the plaintiff's suit on account of the plaintiff not having taken the oath but must either proceed to administer the oath and decide the case in accordance therewith or accept the plaintiffs, refusal to abide by the oath drawing such inference from the refusal as is permissive and then proceed with the trial of the case in accordance with law. 99 I.C. 288=1927 L. 78 (1). This section only provides that as against a person who offers to be bound by the special oath, it will be conclusive proof of the matter stated. 26 Bom.L.R. 713=82 I.C. 359=1924 B. 511. Failure of defendant to take oath owing to plaintiff's absence to hear oath—Evidence when conclusive. *See* 90 I.C. 77=49 M.L.J. 379. Pre-emption—Offer by guardian of minor defendant to be bound by oath of plaintiff Extent of minor's liability. *See* 44 A. 117=64 I.C. 646=1922 A. 160=19 A.L.J. 911. *An oath is binding only on the person who offers to be bound by it.* Where in a suit only one of the plaintiffs agrees to the dismissal of the suit, in case the defendant takes the oath and the defendant does so accordingly, the dismissal is conclusive only against the plaintiff who consented. 50 P.W.R. 1918; 83 P.W.R. 1918= 45 I.C. 230. *See also* 1929 A. 759. The effect of an oath taken under the Oaths Act is merely to furnish conclusive evidence on the matter in issue and a decision on oath is *res judicata*, 36 M. 287=24 M.L.J. 321=18 I.C. 835. The fact that a case was decided on the oath of the defendant is not a sufficient ground for refusing the defendant an opportunity to prove to the satisfaction of the Court that the claim had been brought on a false document, to support an application under S. 476, Cr. P. Code. 96 I.C. 877=27 Cr.L.J. 1021=1926 A. 577. Where a decree is passed on the evidence of a witness owing to an agreement to be bound by the oath of that witness, such a decree is not a consent decree under S. 96 (3), C. P. Code. A consent decree means a decree in a suit which has been compromised. An agreement to be bound by the evidence of a witness is not an agreement to compromise. Such a decree is appealable and cannot be questioned by a separate suit. 172 I.C. 421. I.L.R. (1940) Nag. 310=1938 Nag. 64. But the agreement may amount to an adjustment of dispute under O. 23, R. 3, C. P. Code and may create an estoppel. 1937 A.L.J. 1066=171 I.C. 697=1937 A. 701. S. 11 cannot be construed as meaning that the evidence given on oath in a proceeding becomes automatically conclusive in all possible proceedings in which the subject-matter of the evidence given on oath may be involved. It can only be evidence in the proceeding in which it is actually being received. In an application under O. 21, R. 100, C. P. Code, for delivery the respondent challenged the petitioner to take a special oath, and the oath having been taken the application was allowed. The respondent then filed a suit under O. 21, R. 103, and the defendant (petitioner) pleaded that no suit would lie because of the evidence which he have on oath in the proceedings under O. 21, R. 100. *Held*, that though the suit following

12. If the party or witness refuses to make the oath or solemn affirmation referred to in section 8, he shall not be compelled to make it, but the Court shall record, as part of the proceedings, the nature of the oath or affirmation proposed, the facts that he was asked whether he would make it, and that he refused it, together with any reason which he may assign for his refusal.

Procedure in case of refusal to make oath.

V.—Miscellaneous.

13. No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever, in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.

Proceedings and evidence not invalidated by omission of oath or irregularity.

NOTES.

the order on the claim petition might be a continuation of the same proceedings for some purposes, there was an essential difference between the two; and unless it was clearly present to the minds of the parties that the evidence given on oath in the claim petition was in no manner to be challenged in or by a subsequent suit it must be held that an oath in those proceedings must relate to the claim proceedings themselves and to them alone. The burden lay on the applicant to show that the challenge was intended to have any effect upon any possible civil suit which might be filed under R. 103 of O. 21, C. P. Code. 51 L.W. 449=1940 Mad. 627=(1940) 1 M.L.J. 685.

Sec. 12.—A Court does not act irregularly or illegally in taking into consideration plaintiff's refusal to take oath the defendant agreeing to be bound by it. But no weight should be attached to plaintiff's refusal when defendant also refuses. 7 N.L.R. 50=10 I.C. 472, A mere *refusal to take a particular oath* is not sufficient for deciding the issue against the party refusing it. 32 I.C. 619. *See also* 93 I.C. 830=1926 C. 817. If a party refuses to make the oath, the Court has no power to compel him to make it. The duty of the Court is to record as part of the proceedings, the nature of the oath proposed, the facts that he was asked whether he would make it and that he refused it together with any reason which he may assign for his refusal. 9 Mys.L.J. 362. No doubt the refusal to take a special oath is conduct which the Court is entitled to consider along with other evidence in the case but the refusal should not automatically be allowed to outweigh the positive evidence which has been adduced. Where therefore the plaintiff has produced his account books which the defendant called on him to produce and he has given all the evidence necessary to support his case, his refusal to take a special oath offered by the defendant which the plaintiff considered derogatory should not be taken as reflecting on the truth of his claim. 142 I.C.137=1933 N. 52. A challenger should not be permitted to resile after his offer has been accepted by the other party unless good ground is shown to the satisfaction of the Court by the challenger. Apart from authorities, there is no principle of law on which an agreement can be allowed to be broken with impunity without any valid reason. 1938 M. W. N. 110=47 L. W. 453=1938 Mad. 385=(1938) 1 M.L.J, 368. (43 L.W. 681=1936 Mad. 406=70 M. L.J. 449 reversed.) Application of S. 12 to the case of challenger, would be an extension of the provisions of S. 12 in a manner which is not justifiable. Where the challenger who was to light the camphor in accordance with the offer made by him, has refused to perform that which he had undertaken to do, he should be taken to have waived that condition. The Court can order any Commissioner to light the camphor but should see that it is extinguished by the other party when taking the oath. (1938) 1 M.L.J. 368.

Sec. 13.—As to scope of section. *see* 1938 M.W.N. 90=(1938) 1 M.L.J. 289. Sec. 13 cures the form of the oath and even an entire omission to take the oath, but does not cure the absence of authority in the officer administering the oath. 116 I.C. 248=31 Bom.L.R. 144=30 Cr.L.J. 593=1929 B. 126. When a Judge or Magistrate has elected to take the statement of a person as evidence, he has no option but to administer either the oath or affirmation to such a person as the case may require. The proper course in such cases is ot record the questions and answers put to the witness to ascertain whether he is competent to testify and, if the Court comes to the conclusion that he is competent, an oath or affirmation should be administered. A child is generally competent, if he is old enough to understand that it ought to speak the truth, 2 L.B.R 322. *See also* 1935 A. 579. As to the effect of omission to record deposition as on solemn oath or affirmation, *see* 18 C.W.N. 1323. As to whether if the jury in a Sessions trial are not sworn, the omission is one which could be covered by S. 13. *See* 20 W.R. (Cr.) 19. Where on account of her youth, neither an oath nor affirmation was administered to a witness that does not render the evidence of such a witness inadmissible 1937 A.M.L.J. 134. *See also* 1938 Mad. 490=(1938) 1 M.L.J. 289; 1939 Rang. 402; 15 Mys.L.J. 217=42 Mys. H. C. Rep. 295.

Persons giving evidence bound to state the truth.

14. Every person giving evidence on any subject before any Court or person hereby authorized to administer oaths and affirmations shall be bound to state the truth on such subject.

15. [*Amendment of Penal Code, Ss.* 178 *and* 181.] *Repealed by Act I of* 1938.

Official oaths abolished.

16. Subject to the provisions of sections 3 and 5, no person appointed to any office shall, before entering on the execution of the duties of his office, be required to make any oath, or to make or subscribe any affirmation or declaration whatever.

SCHEDULE.

[*Repealed by the Repealing Act* (*XII of* 1873).]

OBSCENE PUBLICATIONS ACT (VIII OF 1925).

[*The whole of this Act was repealed by Act I of* 1938.]

THE OBSTRUCTIONS IN FAIRWAYS ACT (XVI OF 1881).

[Rep. in part by Act X of 1914.]

PREFATORY NOTE.—The following is the Statement of Objects and Reasons appended to the Bill:—

"The object of this Bill is to empower the Government to remove obstructions to navigation which may exist in fairways situate in seas adjacent to British India and to prohibit the creation of such obstructions for the future. The advantages of having such law have been impressed upon the Government by certain cases. In one of these a question has been raised as to the power of Government to remove the fishing stakes which are annually placed during the fine season in the sea off the port of Bombay, and which, having recently been advanced into the approach to the harbour, are now a source of serious danger to vessels frequenting that port. In another case which related to the deposit of ballast by shipmaster, at the mouth of the Rangoon river a practice, which, if permitted, might cause serious impediment and danger to the navigation of the approaches to the Port of Rangoon, the need for some other preventive powers than those which Government now possesses, has been made apparent.

There can be no doubt that it is extremely desirable that the powers of Government officers and the procedure to be followed by them, in relation to matters of this nature, should be clearly defined, and as the Indian Statute Book, as it now stands, does not deal adequately with the subject, the present Bill has been prepared. A precedent for such legislation will be found in the Imperial Statute 40 and 41 Vict., c. 16 (The Removal of Wrecks Act, 1877).

The Bill, while following generally the lines of the statute, goes beyond it in two material respects. The power to remove obstructions conferred by it is not confined, as in the statute, to the case of obstruction caused by wrecks, but extends also to fishing stakes, ballast and any other thing which may form an obstruction or danger to navigation. The other point in which the Bill goes beyond the statute is that, in addition to giving power to remove existing obstruction, it enables the Government to prevent the wilful creation of obstructions in the future. With this object the Governor-General in Council is empowered (section 7) to make rules to regulate or prohibit in any fairway the placing of fishing stakes the casting of ballast, or the doing of any other act which will, in his opinion, cause or be likely to cause danger or obstruction to navigation." (*Fort St. George Gazette*, Part III, 11th January, 1881.)

EFFECT OF SUBSEQUENT LEGISLATION.—Section 1 repealed in part by Act X of 1914.

For the *Statement of Objects and Reasons*, see *Gazette of India*, 1881, Pt. V, p. 3; for Proceedings in Council, see *ibid.*, 1881, Supplement, pp. 19 and 405.

NOTES.

Sec. 14.—As to application of the section, to child witness, *see* 76 I.C. 1037=25 Cr.L.J. 317; 1939 N.L.J. 396.

[15*th March*, 1881.

An Act to empower the Government to remove or destroy obstructions in fairways, and to prevent the creation of such obstructions.

WHEREAS, it is expedient to empower the Government to remove or destroy obstructions to navigation in fairways leading to ports in British India, and to prevent the creation of such obstructions; It is hereby enacted as follows:

Preamble.

Short title.

1. This Act may be called THE OBSTRUCTIONS IN FAIRWAYS ACT, 1881; [1][* * * *]

But nothing herein contained shall apply to vessels [2][belonging to, or hired by a contract made on behalf of, the Crown].

Central Government empowered to remove or destroy obstruction in fairway.

2. Whenever, in any fairway, leading to any port in British India, any vessel is sunk, stranded or abandoned, or any fishing stake, timber or other thing is placed or left, [2][the Central Government] may, if in its opinion such thing is, or is likely to become, an obstruction or danger to navigation,—

(*a*) cause such thing or any part thereof to be removed; or

(*b*) if such thing is of such a description or so situate that, in the opinion of the [2][Central Government], it is not worth removing, cause the same or any part thereof to be destroyed.

Central Government entitled to expenses incurred in removing obstruction.

3. Whenever anything is removed under section 2 the [3][Central Government] shall be entitled to receive a reasonable sum, having regard to all the circumstances of the case, for the expenses incurred in respect of such removal.

Dispute concerning such expenses.

Any dispute arising concerning the amount due under this section, in respect of anything so removed, shall be decided by the District Magistrate or Presidency Magistrate having jurisdiction at the place where such thing is, upon application to him for that purpose by either of the disputing parties; and such decision shall be final.

Notice of removal to be given by Central Government.

4. The [4][Central Government] shall, whenever anything is removed under section 2, publish in the Official Gazette a notification containing a description of such thing, and the time at which and the place from which the same was so removed.

Things removed may, in certain cases, be sold.

5. If, after publishing such notification, such thing is unclaimed, or

if the person claiming the same fails to pay the amount due for the said expenses and any customs-duties or other charges properly incurred by the [4][Central Government] in respect thereof.

the [4][Central Government] may sell such thing by public auction, if it is of a perishable nature, forthwith, and, if it is not of a perishable nature, at any time not less than six months after publishing such notification as aforesaid.

Proceeds how applied.

6. On realizing the proceeds of such sale, the amount due for expenses and charges as aforesaid, together with the expenses of the sale, shall be deducted therefrom, and the

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LEG. REF.

[1] Repealed by Act X of 1914.

[2] Substituted by A.O., 1937.

[3] Substituted by A.O., 1937 for 'Government.'

[4] Substituted for 'Local Government' by A.O., 1937.

NOTES

Sec. 3.—*See* Rat. 241=Cr. Rg, 8 of 1886.

surplus (if any) shall be paid to the owner of the thing sold, or if no such person appear and claim such surplus, shall be held in deposit for payment, without interest, to any person thereafter establishing his right to the same:

Provided that he makes the claim within one year from the date of the sale.

"Vessel" to include tackle, cargo, etc.

7. For the purposes of this Act, the term "vessel" shall be deemed to include also every article or thing or collection of things being or forming part of the tackle, equipment, cargo, stores or ballast of a vessel; and any proceeds arising from the sale of a vessel, and of the cargo thereof, or of any other property recovered therefrom, shall be regarded as a common fund.

Power to make rules to regulate and prohibit the placing of obstructions in fairways.

8. The Central Government may, from time to time, by notification[1] in the Official Gazette, make rules to regulate or prohibit, in any fairway leading to a port in British India, the placing of fishing stakes, the casting or throwing of ballast, rubbish or any other thing likely to give rise to a bank or shoal, or the doing of any other act which will, in [2][its] opinion, cause, or be likely to cause, obstruction or danger to navigation.

Penalty for breach of such rules.

9. Whoever is guilty of any act or omission in contravention of the rules made under section 8 may be tried for such offence in any district or presidency-town in which he is found, and shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

Compensation payable in certain cases for damage caused under this Act.

10. Whenever the maintenance or creation of an obstruction in any fairway, has become lawful by long usage or otherwise, and such obstruction is removed or destroyed[4] under section 2, or its creation is regulated or prohibited under section 8, any person having a right to maintain, or create such obstruction shall be entitled to receive from the [3][Central Government] reasonable compensation for any damage caused to him by such removal, destruction, regulation or prohibition.

Every dispute arising concerning the right to such compensation, or the amount thereof, shall be determined according to the law for the time being in force relating to like disputes in the case of land needed for public purposes and not otherwise; and for the purposes of such law the fairway from or in which such obstruction was removed or destroyed, or in which its creation was regulated or prohibited, shall be deemed to be a part of the presidency-town or district in which the port to which such fairway leads is situate.

Certain action of the Government previous to passing of this Act be deemed to have been taken hereunder.

11. Whenever any obstruction in a fairway leading to a port in British India has been removed or destroyed or whenever the creation of any such obstruction has been regulated or prohibited, by an order of the Central Government or a Provincial Government, previous to the passing of this Act, such removal, destruction, regulation or prohibition shall be deemed to have been effected under this Act.

LEG. REF.

For such notification (1) for Madras, *see* Madras R. and O; (2) for Bombay, *see* Bombay R and O.

[2] Substituted for "his" by A.O.. 1937.

[4] Substituted for 'Secretary of State for India in Council' by A.O., 1937.

NOTES.

Sec. 10.—*See* the Land Acquisition Act (I of 1894).

Saving of other powers possessed by Central Government.

12. Nothing herein contained shall be deemed to prevent the exercise by the [1][Central Government] of any other powers possessed by it in this behalf.

Application to fairways in inland waterways.

[2][13. All references in this Act to the Central Government shall, in relation to fairways in inland waterways, be construed as references to the Provincial Government concerned.]

THE OFFICIAL GAZETTES ACT (XXXI OF 1863).

N.B.—This Act has been declared to have ceased to have effect by the Government of India (Adaptation of Indian Laws) Order, 1937 and has also been expressly repealed by Act I of 1938.

THE OFFICIAL SECRETS ACT (XIX OF 1923).[3]

Year.	No.	Short title.	Amendments.
1923	XIX	The Indian Official Secrets Act, 1923.	Repealed in part. XII of 1927; see Act XXXV of 1939.

[*2nd April*, 1923.

An Act to consolidate and amend the Law in British India relating to official secrets.

WHEREAS the law in British India relating to official secrets is at present contained in two Acts of the Governor-General in Council, namely, the Indian Official Secrets Act, 1889, and the Indian Official Secrets (Amendment) Act, 1904, and one Statute of Parliament, namely, the Official Secrets Act, 1911; and

WHEREAS the Official Secrets Act, 1911, has been amended by the Official Secrets Act, 1920, which statute applies to the United Kingdom and to certain British possessions, but not to British India; and

WHEREAS it is expedient that the law relating to official secrets in British India should be consolidated and amended;

It is hereby enacted as follows:—

Short title, extent and application.

1. (1) This Act may be called THE INDIAN OFFICIAL SECRETS ACT, 1923.

(2) It extends to the whole of British India, and applies also—

(*a*) to all subjects of His Majesty and servants of the Crown within [4][any Indian State]; and

(*b*) to all Indian subjects of His Majesty without and beyond British India.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

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[1] Substituted for "Government" by A.O., 1937.

[2] Inserted by A.O., 1937.

[3] For Statement or Objects and Reasons, see *Gazette of India*, 1912, Pt. V, p. 210; for Report of Select Committee, *see ibid.*, 1923, Pt. V, p. 61

[4] Substituted by A.O., 1937.

NOTES.

Sec. 2.—*Cf.* sec. 12, 1 and 2 Geo. V, c. 28.

(1) any reference to a place belonging to His Majesty includes a place occupied by any department of the Government, whether the place is or is not actually vested in His Majesty;

[1][(1-A) Reference to a department of the Government include the departments of any Government in British India and any department of the Crown Representative, and include also the Federal Railway Authority;]

(2) expressions referring to communicating or receiving include any communicating or receiving, whether in whole or in part, and whether the sketch, plan, model, article, note, document, or information itself or the substance, effect or description thereof only be communicated or received; expressions referring to obtaining or retaining any sketch, plan, model, article, note or document, include the copying or causing to be copied of the whole or any part of any sketch, plan, model, article, note or document; and expressions referring to the communication of any sketch, plan, model, article, note or document include the transfer or transmission of the sketch, plan, model, article, note or document;

(3) "document" includes part of a document;

(4) "model" includes design, pattern and specimen;

(5) "munitions of war" includes the whole or any part of any ship, submarine, aircraft, tank or similar engine, arms and ammunition, torpedo, or mine intended or adopted for use in war, and any other article, material, or device, whether actual or proposed, intended for such use;

(6) "Office under His Majesty" includes any office or employment in or under any department of the Government or of the Government of the United Kingdom or of any British possession;

(7) "photograph" includes an undeveloped film or plate;

(8) "prohibited place" means—

(*a*) any work of defence, arsenal, naval, military, or air force establishment or station, mine, minefield camp, ship or aircraft belonging to, or occupied by or on behalf of, His Majesty, any military telegraph or telephone so belonging or occupied, any wireless or signal station or office so belonging or occupied and any factory, dockyard or other place so belonging or occupied and used for the purpose of building, repairing, making or storing any munitions of war, or any sketches, plans, models or documents relating thereto, or for the purpose of getting any metals, oil or minerals of use in time of war;

(*b*) any place not belonging to His Majesty where any munitions of war or any sketches, models, plans, or documents relating thereto, are being made, repaired, gotten or stored under contract with, or with any person on behalf of, His Majesty, or otherwise on behalf of His Majesty;

(*c*) any place belonging to or used for the purpose of His Majesty which is for the time being declared by the Central Government, by notification in the Official Gazette, to be a prohibited place for the purposes of this Act on the ground that information with respect thereto, or damage thereto, would be useful to an enemy, and to which a copy of the notification in respect thereof has been affixed in English and in the Vernacular of the locality;

(*d*) any railway, road, way or channel, or other means of communication by land or water (including any works or structures being part thereof or connected therewith), or any place used for gas, water or electricity works or

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LEG. REF.

[1]Sub-sec. (1-A) of sec. 2 inserted by A.O., 1937.

NOTES.

Sec. 2, Cl. (5).—*Cf.* Sec. 9 (2) of 10 and 11 Geo. V. c. 75.

Sec. 2, Cl. (8).—*Cf.* Sec. 3 of 1 and 2 Geo. V, c. 28.

Cl. (8) (*a*).—*Cf.* Sec. 10 of 10 and 11 Geo. V, c. 75.

Cl. (8) (*b*).—*Cf.* Sec. 3 of 1 and 2 Geo. V, c. 28.

other works for purposes of a public character, or any place where any munitions of war or any sketches, models, plans, or documents relating thereto, are being made, repaired, or stored otherwise than on behalf of His Majesty, which is for the time being declared by the Central Government, by notification in the Official Gazette to be a prohibited place for the purposes of this Act on the ground that information with respect thereto, or the destruction or obstruction thereof, or interference therewith, would be useful to an enemy, and to which a copy of the notification in respect thereof has been affixed in English and in the vernacular of the locality;

(9) "sketch" includes any photograph or other mode of representing any place or thing; and

(10) "Superintendent of Police" includes any police-officer of a like or superior rank, and any person upon whom the powers of a superintendent of Police are for the purposes of this Act conferred by the Central Government. [1][* * *].

Penalties for spying.

3. (1) If any person for any purpose prejudicial to the safety or interests of the state—

(*a*) approaches, inspects, passes over or is in the vicinity of, or enters any prohibited place; or

(*b*) makes any sketch, plan, model, or note which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy; or

(*c*) obtains, collects, records or publishes or communicates to any other person any secret official code or pass word, or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy;

he shall be punishable with imprisonment for a term which may extend, where the offence is committed in relation to any work of defence, arsenal, naval, military or air force establishment or station, mine, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of His Majesty or in relation to any secret official code, to fourteen years and in other cases to three years.

(2) On a prosecution for an offence punishable under this section with imprisonment for a term which may extend to fourteen years it shall not be necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudical to the safety or interests of the State, and, notwithstanding that no such act is proved against him, he may be convicted, if, from the circumstances of the case or his conduct or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the State; and if any sketch, plan, model, article, note, document, or information relating to or used in any prohibited place, or relating to anything in such a place, or any secret official code or pass word is made, obtained, collected, recorded, published or communicated by any person other than a person acting under lawful authority, and from the circumstances of the case or his conduct or his known character as proved it appears that his purpose was a purpose prejudicial to the safety or interests of the State, such sketch, plan, model, article, note, document or information shall be presumed to have been made, obtained, collected, recorded, published or communicated for a purpose prejudicial to the safety or interests of the State.

LEG. REF.

[1]Words "or by any Local Government" omitted by A.O., 1937.

NOTES.

Sec. 2, Cl. (9).—*Cf.* Sec. 13 of 1 and 2 Geo. V, c. 28.

Sec. 3.—*Cf.* Sec. 1 of 1 and 2 Geo. V, c. 28.

Secs. 3 and 4: CASE-LAW.—The disclosure of Government Department Examination papers may be an offence under the Indian Official Secrets Act. 1 L.B.R. 133.

Communications with foreign agents to be evidence of commission of certain offences.

4. (1) In any proceedings against a person for an offence under section 3, the fact that he has been in communication with, or attempted to communicate with, a foreign agent, whether within or without British India, shall be relevant for the purposes of proving that he has, for a purpose prejudicial to the safety or interests of the State, obtained or attempted to obtain information which is calculated to be or might be, or is intended to be, directly or indirectly, useful to an enemy.

(2) For the purpose of this section, but without prejudice to the generality of the foregoing provision,—

(*a*) a person may be presumed to have been in communication with a foreign agent if—

(i) he has, either within or without British India, visited the address of a foreign agent, or consorted or associated with a foreign agent, or

(ii) either within or without British India, the name or address of, or any other information regarding, a foreign agent has been found in his possession, or has been obtained by him from any other person;

(*b*) the expression "foreign agent" includes any person who is or has been or in respect of whom it appears that there are reasonable grounds for suspecting him of being or having been employed by a foreign power, either directly or indirectly, for the purpose of committing an act, either within or without British India, prejudicial to the safety or interests of the State, or who has or is reasonably suspected of having, either within or without British India, committed, or attempted to commit, such an act in the interests of a foreign power;

(*c*) any address, whether within or without British India, in respect of which it appears that there are reasonable grounds for suspecting it of being an address used for the receipt of communications intended for a foreign agent, or any address at which a foreign agent resides, or to which he resorts for the purpose of giving or receiving communications, or at which he carries on any business, may be presumed to be the address of a foreign agent, and communications addressed to such an address to be communications with a foreign agent.

Wrongful communication, etc., of information.

5. (1) If any person having in his possession or control any secret official code or pass word or any sketch, plan, model, article, note, document or information which relates to or is used in a prohibited place or relates to anything in such a place, or which has been made or obtained in contravention of this Act, or which has been entrusted in confidence to him by any person holding office under His Majesty, or which he has obtained or to which he has had access owing to his position as a person who holds or has held office under His Majesty or as a person who holds or has held a contract made on behalf of His Majesty, or as a person who is or has been employed under a person who holds or has held such an office or contract,—

(*a*) wilfully communicates the code or pass word, sketch, plan, model, article, note, document or information to any person other than a person to whom he is authorized to communicate it, or a Court of Justice or a person to whom it is, in the interests of the State, his duty to communicate it; or

(*b*) uses the information in his possession for the benefit of any foreign power or in any other manner prejudicial to the safety of the State; or

(*c*) retains the sketch, plan, model, article, note or document in his possession or control when he has no right to retain it, or when it is contrary to

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NOTES.

Sec. 4.—*Cf.* Sec. 2 of 10 and 11, Geo. V, c. 75.

Sec. 5.—*Cf.* Sec. 2 of 1 and 2 Geo. V, c. 28

Cl. (1) (*b*).—*Cf.* Sec. 2 (1) of 10 and 11 Geo. V, c. 45.

his duty to retain it, or wilfully fails to comply with all directions issued by lawful authority with regard to the return or disposal thereof; or

(*d*) fails to take reasonable care of, or so conducts himself as to endanger the safety of, the sketch, plan, model, article, note, document, secret official code or pass word or information;

he shall be guilty of an offence under this section.

(2) If any person voluntarily receives any secret official code or pass word or any sketch, plan, model, article, note, document or information knowing or having reasonable ground to believe, at the time when he receives it, that the code, pass word, sketch, plan, model, article, note, document, or information is communicated in contravention of this Act, he shall be guilty of an offence under this section.

(3) If any person having in his possession or control any sketch, plan, model, article, note, document or information, which relates to munitions of war, communicates it, directly or indirectly, to any foreign power or in any other manner prejudicial to the safety or interests of the State, he shall be guilty of an offence under this section.

(4) A person guilty of an offence under this section shall be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

Unauthorised use of uniforms; falsification of reports, forgery, personation, and false documents.

6. (1) If any person for the purpose of gaining admission or of assisting any other person to gain admission to a prohibited place or for any other purpose prejudicial to the safety of the State—

(*a*) uses or wears, without lawful authority, any naval, military, air force, police or other official uniform, or any uniform so nearly resembling the same as to be calculated to deceive, or falsely represents himself to be a person who is or has been entitled to use or wear any such uniform; or

(*b*) orally, or in writing in any declaration or application, or in any document signed by him or on his behalf, knowingly makes or connives at the making of any false statement or any omission; or

(*c*) forges, alters, or tampers with any passport or any naval, military, air force, police, or official pass, permit, certificate, licence, or other document of a similar character (hereinafter in this section referred to as an official document), or knowingly uses or has in his possession any such forged, altered, or irregular official document; or

(*d*) personates, or falsely represents himself to be, a person holding, or in the employment of a person holding, office under His Majesty, or to be or not to be a person to whom an official document or secret official code or pass word has been duly issued or communicated, or with intent to obtain an official document, secret official code or pass word, whether for himself or any other person knowingly makes any false statement; or

(*e*) uses, or has in his possession or under his control without the authority of the department of the Government or the authority concerned, any die, seal or stamp of or belonging to, or used, made or provided by, any department of the Government, or by any diplomatic, naval, military, or air force authority appointed by or acting under the authority of His Majesty, or any die, seal or stamp so nearly resembling any such die, seal or stamp, as to be calculated to deceive, or counterfeits any such die, seal or stamp, or knowingly uses, or has in his possession or under his control, any such counterfeited die, seal or stamp;

he shall be guilty of an offence under this section.

NOTES.

Sec. 5, Cl. (2).—*Cf.* Sec. 9 (1) of 10 and 11 Geo. V, c. 75.

Sec. 6.—*Cf.* Sec. 1 of 10 and 11 Geo. V, c. 75.

(2) If any person for any purpose prejudicial to the safety of the State—

(*a*) retains any official document, whether or not completed or issued for use, when he has no right to retain it, or when it is contrary to his duty to retain it, or wilfully fails to comply with any directions issued by any department of the Government or any person authorised by such department with regard to the return or disposal thereof; or

(*b*) allows any other person to have possession of any official document issued for his use alone, or communicates any secret official code or pass word so issued, or, without lawful authority or excuse, has in his possession any official document or secret official code or pass word issued for the use of some person other than himself, or, on obtaining possession of any official document by finding or otherwise, wilfully fails to restore it to the person or authority by whom or for whose use it was issued, or to a police officer; or

(*c*) without lawful authority or excuse, manufactures or sells, or has in his possession for sale, any such die, seal or stamp as aforesaid;

he shall be guilty of an offence under this section.

(3) A person guilty of an offence under this section shall be punishable with imprisonment for a term which may extend to two years, or with fine or with both.

(4) The provisions of sub-section (2) of section 3 shall apply, for the purpose of proving a purpose prejudicial to the safety of the State, to any prosecution for an offence under this section relating to the naval, military or air force affairs of His Majesty, or to any secret official code in like manner as they apply, for the purpose of proving a purpose prejudicial to the safety or interests of the State, to prosecutions for offences punishable under that section with imprisonment for a term which may extend to fourteen years.

Interfering with officers of the police or members of His Majesty's forces.

7. (1) No person in the vicinity of any prohibited place shall obstruct, knowingly mislead or otherwise interfere with or impede, any police-officer, or any member of His Majesty's forces engaged on guard, sentry, patrol, or other similar duty in relation to the prohibited place.

(2) If any person acts in contravention of the provisions of this section, he shall be punishable with imprisonment which may extend to two years, or with fine, or with both.

Duty of giving information as to commission of offences.

8. (1) It shall be the duty of every person to give on demand to a Superintendent of Police, or other police-officer not below the rank of Inspector, empowered by an Inspector-General or Commissioner of Police in this behalf, or to any member of His Majesty's forces engaged on guard, sentry, patrol, or other similar duty, any information in his power relating to an offence or suspected offence under section 3 or under section 3 read with section 9 and, if so required, and upon tender of his reasonable exprenses, to attend at such reasonable time and place as may be specified for the purpose of furnishing such information.

(2) If any person fails to give any such information or to attend as aforesaid, he shall be punishable with imprisonment which may extend to two years, or with fine, or with both.

Attempts, incitements, etc.

9. Any person who attempts to commit or abets the commission of an offence under this Act shall be punishable with the same punishment, and be liable to be proceeded against in the same manner as if he had committed such offence.

NOTES.

Sec. 7.—*Cf.* Sec. 3 of 10 and 11 Geo. V, c. 75.

Sec. 8.—*Cf.* Sec. 6 of 10 and 11 Geo. V, c. 75

Sec. 9.—*Cf.* Sec. 7 of 10 and 11 Ceo. V, c. 75.

Penalty for harbouring spies.

10. (1) If any person knowingly harbours any person whom he knows or has reasonable grounds for supposing to be a person who is about to commit or who has committed an offence under section 3 or under section 3 read with section 9 or knowingly permits to meet or assemble in any premises in his occupation or under his control any such persons, he shall be guilty of an offence under this section,

(2) It shall be the duty of every person having harboured any such person as aforesaid, or permitted to meet or assemble in any premises in his occupation or under his control any such persons as aforesaid, to give on demand to a Superintendent of Police or other police-officer not below the rank of Inspector empowered by an Inspector-General or Commissioner of Police in this behalf, any information in his power relating to any such person or persons, and if any person fails to give any such information, he shall be guilty of an offence under this section.

(3) A person guilty of an offence under this section shall be punishable with imprisonment for a term which may extend to one year, or with fine or with both.

Search warrants.

11. (1) If a Presidency Magistrate, Magistrate of the first class or sub-divisional Magistrate is satisfied by information on oath that there is reasonable ground for suspecting that an offence under this Act has been or is about to be committed, he may grant a search warrant authorising any Police officer named therein, not being below the rank of an officer-in-charge of a police station, to enter at any time any premises or place named in the warrant, if necessary, by force, and to search the premises or place and every person found therein, and to seize any sketch, plan, model, article, note or document, or anything of a like nature, or anything which is evidence of an offence under this Act having been or being about to be committed which he may find on the premises or place or any such person, and with regard to or in connection with which he has reasonable ground for suspecting that an offence under this Act has been or is about to be committed.

(2) Where it appears to a police-officer, not being below the rank of Superintendent, that the case is one of great emergency, and that in the interest of the State immediate action is necessary, he may by a written order under his hand give to any police-officer the like authority as may be given by the warrant of a Magistrate under this section.

(3) Where action has been taken by a police-officer under sub-section (2) he shall, as soon as may be, report such action, in a Presidency town to the Chief Presidency Magistrate, and outside such town to the District or Sub-divisional Magistrate.

Power to arrest.

12. Notwithstanding anything in the Code of Criminal Procedure, 1898,—

(*a*) an offence punishable under section 3 or under section 3 read with section 9 with imprisonment for a term which may extend to fourteen years shall be a cognizable and non-bailable offence;

(*b*) an offence under clause (*a*) of sub-section (1) of section 6 shall be a cognizable and bailable offence; and

(*c*) every other offence under this Act shall be a non-cognizable and bailable offence, in respect of which a warrant of arrest shall ordinarily issue in the first instance.

NOTES.

Sec. 10.—*Cf.* Sec. 7 of 1 and 2 Geo. V, c. 28.

Sec. 11.—*Cf.* Sec. 9 of 1 and 2 Geo. V, c. 28.

Sec. 12.—*Cf.* Sec. 6 of 1 and 2 Geo. V, c. 28.

Restriction on trial of offences.

13. (1) No Court (other than that of a Magistrate of the first class specially empowered in this behalf by the [1][appropriate Government]) which is inferior to that of a District or Presidency Magistrate shall try any offence under this Act.

(2) If any person under trial before a Magistrate for an offence under this Act at any time before a charge is framed claims to be tried by the Court of Session, the Magistrate shall, if he does not discharge the accused, commit the case for trial by that Court, notwithstanding that it is not a case exclusively triable by that Court.

(3) No Court shall take cognizance of any offence under this Act unless upon complaint made by order of, or under authority from, the [2][appropriate Government] [3][* * *] or some officer empowered by the [2][appropriate Government], in this behalf:

Provided that a person charged with such an offence may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody or on bail, notwithstanding that such complaint has not been made, but no further or other proceedings shall be taken until such complaint has been made.

(4) For the purposes of the trial of a person for an offence under this Act, the offence may be deemed to have been committed either at the place in which the same actually was committed or at any place in British India in which the offender may be found.

[4][(5) In this section, the appropriate Government means—

(*a*) in relation to any offences under section 5 not connected with a prohibited place or with a foreign power, the Provincial Government; and

(*b*) in relation to any other offence, the Central Government.]

Exclusion of public from proceedings.

14. In addition and without prejudice to any powers which a Court may possess to order the exclusion of the public from any proceedings, if, in the course of proceedings before a Court against any person for an offence under this Act or the proceedings on appeal, or in the course of the trial of a person, under this Act, application is made by the prosecution, on the ground that the publication of any evidence to be given or of any statement to be made in the course of the proceedings would be prejudicial to the safety of the State, that all or any portion of the public shall be excluded during any part of the hearing, the Court may make an order to that effect, but the passing of sentence shall in any case take place in public.

Offences by companics, etc.

15. Where the person guilty of an offence under this Act is a company or corporation, every director and officer of the company or corporation with whose knowledge and consent the offence was committed shall be guilty of the like offence.

Repeals.

16. [*Repealed by Act XII of* 1927.]

LEG. REF.

[1]Substituted for 'Local Government' by A.O., 1937.

[2]Substituted for 'Governor-General in Council' by *ibid.*

[3]Words "the Local Government" omitted by *ibid.*

[4]Sub-sec. (5) of sec. 13 inserted by A.O., 1937.

NOTES.

Sec. 13.—*Cf.* Sec. 10 (3) of 1 and 2 Geo. V, c. 28.

Sec. 13 (3).—*Cf.* Sec. 3 of 1 and 2 Geo. V, c. 28.

THE OFFICIAL TRUSTEES ACT (II OF 1913).[1]

Year.	No.	Short title.	Amendments.
1913	II	The Official Trustees Act.	Repealed in part, V of 1917; XII of 1927 Amended, X of 1914; XVIII of 1919; XXI of 1922.

PREFATORY NOTE.—The following is the Statement of Objects and Reasons annexed to the Official Trustees Bill:—"The revision of the law relating to the office of Administrator-General has necessitated revision of the law relating to the Office of Official Trustee. Many of the provisions of the existing law already apply *mutatis mutandis* to both offices, and it is considered desirable further to approximate the constitution of these offices and the conditions of their tenure as closely as possible since their duties will be normally discharged by the same person. The existing law relating to the office of the Official Trustee is contained in the Official Trustees Act, XVII of 1864, the Probate and Administration Act, II of 1890, and the Administrators-General and Official Trustees Act, V of 1902. The trend of this legislation has, as in the case of the legislation relating to the Administrator-General, been to substitute for a class of Official Trustees remunerated by commission a class of salaried officials whose liabilities are undertaken by the Government in return for fees credited to the Government. The draft Bill carries this process a stage further, and does away with the old system of Official Trustees remunerated by commission.

Under the existing law, Official Trustees are subject to the control of the Government and of the High Court. For obvious reasons such a dual control is undesirable, and bulk of the opinion consulted, including that of the Calcutta High Court, is in favour of the transfer of the whole control to the Government. The Bill gives effect to this object. Since the Indian Law relating to the Office of Official Trustee was enacted, the Public Trustees Act, 1906, 6 Edw. VII, Cap. 55, has been passed, and consideration of some of the provisions of that Statute have enabled useful amendments to be made in the Indian Law. The Bill further deals with the qualifications for appointment of Official Trustee, fees, the rule-making power and similar matters on the same lines as those explained in connection with the Bill relating to the office of Administrator-General. Opportunity has been taken to make several minor amendments in the law and to consolidate the enactments relating to the Official Trustee. The more important of the changes are explained in the table of distribution annexed to the Bill and in the Notes on Clauses annexed hereto."

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LEG. REF.

[1]For Statement of Objects and Reasons, see *Gazette of India*, 1912, Pt. V, p. 202; for Report of Select Committee, see *ibid.*, 1913, Pt. V, p. 19; and for the Proceedings in Council, see *ibid.*, 1912, Pt. VI, p. 699 and *ibid.*, 1913, Pt. IV, pp. 15 and 28.

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THE OFFICIAL TRUSTEES ACT (II OF 1913).

[*27th February*, 1913.

An Act to consolidate and amend the law constituting the office of Official Trustee.

WHEREAS it is expedient to consolidate and amend the law constituting the office of the Official Trustee; It is hereby enacted as follows:—

PART I.
PRELIMINARY.

Short title, extene and comencement.

1. (1) This Act may be called THE OFFICIAL TRUSTEES ACT, 1913.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas, and applies also to all [1][British subjects in Indian States].

(3) It shall come into force on such date[2] as the Central Government by notification in the Official Gazette may direct.

Interpretation clause.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) [1]['Government' or 'the Government' means in relation to any Province, the Provincial Government, and, in relation to British subjects in Indian States, the Central Government.]

[1][(2) "High Court" means—

(*a*) in relation to Bengal, Assam, and the Andaman and Nicobar Islands, the High Court at Calcutta;

(*b*) in relation to Madras and Coorg, the High Court at Madras;

(*c*) in relation to Bombay and British Baluchistan, the High Court at Bombay;

(*d*) in relation to the United Provinces and Ajmer-Merwara, the High Court at Allahabad;

(*e*) in relation to the Punjab and Delhi, the High Court at Lahore;

(*f*) in relation to the Provinces of Bihar and Orissa, the High Court at Patna;

(*g*) in relation to the Central Provinces and Berar, the High Court at Nagpur;

(*h*) in relation to Sind, the Judicial Commissioner's Court;

(*i*) in relation to the North-West Frontier Province, the Judicial Commissioner's Court;

LEG. REF.

[1]Substituted by A.O., 1937.

[2]The 1st April, 1914, see *Gazette of India*, 1914, Pt. I, p. 365.

NOTES.

Sec. 1.—Official Trustee is not an officer of the Court within the meaning of R. 13 of Part II of the Bombay Original Side Rules, 30 Bom.L.R. 177=1928 B. 69. Official Trustee cannot be appointed guardian of the property of a minor. (*Ibid*)

(*j*) in relation to British subjects in any Indian State, that one of the aforesaid Courts which the Central Government may from time to time notify in this behalf.]

(3) [1][*Omitted*.]

(4) "Prescribed" means prescribed by rules under his Act;

(5) [1][*Omitted*.]

(6) [1][*Omitted*.]

(7) [1][*Omitted*.]

[2][(8) 'Division' means the Province or State or group of States for which an Official Trustee has been appointed under this Act.]

Extent of jurisdiction of High Courts

3. For the purposes of this Act the High Court [3][* * *] shall have jurisdiction throughout the [4][Division].

PART II.

THE OFFICE OF OFFICIAL TRUSTEE.

Official Trustees.

4. [5][(1) The Provincial Government for each Province, and the Central Government for British subjects in any Indian State or group of Indian States, shall appoint an Official Trustee,

Provided that nothing herein contained shall be deemed to bar the appointment of the same person as Official Trustee for two or more Divisions.]

(2) No person shall be appointed to the office of Official Trustee [6][* *] who is not—

(*a*) a Barrister; or

(*b*) an Advocate, Attorney or Vakil enrolled by a High Court; or

(*c*) a person holding the office of Deputy Administrator-General at the commencement of this Act; [2][or

(*d*) in the case of a Province other than Bengal, Madras or Bombay a person already in the service of the Crown.]

[7][* * * * * *]

Appointment and powers of Deputy Official Trustee.

5. The Government may appoint a Deputy or Deputies to assist the Official Trustee; and any Deputy so appointed shall, subject to the control of the Government and the general or special orders of the Official Trustee, be competent to discharge any of the duties and exercise any of the powers of the Official Trustee, and when discharging such duties or exercising such powers, shall have the same privileges and be subject to the same liabilities as the Official Trustee.

Official Trustee to be corporation sole, to have perpetual succession and official seal, and to sue and be sued in his corporate name.

6. The Official Trustee shall be a corporation sole by the name of the Official Trustee of the [4][Division] for which he is appointed and, as such Official Trustee, shall have perpetual succession and an Official seal, and may sue and be sued in his corporate name.

LEG. REF.

[1]Paras. (3), (5), (6) and (7) omitted by A.O., 1937.

[2]Inserted by *ibid*.

[3] The words "at a Presidency-town" omitted by *ibid*.

[4]Substituted by *ibid* for "Presidency".

[5] substituted by ibid for the original sub-section.

[6] The words "of any of the said Presidencies" omitted ibid.

[7] subsection (3) omitted by ibid.

NOTES.

Secs. 4 and 8.—A testator cannot appoint the Official Trustees as executor of his will; and if so appointed, he will not be entitled, by virtue of his office and as in the name of the Official Trustee, to have a grant of probate. 7 I.C. 247.

Secs. 5 and 7.—Official trustee, position of —Suit against, for breaches in respect of a trust

PART III.

RIGHTS, POWERS, DUTIES AND LIABILITIES OF OFFICIAL TRUSTEE.

General powers and duties of Official Trustee.

7. (1) Subject to, and in accordance with, the provisions of this Act and the rules made thereunder, the Official Trustee may, if he thinks fit,—

(*a*) act as an ordinary trustee;

(*b*) be appointed trustee by a Court of competent jurisdiction:

(2) Save as hereinafter expressly provided, the Official Trustee shall have the same powers, duties and liabilities, and be entitled to the same rights and privileges and be subject to the same control and orders of the Court as any other trustee acting in the same capacity.

(3) The Official Trustee may decline, either absolutely or except on such conditions as he may impose, to accept any trust.

(4) The Official Trustee shall not accept any trust under any composition or scheme or arrangement for the benefit of creditors nor of any estate known or believed by him to be insolvent.

(5) The Official Trustee shall not, save as provided by any rules made under this Act, accept any trust for a religious purpose or any trust which involves the management or carrying on of any business.

(6) The Official Trustee shall not administer the estate of a deceased person, unless he is expressly appointed sole executor of, and sole trustee under the will of such person.

(7) The Official Trustee shall always be sole trustee, and it shall not be lawful to appoint the Official Trustee to be trustee along with any other person.

Official trustee may with consent be apyointed trustee of settlement by grantor.

8. (1) Any person intending to create a trust other than a trust which the Official Trustee is prohibited from accepting under the provisions of this Act may by the instrument creating the trust and with the consent of the Official Trustee, appoint him by that name or any other sufficient description to be the trustee of the property subject to such trust:

Provided that the consent of the Official Trustee shall be recited in the said instrument and that such instrument shall be duly executed by the Official Trustee.

(2) Upon such appointment the property subject to the trust shall vest in such Official Trustee, and shall be held by him upon the trusts declared in such instrument.

Appointment of Official Trustee as trustee by will.

9. When the Official Trustee has by that name or any other sufficient description been appointed trustee under any will, the executor of the will [1][the testator] or the administrator of his estate shall, after obtaining probate or letters of administration, notify in the prescribed manner the contents of such will to such Official Trustee; and if such Official Trustee consents to aceept the trust, then upon the execution by such executor or administrator of an instrument in writing transferring the property subject to the trust to the Official Trustee, such property shall vest in such Official Trustee, and shall be held by him upon the trusts expressed in the said will:

Provided that the consent of the Official Trustee shall be recited in the said instrument and that such instrument shall be duly executed by the Official Trustee.

LEG. REF.

[1]The words "for such testator" were substituted by Act XVIII of 1919, s. 2 and Sch. I.

NOTES.

administered by him as an ordinary trustee—Consent of Governor not necessary. *See* 1940 Rang.L.R. 273.

Sec. 8.—*See* 37 C. 387=6 I.C. 973.

Power of High Court to appoint Official Trustee to be trustee of property.

10. (1) If any property is subject to a trust other than a trust which the Official Trustee is prohibited from accepting under the provisions of this Act, and there is no trustee within the local limits of the ordinary or extraordinary original civil jurisdiction of the High Court willing or capable to act in the trust, the High Court may, on application, make an order for the appointment of the Official Trustee by that name with his consent to be the trustee of such property.

(2) Upon such order such property shall vest in the Official Trustee and shall be held by him upon the same trusts as the same was held previously to such order, and the provisions trustee or trustees (if any) shall be exempt from liability as trustees of such property save in respect of acts done before the date of such order.

(3) Nothing in this section shall be deemed to affect the provisions of the Trutees' and Mortgagees' Power Act, 1866, or the Indian Trusts Act, 1882.

Power of private trustees to appoint Official Trustee to be trustee of property.

11. (1) If any property is subject to a trust other than a trust which the Official Trustee is prohibited from accepting under the provisions of this Act, and all the trustees or the surviving or continuing trustee or trustees and all persons beneficially interested in the trust are desirous that the Official Trustee shall be appointed in the room of such trustee or trustees, it shall be lawful for such trustee or trustees, by an instrument in writing to appoint the Official Trustee by that name or any other sufficient description with his consent to be the trustee of such property:

Provided that the consent of the Official Trustee shall be recited in the said instrument and that such instrument shall be duly executed by him.

(2) Upon such appointment such property shall vest in the Official Trustee and shall be held by him upon the same trusts as the same was held previously to such appointment, and the previous trustee or trustees shall be exempt from all liability as trustees of such property save in respect of acts done before the date of such appointment.

Executor or administrator may pay to Official Trustee legacy, share, etc., of infant or lunatic.

12. (1) If any infant or lunatic is entitled to any gift, legacy or share of the assets of a deceased person, it shall be lawful for the person by whom such gift is made, or executor or administrator by whom such legacy or share is payable or transferable or any trustee of such gift, legacy or share, to transfer the same by an instrument in writing to the Official Trustee by that name or any other sufficient description with his consent:

Provided that the consent of the Official Trustee shall be recited in the said instrument and that such instrument shall be duly executed by the Official Trustee.

(2) Any money or property transferred to the Official Trustee under this section shall vest in him and shall be subject to the same provisions as are contained in this Act as to other property vested in such Official Trustee.

NOTES.

Secs. 10 and 3 (AS AMENDED BY ORDER IN COUNCIL.)—Under the Provisions of S. 3 as amended by the Order in Council, 1937, and S. 10 of the Official Trustees Act, the High Court of Calcutta has no jurisdiction to appoint the Official Trustee of Bengal as trustee over properties situate within the province of Bihar which is outside the division of Bengal. The amended Act makes it quite plain that Bihar now not only a separate province but a "Division" which must have an Official Trustee of its own. 42 C.W.N. 942.

Official trustee not to be required to give bond or security.

13. (1) No Official Trustee shall be required by any Court to enter into any bond or security on his appointment in any capacity under this Act.

(2) No Official Trustee or Deputy Official Trustee shall be required to verify otherwise than by his signature any petition presented by him under the provisions of this Act, and if the facts stated in any such petition are not within the Official Trustee's personal knowledge, the petition may be verified and subscribed by any person competent to make the verification.

Entry of Official Trustee not to constitute notice of a trust.

14. The entry of the Official Trustee by that name in the books of a company shall not constitute notice of a trust; and a company shall not be entitled to object to enter the name of the Official Trustee on its register by reason only that the Official Trustee is a corporation; and, in dealing with property, the fact that the person dealt with is the Official Trustee shall not of itself constitute notice of a trust.

Liability of Government.

15. (1) The revenues of the Government [1][* *] shall be liable to make good all sums required to discharge any liability which the Official Trustee, if he were a private trustee, would be personally liable to discharge, except when the liability is one to which neither the Official Trustee nor any of his officers has in any way contributed or which neither he nor any of his officers could by the exercise of reasonable diligence have averted, and in either of those cases the Official Trustee shall not, nor shall the revenue [2][of the Government] [3][* * *] be subject to any liability.

(2) Nothing in sub-section (1) shall be deemed to render the revenues [2][of the Government] [3][* * * *] of any official Trustee appointed under this Act liable for anything done by or under the authority of any Official Trustee before the commencement of this Act.

Notice of suit not required in certain cases.

16. Nothing in section 80 of the Code of Civil Procedure, 1908, shall apply to any suit against the Official Trustee in which no relief is claimed against him personally.

PART IV.

FEES.

Fees.

17. (1) There shall be charged in respect of the duties of the Official Trustee such fees, whether by way of percentage or otherwise, as the Government may prescribe:

Provided that in the case of a trust accepted by the Official Trustee before the commencement of this Act the fees prescribed under this section shall not exceed the fees leviable in respect of such trust under the Official Trustees Act, 1864, as subsequently amended.

(2) The fees under this section may be at different rates for different properties or classes of properties or for different duties, and shall, so far as may be, be arranged so as to produce an amount sufficient to discharge the salaries and all other expenses incidental to the working of this Act (including such sum as Government may determine to be required to insure the revenues of the Government [4][' *] against loss under this Act).

LEG. REF.

[1]The words "of India" were omitted by Act XXI of 1922, S. 3.

[2]The words "of the Government or" were nserted by *ibid.*

[3]The words "or of the Government of India" omitted by A.O., 1937.

[4]The words "of India" were omitted by Act XXI of 1922, S .

Disposal of fees.

18. (1) All expenses which might be retained or paid out of the trust fund, if the Official Trustee were a private trustee, shall be so retained or paid, and any fees leviable under this Act shall be retained or paid in like manner as and in addition to such expenses.

(2) The Official Trustee shall transfer and pay to such authority and in such manner and at such times as the Government may prescribe, all fees received by him under this Act, and the same shall be carried to the account and credit of the Government [1][* *].

PART V.

AUDIT.

Auditors to be appointed to examine Official Trustee's accounts, etc., and to report to Government.

19. (1) The accounts of the Official Trustees shall be audited at least once annually and at any other time if the Government so direct by the prescribed person and in the prescribed manner.

(2) The auditor shall examine, such accounts and shall forward to Government a statement thereof in the prescribed form, together with a report thereon and a certificate signed by him showing—

(*a*) whether the accounts contain a full and true account of everything which ought to be contained therein, and

(*b*) whether the books, which by any rules made under this Act are directed to be kept by the Official Trustee, have been duly and regularly kept, and

(*c*) whether the trust funds and securities have been duly kept and invested and deposited in the manner prescribed by this Act or any rules made thereunder;

or (as the case may be) that such accounts are deficient, or that the Official Trustee has failed to comply with this Act or the rules made thereunder in such respects as may be specified in such certificate.

Auditor's power to summon witnesses and to call for documents.

20. (1) Every auditor shall have the powers of a Civil Court under the Code of Civil Procedure, 1908,—

(*a*) to summon any person whose presence he may think necessary to attend him from time to time, and

(*b*) to examine any person, on oath to be by him tdministered, and

(*c*) to issue a commission for the examination on interrogatories or otherwise of any person, and

(*d*) to summon any person to produce any document or thing, the production of which appears to be necessary for the purposes of such audit or examination.

(2) Any person who, when summoned, refuses, or without reasonable cause neglects, to attend or to produce any document or thing or attends and refuses to be sworn, or to be examined shall be deemed to have committed an offence within the meaning of, and punishable under, section 188 of the Indian Penal Code, and the auditor shall report every case of such refusal or neglect to Government.

Cost of audit, etc., how paid.

21. The cost of and incidental to every such audit and examination shall be determined in accordance with rules made by the Government and shall be defrayed in the prescribed manner.

LEG. REF.

[1]The ords "of India" were omitted by Act XXI of 1922, S. 4.

Right of beneficiary to inspection and copies of accounts.

22. Every beneficiary under a trust which is being administered by the Official Trustee shall, subject to such conditions and restrictions as may be prescribed, be entitled, at all reasonable times, to inspect the accounts of such trust, and the report and certificate of the auditor and, on payment of the prescribed fee, to be furnished with copies thereof or extracts therefrom, and nothing in the Indian Trusts Act, 1882, shall affect the provisions of this section.

PART VI.

MISCELLANEOUS.

Transfer to Government of accumulations in the hands of Official Trustee.

23. When any moneys payable to a beneficiary under a trust have been in the hands of any Official Trustee for a period of twelve years or upwards whether before or after the commencement of this Act in consequence of the Official Trustee having been unable to trace the person entitled to receive the same, such moneys shall be transferred in the prescribed manner to the account and credit of the Government [1][* *]:

Provided that no such moneys shall be so transferred if any suit or proceeding is pending in respect thereof in any Court.

Mode of proceeding by claimant to recover money so transferred.

24. (1) If any claim is made to any money so transferred and such claim is established to the satisfaction of the prescribed authority, the Government [1][* *] shall pay to the claimant the amount in respect of which the claim is established.

(2) If such claim is not established to the satisfaction of the prescribed authority, the claimant may, without prejudice to his right to take any other proceedings for the recovery of such moneys, apply by petition to the High Court against the [2][Government] and, after taking such evidence as it thinks fit, such Court shall make such order on the petition in regard to the payment of such moneys as it thinks fit, and such order shall be binding on all parties to the proceedings:

[3][Provided that nothing in this section affects any option afforded to a claimant by section 179 of the Government of India Act, 1935.]

(3) The Court may further direct by whom all or any part of the costs of such proceedings shall be paid.

Power of High Court to make orders in respect of property vested in Official Trustee.

25. The High Court may make such orders as it thinks fit respecting any trust property vested in the Official Trustee, or in the interest or produce thereof.

Who may apply for order under Act.

26. Any order under this Act may be made, on the applicatin of any person beneficially interested in any trust property or of any trustee thereof.

Order of Court to have effect of a decree.

27. Any order made by a High Court under this Act shall have the same effect as a decree.

General powers of administeration.

28. The Official Trustee may, in addition to and not in derogation of any other powers of expenditure lawfully exercisable by him, incur expenditure—

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[1]The words "of India" were omitted by Act XXI of 1922, S. 4.

[2]Substituted by A.O., 1937 for "Secretary of state for India in Councill".

[3]Inserted by *ibid.*

NOTES.

Sec. 27 —An order made by the High Court under the Official Trustees Act has the same effect as a decree under S. 27 of that Act, and is, therefore, appealable. 42 C.W.N. 942.

(*a*) on such acts as may be necessary for the proper care and management of any property belonging to any trust administered by him; and

(*b*) with the sanction of the High Court on such religious, charitable and other objects and on such improvements as may be reasonable and proper in the case of such property.

Transfer of trust property by Official Trustee to original trustee or any other trustee.

29. (1) Nothing in this Act shall be deemed to prevent the transfer by the Official Trustee of any property vested in him to—

(*a*) the original trustee (if any); or

(*b*) any other lawfully appointed trustee; or

(*c*) any other person if the Court so directs.

(2) Upon such transfer such property shall vest in such trustee, and shall be held by him upon the same trusts as those upon which it was held prior to such transfer, and the Official Trustee shall be exempt from all liability as trustee of such property except in respect of acts done before such transfer:

Provided that, in the case of any transfer under this section, the Official Trustee shall be entitled to retain out of the property any fees leviable in accordance with the provisions of this Act.

Rules.

30. (1) The Government shall make rules for carrying into effect the objects of this Act and for regulating the proceedings of the Official Trustee in the discharge of his duties.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(*a*) the accounts to be kept by the Official Trustee and the audit and inspection thereof;

(*b*) the safe custody, and deposit of the funds and securities which come into the hands of the Official Trustee;

(*c*) the remittance of sums of money in the hands of the Official Trustee in such remittances are required;

(*d*) the statements, schedules and other documents to be submitted by the Official Trustee to Government or to any other authority and the publication of such statements, schedules or other documents;

(*e*) the realization of the cost of preparing any such statements, schedules or other documents;

[1][* * * * *]

(*f*) subject to the provisions of this Act, the fees to be paid thereunder and the collection and accounting for any fees so fixed;

(*g*) the manner in which and the person by whom the costs of and incidental to any audit under the provisions of this Act are to be determined and defrayed;

(*h*) the manner in which summonses issued under the provisions of section 20 are to be served and the payment of the expenses of any persons summoned or examined under the provisions of this Act and of any expenditure incidental to such examination;

(*i*) the acceptance by the Official Trustee of trusts for religious purposes and trusts which involve the management or carrying on of business; and

(*j*) any matter in this Act directed to be prescribed.

(3) Rules made under the provisions of this section shall be published in the Official Gazette, and shall thereupon have effect as if enacted in this Act.

LEG. REF.

[1]Clause (*ee*) which was added by Act X of 1914 repealed by Act V of 1917, S. 6 and Sch.

31. [*Division of Presidency into Provinces.*] *Rep. by the A.O.*, 1937.

Savings of provisions of Indian Registration Act 1908.

32. Nothing contained in this Act shall be deemed to affect the provisions of the Indian Registration Act, 1908.

[1][32-A. The amendments of this Act which come into force on the commencement of Part III of the Government of India Act, 1935, shall not affect any legal proceedings pending in any Court on that date or be construed as automatically transferring any property from any Official Trustee to any other Official Trustee; but nothing in this section shall be construed as preventing a transfer of any such property in accordance with any of the other provisions of this Act.]

Savings.

Repeals.

[4][33. *Repealed by Act XII* of 1927.]

THE SCHEDULE.

ENACTMENT REPEALED.

[*Repealed by the Repealing Act* (*XII of* 1927), *S.* 2 *and Sch.*]

THE PARSI MARRIAGE AND DIVORCE ACT (III OF 1936).

[*Rep. in part by Act XX of* 1937 *and amended by Act XIV of* 1940.]

[23*rd April*, 1936.

An Act to amend the law relating to marriage and divorce among Paris.

WHEREAS it is expedient to amend the law relating to marriage and divorce among Paris; It is hereby enacted as follows:—

PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called THE PARSI MARRIAGE AND DIVORCE ACT, 1936.

(2) It extends to the whole of British India and, in respect of Parsi subjects of His Majesty, to the whole of India:

Provided that the Central Government may, in respect of territories in India beyond the limits of British India, by notification in the Official Gazette direct that the provisions of this Act relating to the constitution and powers of Parsi Matrimonial Courts, and to appeals from the decisions and orders of such Courts shall apply with such modifications as may be specified in the notification.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette appoint.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "Chief Justice" includes senior Judge;

LEG. REF.

[1] Inserted by A.O., 1937.

NOTES.

Sec. 1.—The common law of England applies to the Parsis who inhabit the town and island of Bombay. The wife is entitled to pledge her husband's credit and defend herself in any action against her for dissolution of his marriage with her at his cost. The wife's solicitors must secure their costs from the husband before they apply for charging order against her property recovered or preserved in the suit by them. 12 I.C. 554=13 Bom.L.R. 920. On this section, *see also* 13 B. 302 (infant marriage among Parsis); 10 Bom.L.R. 417; 33 B. 509; 22 B. 430.

Sec. 1 (2).—The effect of S. 1 (2) is to extend the Act even to Native States in India in its application to Parsis, provided that the Parsis are subjects of His Majesty. I.L.R. (1941) B. 589=43 Bom.L.R. 569=1941 Bom. 330. The words "*Parsi subjects of His Majesty*" in S. 1 (2) refers to the political status of such subjects as opposed to their civil status. The

(2) "Court" means a Court constituted under this Act;

(3) to "desert", together with its grammatical variations and cognate expressions, means to desert the other party to a marriage without reasonable cause and without the consent, or against the will, of such party;

(4) "grievous hurt" means—

(*a*) emasculation;

(*b*) permanent privation of the sight of either eye;

(*c*) permanent privation of the hearing of either ear;

(*d*) privation of any member or joint;

(*e*) destruction or permanent impairing of the powers of any member or joint;

(*f*) permanent disfiguration of the head or face; or

(*g*) any hurt which endangers life;

(5) "husband" means a Parsi husband;

(6) "marriage" means a marriage between Parsis whether contracted before or after the commencement of this Act;

(7) a "Parsi" means a Parsi Zoroastrian;

(8) "priest" means a Parsi priest and includes Dastur and Mobed; and

(9) "wife" means a Parsi wife.

II.—MARRIAGES BETWEEN PARSIS.

Requisites to validity of Parsi marriages.

3. No marriage shall be valid if—

(*a*) the contracting parties are related to each other in any of the degrees of consanguinity or affinity set forth in Schedule I; or

(*b*) such marriage is not solemnized according to the Parsi form of ceremony called "Ashirvad" by a priest in the presence of two Parsi witnesses other than such priest; or

(*c*) in the case of any Parsi (whether such Parsi has changed his or her religion or domicile or not) who has not completed the age of twenty-one years, the consent of his or her father or guardian has not been previously given to such marriage.

Re-marriage when unlawful.

4. (1) No Parsi (whether such Parsi has changed his or her religion or domicile or not) shall contract any marriage under this Act or any other law in the lifetime of his or her wife or husband, whether a Parsi or not, except

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NOTES.

jurisdiction of the Court therefore depends upon the political status of the Parsi subject, *i.e.*, his nationality and allegiance, and not upon his domicil. A mere change of domicile does not in any way change a Parsi's nationality or his political status. 43 Bom.L.R. 569=I.L.R. (1941) Bom. 589=1941 Bom. 330.

Secs. 2 (2) and 39.—There is a distinct cleavage of functions under the Parsi Marriage and Divorce Act between the presiding Judge of the Court and the delegates who are appointed to aid him in the adjudication of cases. The word "Court" is promiscuously used throughout the Act, but it cannot be read as including the delegates in all cases. Some confusion has crept into the Act by the use of the word "Court" promiscuously, but under the cleavage of functions under the Act, the word must be read in its context in order to determine whether it includes both the Judge and the delegates or the Judge alone. All interlocutory applications, such as those under S. 39, are correctly dealt with by the Judge sitting alone, and an order passed in such applications by the Parsi Matrimonial Judge sitting alone without the delegates cannot be said to be a nullity. 40 Bom.L.R. 50=1938 Bom. 195.

Sec. 3.—*See* 22 Bom. 430. A Parsi minor who is over 18 and below 21 years of age is competent to maintain a suit for breach of promise of marriage, where the contract of marriage has been made by the minor's guardian and on the minor's behalf and for the minor's benefit. Such a contract is a perfectly valid one and is enforceable in law by the minor. The benefit to the minor need not be pecuniary or proprietary only. 39 Bom.L.R. 486=1937 Bom. 392.

Secs. 3, 6 and 8.—The entry in a register maintained according to Ss. 6 to 12 is not in itself one of the requisites for a valid marriage amongst the Parsis. 22 Bom.L.R. 913=45 B. 146. Where there is no certificate and no entry in the marriage register, any other relevant evidence is admissible to prove the marriage having taken place. 45 Bom. 146.

after his or her lawful divorce from such wife or husband or after his or her marriage with such wife or husband has lawfully been declared null and void or dissolved, and, if the marriage was contracted with such wife or husband under the Parsi Marriage and Divorce Act, 1865, or under this Act, except after a divorce, declaration or dissolution as aforesaid under either of the said Acts.

(2) Every marriage contracted contrary to the provisions of sub-section (1) shall be void.

Punishment of bigamy.

5. Every Parsi who during the lifetime of his or her wife or husband, whether a Parsi or not, contracts a marriage without having been lawfully divorced from such wife or husband, or without his or her marriage with such wife or husband having legally been declared null and void or dissolved, shall be subject to the penalties provided in sections 494 and 495 of the Indian Penal Code for the offence of marrying again during the lifetime of a husband or wife.

Certificate and registry of marriage.

6. Every marriage contracted under this Act shall, immediately on the solemnization thereof, be certified by the officiating priest in the form contained in Schedule II. The certificate shall be signed by the said priest, the contracting parties, or their fathers or guardians when they shall not have completed the age of twenty-one years, and two witnesses present at the marriage; and the said priest shall thereupon send such certificate together with a fee of two rupees to be paid by the husband to the Registrar of the place at which such marriage is solemnized. The Registrar on receipt of the certificate and fee shall enter the certificate in a register to be kept by him for that purpose and shall be entitled to retain the fee.

Appointment of Registrar.

7. For the purposes of this Act a Registrar shall be appointed. Within the local limits of the ordinary original civil jurisdiction of a High Court, the Registrar shall be appointed by the Chief Justice of such Court, and without such limits, by the Provincial Government. Every Registrar so appointed may be removed by the Chief Justice or Provincial Government appointing him.

Marriage register to be open for public inspection.

8. The register of marriages mentioned in section 6 shall, at all reasonable times, be open for inspection, and certified extracts therefrom shall, on application, be given by the Registrar on payment to him by the applicant of two rupees for each such extract. Every such register shall be evidence of the truth of the statements therein contained.

Copy of certificate to be sent to Registrar-General of Births, Deaths and Marriages.

9. Every Registrar, except the Registrar appointed by the Chief Justice of the High Court of Judicature at Bombay, shall, at such intervals as the Provincial Government by which he was appointed from time to time directs, send to the Registrar-General of Births, Deaths and Marriages for the territories administered by such Provincial Government a true copy certified by him in such form as such Provincial Government from time to time prescribes, of all certificates entered by him in the said register of marriages since the last of such intervals.

Registration of divorces.

10. When a Court passes a decree for divorce, nullity or dissolution, the Court shall send a copy of the decree for registration to the Registrar of Marriages within its jurisdiction appointed under section 7; the Registrar shall enter the same in a register to be kept by him for the purpose, and the provisions of Part II applicable to the Registrars and registers of marriages shall be applicable, so far as may be, to the Registrars and registers of divorces and decrees of nullity and dissolution.

11. Any priest knowingly and wilfully solemnizing any marriage contrary to and in violation of section 4 shall, on conviction thereof, be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two hundred rupees, or with both.

Penalty for solemnizing marriage contrary to section 4.

12. Any priest neglecting to comply with any of the requisitions affecting him contained in section 6 shall, on conviction thereof, be punished for every such offence with simple imprisonment for a term which may extend to three months, or with fine which may extend to one hundred rupees, or with both.

Penalty for priest's neglect of requirements of section 6.

13. Every other person required by section 6 to subscribe or attest the said certificate who shall wilfully omit or neglect so to do, shall, on conviction thereof, be punished for every such offence with a fine not exceeding one hundred rupees.

Penalty for omitting to subscribe and attest certificate.

14. Every person making or signing or attesting any such certificate containing a statement which is false, and which he either knows or believes to be false, shall be punished with simple imprisonment for a term which may extend to three months, or with fine which may extend to one hundred rupees, or with both; and if the act amounts to forgery as defined in the Indian Penal Code, then such person shall also be liable, on conviction thereof, to the penalties provided in section 466 of the said Code.

Penalty for making, etc., false certificate.

15. Any Registrar failing to enter the said certificate pursuant to section 6 shall be punished with simple imprisonment for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

Penalty for failing to register certificate.

16. Any person secreting, destroying, or dishonestly or fraudulently altering the said register in any part thereof, shall be punished with imprisonment of either description as defined in the Indian Penal Code for a term which may extend to two years, or if he be a Registrar, for a term which may extend to five years and shall also be liable to fine which may extend to five hundred rupees.

Penalty for secreting, destroying or altering register.

17. No marriage contracted under this Act shall be deemed to be invalid solely by reason of the fact that it was not certified under section 6, or that the certificate was not sent to the Registrar, or that the certificate was defective, irregular or incorrect.

Formal irregularity not to invalidate marriage.

III.—PARSI MATRIMONIAL COURTS.

18. For the purpose of hearing suits under this Act, a special Court shall be constituted in each of the Presidency-towns of Calcutta, Madras and Bombay, and in such other places in the territories of the several Provincial Governments as such Governments respectively shall think fit.

Constitution of Special Courts under the Act.

19. The Court so constituted in each of the Presidency-towns shall be entitled the Parsi Chief Matrimonial Court of Calcutta, Madras or Bombay as the case may be. The local limits of the jurisdiction of a Parsi Chief Matrimonial Court shall be conterminous with the local limits of the ordinary original civil jurisdiction of the High Court. The Chief Justice of the High

Parsi Chief Matrimonial Courts.

Court, or such other Judge of the same Court as the Chief Justice shall from time to time appoint, shall be the Judge of such Matrimonial Court, and, in the trial of cases under this Act, he shall be aided by seven delegates.

Parsi District Matrimonial Courts.

20. Every Court so constituted at a place other than a Presidency-town shall be entitled the Parsi District Matrimonial Court of such place. Subject to the provisions contained in section 21, the local limits of the jurisdiction of such Court shall be conterminous with the limits of the district in which it is held. The Judge of the principal Court of original civil jurisdiction at such place shall be the Judge of such Matrimonial Court, and in the trial of cases under this Act, he shall be aided by seven delegates.

Power to alter territorial jurisdiction of District Courts.

21. The Provincial Government may from time to time alter the local limits of the jurisdiction of any Parsi District Matrimonial Court, and may include within such limits any number of districts under its Government.

Certain districts to be within jurisdiction of the Chief Matrimonial Courts.

22. Any district which the Provincial Government, on account of the fewness of its Parsi inhabitants, shall deem it inexpedient to include within the jurisdiction of any District Matrimonial Court, shall be included within the jurisdiction of the Parsi Chief Matrimonial Court for the territories under such Provincial Government where there is such a Court.

Court seals.

23. A seal shall be made for every Court constituted under this Act, and all decrees and orders and copies of decrees and orders of such Court shall be sealed with such seal, which shall be kept in the custody of the presiding Judge.

Appointment of delegates.

24. (1) The Provincial Governments shall, in the Presidency-towns and districts subject to their respective Governments, respectively appoint persons to be delegates to aid in the adjudication of cases arising under this Act, after giving the local Parsis an opportunity of expressing their opinion in such manner as the respective Governments may think fit.

(2) The persons so appointed shall be Parsis, their names shall be published in the Official Gazette and their number shall, within the local limits of the ordinary original civil jurisdiction of a High Court, be not more than thirty, and in districts beyond such limits, not more than twenty.

Power to appoint new delegates.

25. The appointment of a delegate shall be for ten years; but he shall be eligible for reappointment for the like term or terms. Whenever a delegate shall die, or have completed his term of office, or be desirous of relinquishing his office, or refuse or become incapable or unfit to act, or cease to be a Parsi, or be convicted of an offence under the Indian Penal Code or other law for the time being in force, or be adjudged insolvent, then and so often the Provincial Government may appoint any person being a Parsi to be a delegate in his stead; and the name of the person so appointed shall be published in the Official Gazette.

Delegates to be deemed public servants.

26. All delegates appointed under this Act shall be considered to be public servants within the meaning of the Indian Penal Code.

NOTES.

Sec. 20.—No trial under the Act can be satisfactory in which a delegate who is to all intents and purposes a member of a jury, cannot understand the proceedings. 43 I.C. 71.

A delegate under the Act is in a similar position to a juror, and cannot be challenged in appeal. 43 I.C. 71. *See also* 1938 Bom. 195=40 Bom.L.R. 50.

Selection of delegates under sections 19 and 20 to be from those appointed under section 24.

27. The delegates selected under sections 19 and 20 to aid in the adjudication of suits under this Act, shall be taken under the orders of the presiding Judge of the Court in due rotation from the delegates appointed by the Provincial Government under section 24:

Provided that each party to the suit may, without cause assigned challenge any three of the delegates attending the Court before such delegates are selected and no delegate so challenged shall be selected.

Practitioners in Matrimonial Courts.

28. All legal practitioners entitled to practice in a High Court shall be entitled to practise in any Court constituted under this Act, and all legal practitioners entitled to practise in a District Court shall be entitled to practise in any Parsi District Matrimonial Court constituted under this Act.

Court in which suits to be brought.

29. (1) All suits instituted under this Act shall be brought in the Court within the limits of whose jurisdiction the defendant resides at the time of the institution of the suit.

(2) When the defendant shall at such time have left British India such suit shall be brought in the Court at the place where the plaintiff and defendant last resided together.

(3) In any case, whether the defendant resides in British India or not, such suit may be brought in the Court at the place where the plaintiff resides or at the place where the plaintiff and the defendant last resided together, if such Court, after recording its reasons in writing, grants leave so to do.

IV.—MATRIMONIAL SUITS.

Suits for nullity.

30. In any case in which consummation of the marriage is from natural causes impossible, such marriage may, at the instance of either party thereto, be declared to be null and void.

Suits for dissolution.

31. If a husband or wife shall have been continually absent from his or her wife or husband for the space of seven years, and shall not have been heard of as being alive within that time by those persons who would have naturally heard

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Sec. 29 (3).—The term "resides" is an elastic term and the meaning to be given to it must depend upon the circumstances of the case. It is not essential for the purpose of residence that a person should have a house of his own. If a person resides permanently at a particular place, there can be no doubt that it is his or her residence. But the residence need not necessarily be permanent. It is enough if it is *bona fide*, with an element of continuity about it, it should not be merely casual or for a temporary or passing purpose. 43 Bom.L.R. 569=I.L.R. (1941) Bom. 589=1941 Bom. 330.

Sec. 29 (3) and 47 (b).—An application under O. 13, R. 14 (*a*) of the Original Side Rules of the Madras High Court for revocation of leave granted to a Parsi wife under S. 29 (3) to present her proceedings in the Parsi Chief Matrimonial Court in Madras (High Court), would be incompetent as the remedy could be sought only by way of an appeal under S. 47 (*b*) of the Act from the order granting leave. 1942 Mad. 159=54 L.W. 668=(1941) 2 M.L.J. 935.

Sec. 30.—In March, 1882, the plaintiff and defendant, Parsis, were married according t the rites and ceremonies of their religion. On October, 1882, the plaintiff attained puberty and for 17 months from that time she lived with the defendant in his parent's house, but there was no consummation of the marriage. There was no physical defect in either plaintiff or defendant nor any unwillingness in the plaintiff to consummate the marriage; but the defendant had always entertained such hatred and disgust for the plaintiff as to result, in the opinion of the medical experts, in an incurable impotency in the defendant as regards the plaintiff. The delegates unanimously found, on the evidence, that the consummation of this marriage had from its commencement been impossible; because the defendant was from a physical cause, namely, impotency as regards the plaintiff, unable to effect consummation. They also found that there was no collusion or connivance between the parties. *Held*, on this finding, that such impotency *quoad* the plaintiff must be regarded as one of the causes going to make consummation of a marriage impossible under S. 28 of Act XV of 1865, there being nothing in the Act to suggest a contrary opinion. 16 B. 639. *See also* 17 B. 146 (150).

of him or her, had he or she been alive, the marriage of such husband or wife may, at the instance of either party thereto, be dissolved.

Grounds for divorce.

32. Any married person may sue for divorce on any one or more of the following grounds, namely:—

(*a*) that the marriage has not been consummated within one year after its solemnization owing to the wilful refusal of the defendant to consummate it;

(*b*) that the defendant at the time of the marriage was of unsound mind and has been habitually so up to the date of the suit:

Provided that divorce shall not be granted on this ground, unless the plaintiff (1) was ignorant of the fact at the time of the marriage, and (2) has filed the suit within three years from the date of the marriage;

(*c*) that the defendant was at the time of marriage pregnant by some person other than the plaintiff:

Provided that divorce shall not be granted on this ground, unless (1) the plaintiff was at the time of the marriage ignorant of the fact alleged, (2) the suit has been filed within two years of the date of marriage, and (3) marital intercourse has not taken place after the plaintiff came to know of the fact;

(*d*) that the defendant has since the marriage committed adultery or fornication or bigamy or rape or an unnatural offence:

Provided that divorce shall not be granted on this ground, if the suit has been filed more than two years after the plaintiff came to know of the fact;

(*e*) that the defendant has since the marriage voluntarily caused grievous hurt to the plaintiff or has infected the plaintiff with venereal disease or, where the defendant is the husband, has compelled the wife to submit herself to prostitution:

Provided that divorce shall not be granted on this ground if the suit has been filed more than two years (*i*) after the infliction of the grievous hurt, or (*ii*) after the plaintiff came to know of the infection, or (*iii*) after the last act of compulsory prostitution;

(*f*) that the defendant is undergoing a sentence of imprisonment for seven years or more for an offence as defined in the Indian Penal Code:

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Sec. 32 : SECOND MARRIAGE AFTER THE ACT BUT BEFORE IT CAME INTO OPERATION.—A Parsi residing in Bombay, after the passing of Act XV of 1865, but before it came into operation, contracted a second marriage, during the lifetime of his first wife, from whom he had not been divorced. and whom he, moreover, wilfully deserted for two years. On appeal from an order by the Judge of the Parsi Chief Matrimonial Court, rejecting a plaint for divorce by the first wife, on the ground that the subject-matter of the plaint did not constitute, a cause of action, under S. 30 of Act XV of 1865. *Held*, that the facts alleged in the plaint did not amount to "bigamy coupled with adultery," nor to "adultery coupled with wilful desertion," within the meaning of S. 30 of Act XV of 1865; as a second marriage contracted by a Parsi husband during the lifetime of his first wife, was not unlawful before the Act came into operation; nor did the provisions of the Act in any way affect the validity of the consequences of such a marriage. 3 Bom.H.C. R. (A.C.J.) 113. *See also* 1936 Bom. 442=60 B. 868=38 Bom.L.R. 836.

PROCEDURE.—In a suit by a husband for divorce under S. 30 of the Parsi Marriage Act, XV of 1865, the defendant, if under the age o 21 years, although more than 18, must be deemed to be a minor, and a guardian for the suit of the defendant must be appointed. 18 B. 366. *See also* 22 B. 430 (435). *See* 16 B. 136; 18 B. 366; 3 B.H.C. (A.C.) 113; 22 B. 430.

Sec. 32 (b) Proviso.—The conditions laid down in the proviso to S. 32 (*b*) are cumulative and both of them have to be fulfilled before a plaintiff can maintain a suit for divorce on the ground that the defendant at the time of the marriage was of unsound mind and has been habitually so up to the date of the suit; the plaintiff must therefore show that he was ignorant of his spouse's unsoundness of mind at the date of the marriage, and secondly, that the suit has been brought within three years, not from the date of his knowledge of his wife's unsoundness but within three years from the date of the marriage. 1938 B. 65=39 Bom.L.R. 1146.

Provided that divorce shall not be granted on this ground, unless the defendant has prior to the filing of the suit undergone at least one year's imprisonment out of the said period;

(*g*) that the defendant has deserted the plaintiff for at least three years;

(*h*) that a decree or order for judicial separation has been passed against the defendant, or an order has been passed against the defendant by a Magistrate awarding separate maintenance to the plaintiff, and the parties have not had marital intercourse for three years or more since such decree or order;

(*i*) that the defendant has failed to comply with a decree for restitution of conjugal rights for a year or more; and

(*j*) that the defendant has ceased to be a Parsi:

Provided that divorce shall not be granted on this ground if the suit has been filed more than two years after the plaintiff came to know of the fact.

Joining of co-defendant.

33. In every such suit for divorce on the ground of adultery, the plaintiff shall, unless the Court shall otherwise order, make the person with whom the adultery is alleged to have been committed a co-defendant, and in any such suit by the husband, the Court may order the adulterer to pay the whole or any part of the costs of the proceedings.

Suits for judicial separation.

34. Any married person may sue for judicial separation on any of the grounds for which such person could have filed a suit for divorce, or on the ground that the defendant has been guilty of such cruelty to him or her or their children, or has used such personal violence, or has behaved in such a way as to render it in the judgment of the Court improper to compel him or her to live with the defendant.

NOTES.

Sec. 32 (g).—A wife suing her husband for dissolution of marriage on the ground of desertion under S. 32 (*g*) have to prove (*a*) that she has been deserted by the defendant for at least three years, and (*b*) that she has been deserted without reasonable cause and without her consent or against her will. Desertion under S. 32 (*g*) read with S. 2 (3) of the Act, in its essence, is the abandonment of one spouse by the other with the intention of breaking off matrimonial relations between them, and thereby bringing the cohabitation to an end. The question of desertion cannot be decided merely by enquiring which party left the matrimonial home first. If the party who by his or her conduct brings the cohabitation to an end that is guilty of desertion. 1938 Bom. 86=39 Bom.L.R. 1141.

Sec. 32 (j).—A wife suing her husband for dissolution of marriage on the ground set forth in S. 32 (*j*) has the burden of proof on her. In order to succeed she must prove that her husband had ceased to be a Parsi Zoroastrian and that she has filed the suit within two years after she came to know of the fact that the defendant, her husband, had ceased to be a Parsi. A mere doubt or suspicion on the part of the plaintiff that the defendant had ceased to be a Parsi will not suffice. It is enough for the plaintiff to prove that her husband had ceased to be a Parsi Zoroastrian during their married lives. It is not necessary to prove that the defendant continues to be a non-Parsi till the date of the suit or for any particular period of time. It is not consequently open to the defendant in such a suit to show that he had become a Parsi Zoroastrian again, either when the suit was filed or before the hearing. 1938 Bom. 68=39 Bom.L.R. 1143.

Sec. 34.—The Bombay High Court, if can grant an order of judicial separation between a Parsi husband and wife. *See* 38 B. 615=16 Bom.L.R. 211. The Parsi Matrimonial Court has exclusive jurisdiction to entertain suits concerning matrimonial disputes among Parsis. 38 B. 615. On this section, *see also* 13 Bom.L.R. 920=12 I.C. 554. Adultery of the petitioner is a legal ground on which the Court can refuse the petition for divorce. 10 Bom.L.R. 1019. "Cruelty" in S. 34 means legal cruelty as understood in English law, namely, injury causing danger to life or limb or health, or reasonable apprehension of such injury. Such cruelty need not necessarily be physical violence. It may even consist in a course of harsh conduct pursued by the husband towards his wife or their children, and also *vice versa* by the wife; and even a single act of gross cruelty may be enough to constitute legal cruelty, if it is such as to lead to a reasonable apprehension of further acts of cruelty towards the aggrieved party. 1938 Bom. 81=39 Bom.L.R. 1138. In order to constitute a ground for judicial separation there must be not merely improper behaviour, but behaviour of such a nature as to make it improper for husband and wife to live together in future. What has to be considered is the course of conduct of the parties towards each other during their married lives

Decrees in certain suits.

35. In any suit under section 30, 31, 32 or 34, whether defended or not if the Court be satisfied that any of the grounds set forth in those sections for granting relief exist, that none of the grounds therein set forth for withholding relief exist and that—

(*a*) the act or omission set forth in the plaint has not been condoned;

(*b*) the husband and wife are not colluding together;

(*c*) the plaintiff has not connived at or been accessory to the said act or omission:

(*d*) (save where a definite period of limitation is provided by this Act) there has been no unnecessary or improper delay in instituting the suit; and

(*e*) there is no other legal ground why relief should not be granted;

then and in such case, but not otherwise, the Court shall decree such relief accordingly.

Suit for restitution of conjugal rights.

36. Where a husband shall have deserted or without lawful cause ceased to cohabit with his wife, or where a wife shall have deserted, or without lawful cause ceased to cohabit with her husband, the party so deserted or with whom cohabitation shall have so ceased may sue for the restitution of his or her conjugal rights and the Court, if satisfied of the truth of the allegations contained in the plaint, and that there is no just ground why relief should not be granted, may proceed to decree such restitution of conjugal rights accordingly.

Counter-claim by defendant for any relief.

37. In any suit under this Act, the defendant may make a counter-claim for any relief he or she may be entitled to under this Act.

No suit to be brought to enforce marriage or contract arising out of marriage when husband is under sixteen years or wife under fourteen years.

38. Notwithstanding anything hereinbefore contained no suit shall be brought in any Court to enforce any marriage or any contract connected with or arising out of any marriage, if, at the date of the institution of the suit the husband shall not have completed the age of sixteen years, or the wife shall not have completed the age of fourteen years.

Alimony *pendente lite*.

39. In any suit under this Act if the wife shall not have an independent income sufficient for her support and the necessary expenses of the suit, the Court, on the application of the wife, may order the husband to pay her monthly or weekly during the suit such sum not exceeding one fifth of her husband's net income as the Court, considering the circumstances of the parties, shall think reasonable.

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and whether the plaintiff has shown just and lawful grounds not only for living separately from his or her spouse, but for asking for a decree of the Court for judicial separation. It is not enough to say merely that it would not be possible for the parties to live happily together hereafter. The Court has to be satisfied that the causes of disagreement between the husband and wife are grave and weighty, and such as to show an absolute moral impossibility that the duties of married life can be discharged. In determining what is moral impossibility the Court should take into consideration the feelings and customs of the community to which the parties belong. I.L.R. (1938) Bom. 75=39 Bom.L.R. 1138=1938 Bom. 81.

Sec. 36.—*See* 2 Bom.L.R. 845. A decree for restitution of conjugal rights under the Act is enforceable only in the manner provided in S. 36 of the Act; such provision is in substitution of, and not in addition to, the ordinary remedies provided by the Code of Civil Procedure. 9 Bom.H.C. R. (A.C.J.) 290.

Sec. 39—S. 39 applies merely to orders pending the suit and the payments are merely payments during the suit. It does not limit or qualify the liability of the husband to the wife's solicitors. 12 I.C. 554=13 Bom.L.R. 920. The table of fees of the High Court contemplates merely party costs between the parties to a Parsi Matrimonial suit and does not relate to the rights of the wife's solicitors to recover their attorney and client's costs from the husband. 13 Bom.L.R. 920. A wife sued her husband for judicial separation in the Parsi Matrimonial Court. Alimony was granted to be paid by an order dated 11th July, 1891, which directed the

Permanent alimony.

40. (1) The Court may, if it shall think fit at the time of passing any decree under this Act or subsequently thereto on application made to it for the purpose, order that the husband shall [1][while the wife remains chaste and unmarried]—

(*a*) to the satisfaction of the Court, secure to the wife [2][* *] such gross sum or such monthly or periodical payment of money for a term not exceeding her life as, having regard to her own property, if any, her husband's ability and the conduct of the parties, shall be deemed just, and for that purpose may require a proper instrument to be executed by all necessary parties and suspend the pronouncing of its decree until such instrument shall have been duly executed, or

(*b*) make such monthly payments to the wife for her maintenance and support as the Court may think reasonable.

In case any such order shall not be obeyed by her husband, it may be enforced in the manner provided for the execution of decrees and orders under the Code of Civil Procedure, 1908, and further the husband may be sued by any person supplying the wife with necessaries during the time of such disobedience for the price of such necessaries.

(2) The Court, if satisfied that there is a change in the circumstances of either party at any time, may at the instance of either party vary, modify or rescind such order in such manner as the Court may deem just.

[3][(3) Where an order for alimony or maintenance in favour of a wife has been made either under the provisions of the Parsi Marriage and Divorce Act, 1865, or under the provisions of this Act, the Court, if satisfied that the wife has re-married or has not remained chaste, shall vary or rescind the order.]

Payment of alimony to wife or to her trustee.

41. In all cases in which the Court shall make any decree or order for alimony it may direct the same to be paid either to the wife herself, or to any trustee on her behalf to be approved by the Court, and may impose any terms or restrictions which to the Court may seem expedient, and may from time to time appoint a new trustee, if for any reason it shall appear to the Court expedient so to do.

LEG. REF,

[1]Inserted by Act XIV of 1940.

[2] The words "while she remains chaste and unmarried" were omitted by ibid.

[3] Added by ibid.

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defendant to pay alimony to her from the 15th April, 1891, "until the final decree herein be passed." On the 18th July, 1891, the suit was dismissed, and after that date the defendant ceased to pay alimony. The plaintiff obtained a rule for review of judgment, which was dischared on the 27th January, 1892, and on the 18th March, 1892, she filed an appeal against the decree dismissing the suit and against the order refusing a review. She now applied for an order directing the defendant to pay her all the arrears of alimony "*pendente lite*" from the date of filing the suit or so much as had not been paid, and that he should pay her further alimony until the final disposal of the appeal. *Held*, dismissing the application, that the words "final decree herein" contained in the order of the 11th July, 1891, by which alimony was granted, meant the decree in the suit and not in the appeal, that the Parsi Matrimonial Court constituted under Act XV of 1865 had no power to award alimony "*pendente lite*" after decree and pending appeal and that an unsuccessful wife is not entitled to claim alimony after final decree and pending appeal, nor for the period during which she is seeking review of judgment. 17 B. 146. Whether a Court where a petition for review is pending before it has a discretion to allow or continue alimony "*pendente lite*," *see* 17 B. 146. The words "during the suit" in S. 33 of Act XV of 1865 include the period up to the making of a final or absolute decree. *Ellis* v. *Ellis*, 8 P.D. 188 and *Dunn* v. *Dunn*, 13 P.D. 91, should guide the practice of the Parsi Matrimonial Court in allotment of alimony for the time following a decree *nisi*. 17 B. 146. Jurisdiction—"Court"—Application under S. 39—Jurisdiction to hear—Judge alone can hear and it is not necessary for the Judge to sit with the delegates. *See* 40 Bom.L.R. 50=1938 B. 195.

SEC. 40.—*See* I.L.R. (1938) Bom. 280=40 Bom.L.R. 195=1938 Bom. 218. Decree for dissolution of marriage—Order for alimony at fixed rate per month—Amount not secured—Absence of liberty to apply for variation of amount—Liberty to apply for variation implied—Inherent power of Court to vary for good cause—Re-marriage of wife is good ground for reduction. 60 B. 868=38 Bom.L.R. 836=1936 B. 442.

Disposal of joint property.

42. In any suit under this Act the Court may make such provisions in the final decree as it may deem just and proper with respect to property presented at or about the time of marriage which may belong jointly to both the husband and wife.

Suits may be heard with closed doors.

43. In every suit preferred under this Act, the case shall be tried with closed doors should such be the wish of either of the parties.

Validity of trial.

44. Notwithstanding anything contained in section 19 or section 20, where in the case of a trial in a Parsi Matrimonial Court not less than five delegates have attended throughout the proceedings, the trial shall not be invalid by reason of the absence during any part thereof of the other delegates.

Provisions of Civil Procedure Code to apply to suits under the Act.

45. The provisions of the Code of Civil Procedure, 1908, shall, so far as the same may be applicable, apply to proceedings in suits instituted under this Act including proceedings in execution and orders subsequent to decree.

Determination of question of law and procedure and of fact.

46. In suits under this Act all questions of law and procedure shall be determined by the presiding Judge; but the decision on the facts shall be the decision of the majority of the delegates before whom the case is tried:

Provided that, where such delegates are equally divided in opinion, the decision on the facts shall be the decision of the presiding Judge.

Appeal to High Court.

47. An appeal shall lie to the High Court from—

(*a*) the decision of any Court established under this Act, whether a Chief Matrimonial Court or District Matrimonial Court, on the ground of the decision being contrary to some law or usage having the force of law, or of a substantial error or defect in the procedure or investigation of the case which may have produced error or defect in the decision of the case upon the merits, and on no other ground; and

(*b*) the granting of leave by any such Court under sub-section (3) of section 29:

Provided that such appeal shall be instituted within three calendar months after the decision appealed from shall have been pronounced.

Liberty to parties to marry again.

48. When the time hereby limited for appealing against any decree granting a divorce or annulling or dissolving a marriage shall have expired, and no appeal shall have been presented against such decree, or when any such appeal shall have been dismissed, or when in the result of any appeal a divorce has been granted or a marriage has been declared to be annulled or

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Sec. 45: WIFE'S COSTS IN MATRIMONIAL SUITS.—Under the Common Law, the wife is entitled to pledge her husband's credit and defend herself at his cost in any action that he may file against her for dissolution of his marriage with her. It is not necessary that the wife should be successful in the proceedings. The costs of the wife payable by the husband are not limited to the amount paid into the Court or secured by the husband for that purpose. The solicitors of the wife must make all efforts to secure their costs from their real debtor, the husband, before they can be allowed to apply for a charging order against the wife's property 'recovered or preserved' in the suit through their exertion. 13 Bom.L.R. 920.

Sec. 47 (b).—*See* 54 L.W. 668=(1941) 2 M.L.J. 935 cited under S. 29 *supra*.

dissolved, but not sooner, it shall be lawful for the respective parties thereto to marry again, as if the prior marriage had been terminated by death.

V.—CHILDREN OF THE PARTIES.

Custody of children.

49. In any suit under this Act, the Court may from time to time pass such interim orders and make such provisions in the final decree as it may deem just and proper with respect to the custody, maintenance and education of the children under the age of sixteen years, the marriage of whose parents is the subject of such suit, and may, after the final decree upon application, by petition for this purpose, make, revoke, suspend or vary from time to time all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such final decree or by interim orders in case the suit for obtaining such decree were still pending.

Settlement of wife's property for benefit of children.

50. In any case in which the Court shall pronounce a decree of divorce or judicial separation for adultery of the wife, if it shall be made to appear to the Court that the wife is entitled to any property either in possession or reversion, the Court may order such settlement as it shall think reasonable to be made of any part of such property, not exceeding one half thereof, for the benefit of the children of the marriage or any of them.

VI.—MISCELLANEOUS.

Superintendence of High Court.

51. The High Court shall have superintendence over all Courts constituted under this Act subject to its appellate jurisdiction in the same manner as it has over other Courts under section 107 of the Government of India Act, and all the provisions of that section shall apply to such Courts.

Applicability of provisions of the Act.

52. (1) The provisions of this Act shall apply to all suits to which the same are applicable whether the circumstances relied on occurred before or after the passing of this Act, and whether any decree or order referred to was passed under this Act or under the law in force before the passing of this Act, and where any proceedings are pending in any Court at the time of the commencement of this Act, the Court shall allow such amendment of the pleadings as may be necessary as the result of the coming into operation of this Act.

(2) A Parsi who has contracted a marriage under the Parsi Marriage and Divorce Act, 1865, or under this Act, even though such Parsi may change his or her religion or domicile, so long as his or her wife or husband is alive and so long as such Parsi has not been lawfully divorced from such wife or husband or such marriage has not lawfully been declared null and void or dissolved under the decree of a competent Court under either of the said Acts, shall remain bound by the provisions of this Act.

53. [*Repeal.*] *Rep. by the Repealing and Amending Act (XX of 1937). S. 3 and Sch.* II.

NOTES.

Sec. 52.—The relief by way of declaration of nullity of marriage on the ground of unsoundness of mind which was available under S. 27 of Act XV of 1865 has been abrogated and done away with under the new Act of 1936, which only gives a right to have the marriage dissolved on the ground of unsoundness of mind provided the suit is brought within three years of the marriage. In view of S. 52 of the new Act, the new Act has to be applied to a suit brought after the new Act, though the circumtances relied on by the plaintiff for relief in the suit actually occurred before the passing of the new Act. 1938 Bom. 65=39 Bom.L.R. 1146.

SCHEDULE I.

(*See* Section 3.)

Table of prohibited degrees of consanguinity and affinity.

A man shall not marry his—

1. Paternal grand-father's mother.
2. Paternal grand-mother's mother.
3. Maternal grand-father's mother.
4. Maternal grand-mother's mother.
5. Paternal grand-mother.
6. Paternal grand-father's wife.
7. Maternal grand-mother.
8. Maternal grand-father's wife.
9. Mother or step-mother.
10. Father's sister or step-sister.
11. Mother's sister or step-sister.
12. Sister or step-sister.
13. Brother's daughter or step-brother's daughter, or any direct lineal descendant of a brother or step-brother.
14. Sister's daughter or step-sister's daughter, or any direct lineal descendant of a sister or step-sister.
15. Daughter or step-daughter, or any direct lineal descendant of either.
16. Son's daughter or step-son's daughter, or any direct lineal descendant of a son or step-son.
17. Wife of son or step-son, or of any direct lineal descendant of a son or step-son.
18. Wife of daughter's son or of step-daughter's son, or of any direct lineal descendant of a daughter or step-daughter.
19. Mother of daughter's husband.
20. Mother of son's wife.
21. Mother of wife's paternal grand-father.
22. Mother of wife's paternal grand-mother.
23. Mother of wife's maternal grand-father.
24. Mother of wife's maternal grand-mother
25. Wife's paternal grand-mother.
26. Wife's maternal grand-mother.
27. Wife's mother or step-mother.
28. Wife's father's sister.
29. Wife's mother's sister.
30. Father's brother's wife.
31. Mother's brother's wife.
32. Brother's son's wife.
33. Sister's son's wife.

A woman shall not marry her—

1. Paternal grand-father's father.
2. Paternal grand-mother's father.
3. Maternal grand-father's father.
4. Maternal grand-mother's father.
5. Paternal grand-father.
6. Paternal grand-mother's husband.
7. Maternal grand-father.
8. Maternal grand-mother's husband.
9. Father or step-father.
10. Father's brother or step-brother.
11. Mother's brother or step-brother.
12. Brother or step-brother.
13. Brother's son or step-brother's son, or any direct lineal descendant of a brother or step-brother.
14. Sister's son or step-sister's son, or any direct lineal descendant of a sister or step-sister.
15. Son or step-son, or any direct lineal descendant of either.
16. Daughter's son or step-daughter's son, or any direct lineal descendant of daughter or step-daughter.
17. Husband of daughter or of step-daughter, or of any direct lineal descendant of a daughter or step-daughter.
18. Husband of son's daughter or of step-son's daughter, or of any direct lineal descendant of a son or step-son.
19. Father of daughter's husband.
20. Father of son's wife.

21. Father of husband's paternal grand-father.
22. Father of husband's paternal grand-mother.
23. Father of husband's maternal grand-father.
24. Father of husband's maternal grand-mother.
25. Husband's paternal grand-father.
26. Husband's maternal grand-father.
27. Husband's father or step-father.
28. Brother of husband's father.
29. Brother of husband's mother.
30. Husband's brother's son, or his direct lineal descendant.
31. Husband's sister's son, or his direct lineal descendant.
32. Brother's daughter's husband.
33. Sister's daughter's husband.

NOTE.—In the above table the words "brother" and "sister" denote brother and sister of the whole as well as half blood. Relationship by step means relationship by marriages.

SCHEDULE II.

(*See* Section 6.)

Certificate of Marriage.

	Date and place of marriage.
	Names of the husband and wife.
	Condition at the time of marriage.
	Rank or profession.
	Age.
	Residence.
	Names of the fathers or guardians.
	Rank or profession.
	Signature of the officiating priest.
	Signatures of the contracting parties.
	Signatures of the fathers or guardians of the contracting parties under 21 years of age.
	Signatures of witnesses.

THE PARTITION ACT (IV OF 1893).

Year.	No.	Short title.	Amendments.
1893	IV	Partition Act.	Repealed in part, X of 1914, Am., Act XIII of 1898.

PARTITION BILL.—The Hon'ble Dr. Rashbehary Ghose moved for leave to introduce a Bill to amend the Law relating to partition. He said:—"I promise to state briefly the present condition of the law on the subject, the alteration it is proposed to introduce, and

the grounds on which such alterations would seem to be desirable. In this country, where coparcenary is one of the commonest modes of holding property, the proper method of effecting a partition must always be a question of considerable importance. But if we except the different local laws concerned with the division of revenue-paying estates, the only statutory enactment on the subject is to be found in section 396 of the C.P. Code. Under this section which embodies the practice of the Eglish Court of Chancery prior to the Partition Act of 1868, a commission is issued by the Court to certain persons; the canonical number is three, who are directed in the first instance to ascertain and inspect the property and to divide it into requisite number of shares, with authority in some cases to make payments in money by way of equality of partition. The next duty of the Commissioners is to prepare a report, or, if they cannot agree, separate reports which are, however, liable to be quashed by the Court, when a new commission is issued in the same terms and with possibly the same result. In England this cumbrous, dilatory and expensive procedure has been replaced, in most cases by statute by the much simpler method of a sale of the property and a division of the proceeds. Under the old Chancery practice, which has been reproduced in our Code, no amount of inconvenience or practical difficulty, however great, could prevail against a claim for partition. I will here give only one illustration. In the well-known case of *Turner* v. *Morgan* reported not in the pages of Dickens but in Vesey, where a house had to be divided between two persons, and one of the parties insisted upon a partition by metes and bounds, the Lord Chancellor said that out of mercy to the parties he would let the case stand over, as the worst thing for the parties would be a decree for partition and his Lordship suggested a reference as to the value and to which party the option of buying or selling should be given. The suggestion was not accepted, and when the commissioners allotted to one of the parties the whole stack of chimneys, all the fire places, the only stair case and all the conveniences in the yard, the Lord Chancellor declined to interfere because he did not know how to make a better partition. The well-known Greek saying that the half is better than the whole points a moral which I am afraid is too often lost sight of by suitors. In India cases like *Turner* v. *Morgan* are, as might be expected, of frequent occurrence, and as observed by Babu Amrito Lal Chatterjee, a Subordinate Judge of mature experience, one perverse member of a family may by his obstinacy practically ruin the whole property. The learned Judge mentions what he calls a typical case of its kind and adds, such cases though not very common, are not very rare in the country." Mr. Neill, the Judicial Commissioner of the Central Provinces, also speaks of the extreme difficulty of partitioning some kinds of property under the present law, and points out that partition is not, unfrequently, made the occasion of annoyance by ill-conditioned coparceners. Cases, adds Mr. Neill, have remained pending for years simply on account of the difficulty of making a partition under the present state of the law. Other learned Judges have also expressed similar opinions, and if some Judges have been more fortunate, it is due probably to mere accident if not to the occasional display of a rigour beyond the reach of law. I trust I have said enough to show that it cannot be affirmed that no amendment of the law is called for as a state of things in which a judicial deadlock, so to speak is possible can never be viewed with indifference by the Legislature. I may add that the question of amending the present law has been mooted from time to time and a mass of valuable opinion, not the less valuable on account of the divergence of views which the communications disclose, has been collected by Government and through the courtesy of the Honourable Member in charge of the Home Department placed at my disposal. In England as I have already pointed out, the old procedure has been, in a very large measure, rendered obsolete by legislation. In this country owing to the division and sub-division of landed property which is constantly taking place under the Hindu and Muhammadan Laws of Inheritance, the evil from one point of view is undoubtedly much greater, but the strong attachment of my countrymen to landed property, especially when it is ancestral, should make us extremely cautious in replacing in any particular case the usual remedy of an equal partition by a sale of the property and a division of the proceeds. Whether the sentiment which animates my countrymen is economically wise or not, I need not pause here to discuss. I will only say that man does not live by political economy alone. There are currents of thought and feeling deeper than any ever sounded by the economist's plummet. Speaking for myself, and as a Hindu, I am bound to say that I fully sympathise with the sentiment which attaches us to our landed possessions and should be sorry to see it disappear. It is a healthy sentiment and furnishes one of the best securities for the maintenance of laws. We cannot therefore proceed too varily and accordingly the power with which it is proposed to invest the Court is only given subject to very stringent conditions, and only to the extent necessary to meet an acknowledged evil. These conditions are, (1) that the property cannot conveniently be divided; (2) that it would be more beneficial for parties that it should be sold; (3) that at least one half of the shareholders must concur in the sale. But in order to prevent the possibility of a request for sale being made on inadequate grounds or from improper motives, provision is made for the compulsory transfer of their shares by the parties who desire a sale to the other shareholders at a valuation to be made by the Court. But even when all these conditions exist, a large measure of discretion is left to the Court which I trust will never be crystallised into a cluster of right rules.

The result therefore is that, although the Court would be wholly unable to sell the property in the absence of any of the conditions imposed on the power, it may refuse to do so notwithstanding the existence, of all these conditions, if in the exercise of a sound discretion it is of opinion that no sale should take place in any particular case. I venture to think that with these safeguards, the measure while meeting an acknowledged evil cannot fairly be charged with introducing any serious innovation or with trenching in any degree on the rights of persons holding property in common. The question is one really of procedure, and the present Bill will merely affect the mode of relief and nothing else. Indeed even under the present practice when the Court gives compensation in money by way of equality of partition, it really make a transfer of a part of the property, although the transaction is disguised under a slightly different name. The present Bill is only an extension of this practice to some very exceptional cases in which, in the absence of such law. the common property might be destroyed or rendered comparatively valueless. I ought to add that it is a great satisfaction to me to find that the fathers of Hindu law, who shaped out and elaborated our jurisprudence, anticipated by several centuries the improvements only recently grafted on the old Chancery practice in England. Speaking of indivisible property—a class in which Shankha and Likhita place dwelling-houses, Vrihaspati declares:—"They (the sages) by whom it is ordained that clothes and the like are not liable to partition have not decided (as to what should be done with respect to such things). The estate of opulent men consisting of vehicles and ornaments if held in common (by his heirs) would be enjoyed, for it cannot be allotted to any one (the co-heirs). Therefore it must be divided in an equitable manner; else it would be useless. An equitable partition is made by distribution of the price after the sale of clothes and ornaments, by distribution of a written debt after recovery, by exchanging the dressed food with an equal allotment of undressed grain by drawing water of a single well or pond for use according to need." Digest V, 366; Vivada Ratnakara, Asiatic Society's Sanskrit edition, 505. The practice of giving money compensation in certain cases is also, I am glad to find, recognized in Muhammadan Law (Hedaya-Bk. 39, Ch. 3). "I should add that when the Court finds it necessary to direct a sale of the property the co-sharers will not only be at liberty to bid but a right in the nature of pre-emption has been conceded to them." The only other section of the Bill to which it is necessary to call attention is section 4, which compels a stranger who has brought a share of dwelling-house belonging to an undivided family to transfer it to the members of the family if they undertake to buy it upon a valuation to be made by the Court. To those who are familiar with the habits, usages and feelings of my countrymen, I need hardly say that the intrusion of a stranger into the family dwelling-house is regarded as nothing short of a calamity. The mischief has been remedied to a certain extent by section 44, paragraph 2 of the Transfer of Property Act, an enactment, which recognizes and if I may say so very properly recognizes, the truth of the poet's saying not always perhaps borne in mind that right too rigid hardens into wrong. In conclusion, I will only say that whatever hostile criticism may be levelled against the other parts of the Bill, a provision which protects the family dwelling-house from the instrusion of a stranger into any portion of it will be welcomed as a boon, and a blessing by my countrymen, of every creed and of every shade of opinion. (*Fort St. George Gazette*, 12th April, 1892, Part III, pp. 4-5.)

THE PARTITION ACT (IV OF 1893).[1]

[*9th March*, 1893.

An Act to amend the Law relating to Partition.

WHEREAS it is expedient to amend the law relating to partition; It is hereby enacted as follows:—

Title, extent and saving.

1. (1) This Act may be called THE PARTITION ACT, 1893;

LEG. REF.

[1] For Statement of Objects and Reasons, see *Gazette of India*, 1892, Pt. V, p. 46; for Report of the Select Committee, see *ibid.*, 1893, Pt. V, p. 51 and for Proceedings in Council, see *ibid.*, 1893, Pt. VI, pp. 38 and 49.

For Civil Rules of Practice made by the High Court, Madras, under this Act, the Code of Civil Procedure and certain other Acts for observance by the Subordinate Civil Courts of that Presidency, except the Madras Small Cause Court, see *Fort St. George Gazette*, 1905 (Supplement), p. 1. The Act has been declared in force in Upper Burma (except the Shan States) by the Burma Laws Act (XIII of 1898), Burma Code.

NOTES.

Sec. 1: GENERAL.—A suit for partition determines the shares of the co-sharers *inter se*. 17 C, W.N. 128. Decree for partition can be passed in spite of previous partition if the previous one does not conform to the shares of parties. 29 C.W.N. 229=1925 C. 425. In the case of

(2) It extends to the whole of British India; [*]

[1][* * * * *]

(4) But nothing herein contained shall be deemed to affect any local law providing for the partition of immovable property paying revenue to Government.

LEG. REF.

[1]The word "and" at the end of sub-S. (2) and sub S. (3) repealed by Act X of 1914, S. (3) and Sch. II.

NOTES.

joint property, the presumption is that it is liable to be partitioned. 39 P.L.R. 876. In partition cases, the rights and claims of each party in the matter of possession and improvements effected should be taken into consideration, and possession should be maintained in an equitable manner. 18 Lah.L.T. 10. The most ordinary method when one co-sharer has put up buildings on the land is to allot to him for his share a portion of the land which contains his building. When this cannot be done or would not be fair, it may nevertheless be unreasonable and unnecessary to treat such co-sharer exactly as the others. 41 C.W.N. 613= 39 Bom.L.R. 748=1937 P.C. 61=(1937) 2 M. L.J. 114 (P.C.). A partition of property can always be made by oral agreement; if the terms of the partition are reduced to writing then the document must be registered; but there is no necessity for any writing whatever in carrying out a partition. (6 L.B.R. 170 and 1931 Cal. 223, Foll.) 164 I.C. 392=1936 Rang. 336. Where it is a part of the arrangement between the parties that a deed of partition should be executed in terms of a partition made orally between them, the oral agreement, so long as the deed is not executed, is not complete so as to be binding upon them. 1936 O.W.N. 1162 =1937 Oudh 53. The general rule is that a suit for partition must embrate all the joint properties. But there are certain recognised exceptions to this rule. One of them is that where properties are held jointly by all the co-sharers jointly with strangers who cannot conveniently be added as parties to the suit for partition between members of the joint family, such joint properties should be excluded from partition as forming an exception to the general rule. 40 C.W.N. 1237. A suit for partition of common properties, and not joint properties, is not liable to be dismissed on the ground that the suit does not include all the common properties available for partition. In the case of tenants-in-common or in a case where an award has taken place between several persons, a person who files a suit to enforce the award is not bound to include each and every property that is given under the award. The rule against partial partition which applies to the case of a joint Hindu family does not apply to the case of tenants-in-common, especially when there has been an award by which rights have been created in favour of the parties in specific properties, and it is not incumbent on a person to include in his suit all the properties which are awarded to him under the award. 41 Bom. L.R. 170=1939 Bom. 114. Apart from the Act, the Court has an inherent power to refuse to divide the property by metes and bounds and to adopt such other means as may appear equitable for effecting a just partition. 34 L.W. 730 =61 M.L.J. 552. Partition of a house, with a single latrine left for common use. *See* 17 C. P.L.R. 45. On this section, *see also* 52 P.W.R. 1907; 1 I.C. 697. The ordinary rule is that a suit for partition must embrace all joint properties owned by the parties thereto. But there is also the complementary rule that a suit for partition cannot include properties in which each of the parties does not claim an interest. 40 P.L.R. 767=1939 Lah. 34. A previous partition for convenience of possession by itself cannot stand in the way of a decree for partition so long as it is not found that it was in conformity with the shares of the respective parties. (21 C.W.N. 229, Rel. on.) 43 C.W.N. 181=69 C.L.J. 527. The partition proceedings require that the partition should be *chakbat* as far as possible; but if other considerations are more important, the necessity compactness of the *chaks* will have to be waived. 1940 R.D. 441= 1940 A.W.R. (B.R.) 216. Where there is bitter dispute between groups of co-sharers it is desirable that the plots should be divided up and allotted. The fact that such a course would result in the formation of pattis of very small area should not by itself be treated as a factor contributing to the refusal of a partition. 1938 R.D. 869. No doubt in a partition suit every party, whether arrayed as a plaintiff or as a defendant, is substantially a plaintiff in the suit and is entitled to a decree, and he can move the Court, on payment of the proper stamp duty, to take steps to put him in posession of the share allotted to him. But if the Court merely passes a final decree in favour of the plaintiffs and directs that they be put in possession of their shares and it does not allot shares to the defendants, the latter cannot put in an application praying that a decree sheet be prepared and on payment of the requisite stamp duty they may be put in possession of the shares allotted to them. Before doing so, they must apply for an amendment of the decree so as to direct that they also be put in possession of their shares. 42 P.L.R. 148=1940 Lah. 202. A partition necessarily affects the interest of a mortgagee of an undivided share, since after the partition his security is upon the divided share or the separate allotment. He may be prejudiced if that share does not receive a proper allotment in severalty, and it is not for the benefit of all other persons interested in the joint property that he should be bound by the. allotment. Hence it will in general meet the case if he is allowed to attend and be heard at that stage at which the making of a proper allotment is effected. If, however, the mortgagee has proceeded to a sale pending partition, the purchaser will become a necessary party to the partition suit, I.L.R.

Power to Court to order sale instead of division in partition suits.

2. Whenever in any suit for partition in which, if instituted prior to the commencement of this Act, a decree for partition might have been made, it appears to the Court that, by reason of the nature of the property to which the suit relates, or of the number of the shareholders therein or of any other special circumstance, a division of the property cannot reasonably or conveniently be made and that a sale of the property, and distribution of the proceeds would be more beneficial for all the shareholders, the Court may, if it thinks fit, on the request of any of such shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds.

NOTES.

(1940) 1 Cal. 255=67 I.A. 11=44 C.W.N. 233 =42 Bom.L.R. 331=1940 P.C. 11=(1940) 1 M.L.J. 97 (P.C.). Where in a suit for partition a preliminary decree was passed, the fact that an appeal had been preferred from that decree does not oust the jurisdiction of the trial Court to entertain a petition of compromise and an application for permission to compromise on behalf of the minor defendants. A partition suit in which a preliminary decree has been passed must be deemed to be pending until the passing of the final decree. 12 Luck. 260=1936 Oudh 320. A partition suit in which a preliminary decree has been passed is still a pending suit and the rights of parties who are added after the preliminary decree have to be adjusted at the time of final decree. 67 I.A. 11=I.L.R. (1940) 1 Cal. 255=44 C.W.N. 233=1940 P.C. 11=(1940) 1 M. L. J. 97 (P. C.). An order dismissing a partition suit in default after a preliminary decree has been passed is illegal. The Court cannot, however, ignore that order and take further proceedings in the suit, unless it is set aside in due course of law. An order appointing a commissioner to effect partition cannot be deemed to be tantamount to an order setting aside the dismissal of the suit in default. 162 I.C. 412=1936 Lah. 875. The costs mentioned in the partition proceedings are only an estimate and the liability arises on the date the partition is actually confirmed. The person whose name stands in the khewat on that date is liable in respect of it. 1940 A.W.R. (B.R.) 199=1940 O.W.N. 1043. *See also* 40 C.W.N. 1237. Where there is discrepancy between the partition papers consisting of the *chitta* and the *dole* on the one hand and the partition map on the other, the rule that is to be followed is that the partition papers should prevail over the map in as much as the map simply purports to delineate the plots that are allotted to the co-sharers by the partition papers. 46 C.W.N. 509. Where two persons jointly purchased land but one of them advanced more than his half-share of the purchase-money on the promise of the other person to pay the excess amount, the latter cannot have partition and possession of his half-share without paying the excess amount to the other. 22 L.W. 782. What amounts to partition—Award directing a partition, if a partition deed—Stamp duty. *See* 101 I.C. 401.

CONSTRUCTION OF ACT.—The Partition Act must be construed strictly. 27 A.L.J. 651=1929 A. 443.

Secs. 1 (4) and 2.—Where a mortgagee right in a zemindari property is sought to be partitioned the party to the suit, owning at least a moiety, can request the Court to have the property sold to the highest bidder and to distribute the sale proceeds amongst the sharers. 35 A. 387=19 I.C. 651=11 A.L.J. 534.

SEC. 2.—APPLICABILITY—"REQUEST" MEANOF.—S. 2 authorises the Court to apply S. 2 only on the previous request of the parties. The consent of parties must appear in the record prior to judgment. 1942 N.L.J. 134. Where the request made by the co-sharer is that a sale may be held and that whoever among the co-sharers offers the highest bid may be given the property, the request does not amount to a request under S. 2, and so the provisions of the Act do not apply. 27 A.L.J. 651=1929 A. 443. Where, on the report of the Official Commissioner recommending a sale, notice is issued to all the parties and the sale is held, it should not be set aside for want of a requisition under S. 2 of the Act, if it is valid otherwise. 142 I. C. 461=1933 S. 40. As to allowing 5 per cent. of purchase-money as solatium to auction purchaser on setting aside sale, *see* 1933 S. 40. In the absence of a finding that a division of the propery cannot reasonably or conveniently be made, action cannot be taken under S. 2 of the Partition Act. 36 P.L.R. 258=1934 L. 965.

SCOPE.—Where a suit for partition of property situated in business area of a town is instituted, a prayer that the partition should take place according to the Partition Act can be made at any stage of the litigation where the parties own more than a moiety of the property in dispute. 1930 L. 639. Shareholders of different grades may sue for partition, because the right of partition exists when two persons are in joint possession of land under permanent titles those titles though may not be identical. A shareholder, however small, may sue for partition of the entire property. But an application under S. 2 contemplates a somewhat different set of circumstances. There may be partition as between persons possessing one moiety of the property in the zemindari right and other persons possessing the other moiety in permanent tenancy right. But if there is an application by the tenants representing only the tenant's interest, it would be anomalous if that would give them a right to have a direction from the Court for the sale of the entire property, even though the zamindars were not willing. 52 C.L.J. 68=1930 C. 616. A claim by a co-owner to partition of a party wall cannot ordinarily be resisted, even where the claim

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causes inconvenience and difficulty of partition. In the case of a party wall, it is impracticable to take any action under S. 2, Partition Act. 1934 L. 893.

IRREGULARITIY IN PROCEEDING—*De novo* PROCEEDINGS—PROCEDURE.—Where partition proceedings are badly drawn up, they may be quashed and proceedings started *de novo*, but there should be as little disturbance as possible of any agreement or orders passed in the prior proceedings. 18 R.D. 6=11 O.W.N. 94.

MORTGAGE BY JOINT OWNER PRIOR TO PARTITION—RIGHTS OF MORTGAGEE.—Where the property is joint at the time of the execution of a mortgage by a joint owner, he could only mortgage his undivided share in the property, and such a right is always subject to the right of the other co-owners to effect a partition, and when such partition is carried out, the mortgagee can only enforce his rights against such property as falls to the share of his mortgagor unless he can show that the partition was fraudulent. It is not essential that the mortgagee should have been made a party to the partition proceedings. 1934 L. 809=16 L. 392.

PARTITION DECREE—DELIVERY OF POSSESSION.—In execution of a final decree for partition, *A*'s share was delivered, but it was found that *A* could not get actual possession of his share as some huts belonging to other co-sharers were standing on it: *Held* that Court's order for a fresh delivery of possession by removing the huts was wtthin jurisdiction. 38 C.W.N. 832=1934 C. 793.

SUIT FOR PARTITION,—DUTY OF COURT.—In a suit for partition, it is not incumbent on the Court to effect a partition of the property only if the parties agree to abide by the partition or agree to the appointment of a particular person as a local commissioner. 36 P.L.R. 258=1934 L. 965.

SUIT FOR PARTITION—RIGHTS OF DEFENDANTS *inter se*—IF SHOULD BE DECIDED.—It is no doubt usual in partition suits to decide the shares of all the parties. But where the defendants agreed to have a preliminary decree being passed in favour of the plaintiff for partition of his share without their rights being decided, and the preliminary decree was not appealed against, it is not open to the defendants in subsequent proceedings to contend that their rights *inter se* should have been decided. 36 P.L.R. 112=1934 L. 172.

SUBSEQUENT EVENTS.—As to power of Court to take into consideration, *see* 1933 S. 371.

Secs. 2 and 3: SCOPE AND APPLICATION.—S. 3 comes into play only when a sale has been applied for under S. 2 by a shareholder or shareholders interested to the extent of at least one-half of the property. It is at that stage and before the sale is actually ordered that the right to apply, for leave to buy at a valuation can be exercised under S. 3. But that can be done only by a shareholder other than the large shareholder who applied for sale under S. 2. The effect, curiously enough, is to favour the smaller shareholder at the expense of the larger and that explains why Ss. 2 and 3 have been so strictly construed by the Courts. If a sale is directed under S. 2 and S. 3 does not apply either because the application was not of the nature, or the applicant was not the one specified in the section, then the sale is governed by S. 6, and shareholders and strangers alike may bid at the sale. 34 L.W. 730=61 M.L.J. 552. The provisions of the Act apply to the stage at which the suit is in the Court of first instance. 1923 A. 293 (1). The principle underlying S. 2 is that partition ought not to be made, if by partition the intrinsic value of the property would be destroyed. 103 I.C. 367=1927 A. 686. The sale which a Court directing partition can order under the section is only of a complete share, and not a mere portion thereof. 91 I.C. 1009 =1926 O. 230. An appellate Court can order sale of property, when the partitioning is inconvenient,provided objection was taken to the mode of partitioning in the trial Court and the made suggested by the party was disallowed. 33 I.C. 810=14 A.L.J. 35. *See also* 5 C.W.N. 128; 24 M. 639; 32 B. 103. If any party to a decree for partition finds it inconvenient in actual practice, it is open to him to apply under S. 2 of the Act. 20 A.L.J. 90=1922 A. 185. *See* 1924 L. 325=3 Lah.L.J. 102=66 I.C. 885. The proper time to apply under S. 3 is before the Court makes an order under S. 2 and after the request had been made by one of the parties that the property should be sold. 48 M. 920=49 M.L.J. 411. "Such shareholder" occurring in the latter part of S. 3 (1) must necessarily mean the shareholder who applied for leave to buy. 48 M. 920. *See also* 91 I.C. 516=1925 M. 1234. Consent order direcing sale—Subsequent application claiming to buy property at a valuation—S. 3, if applicable to the case. *See* 91 I.C. 516=1925 M. 1234. In a suit by plaintiff for purchase of defendant's share at a valuation by Court, defendant has the option of asking the Court that the plaintiff's share may be sold to him at a valuation fixed by the Court. 97 I.C. 690=1926 C. 1190. Dwelling-house—Reasonably or conveniently partitioned—Application for withdrawal of suit. 47 I.C. 904=16 A.L.J. 584. If, in a suit for partition, there are two parcels of land, one capable of partition, and the other not so capable, the Court can order the sale of the latter. 36 C.L.J. 217=49 C. 1043. But an order directing the sale of one of the allotments obtained after partition is not within Ss. 2 and 9 of the Act. 49 C. 1043. Order for sale—When inappropriate. 96 P.R. 1916= 34 I.C. 587. Any of the parties consenting to a sale under the Act may withdraw his consent, but the withdrawal must be made before the order for sale is made. 62 I.C. 430=13 L.W. 429. Suit for partition—Consent order directing sale—Subsequent application claiming to buy property at a valuation—S. 3 if applies to the case. 48 M. 920=49 M.L.J. 411.

Secs. 2 and 4.—Where the passage in a dwelling-house giving access to the rooms of different co-sharers must perforce be left joint, the property is not susceptible of partition by metes and bounds. 24 I.C. 273=7 S.L.R. 117. A co-sharer who applies for sale of the property has no right to buy up the shares of other co-

Procedure when sharer undertakes to buy.

3. (1) If, in any case in which the Court is requested under the last foregoing section to direct a sale, any other shareholder applies for leave to buy at a valuation the share or shares of the party or parties asking for a sale, the Court shall order a valuation of the share or shares in such manner as it may think fit and offer to sell the same to such shareholder at the price so ascertained, and may give all necessary and proper directions in that behalf.

(2) If two or more shareholders severally apply for leave to buy as provided in sub-section (1), the Court shall order a sale of the share or shares to the shareholder who offers to pay the highest price above the valuation made by the Court.

(3) If no such shareholder is willing to buy such share or shares at the price so ascertained, the applicant or applicants shall be liable to pay all costs of or incident to the application or applications.

Partition suit by transferee of share in dwelling-house.

4. (1) Where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf.

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sharers ; the right to buy out is vested in other co-sharers who have not applied for sale. 24 I. C. 273.

Sec. 3.—*See* under S. 2. Where two or more co-sharers apply for leave to buy the property, the procedure laid down in S. 3 (2) of the Act must be followed. 103 I.C. 367=1927 A. 686. Court is not authorized to hold a public auction. 40 C.W.N. 955.

Sec. 4: CONDITIONS TO BE FULFILLED FOR APPLICATION OF S. 4.—S. 4 should be liberally construed and not strictly construed. I.L.R. (1937) Nag. 73=19 N.L.J. 241=1937 Nag. 4. For the application of S. 4, four conditions ought to be fulfilled: (1) The house should be owned by an undivided family ; (2) the share of a co-sharer should have been transferred to a person who was a stranger to the family; (3) the purchaser should have sued for partition ; and (4) a member of the family being a shareholder claims or undertakes to buy the share of the stranger transferee. 119 I.C. 523=1929 A. 414. *See also* 34 L.W. 730=61 M.L.J. 552. S. 4 will apply even to a house, a portion of which is already separated owing to one member selling his interest in it. 119 IC. 523=1929 A. 414. The operation of S. 4 comes into play after it is found that a stranger transferee is entitled to partition. In fact no order can be passed under the Act before such a transferee establishes his claim. 90 I.C. 121 ; 39 A. 672= 41 I.C. 867. *See also* 15 C.W.N. 555 (Note)= 11 I.C. 370. The section must be strictly construed. 15 C.W.N. 555 (Note). *See also* 1937 Nag. 4. But *see* 19 N.L.J. 241=165 I.C. 930. The object of S. 4 is to enable the members to buy out an outsider who is a transferee from one of the co-sharers. Ordinarily an application of this kind would be made before a preliminary decree is passed. 64 I.C. 917=23 Bom.L. R. 1083. *See also* 12 C.L.J. 525 ; 7 C.L.J. 98. An application under S. 4 can be made at any stage of a suit even in an appellate Court ; a party in a partition suit whether a plaintiff or a defendant is at the same time a plaintiff as well as a defendant. This dual capacity of a party in a partition suit does not preclude even a defendant who claims a share in the dwelling-house from being treated as plaintiff for purposes of S. 4. 49 C.L.J. 136=116 I.C. 161=1929 C. 269. *See also* 19 N.L.J. 241=165 I.C. 930 (word 'sons' interpreted). It may be made even after a preliminary decree in the suit. 45 C. 873=22 C.W.N. 515. The transferee of a share in undivided property is entitled under S. 44, Transfer of Property Act, to his transferor's right to joint possession or other common or part enjoyment of the property in all cases except where the subject matter of the transfer is a share of a dwelling-house belonging to an undivided family of which he (the transferor) is not a member in which case he is not entitled to joint possession or other common or part enjoyment of the property but is entitled to a partition of the property which, however, must be denied to him under S. 4, Partition Act, in the event of a member of the family being a shareholder undertakes to buy the share of the transferee. 1940 Rang. 53. Option of purchase given under this section is not taken away by the preliminary decree. 1922 C. 129. *See also* 12 C.L.J. 525 ; 45 C. 873. S. 4 refers to cases where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such a family the principle being that property must so far as possible be left in the possession of the person in occupation. 73 I.C. 748. "Family," meaning of. *See* 12 C.L.J. 525 =7 I.C. 436 ; 40 I.C. 577. The expression "undivided family" means an undivided family

(2) If in any case described in sub-section (1) two or more members of the family being such shareholders severally undertake to buy such share, the Court shall follow the procedure prescribed by sub-section (2) of the last foregoing section.

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whether Hindu, Mohamedan, Christian or Buddhist, etc. (30 All. 324, Rel. on.) 187 I.C. 844 =1940 Rang. 53. *See also* 1939 A.L.J. 640. Undivided family in S. 4 means a family which is undivided *qua* the dwelling-house in question. 190 I.C. 117=A.I.R. 1941 Pat. 4. "Undivided family," meaning of—"Family"—"Dwelling-house." *See* 109 I.C. 67; 9 O.C. 166. "Dwelling-house belonging to an undivided family"—What is. *See* 4 A. L. J. 209= 29 A. 308. "Dwelling-house" in S. 4 includes the land and appurtenances which are ordinarily and reasonably necessary for its enjoyment. The section is not inapplicable for portions of houses left undivided. 190 I.C. 117. A "dwelling-house" in S. 4 means not only the house itself but also the land and appurtenances which are ordinarily and reasonably necessary for its enjoyment. The Court must therefore make a valuation of such land and appurtenances also, if any. 18 Pat.L.T. 866=1937 P.W.N. 902= 1938 Pat. 13. The expression "dwelling-house belonging to an undivided family" appearing in S. 4, Partition Act, has been borrowed from S. 44, Transfer of Property Act, and bears the same meaning. The word 'family' includes a group of persons related in blood, who live in one house under one head or management and it is not restricted to a body of persons who can trace their descent from a common ancestor. 1940 Rang. 53. Section also applies to Muhammadan family. *See* 30 A. 324=5 A.L.J. 352; 38 Bom.L.R. 261=162 I.C. 941=1936 B. 197. The term "undivided family" has not been used in a technical sense and is applicable to Hindus and Mahomedans alike and must be held to have much the same meaning as the words "undivided family" in cl. (2), S. 44, T. P. Act. 119 I.C. 523=1929 A. 414. *See also* 1936 L. 291. It is not restricted to joint Hindu family divided in status and possessed of a dwelling-house which has not been actually divided or partitioned among the members of the famiiy. 53 M. 417=1930 M. 561=58 M.L.J. 341; 97 I. C. 416. It means undivided *qua* the property sought to be divided and a family owning it without dividing the same. 30 I.C. 936=9 S. L.R. 84. It is sufficient if the parties are co-owners, whether as joint tenants or tenants-in-common. 30 I.C. 936 (30 A. 324, Ref.). A Court of appeal is as much entitled to pass an order under the section as a trial Court. It can do so even after the records are sent back to the trial Court, though that Court also may have jurisdiction in the matter. 30 I.C. 936. The powers can be exercised at any time before the final allotments are made. The section does not indicate when the willingness should be signified to the judge. 30 I.C. 936. It cannot be held as a matter of law that two Mahomedan sisters married or unmarried cannot form an undivided family within the meaning of S. 4 of the Act. The phrase 'undivided family' in the section is used in a very wide and general sense and two Mahomedan married daughters too may be regarded as members of an undivided family within the meaning of the Act if the house is undivided and if one of them permanently occupies the house and the other though she lives mostly with her husband, has not permanently abandoned all intention of occupying the house should it become necessary io do so. 1941 A.L.J. 284=1941 O.W.N. 707= 1941 All. 281. A widow in a joint Hindu family is a member of the "undivided family" 19 N.L.J. 241=165 I.C. 930. Where a widow had, though she re-married long ago, continued to live in the family house, she retains her status as a member of an 'undivided family' *qua* the family house and as such is entitled to purchase any share which might have been sold. 1939 A.L.J. 629=1939 All. 640. Though the determining principle under the section is ownership rather than occupation, an owner, who is not in occupation and who has no intention of occupying, is not entitled to the benefit of the section, merely because he is an owner. 38 Bom.L.R. 261=1936 B. 197. A Mahomedan daughter who has married and is living with her husband but not in the dwelling house which is the subject of partition is not entitled to the benefit of S. 4 of the Act, as she is not a member of an undivided family with reference to the dwelling-house. 1936 Bom. 197. The word 'transferred' in the section includes also a Court auction-purchaser. 1936 L. 291. The word 'transfer' in S. 4 is not conferred only to a transfer by private agreement. It also means a transfer by operation of law. S. 2 (*d*) of the Transfer of Property Act does not govern the meaning of the word 'transfer.' 66 C.L.J. 87= 1938 Cal. 171. Order under S. 4 when can be passed—Powers of appellate Court. 1926 C. 95. It is necessary for a Court, when a suit is instituted by a stranger to an undivided family for partition of a house to find first whether the house in question is a dwelling-house and belongs to an undivided family and further that, if a member of an undivided family who is a share-holder in that dwelling-house undertakes to buy his share, to value the share the valuation to be decided in any manner that the Court should think fit. 123 I.C. 336=1930 A. 509. Under S. 4 the question for consideration is whether the purchaser was a member of the undivided family to which the dwelling house belonged at the time of the sale. The fact that he was a member of the family to which the property originally belonged is quite irrelevant. 45 C.W,N. 74=1941 Cal. 311. The mere fact that the purchaser has obtained possession of the property is not sufficient to defeat the claim of a member of a family under S. 4 of the Partition Act. Unless it can be shown that the purchaser's possession was such that he could be regarded as having become a membor of the family, no possession would serve to defeat the claim. 45 C.W.N. 74=1941 Cal. 311. On this section, *see also* 15 C.W.N. 555 (discretion of

5. In any suit for partition a request for sale may be made or an undertaking, or application for leave, to buy may be given or made on behalf of any party under disability by any person authorized to act on behalf of such party in such suit, but the Court shall not be bound to comply with any such request, undertaking or application, unless it is of opinion that the sale or purchase will be for the benefit of the party under such disability.

Representation of parties under disability.

6. (1) Every sale under section 2 shall be subject to a reserved bidding,

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Court to refuse partition); 1 A.L.J. 474 (power of Court to extend time); An application under S. 4 may be made at appellate stage or at any stage before the final decree, and can be entertained in second appeal. 190 I.C. 117. The word "Court" in S. 4 means not merely the trial Court, but also includes an appellate Court; an appellate Court has therefore power to act under the section though no such application has been made in the trial Court. 18 Pat.L.T. 866 = 1937 P.W.N. 902 = 1938 Pat. 13 ; 12 C.L.J. 525 (application under the section may be made after preliminary decree). *See also* 10 C.L.J. 503; 5 C.W.N. 128; 24 M. 639; 32 B. 103. The word "sues" may be applied indifferently either to the defendant or the plaintiff, for the suit of one party or of the other must be followed. The word signifies not only "to prosecute" but also "to defend" or to do something which the law requires for the better prosecution or defence of the cause. In view of the clear intention of the Act, where in the course of a suit by a member of a joint family, the defendant, a transferee from another member, applies to have a partition under the Partition Act, he is correctly regarded as having "sued" for partition within the meaning of S. 4; and the plaintiffs (members) can therefore apply to buy his share. I.L.R. (1937) Nag. 73 = 19 N.L. . 241 = 1937 Nag. 4.

DECREE—FORM OF—PROCEDURE.—In a case under S. 4 of the Partition Act, ordinarily the purchaser should be asked to deposit in Court the purchase money by a time fixed by theCourt, the time to be fixed and extended at the discretion of the Court. If the purchaser deposits the said purchase money within the time allowed by the Court a decree should be passed in the suit in favour of the purchaser declaring that all rights of the plaintiff or persons claiming partition in the property in suit have been transferred by a Court sale in favour of the defendant on payment of the said sale price and plaintiff's claim for partition is dismissed, If necessary a sale certificate may also be issued to the purchaser. In case the defendant or the purchaser makes default in payment of purchase money a decree for partition should be made in favour of plaintiff and the partition proceeded with. 1941 A.L.J. 284 = 1941 O.W.N. 707 = 1941 All. 281.

PRELIMINARY DECREE—FORM AND CONTENTS. —A preliminary decree in a partition suit must contain the following classes:—(1) Declaration of properties belonging to the estate; (2) Declaration of shares of the parties; (3) Order for partition, division and allotment; (4) Appointment of Commissioner for the purpose of partition setting out the conditions, powers and duties; (5) Receiver, if appointed; (6) Special Referee to take accounts; (7) Costs prior and subsequent to preliminary decree, and a provision for the ascertainment of costs before the filing of the return at the instance of the Commissioner; (8) Provisions relating to conveyances and documents of title, etc.; (9) Liberty to apply including liberty to bring on the matter for further directions in the Partition List at the instance of the commissioner or at the instance of any party with the Commissioner's consent or with the sanction of the special officer. I.L.R. (1941) 2 Cal. 410.

COMMISSIONER'S ACCOUNTS—METHOD OF PREPARATION.—The Commissioner of partition has to prepare the following five accounts and annex them to his *final* return : (1) *Property account:* On the credit side should be the receipts and on the debit side the amounts credited to the parties in respect of their shares. (2) *Cash account :* All receipts and disbursements should find place in such account with the respective references to the other accounts, for instance, payment to the pool account. (3) The *ledger account* should show on the credit side the share of the sale-proceeds with which each party is credited, on the debit side the amounts paid to the parties or on their account. On the debit side also should be debited the share of the pooled costs payable by each party. (4) *Costs adjustment account:* On one side. the costs of the partition which have to be dealt with by the Commissioner. First, costs of the Commissioner. Then the ascertained party and party costs of each party. On the other side of the account, the liability of the parties for the aggregate of the said costs. (5) The *costs pool account* is designed mainly to meet the difficulties of advances to the parties and to the parties' solicitors. On one side should appear the amounts payable by the parties in respect of pooled costs. On the other side must be brought in all advances to the solicitors in respect of such costs. Also on this side must appear the actual amounts payable and paid to the solicitors before the final return is filed. I.L.R. (1941) 2 Cal. 410.

RECEIVER'S ACCOUNTS—METHOD OF PREPARATION.—Receivers in partition suits should prepare a classified statement of account from which the Commissioner can at once enter up his accounts:—(1) Property account; (2) Cash accounts; (3) Parties' ledger accounts; (4) Costs adjustment account; and (5) Pool account. Receiver's costs must be taxed or assessed, and included in the above account. I.L.R. (1941) 2 Cal. 410.

Sec. 6.—Where the property is incapable of

Reserved bidding and bidding by shareholders.

and the amount of such bidding shall be fixed by the Court in such manner as it may think fit and may be varied from time to time.

(2) On any such sale any of the shareholders shall be at liberty to bid at the sale on such terms as to non-payment of depositor as to setting off or accounting for the purchase-money or any part thereof, instead of paying the same, as to the Court may seem reasonable.

(3) If two or more persons, of whom one is shareholder in the property, respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be bidding of the shareholder.

Procedure to be followed in case of sales.

7. Save as hereinbefore provided, when any property is directed to be sold under this Act, the following procedure shall, as far as practicable, be adopted, namely:

(*a*) if the property be sold under a decree or order of the High Court of Calcutta, Madras or Bombay in the exercise of its original jurisdiction, [1][* *] the procedure of such Court in its original civll jurisdiction for the sale of property by the Registrar;

(*b*) if the property be sold under a decree or order of any other Court, such procedure as the High Ccurt may from time to time by rules prescribe in this behalf, and until such rules are made, the procedure prescribed in the Code of Civil Procedure in respect of sales in execution of decrees.

Orders for sale to be deemed decrees.

8. Any order for sale made by the Court under section 2, 3 or 4 shall be deemed to be a decree within the meaning of section 2 of the Code of Civil Procedure.

LEG. REF.

[1] Words 'or of the Court of the Recorder of Rangoon' omitted by A.O., 1937.

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partition, the Court should direct the sale to be held among the parties and the property should be given to the party who offers the highest price above the valuation of the Court. 52 C. L.J. 68=1930 C. 616. It is incumbent upon the Court, whether it is moved in that behalf or not, to fix a reserved bidding under S. 6, and the non-observance of such a statutory provision which results in the realization of an inadequate price is a sufficient ground, where minors are concerned, to refuse to confirm the sale. 142 I. C. 461=1933 Sind 40.

See. 7: OBJECTIONS TO SALE—ORDER ON—APPEAL.—As defendants are entitled to prefer objections to a sale held under the provisions of S. 7 just as in execution proceedings, an appeal lies against the decision on such objections. 30 Punj.L.R. 604=118 I.C. 530=1929 L. 245. The Partition Act provides for the case of a deadlock where certain parties do not agree. It does not however prevent the parties from bringing to sale the property by consent even in a suit for partition under the Act. Where therefore in a partition suit, a consent decree is passed by which the parties agree to a sale of certain property by the Commissianer at his discretion, the sale held under such decree is not a sale under the Partition Act and therefore the Commissioner is not bound to follow the rules of the Calcutta High Court in Chap. 27 of the Rules and Orders of that Court framed under that Act. 172 I.C. 482=1937 Cal, 384. In a partition suit under the Act, the parties arrived at a compromise and a consent decree was passed and the parties agreed that the property in question should be sold by the Commissioner for that purpose. On this the Court directed the Commissioner to fix a reserve, while holding the sale. *Held*, that the mere fact that the Commissioner was directed to fix a reserve did not mean that he was bound to sell above the reserve and that failing that he was bound to get the directions of the Court. It might have been better to do so but it was not a failure to carry out the terms of any order 172 I.C. 482=1937 Cal. 384.

Sec. 8.—Where the trial Court allows a sale, but the appellate Court refuses to pass an order for sale reversing the trail Court's order, the appellate order is a decree and is appealable, if the requirements of a second appeal under S. 100, C. P. Code, are fulfilled. 49 C. L. J. 136=1929 C. 269. An order passed on an application made under S. 4 is a decree by reason of the provisions of S. 8 and is therefore appealable. I. L. R. (1937) Nag. 73=19 N. L. J. 241=A. I. R. 1937 Nag. 4. An order rejecting an application for sale under S. 4 is not a "decree" and is, therefore, not appealable as such. The correctness of that order can, therefore, be questioned in an appeal filed against the final decree. 45 C. W. N. 74=A. I. R. 1941 Cal. 311.

Saving of power to order partly partition and partly sale.

9. In any suit for partition the Court may, if it shall think fit, make a decree for a partition of part of the property to which the suit relates and a sale of the remainder under this Act.

Application of Act to pending suits.

10. This Act shall apply to suits instituted before the commencement thereof, in which no scheme for the partition of the property has been finally approved by the Court.

THE INDIAN PARTNERSHIP ACT (IX OF 1932).

Year.	No.	Short title.	Amendment.
1932	IX	Thc Indian Partnership Act.	Amended by Act XXIV of 1934.

PREFATORY NOTE: *History of the Act.*—Till very recent times, the main body of the law relating to partnership in India was contained in Chapter XI of the Indian Contract Act, 1872. On or about the beginning of 1930, a bill to define and amend the law relating to partnership, with notes setting forth the reasons for its various provisions, was prepared in the Legislative Department, was placed before a Select Committee consisting of four eminent lawyers with Sir B. L. Mitter, Law Member of the Governor-General in Council, as Chairman and formed the basis of their discussions. The Select Committee examined the bill very closely and in the course of their report, said:—

"In paragraph 8 of the report of the Special Committee on the Sale of Goods Bill, which was adopted as the Statement of Objects and Reasons to that bill, it was said:—

"When Sir James Stephen moved the Indian Contract Bill, he admitted that it was not and could not pretend to be, a complete code upon the branch of law to which it related. He, however, expressed a hope that in later years it would be easy to enact supplementary chapters relating to the several branches of the law of contract which the bill did not touch. This hope has never been fulfilled. In the later years it was found more convenient to have separate enactments for the several branches of the law of contract, *e.g.*, the Transfer of Property Act, the Negotiable Instruments Act, and the Merchant Shipping Act. In our opinion, in view of the complexity of modern conditions, the time has now come when this process should be accelerated by embodying the different branches of law relating to contract in separate self-contained enactments; and we hope that the bill which we attach to our report may be passed into law at an early date and may be but the first of the series required to complete the task which we have outlined above."

The present bill is the second of the series foreshadowed by the Special Committee, and like its prdecessor it is based on the corresponding English Act, in this case the Partnership Act, 1890 (53 & 54 Vic., c. 39). The law relating to partnership is at present contained in Chapter XI, of the Indian Contract Act, 1872, which was based on the rules included in the Report of the Indian Law Commission presided over by Lord Romilly, in 1866. These rules were based on English precedents. The main object then in view was, in the words of Sir James Stephen who piloted the Indian Contract Bill through the Council, "that of providing a body of law to the Government of the country so expressed that it might be readily understood both by English and Indian Government servants without extrinsic help from the English law libraries." With that object in view the Select Committee on the Indian Contract Bill, in its report, dated 22nd February, 1870, said that many important matters relating to partnership were left unnoticed in Chapter XI. In addition to these omissions the development of trade in India has shown further matters on which legislation is now required. In the absence of clear and definite rules on these points, Indian Courts have held that Chapter XI of the Indian Contract Act is not exhaustive and have relied on analogies drawn from the English law. In regard to partnership the position is much the same as that in regard to the sale of goods, and the remarks of the Special Committee on the Sale of Goods Bill in paragraph 6 of their Report may be repeated with cogency:—

"Whatever merit the simple and elementary rules embodied in the Indian Contract Act may have had, and however sufficient and suitable they may have been for the needs which they were intended to meet in 1872, the passage of time has revealed defects

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Sec. 9.—*See* notes under S. 2.

Sec. 10.—S. 10 is applicable where a preliminary decree has been made but a final partition has not been effected. 17 I.C. 284 = 1912 M.W.N. 943.

the removal of which has become necessary in order to keep the law abreast of the developments of modern business relations."

The Special Committee showed that the English Sale of Goods Bill was "a very successful and correct codification of this branch of mercantile law" and that it had been adopted in most of the British Possessions and many of the United States of America, with only such small variations as were found necessary to adapt its provisions to local circumstances. The Special Committee, therefore, adopted the Sale of Goods Act, 1893, as the source of the Indian Sale of Goods Bill, and modified it only to the small extent required to adapt it to Indian conditions. The bill as drafted by them became the Indian Sale of Goods Act (III of 1930), with a few minor modifications.

The English Partnership Act, 1890, affords both a comparison with and a contrast to the Sale of Goods Act, 1893. The law it contains has been adopted in nearly all the British Dominions and Colonies and it also forms the basis of a uniform Partnership Act which is in force in the United States of America. Herein it affords a comparison with the Sale of Goods Act and there can be no doubt that, if its provisions are closely followed in India, the commercial community will derive great advantages: Sir Courtney Illbert has remarked:

"Experience shows that whenever Parliament passes a good law carefully framed like the Bills of Exchange Act or the Sale of Goods Act, Legislatures in other parts of the British Dominions readily copy it or adapt it. This would presumably be the best mode of obtaining such kind and amount of uniformity in commercial legislation throughout the Empire as is in existing circumstances feasible and desirable." (*Vide* the article on Unification of Commercial Law in Volume II of the Journal of Comparative Legislation.)

The Partnership Act, 1890, has received some approval from legal commentators, and generally recognised as a useful code embodying most of the law applicable to modern partnerships. In the Introduction to the 9th Edition of Lindley on Partnership it is said that the Act "has the merit of reducing a mass of law, previously undigested except by private authors, into a series of propositions authoritatively expressed."

The Partnership Act, 1890, however, has not been such a successful piece of codification as the English Sale of Goods Act, 1893, and herein lies the contrast. The full context of the quotation from Lindley given above runs as follows:—

"Opinions will naturally differ as to the utility of statutes which deal with important branches of law, but which do not profess to deal with them exhaustively. No doubt an incomplete piece of work is unsatisfactory, but it does not follow that such a work is not worth executing; it is well done as far as it goes, it may be a great boon; and the Partnership Ait, 1890, although imperfect, has the merit of reducing a mass of law, previously undigested except by private authors, into a series of propositions authoritatively expressed and as carefully considered as any Act of Parliament is likely to be."

The learned author of the treatise proceeds to discuss the difficulty of passing a considered code of law on a technical subject through a democratic legislature like Parliament and he concludes:

"Taken as a whole the law of England, both civil and criminal, is well adapted to the requirements of the English people; but it sadly wants methodising and authoritative revision; and any such revision of any branch of it is a distinct gain. From this point of view the Act in question (*i.e.*, the Partnership Act, 1890), is decidedly useful, although it is by no means a perfect measure, nor even as good as Parliament might have made it."

These remarks have encouraged us to depart from the precedent of the sale of Goods Bill, where the English Act was modified in a few particulars only, and to use the Partnership Act, 1890, with some degree of freedom. Nevertheless, the bill does not alter in any substantial way the English law of partnership or the Indian law of partnership, which is based thereon. The main principles are the same, and likewise all important details. The deviations in principle it does show are on minor points, and have been introduced in order to adapt the law to Indian conditions or to supplement it in places where it is incomplete, or are supported by the views of authoritative commentators. Further, the wording of clearly defined principles in the Partnership Act, 1890, has been freely adopted. Admittedly, any change in the wording of the English Act may have the disadvantage of making useful English decisions difficult to apply to Indian cases, but it is anticipated that the practical identity in substance of the two Acts and the similarity in wording of important provisions will avoid this undesirable result and will attract to difficult cases in India the benefits of English judicial experience.

The main source of the difference between the bill and the Partnership Act, 1890, lies in the greater emphasis given in the bill to the personality of a firm. On this subject Lindley remarks:—

"One feature peculiar to the English law of partnership, and distinguishing it from the laws of other European countries and of Scotland, was the persistency with which the firm, as distinguished from the partners composing it, was ignored both at law and in equity. As no one can owe money to himself it was held that no debt could exist between any member of a firm and the firm itself; and although Courts of Equity, in winding up

the concerns of a firm, treated the firm as the debtor or creditor of its members as the case might be, yet this was only for purposes of book-keeping, and in order to arrive at the net balance to be paid to or by each of the partners on the ultimate settlement of their accounts. This non-recognition of the firm was a defect in the law of partnership; and it is to be regretted that the Partnership Act did not go further than it did in the direction of assimilating the English law to the Scotch. Had it done so, the difficulties of suing and being sued, and of dealing with partners abroad, would have been greatly diminished."

The bill goes some way to meet Lindley's criticism but it adheres strictly to the old established English and Indian view that a firm is not a legal person. 49 Bom. 245=1925 Bom. 69. The emphasis above referred to arises from two causes, the first of which is a mere matter of wording. The English Act defines the word "partnership" as being "the relation which subsists between persons carrying on a business in common with a view to profit", and, as regards a "firm" it says that "persons who have entered into partnership with one another are for the purposes of this Act called collectively a firm." It appears that the framers of the English Act, wished throughout to lay stress on the abstract relation of partnership and to avoid giving colour to the view that the firm has any degree of personality, for in the Act the term "partnership" is frequently used in the sense of "firm", and also as an adjective in the sense of "belonging to a firm" or "relating to a firm." The use of the defined word "firm" seems almost to be avoided. The bill confines the word "partnership" to its legimate defined meaning of the relation which exists between partners, and wherever the partners themselves are referred to collectively it uses the word "firm". Hence the word "firm" occurs very frequently in the bill, whereas the word "partnership" occurs rarely, and thereby the bill, as compared with the English Act, emphasises the concrete thing the firm, as against the abstract relation, the partnership.

The second cause of the emphasis is very largely a matter of arrangement. The strict view of the existing law placing full stress upon the abstract relation of partnership, is that "on any change amongst the persons comprising a partnership, there is in fact a new partnership". (Lindley, page 166.) This, however, is not the practical or commercial view of a firm, whereunder a firm has a sufficient degree of personality and of continuity to justify such common places as advertisements which claim that a firm has been established for a century. Even the English Law as expressed in the Partnership Act, 1890, has been forced to depart from the strict legal view of the firm, for it speaks of changes in a firm, or person dealing with a firm after a change in its constitution, of debts due from the firm to a partner, and uses other phrases conceding some degree of personality to the firm, and of continuity in its existence in spite of internal changes. The bill goes in this direction to the limits which are already implied in the English Act and it collects together in a separate Chapter, entitled "Incoming and outgoing partners" all provisions which directly bear upon the introduction, retirement, expulsion, insolvency and death of partners in those cases where the business of the firm is carried on without a dissolution of partnership. The result is that, apart from the preliminary Chapter and the Chapter on "The nature of partnership," the Bill has three Chapters which deal with the working firm, namely,—

Chapter III.—Relations of partners to one another,
Chapter IV.—Relations of partners to third parties,
Chapter V.—Incoming and outgoing partners,

and one Chapter relating to the extinction of a firm, namely,—

Chapter VI.—Dissolution of a firm.

This re-arrangement of the English Act, 1890, has been done with a view to secure practical convenience to lawyers and business men in that very numerous class of cases where there is a change in the constitution of a firm without a dissolution. The new Chapter V contains a number of concise propositions setting out the legal consequences flowing from changes in the personnel of the firm when there is no dissolution, which are embodied in various sections of the English Act, scattered throughout all three of its parts. The rearrangement has also the advantage of confining Chapter VI strictly to provisions relating to the dissolution of a firm and its legal consequences. But in so re-arranging the English Act, the framers of the Indian Act have not departed from any of the outstanding conceptions or principles of English Law. Chapter VII contains provisions relating to the Registration of Firms.

"It has already been indicated that the bill contains other provisions, which are not contained in the Partnership Act, 1890. These are considered in detail in the Notes on Clauses attached to the bill, but one set of provisions is important enough to justify its mention in this Report. In the Introduction to Lindley, page 8, it is said, under the marginal head "Goodwill:"

"One matter of great practical importance and of some difficulty is unfortunately dealt with, *i.e.*, the goodwill of a dissolved firm and the extent to which, and the persons by whom, the use of its name may be continued. Sir Frederick Pollock's bill dealt with these points; as did also the bill which passed the House of Commons in 1889, and the bill which was brought into the House of Lords in 1890. But owing, it is believed, to differences of opinion, and to the difficulty of arriving at a conclusion which would be

acceptable to both Houses of Parliament, the clauses relating to these subjects were struck out. The law upon them must be extracted from judicial decisions and the doubts and difficulties which beset question arising on these subjects must remain for future judicial or legislative solution."

Perhaps a reason for the differences of opinion on the clauses relating to goodwill was that they were framed generally, and not with application to the goodwill of firms only. Sir Frederick Pollock himself says in his Digest of the Law of Partnership (12th edition, pages 121-122) :

"The Act does not make any express provision for disposing of the goodwill on the dissolution of a firm. Probably this is due to the consideration that the rules of law relating to goodwill are not confined to cases where a business has been carried on in partnership, and therefore do not belong to the law of partnership in any exact sense. Nevertheless, the rules have been settled chiefly by decisions in partnership cases, and the question of goodwill is one of those which ought always to be considered and provided for in the formation of a partnership, and constantly has to be considered on its dissolution, whether provided for or not."

It is considered that the views of these two eminent writers should be followed, and accordingly provision is made in the bill for the disposal of the goodwill of a firm. Provisions governing the sale of goodwill generally would be out of place, but they are of sufficient importance in their bearing on firms to justify their inclusion in a restricted form. There is perhaps no statute on the Indian Statute Book where general provisions could find a logical place, but it is hoped that the provisions now proposed for the goodwill of firms will be found to contain principles which may be used as a general guide". (*See* Statement of Objects and Reasons.)

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THE INDIAN PARTNERSHIP ACT (IX OF 1932).

[*8th April*, 1932.

An Act to define and amend the law relating to partnership.

WHEREAS it is expedient to define and amend the law relating to partnership; It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called THE INDIAN PARTNERSHIP ACT, 1932.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force on the 1st day of October, 1932, except section 69, which shall come into force on the 1st day of October, 1933.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) an "act of a firm" means any act or omission by all the partners, or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm;

(*b*) "business" includes every trade, occupation and profession;

NOTES.

Sec. 1 (3)—**Sec. 1. (3)** of the Act enacts that S. 69 of the Act did not come into force before the 1st October, 1933. This was intended to give time to unregistered firms to get themselves registered in order to enable them to bring suits. 15 Pat, 810=17 Pat. L. T. 713=1937 Pat. 16. The meaning of the provision that "the Act shall come into force on 1st October, 1932, except S. 69 which shall come into force on 1st October, 1933", in S. 1 (3), is that after 1st October, 1933, S. 69 will become operative and a firm which is not registered and which sues to enforce a right arising from a contract shall be non-suited. 161 I. C. 741=1936 Cal. 133.

Sec. 2 (b), 4 & 69.—S. 2, Cl, (*b*) read with S. 4 is intended to mean a continued participation of two or more persons in a trade, occupation or profession with the intention of sharing profits accruing from it. An adventure or an undertaking mentioned in S. 8 of the Act presumes the existence of a partnership as defined in S. 4 and therefore *a fortiori* the existence of a business mentioned in S. 2, Cl. (*b*). A solitary transaction in which two persons have jointly lent money to another would not make those persons partners in a firm and hence their registration is not necessary under S. 69 of the Act. 193 I. C. 51=1941 Pesh. 6. *See also* 1938 Nag. 550; 1940 Nag. 211; 1940 A. 230.

(*c*) "prescribed" means prescribed by rules made under this Act;

(*d*) "third party" used in relation to a firm or to a partner therein means any person who is not a partner in the firm; and

(*e*) "expressions used but not defined in this Act and defined in the Indian Contract Act, 1872, shall have the meanings assigned to them in that Act."

Application of provisions of Act IX of 1872.

3. The unrepealed provisions of the Indian Contract Act, 1872, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to firms.

CHAPTER II.

THE NATURE OF PARTNERSHIP.

Definition of "partnership"

4. "Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

NOTES.

Sec. 4 : ELEMENTS OF "PARTNERSHIP".—"(1) There must be an agreement entered into by all the persons concerned. *See* 51 A. 827=1929 A. 536=118 I.C. 145. *See also* 18 I.C. 141 and S. 5, *infra*; (2) the agreement must be to share the profits of a business; and (3) the business must be carried on by all or any of the persons concerned, acting for all. All these elements must be present before a group of associates can be held to be partners. These three elements may appear to overlap, but they are nevertheless distinct. The first element relates to the voluntary contractual nature of partnership; the second gives the motive which leads to the formation of firms, *i.e.*, the acquisition of gain; and the third shows that the persons of the group who conduct the business do so as agents for all the persons in group, and are therefore liable to account to all." Under the law as it stood before this Act a firm as such had no existence in law. The law regarded only the individual partners. This Act has to some extent recognised that the firm is some sort of legal entity apart from its partners. 62 C. 510=39 C.W N. 606. *See also* 1937 O.W.N. 344=1937 Oudh 438; 20 Pat.L.T. 825=1939 Pat. 323; 1937 Nag. 68=19 N.L.J. 306; 1936 Cal. 133. Partnership rests on agreement and so long as the agreement contemplates an outgoing and an incoming on the joint account in respect of a business, the partnership is complete and all subsequent rights and liabilities are governed by laws which relate to partnership. It is not the subsequent happenings, which determine the question but the initial agreement. If S. 4 has effected a change, it has been in the direction of widening the definition of partnership and not of narrowing it. The change in the definition of partnership has not affected the efficacy of illustrations (*a*) and (*b*) to S. 239 of the Contract Act, now repealed. 1940 N.L.J. 50=1940 Nag. 211. The mere circumstance that a person is to share profits only and not losses does not by itself militate against the presumption of partnership. 18 Lah. 306=39 P.L.R. 998=1937 Lah. 338 (F.B.). There may be a partnership in a single transaction, and it is also clear that sharing profits and contributing to losses are indications of a partnership, but by themselves they are not enough to constitute a partnership. One essential element of a partnership is that there should be agency. The words "acting for all" in S. 4 were inserted to emphasise that partners are agents and not merely principals. I.L.R. (1939) Bom. 616=41 Bom.L.R. 899=1939 Bom. 410. The mere fact that a committee is not a registered body and has no independent existence in law, cannot make the servants of the committee personally liable. Although the association as such cannot be sued, its members will be jointly liable. 1933 L. 93. Whether the relation of partners exist between two or more persons is a question of fact depending in each case upon the real intention and contract of the parties ascertained from the contents of the written instruments (if any), and from their conduct. 28 C.W.N. 34=1924 C. 424. The use of the word "partner" or "partnership" in the agreement does not necessarily show that there is a partnership. 65 I.C. 368=1922 N. 67. *See also* 51 B. 342=1927 B. 187; nor does the omission of the word necessarily mean its absence. 51 B. 342; 28 C.W.N. 34=1924 C. 424. The law regards the body and substance of the agreement and its real character. (1932 S. 218, Ref.) The question whether certain persons are partners in the legal sense depends on the legal relation proved to exist between the partners. 139 I.C. 860=1932 S. 78. Where one firm enters into an agreement of partnership with another, what happens in law and in fact, is that the individual partners of the one firm join with the individual partners in the other firm, the result being that all the individual partners of the two firms become partners individually in the new firm. 62 C. 510=39 C. W.N. 606. *See also* 1936 Lah. 514.

ILLUSTRATIVE CASES.—Where husband took his wife in partnership and fixed her share, but reserved power to take more partners or determine her share, *held*, there was a partnership. 25 Bom.L.R. 1225=1924 B. 182. If parties to a contract agree to become partners they need not say that they agree to combine property, labour or skill, this may be implied. That one of them plays a dominant part is not inconsis-

"partner," "firm" and "firm name".

Persons who have entered into partnership with one another are called individually "partners" and collectively "a firm", and the name under which their business is carried on is called the "firm name."

NOTES.

tent with partnership. 25 Bom.L.R. 1225=1924 B. 182=77 I.C. 699.

CONTRACTS AMOUNTING TO PARTNERSHIP.—An agreement of partnership need not be express. It can arise out of a mutual understanding evidenced by a consistent course of conduct, and indeed, by the express admission of the parties concerned. 177 I.C. 831=1938 Nag. 324. Where four creditors of a debtor agree to sue the debtor for their individual debts, to share costs and to divide the profits of all the suits, the transaction is of the nature of a partnership in the four suits. A suit between the creditors must be brought as a suit between partners for accounts. 9 B.H.C.R. 418. Where in a partnership of four persons, three were to contribute capital, the other person who had a share in the profits for contributing labour is also a partner. 1928 A. 549=111 I.C. 686. To constitute a *contract of cultivating partnership* as distinguished from a contract of tenancy, it is enough that the person providing the land furnishes a portion of the working capital, as a part of the transaction by which he provides the land and not as a loan. Such person need not actually take part in tilling it. 10 C.P.L. R. 29.

PARTNERSHIP TO WORK MINES.—A contract to work certain mines on condition that the plaintiff was to receive a sum of money as a *bonus* down and also a certain amount as rent and that the profits and losses were to be divided in the proportion of one-fourth to plaintiff and three-fourths to defendant, is a contract of partnership; and the payment of money, which went by the name of rent, was in the nature of a fixed sum to be received by the plaintiff in consideration of the land which represented his portion of the capital. 9 W.R. 499. *See also* 28 C.W.N. 34=1924 C. 424. Where there is an agreement between two persons for the joint acquisition of a business and for the sharing of its profits in proportion to the contributions of each and the partnership is registered under the Partnership Act, there is a valid partnership and it is not affected either by the fact that the sale-deed refers to the partners individually and not as partners or that one of them had not paid his contribution at all. 1942 O.W.N. 269=1942 O.A. 205. *A clerk or gumastha* sharing in profits and losses may be a partner. 155 P.L.R. 1917=44 I.C. 283. *See also* 1922 N. 67=65 I.C. 368; 28 C.W.N. 34=1924 C. 424.

PARTNERSHIP WITH EXCISE LICENSEE.—It is not unlawful for an *excise licensee* to admit an unlicensed person into partnership. 14 C.P.L.R. 67 (*dissenting from* 11 C.P.L.R. 62). There is nothing illegal in persons combining to bid for and take a licence to conduct a toddy shop in their joint names. 1928 M. 1197=114 I.C. 655. So also, where one of the terms of a icence granted under the Excise Act was that he licence was non-transferable, an agreement, by which the licensee admitted certain persons to a share in the profits of the business carried on, under the licence, in consideration of their assisting him in the liquor sales, cannot render the partnership invalid, inasmuch as the agreement cannot amount to a transfer of the licence. 114 P.R. 1906. *See also* 1937 Nag. 250; 70 M. L.J. 691.

CONTRCT NOT AMOUNTING TO PARTNERSHIP.—An agreement to share the trees cut in a forest does not create a partnership. 8 L. 310=1927 L. 333=100 I.C. 846. Where there is no combination of property, labour or skill, and the labour or skill or property were all on the side of the defendant, the plaintiff simply supplying the defendant with certain sums of money, the agreement between the parties is not a partnership. 4 A. 74 (80). *Creditors jointly advancing money* do not become partners, even though they possess a right to share the profits. 1922 N. 67 =65 I.C. 368. But persons making an agreement to carry on a money-lending business and share the profits therefrom, are partners and constitute a firm under S. 4. 1937 N. 134 *Marriage is not a partnership* as defined under the Act and property acquired during marriage under the Mahomedan Law cannot be regarded as partnership property. U.B.R. [December, 1901 (Mahomedan Law.)]. Where the substantial purpose of an association is not to carry on a business for gain (as for instance in the case of subscribers to the General Family Pension Fund) the fact that gain may accrue incidentally, or may arise from merely subsidiary provisions, does not make registration necessary. 17 C. 786.) (808). *A firm* is not 'a person' so as to be a member of a partnership concern. 1932 A.L.J. 999. *See also* 1932 C. 768. Before a minor can be admitted to benefits of partnership under S. 30 of this Act, there must be at least two adult partners who are capable of contracting. 164 I.C. 806=1936 M. 707=71 M.L.J. 373. Under the Mahomedan Law *wakf* property being vested in the Almighty, there can be no partnership in law with a *wakf*. 41 C.W.N. 629. A person cannot be at one and the same time a partner in his individual capacity and also in his representative capacity. 41 C.W.N. 629=I.L.R. (1937) 2 Cal. 160.

PARTNERSHIP AND TRADE UNION.—When several businessmen by an arrangement form themselves into a combination for the common purpose of enriching themselves by preventing the cutting of prices for which various rules were made, and besides provision was made for the payment into a common pool and a sharing out of it, for arbitration in case of disputes, etc., on a question whether it amounted to a partnership, it was *held* that it was simply a case of a combination of various businesses *inter se* to benefit the members and it was a case of a combination and not a case of a partnership and that it fell within the definition of Trade Union. I.L.R. (1941) Nag. 702=1940 N.L.J. 239=1940 Nag. 228.

Partnership not created by status.

5. The relation of partnership arises from contract and not from status;

NOTES.

ESSENTIALS OF PARTNERSHIP.—In dealing with the subject of partnership too much attention cannot be paid to the consideration of the question:—What is a partnership and who is a partner? For it is a question of no mere academic interest, because if the relation of private partnership exists, then whatever may be the arrangements between the partners *inter se* as to how the losses are to be borne, each partner will, as between himself and the creditors of the firm, be liable to the last farthing of his fortune, *See* 51 B. 342=1927 B. 187. The foundation of this rule is "that each individual partner constitutes the others his agents for the purpose of entering into all contracts for him within the scope of the partnership concern, and consequently is liable to the performance of such contracts in the same manner as if entered into personally by himself." (*See* 163 P.L.R. 1911=10 I.C. 250.) Therefore, if once the relation of partners is established between one who actively carries on a business and another who passively participates in the profits, the latter will become equally liable with the former for the debts and liabilities of the firm. Although two persons may hold themselves out as partners and be liable to third parties accordingly, yet it does not necessarily follow that they would be partners *inter se*. 51 B. 342=29 Bom.L.R. 207 =1927 B. 187. The right to control the partnership property, the right to receive profits and the liability to share in losses are elements which help one in finding whether a partnership exists. 27 B. 157 (161). There are two essentials—(1) an agreement between persons to combine their property, labour or skill, and (2) an agreement to share the profits. U.B.R. December, 1901 (Mahomedan Law), 1. *See also* 12 Mys. L.J. 404; 1937 O. 438=167 I.C. 839. An agreement express or implied, is necessary for the creation of a partnership. 51 A. 827=1929 A. 536. An agreement to share losses is not a necessary ingredient. 51 A. 827 *See also* 168 I.C. 549=1937 L. 338. Before there can be a partnership in respect of a single transaction, there must be present the other requisites of a partnership. Under S. 4, there must be a 'business,' an agreement to share its profits, and carrying on of it by all or any one acting on behalf of all. A mere isolated act of money-lending on joint security cannot be regarded as constituting business within the meaning of that definition. 1938 N.L.J. 403=1938 Nag. 550. *See also* 1940 All. 230=1940 N.L.J. 50= 1940 Nag. 211. A single transaction or venture does not amount to 'business' as mentioned in S. 4 and hence S. 69 does not apply to such a transaction. I.L.R. (1940) All. 256=1940 A.L. J. 179=1940 All. 230. *See also* 1938 Nag. 550. Where certain persons refer to themselves as a firm, it must be presumed even in absence of evidence, that they are parties who have entered into partnership with one another and are a partnership firm. 161 I.C. 741=1936 C. 133. Once it is established beyond doubt that a person is sharing in profits and losses in a fixed proportion in a firm, there arises a strong presumption in favour of his being a partner, and it lies on him to explain or get rid of that presumption. When it is further shown that he has acted as manager of the firm and has a powerful voice in its affairs, there is no doubt of his being a partner. 153 I.C. 969=1935 L. 209. Although a right to participate in the profits of trade is a strong test of partnership, and there may be cases where from such participation alone, it may, as a presumption, not of law, but of fact, be inferred, yet whether that relation does or does not exist must depend on the real intention and contract of the parties. To constitute a partnership, the parties must have agreed to carry on business and to share profits in some way in common. 18 W.R. 384 (387)=10 B.L.R. 312 (P.C.), followed in 6 C.W.N. 429 and 10 C.W.N. 313; 51 M 308= 1928 M. 890=55 M.L.J. 12. But wherever the agreement between parties creates a relation, which is, in substance, a partnership no more words or declarations to the contrary will prevent, as regards third persons, the consequences flowing from the real contract. 18 W.R. 384 (P.C.) Participation in profits is not always conclusive evidence of a partnership. It is however a very cogent evidence, and if it stands alone, may be conclusive evidence. But the fact of participation in profits must be considered in the light of other circumstances. 51 M. 308=55 M.L.J. 12. *See also* 1939 Pat. 323. On the death of a Mahomedan who is the sole proprietor of a business, his heirs inherit the business as tenants in common, but do not automatically become partners. But if they continue to carry on the business and to share the profits, the necessary inference must be that they had entered into an implied, if not express, agreement to become partners of the new firm. The relationship of partners existing between the parties is confined to the stock-in-trade, outstandings and cash, etc., belonging to the firm, and cannot be extended to the immovable properties acquired with the income of the firm but not in the name of the firm, when such properties have nothing to do with the business of the firm which is a trading partnership carrying on a furniture business. The relationship between the parties in regard to these immoveable properties is that of co-tenants. 1937 O. 438=167 I.C. 839=1937 O W.N. 344. Hindu joint family a partner with strangers—Suit by a co-parcener for his share on the basis of dissolution before suit—Denial of dissolution—Maintainability of suit—Procedure. *See* 1938 Mad. 388=(1938) 1 M.L.J. 106. The onus is on the party who alleges a change in the firm to establish it. 32 S.L.R. 765=(1938) 2 M.L.J. 966 (P.C.).

Sce. 5: PRINCIPLE OF THE SECTION.—"Our law has always treated the partnership relation as founded on voluntary contract. It does not surprise parties into a partnership against their

and, in particular, the members of a Hindu undivided family carrying on a family business as such, or a Burmese Buddhist husband and wife carrying on business as such are not partners in such business.

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will, although it does not require an express agreement between them. 51 A. 827; nor is it bound by their statements of intention in associating themselves together for business transactions. It will regard their conduct rather than their language in determining whether their voluntary association in a business enterprise amounts to a partnership or not." *See* 51 B. 342=1927 B. 187; 51 A. 827=1929 A. 536. To determine whether a particular contract constitutes a partnerhip between the parties thereto, its controlling purpose is to ascertain their intention as disclosed by the entire transaction. 28 C.W.N. 34=1924 C. 424=81 I.C. 17. But the intention is the legal intention deducible from the acts of the parties. 51 B. 342. If the entire agreement between the parties has been committed to writing, every clause is to be considered and effect given to each, if possible. If the agreement is partly in writing, partly oral, and partly evidenced only by conduct then all the steps taken by the parties in connection with the enterprise are to be considered. 51 B. 342 Hence, the general rule always is that a person can become partner only by his own consent and that of the other members. Hence a minor's incapacity to become a partner by his own consent. 118 I.C. 141. *See also* 26 C. 349 (354); 25 A. 378 (384); *see* S. 30, *infra*. Minor cannot become a partner by contract. 49 C. 560=43 M.L.J. 41=1922 P.C. 237=49 I.A. 108 (P.C.). *See also* 142 I.C. 203=34 P.L.R. 346; 10 Mys. L.J. 316. The agreement or consent to form a partnership may be express or implied but is necessary for the creation of a partnership. One member of a *joint Hindu family* entering into partnership does not make the others liable in the absence of proof of agency or consensus. 51 A. 827=1929 A. 536. *See also* 56 C.L.J. 440. A manager of a joint Hindu family, who enters into a partnership business with a stranger, cannot by such act, *ipso facto* make the other members of the family partners in the business so as to clothe them with all the rights and obligations of a partner as defined by this Act. In such a case the family as a unit does not become a partner, but only such of its members as in fact enter into a contractual relation with the stranger. 38 C.W.N. 1186=150 I.C. 802 =67 M.L.J. 366 (P.C.). *See also* 1927 S. 247= 107 I.C. 221; 34 P.L.R. 166=1933 L. 68. But *see also* 19 A.L.J. 525=63 I.C. 548. A joint Hindu family cannot be a partnership of itself; nor can two joint families be brought into relation with one another by an agreement to be a partnership. But there can be a partnership between the managing member of one joint family, and the manager of another family, the partnership being between the two persons and not between the families. 39 C.W.N. 357. A Hindu joint family which carries on a trade or business is not a partnership under S. 4 of the Partnership Act. 39 C.W.N. 275. As to the position of an *ancestral trading firm*, see 61 C. 975=152 I.C. 991=38 C.W.N. 914=1934 C. 810; 5 B. 38; 25 A. 378; 9 Bom.L.R. 278; 9 B. 311; 5 C. 792; 1 C. 470; 6 C. 815; 7 B. 217; 23 B. 144; 9 Bom.L.R. 274; I.L.R. (1938) 1 Cal. 369=1939 Cal. 92. The assumption that a joint Hindu family firm can come into existence only if the business has descended from father to son, is obviously wrong. There is no provision of law which prohibits the members of a Hindu coparcenary to start family business out of joint funds at any time, after the death of their father or other ancestor. Such a firm is exempt from registration under S. 5 of the Act. 40 P.L.R. 456=1938 Lah. 563. *See also* 1936 A.M.L.J. 130. Where a stranger is associated with the members of a joint Hindu family in a business whose capital is derived from the property of the joint family and the stranger, the rights and liabilities are determined more by the Contract Act than by the Hindu Law. 1933 A. 311. *See also* 65 C.L.J. 426. Where a stranger is associated with the joint family from the very beginning in the trade and another stranger is introduced into the partnership at a time when the family consists only of minors, the new firm cannot be said to be an ancestral firm or its offshoot and the minors are not liable for the debts of the firm, unless they have been admitted to the benefits of the partnership. 1933 A. 311. Cutchi Memons are only governed by tho Hindu Law as regards succession and inheritance, and the Hindu Law cannot be applied to their property. A Cutchi Memon family carrying on business does not fall under the latter part of S. 5 of the Partnership Act. Consequently a suit by an unregistered partnership composed of the members of a Cutchi Memon family is not maintainable under S. 69 of the Partnership Act. 1937 Mad. 666=(1937) 2 M. LJ.. 221. Where a husband took his wife in parnership and fixed her share, but reserved to himself the power to take more partners, held there was a partnership. 25 Bom.L.R. 1225= 1924 B. 182=77 I.C. 699. The mere fact that a number of *Indian Christians with ties of relationship* are living together in a house and have a common mess would not confer on such a group of persons the rights and obligations recognised by Hindu Law in respect of a joint Hindu family, nor can the family be treated as a partnership in the legal sense if some members thereof have been carrying on some trade. In the absence of an express or implied agency, a debt borrowed by tne managers of the trade by executing a promissory note is not binding on the other members. 1934 M. 327=66 M.L.J. 671.

Sec. 4, 5 and 6.—When more than one businessman associate together for the purpose of carrying on a business, it is legitimate to infer that they are not doing it for philanthropic purposes but intend to make a profit out of it; also that they all intend to share in the benefit of the proceeds. The person who actually conducts the business acts on behalf of all his associates, that is to say, on behalf of all who are joint proprietors with him. He does not act for his

Mode of determining existence of partnership.

16. In determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together.

Explanation I.—The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners.

Explanation II.—The receipt by a person of a share of the profits of a business, or of a payment contingent upon the earning of profits or varying with the profits earned by a business, does not of itself make him a partner with the persons carrying on the business;

and, in particular, the receipt of such share or payment—

(*a*) by a lender of money to persons engaged or about to engage in any business,

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LEG. REF.

[1]*Cf.* S. 2 of the English Partnership Act.

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own separate and exclusive benefit. His intention is obviously to further the business as a whole for the benefit of all who own the concern. That is all that is necessary to constitute a partnership within the meaning of Ss. 4, 5 and 6 of the Act. 177 I.C. 831=1938 Nag. 324. Partnership—Test to determine— Agreement reciting that one party appointed another to carry on business—Power conferred on former to dismiss latter for mismanagement—Provision for sharing of profits and losses does not constitute partnership. *See* 20 Pat.L.T. 798=1940 Pat. 116. *See also* 1940 Pat. 683=19 Pat.L.T 715.

Sec. 6.—Persons may be partners in the eye of law, though they state in the document that they should not be such; and though they represent themselves to be such and be liable to third parties, they may not be partners *inter se.* 51 B. 342=29 Bom.L.R. 107. *See also* 1922 N. 67=65 I.C. 368; 56 C.L.J. 172. It is not necessary that all the partners should share the losses, and they may agree to draw a salary instead of a share in profits. 51 B. 342=1927 B. 187=100 I.C. 846. *See also* 43 C. 733=21 C.W.N. 632. Mere co-ownership of land does not make the co-owners partners nor the mere receipt of their share of income. Where two of the co-owners not only shared the profits out of the land between themselves, but jointly worked the land, jointly engaged coolies and both took active part in raising the crops: *Held,* that they were partners. 1933 R. 120. A partner may after full disclosure buy partnership property for a fair price. 43 C. 733=21 C.W.N. 632=31 I.C. 430. Persons filing suits and signing processes in the name of a firm do not necessarily become partners, for even salaried managers conduct proceedings in their own names describing themselves as managing proprietors. 1927 S. 247=107 I.C. 321.

Expl. I.—A right to participate in profits is a strong but not conclusive test of partnership. The true test is whether there is really a common business carried on by or on behalf of the alleged partner. 1925 N. 436=89 I.C. 283. *See* S. 4, *supra*. "Partnership" does not mean that the partners should necessarily divide the profits at any time. Each may leave his share in the business. The real test is whether he has power to withdraw it. 1930 N. 6=121 I.C. 38. The question of partnership is a question of intention, which must be decided on a consideration of the conduct of the parties and of all the surrounding circumstances. Participation in profits, though not conclusive, is a cogent piece of evidence which must be given due weight in the light of other circumstances. 167 I.C. 839=1937 O.W.N. 344=1937 Oudh 438. An arrangement to share in the profits does not necessarily show that the person who shares in such profits is a partner of the firm, but this fact will have to be considered along with the evidence relating to other characteristics of a parthership, such as sharing of losses, etc., in arriving at a conclusion whether the parties intented to carry on the business in partnership. 1925 M. 768=48 M. L.J. 518; 56C.L.J. 172.

Expl. II (a).—Even an agreement that the lender shall receive a share of the borrower's profits in addition to the statutory rate of interest on the loan does not make them partners. *See* 52 M.L.J. 303=1927 M. 1096. Partnership is not created from the mere use of the word. If a person is merely to advance money and be re-paid by a share in profits, or if a person, acting as servant, is to be paid by a share in the profits and is not to be liable for losses not occasioned by his neglect or default, no partnership is created. 1922 N. 67=65 I.C. 368. *See also* 136 I.C. 396=1932 P.C. 63 (P.C.) U.B.R. Dec. 1903. Contract, p. 10 (11)=1927 M. 1096= 52 M.L.J. 303. Even the fact that the lender took an active interest in the business, is not consistent with his position as a lender. 10 C. W.N. 313. *See also* 4 A. 74 (80). *Creditors jointly advancing money do not become partners,* even though they possess a right to share profits. 1922 N. 67=65 I.C. 368. Muthalalis in a *Labbai* or *Ejman* partnership in Madras Presidency are not partners and will rank as other creditors when the firm becomes insolvent. Though participation in profits is a strong test of partnership and a presumption of fact to that effect arises, yet the test is not conclusive. 51 M. 308=55 M.L.J. 12=1928 M. 890. But *one person can both be a partner and creditor;* as cre-

(*b*) by a servant or agent as remuneration,
(*c*) by the widow or child of a deceased partner, as annuity, or
(*d*) by a previous owner or part owner of the business, as consideration for the sale of the goodwill or share thereof,
does not of itself make the receiver a partner with the persons carrying on the business.

Partnership at will.

7. Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is "partnership at will."

Particular partnership.

8. A person may become a partner with another person in particular adventures or undertakings.

CHAPTER III.

RELATIONS OF PARTNERS TO ONE ANOTHER.

General duties of partners,

9. Partners are bound to carry on the business of the firm to the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the firm to any partner or his legal representative.

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ditor for amount advanced beyond the agreed capital, he is entitled to interest and to demand of the other partners their respective shares under S. 43 of the Contract Act. 1921 N. 45=64 I.C. 183.

Expl. II (b).—A *gumastha* of a firm, who is paid by a share of the profits, according to the long understood practice in this country, is not a partner. 14 C. 791 (793). *See also* 54 M.L.J. 219=1927 M. 1053=106 I.C. 308. So also the fact that an *assistant in a firm of brokers* received over and above his salary, a share in the profits, and that, with the knowledge of the partners, he also occasionally signed on delivery orders, which came from buyers in favour of the firm, that he occasionally signed, with his own signature, letters dealing with mere matters of detail, that he purported to make firm offers to buyers and sellers and initialled alterations on some contracts, does not constitute him a partner in that firm. 6 C.W.N. 429. But a gumastha sharing in profits and losses may become a partner. 155 P.L.R. 1917=44 I.C. 283. A servant whose remuneration varies with the profits may be partner in a popular sense, but is not necessarily legally so. 1922 N. 96=69 I.C. 781. *See also* 1922 N. 67=65 I.C. 368. Where in addition to his salary the person was to receive a certain percentage "as commission" on net profits, *held*, the said percentage was a share in profits. 28 C.W.N. 34=1924 C. 424=81 I.C. 17.

Expl. II (c).—Where the sole proprietor of a firm dies, his heirs only succeed to his assets, and do not become partners, unless they agreed expressly or impliedly to continue the old firm. Such agreement can be inferred from the continuance of the old business on the same lines and in the same manner. 23 A.L.J. 961=1926 A. 161. Property left by a deceased partner and used in the business is to be treated as a loan to the partnership. 37 B. 158=19 I.C. 406

POSITION OF RETIRING PARTNER.—Retiring partner can, in the absence of an agreement to the contrary, claim not only interest but, at his option, either a share of the profits of the business interest on the amount of his share of the partnership assets. 52 M. 672=1929 M. 456=56 M.L.J. 657. He is not bound to make his election until the share of the profits has been ascertained. It is not necessary that the whole of the partneship assets should be used by the remaining partners. 56 M.L.J. 657.

Sec. 7.—*Cf.* Ss. 26, 27 and 32 of the Partnership Act.

Sec. 8.—This section is new and is inserted to meet cases which are probably much more frequent in India than in England. The practice of establishing "particular partnership" is much favoured by Indian firms with numerous branches, and the practice should not be hampered by doubts regarding the extent of the liabilities of the "particular partner". (*Statement of Objects and Reasons.*) A partnership may be organized for the prosecution of a single adventure as well as for the conduct of a continuous business. *See* S. 17, *infra.*

Sec. 9.—*Cf.* Contract Act, S. 257, and English Partnership Act, S. 28.

PRINCIPLE OF THE SECTION.—Parties, when treating for a contract of partnership, are bound to exercise the utmost good faith towards each other. *See* 1930 M. 141=123 I.C. 596. *See also* 11 A.L.J. 423=19 I.C. 250. All the sections subsequent to S. 9 of the Act dealing with the relations of partners to one another are no more than amplifications and illustrations of the principles contained in S. 9. 194 I.C. 380=1941 Sind. 73. A secret agreement between two partners to the prejudice of a third partner is unlawful and void. U.B.R. 1903, Jan. (Contract), pp. 4-5. So also surviving partners are treated as trustees for the benefit of the representatives of a deceased partner. 1 Bom.H.C.R. App. 51 (62). *See also* 67 I.C. 10=34 C.L.J.

Duty to indemnity for loss caused by fraud.

10. Every partner shall indemnify the firm for any loss caused to it by his fraud in the conduct of the business of the firm.

Determination of rights and duties of partners by contract between the partners.

11. (1) Subject to the provisions of this Act, the mutual rights and duties of the partners of a firm may be determined by contract between the partners, and such contract may be express or may be implied by a course of dealing.

Such contract may be varied by consent of all the partners and such consent may be express or may be implied by a course of dealing.

Agreements in restraint of trade.

(2) Notwithstanding anything contained in section 27 of the Indian Contract Act, 1872, such contracts may provide that a partner shall not carry on any business other than that of the firm while he is a partner.

The conduct of the business.

12. Subject to contract between the partners—

(*a*) every partner has a right to take part in the conduct of the business;

(*b*) every partner is bound to attend diligently to his duties in the conduct of the business;

(*c*) any difference arising as to ordinary matters connected with the business may be decided by a majority of the partners, and every partner shall have the right to express his opinion before the matter is decided, but no change may be made in the nature of the business without the consent of all the partners; and

(*d*) every partner has a right to have access to and to inspect and copy any of the books of the firm.

Mutual rights and liabilities.

13. Subject to contract between the partners—

(*a*) a partner is not entitled to receive remuneration for taking part in the conduct of the business;

(*b*) the partners are entitled to share equally in the profits earned and shall contribute equally to the losses sustained by the firm;

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405; 6 B. 528; 48 C. 906. As to the effect of an acknowledgment by surviving partner on limitation, *see* 8 M.L.J. 261. Good faith and utmost *bona fides* are required in dealings between *working and sleeping partners* when matters relating to accounts are cocerned, and when, as a result of the accounts produced by the working partners, they induce the other partners to execute in their favour a promissory note in respect of the amounts so found to be due to the working partners according to the accounts produced by them. 123 I.C. 569=1930 M. 141. All the partners are deemed to have such knowledge and notice of the acts of any of their partners relative to their business, as in discharge of their plain duty they might or ought to have obtained. 27 S.L.R. 41=1933 S. 176.

Sec. 11.—*Cf.* S. 252 and S. 27, Contract Act and S. 19, English Partnership Act, The opening words of S. 11 'subject to the provisions of this Act' mean that the relation of partners shall be governed by contract unless the contract that they enter into is one which is prohibited by any provision in the Act. S. 11 has deliberately been so worded by the Legislature as to make it clear that the relationship of the partners shall be determined by the contract between them, subject of course to the provisions of the Act. I.L.R. (1939) All. 577=1939 A.L.J. 440=1939 All. 548.

Sec. 12.—*Cf.* Contract Act S. 253, sub-Ss. (3) to (5); S. 24. English Partnership Act, 1890, As to power of partner to take part in partnership business, *see* 23 B. 144; 20 B. 467; 19 B. 269.

Sec. 13.—*Cf.* Contract Act, S. 253 and S. 24, English Partnership Act. Cl. (*f*) is new and is intended to safeguard the firm's interests against the torts of individual partners.

Cl. (b): PRESUMED EQUALITY OF PARTNERS' SHARES.—The presumption is about the equality of the partner's shares in profits and loss. The burden of proof is on the party who alleges a special agreement about the shares being unequal. 26 C. 281 (282). *See also* 40 P.R. 1908; 12 B.H.C. (A.C.J.) 165. As to the joint liability of partners to share loss, *see* 24 B. 77; 40 P. R. 1908. S. 13 (*b*) will come into operation only when there is no agreement between the

(*c*) where a partner is entitled to interest on the capital subscribed by him, such interest shall be payable only out of profits;

(*d*) a partner making, for the purposes of the business, any payment or advance beyond the amount of capital he has agreed to subscribe, is entitled to interest thereon at the rate of six per cent. per annum;

(*e*) the firm shall indemnify a partner in respect of payments made and liabilities incurred by him—

(i) in the ordinary and proper conduct of the business, and

(ii) in doing such act, in an emergency, for the purpose of protecting the firm from loss, as would be done by a person of ordinary prudence, in his own case, under similar circumstances; and

(*f*) a partner shall indemnify the firm for any loss caused to it by his wilful neglect in the conduct of the business of the firm.

The property of the firm.

14. Subject to contract between the partners, the property of the firm includes all property and rights and interest in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm or for the purposes and in the course of the business of the firm, and includes also the goodwill of the business.

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partners. 46 L.W. 520=1938 Mad. 5=(1937) 2 M.L.J. 760. The right to interest on capital contributed by one of the partners, even when there is a stipulation for payment of such interest, ordinarily ceases at the date of the dissolution of the partnership, and in the taking of accounts between the parties, no interest under this head should be allowed after the date of dissolution. Interest on capital is payable only out of profits under S. 13 (*b*) except where there is an express contract providing for payment of interest regardless of profits. 51 L.W. 108= 1940 M.W.N. 29=1940 Mad. 505. On dissolution, a capitalist partner has no higher rights than the other partners. 1926 S. 49=89 I.C. 577. He cannot compel working partners to sell their rights to him. 192 6 S. 49 Under this section the share of each partner in the partnership property is the value of his original contribution, and partners must contribute equally to losses sustained by the partnership. In the absence of a contract to the contrary, the share of loss or profit is ascertained by dividing the total loss or profit by the number of partners. The rule laid down is, that, if the assets of the partnership will not suffice to pay the amount of capital to be credited to each partner, the deficiency is a loss of capital; and is to be borne or made good by the partners. 40 P.R. 1908. The fact that the partners contributed capital in unequal shares will not exclude the presumption of equality in profit and loss (*see* cases *supra*), though it is a matter to be taken into consideration on the final statement of accounts (Part. Act, 1890, S. 44). As to suit for accounts in a partnership where partners contributed in unequal shares, *see* 8 L. 241=1927 L. 485. The fact that certain persons perform several acts in the expectation that a partnership would be created, such as the advance of money for purchase of partnership material, the taking of a house on rent expecting that it would be required for the partnership, cannot lead to the conclusion that a partnership has been created. Where the cardinal points have been definitely agreed upon, the fact that reference has been made to a more formal agreement in future will not prevent the Court from coming to the conclusion that the contract of partnership has been concluded. But when a cardinal point has never been agreed upon, namely, as to when the partnership is to come into force, and that date is left blank in the agreement, it cannot be held that the partnership has come into existence or that the parties are partners. 19 N.L.J. 306= 1937 Nag. 68.

INTEREST ON ADVANCES AND CAPITAL.—A partner is not only entitled to be repaid any actual payments or advances made by him for the purposes of the partnership beyond the amount of capital he has agreed to subscribe, but is also entitled to interest thereon and this even though the partners may not have been aware of the outlay. Ex parte *Chippandale*, (1854) 4 De.G., M. & G. 36; 43 E.R. 415. *See also* 1932 L. 301; 137 I.C. 162=1932 L. 389; 23 S.L.R. 313=1928 S. 133; 64 I.C. 183; 1931 N. 45. Partners are not as regards partnership dealings considered as debtor and creditor *inter see* until the concern is wound up or until there is a binding settlement of the accounts. It follows that one partner has no right of action against another for the balance owing to him until after final settlement of the account; but a partner may have a right of action against another for a debt which is independent of the partnership accounts. The only remedy between partners is one for partnership accounts. 62 Cal. 510=39 C.W.N. 606=1938 Cal. 377 *See also* 38 Bom. L. R. 486=1936 B. 246.

Cl. (f).—As to liability of a negligent partner, *see* 87 I.C. 735=1925 B. 324.

Sec. 14.—English Partnership Act, Ss. 20 and 21 and S. 253 (1), Contract act. S. 14 o the Act is not exhaustive; it only provides what the property of the firm shall include. Debts due to a firm fall within the description of pro-

Unless the contrary intention appears, property and rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm.

Application of the property of the firm.

15. Subject to contract between the partners, the property of the firm shall be held and used by the partners exclusively for the purposes of the business.

Personal profits earned by partners.

16. Subject to contract between the partners,—

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perty, being property acquired for the firm. I. L.R. (1938) Bom. 102=39 Bom. L.R. 1214= 1938 Bom 108. Where a partnership firm is styled 'X factory' it is improbable that the ownership rights of the partners of that firm would be confined to the business and machinery and would not include the building in which the business is conducted and the machinery is contained. I.L.R. (1938) All 638=1938 A.L.J. 610=1938 All 452. It does not neeessarily follow because certain partners jointly own immovable property which they use for the purposes of the partnership business that that property is partnership property. Whether it is or is not depends upon the agreement between the partners. From the mere fact that two brothers who jointly inherited a house set up a business in that house in partnership, it could not be inferred that they were intending to transfer their shares in the house to their partnership business. 162 I.C. 143= 1936 All. 270.

Secs. 14 and 15.—*See* English Partnership Aet, Ss. 20 and 21 and S. 253, Contract Act.

PARTNERSHIP PROPERTY.—The expression "partnership pioperty" denotes everything to which all the partners are entitled *as partners*; persons may be entitled to property jointly or in common and may also be partners; yet that property may not be partnership property. Whether any particular property is or is not partnership property depends upon the agreement between the partners and, in the absence of any express agreement,upon the circumstances under which it was acquired. 30 I.C. 24; 55 B. 795=1931 B. 422. Purchase of immovable property in the name of the firm with the funds of the firm and making costly improvements with the same funds are indications showing that the property so purchased is the property of the firm. 1929 S. 189. *See also* 29 M. 149; 49 P.W,R. 1916=32 I.C. 853. Land purchased by partners in a trading concern out of partnership fund does not of necessity become partnership Property. Whether they hold such land as co-owners or as partners depends upon the purpose for which it is purchased. Therefore when the land is purchased out of partnership funds, and not used for its business, the question is one to be determined on general evidence. 30 I.C. 24=9 S.L.R. 11. In the absence of any allegation or proof to the effect that portions of the assets of partnership were, by the agreement of the partners, withdrawn from the partnership and converted into land or house to be owned by the partners as co-owners, lands and houses bought in the name of one partner and paid for by the firm or from the profits of the partnership business are *prima facie* partnership properties. 25 M. 149 (165). But a contract on the part of a company to continue to employ a firm as its agents, is not to be regarded as an asset of the firm, in which the legal representative of a deceased partner of the firm would be entitled to participate, as the contract is determinable at any time by the company the profits of which would be derived entirely by the services of the surviving partners, and in respect of which no liability could be incurred by the deceased. But contracts, which would render the estate of the deceased liable in the event of loss, and in the profits of which, therefore, such estate is entitled to participate, constitute assets of the partnership. 9 B. 536 (555, 556).

LOAN BY PARTNER TO FIRM—RIGHT TO INTEREST ON.—The general rule is that the interest is not allowed between partners. But when a partner advances moneys of his own to the partnership, over and above the amount of his capital, such advances will be treated as loans by him, and he is entitled to interest on the same in the absence of a stipulation to the contrary. 12 Mys.L.J. 404=39 Mys. H.C.R. 1012 *see also* 1938 Mad 38; 15 Mys. L. J. 3.

GOODWILL OF THE BUSINESS.—*See* 34 C.W. N. 737; 52 M. 672=56 M.L.J. 657.

Sec. 16.—*Cf.* Ss. 29 and 30 of the English Partnership Act and Ss. 258 and 259 of the Contract Act.

THE SELECT COMMITTEE said :—Ss. 29 (1) and 30 of the English Act, corresponding to Ss. 258 and 259 of the Indian Act, have been run together into this clause, without change of substance. Sub-s. (2) of S. 29 of the English Act has been placed in the Chapter on the dissolution of the firm, where it appears as cl. 50.

CASE-LAW.—A plaintiff (partner) who is liable to account should give credit for defendant's share of profits, even though the claim be barred by time. "He who seeks equity must do equity." 42 P.L.R. 1917=35 I.C. 910. Where one partner is carrying on a different business, the mere fact that some knowledge and information are useful in both does not create liability to account. 34 C.L.J. 405=67 I.C. 10. A minor representative of a deceased partner is not personally liable to account to survivor for partnership business carried on during deceased's lifetime. His liability is confined to the extent of assets received. 40 A. 446=16 A.L.J. 305=45 I.C. 31. One partner can recover profits from his other partner who carries on a rival trade to the prejudice of the partnership business. 19 I.C. 250=11 A.L.J. 423. A firm cannot claim commission on goods purchased on its own

(*a*) if a partner derives any profit for himself from any transaction of the firm, or from the use of the property or business connection of the firm or the firm name, he shall account for that profit and pay it to the firm;

(*b*) if a partner carries on any business of the same nature as and competing with that of the firm, he shall account for and pay to the firm all profits made by him in that business.

17. Subject to contract between the partners—

Rights and duties of partners after a change in the firm.

(*a*) where a change occurs in the constitution of a firm, the mutual rights and duties of the partners in the reconstituted firm remain the same as they were immediately before the change, as far as may be;

after the expiry of the term of the firm, and

(*b*) where a firm constituted for a fixed term continues to carry on business after the expiry of that term, the mutual rights and duties of the partners remain the same as they were before the expiry, so far as they may be consistent with the incidents of partnership at will; and

where additional undertakings are carried out.

(*c*) where a firm constituted to carry out one or more adventures or undertakings carries out other adventures or undertakings, the mutual rights and duties of the partners in respect of the other adventures or undertakings, are the same as those in respect of the original adventures or undertakings.

CHAPTER IV.

RELATIONS OF PARTNERS TO THIRD PARTIES.

Partner to be agent of the firm.

18. Subject to the provisions of this Act, a partner is the agent of the firm for the purposes of the business of the firm.

Implied authority of partner as agent of the firm.

19. (1) Subject to the provisions of section 22, the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm.

The authority of a partner to bind the firm conferred by this section is called his "implied authority."

(2) In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to—

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behalf. 36 I.C. 210. A partner can carry on separate business, not competing with firm's business. Mere facility to push private business conferred by connection with firm does not create liability to account for the profits of his private business. 1926 C. 380=90 I.C. 492.

Sec. 17.—*Cf.* S. 256 of the Contract Act and S. 27 of the English Partnership Act. A. person, becoming a surety to a firm for another's conduct as cashier, will not be liable to compensate any defalcation, which occurs subsequent to a change in the constitution and the name of the firm. 28 C. 597. As to the rights of a deceased partner's representatives to share in profits made subsequent to the death of the partner by the surviving partners, *see* 48 C. 906=1922 C. 122=64 I.C. 861. The share of deceased partner is not liable for debts incurred by the surviving partners after his death. 22 S.L.R. 105=1928 S. 121=110 I.C. 730.

Chap. IV. INTRODUCTORY.—This Chapter is mostly taken up with the statement and development of the principle that each partner is an agent of the firm. In arrangement, it differs widely from the corresponding part of the English Act. It elaborates some of the provisions of that part and omits others and introduces some new matter. (*Report of the Select Committee.*)

Sec. 18—The agency of partners arises not by reason of contract but by reason of the existence of the relationship of parties as partners. From the fact that in a deed one party is made the agent of another for some porposes it does not follow that the relationship of partners exists between them. 19 Pat. 715=1940 Pat. 683.

Secs. 18 and 19: PRINCIPLES OF THE SECTIONS.—The Special Committee said: "Cl. 19 begins with the first principle given in S. 5 of the English Act—that every partner is an agent of the firm. It also contains the next important principle in S. 5 of the English Act, which defines the general extent of a partner's

(*a*) submit a dispute relating to the business of the firm to arbitration,
(*b*) open a banking account on behalf of the firm in his own name,
(*c*) compromise or relinquish any claim or portion of a claim by the firm,
(*d*) withdraw a suit or proceeding filed on behalf of the firm,
(*e*) admit any liability in a suit or proceeding against the firm,
(*f*) acquire immovable property on behalf of the firm,
(*g*) transfer immovable property belonging to the firm, or
(*h*) enter into partnership on behalf of the firm.

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agency, namely, that an act of a partner, which (*a*) is done to carry on business, of the kind carried on by the firm, and (*b*) is done in the way usual in such a business, binds the firm. The remainder of the English section is contained in S. 20. The second paragraph in sub-s. (1) of S. 19 introduces a convenient term intended to avoid confusion when references are made to the authority of a partner as agent. The authority defined in the first paragraph of the sub-clause has been variously designated as "implied," "ordinary," "apparent" and "ostensible", and it is sometimes not clear what the exact meaning of these terms may be. The word "implied" is favoured by Lindley and seems to be the most suitable, as the kind of agency contemplated is one which flows from, or is implied by the partnership of a partner. Sub-S. (2) has no statutory precedent, but has been extracted from S. 2 of Chapter I of Book II of Lindley's work, which contains an exhaustive account of the subject of the extent and limitations of a partner's implied authority. The selection has been made with regard to Indian conditions.

Sec. 19.—**Cl.** (a) reproduces *Stead* v. *Salt* (3 Bing. 101), which has been followed in 22 A. 135 *See also* 148 I.C. 1080=35 P.L.R. 417=1934 L. 483.

Cl. (b) is *Alliance Bank, Ltd.* v. *Kearsley* (L..R. 6 C.P. 433).

Cl. (c) is a proposition on the law of agency contained in many rulings, *see* Lindley, p. 195.

Cl. (d) is contrary to *Harwood* v. *Edwards* cited by Lindley at p. 354, a case which seems to be unreported. It seems unreasonable to hold that a partner cannot compromise a claim by the firm but that he can withdraw a suit. The clause as drafted seems best suited to Indian conditions.

Cl. (e).—This is *Hambidge* v. *De la Crouee* (3 C.B 742).

Cl. (f) follows *Sharp* v. *Milligan* (22 Beav. 606 and 16 B. 568, setting aside 19 M. 471).

Cl. (g) is covered by *Harrison* v. *Jackson* (7 T.R. 207).

Cl. (h) is from *Singleton* v. *Knight* (13 A. C. 788). (*Special Committee's Report.*)

AUTHORITY OF A PARTNER TO BIND THE FIRM BY HIS ACTS—GENERAL—ACT TO BE WITHIN THE SCOPE OF THE PARTNERSHIP.—Every partner is, in contemplation of law, the general and accredited agent of the partnership and may, consequently, bind all the other partners by his acts in all matters which are within the scope and objects of the partnership. *See* Story on Agency, Chap. VI, Ss. 124, 125, cited in 6 Moo. P.C. at 193, 194: 81 I.C. 513=28 C.W.N. 824=1925 C. 29. "Ordinary partnerships are by the law assumed and presumed to be based on the mutual trust and confidence of each partner in the skill, knowledge and integrity of every other partner. As between the partners and the outside world (whatever may be their private arrangements between themselves) each partner is the unlimited agent of every other in every matter which is partnership business and not being in its nature beyond the scope of the partner, ship." *Per* Lord Justice James in *Baird's Case* (1870) L.R. 5 Ch. 725, 733. *See also* 101 I.C. 742=1927 L. 385; 8 C. 678=11 C.L.R. 225; 83 I.C. 539=17 S.L.R. 164. The acts done by a partner in violation of his duty to the firm cannot bind it when the other party to the transaction is cognizant of, or co-operates in, such breach of duty. *See* Story on Agency, Chap. VI. cited in 6 Moo. P.C. 193, 194. A partner is not liable for purchases made by a co-partner, out of the scope of partnership business and without the authority of the other. 15 B.L.R. 372. Where terms of partnership cannot be ascertained, no relation of principal and agent between the parties arises. 185 P. W.R. 1916=31 I.C. 632. The mere fact that a party makes no reference to his partners or sharers in the profits does not really affect his right in assigning the actionable claim, for, as a managing partner, he has a right to assign such a claim, and the only remedy of the partners or sharers in the firm is by a suit for accounts against the managing proprietor. 1933 S. 210.

ANY REPRESENTATION BY ONE OF THE PARTNERS will not bind the other partner. 1935 C. 275.

THE ACT MUST BE DONE TO CARRY ON THE BUSINESS IN THE USUAL WAY.—Every partner is an agent of the firm, and his other partners for the purpose of the business of the partnership; and *prima facie* the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member, bind the firm and his partners (Partnership Act, 1890, S. 5). *See* 83 I.C. 539=17 S.L.R. 164=1924 S. 29; 1926 M. 114=50 M.L.J. 67. *See also* 56 C. 536=1929 C. 714. A partner's implied or apparent authority to bind his firm is limited to acts which are necessary for carrying on the partnership business in the way in which such businesses are usually carried on, and does not extend to acts which, however urgent, are in this sense unusual. *Hawtayne* v. *Bourne*, 7 Mee. & W. 595; 56 R.R. 806; *Simpson's Claim*, 36 Ch. D. 532. *See also* 13 I. C. 255=5 S.L.R. 168; L.B.R. (1872-1892), 519, 521; 1926 S. 291 =21 S.L.R. 267; 10 O. W. N. 316=1933 O. 259. A partner in a mercantile firm has autho-

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rity to draw and accept bills on behalf of the firm, and even if such implied authority has been expressly cancelled but such cancellation is not brought to the discounting banks, the discounting banks are entitled to recover against the other partners. 1930 P.C. 238 (13 M.I.A. 358, Ref.). A partner in a trading firm may draw, endorse, etc., hundis for the purposes of partnership. 9 Bom. I.. R. 274.

POWER TO REFER TO ARBITRATION.—One partner of a firm cannot enter into an agreement to refer a matter in dispute to arbitration on behalf of a firm unless all parties join in it. 35 P.L.R. 417=1934 L. 483.

POWER TO ENTER INTO CONTRACT.—A partner is liable for a *bona fide contract* entered into by other partners. 106 I.C. 516=46 C.L.]. 362=1928 C. 57; 1924 C. 1056; 1925 C. 29. *See also* 9 B. 311. It is a mistake to suppose that, because a firm obtains the benefit of a contract made with one of its partners, it must needs be bound by the contract. 14 C.P.L.R. 22 (26). If a partner, who entertains customers, wishes to be reimbursed, he should take the precaution of having an agreement made for an allowance. 108 I.C. 813=23 S.L.R. 313=1928 S. 133. *See also* 1937 L. 715. (Lease of premises in name of one partner—Other partners also are liable for rent).

IMPLIED POWER TO BORROW.—Any partner in a trading firm has an implied authority to borrow money for the purposes of the business on the credit of the firm. 48 B. 176=77 I.C. 548. *See also* 34 Bom.L.R. 1137=1932 B. 539; 10 R. 204=1932 R. 118; 123 I.C. 358=1930 M. 168; 40 M. 727; 28 C.W.N. 824=1925 C. 293; (1847) 6 Moo.P.C. at pp. 193, 194; 79 R.R. 53. Where, however, the business is not of a commercial nature, *e.g.*, where it is a professional business, or even the business of a farmer or a quarry worker, where there is no buying and selling of goods, or an auctioneer, no partner can borrow or pledge the partnership property so as to bind his co-partners. 48 B. 176. A partnership in rice mill is not a trading partnership and one partner cannot bind the others by negotiable instruments without express authority. 66 I.C. 584=11 L.B.R. 137. The presumption as to the existence of an authority to borrow is, however, not confined to trading partnership only, but it applies to every business which cannot be carried on in the usual way without such power. 21 S.L.R. 267=1926 S. 291. A bond or promissory note executed by the managing partner, for the joint purpose of the firm and within the ordinary scope of his authority is binding on the remaining partners. 24 W.R. 60 (61). *See also* 62 I.C. 315=10 L.B.R. 321; 33 P.L.R. 411; 10 R. 204=138 I.C. 210=1932 R. 119. Where a partner of a firm executes a promissory note in his individual capacity and not on behalf of the firm, the executant alone is liable under the note. 142 I.C. 837=35 Bom.L.R. 68=1933 B. 101. A partner is always liable for the partnership debt unless there is a restriction expressed or implied on the liability to be incurred by one partner on a bill or a promissory note which may be incurred by another partner for partnership purposes. 40 M. 727=31 M.L.J. 138. *See also* 9 Bom.L.R. 274. So far as the question of the authority of a partner to sign and endorse promissory notes on behalf of others is concerned, it is sufficient if such authority can be inferred from the surrounding circumstances. 84 I.C. 391=2 R. 367=1925 R. 30. *See also* 35 Bom.L.R. 68=1933 B. 101. Dormant partner is liable only to the extent of sums borrowed by the active partner in his capacity as a member of the firm. 28 C.W.N. 824=1925 C. 29; 142 I.C. 837=1933 B. 101=35 Bom.L.R. 68. Every one of the partners, in a mercantile firm of ordinary trading partnership, is liable upon a bill drawn by a partner in the recognized trading name of the firm for a transaction incident to the business of the firm, although his name does not appear on the face of the instrument and although he be a sleeping and secret partner. In order to take a case out of this general rule, it must be shown that the holder of the bill knew, at the time he received it, that the transaction was the private affair of single partner. 13 W.R.P.C. 29 (30)=13 M.I.A. 358. Where there is a contract with the partnership and a promissory note is signed by a partner in his own name and not in the name of the partnership, as evidence of such contract, all the partners will be liable. 123 I.C. 358=1930 M. 168; 35 Bom.L.R. 68=1933 B. 101. Where one of partners of a firm signs a promissory note, in order that all the partners are liable under it, it is necessary that not merely the firm's name should be disclosed "in some way", but it must be disclosed in such a way that, on any fair interpretation of the instrument, the firm must be the real person liable upon the bill. One of the partners of a firm signed a pro-note describing himself as "Proprietor, Punjab Alliance Auction Rooms, Lahore". *Held*, that this description was not sufficient to justify the other partners in the firm being held liable. 15 L. 652=1934 L. 358. The joint liability of each partner being the ordinary incident of the partnership, one of the partners has no authority, without the consent of the co-partners, to change the joint liability into a joint and several liability. 24 B. 77 (84). Where two of the partners of a firm execute a promissory note in favour of a third agreeing to pay him a certain sum of money as being due to him on taking partnership accounts, the remaining partners of the firm will not be bound by the promissory note. 117 I.C. 108=1929 A. 542. In the case of a running money-lending business one partner can borrow and mortgage firm's assets; but when it is being wound up this cannot be done except for necessity. 8 L.B.R. 363=36 I.C. 225.

POWER TO SETTLE AN ACCOUNT.—A partner has power to settle an account between the partnership and a third person, so as to bind the other partner. 12 M.L.J. 444=26 M. 186 (P.C.). *See also* 45 P.R. 1899=5 P.L.R. 1900 (a case of a Hindu joint family business). In a working partnership there is a presumption that a partner has authority to strike balances in the firm account. 1929 L. 512.

POWER TO PAY THE DEBTS OF THE FIRM.—One partner can apply assets in paying debts that would be otherwise barred. 19 Bom.L.R. 86=38 I.C. 873.

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POWER TO MAKE PART-PAYMENTS, ENDORSE OR ACKNOWLEDGE TO SAVE LIMITATION.—On the same principle he can pass acknowledgments to save off the claims of creditors and to save the claims from being barred by limitation. 19 Bom.L.R. 86=38 I.C. 873; 33 P.L.R. 584=1932 L. 456. *See also* on the point 41 M. 427=34 M.L.J. 373 (F.B.), following. 37 M. 146=25 M.L.J. 507 and overruling 32 M. 421 and 35 M. 142; 15 Mys.L.J. 3. If one partner has authority to discharge a debt he can also make part-payments and endorse them. 2 R. 367=1925 R. 30=84 I.C. 391. *See also* 123 I.C. 358=1930 M. 168; 1931 L. 136. In the case of a mercantile firm, each partner is entrusted by his co-partners with a general authority to do any act necessary for, or usually done in, carrying on the business of such partnership; a partner's authority extends to making an acknowledgment by part-payment so as to bind his partners. 1926 M. 114=50 M.L.J. 67. *See also* 56 C. 556=33 C.W.N. 412=1929 C. 714; 10 B. 358 (362); 5 P.L.R. 1900=45 P.R. 1889. Acknowledgment by a partner, during the subsistence of the partnership, must, in order to save limitation, be an act necessary for, or usually done in, carrying on the business of the partnership. 26 B. 42=3 Bom.L.R. 484. But an acknowledgment by a partner, after dissolution of the business, cannot save limitation, if the creditor had, at the date of acknowledgment, notice of the dissolution. 26 B. 42=3 Bom.L.R. 484. *See also* 8 L.B.R. 363=36 I.C. 225. Similarly, where a partnership is dissolved by the death of one of the partners, the surviving partners cannot bind the representatives of the deceased by their acknowledgment, unless they are specially authorised to do so. 8 M.L.J. 261. *See also* 85 I.C. 775=1925 N. 268. An acknowledgment made by one partner does not bind the other partners in the absence of proof that they authorised such an acknowledgment or payment; and such authority cannot be presumed. 85 I.C. 775=1925 N. 268.

POWER TO RECEIVE DEBTS DUE TO THE FIRM.—Though payment to a partner of a firm debt is a valid discharge of the debt, an agreement to set-off a debt due to the firm against a private debt due from one partner must be presumed to be in fraud of the partnership and does not amount to a valid discharge of the debt due to the firm. 9 I.C. 116=13 C.L.J. 234. *See also* 19 M. 471 (475). But *see* 12 L. 270=1931 L. 136, holding that such mere adjustment does not necessarily amount to a fraud and does not prejudice the plaintiff firm, and in the absence or proof of fraud or prejudice, it is binding on the plaintiff firm. Son of a deceased partner cannot give a complete discharge of a debt due to the partnership. 109 I.C. 50=1928 L. 832. An authority to give discharge for a debt on payment would not include a power to compromise or settle it in any way a partner liked. 59 M. 1036=1936 M. 593=71 M.L.J. 378.

POWERS TO EXECUTE A RELEASE.—A partnership firm is not a legal entity like a limited liability company. Consequently, a conveyance to the firm operates as a conveyance to the individual partners. Release of property mortgaged to a firm as a whole is useless, unless it is known who the individual partners are and whether the executant of the release is authorised by them to act on their behalf. 49 B. 245=1925 B. 69.

Sub-Sec. 2 Cl. (a): POWER TO SUBMIT A DISPUTE TO ARBITRATION.—A partner has no authority to bind his firm by a submission to arbitration. *Stead* v. *Salt*, 1825, 3 Bing. 101; 34 Bom.L.R. 1112=1932 B. 516; 59 I.C. 501=39 M.L.J. 269; 92 I.C. 705=1926 L. 91; 133 I.C. 558. *See also* 107 I.C. 793=1928 M. 107; 83 I.C. 539=17 S.L.R. 164. Special authority, express or implied, is necessary to bind the other partners by submission to arbitration. 7 L.W. 114=43 I.C. 508; 76 I.C. 359=1924 S. 41. But a partner who ratifies the submission will be bound by it. 7 L.W. 114=43 I.C. 508. *See also* 22 A. 135 (138). Where the suit is brought against a firm, the reference to arbitration is made by a firm, and the award is against a firm and not against the individual members thereof, the award is valid, though the submission is signed by the managing members of the firm only and not by all members. 71 I.C. 734=1923 L. 212. Where the submission has been made in good faith and the partner has to make payment in accordance with the award, the partner is *entitled to claim contribution* from his partners on the basis of the award. 59 I.C. 501=39 M.L.J. 269. When one or some of the partners pays off a debt due by the partnership, he is entitled to file a suit to compel contribution from his or their other partners. Such a suit cannot be regarded as one for account of partnership. 1941 N.L.J. 667. Where a creditor obtains a joint decree against some of the partners of a firm in respect of a partnership debt contracted by them, one of the judgment-debtors by paying the entire decretal amount is not entitled to sue his co-judgment-debtors alone for contribution in the absence of the other partners, unless there are special circumstances. Such special circumstances generally arise where there is an express promise by the co-judgment-debtors to indemnify the plaintiff. If, on the other hand, the debt that is paid by the plaintiff is not a partnership debt but a debt contracted by the partners on their own personal liability quite independently of the partnership business, a suit for contribution would undoubtedly lie. The mere fact that a joint decree is passed against some of the partners is not sufficient for the purpose of showing that it is a separate liability incurred by them jointly. 43 C.W.N. 1214; *see also* I.L.R. (1942) Nag. 340 =1942 Nag. 72.

Sub-sec. (2), cls. (c) and (d).—Now a partner has no authority to compromise or relinquish any portion of a claim by the firm. Prior to the Act, it was held by Kincaid, J.C. and Aston, A.J.C. (Kennedy, A.J.C., dissenting) that one partner might release a cause of action in which all the partners were jointly interested in the absence of fraud. 80 I.C. 583=1925 S. 63. *See also* 76 I.C. 359=1924 S. 41. The right of one partner to claim a share in a debt fraudulently released by the

Extention and restriction of partner's implied authority.

20. The partners in a firm may, by contract between the partners, extend or restrict the implied authority of any partner.

Notwithstanding any such restriction, any act done by a partner on behalf of the firm which falls within his implied authority binds the firm, unless the person with whom he is dealing knows of the restriction or does not know or believe that partner to be a partner.

Partner's authority in an emergency.

21. A partner has authority, in an emergency to do all such acts for the purpose of protecting the firm from loss as would be done by a person of ordinary prudence, in his own case, acting under similar circumstances, and such acts bind the firm.

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others is a personal one not passing to his legal representatives. 41 M. 446=34 M.L.J. 41=44 I.C. 466. This cl. (*c*) would apply even where the compromise is effected in the form of "an assignment" of a decree in favour of the firm. 59 M. 1036 (noted *supra*). But *see* 1936 A.M.L.J. 79. A partner in a trading firm has an applied authority to assign a debt due to the firm; but he has no such authority to assign a decree for money obtained by the firm for an amount which is less than the decretal amount. 43 Bom. L.R. 888=1942 Bom. 22.

Cl. (f).—A lease taken by two partners without the concurrence of the third, cannot bind the latter, when such concurrence is a necessary condition of the partnership. 21 I.C. 3=7 L.B.R. 42. Where, by agreement between the partners, any one of them is empowered to take a lease and execute any necessary documents, it must be taken that such documents were intended to operate, as if all the members were parties thereto, although the other members are not mentioned in the agreement and did not execute them. 19 M. 471 (476). But *see* 16 B. 568 (574), holding that the other partners are not liable to be directly sued by the lessor for the rent reserved by the lease.

Cl. (g): PARTNER'S POWER TO MORTGAGE PARTNERSHIP PROPERTY.—Prior to the Act, the Courts were of the view that a partner can effect a legal as well as an equitable mortgage of partnership property. It is settled law in England that a partner can effect a mortgage by deposit of title-deeds. *See* Lindley on Partnership, pp. 156 and 165; and In re *Clough*, (1885) 31 Ch. D. 324; and In re *Bourne*, *Bourne* v. *Bourne*. (1906) 2 Ch. 427. This clause would seem to prohibit even such a mortgage, because a mortgage by deposit of title.deeds would be a transter of the immoveable property, by the operation of S. 58 of the T. P. Act. (*See* Sel. Com. Report.) The case-law in India prior to the Act is summarised below:—Power to borrow is incidental to power to trade and power to pledge the business assets is incidental to power to borrow. *See* 31 M. 206; 2 M.I.A. 487 (P.C.); 4 A. 437 (460). If the partnership be of a general commercial nature, one partner may even pledge or sell the partnership property. 81 I.C. 513=28 C.W.N. 824=1925 C. 29. The managing partner has power to execute mortgage of partnership property in order to raise money to carry on the business. 107 I.C. 453=1928 P.C. 135 (P.C.). In a partnership whose business it is to buy and deal in land, a partner can mortgage the partnership land. 10 I.C. 776.

RELATION OF PARTNERS—RIGHT OF SUIT OF INTER SE.—Partners are not, as regards partnership dealings, considered as debtor and creditor *inter se* until the concern is wound up or accounts settled. One partner has, therefore, no right of action against another for the balance owing to him until after final settlement of accounts; but he can proceed against another for a debt which is independent of the partnership account. The only suit possible between the parties is one for partnership accounts. 62 C. 510=39 C.W.N. 606.

RIGHT OF SURVIVING PARTNER.—A surviving partner can file a suit without impleading the representatives of a deceased partner for the recovery of a partnership debt which accrued due during the lifetime of the deceased partner. 11 Mys.L.J. 344.

SUIT NOT IN FIRM NAME—ALL PARTNERS MUST BE IMPLEADED.—If a suit is not brought in the name of a firm, all the partners should be impleaded. A suit by a person as the sole owner of a firm, at the time of the institution of the suit cannot be said to be one on behalf of the firm. 35 P.L.R. 616=1934 L. 459. Individual partners may be sued personally along with the firm and a decree can be passed against the partners as well as the firm. 187 I.C. 373=1940 Sind 19. *See also* 1938 Rang. 205. Suit against partners—Partnership business carried on by some members of joint Hindu family—Relief against other members on footing that business is joint Hindu family business—Pleadings—Relief. *See* 1938 Rang. 205.

Sec. 20.—*Cf.* Ss. 5 and 8, English Partnership Act and S. 251, Contract Act. Partner cannot by notice absolve himself from liability for other partners' acts. But unauthorised dealings by one partner contrary to resolution by majority are not binding on partnership as against party with notice of resolution. 1928 S. 37=105 I.C. 862. Where the contract of hire of a partnership lorry is made by one partner personally, such partner acts as an agent of other partners, and the former is entitled to sue upon the contract in his own name. 1933 N. 221 (2). Partnership contract—Damages for breach of agreement—Liability of partners. 1933 O. 259. Debt contracted by one partner—Liability of

22. In order to bind a firm, an act or instrument done or executed by a partner or other person on behalf of the firm shall be done or executed in the firm name, or in any other manner expressing or implying an intention to bind the firm.

Mode of doing act to bind firm.

23. An admission or representation made by a partner concerning the affairs of the firm is evidence against the firm, if it is made in the ordinary course of business.

Effect of admissions by a partner.

24. Notice to a partner who habitually acts in the business of the firm of any matter relating to the affairs of the firm operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

Effect of notice to acting partner.

25. Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner.

Liability of a partner for acts of a firm.

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other partner or his estste—Money borrowed by executor of such partner—Estate not liable. Executor is personally liable. 1940 Rang. 60.

Sec. 22.—*Cf.* S. 6 of the English partnership Act.

PRINCIPLES OF THE SECTION—FIRM WHEN BOUND BY ACTS OF ITS AGENT.—See *British Homes Ass. Corp., Ltd.* v. *Paterson,* (1902) 2 Ch. 404; 126 I.C. 741=1928 B. 516; 1926 M. 390; 1930 S. 4. *See also* 13 I.C. 255=5 S.L. R. 168; 35 Bom.L.R. 68=1933 B. 101. One partner cannot bind the others by guarantee apparently unconnected with the partnership. [*Duncan* v. *Lowndes*, (1813) 3 Camp. 478; 20 N.L.R. 140=1924 N. 411]. A partner is not liable for the action of other partners unless the same is on behalf of the partnership. 20 N.L.R. 140=1924 N. 411. A bill given for partnership purposes by one partner in his own name, and not in the firm's name, does not bind the other partner. Re *Adansonia Fibre Co., Miles' Claim*, (1874) 9 Ch. App. 635. *See also* 39 B. 261=42 I.A. 48=28 M.L.J. 515 (P.C.). A pro-note was headed "The Lahore Cotton Baling Press," and signed by one *G* alone. A suit was brought against *G* and *H*, alleging that *H* was the partner and thus liable. *Held*, that the form of the document showed that *H* was not liable. 111 I.C. 745= 1928 L. 722. Where two persons form a partnership for the purpose of a trading adventure, and *goods are purchased or moneys raised, ostensibly by an individual adventurer* but truly and substantially, for the purpose of the joint adventure, the adventurers are liable as partners. But there is no such responsibility for goods purchased upon the credit of an individual adventurer, though they are afterwards brought into stock as his contribution to the joint adventure. The test to be applied to each case, to find out whether the transaction is or is not a partnership transaction, is laid down in (1810) 12 East 421. 39 B. 261=42 I.A. 48=28 M.L.J. 515=26 I.C. 915 (P.C.). Where some of the *partners signed an agreement* without any words following their signatures to show in what capacity they signed, but the instrument sufficiently disclosed that the agreement was made on behalf of the firm, it was held that the other partners also were bound by the agreement. 113 I.C. 380=1928 M. 1196=55 M.L.J 574. Words which may be construed as merely a description or as showing the designation of the person signing the instrument will not be sufficient to make a firm liable. 1930 S. 4.

Sec. 23.—"S. 23 is based on S. 15 of the English Act." (*Report of the Select Committee.*)

"IF IT IS MADE IN THE ORDINARY COURSE OF BUSINESS".—If the transaction in connection with which a representation or an admission is made is within the scope of the partner's authority as agent of the firm, such representation or admission will bind all of the partners, otherwise it will not, unless actually authorized or ratified by them. *See* 84 I.C. 199. It is receivable against the partner making it, although not ordinarily conclusive against him.

Sec. 24.—*Cf.* S. 16 of the English Partnership Act.

Sec. 25.—*Cf.* English Partnership Act, Ss. 9 and 12 and Indian Contract Act, Ss. 249 and 250. Partners are jointly and severally liable for the acts or omissions of any of them which cause loss or damage to third persons, if such acts are either done by a partner in the ordinary course of the firm's business or with the authority of his partners (S. 26). They are also jointly and severally liable where a partner receives and misapplies the money or property of a third person while acting within the scope of his apparent authority, and where the firm receives, in the ordinary course of its business, money or property which is misapplied by one or more of the partners while in the firm's custody (S. 27). *See* 48 B. 176=1924 B. 260. Surety letter of managing partner given on behalf of the firm binds all the partners. 1939 N.L.J. 80=1939 Nag. 31. When a firm ceases to exist, but some of the partners carry on the business under the same name, the retiring partners cannot be made liable for any transaction entered into after the dissolution. 68 I.C. 932=1922 L. 466. The estate of the deceased partner is not liable for the debt contracted by

Liability of the firm for wrongful acts of a partner.

26. Where, by the wrongful act or omission of a partner acting in the ordinary course of the business of a firm, or with the authority of his partners, loss or injury is caused to any third party, or any penalty is incurred, the firm is liable therefor to the same extent as the partner.

Liability of firm for misapplication by partners.

27. Where—

(*a*) a partner acting within his apparent authority receives money or property from a third party and misapplies it, or

(*b*) a firm in the course of its business receives money or property from a third party, and the money or property is misapplied by any of the partners while it is in the custody of the firm,

the firm is liable to make good the loss.

Holding out.

28. (1) Any one who by words spoken or written or by conduct represents himself, or knowingly permits himself to be represented, to be a partner in a firm, is liable as a partner in that firm to any one who has on the faith of any such representation given credit to the firm, whether the person representing himself or represented to be a partner does or does not know that the representation has reached the person so giving credit.

(2) Where after a partner's death the business is continued in the old firm name, the continued use of that name or of the deceased partner's name as a part thereof shall not of itself make his legal representative or his estate liable for any act of the firm done after his death.

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the surviviug partner to enable him to perform a contract entered into during the lifetime of the former. The suit debt being binding on the partnership assets, the surviving partner has power to pledge the partnership assets in discharge of it. As regards that amount, a personal decree against the partnership assets n his hands can be passed. 42 M. 15=35 M.L.J. 669 =47 I.C. 958. Except on dissolution of the partnership, no suit could be maintained by a partner or his assignee for contribution against the other partner in respect of a partnership debt. 33 M.L.J. 509=43 I.C. 217. A partner is always liable for the partnership debt, unless there is a restriction expressed or implied on the liability to be incurred by one partner on a bill or promissory note which may be executed by another partner for partnership purposes. 40 M. 727=31 M.L.J. 138. Where a partnership is rescinded on the ground of fraud, the partners at fault cannot ask the other partners to contribute to the loss which may have resulted in the partnership. 60 I.C. 709.

Sec 26.—*See* S. 10, English Partnership Act. "Ss. 26 and 27 describe the tortious acts for which a firm is liable. They reproduce Ss. 10 and 11 of the English Act, with very little change." (*Report of the Select Committee.*) The mere fact that a partner, in instituting a malicious prosecution against a stranger, described himself as the agent of the partnership, acting in the matter of the complaint against the stranger on behalf of the firm, is not sufficient to render the firm or all the partners liable in damages to the stranger. There must be evidence to show that the firm was in some way or other concerned in the prosecution and had instigated it, 28 B. 226 (231). As to liability of partner for *criminal breach of trust*, *see* 41 P.L.R. 37; 1939 Sind 21.

Sec. 27.—*See* S. 11, English Partnership Act. Any partner in a trading firm has an implied authority to borrow money for the purposes of the business on the credit of the firm. A firm would be a trading firm if its business consists in buying and selling. In such a case, there is no duty cast on the person who advances the money to make any further enquiries and the other partners are responsible though the borrowing partner may misappropriate the money. 48 B. 176=77 I.C. 548=1924 B. 260.

Sec. 28.—*See* S. 14, English Partnership Act and Ss. 245 and 246 of the Indian Contract Act. "S. 28 introduces the doctrine of 'holding out.'"

PRINCIPLES OF THE SECTION.—*See* 10 C.W.N. 513; 18 W.R. 384; 78 P.R. 1903. Any conduct on the part of a person reasonably calculated to lead others to suppose that he is a partner in a particular business amounts to a holding out on his part; for by such conduct he lends his credit to the concern. A frequent method of holding out consists in the use of one's name as a part of the firm style. Such use is a virtual representation that the person thus named is a member of the firm. *See* 88 I.C. 584=1925 O. 451; 87 I.C. 508=29 C.W.N. 496=1925 C. 937. The addition of "& Co." to the name of an individual does not indicate that any particular person is designated by those words. Still a person may be held out as a partner, without having his name appear in the firm style,or being disclosed in any way. 1925 O. 451. Under this Act the rule of liability by "holding out" can be relied on only by the persons to whom the representation has been made and who have acted on the faith of its being true. 87 I.C. 905=1925 S. 310. *See also* 10 C.W.N.

29. (1) A transfer by a partner of his interest in the firm, either absolute or by mortgage, or by the creation by him of a charge on such interest, does not entitle the transferee, during the continuance of the firm, to interfere in the conduct of the business, or to require accounts, or to inspect the books of the firm, but entitles the transferee only to receive the share of profits of the transferring partner, and the transferee shall accept the account of profits agreed to by the partners.

Rights of transferee of a partner's interest.

(2) If the firm is dissolved or if the transferring partner ceases to be a partner, the transferee is entitled as against the remaining partners, to receive the share of the assets of the firm to which the transferring partner is entitled, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

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513; 18 W.R. 384 (387); 78 P.R. 1903. As to liability of retiring partner, *see* 137 P.L.R. 1908 =102 P.W.R. 1908. But there may be cases in which the holding out has been so public and so long continued that the Court may infer that one dealing with the parties knew it, and relied upon it, without direct testimony to that effect.

Sec. 29.—*See* S. 31, English Partition Act.

CHANGE OF MEMBERSHIP OF FIRM BY TRANSFER OF A PARTNER'S INTEREST IN THE FIRM.—It is perfectly competent for a partner to sell his interest in the firm and retire therefrom. Such transaction does not prevent the continuance of the partnership by the other partners. On the contrary, if the business is thereafter carried on by the other partners, it will be presumed that their original contract remains in force, so far as it is consistent with the change of members. Without the retirement of a partner, the members of an existing firm may admit a new member into the firm. If the incoming partner is induced to become a member of the firm by false and fraudulent representations, he may rescind or maintain an action on the ground of fraud. As to the effect of fraud on creditors, *see* 18 N.L.R. 186=64 I.C. 719=1922 N. 70. The fundamental principle underlying the law of partnership is that a stranger cannot be foisted upon the partners against their will; consequently even when a partner transfers his interests in a firm the transferor does not cease to be a partner nor does the transferee become one. 1942 N.L.J. 229. The assignee of a partner is not bound by any settlement of accounts entered into by the remaining partners behind his back and after notice of assignment. 52 M. 509=1929 M. 627=56 M.L.J. 776. The legal power of a partner to make a transfer of his interest to a third person is unquestioned. The transferee, however, does not become a tenant-in-common with the other partners in any specific goods, but acquires only the interest his vendor had, which is his share of the residue after the affairs of the firm are settled and the debts paid, including, debts due from the firm to a partner. Such a purchase does not make the buyer a partner in the firm, without the concurrence of all the partners, either given expressly or implied from conduct. The assignee or mortgagee of the share of a partner is entitled to receive a share of the profits to which the assigning partner would be entitled and the assignee must accept the accounts of profits agreed to by the partners. 10 P. 792=12 Pat.L.T. 361=1932 P. 15. *See also* 4 L.W. 10=34 I.C. 543. Where two out of a firm of three partners assigned their shares to two others and it was not proved that the third partner relinquished his claim upon the assignors as a partner, although he might have had knowledge of the assignment, he is entitled to sue for the winding up of the partnership and for a decree for account as against the assignor-partners and the assignees. 27 C. 93. One partner cannot by his action introduce a third party without the consent of the other partners, so as to give the third party a right to interfere in the management of the business or to ask for an account. It is only when dissolution occurs that the right of the assignee arises to take action in the same way as his assignor could have done, to claim an account as from the date of the dissolution. But it is the assignor and not the assignee who can sue for dissolution. 27 Bom.L.R. 409=1925 B. 347. *See also* 10 P. 792, *supra*. That is the law as laid down in the English Partnership Act (*see* Sec. 31) and that also represents and always represented the law in India, although there was, before the enactment of this section, no statutory provision to that effect. 10 P. 792. The purchaser of the right of one of the partners of a mill, pending a suit for dissolution and accounts, is not entitled to maintain a separate suit for damages for use and occupation of the mill even though the mill solely belonged to his vendor. 19 C.W.N. 1115=31 I.C. 707. A receiver appointed at the instance of an assignee of the share of a partner cannot, any more than the assignee himself, sue the other partners for accounts before dissolution. 10 P. 792=133 I.C. 40=12 Pat.L.T. 361. As to exceptional circumstances, under which the right to account may be recognised, *see* 10 P. 792=133 I.C. 40=12 Pat.L.T. 361. A partner has no right to any specific items of partnership property, but a partner in a firm, unlike a shareholder in a joint stock company, is a 'joint owner' and holds an interest in the partnership property, and dissolution of property, operates as a transfer of that interest. An agreement to assign his interests in a firm owning immoveable property requires to be registered. 132 I.C. 305=1931 M. 580=60 M

30. (1) A person who is a minor according to the law to which he is subject may not be a partner in a firm, but, with the consent of all the partners for the time being, he may be admitted to the benefits of partnership.

Minors admitted to the benefits of partnership.

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L.J. 527. In a suit by a transferee or an assignee from an ex-partner in a firm after the dissolution of the partnership for accounts of the dissolved partnership as a whole and not for accounts after the date of the dissolution only the assignors are necessary parties. Consequently, when they are not joined either as plaintiffs or defendants till more than three years after the dissolution of the partnership the entire suit must stand dismissed. Sec. 130 (2), T. P. Act, does not obviate the necessity of impleading the assignor in such a suit. 194 I.C. 380=1941 Sind 73.

Sec. 30.—*Cf.* Ss. 247 and 248, Contract Act. There is nothing corresponding to this section in the English Act. A minor on attaining majority cannot be adjudicated insolvent for the debts of the firm. 36 I.C. 787=1917 M.W.N. 150; 58 I.C. 558. Though a minor partner cannot be adjudicated insolvent, the firm can be and its profits can be dealt with for the benefit of the creditors. Minor has a right to share in the property still left. 21 S.L.R. 280=1927 S. 18=97 I.C. 446. *See also* 42 A. 515=18 A. L.J. 611; 58 I.C. 557; 42 C. 225=26 I.C. 836; 42 I.C. 98. Sec. 247, Contract Act, in stating the position which an infant partner occupies, does not seem to accord with the English cases. Under Sec. 247, the infant, while entitled to share the profits of the business, is not liable for the losses except to the extent of his own share in the partnership property. According to the English cases, a minor is no more bound by a contract of partnership than by any other contract. Moreover, under Sec. 247, the minor's share in the property of the firm is liable for its obligations, whether he has derived benefit from the business or not. 20 B. 767 (777). Sec 248, Contract Act, seems to place the creditors of the firm in a more favourable position than in England. 25 C.W.N. 847=66 I.C. 811. "*Benefits of partnership*" include benefits which minor would enjoy if he were major. 86 I.C. 944=18 S.L.R. 96 =1925 S. 272. As to the scope of this section, *see* 23 B. 146 (161). As to what amounts to the admission of a minor to the benefits of a partnership, *see* 1917 M.W.N. 150=36 I.C. 787. This section is subject to the provisions of Sec. 11, Contract Act, and a minor cannot simultaneously create a partnership and admit himself to its benefits. There must be a partnership already in existence before a minor can be admitted to the benefits thereof. 1922 L. 441 =67 I.C. 95. The question whether a minor has been admitted to the benefit of a partnership is one of fact to be pleaded and proved at the trial and cannot be allowed to be raised for the first time on appeal. 49 C. 560=49 I.A. 108=43 M.L.J. 41 (P.C.). Where one of two partners died leaving a minor son, but the business was carried on under the old name and style with the partnership funds, *held*, that the minor could not enter into a contract with the surviving partner and was consequently not a partner. 53 A. 479=130 I.C. 704=1931 A. 327. In a such case the partnership having come to an end on the death of one of the partners, there was no question of the minor being admitted to the benefit of the partnership. 53 A. 479. Although a minor cannot be a member of partnership by his own contract, yet, if he is admitted to the benefits of the partnership by the other members, he can bind the others by his dealings in respect of the partnership business. 42 I.C. 98. The Secs. 247 and 48, Contract Act, are independent of Hindu law and apply to all persons. 36 I.C. 787. *See*, however, 41 M. 824, *infra*. Secs. 247 and 248, Contract Act, do not apply to minor members in a joint family trade whether started by manager or inherited. The minor's interest depends on his belonging to the family, not on his agreement or admission. Minor is not liable for debts contracted during his minority. 41 M. 824=35 M.L.J. 473=49 I.C. 220. *See also* 23 C.W.N. 500=29 C.L.J. 280=51 I.C. 597. A Hindu infant, who, by birth or inheritance, becomes entitled to an interest in a joint family business, does not necessarily become a member of the trading partnership, which carries on the business. He can only become a member of the partnership by a consentient act on the part of himself and his partners. 26 C. 349 (354). Members of the family, who are minors and are not shown to have been admitted into a trading firm and to have taken part in its business, need not be made parties as plaintiff to a suit to recover arrears due to a family trading firm. 25 A. 378 (384). The guardian of a Hindu minor is competent to carry on an ancestral trade on behalf of the minor; but the minor is not personally liable for the debts of the business, and, on the analogy of the rule in S. 247 with regard to his liability on being admitted to partnership contracts, the share of the minor in the property is alone liable. 3 C. 738. S. 247 is not strictly applicable, however, where the minor is the sole owner of the firm, as there is no case of partnership there. But, in such a case, where the ancestral trade is carried on under the superintendence of the natural guardian of the minor for the benefit of herself (she having a claim to maintenance) and the said minor, the latter will be bound by all the acts of the natural guardian, which are necessarily incidental to or flowing out of the carrying on of that trade. 20 B. 767 (777, 779).

POSITION OF MINOR PARTNER.—Minor, though participating in profits of a firm, is not a partner. *See* 23 B. 146 (161). A person who is under the age of majority cannot be a member of the "firm" as defined in S. 4. He may be admitted to the benefits of a firm but cannot be made personally liable for any obligations of the firm. His share in the property of the firm is liable for the obli-

(2) Such minor has a right to such share of the property and of the profits of the firm as may be agreed upon, and he may have access to and inspect and copy any of the accounts of the firm.

(3) Such minor's share is liable for the acts of the firm, but the minor is not personally liable for any such act.

(4) Such minor may not sue the partners for an account or payment of his share of the property or profits of the firm, save when severing his connection with the firm, and in such case the amount of his share shall be determined by a valuation made as far as possible in accordance with the rules contained in section 48:

Provided that all the partners acting together or any partner entitled to dissolve the firm upon notice to other partners may elect in such suit to dissolve the firm, and thereupon the Court shall proceed with the suit as one for dissolution and for settling accounts between the partners and the amount of the share of the minor shall be determined along with the shares of the partners.

(5) At any time within six months of his attaining majority, or of his obtaining knowledge that he had been admitted to the benefits of the partnership, whichever date is later, such person may give public notice that he has elected to become or that he has elected not to become a partner in the firm, and such notice shall determine his position as regards the firm:

Provided that, if he fails to give such notice, he shall become a partner in the firm on the expiry of the said six months.

(6) Where any person has been admitted as a minor to the benefits of partnership in a firm, the burden of proving the fact that such person had no knowledge of such admission until a particular date after the expiry of six months of his attaining majority shall lie on the persons asserting that fact.

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gations of the firm and that share is no more than his right to participate in the property of the firm, after its obligations have been satisfied. 21 S.L.R. 280=97 I.C. 446; 30 C. 539 (P.C.) and 1922 P.C. 237; 49 C. 560=43 M.L.J. 41=49 I.A. 108 (P.C.). *See also* 25 C.W.N. 847=66 I.C. 811; and 43 I.C. 76=7 L.W. 218. By merely being admitted to the benefits of a partnership, a minor does not become a partner. It is only by his acquiescence after he attains majority that he can be said to have accepted the position of a partner, with all the liabilities of a partner. 62 I.C. 802=40 M.L.J. 153.

Sec. 30 (2).—A minor admitted to the benefits of partnership is entitled to participate in the property of the firm after its obligations are discharged. 49 C. 560=43 M.L.J. 41=61 I.C. 124. *See also* 86 I.C. 944=18 S.L.R. 96=1925 S. 272; 21 S.L.R. 280=1927 S. 18=97 I.C. 446; 42 A. 515; 42 C. 225; 58 I.C. 557. Minors admitted to partnership are liable to the extent of their shares for partnership debts, but they are not personally liable. 20 Bom.L.R. 762=1928 P.C. 135 (P.C.). *See also* 51 I.C. 597=22 C.W.N. 500; 21 S.L.R. 280=97 I.C. 446; 71 M L.J. 373; 66 I.C. 811=25 C.W.N. 847; 43 I.C. 76=7 L.W. 218; 3 C. 738; 41 M. 824=35 M. L.J. 473=49 I.C. 220. Minor member of joint Hindu family not liable for debts, contracted during his minority *See also* 11 C.W.N. 135.

RIGHTS OF MINOR SONS OF DECEASED PARTNER.—Where, on the death of one of two partners, widow and her minor sons agreed to continue the partnership, but later sued for dissolution, *held*, the minors were like partners but not liable for losses, and the surviving partner was liable to account to deceased partner's representatives for his share of the profits and assets at his death, deducting a reasonable amount as remuneration for his services since then. 6 R. 198=1928 R. 160. But *see also* 53 A. 497=1931 A. 327, *cited supra*. In a suit against a partnership firm, there cannot be a personal decree against the minor partners. They would be liable only to the extent of their interest in the assets of the firm. 35 P.L.R. 539.

MINOR REPRESENTATIVE OF DECEASED PARTNER, LIABILITY OF.—A minor representative of deceased partner managing the firm is liable to account to the survivor for partnership business carried on during the deceased's lifetime. The liability of the minor is not taken away by minor's want of personal knowledge. This liability is however confined to the extent of assets received by the minor representative. 40 A. 446=16 A.L.J. 305=45 I.C. 31. *See also* 71 M.L.J. 373.

FRAUD BY MINOR.—The exception of an infant is not made in S. 115, Evidence Act, and therefore, a minor, who executed a registered sale-deed representing himself to be of full age, is estopped from subsequently seeking to set aside the sale, on the ground of his minority. 21 B. 198 (201); 23 B. 146 (155).

(7) Where such person becomes a partner,—

(*a*) his rights and liabilities as a minor continue up to the date on which he becomes a partner, but he also becomes personally liable to third parties for all acts of the firm done since he was admitted to the benefits of partnership, and

(*b*) his share in the property and profits of the firm shall be the share to which he was entitled as a minor.

(8) Where such person elects not to become a partner,—

(*a*) his rights and liabilities shall continue to be those of a minor under this section up to the date on which he gives public notice,

(*b*) his share shall not be liable for any acts of the firm done after the date of the notice, and

(*c*) he shall be entitled to sue the partners for his share of the property and profits in accordance with sub-section (4).

(9) Nothing in sub-sections (7) and (8) shall affect the provisions of section 28.

CHAPTER V.

INCOMING AND OUTGOING PARTNERS.

Introduction of a partner.

31. (1) Subject to contract between the partners and to the provisions of section 30, no person shall be introduced as a partner into a firm without the consent of all the existing partners.

(2) Subject to the provisions of sectoin 30, a person who is introduced as a partner into a firm does not thereby become liable for any act of the firm done before he became a partner.

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Chap. V.—"Though Chapter VII on the Registration of Firms is the most important departure in the Act as regards substance, this Chapter is the most important departure as regards form. As mentioned in the Select Committee's Report, it contains no material change in the law of partnership, but it collects together and sets out in a convenient form all rules relating to the coming in of a partner, and all rules relating to the going out of a partner *in so far as these rules do not relate to the dissolution of the firm or to the consequences of dissolution*. As a result of the limitation on the selection of these provisions, they relate chiefly to what is referred to in various places in the Act as a 'change in the firm', that is, a change in the constitution of the firm which has not resulted in the dissolution of the firm. However, a few provisions, such as S. 34 (1) and S. 37 are of general application, that is, they apply where the firm continues without dissolution, and also where a dissolved firm is reconstituted and carries on the business with the property and assets of the dissolved firm. For this reason, the Chapter is given the non-committal title of 'Incoming and Outgoing Partners,' rather than the restricted title of 'Change in a Firm,' which would otherwise have been more suitable". *Report of Select Committee.*)

Sec. 31.—*Cf.* Ss. 249 and 253 (6) of the Contract Act and Ss. 17 and 24 of the English Act. S. 249. Contract Act, had no application to cases where, by *arrangement* between the parties, a person becomes entitled to the profits and liable for the debts accruing to and incurred by the firm, before his admission as a partner. 9 C.L.R. 21.

Sec. 31 (2) : LIABILITY OF INCOMING PARTNER—COMMENCEMENT.—If a newly constituted partnership agrees among its members that the members of the new partnership shall have the power to bind it for the taking on of the debts of the previous firm which the new partnership had taken over, that would be binding on the new partnership, provided, however, there is anything in the transaction to show that the persons who executed the bills or notes or whatever are relied upon, were purporting to act on behalf of the new partnership. 1927 M. 889=53 M.L.J. 303. Even if the incoming partner has agreed with his co-partners that as between themselves, the partnership shall be deemed to have commenced at an earlier date, or that the debts of the old firm shall be taken over by the new, this is not of itself sufficient to give creditors who are no parties to the agreement, any right to sue the new partner for anything done before he in fact become a partner. 51 M.L.J. 506=49 M. 930=1926 M. 1138. To give the creditors this right, there must be some agreement to that effect between the new partners and the creditors. 51 M.L.J. 506=49 M. 930. Apart from privity of contract, a creditor cannot rely on agreement between partners *inter se* such as that the new partner would be liable for antecedent debts. (*Ibid.*) To determine whether a new partner becomes liable to an existing creditor of the firm, two questions have to be considered (1) whether the new

Retirement of a partner.

32. (1) A partner may retire—

(*a*) with the consent of all the other partners,

(*b*) in accordance with an express agreement by the partners, or

(*c*) where the partnership is at will, by giving notice in writing to all the other partners of his intention to retire.

(2) A retiring partner may be discharged from any liability to any third paty for acts of the firm done before his retirement by an agreement made by him with such third party and the partners of the reconstituted firm, and such agreement may be implied by a course of dealing between such third party and the reconstituted firm after he had knowledge of the retirement.

(3) Notwithstanding the retirement of a partner from a firm, he and

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firm has assumed the liability to pay the debt, and (2) whether the creditor has agreed to accept the new firm, as his debtors and to discharge the old partnership from its liability. 35 C.W.N. 593. If a partner of a firm retires after he has entered into a contract and a new partner joins the firm, the newly constituted firm is different from the old firm and cannot institute a suit on the contract entered into by the latter, except when the new took over all the liabilities and outstandings of the old firm. 65 I.C. 26=1922 S. 13.

PURCHASER OF STOCK OF OLD FIRM—NO LIABILITY FOR THE DEBTS OF OLD FIRM.—S. 262, Contract Act, does not provide for a statutory charge on the property. Hence where a person purchases the stock of an old firm, he is not liable for the debts of the firm, unless such debts are made a charge on the property purchased. 1933 A.L.J. 170=1933 A. 175.

Sec. 32 (2): PRINCIPLE OF SUB-S. (2).—The law that the creditor is not bound by the arrangements between the partners new and old is more for the benefit of the creditor than to his detriment. If a partner retires after the debt was contracted with an arrangement with his co-partners for extinction of his personal liability, such an arrangement does not affect the right of the creditor who can hold all the partners who dealt with him liable. 35 C.W.N. 593. As a general rule, however, a partner who retires from a firm often takes from the continuing partners a contract indemnifying him against firm debts. Such contracts of indemnity do not, however, relieve the retiring partner from liability to firm creditors. If a person has retired from a firm, he is quite entitled to show that immediately after the date of retirement, he wrote to the Bank and informed them that he had severed his connection with the firm and could not continue to guarantee its account. If he does that, any statement by him made at the time as the reason for his refusing to continue to gurantee is admissible to explain his conduct. 35 C.W.N. 705. A *continuing guarantee* given to a firm, or in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to the future by a change in the firm. The reason is that such a change destroys its identity. (*See* S. 38, *infra.*) *Acknowledgment by one of the several partners* in the absence of notice of dissolution by resigning partner is binding on resigning partner. 56 C. 556=33 C.W.N. 412=1929 C. 714. *See also* 1926 M. 114=50 M.L.J. 867; 26 B. 42. *Where notice of dissolution was sent to the branches* and the *arthias* of the firm, and there was no attempt at concealment of the change in its constitution, the mere fact that the continuing partner retained the old firm's name, which does not disclose the identity of the retired partners, cannot render them liable for debts contracted by the continuing partner, after their retirement. 78 P.R. 1903. But where the persons who intended to retire from business did in fact continue to associate with its work, a presumption may legitimately be drawn in favour of the continuance of the partnership. 67 IC. 10=34 C.L.J. 405. A partner who has retired before a certain transaction with the firm to which he had belonged takes place, cannot be held responsible, unless it can be shown that the transaction was with either a previous customer or one who was aware that the retired partner had been a partner. 137 P.L.R. 1908=102 P.W.R. 1908; 68 I.C. 932=1922 L. 466; *see also* 14 L. 188=1933 L. 417; or that he has *actually held himself out to be a partner*, a position which gives rise to a different class of consideration. 137 P.L.R. 1908=102 P.W.R. 1908. If a person is a member of a firm, and known to be such, persons dealing with the firm may be influenced by his credit, and unless he takes proper steps to make his retirement clear, he will be held responsible to them, who knew of his partnership and might have been influenced by the fact. But it is definite personal knowledge which is required. It cannot be held as a principle that when a person has dealings with a man who was once a member of a joint Hindu family and competent to pledge the resources of that family such person can hold all the members, who once constituted a joint Hindu family responsible, unless they have taken the precaution publicly to proclaim their partition. If it be shown that the father of a minor son, had notice of a fact, such minor cannot say that he had no notice. 137 P.L.R. 1908=102 P.W.R. 1908. The outgoing partner has a right to be indemnified against the partnership debts by the appropriation thereto of the partnership assets unless such right has been taken away by any deed or agreement to which he is a party. 1933 S. 182.

Sec. 32, sub-sec. (3): PRINCIPLE OF SUB-CL. (3).—Obligations resulting from contracts entered into before a partner's retirement are binding upon him, even though such obliga-

the partners continue to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement:

Provided that a retired partner is not liable to any third party who deals with the firm without knowing that he was a partner.

(4) Notices under sub-section (3) may be given by the retired partner or by any partner of the reconstituted firm.

Expulsion of a partner.

33. (1) A partner may not be expelled from a firm by any majority of the partners, save in the exercise in good faith of powers conferred by contract between the partners.

(2) The provisions of sub-sections (2), (3) and (4) of section 32 shall apply to an expelled partner as if he were a retired partner.

Insolvency of a partnership.

34. (1) Where a partner in a firm is adjudicated an insolvent he ceases to be a partner on the date on which the order of adjudication is made whether or not the firm is thereby dissolved.

(2) Where under a contract between the partners the firm is not dissolved by the adjudication of a partner as an insolvent, the estate of a partner so adjudicated is not liable for any act of the firm and the firm is not liable for any act of the insolvent, done after the date on which the order of adjudication is made.

Liability of estate of deceased partner.

35. Where under a contract between the partners the firm is not dissolved by the death of a partner, the estate of a deceased partner is not liable for any act of the firm done after his death.

36. (1) An outgoing partner may carry on a business competing with that

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tions are not consummated until after his retirement and although as between himself and the new firm, the latter has undertaken to discharge them. The same is true of obligations incurred after his retirement, and before notice thereof has been duly given unless he is a dormant partner. *See* 75 P.R. 1908=122 P.W.R. 1908; 28 B. 606 (614). But for liabilities incurred by the new firm after his retirement, which has been duly notified, he is not responsible. *See also* 1922 L. 466; 9 M. 492. The phrase *Shikmi Sharik*, by its etymological sense, means a partner whose name is not disclosed, that is, a dormant partner. Therefore, on the retirement of a *Shikmi Sharik*, no notice of the dissolution of the partnership need be given. But he is liable to all the claims on the partnership till the date of his retirement. The *onus* of proving that he has retired from the partnership at a specific period lies on him, on general principles as well as under S. 105, Evidence Act. 75 P.R. 1908=122 P.W.R. 1908. Where the goods are sent to a firm on inspection during the continuance of a partnership and out of them those that are not required are returned after the dissolution of the partnership, though the cause of action may not arise till the unrequired goods are returned, yet all those persons who were members of the firm at the time the goods were sent to it on inspection will be liable for the goods taken. 26 C.W.N. 496=1925 C. 937.

NOTICE.—*See* 28 B. 606; 9 M. 492 (494). When a dormant partner ceases to be a member of the firm, the real authority of his co-partners to bind him is thereby withdrawn; and as *ex hypothesi* no one knows of the authority, no one is entitled to rely upon its continuance. 1930 B. 449 following 1927 B. 560 and 1929 P.C. 132. *See also* 1938 A.L.J. 907=1938 A. 619; 1936 Pat. 539. As to the liability of dormant partners, *see* 13 W.R. 29 (30)=13 M.I.A. 358 (P.C.); 9 W.R. 355 (356). *See also* 8 C. 678. S. 264, Contract Act, is a particular form of estoppel by conduct and a person is not entitled to take advantage of it unless the facts raise a presumption that the absence of public notice excited in him a belief which caused him to do something that he would not otherwise have done. 1933 L. 591.

Secs. 32, 33 and 45.—Though a partner's connection with a firm may have ceased, the firm would nevertheless continue to be bound by the transactions of that partner made with third parties, until public notice of the severance is given or it is shown that the third party was aware of the severance on the date of transaction. 1938 A.L.J. 907=1938 A. 619.

Sec. 33.—*See* 12 C.W.N. 455; 1938 All. 619.

Sec. 35.—This section is derived from subs. (3) of S. 36 of the English Act. Like S. 34, it is confined to the case where the firm continues without dissolution. Where dissolution has occurred, these matters are provided for in Ss. 45 and 47. (*Report of Select Committee.*)

Sec. 36: CONTINUED USE OF FIRM NAME.—The right to continue the use of the old firm

Rights of outgoing partner to carry on competing business.

of the firm and he may advertise such business, but, subject to contract to the contrary, he may not—

(*a*) use the firm name;

(*b*) represent himself as carrying on the business of the firm, or

(*c*) solicit the custom of persons who were dealing with the firm before he ceased to be a partner.

Agreements in restraint of trade

(2) A partner may make an agreement with his partners that on ceasing to be a partner he will not carry on any business similar to that of the firm within a specified period or within specified local limits; and, notwithstanding anything contained in section 27 of the Indian Contract Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable.

Right of outgoing partner in certain cases to share subsequent profits.

37. Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with th property of the firm without any final settlement of accounts as between them and the outgoing partner or his estate, then, in the absence of a contract to the contrary, the outgoing partner, or his estate is entitled at the option of himself or his representatives to such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm or to interest at the rate of six per cent. per annum on the amount of his share in the property of the firm:

Provided that where by contract between the partners an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner, assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

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name, after the retirement of a partner, may, be acquired by an express agreement with such partner. 1922 L. 466. Where, after dissolution of a certain firm, the assets are divided between the partners, one of the partners, can make use of the old firm's name in suits and execution proceedings for the recovery of the debts which fell to his share at the division, unless that causes any risk of liability to the others, and an injunction cannot be granted to restrain such use at the instance of the others. (22 Hals. Para, 162, Rel. on.) 9 R. 85=1931 R. 138. Mere passive acquiescence or even consent to the use of the firm's name by a partner who has left the firm would not make him liable to persons dealing with the firm after he has left it. 3 I. C. 415.

SEC. 37.—Section corresponds to S. 42 of the English Partnership Act.

SCOPE OF SECTION.—Where a partner, on the death of another partner, retains the partnership capital in his hands and employs it in trade, he is bound to render an account of the profits of the partnership to the other partner's son from the time of the death of that partner up to the date when the final decree is made. 53 A. 479 =1931 A. 327. Where on the dissolution of a firm one of the partners retains assets of the firm in his hands without any settlement of accounts and applies them in continuing the business for his benefit, he may be ordered to account for these assets with interest thereon, even in the absence of fraud or misconduct in the nature of fraud. 42 C. 914=42 I.A. 91=29 M.L.J. 70 (P.C.). The assets of the deceased partner are a loan to the firm if they are retained in the business after his death, and the arrangement he makes at the time of death binds his estate. 37 B. 158=19 I.C. 406=15 Bom.L.R. 192. Where on an assignment of a partner's share the partnership is dissolved and a new firm is formed by the remaining partners, the assignee is entitled at his option either to the profits of the new firm or interest at 6 per cent. 52 M. 509=1929 M. 627=56 M.L.J. 776.

PROFITS ATTRIBUTABLE TO THE SHARE OF THE OUTGOING PARTNER'S CAPITAL.—A minor who is entitled to claim the assets of his deceased father in a partnership cannot claim as of right a share in the profits of the concern. There is no fiduciary relation between the surviving partners and the legal representatives of the deceased partner. The amount due to the deceased is a loan and nothing more. 4 L.W. 521=37 I.C. 728.

NATURE OF RIGHT—ALTERNATIVE, INTEREST OR PROFITS.—The right, under this section where it exists, is an *alternative right* to interest on the capital improperly retained in the business or to

38. A continuing guarantee given to a firm, or to a third party in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions from the date of any change in the constitution of the firm.

Revocation of continuing guarantee by change in firm.

CHAPTER VI.

DISSOLUTION OF A FIRM.

39. The dissolution of partnership between all the partners of a firm is called the "dissolution of the firm".

Dissolution of firm.

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an account of the profits made by its use; and one or other of these alternatives must be distinctly chosen. *A double claim for both profits and interest is inadmissible. Vyse* v. *Foster*, 1874 L.R. 7 H.L. at p. 336. *See also* 1929 M. 456=56 M.L.J. 657=52 M. 672. He is not bound to make his election until the share of the profits that would fall to him has been ascertained and hence his final election must be postponed until the accounts have been taken. And for such retiring partner to be able to claim his share of the profits, it is not necessary that the whole of the partnership assets should be used by the remaining partners, and it is enough if any portion of the assets are so used. 52 M. 672=1929 M. 456=56 M.L.J. 657. Where a partner invests capital of his own in the partnership business, he should in equity be allowed to charge interest on the capital so employed in making up the profit and loss account of the business. 110 I.C. 639=23 S.L.R. 471=1929 S. 85. In an action to dissolve and wind up the affairs of a partnership, until the accounts have been taken, it is impossible to say what if anything is due from any partner or co-partners; interest, therefore, should only be allowed to the plaintiffs from the date of final decree by which amount (if any) is found to be due from the defendants to the plaintiffs and not from the date of plaint. 34 C W.N. 737=1930 P.C. 185 (P.C.). A partner is not charged with interest in respect of overdrawings. 1930 P.C. 185.

Sec. 38.—'*Cf.* S. 18 of the English Act and S. 260 of the Indian Contract Act. (*Report of Select Committee.*)

Chapter VI.—This Chapter is derived from that part of the English Act which is headed "Dissolution of Partnership and its consequences," but it excludes certain matters already included in the previous Chapter, and introduces some new matter, notably S. 55 on goodwill. (*Report of Select Committee.*)

Sec. 39.—As to the position of parties in a partnership suit being in some particulars different from that of the position of parties in an ordinary money suit, *see* 11 L. 359=1930 L. 725. Where a member of a joint Hindu family enters into a partnership, he might be representing the family of which he may be a member and may as such be accountable to the other members of the family; but so far as other parties to the deed of partnership are concerned, they must confine themselves to the terms of the deed itself and cannot be permitted to travel beyond it by arising a plea that his brother, a person not party to the said deed should have been impleaded in a suit for dissolution of partnership. 1930 L. 655=11 L. 359. *See also* Notes under S. 42, cl. (*c*), *infra*. The presumption of agency does not exist in the case of a partnership which has ceased to be a going concern. 1925 N. 268=85 I.C. 775. Though it be true that a mere suspension of business of partnership does not necessarily lead to the conclusion that there has been a dissolution of the partnership, still the cessation of business coupled with other circumstances may legitimately lead to the inference that the partnership had been dissolved. 107 I.C. 673=26 A.L.J. 240=1928 A. 58; 1927 P.C. 70 and 1925 A. 786, Dist. After a partnership has been dissolved and accounts settled, any balance struck by a partner is one without authority and consideration. It does not create any liability on the firm. 95 I.C. 88 =1926 L. 522.

SUIT FOR DISSOLUTION AND ACCOUNT—PROCEDURE.—Where a suit is filed for dissolution and settlement of accounts of a partnership business, ordinarily the liabilities have to be paid and assets to be collected and the business has to be wound up. Sometimes this is begun by ascertaining the liabilities and assigning them either to the parties with the consent of the creditors or by discharging them out of the sale proceeds of the assets of the business. The amounts due to the partnership are valued and assigned to the parties, or auctioned between them, or sold to third parties. 160 I.C. 642=1936 Lah. 458. When a partnership at will is formed, apart from the circumstances in which the Court may dissolve it, it can come to an end by a notice of dissolution or abandonment by one of the partners of the partnership. The fact that no further partnership business is done does not result in a dissolution of the partnership. The distinction between the closing of a business and the dissolution of a partnership must be kept in view. I.L.R. (1940) Bom. 505=42 Bom.L.R. 511=1940 Bom. 263. *See also* 1938 Sind 82.

DECREE—FORM OF.—The proper form of an order in dissolution of partnership is given in Form 21, Appendix D to the C. P. Code where there is a form given for a preliminary decree in a suit for dissolution of partnership and the taking of partnership accounts. The practice which has obtained some recognition of copying down the concluding sentences of a judgment

Dissolution by agreement.

40. A firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners.

Compulsory dissolution.

41. A firm is dissolved—

(*a*) by the adjudication of all the partners or of all the partners but one as insolvent, or

(*b*) by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the partners to carry it on in partnership:

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and incorporating those as an order instead of making an order as contemplated by the first schedule is bad and ought to be discouraged. 179 I.C. 64=1938 Rang. 478. A suit for dissolution of a partnership by one partner against another, without impleading all the partners of the business is not maintainable and must fail. 46 Mys.H.C.R. 234=19 Mys.L.J. 351. Even an assignee of a partner's rights cannot intervene until after dissolution, still less can a person who claims to be a mortgagee of partnership property from a partner for a non-partnership purpose. Such a person claiming under a title which is a nullity as against the firm and the other partners cannot be joined in a suit for dissolution. 1941 N.L.J. 657.

Sec. 40 covers the case where all the partners agree that the firm should then be dissolved; and also the case where the dissolution occurs in pursuance of a contract previously made, for example, in the articles of partnership. (*Report of Select Committee.*) It is open to the partners of a partnership to come together and agree to an account among themselves, even after the expiry of three years from date of dissolution; and such a settlement is supported by consideration, as all of them make mutual promises to abide by such settlement. 142 I.C. 549=37 C.W.N. 580=1933 P.C. 120=64 M.L.J. 596 (P.C.). A firm carries on business so long as its business debts remain undischarged. The mere fact that no new business was done after a particular date does not amount to a dissolution of the firm. 32 S.L.R. 672=1938 Sind. 82; 1938 Rang. 478. *See also* 1937 Mad. 599; 1940 B. 63. Where the predominant intention of the executants of a deed of partnership is that the firm shall continue to carry on business without running the risk of dissolution at the instance of one of the partners who did not agree with the rest and wherein machinery is provided by which a partner apprehending loss can obtain adequate relief and finally there is a provision for settlement of disputes by arbitration, it is clear that it was the intention of the executants that the partnership shall not be dissolved on the happening of the contingencies mentioned in the Partnership Act. In such a case one of the partners has no right to bring a suit for dissolution of the partnership on the ground that the managing partner does not manage the business in a manner which may be profitable to the partners. I.L.R. (1939) A. 577=1939 A.L.J. 440=1939 All. 548.

Sec. 41 relates to events whose occurrence unavoidably dissolves a firm. Cl. (*a*) is new, but needs no comment. Cl. (*b*) is S. 34 of the English Act and S. 255 of the Indian Contract Act. The proviso incorporates a suggestion made by Lindley at page 682. (*Report of Select Committee.*)

Cl. (a).—As to the dissolution of the partnership by the bankruptcy or insolvency of the partners, it may be remarked that this naturally, and indeed, upon just reasoning, necessarily produces this effect, for the bankrupt partners are thereby disabled to perform their portion of the partnership contract, since all their preperty, is by operation of law immediately upon the declaration of bankruptcy or insolvency, divested out of them and it passes by assignment to the persons who are duly designated as the assignees thereof, to dispose of the same, and to distribute the proceeds among their creditors. The assignees are not, on the one hand, compellable to become partners, nor, on the other hand, are the other partners compellable to admit them into the partnership. But a more important and an absolutely conconclusive ground is that the further continuation of the partnership is utterly incompatible with the whole policy and objects of the bankrupt and insolvent systems. These systems contemplate an immediate sale and distribution of the assets among the creditors; and the assignees have no authority whatever to enter into any further engagements in any trade or business on account of the creditors, or at their risk. (Story, S. 313); 1928 S. 71=106 I. C. 54; 1925 S. 410=87 I.C. 905. *A fortiori,* the like doctrine applies where all the partners become bankrupt, for then the whole property is divested out of all of them. (Story, S. 313.) But the mere failure of a company does not dissolve a partnership. 1929 A. 236=117 I.C. 824. On this section, *see also* 1932 S. 71; 1932 S. 164; 1932 B. 316.

Sec. 41, Cl. (b).—The illegality of the partnership is no answer to a demand against it arising out of a transaction to which it is a party if the other person was not aware of it. If a business is carried on by two partners and is legal only so far as one is concerned, the presumption is that he has benefited by one half of the loan and a decree should be given against that partner only for half the amount borrowed by the partnership. 43 M. 141=38 M.L.J. 123 =54 I.C. 45. S. 25, Punjab Laws Act, only applies to a person's misconduct previous to his being declared an insolvent, and the bankruptcy of a firm does not necessarily involve a legal prohibition of its business. The partners themselves are thereby prevented from carrying on the business, but it does not follow that the business itself is prohibited by law. 37 P.R.

Provided that, where more than one separate adventure or undertaking is carried on by the firm, the illegality of one or more shall not of itself cause the dissolution of the firm in respect of its lawful adventures and undertakings.

Dissolution on the happening of certain contingencies.

42. Subject to contract between the partners a firm is dissolved—

(*a*) if constituted for a fixed term, by the expiry of that term;

(*b*) if constituted to carry out one or more adventures or undertakings,

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1897. A suit to recover even the money advanced as capital for the purposes of a partnership, which was partly illegal, is bad. 3 Bom.L.R. 164.

Sec. 42.—It is the duty of the Courts to bring about the fulfilment of the expectations of the parties, and when a partnership has been entered into for a fixed term, the Courts should not permit a partner to drive the others to a dissolution. 66 I.C. 473=2 L. 351=1922 L. 195. Where plaintiff and defendant entered into partnership for a fixed term, but plaintiff failed to carry out his part of the partnership work, it was held that the plaintiff was not entitled to compensation for certain work done by him, that the defendant could not be expected to wait indefinitely for plaintiff to do his share of work, but that he was entitled to the nett share of profits. 6 P.L.R. 1915=27 I.C. 650. On this section, *see also* 86 I.C. 950=1925 S. 300. When a partner dies, his representative has an interest in and a lien upon the partnership assets and can claim a taking of accounts as upon dissolution caused by the death of the deceased. Where the surviving partners alienate any property, the proper remedy of the personal representative of the deceased partner is to ask for the taking of a general partnership account and not by a suit for a half-share in the alienated property. I.L.R. (1939 Nag. 396=1938 Nag. 182.

Cls. (b) and (c).—*See* 80 I.C. 378=46 M.L.J. 503; 46 I.C. 467=118 P.W.R. 1918; 1939 A. 217. The principle of this sub-cl. (*c*) is that partners cannot be expected to acquiesce in new partners being forced upon them. In the event of a partner dying, they may well object to the executors or administrators or other heirs coming into the business. *See* 101 P.R. 1914=27 I.C. 69=218 P.L.R. 1915. Even where there is a period fixed, the death of one partner dissolves the partnership and the case of a partnership for a particular adventure is no better than the case where there is an express period. 52 M.L.J. 318=1927 M. 491.

EFFECT OF PROVISIONS IN THE ARTICLES OF ASSOCIATION CONCERNING DEATH.—But although a dissolution of the partnership takes place by law upon the death of any one of the partners, this proposition must be understood with the limitation that, by the articles of co-partnership, or other agreement between the partners, it is not otherwise stipulated by the parties. For it is entirely competent for the parties to vary this general result of law by an express agreement; and if such an agreement exists, it will depend upon the particular terms thereof. 66 I.C. 811=25 C.W.N. 847; 124 I.C. 19; 68 I.C. 722=1922 L. 349, 16 C.W.N. 299=13 I.C. 23. *A contract to the contrary* (*i.e.*) death should not necessarily dissolve the partnership, need not be always express. It may be inferred from certain facts; but the mere existence of an adventure is not such a fact as leads to the inference of an agreement to the contrary. The mere fact that the accounts were intended to be taken after all the stock is sold cannot be held to mean that there is an agreement that if there is a death before all the stock is sold there is to be no dissolution. 1927 M. 491=52 M.L.J. 318. *See also* 8 Bom.L.R. 8; 94 I.C. 547=1925 S. 103; 25 C.W.N. 847=66 I.C. 811. It may be inferred also from the conduct of the parties. 1935 L. 350. Where, on the death of a partner, the business was carried on the assumption that his widow was a partner, *held*, that the conduct of the parties showed that there must have been a contract between the original parties, that the partnership would not be dissolved by the death of a partner, but should be continued with the representative of the deceased as a partner. 16 C.W.N. 299=15 C.L.J. 204. *See also* 25 C.W.N. 847=1921 C. 538; 124 I.C. 19. Death of a partner—Trust deed by deceased partner to continue the business, attested by the other partners—Effect of. 48 C. 906=26 C.W.N. 463. The profits of a business continued after the death of a partner may as regards the legal representatives of the deceased partner, be regarded as accretions to the property in accordance with the maxim '*accessorium siquitur sum principale*' —the accessory right follows the principal. 48 C. 906. Where a partnership is continued after the death of one of the partners it is technically a new partnership and not the old partnership. 94 I.C. 547=1925 S. 103. *See also* 68 I.C. 722=1922 L. 349; 23 I.C. 771=7 S.L.R. 85; 25 W.R. 118 (119). For the purpose of ascertaining what shares the surviving partners brought into the new partnership an account may have to be taken of the old partnership. 80 I.C. 378=46 M.L.J. 503. *See also* 1930 M. 393=57 M.L.J. 404. Where partnership is dissolved by the death of a partner, and a suit is filed for accounts the business is to be regarded as continuing business up to the date of the final decree. 81 I.C. 525=1924 P.C. 93 (P.C.). A partnership dissolves on the death of a partner, and unless a new partnership is formed, the representative of the deceased partner cannot be made jointly liable with the surviving partners. 11 I.C. 403=60 P.W.R. 1911. *See also* 40 A. 446=45 I.C. 31=16 A.L.J. 335; (1939) 2 M.L.J. 279, The death of a partner operates as a dissolution of the partnership,and the fact that the representatives of the deceased received, some time after his death, an account and a portion of the amount advanced, together with the money due to him in the way

(*c*) by the death of a partner; and

(*d*) by the adjudication of a partner as an insolvent.

Dissolution by notice of partnership at will.

43. (1) Where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm.

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of profits, would not reconstitute the partnership but rather indicates a contrary intention. 25 W.R. 49. Where one of the terms of an agreement among the partners of a firm was that, in case of a vacancy caused by the death or retirement of any of them, his nominee should be admitted into the partnership, the business must, in default of such nomination, be intended to be carried on by the continuing or surviving partners. Where the will of such a partner did not refer to the firm or nominate a successor in the partnership, the mere fact that he left all his property to his executor cannot be construed, so as to make the executor a partner in the place of the testator. 9 B. 536 (555). Such an executor is entitled to an account up to the date of the testator's death, but not to a share in the "goodwill" of the business as an asset of the firm, when the goodwill is attached to the name of the firm, which, by the partnership agreement itself, is to be used by the surviving partners for their own benefit. 9 B. 536 (555). Even if a partnership continues after the death of a partner, the estate of the deceased is not liable in respect of subsequent obligation, in the absence of an express agreement. 8 Bom.L.R. 8. On this section, *see also* 114 I.C. 881=1929 A. 148; 31 I.C. 45; 38 I.C. 278; 74 I.C. 721=1924 A. 277; 101 P.R. 1914=27 I.C. 69. It was decided in some of the older cases that an injunction may be granted in cases in which a member of a joint Hindu family was prevented from taking part in the business of the firm. *See* 23 B. 144. *See also* 20 B. 467; 19 B. 269. It is doubtful if this is still good law. *See* S. 5, *supra*, and notes thereunder. A partnership between the manager of a joint Hindu family and a stranger does not make every member of the family a partner so as to clothe him with all the rights and all obligations of a partner. The effect of a partition in the family is to confer on the coparcener a right to call on the manager to get in the assets of the firm due to him as partner by proper proceedings against his copartners. 34 M.L.J. 271=41 M. 454=43 I.C. 9. *See also* 1934 P.C. 192=67 M.L.J. 366 (P.C.); 39 C.W.N 357; 101 P.R. 1914=27 I.C. 69. Where the divided members of a Hindu family run a business, they are partners and where one member puts an end to such partnership, S. 253 (8) of the Contract Act will apply. 63 I.C. 548=19 A.L.J. 525. Where subsequent to the partition of a Hindu joint family, the family business is carried on jointly by two of the members on the one side and another member on the other, the death of the latter dissolves the partnership. 47 A. 784=1925 A. 595. A power-of-attorney executed by two members of a joint Hindu family is not terminated by the death of one of them when the interest of the deceased member passes to the surviving member. 35 M.L.J. 294; 23 M. L.J. 213=44 I.C. 849. Where the manager of a joint Hindu family enters into a partnership for the family benefit with a person, a stranger to the family, the partnership is dissolved on the death of the manager in the absence of any agreement with the survivors, who have no right in such a case against the other partners even to sue for any assets received by them, subsequently to the dissolution of the partnership. 78 I. C. 198=20 N.L.R. 49. But *see also* 61 P.R. 1915=31 I.C. 45. A covenant by a deceased partner of a firm binding his heirs and representatives to continue the partnership cannot be specifically enforced against the heirs and representatives; the effect of the death of the partner coupled with the refusal of the heirs and representatives to continue the partnership would be the dissolution of the firm. Where a Hindu father enters into a partnership with strangers under a deed of partnership which contains a covenant to the effect, that "on the death of any partner, his heir or representative shall thereafter be a partner in his place, being entitled to the right and interest of the said partner, and shall get the business done subjecting himself to the aforesaid terms and that on that account neither the partnership should be cancelled nor would it come to an end," and his sons after the death do not become partners or take part in the management of the business, they cannot be made liable for any loss incurred by the partnership after their father's death as sons of the deceased father. 50 L.W. 151=A.I.R. 1939 Mad 891=(1939) 2 M.L.J. 279.

MAHOMEDAN TRADING FAMILY. — Under Mahomedan Law, there is no such thing as a family trading partnership as under Hindu Law and any partnership transaction between two Mahomedan brothers must be governed by the contract between the parties as regards the partnership. Ordinarily the partnership terminates on the death of one of the partners, unless there is evidence to the contrary. 104 I.C. 833 =54 C. 687=1927 C. 836.

Sec. 42 Cl. (d).—As to the effect of the insolvency of a partner, *see* 87 I.C. 905=1925 S. 310; 106 I.C. 54=1928 S. 71; 1931 R. 191= 131 I.C. 62. There is no automatic dissolution of partnership upon the insolvency of a partner. If two out of four parties are insolvent the partnership continues to subsist. 14 Pat.L.T. 252=1933 P. 239. Where one of the partners becomes insolvent before the coming into force of the Partnership Act, the provisions of the Partnership Act do not apply to such a case but the Contract Act applies. The insolvency therefore of one of the partners does not by itself operate as a dissolution of the partnership. I.L.R. (1937) Nag. 28=A.I.R. 1937 Nag. 314.

Sec. 43.—S. 43 relates to the dissolution of partnership at will. It is taken from cl. (*c*)

(2) The firm is dissolved as from the date mentioned in the notice as the date of dissolution or, if no date is so mentioned, as from the date of the communication of the notice.

Dissolution of the Court.

44. At the suit of a partner, the Court may dissolve a firm on any of the following grounds, namely :—

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and the last paragraph of S. 32 of the English Partition Act. (*Report of Select Committee.*)

PRINCIPLE OF THE SECTION. In respect to partnerships where no certain limit of their duration is fixed, they are deemed to be mere partnerships at will (*see* S. 7, *supra*) and therefore are ordinarily at the common law dissolvable at the will of any one or more of the partners. 67 I.C. 10=34 C.L.J. 405. The intention to dissolve may be inferred in the case of *partnership at will* from circumstances showing that a partner has in fact abandoned his interest. 49 P.W.R. 1916=32 I.C. 853. *See also* 35 P.L.R.557=1934 L. 557. A partnership is not necessarily dissolved merely because it is closed or its business has stopped. It must be dissolved in one way or the other known to and recognised by the law (89 I.C. 122; 1930 L. 378; 66 I.C. 811; Ref.) 37 L.W. 288=1933 M. 353. Where no term is expressly limited for its duration, and there is nothing in the contract to fix it, the partnership may be terminated at a moment's notice by either party. *See* 67 I.C. 10=1921 C. 722 ; 63 I.C. 548=1921 A. 411. In a partnership at will, a partner is entitled to dissolution. It is not an equitable right but it is a legal right under the Code and under the contract. 79 I.C. 944=51 I.A. 154=46 M.L.J. 158 (P.C.). The dissolution takes place as from the date of the notice (67 I.C. 10=34 C.L.J. 405), and without regard to the state of mind of the partner to whom the notice is given. Partnership at will is dissolved from the date on which one partner retires and no notice of the retirement is necessary. 25 I.C. 183. In cases where the partnership is not at will, it is the duty of the Courts to bring about the fulfilment of the expectations of the parties; and when a partnership has been entered into for a fixed term the Courts should not permit a partner to drive the others to a dissolution. 66 I.C. 473=2 L. 351. In the case of a dissolution by notice if the assistance of the Court is required by means of a decree for dissolution, the suit for dissolution must follow the notice. Where the notice is given more than 4 months after the institution of the suit, the relief for dissolution of partnership cannot be granted in that suit. 167 I.C. 839=1937 O.W.N. 344=1937 O. 438. Filing a plaint in a suit for dissolution by one partner is enough in itself to put an end to a partnership at will. 1927 P.C. 70=53 M.L.J. 245 (P.C.). A partnership at will is presumed to endure only so long as the parties are in life and have a capacity to continue it. The dissolution of it, either by death or by a supervenient incapacity, will come under consideration when we speak of dissolution by mere operation of law. *See* secs. 42 and 44. *See also* 100 I.C. 616=1927 M. 491. Where a partnership had come into existence for a fixed period with a clause enabling one partner to dissolve by giving notice of a specified period to the other, then any other method of dissolution by agreement between the partners must be strictly proved, and where the party on whom the onus of proof lies relies on the document to prove the dissolution and the document can with equal justification be read as having two different meanings, then the party fails to satisfy the onus which would lie upon him. 28 Bom. L.R. 1275=50 B. 655=1926 B. 585.

Sec. 44: LUNACY.—The lunacy of a partner does not of itself dissolve the partnership, but confirmed lunacy is a ground for dissolution if the other partners apply to the Court for a decree of dissolution on that ground. 53 C. 214=1928 C. 271.

CASE-LAW.—The adultery of one partner with his co-partner's wife is a sufficient ground for dissolving the partnership. 5 B.L.R. 109. Partner aggrieved by gross misconduct of other partners towards him which makes it impossible for him to continue as partner—Proper remedy is to sue for dissolution under this section. 64 I.C. 204. *See also* 11 C.W.N. 311. A partner guilty of misconduct cannot sue for dissolution of the partnership or for any other relief. The law is the same on this point as in England. Partner who either destroys the old account books of the firm, makes such interpolations in the account books which make them worthless and unreliable, falsely prepares the balance sheet or tries to deprive his firm of a valuable asset is guilty of misconduct. 1 L. 6=57 I.C. 185. Even when a partnership is entered into for a fixed term, a decree for dissolution may be passed, when the mutual confidence, which the partners reposed in each other at the time when the partnership was entered into, has ceased. 89 I.C. 333=1926 L. 145. *See also* 30 C.W.N. 440=1926 C. 745. But neither stoppage of business nor refusal of a partner to make further advances on capital account can be treated as dissolution of the firm. 66 I.C. 811=25 C.W.N. 847. When a partnership is rescinded on the ground of fraud or misconduct, the partner at fraud is not entitled to ask the other members of the partnership to contribute to the losses which may have occurred in the partnership business due to his fraud. 60 I.C. 709=1921 L. 130. One partner is not liable in a suit for accounts upon a dissolution of partnership, for the probable loss sustained by them owing to his neglect or failure to carry out duties imposed upon him by the partnership agreement to the prejudice of the firm's business. 87 I.C. 735=27 Bom.L.R. 500=1925 B. 324. Refusal and neglect on the part of any one partner to perform the duties undertaken by him would give to any other partner the right to apply for dissolution. In such a case the partnership could also be dissolved by agreement without legal proceedings. But for such an agreement the

(*a*) that a partner has become of unsound mind, in which case the suit may be brought as well by the next friend of the partner who has become of unsound mind as by any other partner;

(*b*) that a partner, other than the partner suing, has become in any way permanently incapable of performing his duties as partner;

(*c*) that a partner, other than the partner suing, is guilty of conduct which is likely to affect prejudicially the carrying on of the business, regard being had to the nature of the business;

(*d*) that a partner, other than the partner suing, wilfully or persistently commits breach of agreements relating to the management of the affairs of the firm or the conduct of its business, or otherwise so conducts himself in matters relating to the business that it is not reasonably practicable for the other partners to carry on the business in parnership with him;

(*e*) that a partner, other than the partner suing, has in any way transferred the whole of his interest in the firm to a third party, or has allowed his share to be charged under the provisions of Rule 49 of Order XXI of the First Schedule to the Code of Civil Procedure, 1908, or has allowed it to be sold in the recovery of arrears of land-revenue or of any dues recoverable as arrears of land-revenue due by the partner;

(*f*) that the business of the firm cannot be carried on save at a loss; or

(*g*) on any other ground which renders it just and equitable that the firm should be dissolved.

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consent of all the partners is necessary; otherwise the partnership can come to an end only by efflux of time or decree of Court. 57 I.C. 713=39 M.L.J. 257 (P.C.). Mere refusal of a partner to supply capital when demanded is not conclusive proof of intention to retire. 66 I.C. 811=25 C.W.N. 847. If a partner fall into an error in the management from want of a larger measure of prudence and skill than he is master of, he is not liable for the consequences. In the absence of any specific agreement to the contrary, the rule of diligence among partners is not that they should employ the middle kind of diligence which prudent men employ in their affairs, but that they are safe if they show they acted in the partnership affairs as they would have acted in their own. Good faith is required in a partner as well as diligence and if a partner is guilty of gross negligence, unskilfulness, fraud, or wanton misconduct in the course of the partnership business, he is ordinarily responsible to the other partners, for the losses and damages sustained thereby. 53 I.C. 2 [*Law* v. *Law*, (1905) 1 Ch. 140, Foll.]. One partner neglecting partnership (affairs) is not by itself enough to dissolve the partnership. A partner can retire, but that retirement can only be by and upon notice to the other side. 89 I.C. 122=47 A. 756. Neither stoppage of business nor refusal of a partner to make further advances on capital account can be treated as dissolution of the firm. 66 I.C. 811=25 C.W.N. 847. The question whether there has been an abandonment of the business by a partner depends on the facts of each case. 25 C.W.N. 847.

Sec. 44, cl. (e).—*See* 27 I.C. 344=8 S.L.R. 69. Although the subject-matter of a partnership is precarious and speculative, it is a matter of inference to be drawn from the facts of each case, whether or not there has been abandonment by a partner of his share, or loss of interest by laches. The mere fact that a partner suing for partnership account and for winding up, had previously declined to advance more money for the business and left the management to a co-partner is not sufficient to infer that the former abandoned or lost by laches, his position as a partner. 28 C. 53 (59)=27 I.A. 139 (P.C.). *See also* 25 M. 149 (164); 12 P.R. 1881. Consent to attachment of deceased co-partner's share of partnership assets for personal debts of latter amounts to declaration of cessation of partnership. 51 C. 161=1924 C. 801. As to effect of attachment of half-share of partners, *see also* 8 S.L.R. 67.

Sec. 44, cl. (f).—The expectation of profit being implied in every partnership, if a partnership is entered into, and everything has been done which was agreed to be done, but certain loss is the only result of going on, any partner is entitled to have the concern dissolved, although he may have agreed that the partnership should continue for some definite time, and that time has not yet expired. 1 B. 468 (474)=3 I.A. 200 (P.C.), on appeal from 8 B.H.C. (O.C.) 209. Partners have an inherent right of winding it up, or to apply to have it wound up, in the event of its not being able to be carried on with success. This inherent right, however, may be shown to have been relinquished by any provision in the agreement, from which it can be fairly inferred. 1 B. 468=3 I.A. 200 (P.C.). Courts can dissolve a partnership working at loss even before the period fixed for its continuance. 42 B. 380=35 M. L.J. 262=45 I.A. 61 (P. C.) *See also* 1924 B. 57=81 I.C. 463. Where there has been a complete destruction of mutual confidence, and it is impracticable to continue the partnership

45. (1) Notwithstanding the dissolution of a firm, the partners continue to be liable as such to third parties for any act done by any of them which would have been an act of the firm if done before the dissolution, until public notice is given of the dissolution :

Liability for acts of partners done after dissolution.

Provided that the estate of a partner who dies, or who is adjudicated an insolvent, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable under this section for acts done after the date on which he ceases to be partner.

(2) Notices under sub-section (1) may be given by any partner,

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business with advantage to the partners, or they can no longer perform their duties properly, the partnership should be dissolved. 30 C.W.N. 440=94 I.C. 381. *See also* 89 I.C. 333 =1926 L. 145. The mere failure of a company does not *ipso facto* dissolve a partnership. 117 I.C. 824=1929 A. 236.

PRACTICE AND PROCEDURE.—Where the partners composing a firm as one entity form a partnership with another person, the dissolution of the latter partnership does not dissolve the partnership. 90 I.C. 242=1926 S. 75. A suit for dissolution and winding up of a firm and its branch firm which consist of certain additional partners who have no interest in the main firm is bad for multifariousness. 90 I.C. 970=19 S.L.R. 395=1926 S. 66. Forum for dissolution and rendition of accounts is not the place where the capital is subscribed. 42 P.R. 1916=33 I.C. 953. In the case of a partnership which is wound up, the date on which the winding up was completed is the proper date for calculating the conversion of foregin currency into British Indian currency. 52 M. 509=1929 M. 627=56 M.L.J. 776. *See also* 38 I.C. 873=19 Bom. L.R. 86 ; 25 W.R. 511 ; 12 P.R. 1881 ; 28 C. 53 (59). Where a partner withholds the annual profits of a concern from a member of the firm, the partner excluded from the profits may bring a suit for an account and for his share of the profits, and such a suit shall not be dismissed for the reason that the plaintiff does not claim a dissolution. 66 I.C. 478=2 L. 351. It is only under exceptional circumstances that partners can bring actions against their co-partners, except when the action is for dissolution of partnership, in which case they may claim an account and payment over of moneys that may be found to be due to them on accounts being taken. Actions between partners, which involve the taking of partnership accounts prior to dissolution, are almost unheard of. 9 A. 120 (121). Where, in a suit for dissolution of partnership, a Subordinate Court signally failed to do its duty, and there has not been any patent neglect on the part of the plaintiff to enforce his rights, the High Court has power, by way of superintendence, under S. 15 of the Charter Act, to direct the Subordinate Court to do its duty and to dispose of the matter according to law. 18 A. 4 (8).

Sec. 45 : PRINCIPLE OF THE SECTION.—If a firm is dissolved and no notice is given and people continue to trade with the firm under the firm's name they are not to be affected by a secret dissolution. Their right to sue the retiring partner upon post-dissolution transactions does not depend on the question whether they knew that he was a partner prior to the dissolution. 35 C.W.N. 705. *See* now proviso to this section. 1930 B. 449 ; 104 I.C. 520= 1927 B. 560. In the absence of notice of dissolution all partners are liable to persons dealing with the firm, though after dissolution. 1930 S. 83=121 I.C. 865. On dissolution or retirement, the agency as between the partners ceases, but as regards third persons agency continues until termination is notified. Old customers must be given specific notice and for others reasonable public notice is sufficient. 1925 S. 90=93 I.C. 448. In the case of old customers of a firm publication of notice of dissolution in the public press is not sufficient to relieve a retiring partner from liability. 1 R. 47=1924 R. 133. [But now under the Act, notice under S. 72 is sufficient.] In the absence of notice of dissolution, persons dealing with a firm are entitled to assume that the partnership still continues, though it has actually been dissolved. 50 M.L.J. 67=1926 M. 114. *See also* 1936 Pat. 539. In cases of withdrawal of a partner from the firm or in cases of dissolution, the constituents who have dealings with the firm should have notice of the fact. Mere publication in the *Calcutta Exchange Gazette* is not in law sufficient notice. 1927 M. 661= 104 I.C. 120. *See also* 56 I.A. 174=53 B. 414 =1929 P.C. 132=56 M.L.J. 739 (P.C.) ; 115 I.C. 707 ; 104 I.C. 520=1927 B. 560. Customers old or new dealing with partnership with knowledge of partnership are not affected by dissolution in the absence of notice. 1928 M. 125=106 I.C. 904. *See also* 1927 S. 155=100 I.C. 389. An acknowledgment of partnership debt by a salaried partner of a joint family firm after its dissolution but before general notice thereof is binding on all partners. 1930 B. 236=125 I. C. 442. *See also* 110 I.C. 484= 1928 M. 588.

PROVISO.—This section does not apply to cases of dormant partners nor to cases of death 1927 B. 560=104 I.C. 520 ; 1930 B. 447 ; 35 C.W.N. 705. The section cannot be held to cover the case of a person dealing with the firm, for the first time, after a change from its original constitution, so as to make the partner, who had already retired liable. Such a person has had no dealings with the "firm" originally constituted at all, and cannot be said to be a person *having* dealings with a firm, who will not be affected by any subsequent dissolution, of which no public notice has been given, unless

46. On the dissolution of a firm every partner or his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among the partners or their representatives according to their rights.

Right of partners to have business wound up after dissolution.

47. After the dissolution of a firm the authority of each partner to bind the firm, and the other mutual rights and obligations of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise:

Continuing authority of partners for purposes of winding up.

Provided that the firm is in no case bound by the acts of a partner who has been adjudicated insolvent; but this proviso does not affect the liability of any person who has after the adjudication represented himself or knowingly permitted himself to be represented as a partner of the insolvent.

LEG. REF.

Sec. 46.—*Cf.* S. 39 of the English Partnership Act.

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he himself had notice of such dissolution. 78 P.R. 1903. (Case under S. 264, Contract Act.) But *see* 1927 M.W.N. 770. The section has no application to the case of a dormant partner. 1927 S. 155=100 I.C. 389. *See also* 1928 M. 125=106 I.C. 904; 1929 P. C. 132=53 B. 414 (P.C.); 1927 B. 560=104 I. C. 520; 1930 B. 449=128 I. C. 588. Section illustrative of particular form of estoppel and to be taken with Sec. 115, Evidence Act. 1922 L. 466=68 I.C. 932. This section applies not only to persons who dealt with the firm before the dissolution, but also to persons dealing with the firm after the dissolution or change of partners. 53 C. 214=1926 C. 271=91 I.C. 824. *See also* 1928 S. 121=110 I.C. 730; 87 I.C. 663; 109 I. C. 50. But *see contra* 68 I.C. 932=1932 L. 466. Dissolution by death of partner—Continuance by surviving partner—Valuation of assets, fixing of—Procedure in case of difference. 67 M.L.J. 880.

Sec. 46: PRINCIPLE OF THE SECTION.—The right is available, and may be enforced not only against the partnership assets and the other partners, but also against all persons claiming through them in respect of their interests as partners, for example, assignees, personal representatives, trustees in bankruptcy, or judgment-creditors, except purchasers or pledgees of specific assets of the partnership who might reasonably suppose that all the partnership debts had been paid or barred by lapse of time, or who otherwise deal with the surviving or continuing partner in good faith. *See* 55 M.L.J. 404=1930 M. 393 This lien of the partner is subject to valid rights of a *bona fide* purchaser for value from surviving partners of specific property belonging to the firm. 57 M.L.J. 404=1930 M. 393 (396). If it is necessary to examine the account books of the firm from an earlier date in order to discover what credits are still due to the partnership, the examination of these accounts would not be barred out by the plaintiff's acceptance of the existing accounts as correct. I.L.R. (1939) Lah. 178=1938 Lah. 758. A suit to enforce the right provided in Sec. 46 is generally called a suit for an account, which means an account taken by a Court. The right is not affected by the fact that the retiring partner may have already inspected the accounts of the firm. I.L.R. (1939) Lah. 178=40 P.L.R. 753=1938 Lah. 758.

Sec. 47.—This section follows Sec. 38 of the English Partnership Act. As to the construction and scope of section, *see* 38 Bom.L.R. 1058.

PRINCIPLE OF THE SECTION.—If the dissolution be caused by death or bankruptcy of a partner, this authority to wind up the concern devolves on the surviving or solvent partners alone, to the exclusion of the personal representatives, or trustee in bankruptcy, of the deceased or bankrupt partner. 9 I. C. 450=4 Bur.L.T. 10. Both Sec. 263 of the Contract Act and S. 47 of the Partnership Act refer to the mutual rights and obligations of the partners after dissolution the only distinction between the two sections being that instead of the words "the rights and obligations of the partners" in S. 263, there is, in S. 47 of the Partnership Act, a fuller expression, *viz*, "the authority of each partner to bind the firm, and the other mutual rights and obligations of the partners." Though the dissolution of a firm causes a dissolution of the partnership between the partners, the partnership still subsists, but merely for the purpose of winding up its business and adjusting the rights of the partners *inter se*, and for this purpose the authority of the partners to bind the firm, and all their other mutual rights and obligations, continue notwithstanding the dissolution. The power of each partner, however, extends only so far as it is *necessary* to wind up the affairs of the firm and to complete transactions already begun. He can recover paymet of a debt due to the firm and effectually release the debtor, and also give a valid receipt for the debt, provided it is not done in fraud of his co-partners or in collusion with the debtor. A

Mode of settlement of accounts between partners.

48. In settling the accounts of a firm after dissolution, the following rules shall, subject to agreement by the partners, be observed:—

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partner can also accept a bill of exchange for a debt, but he has no authority to acknowledge a debt, or by his act or admission to involve his co-partners in any new legal liability. The act or dealing in order to be binding on the co-partners, must be an act *necessary* in the winding up of the partnership. Only the winding up can be proceeded with after dissolution, and no other business can be carried on in the name of the firm. 39 Bom.L.R. 1058=1937 Bom. 81.

ILLUSTRATIVE CASES.—A partner can give a valid discharge of a debt due to the partnership after its dissolution. 52 I.C. 456. (*See also* 36 M. 544; 34 M.L.J. 41, Foll.) An individual partner of a firm which has been dissolved has authority to assign a decree obtained by the firm. Realising what is due under the decree would come under winding up the affairs of the firm. 1936 A.M.L.J. 79. The surviving partners can release a debt due to the firm, after dissolution by the death of one partner. 41 M. 446=34 M.L.J. 41=44 I.C. 466. *See also* 1936 A.M.L.J. 79. The question whether the legal personal representatives of a deceased partner were bound by a reference to arbitration by the surviving partners in relation to a partnership contract is not a pure question of law to be decided without reference to the facts of the case. 27 M.L.J. 192=24 I.C. 307 (P.C.). One of two partners dying—Surviving partners to wind up business, and do acts necessary therefor, such as realising assets, paying off debts and fulfilling obligations. 57 M.L.J. 404=1930 M. 393=126 I.C. 97. Surviving partners are entitled to dispose of the property of the firm in connection with winding up—Sale otherwise than in connection with the winding up gives no title to the alienee. 57 M.L.J. 404=1930 M. 393. *See also* 9 I.C. 450. A partner can validly sign and verify a plaint on behalf of the firm, though dissolved. As to the powers of the manager, *see* 1930 B. 236=125 I.C. 442, cited under S. 45, *supra*. Where there is a receiver in existence winding up the affairs of the firm under the Court, and he has been given full powers to collect all outstandings and to pay debts and to distribute the surplus, it is not possible for the managing partner of the firm to refer to arbitration a question as to whether the firm owes anything to any one. 92 I.C 705. It is not competent to a partner of a dissolved firm to enter into a *havala* transaction in respect of a debt due to the firm, and thereby transfer the credit of an amount due to the firm by one person to another thereby making the latter the debtor of the firm instead of the former. 38 Bom. L.R. 1058. One of the partners of a firm has no power to transfer any asset of the firm after its dissolution. 175 I.C. 567=1937 Lah. 934.

Sec. 48.—This is the "accounting" section and is most important. It is copied with only very slight verbal alterations, from S. 44 of the English Partnership Act and requires little explanation. That section has stood with success the incessant and vigilant scrutiny of lawyers, accountants and businessmen in England for nearly forty years, and may safely be followed. (*Report of the Select Committee.*)

ASSETS TO BE DISTRIBUTED: SUB-CL. (*b*).—On the dissolution of the partnership and in the absence of any contract to the contrary, every partner has a right to have all the partnership property sold and to have the proceeds of the sale after discharging all the partnership debts and liabilities divided among all the partners according to their respective shares. 89 I.C. 577=1926 S. 49. Outstandings due to the firm may in distributing the assets of the firm, be assigned to individual partners. Outstandings assigned to partners on dissolution—Partner entitled to use of firm name in collection thereof, unless risk of causing liability to others exists. Injunction against such use of name improper. 1931 R. 74. When partnership is dissolved and accounts are settled, a partner must have some remedy at law to enforce the manner of settlement agreed upon. 113 I. C. 669=1928 M. 733. No partner has on dissolution a right to insist that any particular item of the partnership property shall remain unsold and that it should be either divided *in specie* are allotted to him at an arbitrary value. 89 I.C. 577=1926 S. 49. Ordinarily a partner is not entitled to partial accounts; before such a suit can be instituted a special ground must be made out. If he wants an account of partnership dealings he must sue for a general account. 166 I.C. 953=1937 Pat. 55. Although after dissolution, the managing partner has, for purposes of winding up, a right to put up items of property to sale, yet the Court can go into propriety of alienations if they are suspicious. 52 M. 509=56 M.L.J. 776=1929 M. 627. A firm is not entitled to commission in respect of goods purchased on its own behalf. 36 I.C. 210. Profits made by sale of goods ordered before dissolution, and paid for by firm's money, are divisible among partners, though goods were received and sold subsequently. 1923 O. 23=74 I.C. 324. If, on a dissolution of partnership, there is an amicable settlement of accounts and if items not included in the settlement are received later on, they are to be divided between all the partners. 1929 P. C. 184=116 I.C. 727 (P.C.). In all cases where, after the dissolution and complete winding up of partnership, an asset which had not been taken into account fell in, it ought to be divided between the expartners or their representatives according to their shares in the former partnership. 45 M. 378=49 I.A. 181=43 M.L.J. 305 (P.C.).

PARTNRRSHIP SUIT—PRACTICE AND PROCEDURE—FRAME OF SUIT—An action does not lie, by one partner against the other, for an account during the pendency of the partnership, without asking for its dissolution. 9 A. 120. But a departure from this general rule may be made

(*a*) Losses including deficiencies of capital, shall be paid first out of profits, next out of capital, and, lastly, if necessary, by the partners individually in the proportions in which they were entitled to share profits.

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in certain special circumstances which will depend upon the facts of each case. 1 A.L.J. 94. *See also* 2 M.H.C.R. 28. The rule is that as between partners ordinarily, no suit will lie except one for general account. 101 I.C. 390 =1927 M. 650. A particular item or claim should not be made the subject of a distinct suit. 2 N.W.P. 90. So, a partner cannot sue for money lent by him to his firm, as the advance is only one item in the partnership accounts. 25 B. 606 (612). *See also* 21 W.R. 300 (301). A partner cannot sue his co-partner for his share of profits, which accrued up to a particular time. He must, if he desires relief, sue for an account. 16 W.R. 141 (142). Where a partner withholds the annual profits of a concern from a firm, the partner excluded from the profits may bring a suit for an account and for his share of the profits without claiming dissolution: 66 I.C. 478=2 L. 351=1922 L. 195. When there has been a partnership, there can be no suit for the recovery of money due until it is known what amount is due. 117 I.C. 824= 1929 A. 236. Unless the claim by a partner to recover a sum of money from the other partners in respect of a transaction of the partnership forms part of the inquiry in the action for winding up the partnership, it is not sustainable, no suit will lie therefore after limitation has expired for a suit for an account. 85 I.C. 991 = 43 M. 432=47 M.L.J. 829. No suit lies by one partner against another for damages for breach of certain covenants in the partnership deed. In such cases the proper course is to bring a suit for general accounts and debit the defaulting partner with any loss that might have been incurred by his action, in the general account. 101 I.C. 390=1927 M. 650. When the suit only seeks to compel the partners to discharge the obligation undertaken by them under the agreement of partnership, *e.g.*, to render accounts annually, the Courts will not be justified in refusing relief for the simple reason that no dissolution had been prayed for or that their mutual relations should be settled without the intervention of Court. 141 I.C. 277 (2)=1933 N. 127. The plaintiff suing only for accounts during the currency of the partnership has got to allege special grounds for seeking that relief alone and the defendant should have an opportunity of showing cause against it. 54 M. 671=1931 M. 300=60 M.L. J. 315. *See also* 88 I.C. 153=1925 M. 737=48 M.L.J. 444. A suit will lie between partners, without dissolution, for rescission of a contract entered into between them and for damages on the ground of false representation. 130 I. C. 644=1931 L. 390. So also when advances are made by one partner to another partner, in respect of what he is to contribute to the joint capital. 18 M. 134. *See also* 97 I.C. 757 =1927 M. 68; 1925 M. 737=48 M.L.J. 444; or when two partners borrow from a bank on their joint promissory note and apply the money to a partnership concern, and one of the partners is compelled to pay more than his share of the debt. 18 M. 134. The liability in respect of advances made by one partner to another, though made for the purpose of the acquisition of his share in the partnership property, is a personal one, and not being a debt of the partnership, it could not be recovered from the partnership property. The creditor partner is in no better position than the other ordinary creditors of the debtor partner, and he is not entitled to any priority over the other creditors. 49 L.W. 126=41 Bom.L.R. 663=1938 P.C. 277 (P.C.). A suit to recover an amount advanced in pursuance of a partnership agreement is not maintainable without suing for a general account, where the agreement came into force on the date on which it was executed. It is immaterial that the partnership business did not actually commence. 39 P.L.R. 896=1938 Lah. 43. If the amount paid up by one partner was a liability of the partnership, then the mere fact of his having been compelled to pay the whole of the partnership debt would not entitle him to sue his co-partners or any of them for contribution, in the absence of any special circumstance, though he would be entitled to charge the sum paid in the partnership account. 20 C. 262 (264). *See also* 5 Bom.L.R. 912 (913) =28 B. 179; 33 M.L.J. 509=43 I.C. 217. If, on the other hand, the liability was not a joint liability of the whole partnership, but a joint liability only of himself and some of the other partners, a separate suit would lie in that case. 26 C. 262 (264). *See also* 12 B.H.C.R. 97. A partner of a firm to whom the other partners have executed a promissory note as a result of the adjustment of a part of the partnership account can maintain an independent suit on the promissory note without being obliged to bring a general suit for accounts of the partnership. 41 Bom.L.R. 1263=1940 Bom. 54. After dissolution, until the accounts of the partnership are completely settled, individual partners cannot sue for their share of any separate part of the partnership assets. Such suit will lie if the partnership has been completely wound up and the asset has become available to the partnership thereafter. 178 I.C. 53=1938 Lah. 259. Where, in an agreement, every partner is at liberty to borrow money on his individual credit and apply the same for the benefit of the business, the fact that such money is applied to the partnership business does not render it an item in the partnership business, so as to preclude a partner, who had borrowed money and used it in the business, from maintaining a suit for contribution against the other partners. 26 C. 254. It will be for the Court to determine under what circumstances it will be equitable to order a partial account, having regard to the rights of the parties under the contract. There is no rule of law now in force that a partial account can be ordered only under exceptional circumstances. 66 I.C. 478=2 L. 351. *See also* 20 N.L.J. 196.

PARTIES.—In a suit for accounts of the

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partnership on the death of a partner, all the representatives of the deceased partner should join. S. 7 of the Limitation Act applies to the case. 33 I.C. 564. In a suit about the partnership, the purchaser of the interest of a partner is properly joined as a defendant. 4 A. 437. Where in a suit for partnership accounts, a necessary party defendant has been omitted, the suit will be dismissed, if such party is afterwards added, at a time when the suit is barred as against him. 14 C. 791. In a suit for contribution after dissolution, all partners are necessary parties—Plaintiff liable to account should give credit for defendant's share of profits. 42 P.L.R. 1917=35 I.C. 910. Where in a suit for dissolution of a partnership and an account, the accounting party alleges that certain sums of money due to the firm had been set-off against cross-claims made against, the firm, he must establish the validity of the claims against the firm so as to show the propriety of his action in compromising in respect of them. 1937 O.W.N. 991. *See also* 1936 Lah. 831.

FORUM.—A suit for partnership accounts may be filed at the place where the contract of partnership is entered into (41 A. 513=50 I. C. 156); or where the business of partnership is carried on. 1916 P.R. 42=33 I.C. 953; 50 M.L.J. 298=92 I.C. 915; 132 I.C. 218=1931 L. 673.

LIMITATION.— A suit for an account of partnership, dissolved more than three years before the suit, is barred by limitation, even if the instrument of partition was registered. 22 M. 14; 57 M. 378=1934 M. 162=66 M.L.J. 625; 153 I.C. 969=1935 L. 209. *See also* 25 M. 26 (where plaintiff was a minor).

CONSIDERATIONS IN SETTLEMENT OF ACCOUNTS. —The facts that certain partners deliberately withheld their due services under the contract should be taken into consideration in a suit for accounts of the partnership. 57 I.C. 713=1921 P.C. 91=39 M.L.J. 257 (P.C.). Illegal payments made by the partners by way of bribes for the purpose of securing contracts for the partnership cannot be taken into account in taking accounts and ascertaining the shares of profits in the partnership. If any partner has been foolish enough to give a bribe in the hope that his partner would bear his share of the expenditure, he cannot use the Court to recover that share. Therefore items of expenditure shown to be for an unlawful purpose should be excluded in taking accounts. 49 L. W. 705=1939 Mad. 670=(1939) 1 M.L.J. 905. In a suit for accounts of a dissolved partnership there is no law that an enquiry to determine in whose possession the account books are, must be held before the passing of a preliminary decree, though normally that should be the practice. The person in whose possession the books are and who has kept the accounts and knows all about them is entitled to file a suit for accounts. Normally there is no accounting party in such a suit, though if a partner withholds the books the Court may draw an inference against him when finally settling the accounts. 174 I.C. 837=1937 Lah. 312. *See also* 1936 Lah. 146=161 I.C. 669. Generally one partner cannot charge his co-partners with any sums in the shape of salary or commission, but where a *pardanashin* lady is a partner and the responsibility is thrown upon other partners, allowance should be made in favour of other partners. 16 C.W.N. 299=13 I.C. 23. In an action to dissolve and wind up the affairs of partnership, until the accounts have been taken, it is impossible to say what, if anything, is due from any partner or partners; interest, therefore, should only be allowed to the plaintiffs from the date of final decree by which amount (if any) is found to be due from the defendants to the plaintiffs and not from the date of plaint: 1930 P.C. 185=57 I.A. 245=58 C. 208=59 M.L.J. 121 (P.C.). *See also* 39 P.L.R. 466=1937 Lah. 254. The principle of the common law, which is applicable to a partnership to which neither S. 13 (*c*) of the Partnership Act nor the English Law of partnership applies, is that any agreed interest on the capital brought in by a partner into the business is, unless the contrary is clearly expressed, a payment in lieu, or on account, of profits, and accordingly chargeable to profits only. 38 Bom. L.R. 1058=1937 Bom. 81. *See also* 1941 N.L. J. 657. If a partner makes an advance to the partnership on a promissory note, he can recover it from his partners without general accounts of the partnership being taken. It is not correct to say that no suit could lie on the note if the parties had partnership dealings. 1938 A.M.L.J. 11. Partners are not entitled to interest on their respective capitals unless there is some agreement, express or implied, to that effect. Such an agreement may be inferred if they have themselves been in the habit of charging such interest in their accounts. Where interest on capital is payable, the interest stops at the date of dissolution unless otherwise agreed. An agreement for payment of such interest can also be implied from the usage of their trade or from the practice of their firm. 31 Bom.L.R. 1058=1937 Bom. 81. *See also* 1941 N.L.J. 657; 1937 Sind 103; 1938 Mad. 38; 15 Mys.L.J. 3. In the case of a partnership which is wound up, the date on which the winding up was completed is the proper date for calculating the conversion of foreign currency into British Indian currency. 52 M. 509=1929 M. 627=56 M.L.J. 676. Where, in a suit for dissolution of partnership, the plaintiff, who is appointed as receiver, appropriated a large amount of partnership amount to his own use, without sanction from the Court, *held*, the proper order to pass is one charging the plaintiff with the sums withdrawn by him with interest from the dates of withdrawal. 92 I.C. 274= 1925 P.C. 257.

PROCEDURE IN SUIT.—So far as the suit was concerned, the partnership account should be adjusted between all the parties, irrespective of any private arrangements between two or more of them *inter se*. 1930 L. 655. Partnership accounts should be taken from commencement of partnership, unless later adjustment is proved. Mere fact that regular staff kept such accounts which were open to partners' inspection is not sufficient proof of final settlement. 33 C.W.N. 1104=1930 C. 154. Where a new partnership

(*b*) The assets of the firm, including any sums contributed by the partners to make up deficiencies of capital, shall be applied in the following manner and order:—

(*i*) in paying the debts of the firm to third parties;

(*ii*) in paying to each partner rateably what is due to him from the firm for advances as distinguished from capital;

(*iii*) in paying to each partner rateably what is due to him on account of capital; and

(*iv*) the residue, if any, shall be divided among the partners in the proportions in which they were entitled to share profits.

49. Where there are joint debts due from the firm, and also separate

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based on the old partnership is revived or reconstituted, by the consent of all the partners and their legal representatives, for the purpose of accounts, it is permissible to go into the accounts of the old partnership on the basis of which the new one is constituted. 102 I.C. 694=1927 L. 249. *See also* 1924 M. 708=46 M.L.J. 503. In such cases, the Limitation Act is no bar to taking the accounts of the new partnership by going into the accounts of the old partnership, which have been carried on into the new partnership without interruption or settlement. 25 M. 26 (31, 32). *See also* 1929 S. 930=118 I. C. 741. All questions arising between the partners out of the partnership business must be disposed of in the winding-up suit. 8 B.H. C. (O.C.J.) 209. *See also* 12 B.H.C. 165; 70 I. C. 833=1923 A. 17. (Partnership of patent right). In a dissolution of partnership and accounts, either the partnership accounts should be taken as they stand, or if any items are objected to by the other side as false, the parties should be given an opportunity of proving the accounts. It is not equitable to reject certain items without giving an opportunity of proving them. 7 N.L.J. 212=1925 N. 183. Where plaintiff alleges certain proportion of shares, the defendant while admitting partnership alleges different proportion, it is incumbent on the Courts to weigh carefully the evidence led by both sides and to give a decision as far as possible according to the weight of that evidence. 8 L. 241=1927 L. 485. If a partner has kept accounts relating to the partnership in private books of his own, he must produce such books, for he should have kept his private accounts elsewhere, if he did not want them to be seen. After a dissolution, if books relate to the accounts which have to be taken, they must be produced. 25 S.L.R. 313=1928 S. 133. A suit by a sub-partner for an account of the partnership is maintainable against his partner and he must accept the accounts in the main partnership as settled between the partners of that partnership unless *mala fides* or mistake has been shown. 60 I.C. 967=14 S.L.R. 193. Ordinarily in a suit for settlement of account of a dissolved partnership and of any sub-partnership in which there are additional partners, the act or series of acts which give rise to relief for settlement of accounts of the main partnership are not the same as those which give rise to the relief for settlement of accounts of the sub-partnership. 90 I.C. 973=1926 S. 66. As to suit for accounts in the case of continuance of partnership business after death of partner, *see* 57 M. 378=1934 M. 162=66 M.L.J. 625.

COSTS OF PARTNERSHIP SUIT.—The costs of partnership suits should generally be paid out of the assets of the partnership, or in default of assets by the partners in proportion to their respective shares. 7 C. 428. *See also* 28 Bom. L.R. 386=1926 B. 289. Once the rights and liabilities of partners are fixed in the preliminary decree for accounts, they cannot be varried by a Judge in proceedings taken thereafter. 169 I.C. 635=1937 Sind. 103.

EXECUTION OF DECREE.—A decree in a suit for dissolution of partnership is, for the purposes of execution, to be regarded as a money decree. It can be attached, but cannot be sold. 27 B. 556=5 Bom.L.R. 529. *See also* 43 C.W.N. 997. When once the decree dissolving the partnership is passed, and a receiver is appointed to take the account of the partnership and pay its debts, the creditors of the partnership should not execute his decree against any of the partners, but must go to the Court, which has appointed the receiver, and take its directions. 5 Bom.L. R. 912 (914)=28 Bom. 179. A decree obtained against a partnership can be executed against a partner not only to the extent of the assets of the partnership in his possession but also against the other properties which he may own, unless the partner is able to prove that for some reasons his liability is limited to the extent of the assets of the firm in his hand. 43 P.L.R. J. & K. 153. Where partnership funds are in the hands of the Court receiver, a Court of equity will not allow one of the whole body of creditors to gain priority over the remainder, by the simple expedient of attaching money in Court's hands. 16 B. 575.

RECEIVER.—The ordinary rule that no party is appointed as receiver except by consent has been departed from only in exceptional cases, as for instance, in a case of partnership where there are no allegations of fraud and where the carrying on of the business depends on the personal credit of one of the members of the firm. 148 I.C. 459=1934 C. 444. Court does not take upon itself the management of a partnership except as incidental to winding up. 1934 Cal. 444.

Sec. 49.—This section reproduces S. 262 of the Indian Contract Act.

PROPERTY OF THE FIRM.—The property of the firm affected by this section *is that property* which belonged to the firm at the time of its dissolu-

Payment of firm debts and of separate debts.

debts due from any partner, the property of the firm shall be applied in the first instance in payment of the debts of the firm, and, if there is any surplus, then the share of each partner shall be applied in payment of his separate debts or paid to him. The separate property of any partner shall be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm.

Personal profits earned after dissolution.

50. Subject to contract between the partners, the provisions of clause (*a*) of section 16 shall apply to transactions by any surviving partner or by the representatives of a deceased partner, undertaken after the firm is dissolved on account of the death of a partner and before its affairs have been completely wound up:

Provided that where any partner or his representative has bought the good will of the firm, nothing in this section shall affect his right to use the firm name.

Return of premium on premature dissolution.

51. Where a partner has paid a premium on entering into partnership for a fixed term, and the firm is dissolved before the expiration of that term otherwise than by the death of a partner, he shall be entitled to repayment of the premium or of such part thereof as may be reasonable, regard being had to the

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tion. It includes all that was, at the commencement of the partnership, thrown into the common stock, and whatever has, during its continuance, by means thereof, been added to it. (*See* S. 14, *supra*.) Separate property is that in which the partners are separately interested at the time of the dissolution. Property, therefore, which has been acquired in the partnership after its dissolution, is not to be treated as partnership property; and that which, though originally partnership property has, by virtue of a *bona fide* agreement, been converted into separate property before the dissolution, cannot be claimed by joint-creditors as partnership property. Separate property may similarly be converted into joint property; but the agreement by which the conversion is effected must, in any case, be completely executed and must be made in good faith. (Ex parte *Owen*, 4 D. & Sm., 351; Ex parte *Ruffin*, 6 Ves., 119; 5 R.R. 237.) *See also* 64 I.C. 719=1922 N. 70.

PARTNERS' LIEN.—Although partnership property has annexed to it a paramount liability for partnership debts, yet there is nothing in law which prevents partners from disposing of it as they like or allowing it to be treated as the sole property of one partner and obliges them to preserve it as partnership property for the benefit of the creditors of the partnership. Any disposition of the property by the agreement of the partners is effective unless made with a view to defraud the creditors; and the creditor is not entitled to be consulted in the matter. 64 I.C. 719=18 N.L.R. 186=1922 N. 70. *See also* 40 A. 446=45 I.C. 31=16 A.L.J. 305. Money or property given away does not continue to be the assets of the firm when it is given over to a third party. 54 C. 687=1927 C. 836. Debt by one partner to another—Money advanced to acquire share in partnership property—Lien on debtor partner's share. 15 L. 471=1934 L. 336.

Sec. 50.—This section corresponds to sub-s. (2) of S. 29 of the English Act, with necessary verbal changes. (*Report of Select Committee.*) *N.B.*—In Ss. 50 and 53 the second Select Committee have inserted a proviso which will protect the right of a partner who has brought the goodwill of the firm (*Report of Second Select Committee.*) After dissolution the relationship between surviving and former partner is fiduciary. 57 M.L.J. 404=1930 M. 393. In the absence of any term agreed upon by the parties, any partner may determine the partnership at any time on giving notice of intention to do so. The dissolution takes places as from the date of the communication of the notice. If persons intending to retire from the partnership business continue to take things from the business and to associate otherwise with its works, a presumption may be drawn in favour of the continuance of the partnership. The accounts on a dissolution of partnership have to be taken for the benefit of all the partners concerned and there must be a full enquiry into them irrespective of the relief sought for in the plaint. If a partner without the permission of the other partner carries on a competing business with the firm, he must account for and pay over to the firm all profits made by him in such business and also make compensation to the firm for any loss occasioned thereby. The rule is not however applicable to a different business though the same knowledge and information may be useful in both. 67 I.C. 10=34 C.L.J. 405. After dissolution no ex-partner has power to do any act to bind another ex-partner. 50 M.L.J. 67=1926 M 114.

Sec. 51.—*See* S. 40 of the English Partnership Act.

terms upon which he became a partner, and to the length of time during which he was a partner, unless—

(*a*) the dissolution is mainly due to his own misconduct, or

(*b*) the dissolution is in pursuance of an agreement containing no provision for the return of the premium or any part of it.

Rights where partnership contract is rescinded for fraud or misrepresentation.

52. Where a contract creating partnership is rescinded on the ground of the fraud or misrepresentation of any of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

(*a*) to a lien on, or a right of retention of, the surplus of the assets of the firm remaining after the debts of the firm have been paid, for any sum paid by him for the purchase of a share in the firm and for any capital contributed by him;

(*b*) to rank as a creditor of the firm in respect of any payment made by him towards the debts of the firm; and

(*c*) to be indemnified by the partner or partners guilty of the fraud or misrepresentation against all the debts of the firm.

Right to restrain from use of firm name or firm property.

53. After a firm is dissolved, every partner or his representative may, in the absence of a contract between the partners to the contrary, restrain any other partner or his representative from carrying on a similar business in the firm name or from using any of the property of the firm for his own benefit, until the affairs of the firm have been completely wound up:

Provided that where any partner or his representative has bought the goodwill of the firm, nothing in this section shall affect his right to use the firm name.

Agreements in restraint of trade.

54. Partners may, upon or in anticipation of the dissolution of the firm, make an agreement that some or all of them will not carry on a business similar to that of the firm within a specified period or within specified local limits; and notwithstanding anything contained in section 27 of the Indian Contract Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable.

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Sec. 52.—This corresponds with S. 41 of the English partnership Act with a few verbal changes.

PRINCIPLE OF SECTION.—An agreement entered into on a dissolution will be set aside if it can be shown to have been based upon error or to have been tainted with fraud, whether in the shape of positive misrepresentation or of concealment of truth. 123 I.C. 596=1930 M. 141. The utmost good faith is required in dealings between working and sleeping partners in matters relating to the partnership accounts. 1930 M. 141.

Sec. 54.—This section reproduces the second exception to S. 27 of the Contract Act, with amendments to assimilate it to S. 36 (2) (*See also* notes under Ss. 36 and 55).

GOODWILL OF THE FIRM.—The terms "partnership assets" must be deemed to include the goodwill of the business, for the plaintiff is entitled to a share in the goodwill as well as to a share in the actual assets of the business. 52 M. 772=1929 M. 456=50 M.L.J. 657. *See also* 43 I.C. 661. In a suit for dissolution of partnership while taking accounts the goodwill of the partnership firm should be included in the assets and should be brought into the common account. 1930 A.L.J. 868=34 C.W. N. 737=1930 P.C. 185 (P.C.).

DEFINITION.—The term "goodwill" has been defined as "the expectation of continued public patronage."

The goodwill of a business means every affirmative advantage, as contrasted with negative advantage that has been acquired in carrying on the business, whether connected with or carrying with it the benefit of its own name or style or everything connected with or carrying with it the benefit of the business. 23 S.L.R. 471=1929 S. 85.

VALUE OF GOODWILL.—The value of the goodwill of a dissolved partnership is considerably decreased by the rule laid down in the recent case of *Treqo* v. *Hunt*, (1896) A.C. 7, namely, that the sale of the good-will does not prevent the partners from carrying on a competing business with the purchaser. (*See* sub-S. 2.) It is true that the quondam partners may be restrained by injunction from *soliciting*

55. (1) In settling the accounts of a firm after dissolution, the goodwill shall, subject to contract between the partners, be included in the assets, and it may be sold either separately or along with other property of the firm.

Sale of goodwill after dissolution.

(2) Where the goodwill of a firm is sold after dissolution, a partner may carry on a business competing with that of the buyer and he may advertise such business, but, subject to agreement between him and the buyer, he may not—

Rights of buyer and seller of goodwill.

(*a*) use the firm name,

(*b*) represent himself as carrying on the business of the firm,

(*c*) solicit the custom of persons who were dealing with the firm before its dissolution.

(3) Any partner may, upon the sale of the goodwill of a firm, make an agreement with the buyer that such partner will not carry on any business similar to that of the firm within a specified period or within specified local limits, and, notwithstanding anything contained in section 27 of the Indian Contract Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable.

Agreements in restraint of trade.

CHAPTER VII.

REGISTRATION OF FIRMS.

56. The [1][Provincial Government of any province] may, by notification in the Official Gazette, direct that the provisions of this Chapter shall not apply to [that][2] province or to any part thereof specified in the notification.

Power to exempt from application of this Chapter.

57. (1) The Provincial Government may appoint Registrars of Firms for the purposes of this Act, and may define the areas within which they shall exercise their powers and perform their duties.

Appointment of Registrars.

(2) Every Registrar shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code.

58. (1) The registration of a firm may be effected at any time by sending by post or delivering to the Registrar of the area in which any place of business of the firm is situated or proposed to be situated, a statement in the prescribed form and accompanied by the prescribed fee, stating—

Application for registration.

(*a*) the firm name,

(*b*) the place or principal place of business of the firm,

(*c*) the names of any other places where the firm carries on business,

(*d*) the date when each partner joined the firm,

LEG. REF.

[1] Substituted by the A.O., 1937.

[2] Substituted by *ibid.* for 'any.'

NOTES.

any person who was a customer of the old firm [sub-s. 2, Cl. (*c*)] or from representing themselves as continuing the old business [sub-s. 2, Cl. (*b*)] or from using the firm name [sub-s. 2, Cl. (*a*).] Still, the mere fact that they may compete is a serious factor in the case, and cannot fail to affect the saleable value of the firm's goodwill. *See* 110 I.C. 639=1929 S. 85. The effect of possible or probable competition should be one of the main determining factors in the valuation of the goodwill. 23 S.L.R. 471=1929 S. 85.

Sec. 58. Where a suit is brought by a partnership firm, which has not been registered under S. 58, Partnership Act, a plea that the suit by it is not maintainable can be raised even after a written statement is filed by the defendant (52 I.A. 126, Rel. on.) 161 I.C. 741=1936 C. 133. Registration of a firm which has been dissolved is not contemplated by the Partnership Act. 1940 Rang.L.R. 552=1940 Rang. 294.

(*e*) the names in full and permanent addresses of the partners, and

(*f*) the duration of the firm.

The statement shall be signed by all the partners, or by their agents specially authorized in this behalf.

(2) Each person signing the statement shall also verify it in the manner prescribed.

(3) A firm name shall not contain any of the following words namely:—

"Crown," "Emperor," "Empress," "Empire," "Imperial," "King," "Queen," "Royal," or words expressing or implying the sanction, approval or patronage of the Crown or [1][the Central Government or any Provincial Government or the Crown Representative] except when the [2][Provincial Government] signifies [2][its] consent to the use of such words as part of the firm name by order in writing [3][* * *].

Registration.

59. When the Registrar is satisfied that the provisions of section 58 have been duly complied with, he shall record an entry of the statement in a register called the Register of Firms, and shall file the statement.

Recording of alterations in firm name and principal place of business.

60. (1) When an alteration is made in the firm name or in the location of the principal place of business of a registered firm, a statement may be sent to the Registrar accompanied by the prescribed fee specifying the alteration, and signed and verified in the manner required under section 58.

(2) When the Registrar is satisfied that the provisions of sub-section (1) have been duly complied with, he shall amend the entry relating to the firm in the Register of Firms in accordance with the statement, and shall file it along with the statement relating to the firm filed under section 59.

Noting of closing and opening of branches.

61. When a registered firm discontinues business at any place or begins to carry on business at any place, such place not being its principal place of business, any partner or agent of the firm may send intimation thereof to the Registrar, who shall make a note of such intimation in the entry relating to the firm in the Register of Firms, and shall file the intimation along with the statement relating to the firm filed under section 59.

Noting of changes in names and addresses of partners.

62. When any partner in a registered firm alters his name or permanent address, an intimation of the alteration may be sent by any partner or agent of the firm to the Registrar, who shall deal with it in the manner provided in section 61.

LEG. REF.

[1] Substituted by the A.O., 1937.

[2] Substituted by *ibid.*

[3] The words "under the hand of one of the Secretaries of the Government of India" were omitted by *ibid.*

NOTES.

Sec. 59.—S. 59 contemplates that when a firm has been registered, in the case of a dissolution of the firm by death of a partner, notwithstanding such death the firm should be treated as still registered for the purpose of the Act. The surviving partners whose names are n the register can sue in the name and on behalf of the firm without fresh registration after the death of the other partner. I.L.R. (1940) Bom. 715=42 Bom.L.R. 497=1940 Bom. 257. The mere fact that a joint Hindu family trading firm gets itself registered under the Partnership Act in the name of some of the members of the family does not, by itself and without more, destroy its character as such. 42 P.L.R. 418=1940 Lah. 425.

Secs. 59 and 68—EFFECT OF REGISTRATION —INDEPENDENT PROOF OF MEMBERSHIP.—The registration of a firm raises a presumption that the parties shown as members of the firm and registered as such are actually members of it; but it is no doubt a rebuttable presumption. In the absence of evidence to the contrary, no further proof is necessary as to membership, nor is it necessary to prove that the application for registration bore the signature of the member concerned. 194 I.C. 168=16 Luck. 727=1941 Oudh 376.

Recording of changes in and dissolution of a firm.

63. (1) When a change occurs in the constitution of a registered firm, any incoming, continuing or outgoing partner, and when a registered firm is dissolved, any person who was a partner immediately before the dissolution, or the agent of any such partner or person specially authorized in this behalf, may give notice to the Registrar of such change or dissolution, specifying the date thereof; and the Registrar shall make a record of the notice in the entry relating to the firm in the Register of Firms, and shall file the notice along with the statement relating to the firm filed under section 59.

Recording of withdrawal of a minor.

(2) When a minor who has been admitted to the benefits of partnership in a firm attains majority and elects to become or not to become a partner, and the firm is then a registered firm, he, or his agent specially authorized in this behalf, may give notice to the Registrar that he has or has not become a partner, and the Registrar shall deal with the notice in the manner provided in sub-section (1).

Rectification of mistakes.

64. (1) The Registrar shall have power at all times to rectify any mistake in order to bring the entry in the Register of Firms relating to any firm into conformity with the documents relating to that firm filed under this Chapter.

(2) On application made by all the parties who have signed any document relating to a firm filed under this Chapter, the Registrar may rectify any mistake in such document or in the record or note thereof made in the Register of Firms.

Amendment of Register by order of Court.

65. A Court deciding any matter relating to a registered firm may direct that the Registrar shall make any amendment in the entry in the Register of Firms relating to such firm which is consequential upon its decision; and the Registrar shall amend the entry accordingly.

Inspection of Register and filed documents.

66. (1) The Register of Firms shall be open to inspection by any person on payment of such fee as may be prescribed.

(2) All statements, notices and intimations filed under this Chapter shall be open to inspection, subject to such conditions and on payment of such fee as may be prescribed.

Grant of copies.

67. The Registrar shall on application furnish to any person, on payment of such fee as may be prescribed, a copy, certified under his hand, of any entry or portion thereof in the Register of Firms.

Rules of evidence.

68. (1) Any statement, intimation or notice recorded or noted in the Register of Firms shall, as against any person by whom or on whose behalf such statement, intimation or notice was signed, be conclusive proof of any fact therein stated.

(2) A certified copy of an entry relating to a firm in the Register of Firms may be produced in proof of the fact of the registration of such firm, and of the contents of any statement, intimation or notice recorded or noted therein.

NOTES.

Sec. 68 : PRODUCTION OF CERTIFICATE—EFFECT.—It is impossible to permit a litigant to tender in evidence such a document as is referred to in S. 68 and then to say that the registration was a nullity because the firm had been dissolved long before. The Act appears to expressly preclude any contention by those making statements which find their way on to the Registrar of firms that such statements can be mistaken. 1940 Rang. L.R. 552=1940 Rang. 294. Entry in register as to place of business —Evidentiary value. *See* I.L.R. (1939) 2 Cal. 199=1940 Cal. 134.

69. (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

Effect of non-registration.

NOTES.

Sec. 69: SCOPE AND APPLICABILITY.—The language of sub-Ss. (1) and (2) of S. 69 is wide enough to cover suits relating to a dissolved firm. S. 69 (1) covers a suit by a plaintiff suing in respect of a right vested in him or acquired by him as a partner in a firm, and it is not essential that the firm should be actually in existence at the date of the institution of the suit. 39 Bom.L.R. 260 ; 1940 Nag. 78; 1937 Bom. 225. Though Berar is not in British India, this Act is made applicable to it by notification. 1937 Nag. 134. As to application of this section to a suit by a money-lending firm carrying on business at a place in Berar, *see* 1937 Nag. 134. The partnership Act does nowhere enjoin registration. It is optional and not obligatory. There is no implied obligation on the partners to concur in effecting registration, in a contract of partnership. Even if there is such an obligation, then the obligation would arise out of the partnership agreement (*i.e.*) out of a contract, and the rights flowing from the obligation, of a partner to compel his co-partners to effect registration would be a "right arising from a contract", and a suit to enforce such a right brought by one partner against the other partners of an unregistered firm is expressly barred by the provisions of S. 69 (1). In such a case the proper and indeed the only available remedy is a suit for dissolution and not a suit for a mandatory injunction. 1941 Rang.L.R. 219=1941 Rang. 196.

SUITS BY UNREGISTERED FIRM.—Provisionr of the section are imperative. A plaint filed by an unregistered firm cannot be validated by subsequent registration and amendment of plaint 44 L.W. 648=165 I.C. 939 (2)=1936 M. 991=71 M.L.J. 663. But *see* 41 C.W.N. 534, where it was held that where a firm is registered after suit, and the plea in bar of suit is not taken till in the course of arguments, the suit should not be thrown out but should be treated as properly instituted on the day when the firm is registered. The withdrawal of a suit by an unregistered firm is no bar to a fresh suit on the same cause of action after registration of the firm, as the later suit is technically a suit by a different plaintiff. 44 L.W. 247 (1)=164 I.C. 748=1936 M. 697. The object of S. 69 was to make sure that the general policy of the Legislature that all partnerships, should be registered will be carried out; it is not right to hold that the provision contained in S. 69 was really in the nature of "processual" law in the sense in which that term is used in the cases dealing with the principle of retrospective operation of statutes; 1938 M. 688=(1938) 2 M.L. J. 44. S. 69 has to be interpreted strictly and a suit instituted contrary to its provisions is bad and cannot be subsequently validated by compliance with those provisions. The fact that objection to the maintainability of the suit on the score of non-registration is taken late at the stage of arguments is no ground for holding that the suit should be treated as valid at least from the date of compliance with the section. 1938 Mad. 185=(1937) 2 M.L J 717. Though a suit is filed by the individual partners of a firm, in respect of a debt due to the firm the suit is undoubtedly one, on behalf of the firm and S. 69 applies to such a suit,. 1937 A.M.L.J. 86. Under S. 69 two conditions must exist before a suit can be dismissed. The contract must be with an unregistered firm and the person suing to recover the amount must be that firm or another unregistered firm; it is only then, that there can be an objection to the maintainability of the suit. The mere fact that the contract was with an unregistered firm is not sufficient to dismiss a suit if the plaintiff is otherwise competent to maintain it. Therefore the dismissal of a previous suit by an unregistered firm cannot operate as *res judicata* against the assignee of that firm which is a registerd firm, because even the unregistered firm is competent to maintain another suit for the recovery of the same amount after its registration. 1937 L. 241. S. 69 is not confined either by the general law or by S. 74 to suits in respect of obligations incurred after the coming into force of S. 69, *i,e.*, 1-10-1933, but it applies to all suits filed after that date, though in respect of obligations incurred before that date. The section does not take away any vested rights of the parties, but only enacts a processual rule by stating that prior to bringing a suit a firm must do a certain act, namely, get itself registered. 1938 Mad. 185=(1937) 2 M.L.J. 717. S. 69 prevents a Court from taking cognizance of a suit brought by an unregistered firm, in the saue way a Court shall not take cognizance of a suit barred by limitation; and to hold that because as the result of ignorance or mistake objection was not taken by the defendant in the suit, so the provisions of the law could be flouted, would be to frustrate the intention of the Legislature clearly expressed. Therefore the Judge is right in allowing to be taken or himself taking the objection under S. 69 in appeal for the first time. I.L.R. (1939) Kar. 765=1939 Sind 206. Whether S. 69 contains a prohibiiton against the passing of decrees in favour of unregistered partnerships or whether it only contains a prohibition against the filing of suits by unregistered partnerships, *see* 51 L.W. 683=1940 Mad. 628=(1940) 1 M.L.J. 329 ; *see also* 40 C.W.N· 1180. Where a suit by a firm has been disposed of on the ground that owing to non-registration the suit is not maintainable, the subsequent registration cannot validate the proceedings, and entitle an appellate Court

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect :—

NOTES.

to look into the merits of the case. If registration had been done during the pendency of the suit, it might no doubt have legally proceeded from that date unless there was a bar of limitation. 1939 Nag. 301. The law does not require that a plaint by a firm must expressly note that it has been registered. If the defendant opposes the suit on the ground of non-registration of the firm, he must take the objection in his pleas. The plaintiffs cannot be called upon to show at the time of arguments that they are a registered firm and the suit should not then be dismissed on ground of want of proof of registration. 39 P.L.R. 777= 1938 Lah. 96.

A suit instituted in the name of a firm not being a registered firm is not properly constituted and cannot proceed in that form. The Partnership Act has been in force for a very limited time and the Bar as well as business people in outlying districts may not be yet so familiar with its provisions that it would be appropriate to enforce them too rigidly at present in cases where the institution of the suit under the wrong name may have been due to mistake. The plaintiff in such a case should, therefore, be allowed an opportunity to amend his plaint subject to conditions. The amendment can be allowed even at a late stage as it does not amount to an addition of parties but merely the substitution of the name in order to correct a misdescription. 1937 P.W.N. 36=1937 Pat. 526. A transferee of a debt due to an unregistered firm is not entitled to bring a suit to recover the amount of the debt, since the firm itself had no right of suing for that debt under S. 69 (2). The fact that the original cause of action arose before that Act came into force does not affect the matter, where the debt is transferred after the passing of that Act. 71 C.L.J. 553=44 C.W.N.387=1940 Cal. 528. *See also* 1938 M. 688=(1938) 2 M.L.J. 44; 1937 M. 419; 1940 N.L.J. 63. A suit of the value of above Rs. 100 by an unregistered firm is hit by S. 69 and a decree cannot be passed for Rs. 100 in such a suit. 42 C,W.N. 841.

APPLICABILITY TO ARBITRATION PROCEEDINGS. —Only a 'suit' as used in forensic language is excluded by this section, and not applications as are contemplated in para. 20, Sch. II, C. P. Code. 162 I.C. 670=1936 L. 136; 16 Pat. 742.

APPLICABILITY—FIRM OF FATHER AND SON FORMING A JOINT HINDU FAMILY.—S. 69 does not apply to a firm of father and son who form a joint Hindu family and therefore a suit by such a firm is maintainable even though the firm is not registered. 153 I.C. 510= 1935 A.L.J. 260=1935 A. 280. A Hindu joint family firm need not be registered under the Partnership Act and is not subject to the restrictions imposed by S. 69 of that Act. 1937 A.L.J. 823=1937 All. 650. Where after the death of a Mahomedan his sons carry on the business and some of them are minors, it is a partnership requiring registration. The contract of partnership may be implied and though minors could not contract, there is nothing to prevent their guardian from contracting on their behalf, If such a partnership is unregistered, it cannot maintain a suit. 1939 N.L,J. 427=1939 Nag. 301.

Sec. 69.—Applicability to *Cutchi Memon* family firm—Firm not registered—Suit by—Maintainability—If Hindu joint family business. *See* 1937 M.W.N. 412=(1937) 2 M.L.J. 221.

Sec. 69 (2).—Where a registered firm has been dissolved by the retirement of one of its partners and notice of the dissolution has been given to the Registrar, the firm so far as registration is concerned is to be deemed to be still registered and can sue. I.L.R. (1941) 2 Cal. 289. S. 69 of the Partnership Act is mandatory. Registration of the firm is a condition precedent to its right to institute a suit. If a firm was not registered at the time a suit was filed by it the subsequent registration of the firm does not entitle the Court to proceed with the suit and the only course open to the Court is to dismiss the suit. ((1937) 2 M.L.J. 273, Overruled.) 1942 Mad. 252=54 L.W. 676= (1941) 2 M.L.J. 968. *See also* 40 P.L.R. 667= 1938 Lah. 767=1940 A.M.L.J 81. The provisions of S. 69 (2) are imperative, and a plaint filed by an unregistered firm is in effect no plaint at all. A suit which is not maintainable by reason of non-compliance with the section cannot become maintainable at a later stage by reason of subsequent registration. The crucial date is the date of institution of the suit, and if the firm is unregistered at the date of the institution of the suit the suit must fail; and subsequent registration before the hearing of the suit cannot cure the initial defect. 18 Pat. 114= 20 Pat. L.T. 33=1939 Pat. 239. *See also* 1936 A.M.L.J. 20.

Sec. 69 (3).—In a suit for dissolution of an unregistered partnership, the Court has power to pass a preliminary decree directing *inter alia* that accounts be taken. A prayer for "dissolution of partnership" through Court is a compendious mode of asking a fourfold relief: (*a*) a declaration that the partnership stands dissolved from a certain date; (*b*) a declaration as to who the partners are and what are their proportionate shares: (*c*) a prayer that accounts be taken and the assets and liabilities of the partnership as on the date of dissolution be determined; and (*d*) a final decree be passed. These prayers are implicit in the prayer for dissolution made in a "suit for dissolution of partner-

(*a*) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realize the property of a dissolved firm, or

(*b*) the powers of an official assignee, receiver or Court under the Presidency-Towns Insolvency Act, 1909, or the Provincial Insolvency Act, 1920, to realize the property of an insolvent partner.

(4) This section shall not apply—

(*a*) to firms or to partners in firms which have no place of business in British India, or whose places of business in British India are situated in areas to which, by notification under [1][section 56], this Chapter does not apply, or

(*b*) to any suit or claim of set-off not exceeding one hundred rupees in value which, in the Presidency-towns, is not of a kind specified in section 19 of the Presidency Small Cause Courts Act, 1882, or, outside the Presidency-towns, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887, or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim.

LEG. REF.

[1] Substituted by Act XXIV of 1934.

NOTES.

ship" and it is in this sense that this expression is used in S. 69 (3). 39 P.L.R. 197=1937 Lah. 633. A petition by a creditor firm for the adjudication of a debtor as an insolvent is not "a proceeding to enforce a right arising from a contract", within the meaning of S. 69 (3) of the Partnership Act. The right of a creditor to file an insolvency petition against his debtor is a right conferred upon him by statute and is not a right arising out of a particular contract of loan between the petitioning creditor and the debtor. The fact that the creditor happens to be a firm and that a suit to recover the loan is not maintainable by reason of the firm being unregistered, does not deprive the unregistered firm of its right to file a petition in insolvency against its debtor. 48 L.W. 901 =1939 Mad. 145. Under S. 69. sub-S. 3 (*a*), the provisions of sub-S. (1) are not to affect the enforcing of any right to sue for the dissolution of partnership. Where therefore arbitration proceedings are on the face of them taken for the purposes of the dissolution of partnership of an unregistered firm, the proceedings under Sch. II, para. 20, C. P. Code, would be protected from the application of S. 69. 162 I.C. 670=1936 L. 136. The terms of sub-S. (3) of S. 69 does not contemplate an execution proceeding. The fact that the decree in question was a consent decree cannot make a difference in a case where the decree-holder does not repudiate the compromise but only questions the right of the decree holder to execute the decree. In such a case neither was the execution proceeding meant to enforce a right arising from the contract nor was the objection of judgment debtor directed against its validity. So S. 69 (3) of the Act cannot come into play. 1939 N.L.J. 148. A suit to recover a debt due to a firm brought by persons who were the only members of a firm at the date of dissolution, is a suit to enforce a right to 'realise the property of a dissolved firm' and as such falls within the exception (*a*) to sub-S. (3) of *S.* 69 and hence is maintainable even though the partnership was an unregistered one. I.L.R. (1938) Bom. 102=39 Bom.L.R. 1214=1938 Bom. 108. *See also* 1937 Mad. 730. S. 69 (3) (*a*) of the Partnership Act cannot be construed as permitting a suit for accounts by a partner of an unregistered firm only if the partnership was dissolved before the date of the institution of the suit or prohibiting a prayer for accounts from being joined with the prayer for dissolution of an existing firm. A suit for dissolution of the firm and also for settlement of accounts is maintainable, and the plaintiff can be given a decree for both. 1937 A.L J. 825=1937 A. 674.

Sec. 69 (3) (a)—UNREGISTERED FIRM—MEMBER, IF CAN SUE FOR DISSOLUTION AND ACCOUNTS. —The right of a partner of an unregistered firm to sue and obtain a decree for dissolution and accounts remain unaffected by the provisions of S. 69 of the Partnership Act in view of the proviso contained in sub-S. (3) thereof. I.L.R. (1940) All. 26=1939 A.L.J. 964=A.I.R. 1939 All. 735 (F.B.)

Secs. 69 and 5. Where the plaint is not clearly worded though it is stated therein that the business is a long standing one and the plaintiffs are relations descended from the same ancestor and reside in the same house, and the cause title also does not describe the plaintiffs as constituting a firm and the defendants in their original written statement did not raise any plea on the point of the non-maintainability of the suit for non-registration of the plaintiff's firm but raised that plea in the additional written statement filed by them very late, the Court should not straightaway dismiss the suit on the ground that the provision of S. 69 of the Partnership Act had not been complied with. The Court should take evidence to clear up the matter as to whether the plaintiffs really constituted a partnership firm or were carrying on a joint family business which would come within the exception provided for in S. 5 of the Act. 65 C.L.J. 426.

Secs. 69 and 48—UNREGISTERED FIRM—SUIT FOR DISSOLUTION AND ACCOUNT—DECREE THAT COULD BE PASSED.—In a suit for dissolution of partnership and for accounts in respect of an unregistered firm, while the prayer for dissolution could be decreed, the plaintiff cannot obtain a decree for rendition of accounts against the defendant because, the decree to be granted under O. 20, R. 15, C.P. Code, must be modified in accordance with the provisions of law in S. 69 of the Partnership Act. But the prayer

Penalty for furnishing false particulars.

70. Any person who signs any statement, amending statement, notice or intimation under this Chapter containing any particular which he knows to be false or does not believe to be true, or containing particulars which he knows to be incomplete or does not believe to be complete, shall be punishable with imprisonment which may extend to three months, or with fine, or with both.

Power to make rules.

71. (1) The [1][Provincial Government] may make rules prescribing the fees which shall accompany documents sent to the Registrar of Firms or which shall be payable for the inspection of documents in the custody of the Registrar of Firms, or for copies from the Register of Firms:

Provided that such fees shall not exceed the maximum fees specified in Schedule I.

(2) The Provincial Government may [2][also] make rules—

(*a*) prescribing the form of statement submitted under section 58, and of the verification thereof;

(*b*) requiring statements, intimations and notices under sections 60, 61, 62 and 63, to be in prescribed form, and prescribing the form thereof;

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[1] Inserted by A.O., 1937.
[2] Substituted by A. O., 1937.

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that an account be taken may be granted in the limited terms of S. 48; that is to say the decree in question will be under O. 20, R. 15 and Form No. 21 of Appendix D and if the plaintiff desires a receiver may be appointed to take accounts of the firm. But the decree will state that the relief of making the defendant an accounting party is not granted. I.L.R. (1939) All. 563=1939 A. L.J. 405=A.I.R. 1939 All. 535.

Secs. 69 and 74 (b): OPERATION OF S. 69.—S. 69 of the Act applies to suits for enforcement of claims accrued before the commencement of the Act, if such suits are started after S. 69 begins to operate. S. 69 being an enactment which deals with procedure only, may be considered as retrospective in its operation and may be held to apply *prima facie* to all actions pending as well as future. Therefore the pending litigations in respect of rights already accrued are saved from the operation of S. 69 under S. 74 (*b*). But S. 74 (*b*) does not save litigations started after 1st October, 1938. 39 C.W.N. 67= 1934 C. 754. *See also* 40 C.W.N. 1180; 17 Pat. L.T. 713; 1936 A.M.L.J. 20; 1937 M. 419=45 L.W. 276; (1937) 1 M.L.J. 610=1937 M. 528.

Secs. 69 and 74.—The bar imposed by S. 69 does not apply to a suit to enforce a right accrued before the Act came into force by virtue of S. 74 of the Act. The effect of S. 74 is that the Act is not to affect any right already acquired before the commencement of the Act. S. 74 (*a*) saves from the operation of the Act, a suit to enforce a right which accrued before S. 69 came into operation, though the suit is instituted after S. 69 cannot come into operation. The words "or anything done or suffered" before the commencement of the Act in S. 74 (*b*) must be taken to be governed by the previous words "any legal proceeding or remedy in respect of any such right," and these words apply to legal proceedings to enforce any subsisting rights which are saved by Cl. (*c*) of S. 74. Sub-Cls. (*a*) and (*c*) of S. 74 save existing rights, and sub-Cl. (*b*) saves any legal proceeding or remedy in respect of such rights. S. 74 (*b*) deals with procedure and nothing else, that is to say, it deals with methods of enforcing rights and not with the rights themselves. I.L.R. (1939) Bom. 104=40 Bom.L.R. 1275=A.I.R. 1939 Bom. 61. *See also* 1938 Mad. 688; I.L.R. (1940) Nag. 648=1941 Nag. 367; (1938) 2 M.L.J. 44; 1936 All. 3; 1940 A.M.L.J. 81; 15 Pat. 810=1937 Pat. 16; 1937 Mad. 528; 1940 Sind 125; (1940) 1 M.L.J. 329=1940 Mad. 628; (1937) 1 M.L.J. 610. S.74 which saves rights and remedies which existed before the Act came into force should not be read as being subordinate to S. 69 (2), but should prevail over S. 69 (2). The rights and remedies which accrued before the commencement of the Act are left entirely untouched. S. 74 is a saving section and if effect is to is to be given to the words used, Sec. 69 (2) cannot apply in a case where a suit is filed by a firm which had not been registered but whose registration is effected during the pendency of the suit, when the suit is in respect of a liability arising prior to the Act, Sec. 69 does not bar such a suit. I.L.R. (1939) Mad. 980= 1939 Mad. 860=(1939) 2 M.L.J. 489. *See also* 1940 Mad. 628=(1940) 1 M.L.J. 329. From the opening words 'any legal proceeding or remedy' in sub-Sec. (*b*) of Sec. 74, it is clear that the sub-section relates to those legal proceedings or remedies which were open to a party in respect of any right, title, interest, obligation or liability which had already been accrued or incurred before the commencement of the Act. The absence of the words 'pending' and 'taken' indicate that it was not the intention of the legislature to exempt from the operation of Sec. 69 only proceedings which had been instituted. I.L.R. (1941) All. 311= 1941 A.L.J. 107=1941 All. 178. *See also* 58 All. 495=1935 A.L.J. 1245=1936 All. 3.

(*c*) prescribing the form of the Register of Firms, and the mode in which entries relating to firms are to be made therein, and the mode in which such entries are to be amended or notes made therein;

(*d*) regulating the procedure of the Registrar when disputes arise;

(*e*) regulating the filing of documents received by the Registrar;

(*f*) prescribing conditions for the inspection of original documents;

(*g*) regulating the grant of copies;

(*h*) regulating the elimination of registers and documents;

(*i*) providing for the maintenance and form of an Index to the Register of Firms; and

(*j*) generally, to carry out the purposes of this Chapter.

(3) All rules made under this section shall be subject to the condition of previous publication.

CHAPTER VIII.

SUPPLEMENTAL.

Mode of giving public notice.

72. A public notice under this Act is given—

(*a*) where it relates to the retirement or explusion of a partner from a registered firm, or to the dissolution of a registered firm, or to the election to become or not to become a partner in a registered firm by a person attaining majority who was admitted as a minor to the benefits of partnership, by notice to the Registrar of Firms under section 63, and by publication in the Official Gazette and in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business, and

(*b*) in any other case, by publication in the Official Gazette and in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business.

Repeals.

73. The enactments mentioned in schedule II are hereby repealed to the extent specified in the fourth column thereof. [*Repealed by Act I of* 1938.]

Savings.

74. Nothing in this Act or any repeal effected thereby shall affect or be deemed to affect—

NOTES.

Sec. 74—[*See* notes under 69, *supra*.] Sec. 74 not only saves the rights but also the suit to enforce these rights. There is no reason to restrict Sec. 74 by saying that it covers only a right not dependent upon the adjudication of a Court. Hence a suit by an unregistered firm for rent due up to October, 1933, is not barred but is saved by Sec. 74. I.L.R. (1939) Kar. 765=1939 Sind 206. The legal proceedings indicated in S. 74 (*b*) should not be interpreted as meaning proceedings pending at the time of the commencement of the Act. 1938 Mad. 185=(1937) 2 M.L.J. 717. The Act must be construed in its plain terms, and where its terms admit of no doubt, anything in the nature of speculation as to the intention of the Legislature should be avoided. Sec. 74 (*a*) says that nothing in the Act shall affect any right acquired before the commencement of the Act; and Sec. 74 (*b*) extends this saving clause to any legal proceeding or remedy in respect of any such right; that is, any such right as is mentioned in sub-Sec. (*a*) and has accrued before the commencement of this Act. I would be wrong to say that Sec. 74 (*b*) saves only suits which are pending at the time when the Act comes into force. It saves a remedy, which connotes the right to institute a suit as well. Hence when a suit has been instituted after 1st October, 1933, by a firm not registered under the Partnership Act for recovery of a debt accruing before that date, the suit is not barred by Sec. 69 of the Act but is saved by the provisions of Sec. 74 (*b*). 1938 Rang.L.R. 371 =1938 Rang. 273 (F.B.). The wording of Sec. 74 seems to state in express words that none of the provision of the Act, which includes the provisions of S. 69 shall affect any remedy in respect of any obligation or liability which had arisen before the commencement of the Act. Both cases are covered namely (1) where the legal proceeding has been started before the Act and (2) where the legal proceeding arising out of a remedy that existed before the Act, has been started after the Act. 1940 N.L.J. 63= 1940 Nag. 137.

(*a*) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or

(*b*) any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability, or anything done or suffered before the commencement of this Act, or

(*c*) anything done or suffered before the commencement of this Act, or

(*d*) any enactment relating to partnership not expressly repealed by this Act, or

(*e*) any rule of insolvency relating to partnership, or

(*f*) any rule of law not inconsistent with this Act.

SCHEDULE I.

MAXIMUM FEES.

[*See sub-section* (1) *of section* 7.]

Document or act in respect of which the fee is payable.	Maximum Fee
Statement under section 58 .. .	Three rupees.
Statement under section 60	One rupee.
Intimation under section 61	One rupee.
Intimation under section 62	One rupee.
Notice under section 63	One rupee.
Application under section 64	One rupee.
Inspection of the Register of Firms under sub-section (1) of section 66.	Eight annas for inspecting one volume of the register.
Inspection of documents related t o a Firm under sub-section (2) of section 66.	Elght annas for the inspection of all documents relating to one firm.
Copies from the Register of Firms	Four annas for each hundred words or part thereof.

SCHEDULE II.

ENACTMENTS REPEALED.

[*Repealed by Act I of* 1938.]

THE PATENTS AND DESIGNS ACT (II OF 1911).

Year.	No.	Short title.	Amendments.
1911	II	The Indian Patents and Designs Act.	Repealed in part XXXI of 1920. Amended, XVII of 1924, S. 2; XXIX of 1920; XI of 1930. *See* VI of 1915; XIII of 1927; VII of 1930; XX of 1937; XII of 1939 and XXXIV of 1939.

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THE SCHEDULE.—FEES.

THE PATENTS AND DESIGNS ACT (II OF 1911).[1]

[1*st March*, 1911.

An Act to amend the law relating to the protection of Inventions and Designs.

WHEREAS it is expedient to amend the law relating to the protection of inventions and designs; It is hereby enacted as follows:—

PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called THE INDIAN PATENTS AND DESIGNS ACT, 1911.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas; and

(3) It shall come into force on the first day of January, 1912.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

[2][(1) "Advocate-General" means an Advocate-General appointed under the Government of India Act, 1935]:

(2) "article" means (as respects designs) any article of manufacture and any substance, artificial or natural or partly artificial and partly natural:

LEG. REF.

[1]For Statement of Objects and Reasons, see *Gazette of India*, 1910, Pt. V, p. 92; for Report of Select Committee, see *ibid.*, 1911, Pt. V, p. 1; and for Proceedings in Council, see *ibid.*, 1910, Pt. VI, p. 337, dated 9th April, 1910, and *ibid.*, 1911, Pt. VI, pp. 31, 45 and 179.

[2]Substituted by A.O., 1937, for original cl. (1)..

NOTES.

Sec. 1.—Scope and object of Act. 41 A. 68 =48 I.C. 450=16 A.L.J. 941. An exclusive privilege in respect of an invention under the Invention and Designs Act, 1888, was under the Patents and Designs Act, 1911, converted into a patent and extended throughout the British India. 54 I.C. 417. As to whether Act applies to Berar, *see* 54 I.C. 417. *See also* 27 M.L.J. 573 (law applicable to suits instituted before this Act). In the case of infringement of patents, the test is to see whether a man grappling with the problem solved by the patent attacked and having no knowledge of it can say that his anticipation has solved the problem. In order to render a document a prior publication, it must publish to the world the whole invention, *i.e.*, all that is material to instruct the public to put the patent in practice. Mere suggestions are not enough. Invention is finding out something which other people have not found out. The *quid* to the patentee is the monopoly; the *qua* is that it presents to the public knowledge which they have not got. The real invention may often be the last element of the combination; an invention may further consist only in simplification. 1929 A.C. 269=116 I.C. 593=1929 P. C. 38 (P.C.). Any information as to the alleged invention given by any prior publication must be for the purpose of practical utility, equal to that given by the subsequent patent. The later invention must be described in the earlier publication that is held to anticipate it, in order to sustain the defences of anticipation. Where the question is solely one of prior publication, it is not enough to prove that an apparatus described in an earlier specification could have been used to produce this or that result. It must also be shown that the specifieations contained clear and unmistakable directions so to use it. It must be shown that the public have been so presented with the invention that it is out of the power for any subsequent persons to claim the invention as his own. 124 I.C. 569=1930 P.C. 1 (P.C.). There must be a substantial exercise of the inventive power or inventive genius though it may in cases be very slight. Slight alterations or improvements may produce important results, and may disclose great ingenuity. Sometimes it is a combination that is the invention, if the invention requires independent thought, ingenuity and skill, producing in a distinctive form a more efficient result converting a comparatively defective apparatus into a useful and efficient one, rejecting what is bad and useless in former attempts and retaining what is useful, and uniting them all into an apparatus which, taken as a whole, is novel, there is subject-matter of invention. A new combination of well-known devices and the application thereof to a new and useful purpose, may require invention to produce it, and may be good subject-matter for a patent. Having regard to the conditions of the art of wireless telegraphy there is sufficient invention for claiming a patent even though the same consists only of a small step if it is a step for ward. 1930 P.C. 1=31 L.W. 126 (P.C.). The question whether a specification of a prior invention describes the invention claimed by the subsequent inventor is a question of construction and parol evidence is only admissible for the purpose of explaining words or symbols of art and other such like technical matters and of informing the Court of relevant surrounding circumstances. The date of the knowledge or use by any other person is a date before the invention not before the patent. 1930 P.C. 1. The statute relating to patents [Patent Act (Canada), 1935] does not contemplate or authorize a contingent disclaimer. As soon as a disclaimer is filed and recorded in the office

(3) "Controller" means the Controller of Patents and Designs appointed under this Act:

(4) "copyright" means the exclusive right to apply a design to any article in any class in which the design is registered:

[1][(5) "design" means only the features of shape, configuration, pattern or ornament applied to any article by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trade-mark as defined in section 478, or property mark as defined in section 479 of the Indian Penal Code]:

(6) "District Court" has the meaning assigned to that expression by the Code of Civil Procedure, 1908:

[[2](7) "High Court" means a High Court as defined in sub-section (1) of section 219 of the Government of India Act, 1935].

(8) "invention" means any manner of new manufacture and includes an improvement and an alleged invention:

LEG. REF.

[1]Substituted by Act VII of 1930.
[2]Substituted by Act XII of 1939.

NOTES.

of the Commissioner it is made part of the patent; the only existing claims are the claims as amended by virtue of the disclaimer and the only invention protected by the Letters Patent is the invention, the description whereof is contained in the specification as so amended. 181 I.C. 958=1939 P.C. 91 (P.C.).

Sec. 2 (3).—*See* 54 I.C. 417.

Sec. 2 (5).—Where a design covers the whole body of goods and is part and parcel thereof, it is not a trade-mark but a 'design' nor is it a 'trade description' within S. 2 (2) of the Merchandise Marks Act, 1889. 25 I.C. 998=15 Cr,L.J. 670. Where there was no difference in shape, configuration, pattern or ornament although there was a different mode and principle of construction. *Held*, that this was not a "new" or "original" design within the meaning of the Act. 190 I.C. 281=1940 Pesh. 38. In determining whether there was novelty in the patent which is alleged to be infringed, if it can be shown that the new result was long sought for, that persons skilled in the art had been working without success to attain it, and had long regarded it as a problem and that the invention of the patentee successfully solved the problem —then such a state of affairs constitutes evidence of the strongest kind that the prior knowledge did not in fact give an obvious clue to the solution and ought not to be considered as destroying "subject-matter". Mere simplicity is not necessarily an objection; a mere scintilla of invention is sufficient, especially where the appreciation of a desideratum is one of the important features of the invention and there may be invention in improvements in what is merely simplification, though matters of ordinary skilled designing or workshop improvements cannot be considered as requiring the exercise of invention. The practical utility and commercial success of the invention may be a material factor in determining whether the new result was obvious or not. The fact that the patent has been infringed is evidence of its utility. Better evidence of the utility of the invention cannot possibly be had. 40 Bom.L.R. 478=1938 Bom. 347.

Sec. 2 (8).—*See* 17 A. 490. A new manufacture means not only a new article of manufacture, but also a new process or method of manufacturing something new. It does not mean a new principle of manufacture—a principle cannot be an invention—but means a new application of the principles so as to produce a new method or a new manufacture. 36 Bom. L.R. 881=1934 B. 407.

"INVENTION" — MEANING.— The question whether there is an invention is a question of fact. A new and useful application of an old principle may be a good subject-matter of patent. An improvement on something known may also afford subject-matter, so also a new combination of different matters already known. A patentable combination is one in which the component elements are so combined as to produce a new result or to arrive at an old result in a better or more expeditious or more economical manner. If the result of the combination is either a new article or a better or a cheaper article than before, the combination may afford subject-matter for a patent. The mere collocation of two or more things, without some exercise of inventive faculty, is not however, a subject-matter for a patent. 1936 B. 99 =37 Bom.L.R. 665.

Sec. 2 (8) and (10) : INVENTION WHICH CAN BE SUBJECT-MATTER OF PATENT.—It is of course true that a patent may be granted for a combination which is one producing a new result, or arriving at an old result in a better or cheaper way or giving a useful choice of means but different considerations are applicable to each of these cases in order to arrive at a conclusion as to whether or not there is good "subject-matter" in any particular combination. The fact that the result is new is of itself no doubt cogent evidence of invention, and if it has been necessary to make modifications in the form o construction of all or any of the separate ol

(9) "legal representative" means a person who in law represents the estate of a deceased person:

(10) "manufacture" includes any art, process or manner of producing, preparing or making an article, and also any article prepared or produced by manufacture:

(11) "patent" means a patent granted under the provisions of this Act:

(12) [1]["patentee" means the person for the time being entered on the register of patents kept under this Act as the grantee or proprietor of the patent]:

(13) "prescribed" includes prescribed by rules under this Act; and

(14) "proprietor of a [2][new or original] design,"—

(*a*) where the author of the design, for good consideration, executes the work for some other person, means the person for whom the design is so executed; and

(*b*) where any person acquires the design or the right to apply the design to any article, either exclusively of any other person or otherwise, means, in the respect and to the extent in and to which the design or right has been so acquired, the person by whom the design or right is so acquired; and

(*c*) in any other case, means the author of the design;

and where the property in, or the right to apply, the design has devolved from the original proprietor upon any other person, includes that other person.

PART I.

PATENTS.

Application for and Grant of Patent.

Application.

3. (1) An application for a patent may be made by any person whether he is a British subject or not, and whether alone or jointly with any other person.

(2) The application must be made in the prescribed form, and must be left at the Patent Office in the prescribed manner.

(3) The application must contain a declaration to the effect that the applicant is in possession of an invention, whereof he, or in the case of a joint application one at least of the applicants, claims to be the true and first inventor or the legal representative or assign of such inventor and for which he desires

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LEG. REF.

[2]Substituted by Act VII of 1930.

[3]Substituted for "new and original" by *ibid*.

NOTES.

integers included in the combination in order to ensure their more perfect interaction, there is a strong presumption that there has been invention. It is immaterial whether the "invention" comes into existence by accident or by design, but on the other hand there must have been some inventive step even though the inventive step is but slight. Otherwise the patent is invalid for want of subject-matter. 43 C.W.N. 697.

Sec. 2 (9).—*See* 8 C.W.N. 843.

Sec. 2 (10).—*See* 43 C.W.N. 697.

Sec. 2 (12).—*See* 41 C W.N. 603.

Sec. 2 (13).—*See* 23 C. 702. "Manufacture," as defined by S. 2 (10) comprehends not only the production of an article but also the means or method of producing it, so that a new process or an improvement of an old process can be a manufacture. The subject-matter of a patent must be a new manufacture or art, for if there is no new manufacture or art, there is no subject-matter and therefore no invention. 37 Bom. L.R. 665.

Sec. 2 (14): 'PROPRIETOR'—MEANING.—The proprietor must be the author or one who has acquired the design from the author or a person on whom such rights have devolved. 56 A. 1032=1934 A.L.J. 664=1934 A. 798.

"ACQUIRE DESIGN"—MEANING.—To acquire a design within the meaning of S. 2 (14) (*b*) of the Act, means the transfer of proprietary rights in a design and not merely learning a design. 56 A. 1032=1934 A.L.J. 664=1934 A. 798.

Sec. 3.—Novelty—Specification—Combination of old materials. 41 A. 68=48 I.C. 450; 1929 P.C. 38; 1922 A. 496.

Sec. 3 (3).—As to who is an assign, *see* 23 C. 702 at pp. 709, 710.

to obtain a patent, and must be accompanied by a specification and by the prescribed fee.

(4) Where the true and first inventor is not a party to the application, the application must contain a statement of his name, and such particulars for his identification as may be prescribed, and the applicant must show that he is the legal representative or assign of such inventor.

Specification.

4. (1) The specification must particularly describe and ascertain the nature of the invention and the manner in which the same is to be performed.

(2) Where the Controller deems it desirable, he may require that suitable drawings shall be supplied with the specification, or at any time before the acceptance of the application, and such drawings shall be deemed to form part of the specification.

(3) The specification must commence with the title, and must end with a distinct statement of the invention claimed.

(4) If in any particular case the Controller considers that an application should be further supplemented by a model or sample of anything illustrating the invention or alleged to constitute an invention, such model or sample as he may require shall be furnished before the acceptance of the application, but such model or sample shall not be deemed to form part of the specification.

Proceedings upon application.

5. (1) The Controller shall [1][refer every application to an Examiner and if satisfied on the report of the Examiner] that—

(*a*) the nature of the invention is not fairly described, or

(*b*) the application, specification and drawings have not been prepared in the prescribed manner [2][* * *], or

(*c*) the title [3][of the specification] does not sufficiently indicate the subject-matter of the invention, or

(*d*) the statement of claim does not sufficiently define the invention, or

(*e*) the invention as described and claimed is *prima facie* not a [3][manner of] new manufacture or improvement,

[1](*f*) the specification relates to more than one invention, or

(*g*) in the case of an application claiming priority under section 78-A, the specification describes and claims an invention substantially larger than or substantially different from the invention disclosed in the specification filed with the application made outside British India by virtue of which priority is claimed, or

(*h*) in the case of an application for a patent of addition under section 15-A, the invention described and claimed in the specification is not an improvement or modification of that described and claimed in the original specification]; he may refuse to accept the application or require that the application, specification or drawings be amended before he proceeds with the application; and in the latter case the application shall, if the Controller so directs, bear date as from the time when the requirement is complied with:

[4][Provided that, when a specification comprises more than one invention, the application shall, if the Controller or the applicant so requires, be restricted

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LEG. REF.

[1] Substituted by Act XII of 1939.
[2] The words "or relate to more than one invention" omitted by Act VII of 1930. S. 3.
[3] Inserted by Act XII of 1939.
[4] Added by Act VII of 1930.

NOTES.

Sec. 4: SPECIFICATION OF PATENT—DUTY OF PATENTEE.—It is incumbent on the patentee to particularly describe and ascertain the nature of his invention in the specification, as the ambit of his invention is circumscribed by the claims, 37 Bom. L.R. 665=1936 B. 99.

to one invention and the other inventions may be made the subject-matter of fresh application; and any such fresh application shall be proceeded with as a substantive application, but the Controller may, in his discretion, direct that any such fresh application made before the acceptance of the original application shall bear the date of the original application or such later date as he may fix, and the fresh application shall be deemed, for the purposes of this Act, to have been made on the date which it bears in accordance with such direction.]

[1][(1-A. If the Controller considers, at any time before the acceptance of an application, that the invention claimed therein has been wholly or in part claimed in a specification published on or after the date which the patent applied for would bear if granted, appertaining to an application for a patent which if granted will be of prior date to the patent applied for, he may require that the applicant's specification be amended by the insertion of a reference to such other specification, by way of notice to the public.]

(2) Where the Controller refuses to accept an application or requires an amendment, [1][or the insertion of a reference] the applicant may appeal from his decision to the Central Government.

(3) The investigations required by this section shall not be held in any way to guarantee the validity of any patent, and no liability shall be incurred by the Central Government or any officer by reason of, or in connection with, any such investigation, or any proceeding consequent thereon.

(4) Unless an application is accepted within twelve months from the date of the application, the application shall (except where an appeal has been lodged [2][be deemed to have been refused].

[3][Provided that where, before, or within three months after, the expiration of the said period of twelve months, a request is made to the Controller for an extension of time [4][* * *] the application shall, on payment of the prescribed fee, be continued [1][for any period so requested not exceeding in all three months from the expiration of the said period of twelve months].

Advertisement on acceptance of application.

6. On the acceptance of an application the Controller shall give notice thereof to the applicant and shall advertise the acceptance; and the application and specification, with the drawings (if any), shall be open to public inspection.

Use of invention on acceptance of application.

7. Where an application for a patent in respect of an invention has been accepted any use or publication of the invention during the period between the date of application and the date of sealing such patent shall not prejudice the patent to be granted for the invention:

Provided that an applicant shall not be entitled to institute any proceedings for infringement unless and until a patent for the invention has been granted to him.

8. [*Omitted by Act VII of* 1930.]

9. (1) Any person may, on payment of the prescribed fee, at any time

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LEG. REF.

[1]Inserted by Act XII of 1939.
[2]Substituted by *ibid*.
[3]Snbstituted by Act VII of 1930.
[4]Omitted by Act XII of 1939.

NOTES.

Sec. 9 : "APPLICATION"—UNDERTAKING NOT TO PROCEED WITH THE MATTER TILL DECISION OF APPLICATION—IF CONTINUES TILL DECISION ON APPEAL.—An "application" under S. 9 also includes an appeal from an order thereon; where the Controller of Patents gives an undertaking not to proceed with the matter till "the decision of this application", the under-

Opposition to grant of patent.

within [1][four] months from the date of the advertisement of the acceptance of an application, give notice at the Patent Office of opposition to the grant of the patent on any of the following grounds, namely:—

(*a*) that the applicant obtained the invention from him, or from a person of whom he is the legal representative or assign; or

(*b*) that the invention has been claimed in any specification filed in British India which is or will be of prior date to the patent, the grant of which is opposed; or

(*c*) that the nature of the invention or the manner in which it is to be performed is not sufficiently or fairly described and ascertained in the specification; or

(*d*) that the invention has been publicly used in any part of British India or has been publicly known in any part of British India;

but on no other ground.

(2) Where such notice is given, the Controller shall give notice of the opposition to the applicant, and shall, on the expiration of those [2][four] months after hearing the applicant and the opponent, if desirous of being heard, decide on the case.

(3) The decision of the Controller shall be subject to appeal to the Central Government.

Grant and sealing of patent.

10. (1) If there is no opposition, or, in case of opposition, if the determination is in favour of the grant of a patent, a patent shall, on payment of the prescribed fee, be granted subject to such conditions (if any) as the Central Government thinks expedient to the applicant, or in the case of a joint application to the applicants jointly, and the Controller shall cause the patent to be sealed with the seal of the Patent Office.

[3][(1-A) Notwithstanding anything contained in sub-section (1), where—

(*a*) an applicant has agreed in writing that on the grant to him of a patent he will assign it to another party or to a joint applicant and refuses to proceed with the application, or

(*b*) disputes arise between joint applicants as to proceeding with an application,

the Controller, if he is satisfied of the existence of such agreement or, in any other case, that any joint applicant or applicants ought to be allowed to proceed alone, may direct that such other party or joint applicant or applicants

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LEG. REF.

[1]Substituted for "three" by Act VII of 1930, S. S.

[2]Substituted for "three" by Act XX of 1937, S. 2 and Sch. I

[3]Inserted by Act VII of 1930, S. 6.

NOTES.

taking does not come to an end with the decision of the original Court. "The decision of this application must be construed to mean the final decision, *i.e.*, decision of the appellate Court; the undertaking will remain in force until then, or until the time for filing the appeal runs out," 62 C. 596=39 C.W.N. 573.

CONTROLLER OF PATENTS—DISCRETION TO GRANT OR REFUSE THE ISSUE OF SUBPOENAS.—The Controller of Patents must under S. 9 of the Act issue subpoenas on witnesses, if asked for by either of the parties; the words "after hearing the applicant and the opponent" in S. 9 cannot be read as meaning that the Controller need only hear the applicant and the opponent and can refuse to hear any evidence which either or both wish to adduce. "Hearing" means 'hearing the party and his evidence". 62 C. 596=39 C.W.N. 573.

Sec. 9 (3). APPEAL UNDER—GOVERNER-GENERAL'S POWER TO REMAND.—The Governor General has, in an appeal against an order of the Controller, power to remand the case to the Controller. The power of remand is not specifically given under the Patents and Designs Act. But all the Courts of appeal have inherent powers of remand, and the Governor-General in Council, as a Court of appeal, has such power. 62 C. 596=39 C.W.N. 573.

Sec. 10.—*See* 36 Bom.L.R. 881=1934 B. 407, cited under S. 2 (8), *supra*.

may proceed with the application accordingly and may grant a patent to him or them, as the case may be:

Provided that—

(*i*) the Controller shall not give any such direction until every party interested has had an opportunity of being heard by him, and

(*ii*) an appeal from any such direction shall lie to the Central Government.

(2) A patent shall be sealed as soon as may be, and not after the expiration of eighteen months from the date of application:

Provided that,—

(*a*) Where the Controller has allowed an extension of the time within which an application may be accepted, a further extension of four months after the said eighteen months shall be allowed for the sealing of the patent;

(*b*) where the sealing is delaying by an appeal to the Central Government [1][* * *] or by opposition to the grant of the patent [2][or by any proceedings taken for obtaining a direction of the controller under the provisions of sub-section (1-A)] the patent may be sealed at such time as the controller may direct;

(*c*) where the patent is granted to the legal representative of an applicant who has died before the expiration of the time which would otherwise be allowed for sealing the patent, the patent may be sealed at any time within twelve months after the date of his death;

(*d*) where [1][for any reason] a patent cannot be sealed within the period allowed by [1][any of the foregoing provisions of], this section, that period may, on payment of the prescribed fee and on compliance with the prescribed conditions, be extended [1][to the extent applied for but not exceeding three months].

Date of patent.

11. Except as otherwise expressly provided by this Act, a patent shall be dated and sealed as of the date of the application:

Provided that no proceedings shall be taken in respect of an infringement committed before the [3][advertisement of the acceptance of the application.]

Effect, extent and form of patent.

12. (1) A patent sealed with the seal of the Patent Office shall, subject to the other provisions of this Act, confer on the patentee the exclusive privilege of making, selling and using the invention throughout British India and of authorizing others so to do.

(2) Every patent may be in the prescribed form and shall be granted for one invention only, but the specification may contain more than one claim; and it shall not be competent for any person in a suit or other proceeding to take any objection to a patent on the ground that it has been granted for more than one invention.

Fraudulent applications for patents.

13. (1) A patent granted to the true and first inventor or his legal representative or assign shall not be invalidated by an application in fraud of him, or by protection obtained thereon or by any use or publication of the invention subsequent to that fraudulent application during the period of protection.

LEG. REF.

[1] In sub-section (2), cl. (*b*) of the proviso, the words "or by a reference under S. 8," have been omitted; and in cl. (*d*) for the words "in consequence of the neglect or failure of the applicant to pay any fee" the words "for any reason" have been substituted; after the words "allowed by" the words "any of the foregoing provisions of" have been inserted and for the words "to such an extent as may be prescribed" the words "to the extent applied for but not exceeding three months" have been substituted by Act VII of 1930.

[2] Inserted by Act XII of 1939.

[3] In S. 11 for the words "publication of the specification" the words "advertisement of the acceptance of application" have been substituted by Act VII of 1930.

[1][(2) Where a patent has been revoked by the High Court on the ground that it has been obtained in fraud of the true and first inventor, or where the grant of a patent has been refused by the Controller under section 9 on the ground stated in clause (*a*) of sub-section (1) of that section, the Controller may, on the application of the true inventor or his legal representative or assign made in accordance with the provisions of this Act, grant to him a patent for the whole or any part of the invention, and the patent so granted shall bear the same date as the patent so revoked or, in the case of a patent the grant of which has been refused, the same date as would have been borne by the patent if it had been granted:

Provided that no suit shall be brought for any infringement of the patent so granted committed before the actual date when such patent was granted.]

Term of patent.

14. (1) The term limited in every patent for the duration thereof shall, save as otherwise expressly provided by this Act, be [2][sixteen] years from its date,

Term of Patent.

[2][(1-A) Any patent the original term of which had not expired on or before the 1st day of July, 1930, shall have effect as if the term mentioned therein was sixteen years instead of fourteen years, and any licence existing at that date which has been granted for the term of the patent shall be treated as having been granted for the term as so extended if the licensee so desires.

(1-B) Where any party to a contract with the patentee or any other person entered into before the 1st day of January, 1930, is subjected to loss or liability by reason of the extension of the term of any patent under this section, any District Court having jurisdiction [3][may on application made in this behalf, determine] in what manner and by which parties such loss or liability shall be borne.]

(2) A patent, shall, notwithstanding anything therein or in this Act, cease if the patentee fails to pay the prescribed fees within the prescribed times:

[2][Provided that where the patentee, before or within three months after the expiration of the time for payment, applies to the Controller for an extension of time [4][* * *], the patent shall, on payment of such additional fee as may be prescribed, be continued or revived as the case may be [3][for any period so applied for not exceeding in all three months from the expiration of the time for payment].]

(3) If any proceeding is taken in respect of an infringement of the patent committed after a failure to pay any fee within the prescribed time, and before any enlargement thereof, the Court before which the proceeding is taken may, if it thinks fit, refuse to award any damages in respect of such infringement.

15. (1) A patentee may, [5][* * * *], present a petition to the Central Government praying that his patent may be extended for a further term; but such petition must be left at the Patent Office at least six months before the time limited for the expiration of the patent and must be accompanied by the prescribed fee, [5][and must be advertised by the patentee within the prescribed time and in the prescribed manner].

Extension term of Patent.

(2) Any person may [6][within such time as may be prescribed and on

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LEG. REF.

[1]Sub-s. (2) newly substituted for old sub-s. (2) by Act VII of 1930.

[2]In sub-s. (1) for the word "fourteen" the word "sixteen" has been substituted; after the same sub-section the new sub-s. (1-A) and (1-B) have been inserted; in sub-s. (2) the new proviso has been substituted for old proviso by Act VII of 1930.

[3]Substituted by Act XII of 1939.

[4]The words 'by any period not exceeding three months' Omitted by Act XII of 1939.

[5]In sub-s. (1), the words "after advertising in the prescribed manner his intention to do so" have been omitted; and after the words "prescribed fee" the words within brackets have been added.

[6]In sub-s. (2), after the word "may" the words "within brackets have been inserted.

payment of the prescribed fee], give notice to the Controller of objection to the extension.

(3) Where a petition is presented under sub-section (1), the Central Government may, as [1][it] thinks fit, dispose of the petition [1][itself] or refer it to a High Court for decision.

(4) If the petition be referred to a High Court, then on the hearing of such petition under this section, the patentee, and any person who has given notice under sub-section (2) of objections, shall be made parties to the proceeding, and the Controller shall be entitled to appear and be heard.

[2][(5) The Central Government or the High Court to which a petition is referred shall in considering the petition have regard to the nature and merits of the invention in relation to the public, to the profits made on the patent and to all the circumstances of the case.

(6) If it appears to the Central Government or to the High Court when the petition is referred to it, that the patent has not been sufficiently remunerative, the Central Government or the High Court, as the case may be, may by order extend the term of the patent for a further term not exceeding five or in exceptional cases ten years or may order the grant of a new patent for such term not exceeding ten years as may be specified in the order and subject to any restriction, conditions and provisions which the Central Government or the High Court, as the case may be, may think fit].

Provided that any patent so extended or granted shall, notwithstanding anything therein, or in this Act, cease if the inventor fails to pay before the expiration of each year the prescribed fee.

[3][15-A. (1) Where a patent for an invention has been applied for or granted, and the applicant or the patentee, as the case may be, applies for a further patent in respect of any improvement in or modification of the invention, he may in his application for the further patent request that the term limited in that patent for the duration thereof be the same as that of the original patent or so much of that term as is unexpired, and, if he does so, a patent (hereinafter referred to as a patent of addition), may be granted for such terms as aforesaid.

Patents of addition.

(2) Save as otherwise expressly provided by this Act, a patent of addition shall remain in force as long as the patent for the original invention remains in force, but no longer, and in respect of a patent of addition no fees shall be payable for renewal:

LEG. REF.

[1]Substituted by A.O., 1937.

[2]S. 15, sub-ss. (5) and (6) substituted by Act XII of 1939.

[3]After S. 15 the new S. 15-A has been inserted by Act VII of 1930.

NOTES.

Sec. 15 (4): REFERENCE UNDER—FRESH PETITION TO COURT—NECESSITY.—Under S. 15 of the Act, when a petition is referred for decision to the High Court under sub-s. (4), it is the petition originally submitted to the Governor-General in Council which the High Court should dispose of. The applicant need not file a second or fresh petition in the High Court. Such a procedure is misconceived. 37 Bom.L.R. 187.

SCOPE—PROCEEDINGS UNDER—NATURE OF—PROCEDURE.—On a reference to the High Court by the Governor-General in Council, the matter ceases to be merely administrative and becomes a judicial proceeding, the parties to it being the patentee on the one hand and the objectors on the other; the Controller of Patents has also the right of audience. In such a proceeding, in the absence of any separate or special procedure, the ordinary rules of procedure followed by the High Court, devoid of its technicalities, should be adopted so far as they are applicable to the particular case. The High Court has jurisdiction to allow the objectors to file fresh objections adding further grounds of obiection, if that can be done under the law relating to the amendment of pleadings; and leave to amend the amendments ought to be given when the petitioner is not taken by surprise. 37 Bom.L.R. 187=1935 B. 195.

Provided that if the patent for the original invention is revoked, then the patent of addition shall, if the authority by which it is revoked so orders, become an independent patent, and the fees payable, and the dates when they become payable, shall be determined by its date, but its duration shall not exceed the unexpired term of the patent for the original invention.

(3) The grant of a patent of addition shall be conclusive evidence that the invention is a proper subject for a patent of addition, and the validity of the patent shall not be questioned on the ground that the invention ought to have been the subject of an independent patent.]

Restoration of lapsed patent.

16. (1) Where any patent has ceased owing to the failure of the patentee to pay any prescribed fee within the prescribed time, the patentee may apply to the Controller in the prescribed manner for an order for the restoration of the patent.

(2) Every such application shall contain a statement of the circumstances which have led to the omission of the payment of the prescribed fee.

(3) If it appears from such statement that the omission was unintentional or unavoidable and that no undue delay has occurred in the making of the application, the Controller shall advertise the application in the prescribed manner, and within such time as may be prescribed any person may give notice of opposition at the Patent Office.

(4) Where such notice is given the Controller shall notify the applicant thereof.

(5) After the expiration of the prescribed period, the Controller shall hear the case and, subject to an appeal to the Central Government, issue an order either restoring the patent subject to any conditions [1][and restrictions] deemed to be advisable or dismissing the application:

Provided that in every order under this section restoring a patent such provisions as may be prescribed shall be inserted for the protection of persons who may have availed themselves of the subject-matter of the patent after the patent had ceased.

Amendment of Application or Specification.

Amendment of application or specification by Controller.

17. (1) An applicant or a patentee may at any time, by request in writing left at the Patent Office and accompanied by the prescribed fee, seek leave to amend his application or specification, including drawings forming part thereof by way of disclaimer, correction or explanation, stating the nature of, and the reasons for, the proposed amendment.

(2) If the application for a patent has not been accepted, the Controller shall determine whether and subject to what conditions (if any) the amendment shall be allowed.

(3) In any other case the request and the nature of the proposed amendment shall be advertised in the prescribed manner, and at any time within three months from its first advertisement any person may give notice at the Patent Office of opposition to the amendment.

LEG. REF.

[1]The words "and restrictions" were inserted by Act XVII of 1914, Sch. 1.

NOTES.

Sec 15 (5): ENQUIRY UNDER—SCOPE OF.—In considering an application for extension of a patent, it would be legitimate for the Court to inquire what profits the inventor had made since its registration, and that inquiry may not be limited to what the inventor earned in his country, but might include profits made by him in all countries where the invention was registered or exploited. The Court in such case insists on a full disclosure of the profits made by the inventor or his assignees, and if the Court believes that there has not been a full or *bona fide* disclosure, it may summarily reject the application. 37 Bom.L.R. 187=1935 B. 195.

(4) Where such a notice is given, the Controller shall give notice of the opposition to the person making the request and shall hear and decide the case.

(5) Where no notice or opposition is given, or the person so giving notice of opposition does not appear, the Controller shall determine whether and subject to what conditions, if any, the amendment ought to be allowed.

(6) The decision of the Controller in either case shall be subject to an appeal to the Central Government.

(7) No amendment shall be allowed that would make the application or specification, as amended, claim an invention substantially larger than, or substantially different from, the invention claimed by the application or specification as it stood before amendment.

(8) Leave to amend shall be conclusive as to the right of the party to make the amendment allowed, except in case of fraud; and the amendment shall be advertised in the prescribed manner, and shall in all Courts and for all purposes be deemed to form part of the application or specification.

(9) This section shall not apply when and so long as any suit for infringement or proceeding before a Court for the revocation of the patent is pending.

Amendment of specification by the Court.

18. In any suit for infringement of a patent or proceeding before a Court for the revocation of a patent, the Court may by order allow the patentee to amend his specification by way of disclaimer, [1][correction or explanation] in such manner, and subject to such terms as to costs, advertisement or otherwise, as the Court may think fit:

LEG. REF.

[1]In S. 18 after the word "disclaimer" the words "correction or explanation" have been inserted by Act VII of 1930, S. 12.

NOTES.

Sec. 17 (1) and 6: APPLICATION TO CONTROLLER FOR AMENDMENT OF SPECIFICATION.—In application under S. 17 of the Act, for amendment of specification made to the Controller of Patents, the latter has absolute powers to decide whether the amendment sought would make the specification claim an invention larger than, and substantially different from, that claimed in the original specification. This power of the Controller is, under S. 17 (6), subject to an appeal to the Governor-General in Council. In such a case it is quite impossible for the Court to investigate the matter, and then by anticipation to prohibit the Controller from proceeding, on the assumption that his decision, when given, will be erroneous. To do so would be an usurpation on the part of the Court of the jurisdiction which the law has given to the Controller. 61 C. 450=38 C.W.N. 729=1934 C. 725.

Sec. 17 (1) and (7).—An applicant for amendment of his specification has upon him the burden of showing that his amendment falls with in one or other of the three categories of disclaimer; correction or explanation and that he is not claiming an invention which is substantially larger than, or different from, that originally claimed. The onus is not discharged unless his amendment is unambiguous and he establishes with sufficient certaintly either that this claim is merely one of those already covered by some one or more of the old claims upon which he relies or that it does not comprise an invention substantially larger than or substantially different from that covered by the unamended specification. 1932 A.C. 709=139 I. C. 657=1932 P.C. 266 (P.C.).

Sec. 17 (9): SUIT, WHEN PENDING—APPEAL, IF 'SUIT.'—After judgment was pronounced by the Court in a suit for infringement of patent, an application was presented under S. 17 of the Act, to the Controller of Patents for leave to amend the specification of the amendment. The application was duly advertised under S. 17 (3) of the Act. Subsequently an appeal was filed against the decree in the suit. Objection was raised to the maintainability of the application on the ground that S. 17 (9) of the Act deprived the Controller of all jurisdiction in the matter, as the action for infringement was still to be regarded as pending. *Held*, that the suit for purposes of S. 17 (9) terminated the moment the Court pronounced its judicial decision and could not be regarded as pending when the application was presented to the Controller of Patents; that "suit" did not include an appeal from the decree in a suit for infringement, under S. 17 (9), that an action for infringement meant action before judgment; and that the filing of an appeal did not deprive the Controller of jurisdiction to deal with an application already presented to him under S. 17 (1). 61 C. 450=38 C.W.N. 729=1934 C. 725.

Sec. 18—Application to Court for amendment of specification under S. 18—Withdrawal without leave—Fresh application to Controller of Patents, if barred. *See* 61 C. 450=38 C.W.N. 729=1934 C. 725.

Provided that no amendment shall be so allowed that would make the specification, as amended, claim an invention substantially larger than, or substantially different from, the invention claimed by the specification as it stood before the amendment, and where an application for such an order is made to the Court, notice of the application shall be given to the Controller, and the Controller shall have the right to appear and be heard.

Restriction on recovery of damages.

19. Where an amendment of a specification by way of disclaimer, correction or explanation has been allowed under this Act, no damages shall be given in any suit in respect of the use of the invention [1][before the date of the decision allowing the amendment] unless the patentee establishes to the satisfaction of the Court that his original claim was framed in good faith and with reasonable skill and knowledge.

Register of Patents.

Register of Patents.

20. (1) There shall be kept at the Patent Office a book called the Register of Patents, wherein shall be entered the names and addresses of grantees of patents, notifications of assignments and of transmissions of patents, of licences under patents, and of amendments, extensions and revocations of patents, and such other matters affecting the validity or proprietorship of patents as may be prescribed.

(2) The register of inventions and address-book existing at the commencement of this Act shall be incorporated with, and form part of, the register of patents under this Act.

(3) The register of patents shall be *prima facie* evidence of any matters by this Act directed or authorised to be inserted therein.

(4) Copies of deeds, licences and any other documents affecting the proprietorship in any patent or in any licence thereunder, must be supplied to the Controller in the prescribed manner for filing in the Patent Office [2][* * *].

Crown.

Patent to bind Crown.

21. [3][(1) Subject to the other provisions of this section, a patent shall have to all intents the like effect as against His Majesty the King as it has against a subject.

(2) The officers or authorities administering any department of the service of His Majesty may, by themselves or by such of their agents, contractors or others as may be authorized in writing by them, at any time after the application, and after giving notice to the applicant or patentee, make, use or exercise the invention for the service of the Crown on such terms as may, either before or after the use thereof, be agreed on, with the approval of the Central Government, between such officers or authorities and the applicant or patentee, or, in default of agreement, as may be settled in the manner hereinafter provided. And the terms of any agreement or licence concluded between the applicant or patentee and any person other than such officers or authorities, shall be inoperative so far as concerns the making, use or exercise of the invention for the service of the Crown.

(3) Where an invention which is the subject of any patent has, before the date of the patent, been duly recorded in a document by, or tried by or on

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LEG. REF.

[1]In S. 19 for the words "before the disclaimer, correction or explanation" the words "before the date of the decision allowing the amendment" have been substituted by S. 13 of Act VII of 1930.

[2]In sub-s. (4) of S. 20 the words "and unless such copies have been so supplied, such deeds, licences or other documents shall not be received as evidence of any transaction affecting a patent" have been omitted by Act VII of 1930, S. 14.

[3]New Ss. 21 and 21-A have been substituted for old S. 21 by Act VII of 1930, S. 15.

NOTES.

S. 20. [*See also* notes under S. 29, *infra*.] Register of Patents is a public document. 4 A.L.J. 11.

behalf of, the officers or authorities administering any department of the service of His Majesty (such invention not having been communicated directly or indirectly by the applicant or patentee), such officers or authorities, or such of their agents, contractors, or others as may be authorized in writing by them, may, after giving notice to the applicant or patentee, make, use or exercise the invention so recorded or tried for the service of the Crown, free of any royalty or other payment to the applicant or patentee, notwithstanding the existence of the patent. If, in the opinion of such officers or authorities, the disclosure to the applicant or patentee, as the case may be, of the document recording the invention, or the evidence of the trial thereof, if required, would be detrimental to the public interest, it may be made confidentially to counsel on behalf of the applicant or patentee, or to any independent expert mutually agreed upon.

(4) In the event of any dispute as to the making, use or exercise of an invention under this section, or the terms therefor, or as to the existence or scope of any record or trial as aforesaid, the matter shall be referred to the High Court for decision, who shall have power to refer the whole matter or any question or issue of fact arising thereon to be tried before a special or official referee or an arbitrator upon such terms as it may direct. The Court, referee or arbitrator, as the case may be, may, with the consent of the parties, take into consideration the validity of the patent for the purposes only of the reference and for the determination of the issues between the applicant or patentee and such officers or authorities. The Court, referee or arbitrator, further, in settling the terms as aforesaid, shall be entitled to take into consideration any benefit or compensation which the applicant or patentee, or any other person interested in the patent, may have received directly or indirectly from the Crown or from such officers or authorities in respect of such patent:

Provided that, if the inventor or patentee is a Government servant and the subject-matter of the invention is certified by the Central Government or Provincial Government to be connected with work done in the course of such service, any such dispute shall be settled by the Central Government after hearing the applicant or patentee and any other person having an interest in the invention or patent.

(5) The right to use an invention for the services of the Crown under the provisions of this section, or any provisions for which this section is substituted, shall include, and shall be deemed always to have included, the power to sell any articles made in pursuance of such right which are no longer required for the services of the Crown.

(6) Nothing in this section shall affect the right of the Crown or of any person deriving title directly or indirectly from the Crown to sell or use any articles forfeited under any law for the time being in force relating to customs or excise.

Assignment of patent to the [1][Central Government.]

21-A. (1) The inventor of any improvement in instruments or munitions of war may (either for or without valuable consideration) assign to the [1][Central Government] on behalf of His Majesty all the benefit of the invention and of any patent obtained or to be obtained for the invention; and the [1][Central Government] may be a party to the assignment.

(2) The assignment shall effectually vest the benefit of the invention and patent in the [1][Central Government] on behalf of His Majesty, and all covenants and agreements therein contained for keeping the invention secret and otherwise shall be valid and effectual (notwithstanding any want of valuable

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REF. REF.

[1]Substituted for the words 'Secretary of State for India in Council' by A.O., 1937.

consideration), and may be enforced accordingly by or on behalf of the [1][Central Government].

(3) Where any such assignment has been made, the Central Government may, at any time before the publication of the specification, certify to the Controller that, in the interest of the public service, the particulars of the invention and of the manner in which it is to be performed should be kept secret.

(4) If the Central Government so certify, the application and specifications, with the drawings (if any) and any amendment of the specification and any copies of such documents and drawings, shall, instead of being left in the ordinary manner at the Patent Office, be delivered to the Controller in a packet sealed by authority of the Central Government.

(5) The packet shall, until the expiration of the term during which a patent for the invention may be in force, be kept sealed by the Controller, and shall not be opened save under the authority of an order of the Central Government.

(6) The sealed packet shall be delivered at any time during the continuance of the patent to any person authorized by the Central Government to receive it, and shall, if returned to the Controller, be again kept sealed by him.

(7) On the expiration of the term of the patent, the sealed packet shall be delivered to the Central Government.

(8) Where the Central Government certifies as aforesaid after an application for a patent has been left at the Patent Office but before the publication of the specification, the application and specifications, with the drawings (if any), shall be forthwith placed in a packet sealed by authority of the Controller, and the packet shall be subject to the foregoing provisions respecting a packet sealed by authority of the Central Government.

(9) No proceeding by petition or otherwise shall lie for revocation of a patent granted for an invention in relation to which a certificate has been given by the Central Government as aforesaid.

(10) No copy of any specification or other document or drawing, by this section required to be placed in a sealed packet, shall in any manner whatever be published or open to the inspection of the public, but, save as otherwise provided in this section, the provisions of this Act shall apply in respect of any such invention and patent as aforesaid.

(11) The Central Government may at any time waive the benefit of this section with respect to any particular invention, and the specifications, documents and drawings shall be thenceforth kept and dealt with in the ordinary way.

(12) The communication of any invention for any improvement in instruments or munitions of war to [2][* * *] the Central Government or to any person or persons authorized by [2][* * *] the Central Government to investigate the same or the merits thereof, shall not, nor shall anything done for the purposes of the investigation, be deemed use or publication of such invention so as to prejudice the grant or validity of any patent for the same.]

Compulsory Licences and Revocation.

Compulsory licences and revocation.

22. (1) Any person interested may present a petition to the Central Government, which shall be left at the Patent Office, together with the prescribed fee, alleging that [3][the demand for a patented article in British India is not being met to an adequate extent and on reasonable terms], and praying for the grant of a compulsory licence, or, in the alternative, for the revocation of the patent.

LEG. REF.

[1] Substituted for the words "Secretary of State for India in Council" by A.O., 1937.

[2] The words "the Secretary of State for India in Council or" omitted by Act XXXIV of 1939.

[3] In sub-s. (1) for the words "the reasonable requirements of the public with respect to a patented invention have not been satisfied" the words "the demand for a patented article in British India is not being met to an adequate extent and on reasonable terms" have been substituted by Act VII of 1930, S. 16.

(2) The Central Government shall consider the petition, and if the parties do not come to an arrangement between themselves, the Central Government may, as [1][it] thinks fit, either dispose of the petition [1][itself] or refer it to a High Court for decision.

(3) The provisions of sub-section (4) of section 15, prescribing the procedure to be followed in the case of references to the Court under that section, shall apply in the case of references made to the Court under this section.

(4) If the Central Government is of opinion or where a reference has been made under sub-section (2) to a High Court, that Court finds that [2][the demand for the patented article in British India is not being met to an adequate extent and on reasonable terms] the patentee may be ordered to grant licences on such terms as the Central Government or the High Court, as the case may be, may think just, or, if the Central Government or the High Court is of opinion that [2][the demand will not be adequately met] by the grant of licences, the patent may be revoked by order of the Central Government or the High Court:

Provided that an order of revocation shall not be made before the expiration of four years from the date of the patent, or if the patentee gives satisfactory reasons for his default.

(5) For the purposes of this section [3][the demand for a patented article shall not be deemed to have been met to an adequate extend and on reasonable terms]—

(*a*) If by reason of the default of the patentee to manufacture to an adequate extent and supply on reasonable terms the patented article or any parts thereof which are necessary for its efficient working, or to carry on the patened process to an adequate extent or to grant licences on reasonable terms, any existing trade or industry or the establishment of any new trade or industry in British India is unfairly prejudiced, [4][* * *]; or

(*b*) If any trade or industry in British India is unfairly prejudiced by the conditions attached by the patentee [5][* * *] to the purchase, hire or use of the patented article or to the using or working of the patented process.

(6) [*Omitted by Act VII of* 1930.]

Revocation of patents worked outside British India.

23. (1) At any time not less than four years after the date of a patent granted under this Act, any person may apply to the Central Government [6][for relief under this section] on the ground that the patented article or process is manufactured or carried on exclusively or mainly outside British India.

(2) The Central Government shall consider the application, and, if after inquiry, [1][it] is satisfied—

(*a*) that the allegations contained therein are correct; and

(*b*) that the applicant is prepared, and is in a position, to manufacture, or carry on the patented article or process in British India; and

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LEG. REF.

[1]Substituted by A.O., 1937.

[2]In sub-s. (4) for the words "the reasonable requirements of the public with reference to the patented invention have not been satisfied" the new words within brackets have been substituted; and for the words "the reasonable requirements of the public will not be satisfied" the words "the demand will not be adequately met" have been substituted by Act VII of 1930.

[3]In sub-s. (5) for the words "the reasonable requirements of the public shall not be deemed to have been satisfied" the words "the demand for a patented article shall not be deemed to have been met to an adequate extent and on reasonable terms" have been substituted by Act VII of 1930.

[4]In cl. (*a*) the words "or the demand for the patented article or the article produced by the patented process is not reasonably met" have been omitted by Act VII of 1930.

[5]In cl. (*b*) the words "before or after the commencement of this Act" have been omitted by Act VII of 1930.

[6]In sub-s. (1), S. 23, for the words "for the revocation of the patent" the words "for relief under this section" shall be substituted by Act VII of 1930.

(*c*) that the patentee refuses to grant a licence on reasonable terms, then, subject to the provisions of this section, and unless the patentee proves that the patented article or process is manufactured or carried on to an adequate extent in British India, or gives satisfactory reasons why the article or process is not so manufactured or carried on, the Central Government may make an order

[1][(*a*)] revoking the patent either—

(i) forthwith; or

(ii) after such reasonable interval as may be specified in the order, unless in the meantime it is shown to [2][its] satisfaction that the patented article or process is manufactured or carried on within British India to an adequate extent;

[1][or

(*b*) ordering the patentee to grant a licence to the applicant which may be a licence exclusive to him or otherwise as the Central Government may direct.]

(3) No order revoking a patent shall be made under the last sub-section which is at variance with any treaty, convention, arrangement or engagement with any foreign country or British possession.

(4) The Central Government may, on the application of the patentee, extend the time limited in any order made under sub-section (2), clause (ii), for such period not exceeding two years as [2][it] may specify in a subsequent order or revoke any order made under sub-section (2), clause (*ii*), or any subsequent order if sufficient cause is in his opinion shown by the patentee.

[3][23-A. An order of the High Court under section 22 or of the Central Government] under section 22 or section 23, directing the grant of any licence shall, without prejudice to any other method of enforcement, operate as if it were embodied in a deed granting a licence and executed by the patentee and all other necessary parties.]

Operation of order under section 22 or section 23.

24. A patentee may at any time, by giving notice in the prescribed manner to the Controller, offer to surrender his patent, and the Controller may, if after giving notice of the offer and hearing all parties who desire to be heard he thinks fit, accept the offer, and thereupon make an order for the revocation of the patent.

Power of Controller to revoke surrendered patent.

25. A patent shall be deemed to be revoked if the Central Government declares, by notification in the Official Gazette the patent or the mode in which it is exercised to be mischievous to the State or generally prejudical to the public.

Revocation of patent on public grounds.

Legal Proceedings.

26. [4][(1) Revocation of a patent in whole or in part may be obtained on petition to or on counter claim in a suit for infringement before a High Court on all or any of the following grounds, namely:—

Petition for revocation of patent.

LEG. REF.

[1]In sub-s. (2) after the words "may make an order" the letter and brackets "(*a*)" shall be inserted, and after cl. (*ii*) the new clause (*b*) has been added by Act VII of 1930.

[2]Substituted by A.O., 1937.

[3]Newly added by Act VII of 1930.

[4]Sec. 26, sub-sec. (1) substituted by Act XII of 1939.

NOTES.

Sec. 26.—"Utility, novelty and invention"—Meaning of. *See* 53 C. 306=1926 C. 152. *See also* 40 Bom.L.R. 478=1938 Bom. 347; 1940 Pesh. 38. It is quite competent to a petitioner in revocation proceedings to contend under the provisions of S. 26 (1) (*b*) that an invention claimed by the patentees is neither a novelty nor a patentable invention and thus, in effect, to raise the whole question as one of subject-matter. 43 C.W.N. 697. A *bona fide* and substantial, allegation of any of the grounds specified in S. 26 (2) (*b*) would be sufficient to give a petitioner an initial *locus standi* to present a petition for revocation of a patent even in the absence of the authority of the Advocate-General. A person qualified under S. 26 (2) (*b*) is not, however,

(*a*) that the invention has been the subject of a valid prior grant of a patent in British India;

(*b*) that the true and first inventor or his legal representative or assign was not the applicant, or one of the applicants for the patent;

(*c*) that the patent was obtained in fraud of the rights of the person applying for the revocation or of any person under or through whom he claims;

(*d*) that the invention was not, at the date of the patent, a manner of new manufacture or improvement;

(*e*) that the invention does not involve any inventive step, having regard to what was known or used prior to the date of the patent;

(*f*) that the invention is of no utility;

(*g*) that the specification does not sufficiently and fairly describe and ascertain the nature of the invention and the manner in which the invention is to be performed;

(*h*) that the specification does not sufficiently and clearly ascertain the scope of the invention claimed;

(*i*) that the patent was obtained on a false suggestion or representation;

(*j*) that the primary or intended use or exercise of the invention is contrary to law;

(*k*) that the patentee has contravened, or has not complied with, the conditions contained in the patent;

(*l*) that the specification does not disclose the best method of performance of the invention known to the applicant for the patent at the time when the specification was left at the Patent Office;

(*m*) that prior to the date of the patent, the patentee or other persons (not being authorities administering any department of the service of His Majesty, or the agents or contractors of, or any other persons authorised in that behalf by, the Central Government) secretly worked the invention on a commercial scale (and not merely by way of reasonable trial or experiment) in British India, and thereby made direct or indirect profits in excess of such amount as the Court may in consideration of all the circumstances of the case deem reasonable:

Provided that this sub-section shall have effect in relation to the ground of revocation specified—

(*i*) in clause (*b*), subject to the provisions of section 78-A, or

(*ii*) in clause (*d*), subject to the provisions of sub-section (1) of section 13, sub-section (2) of section 21, section 38 and section 40.]

(2) A petition for revocation of a patent may be presented—

(*a*) by the Advocate-General or any person authorized by him; or

(*b*) by any person alleging—

(i) that the patent was obtained in fraud of his rights or of the rights of any person under or through whom he claims; or

(ii) that he, or any person under or through whom he claims, was the true and first inventor of any invention included in the claim of the patentee; or

(iii) that he, or any person under or through whom he claims an interest in any trade, business or manufacture, had publicly manufactured, used or sold, within British India, before the date of the patent, anything claimed by the patentee as his invention.

NOTES

confined to the grounds of invalidity giving him his *locus* to present the petition. He may also rely on other grounds, namely, those set forth in S. 26 (1) of the Act. 43 C.W.N. 697.

Secs. 26 and 28.—The onus lies heavily on the petitioner to show that the respondent is not the true and first inventor of the invention. 74 P.W.R. 1915=29 I.C. 904. *See also* 10 C.W.N. 985; 17 A. 490.

(3) The High Court may, irrespective of any provisions of the Code of Civil Procedure, 1908, in this behalf, require any person, other than the Advocate-General or any person authorized by him, applying for the revocation of a patent, to give security for the payment of all costs incurred or likely to be incurred by any person appearing to oppose the petition.

Notice of proceedings to persons interested.

27. (1) Notice of any petition for revocation of a patent under section 26 shall be served on all persons appearing from the register to be proprietors of that patent or to have shares or interests therein, and it shall not be necessary to serve the notice on any other person.

(2) The notice shall be deemed to be sufficiently served if a copy thereof is sent by post in a registered letter directed to the person and place for the time being stated in the register.

Framing issue for trial before other courts.

28. (1) A High Court may, if it thinks fit, direct an issue for the trial, before itself or any other High Court, or any District Court, of any question arising upon a petition to itself under section 26, and the issue shall be tried accordingly.

(2) If the issue is directed to another High Court, the finding shall be certified by that Court to the High Court directing the issue.

(3) If the issue is directed to a District Court, the finding of that Court shall not be subject to appeal, but the evidence taken upon the trial shall be recorded, and a copy thereof, certified by the Judge of the Court, shall be transmitted, together with any remarks which he may think fit to make thereon, to the High Court directing the issue, and the High Court may thereupon act upon the finding of the District Court, or dispose of the petition upon the evidence recorded, or direct a new trial, as the justice of the case may require.

Suits for infringement of patents.

29. (1) A patentee may institute a suit in a District Court having jurisdiction to try the suit against any person who, during the continuance of a patent acquired by him under this Act in respect of an invention, makes, sells or uses the invention without his licence, or counterfeits it, or imitates it:

NOTES.

Sec. 27.—In a suit by an unregistered assignee of a patent for infringement of patent rights, the Patna High Court gave judgment against the plaintiff and purported, in respect of a counter-claim made by the defendant, to revoke the patent. In view of this judgment, the Controller entered in the Register of Patents a note to the effect that the patent was revoked. The petitioner who was the original patentee and who had no notice of and was not made a party to the suit applied to the Controller in Calcutta to expunge that entry. On a reference by the Controller to the Calcutta High Court, *held*, that entry which was obviously to the detriment of the petitioner should be expunged from the record and that the renewal fee in respect of the patent offered by the petitioner should be accepted by the Controller on the basis of the validity of the patent granted to him. 41 C.W.N. 603=1937 Cal. 365=I.L.R. (1937) 2 Cal. 230.

Sec. 29.—Under the Act of 1883 a defendant in an action for infringement is allowed to set up by way of defence all the grounds on which the grant of a patent could be opposed. *See* 27 I.C. 996=27 M.L.J. 573. Grounds that can be pleaded as defence under the Act of 1911, cannot be pleaded in a suit instituted before the Act. 27 M.L.J. 573. Novelty and prior user as defence. *See* 18 L.W. 141=28 C.W.N. 343=1923 P.C. 103. A patent may be infringed in several ways, one of which is by using the invention or any colourable imitation thereof in the manufacture of articles or by putting the invention in practice in any other way. A patent may sometimes be infringed by taking a part only of the invention, but that depends on whether the part for which protection is asked is a new and material part especially in the case of combination. The question of infringement is a mixed question of law and fact. The plaintiff in a patent action has got to prove that his process has been counterfeited or imitated by the defendant. It is necessary for him to give the particulars of the breaches constituting the alleged infringement of his patent rights. 37 Bom.L.R. 665. On this section, *see also* 26 A. 96; 12 C.W.N. 446; 4 A.L.J. 11. An assignee of a patent who has not registered the assignment under S. 63 of the Patents and Designs Act is not a patentee within the meaning of S. 2 (12) of that Act, and has, therefore, no right to bring any suit for infringement of patent

[1][Provided that where a counter claim for revocation of the patent is made by the defendant, the suit, along with the counter claim, shall be transferred to the High Court for decision.]

(2) Every ground on which a patent may be revoked under [2][section 26] shall be available by way of defence to a suit for infringement.

Exemption of innocent infringer from liability for damages.

30. A patentee shall not be entitled to recover any damages in respect of any infringement of a patent granted after the commencement of this Act from any defendant who proves that at the date of the infringement he was not aware, nor had reasonable means of making himself aware, of the existence of the patent, and the marking of an article with the word "patent," "patented," or any word or words expressing or implying that a patent has been obtained for the article, stamped, engraved, impressed on, or otherwise applied to the article, shall not be deemed to constitute notice of the existence of the patent unless the word or words are accompanied by the year and number of the patent:

Provided that nothing in this section shall affect any proceedings for an injunction.

Order for inspection, etc., in suit.

31. In a suit for infringement of a patent, the Court may, on the application of either party, make such order for an injunction, inspection or account, and impose such terms and give such directions respecting the same and the proceedings thereon, as the Court may see fit.

Certificate of validity questioned and costs thereon.

32. In a suit for infringement of a patent the Court may certify that the validity of the patent came in question, and if the Court so certifies, then in any subsequent suit in that Court for infringement of the same patent the plaintiff, on obtaining a final order or judgment in his favour, shall, unless the Court trying the suit otherwise directs, have his full costs, charges, and expenses of and incidental to the said suit properly incurred.

Transmission of decrees and orders to the Controller.

33. A Court making a decree in a suit under section 29 or an order on a petition under section 26 shall send a copy of the decree or order, as the case may be, to the Controller, who shall cause an entry thereof and reference thereto to be made in the register of patents.

Power of High Court to stay proceedings, etc.

34. A High Court to which a petition has been presented under section 26 may stay proceedings on or dismiss the petition if in its opinion the petition would be disposed of more justly or conveniently by another High Court.

Hearing with assessor.

35. (1) In a suit or proceeding for infringement or revocation of a patent, the Court may, if it thinks fit, and shall on the request of [3][all] the parties to the proceedings, call in the aid of an assessor specially qualified, and try the case wholly or partially with his assistance.

(2) A Court exercising appellate jurisdiction in respect of such suit or proceeding may, if it thinks fit, call in the aid of an assessor as aforesaid.

LEG. REF.

[1]Proviso to sub-sec. (1) of sec. 29 added by Act XII of 1939.

[2]Substituted by Act XII of 1939.

[3]In sub-s. (1) of S. 35 for the words "either of" the word "all" have been substituted by Act VII of 1930.

NOTES.

rights regarding that patent. 41 C.W.N. 603 = 1937 Cal. 375 = I.L.R. (1937) 2 Cal. 230. *See also* 43 C.W.N. 697.

(3) The remuneration, if any, to be paid to an assessor under this section shall in every case be determined by the Court and be paid by it as part of the expenses of the execution of this Act.

Grant of relief in respect of particular claims.

[1][35-A. Notwithstanding anything contained in section 19, if the Court in any action for infringement of a patent finds that any one or more of the claims in the specification in respect of which the infringement is alleged, are valid, it may, subject to its discretion as to costs and as to the date from which damages should be reckoned and to such terms as to amendment as it may deem desirable, grant relief in respect of any of such claims which are infringed without regard to the invalidity of any other claim in the specification. In exercising such discretion the Court may take into consideration the conduct of the parties in inserting such invalid claims in the specification or permitting them to remain there.]

Remedy in case of groundless threats of legal proceedings.

36. Where, any person claiming [2][to have an interest in a patent] by circulars, advertisements or otherwise, threatens any other person with any legal proceedings or liability in respect of any alleged infringement of the patent, any person aggrieved thereby may bring a suit against him in a District Court having jurisdiction to try the suit, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as he has sustained thereby, if the alleged infringement to which the threats related was not in fact an infringement of [2][the patent]:

[3][Provided that this section shall not apply if an action for infringement of the patent is commenced and prosecuted with due diligence].

Miscellaneous.

Grant of patents to two or more persons.

37. Where, after the commencement of this Act, a patent is granted to two or more persons jointly, they shall, unless otherwise specified in the patent, be treated for the purpose of the devolution of the legal interest therein as joint tenants, but subject to any contract to the contrary, each of such persons shall be entitled to use the invention for his own profit without accounting to the others, but shall not be entitled to grant a licence without their consent, and, if any such person dies, his beneficial interest in the patent shall devolve on his legal representatives.

Public use or knowledge of invention:

[4][38. The public use or knowledge of an invention in British India before the date of the application for a patent thereon shall not invalidate the patent granted thereon if the knowledge has been obtained surreptitiously or in fraud of the true and first inventor or his legal representative or assign or has been communicated to the public in fraud of such inventor or his legal representative or assign or in breach of confidence:

LEG. REF.

[1]Newly added by Act VII of 1930.

[2]In S. 36 for the words "to be the patentee of an invention" the words "to have an interest in a patent" have been substituted; for the words "any legal rights of the person making such threats" the words "the patent" have been substituted by Act VII of 1930.

[3]For the old proviso to S. 36 the new proviso has been substituted by Act VII of 1930.

[4]S. 38 substituted by Act XII of 1939.

NOTES.

Sec. 38: SCOPE—PUBLIC AND PRIVATE USER.—S. 38 of the Act distinguishes clearly between public user and private user. Whether a process has been publicly used or not is a question of fact. 36 Bom.L.R. 881=1934 B. 407=153 I. C. 481. Under S. 38, if an article manufactured under a secret process is of such a character that no one by examining it can find out the secret of that manufacture, then the sale of that article in public cannot amount to public user of the process. Public user does not mean use by the public but use in a public manner and not secretly. Public user which would invalidate an invention or rather on account of which an invention shall not be treated as a new invention

Provided that such inventor or his legal representative or assign has not acquiesced in the public use of his invention, and that he applies for a patent within six months after the commencement of such use].

Loss or destruction of patent.

39. If a patent is lost or destroyed, or its non-production is accounted for to the satisfaction of the Controller, the Controller may at any time, on payment of the prescribed fee, seal a duplicate thereof.

Provisions as to exhibitions and readings before learned societies.

[1][40. The exhibition of an invention at an industrial or other exhibition to which the provisions of this section have been extended by the Central Government by notification in the Official Gazette, or the publication of any description of the invention during the period of the holding of the exhibition, or the use of the invention for the purpose of the exhibition in the place where the exhibition is held, or the use of the invention or the publication of any description thereof, during or after the period of the holding of the exhibition, by any person elsewhere without the privity or consent of the inventor or the reading of a paper by an inventor before a learned society, or the publication of that paper in the society's transactions shall not prejudice the right of the inventor to apply for and obtain a patent in respect of the invention, or the validity of any patent granted on the application:

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[1] Section 40 substituted by Act XII of 1939.

NOTES.

must be the use of the invention in public. 1934 Bom. 407.

SECRET USE OF INVENTION—RIGHT TO PATENT.—When there has been no more than a secret use of the invention by the inventor with a view to taking out a patent or the manufacture for the inventor and under injunctions as to secrecy by a manufacturer, the patent will be good. But this will not be the case where the secret process has been used for profit or where the invention was communicated to a third person in a manner which both in law and in equity allowed him to do what he liked with the invention. S. 38 allows a secret user for a reasonable profit. 1934 B. 407.

PATENT—ESSENTIALS OF VALIDITY—PUBLIC USER AND PRIVATE USER—DISTINCTION.—The two features necessary to the validity of a patent are novelty and utility, but the real test is the novelty of the invention. Novelty is essential, for otherwise there would be no benefit to the public and consequently no consideration moving from the patentee. A plea of want of novelty also includes the plea of want of subject-matter. Under S. 38, there must be an absence of prior publication or of prior public user; and if the user is secret or experimental, the profits made by the inventor from his invention must not be excessive. There is a distinction under the section between public user and private user as also between public user of the invention by working it commercially, and public user of the invention from the point of view of publication. The public user of the invention for purposes of trade may, in certain cases, defeat a patent for want of novelty quite apart from the question of publication. It is also clear that, if the public has once become possessed of the knowledge of the invention before the date of the application, no patent subsequently granted is valid. 37 Bom.L.R. 665=1936 B. 99

PUBLIC USER OR PUBLICATION—WHAT CONSTITUTES.—Public user does not mean a user or exercise of the invention by the public, but a user or exercise in a public manner, and that is a question of fact. If the invention is being put into practice before and at the date of the grant, the grant will not be for a new invention or manufacture, whether the invention is being practised by the patentee himself or by others. A use of the invention for purposes of trade may constitute a prior user invalidating the patent, and a prior public sale of goods or articles treated according to the invention is a public user, the sale being strong evidence of the user being commercial and not experimental. But to constitute evidence of public user, the sale must be open and in the ordinary way of business. The publication of an invention by sale of the articles treated by it for purposes of trade by the patentee or by others may constitute a prior user even if there is no publication. 37 Bom.L.R. 665=1936 B. 99.

EXPERIMENTAL USER—USER FOR PROFIT—DISTINCTION—EXCESSIVE PROFITS—TEST.—A prior user might be of an experimental nature, *i.e.*, what was genuinely necessary for the inventor to satisfy himself as to the practicability of his invention. If it exceeds such limits and is carried on for profits, such user will defeat the subsequent patent. But a distinction has to be drawn between the use of an invention for profit and the carrying out of experiments which turn out succesful and only incidentally bring in profit to the inventor. There is no test or authority laying down the limit beyond which the profits made by the inventor out of his invention are deemed excessive. It is the inventor's profit alone that has to be considered. 37 Bom.L.R. 665. Where the designs in ques-

Provided that—

(*a*) the exhibitor exhibiting the invention or the inventor reading the paper or authorising the publication thereof, as the case may be, gives to the Controller previous notice in the prescribed form; and

(*b*) the application for a patent is made before or within six months from the date of first exhibiting the invention or of the reading of the paper, as the case may be, or when it has not been so read, of the said publication].

Models to be furnished to Indian Museum.

41. The trustee of the Indian Museum may at any time require a patentee to furnish them with a model or sample of his invention on payment to the patentee of the cost of the manufacture of the model or sample, the amount to be settled, in case of dispute by the Central Government.

Foreign vessels in British Indian waters.

42. (1) A patent shall not prevent the use of an invention for the purposes of the navigation of a foreign vessel within the jurisdiction of any Court in British India, or the use of an invention in a foreign vessel within that jurisdiction, provided it is not used therein for or in connection with the manufacture or preparation of anything intended to be sold in or exported from British India.

(2) This section shall not extend to vessels of any foreign State of which the laws do not confer corresponding rights with respect to the use of inventions in British vessels while in the ports of that State, or in the waters within the jurisdiction of its Courts.

PART II.

DESIGNS.

Registration of Designs.

Application for registration of designs.

43. (1) The Controller may, on the application of any person claim to be the proprietor of any new or original design not previously published in British India, register the design under this Part.

(2) The application must be made in the prescribed form, and must be left at the Patent Office in the prescribed manner and must be accompanied by the prescribed fee.

(3) The same design may be registered in more than one class, and, in case of doubt as to the class in which a design ought to be registered, the Controller may decide the question.

(4) The Controller may, if he thinks fit, refuse to register any design presented to him for registration; but any person aggrieved by any such refusal may appeal to the Central Government.

NOTES.

tion had been in use in the locality from long before the date when the registration of the patent was applied for by the plaintiff and it is not possible to say that those designs were new or original, the plaintiff is not entitled to the protection under the Act. 77 I.C. 517= 1922 A. 496. A combination of materials would not be entitled to protection, unless it was a combination of a charcter which involved the exercise of any special inventive power or had some originality about it. 1922 All. 496.

Sec. 43: NEW OR ORIGINAL.—There may be novelty in applying what was an old thing to a new use. 45 C. 606=48 I.C. 437=23 C.W. N. 580.

The test of novelty is the eye of the judge. He must place the two designs side by side and see whether one for which novelty is claimed is new. 45 C. 606. *See also* 53 C. 306=1926 C. 152.

Secs. 43 and 53: EFFECT OF REGISTRATION—SUIT FOR INFRINGEMENT—PLEA IN DEFENCE THAT DESIGN IS NEITHER NEW NOR ORIGINAL.—No registration under S. 43 is effective, unless the design or configuration sought to be protected is new and original and not of a pre-existing common type. In a suit for damages for infringement of a registered design under S. 53, the defendant can be allowed to raise in defence a plea that the design is neither new nor original. 151 I.C. 362=1934 L. 709.

(5) An application which, owing to any default or neglect on the part of the applicant, has not been completed so as to enable registration to be effected within the prescribed time shall be deemed to be abandoned.

(6) A design when registered shall be registered as of the date of the application for registration.

Registration of designs in new classes.

44. Where a design has been registered in one or more classes of goods, the application of the proprietor of the design to register it in some one or more other classes shall not be refused, nor shall the registration thereof be invalidated—

(*a*) on the ground of the design not being a [1][new or original design], by reason only that it was so previously registered; or

(*b*) on the ground of the design having been previously published in British India, by reason only that it has been applied to goods of any class in which it was so previously registered:

[1][Provided that such subsequent registration shall not extend the period of copyright in the design beyond that arising from previous registration.]

Certificate of registration.

45. (1) The Controller shall grant a certificate of registration to the proprietor of the design when registered.

(2) The Controller may, in case of loss of the original certificate, or in any other case in which he deems it expedient, furnish one or more copies of the certificate.

Register of Designs.

46. (1) There shall be kept at the Patent Office a book called the Register of Designs, wherein shall be entered the names and addresses of proprietors of registered designs, notifications of assignments and of transmissions of registered designs, and such other matters as may be prescribed.

(2) The register of designs existing at the commencement of this Act shall be incorporated with, and form part of, the register of designs under this Act.

(3) The register of designs shall be *prima facie* evidence of any matters by this Act directed or authorised to be entered therein.

LEG. REF.

[1] In cl. (*a*) of S. 44, for the words "new and original design" the words "new or original design" have been substituted; and after clause (*b*) the proviso has been newly added by Act VII of 1930.

NOTES.

Secs. 45, 43 and 46.—A certificate of registration, issued by the controller under S. 45 (1) of the Act to the proprietor of a design when registered, is not final and conclusive. There is only a *prima facie* presumption that the person whose name is registered as the proprietor is the proprietor of a new or original design, but the presumption can be rebutted. The certificate is not conclusive, and there is nothing in the Act which prevents the defendant in a suit for damages for infringement of a registered design under S. 53 of the Act from raising in defence the plea that the design was previously published and was neither new nor original. The onus is of course on the defendant who seeks to go behind the certificate of registration to show that the plaintiff is not the proprietor of the registered design in question. 43 Bom.L.R. 280 =1941 Bom. 188.

Sec. 46 (3): PERSON ENTERED AS PROPRIETOR —EVIDENTIARY VALUE.—Where a person is entered as a proprietor of registered design, there is not under the Act conclusive proof from the entry that the plaintiff is the proprietor of the design but that is *prima facie* evidence that he is the proprietor. The plaintiff, in a suit for injunction and damages for infringement of registered design, has therefore the advantage that, if no evidence at all is given, then the certificate is sufficient evidence that he is the proprietor. 56 A. 1032=1934 A.L.J. 664 =1934 A. 798. *See also* 43 Bom.L.R. 280=1941 Bom. 188.

Copyright in registered Designs.

Copyright on registration.

47. (1) When a design is registered, the registered proprietor of the design shall, subject to the provisions of this Act, have copyright in the design during five years from the date of registration.

(2) If [1][* * *] before the expiration of the said five years application for the extension of the period of copyright is made to the Controller in the prescribed manner the Controller shall, on payment of the prescribed fee, extend the period of copyright for a second period of five years from the expiration of the original period of five years.

(3) If [1][* * *] before the expiration of such second period of five years application for the extension of the period of copyright is made to the Controller in the prescribed manner, the Controller may, subject to any rules under this Act, on payment of the prescribed fee, extend the period of copyright for a third period of five years from the expiration of the second period of five years.

Requirements before delivery on sale.

48. (1) Before delivery on sale of any articles to which a registered design has been applied, the proprietor shall—

(*a*) (if exact representations or specimens were not furnished on the application for registration), furnish to the Controller the prescribed number of exact representations or specimens of the design; and, if he fails to do so, the Controller may erase his name from the register, and thereupon the copyright in the design shall cease; and

(*b*) cause each such article to be marked with the prescribed mark, or with the prescribed words or figures, denoting that the design is registered; and, if he fails to do so, the proprietor shall not be entitled to recover any penalty or damages in respect of any infringement of his copyright in the design unless he shows that he took all proper steps to ensure the marking of the article, or unless he shows that the infringement took place after the person guilty thereof knew or had received notice of the existence of the copyright in the design.

(2) Where a representation is made to the Central Government by or on behalf of any trade or industry that in the interests of the trade or industry it is expedient to dispense with or modify as regards any class or description of articles any of the requirements of this section as to marking, the Central Government may, if [2][it] thinks fit by rule under this Act, dispense with or modify such requirements as regards any such class or description of articles to such extent and subject to such conditions as [2][it] thinks fit.

Effect of disclosure on copyright.

49. The disclosure of a design by the proprietor to any other person, in such circumstances as would make it contrary to good faith for that other person to use or publish the design, and the disclosure of a design in breach of good faith by any person other than the proprietor of the design, and the acceptance of a first and confidential order for goods bearing a new or original textile design intended for registration, shall not be deemed to be a publication of the design sufficient to invalidate the copyright thereof if registration thereof is obtained subsequently to the disclosure or acceptance.

Inspection of registered designs.

50. (1) During the existence of copyright in a design or such shorter period not being less than two years from the registration of the design as may be prescribed, the design shall not be open to inspection except by the proprie-

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LEG. REF.

[1] The words "within the prescribed time" omitted by Act XII of 1939.

[2] Substituted by A.O., 1937.

tor or a person authorized in writing by him, or a person authorised by the Contoller or by the Court, and furnishing such information as may enable the Controller to identify the design, and shall not be open to the inspection of any person except in the presence of the Controller, or of an officer acting under him, and on payment of the prescribed fee; and the person making the inspection shall not be entitled to take any copy of the design, or of any part thereof:

Provided that, where registration of a design is refused on the ground of identity with a design already registered, the applicant for registration shall be entitled to inspect the design so registered.

(2) After the expiration of copyright in a design, or such shorter period as aforesaid, the design shall be open to inspection, and copies thereof may be taken by any person on payment of the prescribed fee.

(3) Different periods may be prescribed under this section for different classes of goods.

Information as to existence of copyright.

51. On the request of any person furnishing such information as may enable the Controller to identify the design, and on payment of the prescribed fee, the Controller shall inform such person whether the registration still exists in respect of the design, and, if so, in respect of what classes of goods; and shall state the date of registration, and the name and address of the registered proprietor.

Cancellation of registration.

[1][51-A. (1) Any person interested may present a petition for the cancellation of the registration of a design,

(*a*) at any time after the registration of the design, to the High Court on any of the following grounds, namely:—

(i) that the design has been previously registered in British India, or

(ii) that it has been published in British India prior to the date of registration; or

(*iii*) that the design is not a new or orginal design; or

(*b*) within one year from the date of the registration, to the Controller on either of the grounds specified in sub-clauses (i) and (ii) of Clause (*a*).

(2) An appeal shall lie from any order of the Controller under this section to the High Court, and the Controller may at any time refer any such petition to the High Court, and the High Court shall decide any petition so referred.

Registration of designs to bind the Crown.

51-B. The provisions of section 21 shall apply to registered designs as if those provisions were re-enacted herein and in terms made applicable to registered designs.]

Industrial and International Exhibitions.

Provisions as to exhibitions.

[2][52. The exhibition of a design or of any article to which a design is applied, at an industrial or other exhibition to which the provisions of this section have been extended by the Central Government by notification in the official Gazette, or the publication of a description of the design, during the period of the holding of the exhibition or the exhibition of the design or the article or the publication of a description of the design by any person elsewhere during or after the period of the holding of the exhibition, without the privity or consent

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LEG. REF.

[1] After S. 51, the new sections 51-A and 51-B have been inserted by Act VII of 1930.

[2] Sec. 52 substituted by Act XII of 1939.

of the proprietor, shall not prevent the design from being registered or invalidate the registration thereof:

Provided that—

(*a*) the exhibitor exhibiting the design or article, or publishing a description of the design, gives to the Controller previous notice in the prescribed form; and

(*b*) the application for registration is made within six months from the date of first exhibiting the design or article or publishing a description of the design.]

Legal Proceedings.

Piracy of registered design.

53. (1) During the existence of copyright in any design it shall not be lawful for any person—

NOTES.

Sec. 53.—The equitable remedies in respect of an infringement of a design are not excluded by the statute, and in a suit for relief on the ground of infringement, the plaintiff is therefore entitled to ask for delivery up of the goods with the infringing trade mark to him for destruction. 41 Bom.L.R. 45=1939 Bom. 103. S. 53 is self-contained in itself, and the two parts of S. 53 (2) are clearly disjunctive. A proprietor of a registered design who sues under S. 53 in respect of a fraudulent or obvious imitation of his registered design, is bound to elect under the section between his claim for damages along with the injunction and the payment of the sum of Rs. 1000 which is the maximum amount recoverable. The plaintiff must make his election before the final hearing of suit. 38 Bom.L.R. 823=1936 B. 408=I.L.R. (1937) Bom. 215. "Registered proprietor," meaning of. *See* 1934 A.L.J. 664=1934 A. 798, cited under sec. 2 (14), *supra*. "Court" in sec. 53 must refer to the District Court. 1940 Pesh. 19. Sec. 53 creates three separate acts which are unlawful. The first is to apply the design in the way described; the second is to do anything with a view to enable the design to be applied in the way described in the statement of the first of the offences and the third is to expose or cause to be exposed for sale the article under the conditions specified under head (*b*). The acts referred to in the Patents and Designs Act must, in order to constitute offences under the Act, be committed in British India. 40 Bom.L.R. 661=1938 Bom. 413. It is not necessary, in order to entitle a plaintiff to relief on the ground of infringement of copyright in design, that the infringing design should be an exact copy or reproduction of the registered design. The words "fraudulent or obvious imitation" ought not to be construed as meaning exact reproduction. 41 Bom.L.R. 45=1939 Bom. 103. Under sec. 53 (1) (*a*) it is not the application that has to be fraudulent, but the imitation should be considered as "fraudulent or obvious" or not. A person is entitled to sue the infringer as soon as the latter causes the design to be applied to his goods and imports the same for sale in British India, though the design is actually applied to the goods in a country outside British India. 41 Bom.L.R. 45=1939 Bom. 103. The question of actual damage must always be seriously considered when allotting penalties for the various offences under this section. 1933 R. 240. It is not necessary in a notice under sec. 53 (2) (*b*) warning the defendants of their liability that the words of the statute should be rigidly followed. It is enough if the defendants are not under any misapprehension when they receive the notice. 1933 R. 240. Suit for infringement of registration—Plea in defence that design is neither new nor original can be taken. 35 P.L.R. 731=1934 L. 709; 1934 A.L.J. 664=56 A. 1032=1934 A. 798 (onus of proof is on defendant). The onus of proving that the defendant had knowledge of the plaintiff's rights in the registered designs in dispute or that the defendant applied or caused to be applied such designs to the articles sold by him lies on the plaintiffs. Sec. 106 of the Evidence Act has no application to the case and it cannot be said that such facts are peculiarly within the defendant's knowledge. 40 C.W.N. 938=1936 C. 493. Mere imitation is no offence unless there is an infringement of a patent or copyright or there is attempt to pass goods as goods of another dealer or manufacturer either by using a false trade mark or false description or a trade mark or description likely to deceive purchasers by a deliberate imitation of a genuine mark or description or by falsely giving out goods as the goods of some other dealers or manufacturer. 146 I.C. 1084=1933 N. 344.

COSTS.—Where in a suit for infringement of the plaintiff's copyright in certain trade marks or designs, the defendant states that he has been and is still ready and willing to give an undertaking to the plaintiff and to the Court not to deal with any goods printed with the plaintiff's designs or any obvious imitations thereof in case and for such period as the plaintiff established his copyright in the said designs, that amounts only to a conditional offer of an undertaking which the plaintiff is not bound to accept. But when the defendant goes further and abandons his denial of the plaintiff's rights and admits plaintiff's rights in the designs in question, the undertaking becomes an unconditional undertaking which the plaintiff should accept. The plaintiff should also pray for a judgment in the form of an order embodying the undertaking. If the plaintiff does not do so, but goes on with the suit, he ought not to get the costs incurred by so doing, but ought on the contrary to pay the costs of the defendant. The plaintiffs will get a decree with costs up to the date of the election to proceed with the suit. He will not be entitled to costs incurred subsequently, but

(*a*) for the purpose of sale to apply or cause to be applied to any article in any class of goods in which the design is registered the design or any fraudulent or obvious imitation thereof, except with the licence or written consent of the registered proprietor, or to do anything with a view to enable the design to be so applied; or

[1][(*aa*) to import for the purposes of sale, without the consent of the registered proprietor, any article belonging to the class in which the design has been registered, and having applied to it the design or any fraudulent or obvious imitation thereof; or]

(*b*) knowing that the design or any fraudulent or obvious imitation thereof has been applied to any article, [1][in any class of goods in which the design is registered] without the consent of the registered proprietor to publish or expose to be published or exposed for sale that article.

(2) If any person acts in contravention of this section, he shall be liable for every contravention,—

(*a*) to pay to the registered proprietor of a design a sum not exceeding five hundred rupees recoverable as a contract debt, or

(*b*) if the proprietor elects to bring a suit for the recovery of damages for any such contravention, and for an injunction against the repetition thereof, to pay such damages as may be awarded and to be restrained by injunction accordingly:

Provided that the total sum recoverable in respect of any one design under clause (*a*) shall not exceed one thousand rupees.

(3) When the Court makes a decree in a suit under sub-section (2), it shall send a copy of the decree to the Controller, who shall cause an entry thereof to be made in the register of designs.

Application of certain provisions of the Act as to patents to designs.

54. The provisions of this Act with regard to certificates of the validity of a patent, and to the remedy in case of groundless threats of legal proceedings by a patentee shall apply in the case of registered designs in like manner as they apply in the case of patents, with the substitution of references to the copyright in a design for references to a patent, and of references to the proprietor of a design for references to the patentee and of references to the design for references to the invention.

PART III.

GENERAL.

Patent Office and Proceedings thereat.

Patent Office.

55. (1) The Central Government may provide for the purposes of this Act, an office which shall be called, and is in this Act referred to as, the Patent Office.

(2) The Patent Office shall be under the immediate control of the Controller of Patents and Designs, who shall act under the superintendence and direction of the Central Government.

(3) There shall be a seal for the Patent Office.

(4) Any act or thing directed to be done by or to the Controller may be done by or to any officer authorized by the Central Government.

LEG. REF.

[1] Added by Act XII of 1939.

NOTES.

will be liable to pay such costs to the defendant. 40 C.W.N. 938= 1936 Cal. 493.

PLEADINGS.—In an action for infringement o a patent, the defendant, who denies the case o the plaintiff as to the true and first inventor o the patent, must give particulars as to whom he alleges to be the true and first inventor. 40 Bom.L.R. 478=1938 Bom. 347.

Officers and clerks.

56. The Central Government may appoint the Controller, and so many officers and clerks, with such designations and duties, as he thinks fit.

Fees.

Fees.

57. (1) There shall be paid in respect of the grant of patents and the registration of designs, and applications therefor, and in respect of other matters with relation to the patents and designs under this Act, such fees as may be prescribed[1] by the Central Government so, however, that the fees prescribed in respect of the instruments and matters mentioned in the schedule shall not exceed those there specified.

(2) A proceeding in respect of which a fee is payable under this Act or the rules made thereunder shall be of no effect unless the fee has been paid.

Provisions as to Registers and other Documents in the Patent Office.

Notice of trust not to be entered in registers.

58. There shall not be entered in any register kept under this Act, or be receivable by the Controller, any notice of any trust, expressed, implied or constructive.

Inspection of, and extracts from, registers.

59. Every register kept under this Act shall at all convenient times be open to the inspection of the public, subject to the provisions of this Act; and certified copies, sealed with the seal of the Patent Office, of any entry in any such register shall be given to any person requiring the same on payment of the prescribed fee.

Information relating to patents.

[2][59-A. A person making a request to the Controller in the prescribed manner as respects any patent specified in the request or as respects any application for a patent so specified, for information to be furnished to him by the Controller of any such matters as may be prescribed affecting that patent or application, shall be entitled, subject to the payment of the prescribed fee, to have information supplied to him accordingly.]

Privilege of reports of Controller.

60. (1) Reports of or to the Controller made under this Act shall not in any case be published or be open to public inspection.

Prohibition of publication of specification, drawings, etc., where application abandoned, etc.

61. (1) Where an application for a patent has been abandoned or become void, the specifications and drawings (if any), accompanying or left in connection with such application, shall not, save as otherwise expressly provided by this Act, at any time be open to public inspection or be published by the Controller.

(2) Where an application for a design has been abandoned or refused, the application and any drawings, photographs, tracings, representations or specimens left in connection with the application shall not at any time be open to public inspecion or be published by the Controller.

Power for Controller to correct clerical errors.

62. The Controller may, on request in writing accompanied by the prescribed fee,—

LEG. REF.

[1] For fees prescribed, *see* note to sec. 77, *infra*.

[2] Sec. 59-A inserted by Act XII of 1939.

NOTES.

Secs. 62 and 64.—The Controller upon the application of a private person has no jurisdiction to cancel the registration of a design. The ordinary way of expunging the registration of a design is to apply to the High Court under sec. 64. 45 C. 606=48 I.C. 437=22 C.W.N 530. The only person who can apply unde-

(*a*) correct any clerical error in or in connection with an application for a patent or in any patent or any specification;

(*b*) [*Omitted by Act VII of* 1930];

(*c*) correct any clerical error in the representation of a design or in the name or address of the proprietor of any patent or design, or in any other matter which is entered upon the register of patents or the register of designs.

Entry of assignments and transmissions in registers.

[1][63. (1) Where a person becomes entitled by assignment, transmission or other operation of law to a patent or to the copyright in a registered design, he may make application to the Controller to register his title, and the Controller shall on receipt of such application and on proof of title to his satisfaction, register him as the proprietor of such patent or design, and shall cause an entry to be made in the prescribed manner in the register of the assignment, transmission or other instrument affecting the title.

(2) Where any person becomes entitled as mortgagee, licensee or otherwise to any interest in a patent or registered design, he may make application to the Controller to register his title, and the Controller shall, on receipt of such application and on proof of title to his satisfaction, cause notice of the interest to be entered in the prescribed manner in the register of patents or designs, as the case may be, with particulars of the instrument, if any, creating such interest.]

(3) The person registered as the proprietor of a patent or design shall, subject to the provisions of this Act and to any rights appearing from the register to be vested in any other person, have power absolutely to assign, grant licence as to, or otherwise deal with, the patent or design, and to give effectual receipts for any consideration for any such assignment, licence or dealing:

Provided that any equities in respect of the patent or design may be enforced in like manner as in respect of any other movable property.

[1][(4) Except in the case of an application made under section 64, a document or instrument in respect of which no entry has been made in the register in accordance with the provisions of sub-sections (1) and (2) shall not be admitted in evidence in any Court in proof of the title to a patent or to copyright in a design or to any interest therein, unless the Court, for reasons to be recorded in writing, otherwise directs.]

Rectification of register by Court.

64. (1) The [2][Controller] may, on the application in the prescribed manner of any person aggrieved by the non-insertion in or omission from the register of patents or designs of any entry, or by any entry made in either such register without sufficient cause, or by any entry wrongly remaining on either such register, or by an error or defect in any entry in either such register, make

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LEG. REF.

[1] New sub-secs. (1) and (2) have been substituted for old sub-secs. (1) and (2) and sub-sec. (4) has been newly added by Act VII of 1930.

[2] Substituted for the words "High Court" by Act VII of 1930.

NOTES.

sec. 62 is the registered proprietor or some person in whom his interest is vested. 45 C. 606. Form No. 20 must be limited to applications of a registered owner though it has been framed in a general way. 45 C. 606. As to power of High Court to interfere, *see ibid.*

Sec. 64.—The Controller, whose office happens to be in Calcutta, may refer any application under sec. 64 of the Act to the Calcutta High Court. 41 C.W.N. 603 = 1937 Cal. 365 = I.L.R. (1937) 2 Cal. 230. An assignor of a patent is competent to maintain an application under sec. 64 (1) for the rectification of the register of patents, if the assignee has not had himself registered as proprietor and the name of the assignor continues to remain on the register as proprietor. I.L.R. (1940) 1 C. 551 = 44 C.

such order for making, expunging or varying such entry [1][as he thinks fit and rectify the register accordingly].

(2) The [1][Controller] may in any proceeding under this section decide any question that it may be necessary or expedient to decide in connection with the rectification of a register.

[1][(3) An appeal shall lie to the High Court from any order of the Controller under this section; and the Controller may refer any application under this section to the High Court for decision, and the High Court shall dispose of any application so referred.]

(4) Any order of the Court rectifying a register shall direct that notice of the rectification be served on the Controller in the prescribed manner, who shall upon the receipt of such notice rectify the register accordingly.

[1][(5) Nothing in this section shall be deemed to empower the Controller—

(*a*) to rectify the register of patents or to decide any question relating to a patent, otherwise than for the purpose of correcting a mistake of fact apparent from a reference either to the patent itself or to some order of a competent authority made under any other provision of this Act, or

(*b*) to make any such order cancelling the registration of a design as is provided for in section 51-A.]

Powers and Duties of Controller.

Powers of Controller in proceedings under Act.

65. Subject to any rules in this behalf, the Controller in any proceedings before him under this Act shall have the powers of a Civil Court for the purpose of receiving evidence [2][*] administering oaths [2][*] enforcing the attendance of witnesses [2][*] [3][compelling the discovery and production of documents, issuing commissions for the examining of witnesses and awarding costs, and such award shall be executable in any Court having jurisdiction as if it were a decree of that Court]

Publication of patented inventions.

66. The Controller shall issue periodically a publication of patented inventions containing such information as the Central Government may direct.

Exercise of discretionary power by Controller.

67. Where any discretionary power is by, or under, this Act given to the Controller, he shall not exercise that power adversely to the applicant for a patent, or for amendment of an application, or of a specification, or for registration of a design, without (if so required within the prescribed time by the applicant) giving the applicant an opportunity of being heard.

Power of Controller to take directions of Central Government.

68. The Controller may, in any case of doubt or difficulty arising in the administration of any of the provisions of this Act apply to the Central Government for directions in the matter.

Refusal to grant patent, etc., in certain cases.

69. [4][(1)] The Controller may refuse to grant a patent for an invention, or to register a design, of which the use would, in his opinion, be contrary to law or morality.

LEG. REF.

[1] In sub-sec. (1), for the words "as it may think fit" the words "as he thinks fit and rectify the register accordingly" have been substituted, by Act VII of 1930, and in sub-sec. (2), for the word "Court", the word "Controller" has been substituted; for old sub-secs. (3) and (5) the new sub-secs. (3) and (5) have been substituted by Act VII of 1930.

[2] The word "and" omitted by Act XII of 1939.

[3] Substituted by Act XII of 1939.

[4] Section renumbered as sub-section (1) by Act VII of 1930.

NOTES.

W.N. 429=1940 C. 474. Sec. 64 (1) must be read as giving the subject a right to make an application to the Controller with which sub-sec. (5) prevents him from dealing. The Controller has, therefore, power under sub-sec. (3) to refer an application filed before him for the rectification of the register of patents, although he is prevented by sub-sec. (5) from dealing with it himself. I.L.R. (1940) 1 Cal. 551=44 C.W.N. 429=1940 C. 474.

[2][(2) An appeal shall lie to the Central Government from an order of the Controller under this section.]

Appeals to the Central Government.

70. (1) Where an appeal is declared by this Act to lie from the Controller to the Central Government the appeal shall be made within [2][three] months of the date of the order passed by the Controller, and shall be in writing, and accompanied by the prescribed fee.

(2) In calculating the said period of [2][three] months the time (if any) occupied in granting a copy of the order appealed against shall be excluded.

(3) The Central Government may, if he thinks fit, obtain the assistance of an expert in deciding such appeals, and the decision of the Central Government shall be final.

Evidence, etc.

Evidence before the Controller.

[3][70-A. Subject to any rules made under section 77, in any proceeding under this Act before the Controller, the evidence shall be given by affidavit, in the absence of directions by the Controller to the contrary; but in any case in which the Controller thinks it right so to do he may take evidence *viva voce* in lieu of or in addition to evidence by affidavit or may allow any party to be cross-examined on the contents of his affidavit.]

Certificate of Controller to be evidence.

71. A certificate purporting to be under the hand of the Controller as to any entry, matter or thing which he is authorised by this Act, or any rules made thereunder, to make or do, shall be *prima facie* evidence of the entry having been made, and of the contents thereof, and of the matter or thing having been done or left undone.

Evidence of documents in Patent Office.

[3][71-A. Printed or written copies or extracts, purporting to be certified by the Controller and sealed with the seal of the Patent Office, of or from patents, specifications and other documents in the Patent Office, and of or from registers and other books kept there, shall be admitted in evidence in all Courts in British India, and in all proceedings, without further proof or production of the originals:

Provided that a Court may, if it has reason to doubt the accuracy or authenticity of the copies tendered in evidence, require the production of the originals or such further proof as it considers necessary.]

Transmission of copies of specifications, etc., and inspection thereof.

[4][72. Copies of all such specifications, drawing and amendment left at the Patent Office, as become open to the public inspection under the provisions of this Act, shall be transmitted, as soon as may be, after the printed copies thereof are available, to such authorities as the Central Government may appoint in this behalf, and shall be open to the inspection of any person at all reasonable times at places to be appointed by those authorities and approved by the Central Government.]

Applications and notices by post.

73. Any application, notice or other document authorized or required to be left, made or given at the Patent Office or to the Controller, or to any other person under this Act, may be sent by post.

LEG. REF.

[1] Sub. S. (2) inserted by S. 28, Act VII of 1930.

[2] Substituted by S. 29, ibid. for "Two".

[3] Inserted by Act XII of 1939.

[4] Substituted by ibid.

Declaration by infant, lunatic, etc.

74. (1) If any person is, by reason of infancy, lunacy, or other disability incapable of making any statement or doing anything required or permitted by or under this Act, the lawful guardian, committee or manager (if any) of the person subject to the disability, or, if there be none, any person appointed by any Court possessing jurisdiction in respect of his property, may make such statement or a statement as nearly corresponding thereto as circumstances permit, and do such thing in the name and on behalf of the person subject to the disability.

(2) An appointment may be made by the Court for the purposes of this section upon the petition of any person acting on behalf of the person, subject to the disability or of any other person interested in the making of the statement or the doing of the thing.

Security for costs.

[1][74-A. Where a person giving notice of any opposition under this Act or giving notice to the Court of appeal from any decision of the Controller under this Act, neither resides nor carries on business in British India, the Controller or the Court, as the case may be, may require such person to give security for the payment of all costs incurred and likely to be incurred in the proceedings or appeal, as the case may be, and, in default of such security being given, may disallow the opposition or dismiss the appeal.]

Agency.

Subscription and verification of certain documents.

75. The following documents, namely,—

(1) applications for a patent,
(2) notices of opposition,
(3) applications for extension of term of a patent,
(4) applications for the restoration of lapsed patents,
(5) applications for leave to amend,
(6) applications for compulsory licence or revocation, and
(7) notices of surrenders of patent,

shall be signed and verified, in the manner prescribed, by the person making such applications or giving such notices:

Provided that, if such person is absent from British India, they may be signed and verified on his behalf by an agent resident in British India authorized by him in writing in that behalf.

Agency.

76. (1) All other applications and communications to the Controller under this Act may be signed by, and all attendances upon the Controller may be made by or through a legal practitioner or by or through an agent authorized to the satisfaction of the Controller.

(2) The Controller may, if he sees fit, *require*—

(*a*) any such agent to be resident in British India;

(*b*) any person not residing in British India to employ an agent residing in British India;

(*c*) the personal signature or presence of any applicant, opponent or other person.

Powers, etc., of Central Government.

Power for [Central Government] to make rules.

77. (1) The Central Government may make such rules[2] as [1][it] thinks expedient subject to the provisions of this Act—

LEG. REF.

[1] Inserted by Act VII of 1930.

[2] For rules, see *Gazette of India*, Pt. II, dated 11th Feb., 1933.

[3] Substituted by A. O., 1937, for "he."

NOTES.

Sec. 77 (1).—As to use of forms, *see* 22 C. W.N. 58.

(*a*) for regulating the practice of registration under this Act;

(*b*) for classifying goods for the purposes of designs ;

(*c*) for making or requiring duplicates of specifications, drawings and other documents;

(*d*) for securing and regulating the publishing and selling of copies at such prices and in such manner as the Central Government thinks fit of specifications, drawings and other documents;

(*e*) for securing and regulating the making, printing, publishing, and selling of indexes to, and abridgments of, specifications, and other documents in the Patent Office; and providing for the inspection of indexes and abridgments and other documents;

[1][(*ee*) for the manner in which fees leviable under this Act may be paid;

(*eee*) for ensuring secrecy with respect to patents to which section 21-A applies];

(*f*) generally for regulating the business of the Patent Office, the conduct of proceedings before the Controller, and all things by this Act placed under the direction or control of the Controller or of the Central Government; and

(*g*) generally for the purpose of carrying into effect the provisions of this Act.

(2) The power to make rules under this section shall be subject to the condition of the rules being made after previous publication.

[1][(2-A) Nothing in sub-section (2) shall apply in the case of rules made for the purpose specified in clause (*eee*) of sub-section (1); and any such rules may modify any of the provisions of this Act so far as may be necessary for that purpose.]

(3) All rules made under this section shall be published in the Official Gazette and, on such publication shall have effect as if enacted in this Act.

Offences.

Wrongful use of words "Patent Office".

78. If any person uses on his place of business, or on any document issued by him, or otherwise, the words "Patent Office" or any other words suggesting that his place of business is officially connected with, or is, the Patent Office, he shall be punishable with fine which may extend to two hundred rupees, and, in the case of a continuing offence, with further fine of twenty rupees for each day on which the offence is continued after conviction therefor.

[2][*Reciprocal arrangements with the United Kingdom and other parts of His Majesty's Dominions.*

Reciprocal arrangements with the United Kingdom and other parts of His Majesty's dominions.

78-A. (1) If His Majesty is pleased by Order in Council to [3][declare British India to be a convention country within the meaning of section 91-A of the Patents and Designs Act, 1907] then any person who has applied for protection for any invention or design in the United Kingdom [4][or his legal representative or assignee] [5][shall either alone or jointly with any other person, be entitled to claim that

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LEG. REF.

[1] Inserted by Act VII of 1930, S. 31.
[2] Inserted by Act XXIX of 1920.
[3] Substituted by Act X of 1939.
[4] Inserted by Act XI of 1 , S. 1.

the patent that may be granted to him under this Act, for the said invention or the registration of the said design under this Act, shall be in priority to other applicants and shall have] the same date as the date of the application in the United Kingdom:

Provided that—

(*a*) the application is made in the case of a patent within twelve months, and, in the case of a design within [1][six] months from the application for protection in the United Kingdom; and

(*b*) nothing in this section shall entitle the patentee or the proprietor of the design to recover damages for infringements happening prior to the actual date on which, in the case of a patent, his application is accepted, or; in the case of a design, the design is registered, in British India.

(2) The patent granted for an invention or the registration of a design shall not be invalidated—

(*a*) in the case of a patent, by reason only of the publication of a description of, or use of, the invention, or

(*b*) in the case of a design, by reason only of the exhibition or use of, or the publication of a description or representation of, the design,

in British India during the period specified in this section as that within which the application may be made.

(3) The application for the grant of a patent or the registration of a design under this section must be made in the same manner as an ordinary application under this Act:

Provided that, in the case of a patent, if the application is not accepted within twelve months from the date of the application for protection in the United Kingdom, the specification and the drawings (if any) supplied therewith shall be open to public inspection at the expiration of that period.

(4) Where it is made to appear to the Central Government that the Legislature of any other part of His Majesty's dominions [2][or of any State in India], has made satisfactory provision for the protection of inventions or designs, patented or registered in British India, the Central Government may, by notification in the Official Gazette direct that the provisions of this section, with such variations or additions, if any, as may be set out in such notification, shall apply for the protection of inventions or designs patented or registered in that part of His Majesty's dominions [2][or in that State as the case may be].

Savings and Repeal.

Savings for prerogative.

79. Nothing in this Act shall take away, abridge or prejudicially affect the prerogative of the Crown in relation to the granting of any Letters Patent or to the withholding of a grant thereof.

80. [*Repealed by Act XII of* 1927, *Sch.*]

81. [*Repealed by Act XXXI of* 1920, *Sch. II.*]

THE SCHEDULE.

(*See section* 57.)

FEES.

	Rs.
On application for a patent	10
Before sealing a patent	30

LEG. REF.

[1] Substituted by Act VII of 1930, S. 32, for "four."

[2] Inserted by Act VII of 1930, S. 32.

	Rs.
Before the expiration of the 4th year from the date of the patent ..	50
Before the expiration of the 5th year from the date of the patent ..	50
Before the expiration of the 6th year from the date of the patent ..	50
Before the expiration of the 7th year from the date of the patent ..	50
Before the expiration of the 8th year from the date of the patent ..	[100][1]
Before the expiration of the 9th year from the date of the patent ..	100
Before the expiration of the 10th year from the date of the patent ..	100
Before the expiration of the 11th year from the date of the patent ..	100
[1][Before the expiration of the 12th year from the date of the patent ..	150
Before the expiration of the 13th year from the date of the patent ..	150
Before the expiration of the 14th year from the date of the patent ..	150
Before the expiration of the 15th year from the date of the patent ..	150
Provided that the fees for two or more years may be paid in advance.	
On application to extend the term of patent	50
[2][In respect of] each year of the extended term of a patent or of a new patent granted under section 15	150
On application for registration of a design	3]

THE INDIAN PATENTS AND DESIGNS (EXTENSION OF TIME) ACT (X OF 1942).

[14*th March*, 1942.

An Act to provide for the extension of the time limited by or under the Indian Patents and Designs Act, 1911, *for the doing of acts thereunder.*

WHEREAS it is expedient to provide for the extension of the time limited by or under the Indian Patents and Designs Act, 1911, for the doing of acts thereunder; It is hereby enacted as follows:—

Short title, extent and duration.

1. (1) This Act may be called THE INDIAN PATENTS AND DESIGNS (EXTENSION OF TIME) ACT, 1942.

(2) It extends to the whole of British India.

(3) It shall be in force until the termination of the present hostilities and for one year thereafter.

Power to extend time limits having regard to war circumstances.

2. (1) The Controller of Patents and Designs appointed under the Indian Patents and Designs Act, 1911, may, subject to such conditions, if any, as he thinks fit to impose, extend the time limited by or under that Act for doing any act, where he is satisfied—

(*a*) that the doing of the act within the time so limited was prevented by a person's being on active service or by any other cirumstances arising from the existence of the present hostilities which, in the opinion of the Controller, justify an extension of the time so limited, or

(*b*) that, by reason of circumstances arising from the existence of the present hostilities, the doing of the act within the time so limited would have been or would be injurious to the rights or interests of the person by or on whose behalf the act is or was to be done or to the public interest.

(2) An extension under this section of the time for doing any act—

(*a*) may be for any period that the Controller thinks fit, notwithstanding that under the Indian Patents and Designs Act, 1911, power is conferred to extend the time for doing that act for a specified period only; and

(*b*) may be granted, notwithstanding that that time expired before any application or request for extension was made, or that, by reason of that act not having been done within that time, the relevant application, patent, registration or proceeding has ceased or expired, or become void or invalid, or been treated as abandoned, or been refused.

LEG. REF.

[1] Substituted by Act VII of 1930, S. 33.

[2] Substituted by Act XII of 1939.

THE PAYMENT OF WAGES ACT (IV OF 1936).

[*N.B.*—Am. Act XX of 1937 and Act XXII of 1937.]

[*23rd April*, 1936.

An Act to regulate the payment of wages to certain classes of persons employed in industry.

WHEREAS it is expedient to regulate the payment of wages to certain classes of persons employed in industry; It is hereby enacted as follows:—

Short title, extent, commencement and application.

1. (1) This Act may be called THE PAYMENT OF WAGES ACT, 1936.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force on such date as the Central Govenment may, by notification in the Official Gazette, appoint.

(4) It applies in the first instance to the payment of wages to persons employed in any factory and to persons employed (otherwise than in a factory) upon any railway by a railway administration or, either directly or through a sub-contractor, by a person fulfilling a contract with a railway administration.

(5) The Provincial Government may, after giving three months' notice of its intention of so doing, by notification in the Official Gazette, extend the provisions of the Act or any of them to the payment of wages to any class of persons employed in any industrial establishment or in any class or group of industrial establishments.

(6) Nothing in this Act shall apply to wages payable in respect of a wage-period which, over such wage-period, average two hundred rupees a month or more.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(i) "factory" means a factory as defined in clause (*j*) of section 2 of the Factories Act, 1934;

(ii) "industrial establishment" means any—

(*a*) tramway or motor omnibus service;

(*b*) dock, wharf or jetty;

(*c*) inland steam-vessel;

(*d*) mine, quarry or oil-field;

(*e*) plantation;

(*f*) workshop or other establishment in which articles are produced, adapted or manufactured, with a view to their use, transport or sale;

(iii) "plantation" means any estate which is maintained for the purpose of growing cinchona, rubber, coffee or tea, and on which twenty-five or more persons are employed for that purpose;

NOTES.

Sec. 2.—"Wages" as defined by S. 2 can only mean wages earned and cannot embrace potential wages. Bonus which workman might earn but has not earned cannot form part of his wages. The words "remuneration, which would, if the contract were fulfilled be payable," mean no more than remuneration payable on the fulfilment of the contract. Bonus never becomes payable to an employee who does not earn it under the terms of the contract, 42 Bom.L.R. 955=1941 Bom. 26.

(iv) "prescribed" means prescribed by rules made under this Act;

(v) "railway administration" has the meaning assigned to it in clause (6) of section 3 of the Indian Railways Act, 1890; and

(vi) "wages" means all remuneration, capable of being expressed in terms of money, which would, if the terms of the contract of employment, express or implied, were fulfilled, be payable, whether conditionally upon the regular attendance, good work or conduct or other behaviour of the person employed, or otherwise, to a person employed in respect of his employment or of work done in such employment, and includes any bonus or other additional remuneration of the nature aforesaid which would be so payable and any sum payable to such person by reason of the termination of his employment, but does not include—

(*a*) the value of any house accommodation, supply of light, water, medical attendance or other amenity, or of any service excluded by general or special order of the [1][* * * *] Provincial Government;

(*b*) any contribution paid by the employer to any pension fund or provident fund;

(*c*) any travelling allowance or the value of any travelling concession;

(*d*) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or

(*e*) any gratuity payable on discharge.

Responsibility for payment of wages.

3. Every employer shall be responsible for the payment to persons employed by him of all wages required to be paid under this Act:

Provided that in the case of persons employed (otherwise than by a contractor)—

(*a*) in factories, if a person has been named as the manager of the factory under clause (*e*) of sub-section (1) of section 9 of the Factories Act, 1934,

(*b*) in industrial establishments, if there is a person responsible to the employer for the supervision and control of the industrial establishment,

(*c*) upon railways (otherwise than in factories), if the employer is the railway administration and the railway administration has nominated a person in this behalf for the local area concerned,

the person so named, the person so responsible to the employer, or the person so nominated, as the case may be, shall be responsible for such payment.

Fixation of wage-periods.

4. (1) Every person responsible for the payment of wages under section 3 shall fix periods (in this Act referred to as wage-periods) in respect of which such wages shall be payable.

(2) No wage-period shall exceed one month.

Time of payment of wages.

5. (1) The wages of every person employed upon or in—

(*a*) any railway, factory or industrial establishment upon or in which less than one thousand persons are employed, shall be paid before the expiry of the seventh day,

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LEG. REF.

[1] Words 'Governor-General in Council or' omitted by A.O., 1937.

(*b*) any other railway, factory or industrial establishment, shall be paid before the expiry of the tenth day,

after the last day of the wage-period in respect of which the wages are payable.

(2) Where the employment of any person is terminated by or on behalf of the employer, the wages earned by him shall be paid before the expiry of the second working day from the day on which his employment is terminated.

(3) The [1][Provincial Government] may, by general or special order, exempt, to such extent and subject to such conditions as may be specified in the order, the person responsible for the payment of wages to persons employed upon any railway (otherwise than in a factory) from the operation of this section in respect of the wages of any such persons or class of such persons.

(4) All payments of wages shall be made on a working day.

Wages to be paid in current coin or currency notes.

6. All wages shall be paid in current coin or currency notes or in both.

Deductions which may be made from wages.

7. (1) Notwithstanding the provisions of sub-section (2) of section 47 of the Indian Railways Act, 1890, the wages of an employed person shall be paid to him without deductions of any kind except those authorised by or under this Act.

Explanation.—Every payment made by the employed person to the employer or his agent shall, for the purposes of this Act, be deemed to be a deduction from wages.

(2) Deductions from the wages of an employed person shall be made only in accordance with the provisions of this Act, and may be of the following kinds only, namely:—

(*a*) fines;

(*b*) deductions for absence from duty;

(*c*) deductions for damage to or loss of goods expressly entrusted to the employed person for custody, or for loss of money for which he is required to account, where such damage or loss is directly attributable to his neglect or default;

(*d*) deductions for house accommodation supplied by the employer;

(*e*) deductions for such amenities and services supplied by the employer as the [2][' * *] [Provincial Government] may, by general or special order, authorise;

Explanation.—The word 'services' in this sub-clause does not include the supply of tools and raw materials required for the purposes of employment.

(*f*) deductions for recovery of advances or for adjustment of overpayments of wages;

(*g*) deductions of income-tax payable by the employed person;

(*h*) deductions required to be made by order of a Court or other authority competent to make such order;

(*i*) deductions for subscriptions to, and for repayment of advances from any provident fund to which the Provident Funds Act, 1925, applies or any recognised provident fund as defined in section 58-A of the Indian Income-tax

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LEG. REF.

[1] Substituted by A.O., 1937, for "Governor-General in Council"

[2] Words 'Governor General in Council or' omitted by A.O., 1937.

Act, 1922, or any provident fund approved in this behalf by the Provincial Government, during the continuance of such approval; and

(*j*) deductions for payments to co-operative societies approved by the Provincial Government or to a scheme of insurance maintained by the Indian Post Office.

Fines.

8. (1) No fine shall be imposed on any employed person save in respect of such acts and omissions on his part as the employer, with the previous approval of the Provincial Government or of the prescribed authority, may have specified by notice under sub-section (2).

(2) A notice specifying such acts and omissions shall be exhibited in the prescribed manner on the premises in which the employment is carried on or in the case of persons employed upon a railway (otherwise than in a factory), at the prescribed place or places.

(3) No fine shall be imposed on any employed person until he has been given an opportunity of showing cause against the fine, or otherwise than in accordance with such procedure as may be prescribed for the imposition of fines.

(4) The total amount of fine which may be imposed in any one wage-period on any employed person shall not exceed an amount equal to half-an-anna in the rupee of the wages payable to him in respect of that wage-period.

(5) No fine shall be imposed on any employed person who is under the age of fifteen years.

(6) No fine imposed on any employed person shall be recovered from him by instalments or after the expiry of sixty days from the day on which it was imposed.

(7) Every fine shall be deemed to have been imposed on the day of the act or omission in respect of which it was imposed.

(8) All fines and all realisations thereof shall be recorded in a register to be kept by the person responsible for the payment of wages under section 3 in such form as may be prescribed; and all such realisations shall be applied only to such purposes beneficial to the persons employed in the factory or establishment as are approved by the prescribed authority.

Explanation.—When the persons employed upon or in any railway, factory or industrial establishment are part only of a staff employed under the same management, all such realisations may be credited to a common fund maintained for the staff as a whole, provided that the fund shall be applied only to such purposes as are approved by the prescribed authority.

Deductions for absence from duty.

9. (1) Deductions may be made under clause (*b*) of sub-section (2) of section 7 only on account of the absence of an employed person from the place or places where, by the terms of his employment, he is required to work, such absence being for the whole or any part of the period during which he is so required to work.

(2) The amount of such deduction shall in no case bear to the wages payable to the employed person in respect of the wage-period for which the deduction is made a larger proportion than the period for which he was absent bears to the total period, within such wage-period, during which by the terms of his employment, he was required to work:

Provided that, subject to any rules made in this behalf by the Provincial Government, if ten or more employed persons acting in concert absent themselves without due notice (that is to say without giving the notice which is

required under the terms of their contracts of employment) and without reasonable cause, such deduction from any such person may include such amount not exceeding his wages for eight days as may by any such terms be due to the employer in lieu of due notice.

[1][*Explanation*.—For the purpose of this section, an employed person shall be deemed to be absent from the place where he is required to work if, although present in such place, he refuses, in pursuance of a stay-in-strike or for any other cause which is not reasonable in the circumstances, to carry out his work.]

Deductions for damage or loss.

10. (1) A deduction under clause (*c*) of sub-section (2) of section 7 shall not exceed the amount of the damage or loss caused to the employer by the neglect or default of the employed person and shall not be made until the employed person has been given an opportunity of showing cause against the deduction, or otherwise than in accordance with such procedure as may be prescribed for the making of such deductions.

(2) All such reductions and all realisations thereof shall be recorded in a register to be kept by the person responsible for the payment of wages under section 3 in such form as may be prescribed.

Deductions for services rendered.

11. A deduction under clause (*d*) or clause (*e*) of sub-section (2) of section 7 shall not be made from the wages of an employed person, unless the house-accommodation, amenity or service has been accepted by him, as a term of employment or otherwise and such deduction shall not exceed an amount equivalent to the value of the house-accommodation, amenity or service supplied and, in the case of a deduction under the said clause (*e*), shall be subject to such conditions as [2][* *] the Provincial Government may impose.

Deductions for recovery of advances.

12. Deductions under clause (*f*) of sub-section (2) of section 7 shall be subject to the following conditions, namely:—

(*a*) recovery of an advance of money given before employment began shall be made from the first payment of wages in respect of a complete wage-period, but no recovery shall be made of such advances given for travelling-expenses;

(*b*) recovery of advances of wages not already earned shall be subject to any rules made by the Provincial Government regulating the extent to which such advances may be given and the instalments by which they may be recovered.

Deductions for payments to co-operative societies and insurance schemes.

13. Deductions under clause (*j*) of sub-section (2) of section 7 shall be subject to such conditions as the Provincial Government may impose.

Inspectors.

14. (1) An Inspector of Factories appointed under sub-section (1) of section 10 of the Factories Act, 1934, shall be an Inspector for the purposes of this Act in respect of all factories within the local limits assigned to him.

(2) The [3][Provincial Government] may appoint Inspectors for the purposes of this Act in respect of all persons employed upon a railway (otherwise than in a factory) to whom this Act applies.

LEG. REF.

[1]Inserted by Act XXII of 1937, S. 2.

[2]Omitted by A. O., 1937.

[3]Substituted for 'Governor General in Council' by A. O. 1937.

(3) The Provincial Government may, by notification in the Official Gazette, appoint such other persons as it thinks fit to be Inspectors for the purposes of this Act, and may define the local limits within which and the class of factories and industrial establishments in respect of which they shall exercise their functions.

(4) An Inspector may, at all reasonable hours, enter on any premises, and make such examination of any register or document relating to the calculation or payment of wages and take on the spot or otherwise such evidence of any person, and exercise such other powers of inspection, as he may deem necessary for carrying out the purposes of this Act.

(5) Every Inspector shall be deemed to be a public servant within the meaning of the Indian Penal Code.

Claims arising out of deductions from wages or delay in payment of wages and penalty for malicious or vexatious claims.

15. (1) The Provincial Government may, by notification in the Official Gazette, appoint any Commissioner for Workmen's Compensation or other officer with experience as a Judge of a Civil Court or as a stipendiary Magistrate to be the authority to hear and decide for any specified area all claims arising out of deductions from the wages, or delay in payment of the wages, of persons employed or paid in that area.

(2) Where contrary to the provisions of this Act any deduction has been made from the wages of an employed person, or any payment of wages has been delayed, such person himself, or any legal practitioner or any official of a registered trade union authorised in writing to act on his behalf, or any Inspector under this Act, or any other person acting with the permission of the authority appointed under sub-section (1), may apply to such authority for a direction under sub-section (3):

Provided that every such application shall be presented within six months from the date on which the deduction from the wages was made or from the date on which the payment of the wages was due to be made, as the case may be:

Provided further that any application may be admitted after the said period of six months when the applicant satisfies the authority that he had sufficient cause for not making the application within such period.

(3) When any application under sub-section (2) is entertained, the authority shall hear the applicant and the employer or other person responsible for the payment of wages under section 3, or give them an opportunity of being heard, and, after such further inquiry (if any) as may be necessary, may, without prejudice to any other penalty to which such employer or other person is liable under this Act, direct the refund to the employed person of the amount deducted, or the payment of the delayed wages, together with the payment of such compensation as the authority may think fit, not exceeding ten times the amount deducted in the former case and not exceeding ten rupees in the latter:

Provided that no direction for the payment of compensation shall be made in the case of delayed wages if the authority is satisfied that the delay was due to—

NOTES.

Sec. 15. In the case of a factory, if a person is named as the manager of the factory under the Factories Act, then he would be liable for the amount of wages. The employer is not a proper party when there is a manager appointed. I.L.R (1939) Bom. 96=41 Bom.L.R. 1283=1940 Bom. 87. The reduction of an employee to a lower grade of pay from a higher grade for a short period is a "deduction" within the meaning of the Payment Wages Act. If an employer terminates his existing contract with his employee, but offers to re-employ him on a lower rate, there is nothing against it in the Act, and no question of deduction would arise. I.L.R. (1941) Kar 394= A.I.R. 1941 Sind 191

(*a*) a *bona fide* error or a *bona fide* dispute as to the amount payable to the employed person, or

(*b*) the occurrence of an emergency, or the existence of exceptional circumstances, such that the person responsible for the payment of the wages was unable, though exercising reasonable diligence, to make prompt payment, or

(*c*) the failure of the employed person to apply for or accept payment.

(4) If the authority hearing any application under this section is satisfied that it was either malicious or vexatious, the authority may direct that a penalty not exceeding fifty rupees be paid to the employer or other person responsible for the payment of wages by the person presenting the application.

(5) Any amount directed to be paid under this section may be recovered—

(*a*) if the authority is a Magistrate, by the authority as if it were a fine imposed by him as Magistrate, and

(*b*) if the authority is not a Magistrate, by any Magistrate to whom the authority makes application in this behalf, as if it were a fine imposed by such Magistrate.

Single application in respect of claims from unpaid group.

16. (1) Employed persons are said to belong to the same unpaid group if they are borne on the same establishment and if their wages for the same wage-period or periods have remained unpaid after the day fixed by section 5.

(2) A single application may be presented under section 15 on behalf or in respect of any number of employed persons belonging to the same unpaid group, and in such case the maximum compensation that may be awarded under sub-section (3) of section 15 shall be ten rupees per head.

(3) The authority may deal with any number of separate pending applications, presented under section 15 in respect of persons belonging to the same unpaid group, as a single application presented under sub-section (2) of this section, and the provisions of that sub-section shall apply accordingly.

Appeal.

17. (1) An appeal against a direction made under [1][sub-section (3) or sub-section (4)] of section 15 may be preferred, within thirty days of the date on which the direction was made, in a Presidency-town [2][* * *] before the Court of Small Causes and elsewhere before the District Court—

(*a*) by the employer or other person responsible for the payment of wages under section 3, if the total sum directed to be paid by way of wages and compensation exceeds three hundred rupees, or

(*b*) by an employed person, if the total amount of wages claimed to have been withheld from him or from the unpaid group to which he belonged exceeds fifty rupees, or

(*c*) by any person directed to pay a penalty under sub-section [(4)][1] of section 15.

(2) Save as provided in sub-section (1), any direction made under sub-section (3) or sub-section [1][(4)] of section 15 shall be final.

LEG. REF.

[1]Substituted by S. 2 and Sch. I of Act XX of 1937.

[2]Repealed by the A.O., 1937.

NOTES.

Ses. 17(1)—"DIRECTION"—ORDER REJECTING CLAIM IN TOTO—APPEAL.—The word direction in S. 17 (1) must be construed as including a refusal to make a direction. An employed person has a right of appeal if his claim has been rejected *in toto* as also when his claim is allowed in part only. I.L.R. (1941) Kar. 394=A.I.R. 1941 Sind. 191. Under S. 17 (1) (*b*) the right of appeal depends on the monetary value of the claim made by the applicant and not on any

Powers of authorities appointed under section 15.

18. Every authority appointed under sub-section (1) of section 15 shall have all the powers of a Civil Court under the Code of Civil Procedure, 1908, for the purpose of taking evidence and of enforcing the attendance of witnesses and compelling the production of documents, and every such authority shall be deemed to be a Civil Court for all the purposes of section 195 and of Chapter XXXV of the Code of Criminal Procedure, 1898.

Power to recover from employer in certain cases.

19. When the authority referred to in section 15 or the Court referred to in section 17 is unable to recover from any person (other than an employer) responsible under section 3 for the payment of wages any amount directed by such authority under section 15 or section 17 to be paid by such person, the authority shall recover the amount from the employer of the employed person concerned.

Penalty for offences under the Act.

20. (1) Whoever being responsible for the payment of wages to an employed person contravenes any of the provisions of any of the following sections, namely, section 5 and sections 7 to 13, both inclusive, shall be punishable with fine which may extend to five hundred rupees.

(2) Whoever contravenes the provisions of section 4, section 6 or section 25 shall be punishable with fine which may extend to two hundred rupees.

Procedure in trial of offences.

21. (1) No Court shall take cognizance of a complaint against any person for an offence under sub-section (1) of section 20, unless an application in respect of the facts constituting the offence has been presented under section 15 and has been granted wholly or in part and the authority empowered under the latter section or the appellate Court granting such application has sanctioned the making of the complaint.

(2) Before sanctioning the making of a complaint against any person for an offence under sub-section (1) of section 20, the authority empowered under section 15 or the appellate Court, as the case may be, shall give such person an opportunity of showing cause against the granting of such sanction, and the sanction shall not be granted if such person satisfies the authority or Court that his default was due to—

(*a*) a *bona fide* error or *bona fide* dispute as to the amount payable to the employed person, or

(*b*) the occurrence of an emergency, or the existence of exceptional circumstances, such that the person responsible for the payment of the wages was unable, though exercising reasonable diligence, to make prompt payment, or

(*c*) the failure of the employed person to apply for or accept payment.

(3) No Court shall take cognizance of a contravention of section 4 or of section 6 or of a contravention of any rule made under section 26 except on a complaint made by or with the sanction of an Inspector under this Act.

(4) In imposing any fine for an offence under sub-section (1) of section 20 the Court shall take into consideration the amount of any compen-

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NOTES.

finding of the trial Court. The meaning of the clause is clear, and there is no justification for holding otherwise on the ground that the section lends itself to exaggeration of claims for the purpose of making any orders passed thereon appealable. I.L.R. (1941) Kar. 394=A.I.R. 1941 Sind 191.

sation already awarded against the accused in any proceedings taken under section 15.

Bar of suits.

22. No Court shall entertain any suit for the recovery of wages or of any deduction from wages in so far as the sum so claimed—

(*a*) forms the subject of an application under section 15 which has been presented by the plaintiff and which is pending before the authority appointed under that section or of an appeal under section 17; or

(*b*) has formed the subject of a direction under section 15 in favour of the plaintiff; or

(*c*) has been adjudged, in any proceeding under section 15, not to be owed to the plaintiff; or

(*d*) could have been recovered by an application under section 15.

Contracting out.

23. Any contract or agreement, whether made before or after the commencement of this Act, whereby an employed person relinquishes any right conferred by this Act shall be null and void in so far as it purports to deprive him of such right.

Application of Act to Federal Railways, mines and oilfields.

24. [1][The powers by this Act conferred upon the Provincial Government shall, in relation to Federal railways (within the meaning of the Government of India Act, 1935) mines and oilfields, be powers of the Central Government].

Display by notice of abstracts of the Act.

25. The person responsible for the payment of wages to persons employed in a factory shall cause to be displayed in such factory a notice containing such abstracts of this Act and of the rules made thereunder in English and in the language of the majority of the persons employed in the factory, as may be prescribed.

Rule-making power.

26. (1) The [2][Provincial Government] may make rules to regulate the procedure to be followed by the authorities and Courts referred to in sections 15 and 17.

(2) The Provincial Government may [3][* * *] by notification in the Official Gazette, make rules for the purpose of carrying into effect the provisions of this Act.

(3) In particular and without prejudice to the generality of the foregoing power, rules made under sub-section (2) may—

(*a*) require the maintenance of such records, registers, returns and notices as are necessary for the enforcement of the Act and prescribe the form thereof;

(*b*) require the display in a conspicuous place on premises where employment is carried on of notices specifying rates of wages payable to persons employed on such premises;

(*c*) provide for the regular inspection of the weights, measures and weighing machines used by employers in checking or ascertaining the wages of persons employed by them;

(*d*) prescribe the manner of giving notice of the days on which wages will be paid;

LEG. REF,

[1] Substituted by A. O., 1937, for the original section.

[2] Substituted by A. O., 1937.

[3] Repealed by A. O., 1937.

(*e*) prescribe the authority competent to approve under sub-section (1) of section 8 acts and omissions in respect of which fines may be imposed;

(*f*) prescribe the procedure for the imposition of fines under section 8 and for the making of the deductions referred to in section 10;

(*g*) prescribe the conditions subject to which deductions may be made under the proviso to sub-section (2) of section 9;

(*h*) prescribe the authority competent to approve the purposes on which the proceeds of fines shall be expended;

(*i*) prescribe the extent to which advances may be made and the instalments by which they may be recovered with reference to clause (*b*) of section 12;

(*j*) regulate the scales of costs which may be allowed in proceedings under this Act;

(*k*) prescribe the amount of court-fees payable in respect of any, proceedings under this Act; and

(*l*) prescribe the abstracts to be contained in the notices required by section 25.

(4) In making any rule under this section the Provincial Government may provide that a contravention of the rule shall be punishable with fine which may extend to two hundred rupees.

(5) All rules made under this section shall be subject to the condition of previous publication, and the date to be specified under clause (3) of section 23 of the General Clauses Act, 1897, shall not be less than three months from the date on which the draft of the proposed rules was published.

THE PENSIONS ACT (XXIII OF 1871).

Year.	No.	Short title.	Amendments.
1871	XXIII	Pensions Act, 1871.	Repealed in part, XII of 1891; X of 1914; XII of 1927.

Am. (locally), Act XXI of 1886.

Declared in force—

In the Sonthal Parganas, Reg. III of 1872, S. 3, as amended by Reg. III of 1899, S. 3; in Upper Burma (except the Shan State), Act XIII of 1898, S. 4; in British Baluchistan, Reg. II of 1913, S. 3.

PREFATORY NOTE.—The following is the Statement of Objects and Reasons annexed to the Bill :—

"The law relating to pensions is at present distributed over nine Regulations of the Bengal, three Regulations of the Madras and two Regulations of the Bombay Codes, as well as three Acts of the Governor-General in Council. The main provision of the law as expressed in the Bengal Regulations XXIV of 1793, section 17, Reg. XXIV of 1795, section 14, Reg. XXIV of 1803, section 16 and Reg. VI of 1817, and the Madras Regulation IV of 1831; S. 2 is the reservation to Government of the right of determine all claims to the continuance of pensions, and the exclusion of the jurisdiction of the ordinary Courts of judicature in regard to such claims.

In the Bombay Presidency, under the operation of Regulations XXIX of 1827, and VII of 1830, the Civil Courts are barred from the cognizance of suits to enforce such claims throughout the Dekhan, Khandesh and the South Mahratta country.

The Bengal Regulations, though expressly applicable only to Bengal and the North Western Provinces, are practically in force throughout the more recently acquired provinces; hence the law as above described applies to all India, except a portion of the Bombay Presidency.

Within this excepted country, the Civil Courts have, in more than one instance, assumed jurisdiction in such cases.

The principle on which that jurisdiction is elsewhere disallowed is founded on perfectly equitable considerations and is therefore fit for uniform application. It is in effect the assertion of the right of the State to reserve to itself the power of granting or withholding at pleasure concessions which are made gratuitousiy and without consideration.

The object of the proposed legislation, therefore, is (1) to consolidate the existing law, excluding all those provisions which are either obsolete or ill-adapted for enactment in detail ; and (2) to extend the law so re-enacted to the whole of British India.

The Hon'ble Mr. Cockerell moved for leavc to introduce a bill to consolidate and amend the law relating to pensions. He said that there was on the Statute Book at the present time a considerable number of Regulations and Acts relating to the subject. These enactments contained much that was now obsolete and much in the nature of administrative rules and instructions as to the mode of disbursing pensions which would be more conveniently and appropriately left to be put in operation by means of executive orders. The leading principle of the main provisions of the law was that as the bestowal of pensions and similar allowances was an act of grace or State policy on the part of the ruling power, the Government reserved to itself the determination of all questions affecting the grant or continuance of these allowances and the cognizance of claims relating thereto by the courts of judicature was as between the Crown and grantee, absolutely barred.

This principle governed the Law which applied specifically to the Regulation provinces of the Bengal and Madras Presidencies and which was also practically in force in the non-Regulation provinces. In some parts of the Bombay Presidency also namely the Dekhan, Khandesh and Southern Mahratta Divisions, claims against the Government in the matter of Pensionary grants and allow ances were declared to be not within the cognizance of the ordinary Courts of the judicature, but in the other parts of that presidency in the absence of any such legal restriction the courts had assumed a jurisdiction, expressly denied to them throughout the rest of British India.

It was necessary that this state of things should not be allowed to continue and that it was expedient to assimilate the law as regards this portion of the Bombay Presidency to that which prevailed in all other parts of the Empire. There were no exceptional circumstances which called for the exercise by the Civil Courts in any particular province or provinces of a jurisdiction which under the operation of a principle of universal application was not accorded to them elsewhere. The opportunity, moreover, for rectifying the omission to extend to the Bombay Presidency generally the provisions of the law regarding pensions had now arrived, the law on this subject having been specifically referred to in this council as one of the branches of the general scheme of consideration which was now in progress. The object of the present Bill therefore is to re-enact, in a consolidated form the operative provisions and to apply the consolidated enactment to the whole of British India. [*Fort St Geeorge Gazette Supplement*, 14*th March*, 1871].

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THE PENSIONS ACT (XXIII OF 1871).[1]

[8*th August*, 1871.

An Act to consolidate and amend the Law relating to Pensions and Grants by Government of money or land revenue.

WHEREAS it is expedient to consolidate and amend the law relating to Pensions and Grants by Government of money or land-revenue ;

Preamble.

It is hereby enacted as follows :—

I.—Preliminary.

Short title.

1. This Act may be called THE PENSIONS ACT, 1871.

Extent of Act.

It extends to the whole of British India :

[2][* * * * *]

2. [*Enactments repealed. Saving of Rules.*] *Repealed by Act I of 1938.*

Interpretation-section.

3. In this Act, the expression "grant of money or land-revenue" includes anything payable on the part of Government in respect of any right, privilege, perquisite or office.

LEG. REF.

[1]For the Statement of Objects and Reasons see *Gazette of India*, 1871, Pt. V, p. 141; for Proceedings in Council, see *ibid.*, 1871, Supplement; pp. 314, 401, 682, 1056 and 1147.

[2]The words "and it shall come into force on the date of the passing thereof" were repealed by Act X of 1914 and the words "but not so as to affect any suit in respect of a pension or grant of money or land revenue which may have been instituted before such date" were repealed by XII of 1891.

NOTES.

Sec. 1.—Object of Act. *See* 14 B. 573; 107 I. C. 899=1928 N. 189. Act must be construed strictly. 1925 O. 210. *See also* 10 A. 396=A. W.N. (1888) 72; 107 I.C. 899=1928 N. 189; 1939 Bom. 513=41 Bom.L.R. 882. The word "pension" in the Pensions Act, 1871 and in Civil Procedure Code, S. 60 and in the Transfer of Property Act, S. 6, implies periodical payments of money by Government to the pensioner. 58 I.A. 215=132 I.C. 727=35 C.W.N. 791=61 M.L.J. 208 (P.C.). *See also* 1929 A. 781. It is essential that an Officer to be entitled to pension must be in the service on the date of his retirement. An officer removed from Government service can have no claim for any pension. 2 L. W. 431=29 I.C. 252. A decree in conformity with the award which provides for the distribution in a certain manner of a pension when received from Government does not militate against the provisions of the Act. 37 B. 442=19 I.C. 882. A grant by the British Government confirming a previous grant made by the preceding rule is of such rights as the Government possessed and is excluded from the purview of the Pensions Act. 31 I.C. 728. *See also* 17 B. 169; 1 B. 79. The word pension has nowhere been defined but it ought to be understood in its ordinary sense as implying periodical allowance on account of past services, consideration or merit or by way of compensation to dethroned princes, their families and dependants. A grant of land revenue as such cannot be comprised in the term pension. A grant of Government revenue can in no case be treated as a political pension which is a pension granted on political considerations for reasons of State. The assignment of such grants is not prohibited by the Pensions Act. 1929 A. 781=27 A.L.J. 724. *See also* 61 M.L.J. 208 (P.C.). The provisions of the Act dealing with pensions and grants of land revenue in the District of Ratnagiri are not *ultra vires*. 59 I.C. 452=22 Bom.L.R. 1176=45 B. 196.

Sec. 3.—[*See also* Notes under S. 1, *supra*.] A sum payable by the Government as compensation for forest dues in respect of Jaghir land taken over by the Government for forest purposes is not a pension, but a grant of money or land revenue and is not exempted from attachment. 121 I.C. 664=1930 N. 134 (1).

Secs. 3 and 4: GENERAL.—The *Pensions Act*, which is one which tends to restrict the ordinary legal rights of the subject to have recourse to the Court for remedy of grievances is one *to be strictly construed*. The object of the Act was to reserve to the Government the determination of all questions affecting grants of money, the bestowal of which was an act of grace or State policy on the part of the ruling powers. 107 I.C. 899=1928 N. 189. The Pensions Act is to be construed strictly in favour of the subject. A suit relating to property which is the subject of a grant, in which the plaintiffs claim is quite independent of the grant, and in which there is no dispute as to the fact of the grant or as to its validity or as to the persons entitled under it cannot be regarded as a suit relating to a grant of land revenue within the meaning of S. 4. No certificate is necessary in the case of such a suit under S. 4. 41 Bom.L.R. 882=1939 Bom. 513. S. 4 does not require that the grant should be of the land-revenue alone in order to shut out the jurisdiction to entertain a suit relating thereto. 15 I.C. 871=23 M.L.J. 687. The nature of the grant must depend on what the Government gives and not on what may happen irrespective of the wishes of the Government. If the Government gave only the land revenue, acquisition of the lands by the pensioners does not make them grantees of immovable property. 42 A. 557=87 I.C. 569. The word "suit" does not include execution proceedings. 7 Bom.L.R. 659=30 B. 101; 16 B. 731.

[1][3-A. The expression "the appropriate Government" means, in relation to federal pensions, the Central Government, and in relation to other pensions, the Provincial Government.]

"Definition."

II.—Rights to Pensions.

4. Except as hereinafter provided, no Civil Court shall entertain any suit relating to any pension or grant of money or land-revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim or right for which such pension or grant may have been substituted.

Bar to suits relating to pensions.

LEG. REF.

[1]Inserted by A.O., 1937.

NOTES.

CASES TO WHICH SECTION APPLIES.—The Act contemplates money payment to be received through the Collector from recorded persons bound to pay revenue. 1913 M.W. N. 255. S. 4 applies not only to a suit against Government but also to suits between private parties and the previous certificate of the Collector is necessary where the suit relates to a grant of land revenue. 25 Bom.L.R. 1477=1927 B. 87. "Grant of money or land revenue", meaning of. *See* 5 B. 408=8 I.A. 77 (P.C.). The following are included within the said expression:—(1) Malikana. *See* 17 A. 1=21 I.C. 148 (P.C.); 4 M.L.J. 272 and cases referred to therein. 29 B. 480; (2) *Toda giras hak*. 5 B. 408=8 I.A. 77 (P.C.); (3) Allowances settled by Government upon members of the family of a Nawab. 7 A.W.N. 225; (4) Allowance granted to political prisoners though the same is collected by agreement from a foreign or Native State. 50 M. 711=52 M.L.J. 622. (5) Suit to recover wages for services in temple from trustee out of funds granted by the Government. 107 I.C. 899=1928 N. 189.

THE FOLLOWING ARE GRANTS TO WHICH THE SECTION APPLIES.—A suit, by a hereditary deshmukh of certain Mahals entitled to be directly paid by the ryots thereof, a percentage on the revenue assessed thereon, against the Government, to recover a portion of such percentage collected along with the revenue and retained by it. 2 B. 99=4 I.A. 119 (P.C.). Where a Jaghir, granted for the support of the grantee and his relatives, was resumed by Government, and the money allowance substituted, a suit by a relative of the original grantee to recover, as arrears of his shareis barred. 4 M. 341. *See also* 18 M. 187; 29 B 480; 30 M. 266; 50 M. 411=1927 M. 140. Civil Courts are prohibited from entertaining suit relating to any grant of money conferred by the British Government, whatever may have been the consideration for it. 5 B. 408=8 I.A. 77 ; 17 Bom.L.R. 153=27 I.C. 927 (P.C.). Claim for maintenance by a female member—Government pension—If Act applicable. *See* 17 M.L.J. 139=30 M. 266. S. 4 applies to a heritable right to receive land revenue granted by the Moghul Emperor as reward for services rendered. 25 A. 73. Jaghir —Right to share—Suit for—Necessity for certificate of Collector—Omission to obtain certificate—Effect of. 6 Lah.L.J. 343; 28 A. 104; 27 I.C. 927; 20 M.L.J. 164; 32 A. 148 (P.C.).

THE FOLLOWING DO NOT COME WITHIN THIS SECTION.—A grant of lands, revenue-free. 7 M. 191. *See also* 51 M.L.J. 95. Grant of land revenue—Suit to recover share of—If Act applies. 17 Bom.L.R. 163=27 I.C. 927. The grant of a Zemindari, of which the revenue is remitted by the Government. 8 A.L.J. 692. *See also* 114 I.C. 626 (Jodi fixed for Jaghir land). Previous inams confirmed by British Government—Confirmation not a re-grant—Suit relating to such inam lands not governed by Pensions Act. *See* 21 M. 310. *See also* 29 B. 480=7 Bom.L.R. 497. Agreement between Government and public servant—Increase of pay for risky services —Payment during good behaviour, meaning of —Payment on termination of service and pension—Suit to enforce agreement if maintainable. 15 C.W.N. 470=13 C.L.J. 363. Endowments for religious or pious purposes do not fall within the purview of S. 4—Section applies only to personal grants. 17 M.L.J. 549=31 M. 12 [18 M.L.J. 24 (Note). Foll.]

See. 4 : SCOPE—JURISDICTION OF REVENUE COURT WHETHER AFFECTED.—S. 4 of the Pensions Act does not take away the jurisdiction of the Court of Revenue to entertain a suit by the transferee of the assignee of the land revenue. The jurisdiction of the Civil Court and of the Civil Court alone is limited by the terms of the expression. 27 A.L.J. 724=1929 A. 781. Where a suit is filed in the Revenue Court by an assignee of Government revenue for arrears of revenue, the District Judge hearing the revenue appeal as a Civil Court would be competent to dispose of the matter, and his jurisdiction is not barred under S. 4. 1936 A.L.J. 1281=1936 All. 666. In a suit relating to a cash allowance the non production of the Collector's certificate under S. 4 of the Pensions Act at the time of the filing the suit is not fatal. It is sufficient if it is produced even in appeal in the High Court. 37 Bom.L.R. 343=1935 B. 227. No second appeal lies to the Financial Commission from an order of the Commissioner passed on appeal from an order of the Deputy Commissioner in a proceeding relating to the succession of a jagir. The Financial Commissioner has wide powers of revision conferred by S. 16 of the Land Revenue Act. The Financial Commissioner must exercise his powers of revision in dealing with cases under these rules rather more freely than is the case in regard to mutation proceedings, for instance, which concern disputes which must eventually be decided in the Civil Courts. 20 Lah.L.T. 102.

Secs. 4 and 6.—[*See also* notes under Ss. 3 and 4.] A Civil Court is precluded from making any declaration that would in any way directly or indirectly affect the liability of Government

5. Any person having a claim relating to any such pension or grant may prefer such claim to the Collector of the District or Deputy Commissioner or other officer authorized in this behalf by the [1][appropriate Government] ; and such Collector, Deputy Commissioner or other officer shall dispose of such claim in accordance with such rules[2] as the Chief Revenue-authority may, subject to the general control of the [1][appropriate Government], from time to time, prescribe in this behalf.

Claims to be made to Collector or other authorised officer.

LEG. REF.

[1]Substituted by A.O., 1937.

[2]For notifications prescribing such rules under the powers conferred by this section in Bombay, *see* Bom. R. & O. United Provinces of Agra and Oudh; *see* North-Western Provinces and Oudh, List of Local Rules and Orders, Ed. 1894, p. 42. S. 5 has been amended in its application to U. P. by U.P. Act XII of 1922.

NOTES.

to pay a grant of Government revenue to any person. 37 A. 338=29 I.C. 146. S. 4 is no bar to a suit to recover back possession of land in which *saranjam* right is resumed by the government. 41 B. 408=39 I.C. 65. Though a suit cannot be entertained without a certificate from the Collector, still even an appeal should not be rejected for want of certificate, but plaintiff should be allowed time to produce it. 82 I.C. 486. A suit for a declaration that the plaintiff is the owner of a certain share in a *kulkarni vatan* falls within S. 4 of the Act and is not maintainable without the certificate of the Collector. 42 B. 257=45 I.C. 580. *See also* 37 B. 91. The pre-requisite of filing a certificate under S. 4 is not applicable to a suit for partition of the inam among the members of the family to which it was given and it does not also apply where the grant is of land also and not merely of the land revenue. 26 I.C. 87=27 M. L.J. 618. A suit for partition of lands granted by Government on account of services rendered cannot be said to be one relating to any pension or grant of money or land revenue conferred or made by the British or any former Government; and a certificate under the Act is not necessary for the maintainability of the suit. 17 N.L.J. 118. Where certain land is granted by Government, the grant cannot be split up into two distinct grants of melwaram and kudiwaram so as to fall under S. 4 in respect of the claim for melwaram. 36 M. 559=23 M.L.J. 728. Where the grant is not one of land revenue only, but of the soil also, S. 4 does not apply and no certificate is necessary for a suit to recover assessment or land revenue of the village. 34 Bom.L.R. 1455. The plaintiff was the purchaser from a widow of an allowance computed in respect of Desaigiri Haq. He applied to the Collector to have his name entered in the register under the Watan Act but he was informed that his name had been entered only during the lifetime of the widow. He brought a suit for a declaration that he was the full owner of the allowance and not merely during the lifetime of the widow. *Held*, that the suit cannot be entertained without a certificate under S. 6 of the Act. 33 Bom. L.R. 1029=1931 B. 505.

Secs. 4, 5 and 6—The Pensions Act provides two methods of settling claims relating to grants of land revenue as to which the jurisdiction of Civil Courts is barred by S. 4 of that Act under S. 5 of the Act such claims may be disposed of by the revenue authorities and under S. 6 a Civil Court may take cognisance of disputes between rival claimants to the enjoyment of a grant of land revenue only if a certificate is granted by the revenue authorities that the case is one which it is appropriate that a Civil Court should try. Under R. 11 of the Punjab Pension and Revenue Assignment Rules the power of granting such a certificate is vested in the Financial Commissioner only and not in any subordinate revenue authority. It is clear, therefore, that any person who has a claim relating to any grant of land revenue other than a claim against Government direct may proceed in one of two separate ways. He may apply to the Deputy Commissioner under S. 5 of the Act for the adjudication of his claim or he may apply to the Deputy Commissioner under S. 6 or to the Financial Commissioner direct asking that the Financial Commissioner should grant a certificate that the dispute is one that may be tried by the Civil Courts. These two ways of obtaining adjudication on a claim must be regarded as alternative and it is open to a claimant to choose which of the two methods he will follow. But if both parties have acquiesced in obtaining adjudication on the merits of the case by the revenue authorities, it is inappropriate to grant a certificate which would permit the matter to be reagitated *de novo* in a different forum. 20 Lah.L.T. 94.

Secs 4 and 11.—The Pensions Act does not refer only to political pensions, but relates to all pensions. 161 I.C. 499=1936 L. 85. S. 11 refers merely to pensions, whereas S. 4 refers not only to pensions, but to grant of money or land revenue conferred, whatever may have been the consideration of any such grant. S. 4 is wider than S. 11 and includes matters which do not come under S. 11. 1930 A. 681. There is an obvious distinction between an assignment and a remission of land revenue. A remission of land revenue cannot be regarded as an assignment. The Government may remit a liability to pay land revenue in which case no assessment is made, but that is a very different thing from assessing a certain sum and then granting or assigning that sum to some person other than the Government. A right to lakhiraj or revenue-free land is certainly not a pension or a grant of land revenue. I.L.R. (1940) All. 603=1940 A.L.J. 420=1940 All. 373 (F.B.).

Sec. 5.—The words "any such pension or grant" clearly indicate any pension or grant of money or land revenue referred to in the preceding section. The section clearly authorises the

6. A Civil Court, otherwise competent to try the same, shall take cognizance of any such claim upon receiving a certificate from such Collector, Deputy Commissioner or other Officer authorized[1] in that behalf that the case may be so tried, but shall not make any order or decree in any suit whatever by which the liability of Government to pay any such pension or grant as aforesaid is affected directly or indirectly.

Civil Court empowered to take cognizance of such claims.

LEG. REF.

[1] For instances of notifications authorizing officers under the powers conferred by this section and prescribing rules, in Bombay, *see* Bom. R. & O.

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Collector, etc., to entertain a claim with reference to the grant of land revenue conferred by the former Government. The Local Government has authority to call for evidence in support of the grant and may either recognise the grant or refuse to do so. The proceeding before the officers referred to in this section is more administrative than judicial. 27 A.L.J. 724=1929 A. 781.

Secs. 5 and 6.—Ss. 5 and 6 bar a suit for a declaration against Government that the plaintiff is entitled to muafi rights in a certain mahal. 57 I.C. 156=12 L.W. 311 (P.C.). *See also* 1937 Pesh. 65. On these sections, *see also* 20 I.C. 508; 17 M.L.J. 139; 18 M. 187=5 M.L.J. 168; 1 Bom. 75. A person who wants a declaration that he is entitled to a share in a pension must apply to the Collector or Deputy Commissioner or other authorised officer under S. 5 of the Pensions Act and he cannot go to a Civil Court unless he obtains a certificate under S. 6 of the Act. 121 I.C. 417=1930 L. 795.

Sec. 6.—[*See also* Notes under S. 3, 4 and 5.] A Civil Court cannot take cognizance of a claim relating to a jaghir except upon a certificate of Collector or other officer. 1926 L. 333. Production of the Collector's certificate subsequent to the institution of the suit is not a sufficient compliance with the section. 1928 L. 713. S. 6 does not apply to a suit for a declaration that funeral expenses cannot be claimed to be paid out of income of a jaghir. 1922 L. 365. A suit to establish a right to collect Government revenue from the villages granted as endowment to a religious office is not maintainable in the absence of a certificate under S. 6 28 I.C. 934. If an application for grant of a certificate under S. 6 is rejected by the Collector, the proper procedure is to apply to the Commissioner for reversal of the Collector's order. But as the rules prescribe that a certificate can only be granted by the Financial Commissioner, it is not unreasonable to make an application direct to his Court. 20 Lah.L.T. 94. If a party to a dispute under the Pensions Act wishes the exceptional procedure of S. 6 to be followed, he must apply for the grant of a certificate under that section before and not after the matter has been the subject of final adjudication by the highest revenue authorities under S. 5 of the Act. In such cases, the jurisdiction of the Civil Courts is entirely barred by S. 4 of the Act, and the regular procedure for adjudication of disputes is that prescribed by S. 5. The revival of the jurisdiction of the Civil Courts provided by S. 6 on a certificate from the revenue authorities is clearly intended to be an exceptional alternative to the adjudication prescribed in S. 5, and after the parties have fought out their respective claims in the revenue forum up to the highest revenue authority it would not be correct to permit the whole matter to be reopened in the alternative forum of the Civil Courts. 20 Lah.L.T. 99. *See also* 20 Lah.L.T. 94. A voluntary grant was made by Government to a shrine for its maintenance but the grant was resumable by Government at its pleasure. A suit was brought for a declaration by a certain person of his right to the office of sajjadanashin of such shrine. *Held*, that the claim in the suit not being one for a pension or grant, no certificate was necessary as required by S. 6, Pensions Act. 1937 Pesh. 65. Saranjam inam—Suit to recover—Certificate of Collector—Failure to produce certificate—Appeal—Remand. 39 B. 352=28 I.C. 485. A suit relating to a share in an inam consisting of two-thirds of revenue is not cognizable without Collector's certificate. Where the plaintiff has not obtained the certificate, the hearing may be adjourned to enable him to produce it. 27 I.C.927=17 Bom.L.R. 153. *See also* 39 B. 352=28 I.C. 485; 1937 O.W.N. 1131=1937 Oudh 484. (Production of certificate subsequent to institution of suit even at the appellate stage will be sufficient under the section). A pension is ordinarily not attachable for sale in execution. 44 A. 697=1922 A. 429. A suit for a declaration that the plaintiff is entitled to get his name entered in place of the last manager of a Durga which is in receipt of a cash-allowance from the Government is not maintainable for two reasons: (1) the right of entering the names rests exclusively with the Collector, and none else; (2) the declaration entails a corresponding liability on the Government to pay and a suit to enforce it is barred by S. 6. 55 Bom. 119=32 Bom.L.R. 1420=1931 Bom. 144. A suit for a declaration of the plaintiff's rights to a share of the *toda giras haq* paid to the defendants by the Government is maintainable where the plaintiff has got a certificate from the Collector authorizing the suit in spite of S. 6 of the Pensions Act. The decree declaring that the plaintiff is entitled to a certain share in the cash allowance is one which does not affect the liability of the Government to pay; it only affects the plaintiff's right to share in the amount if and when Government pays it. 33 Bom.L.R. 783=1931 B. 473. In 1883 the predecessors-in-interest of the plaintiff had obtained a certificate from the Collector for instituting a suit against the defendant's predecessors and had got a decree. In 1931 the plaintiff instituted a suit

Pensions for lands held under grants in perpetuity.

7. Nothing in sections 4 and 6 applies to—

(1) any inam[1] of the class referred to in section 1 of Madras Act No. IV of 1862;

(2) pensions heretofore granted by Government in the territories respectively subject to the Lieutenant-Governors of Bengal and the North-Western Provinces either wholly or in part as an indemnity for loss sustained by the resumption by a Native Government of lands held under sanads purporting to confer a right in perpetuity. Such pensions shall not be liable to resumption on the death of the recipient, but every such pension shall be capable of alienation and descent, and may be sued for and recovered in the same manner as any other property.

III.—Mode of Payment.

Payment to be made by Collector or other authorised officer.

8. All pensions or grants by Government of money or land-revenue shall by paid by the Collector or the Deputy Commissioner or other authorized officer, subject to such rules as may, from time to time, be prescribed by the Chief controlling Revenue-authority.

Saving of rights of grantees of land revenue.

9. Nothing in sections 4 and 8 shall affect the right of a grantee of land-revenue, whose claim to such grant is admitted by Government, to recover such revenue from the persons liable to pay the same under any law for the time being in force for the recovery of the rent of land.

Commutation of pensions.

10. The [2][appropriate Government] may with the consent of the holder, order the whole or any part of his pension or grant of money or land-revenue to be commuted for a lump sum on such terms as may seem fit.

LEG. REF.

[1] *i.e.*, "Inams of the classes described in cl. (1), S. 2 (*m*), Regulation IV of 1831, which have been, or shall be, enfranchised by the Inam Commissioner and converted into freeholds in perpetuity, or into absolute freeholds in perpetuity." The classes so described are "hereditary or personal grants of money or of land-revenue, however denominated, conferred by the authority of the Governor in Council [or which, having been made by any Native Government, have been confirmed or continued by the British Government—Act XXXI of 1836] in consideration of services rendered to the State, or in lieu of resumed offices or privileges, or of Zemindaries or Palaiyams forfeited or held under attachment or management by the officers of Government, or as a *yaumia* or charitable allowance, or as a pension.

[2] Substituted by A.O. 1937.

NOTES.

against the defendant without a fresh certificate. *Held*, that the original certificate ceased to have any effect after the decision of that suit and that a fresh certificate was necessary for the institution of the second suit. 14 L. 48=1933 L. 336. Where it is found that the act of the Government in substituting a fixed annual sum in the place of a percentage of Government assessment granted to plaintiff's ancestor is *ultra vires* and invalid, the plaintiff cannot, in view of S. 6 of the Act, be entitled to an order for payment; he is only entitled to a declaration of his rights. 61 I.A. 190=58 B. 306=1934 P. C. 108=66 M.L.J. 614 (P.C.). *See also* 17 Lah. L.T. 17

DISMISSAL OF OFFICER WHO WAS ON INVALID PENSION—SUIT FOR DECLARATION OF WRONGFUL DISMISSAL AND FOR DAMAGES.—A Police Sub-Inspector was first discharged on an invalid pension but was afterwards dismissed, with the consequence of his pension being withdrawn for misconduct prior to discharge. He sued the Secretary of State for a declaration that he was not liable to removal after his retirement and for damages. *Held*, the dismissal could not be considered from the point of view of its having been a breach of contract with reference to S. 96-B (*i*) of the Government of India Act. The dismissal had rather to be viewed as part of the order by which he had been deprived of his pension. The damages prayed for, for the breach of contract set up, could only be for the loss of pension and the Sub-Inspector was debarred by the Pensions Act from bringing any suit that might affect his right to the pension. 57 M. 857=67 M.L.J. 123.

Sec. 7.—Cash allowance substituted for *muafi* grant of land by Mughal Emperor is not pension and is alienable property. 95 I.C. 208=24 A.L.J. 630=1926 A. 521.

Sec. 8.—S. 8 has been amended in its application to U.P. by U.P. Act XII of 1922. *See* 8 A.L.J. 692; 11 Bom.L.R. 1369.

Sec. 9.—*See* 10 A. 396; 1 B. 75; 6 Bom.L.R. 423.

IV.—Miscellaneous.

Exemption of pension from attachment.

11. No pension granted or continued by Government on political considerations, or on account of past services or present infirmities or as a compassionate allowance,

and no money due or to become due on account of any such pension or allowance,

shall be liable to seizure, attachment or sequestration by process of any Court in British India, at the instance of a creditor, for any demand against the pensioner, or in satisfaction of a decree or order of any such Court.

[1] [This section applies in British India also to pensions granted or continued, after the separation of Burma from India, by the Government of Burma.]

12. All assignments, agreements, orders, sales and securities of every kind

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[7]LEG. REF.

[8]Inserted by A.O., 1937.

NOTES.

Sec. 11.—*See* too S. 60, Cl. (*g*) of the Code of Civil Procedure, 1908 (Act V of 1908). S. 11 is unqualified and must be strictly construed in favour of the pensioner. On the insolvency of a pensioner, therefore, the pension drawn by him for past services is not property which is available for distribution among his creditors under S. 28 (5) of the Provincial Insolvency Act; and the Insolvency Court has no power to pass an order directing the insolvent to pay to the Official Receiver any part of his pensions. 164 I.C. 747=40 C.W.N. 142. The intention behind the provisions of S. 11 is applicable equally to the commuted portion as well as to the uncommuted portion of the pension, and the language of S. 11 does not exclude from its protection the money that is due under a commutation order commuting a part of the pension. The commuted portion would be "money due or to become due on account of pension," and therefore the commuted portion of the pension due to a retired Government servant is not liable to attachment at the instance of his creditors in view of S. 11. 52 L.W. 719=1941 Mad. 207=(1940) 2 M.L.J. 782. The term 'pension' as used in the Pensions Act implies 'periodical payments of money to the pensioner.' A jaghir cannot be held to be pension within the meaning of the Pensions Act. (1931 P.C. 160, Rel. on.) I.L.R. (1941) Lah. 564=1940 Lah. 492. For the purposes of S. 11, a grant of land revenue is not a pension and is, therefore, liable to be attached in execution of a decree. 54 I. C. 331=11 L.W. 398. An assignment of revenue for services rendered was held to amount to a pension within the meaning of S. 11 and therefore not transferable under S. 12 of the Act. 1930 A. 681. In the case of grant of land revenue in a *jaghir* the property is not exempt from attachment either under S. 11 of the Pensions Act or under S. 60, C. P. Code. 137 I.C. 799=1932 M. 417. A pension may take the form of an assignment of land revenue such as a *jaghir*. Whether or no particular assignment of land revenue is a pension depends upon the circumstances of the particular case. 1930 L. 904. *See also* I.L.R. (1941) Lah. 564=1940 Lah. 492. *Held*, that a pattidari *jaghir* in the Ambala District cannot be regarded as a pension within the meaning of S. 11 and the *jaghir* income is liable to be attached by the decree-holder. History of such *jaghirs* traced. 31 P.L.R. 538=1930 L. 816. Endowment by Mughal Emperor—Subsequent management by the British—Allowance to descendants not assignable. 44 A. 354=20 A.L.J. 172. Cash allowance substituted for *muafi* grant of land made by the Mughal Emperor is not "pension," and is alienable property. *See* 95 I.C. 208=24 A.L.J. 630=1926 A. 521. A political treaty pension cannot be attached in execution of decree. 62 I.C. 273. A *malikana* is in the nature of pension and so cannot be attached in execution. 8 A.L.J. 126=13 I.C. 194. A *jaghir* granted on political considerations is exempt from attachment whether or not it was granted for services rendered to the British Government. 61 I.C. 895 (L.). *See also* 1940 Lah. 492. S. 11 is wide enough to include cases where the property is to be sold in execution of a mortgage decree and cannot be limited to cases of simple money decrees. It draws no distinction between a case where the property is directed to be sold by a decree or is directed to be sold in pursuance of an attachment made by the order of a Court. 1935 A. 678. Muafi rights cannot be regarded as a "Pension" for the purposes of Ss. 11 and 12. 1936 A.L.J. 161=1936 A. 298. An assignment of land revenue is not a 'pension' within the meaning of Ss. 11 and 12. 1936 A.L.J. 1281=1936 All. 666.

Secs. 11 and 12.—There is nothing in the Act to exclude allowances granted by the British Government to political prisoners from its operation in cases where the British Government by some arrangement with a foreign State collects the allowance which it fixes from the foreign State. Where a Native Chief assigned his political pension to his debtor, *held*, that the transfer is void under Ss. 11 and 12 of the Act. 50 M. 711=1927 M. 604=52 M.L.J. 622.

Sec. 12.—Act has not a retrospective effect and no alienations made before the Pensions Act came into force are invalid under S. 12. 26 I.C. 743. *See also* 6 A. 630; 7 A. 886; 2 M.L.T. 33; 12 P.L.R. (1900) 357. Each case of assignment of land revenue must be considered in terms of the original grant and of subsequent confirments. Where the original grant was to a certain person and his heirs in prepetuity and there is nothing in this grant which indicates that the grant was not transferable, the grant is transferable and is not barred by S. 12. 164 I.C. 1066=1936 A. 666. The plaintiff's predecessor sued the defendant's predecessor for

Assignments, etc., in anticipation of pension to be void.

made by the person entitled to any pension, pay or allowance mentioned in section 11, in respect of any money not payable at or before the making thereof, on account of any such pension, pay or allowance, or for giving or assigning any future interest therein, are null and void.

Reward to informers.

13. Whoever proves to the satisfaction of the [1][appropriate Government] that any pension is fraudulently or unduly received by the person enjoying the benefit thereof shall be entitled to a reward equivalen the amount of such pension for the period of six months.

Power to make rules.

14. [2][In each Province] the Chief Controlling Revenue authority may, with the consent of the [1][appropriate Government], from time to time make rules[3] consistent with this Act respecting all or any of the following matters :—

(1) the place and times at which, and the person to whom, any pension shall be paid ;

(2) inquiries into the identity of claimants ;

(3) records to be kept on the subject of pensions ;

(4) transmission of such records ;

(5) correction of such records ;

(6) delivery of certificates to pensioners ;

LEG. REF.

[1]Substituted by A O., 1937.

[2]Inserted by A.O. 1937.

[3]For notifications making rules under the powers conferred by this section in Bombay—*See* B. R. & O. ; Madras—*See* M. R. & O. ; United Provinces of Agra and Oudh—*See* North-Western Provinces and Oudh List of Local Rules and Orders, Ed., 1894, p. 43 ; Central Provinces—*See* C.P.R. & O.

NOTES.

a declaration of his right to a share of a political pension. Permission was obtained by him under S. 6 of the Pensions Act from the Collector for this suit to be heard by the Civil Court. The suit terminated by a decree in terms of a compromise entered into by the parties. Under the compromise it was agreed that the plaintiff's predecessor and his repre sentatives were entitled to get a monthly allowance generation after generation from the defendant's predecessor and his representatives, in lieu of the plaintiff's predecessor abandoning his claim not only to his alleged share in the political pension but also to his share in the property inherited by the defendant's predecessor. In a suit by the plaintiffs against the defendants for arrears of the monthly allowance, *held*, by *Bennet, J.*, that the particular part of the compromise by which the plaintiff's predecessor relinquished all his right to the pension would be null and void in view of the provisions of S. 12 of the Pensions Act, but that the compromise would still be a valid compromise as the consideration of relinquishment of right to the property was a perfectly good consideration, and that the compromise was binding on the defendants to the extent of the property in their hands left by their predecessor. *Held*, by *Sulaiman, C. J.*, that the compromise decree was not hit by the provisions of S. 12 at all, as an abandonment of the claim to have the question of right to the pension tried by the Court would not in itself amount to an assignment of any share in the political pension, but merely the withdrawal of the suit in lieu of the consideration offered, and that the offer made by the plaintiff's predecessor to abandon his claim to the property as well as to the pension to which he might have been entitled when made in a pending suit which had been instituted after obtaining the certificate of the Collector and which was in every way cognizable by the Civil Court, was not unlawful or invalid, and that the compromise decree was binding on the defendants to the extent of the property devolved on them. 1935 A.L.J. 910=1935 A. 862. [*See also* cases under S. 11.] A deposit of persion papers with a creditor by way of security for a loan is one of the class of transactions which S. 12 of the Act was enacted to prevent. I.L.R. (1939) 2 Cal. 434=43 C.W.N. 1194=1940 Cal. 192.

Sec. 14.—S. 14 has been amended in its application to U.P. by U.P. Act XII of 1922. The Board of Revenue is not competent to revoke or cancel a certificate issued by a Collector under the Pensions Act. 18 I.C. 353=25 M.L.J. 155. The rules issued by the Government and printed at page 125 of the Board's Standing Orders cannot be deemed to be framed under S. 14, and are *ultra vir s.* 25 M.L.J 155. The words '*branch*' and '*family*' used in R. 34 of the rules framed under S. 14 of the Act, which governs the appointment of Dastakis, cannot have a different meaning from that given to them in Proviso (1) to R. 33. R. 34 (1) only permits the daughters of a Dastaki to be appointed in succession to him on the failure of (*a*) male members in the branch of the family to which the first Dastaki belonged, (*b*) the widow or mother of last male Dastaki in certain circumstances, or (*c*) a male member descended from divided brothers or collaterals of the first Dastaki. 1941 N.L.J. 154.

(7) registers of such certificates ;

(8) reference to the Civil Court, under section 6, of persons claiming a right of succession to, or participation in, pensions or grants of money or land-revenue payable by Government ;

and generally for the guidance of officers under this Act.

All such rules shall be published in the Official Gazette, and shall thereupon have the force of law.

SCHEDULE—[*Repealed by Act I of* 1938].

PLEDGING OF CHILDREN'S LABOUR ACT (II OF 1933)

See CHILDREN (PLEADING OF LABOUR) ACT, Vol. I, p. 347).

THE INDIAN PORTS ACT (XV OF 1908).[1]

Year.	Vol.	Short title.	Amendment
1908	XV	The Indian Ports Act, 1908	Supptd. Ben. Act III of 1867. Amended, Act IV of 1911; Act VI of 1916; Act XXXVIII of 1920; Act XV of 1922; Act XXXIX 1923; Act IX of 1925; Act XXXVI of 1925; Act XI of 1929; Act XI of 1931 and Act XXVI of 1938. (*See also* Act X of 1931). Rep. in part and Amended, Act XXXVI of 1925. Amended in its application to Madras by Madras Act I of 1926.

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LEG. REF.

[1] For Statement of Objects and Reasons, see *Gazette of India*, 1908, Pt. V, p. 309; for Report of Select Committee, see *ibid.*, 1908, Pt. V, p. 359 and for Proceedings in Council, see *ibid.*, 1908, Pt. VI, pp. 146, 154 and 182.

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THE INDIAN PORTS ACTS (XV OF 1908).

[18*th December,* 1908.

An Act to consolidate the Enactments relating to Ports and Port-charges.

WHEREAS it is expedient to consolidate the enactments relating to Ports and Port-charges; It is hereby enacted as follows;—

CHAPTER I.

PRELIMINARY.

Title and extent.

1. (1) This Act may be called THE INDIAN PORTS ACT, 1908.

(2) it shall extend, save as otherwise appears from its subject or context,—

(*a*) to the ports mentioned in the first schedule, and to such parts of the navigable rivers and channels leading to such ports respectively as have been declared to be subject to Act XXII of 1855 (*for the Regulation of Ports and Port-dues*) or to the Indian Ports Act, 1875, or to the Indian Ports Act, 1889;

(*b*) to the other ports or parts of navigable rivers or channels to which the [1][*] Government, in exercise of the power hereinafter conferred, extends this Act.

LEG. REF. A.O., 1937.

[1] The word "Local" has been omitted by

(3) But nothing in section 31 or section 32 shall apply to any port, river or channel to which the section has not been specially extended by the [1][* *] Government.

Savings.

2. Nothing in this Act shall—

(i) apply to any vessel belonging to, or in the service of, His Majesty [2][* *] or to any vessel of war belonging to any Foreign Prince or State, or

(ii) deprive any person of any right of property or other private right, except as hereinafter expressly provided, or

(iii) affect any law or rule relating to the customs or any order or direction lawfully made or given pursuant thereto.

Definitions.

3. In this Act, unless there is anything repugnant in the subject or context,—

(1) "Magistrate" means a person exercising powers under the Code of Criminal Procedure, 1898, not less than those of a Magistrate of the second class, and includes, in the towns of Calcutta, Madras and Bombay, a Presidency Magistrate:

(2) "master", when used in relation to any vessel, means, subject to the provisions of any other enactment for the time being in force, any person (except a pilot or harbour master) having for the time being the charge or control of the vessel:

(3) "pilot" means a person for the time being authorized by the [1][* *] Government to pilot vessels:

(4) "port" includes also any part of a river or channel in which this Act is for the time being in force:

(5) "port-officer" is synonymous with master-attendant:

(6) "ton" means a ton as determined or determinable by the rules for the time being in force for regulating the measurement of the net tonnage of British ships: and

(7) "vessel" includes anything made for the conveyance by water of human beings or of property:

[3][(8) 'Major port' means any port which the Central Government may by notification in the Official Gazette declare, or may under any law for the time being in force have declared, to be a major port:

(9) 'Government,' as respects major ports, for all purposes, and, as respects other ports, for the purposes of making rules under clause (*b*) of section 6 (1) and of the appointment and control of port health-officers under section 17, means the Central Government, and save as aforesaid, means the Provincial Government.]

CHAPTER II.

POWERS OF THE [1][* *] GOVERNMENT.

Power to extend or withdraw the Act or certain portions thereof.

4. (1) [4][* * *] The [1][* *] Government may, by notification in the Official Gazette,—

(*a*) extend this Act to any port in which this Act is not in force or to any part of any navigable river or channel which leads to a port and in which this Act is not in force;

(*b*) specially extend the provisions of section 31 or section 32 to any port to which they have not been so extended;

LEG. REF.

[1] Omitted by A.O., 1937.

[2] Words "or the Government of India" omitted by A. O., 1937.

[3] Added by A.O., 1937.

[4] The words "With the previous sanction of the Governor-General in Council" were omitted by sec. 2 of the Indian Ports (Amendment) Act, 1916 (VI of 1916).

(*c*) [1]withdraw this Act or section 31 or section 32 from any port or any part thereof in which it is for the time being in force.

(2) A notification under clause (*a*) or clause (*b*) of sub-section (1) shall define the limits of the area to which it refers.

(3) Limits defined under sub-section (2) may include any piers, jetties, landing-places, wharves, quays, docks and other works made on behalf of the public for convenience of traffic, for safety of vessels, or for the improvement, maintenance or good government of the port and its approaches, whether within or without high-water-mark, and, subject to any rights of private property therein, any portion of the shore or bank within fifty yards of high-water-mark.

(4) In sub-section (3) the expression "high-water-mark" means the highest point reached by ordinary spring tides at any season of the year.

Alteration of limits of ports.

5. (1) The [2][* *] Government may, [3][* * *] subject to any rights of private property, alter the limits of any port in which this Act is in force.

(2) When the [2][*] Government alters the limits of a port under sub-section (1), it shall declare or describe, by notification in the Official Gazette, and by such other means, if any, as it thinks fit, the precise extent of such limits.

Power to make port-rules.

6. (1) The [2][* *] Government may, in addition to any [4]rules which it may make under any other enactment for the time being in force, make such rules, consistent with this Act, as it thinks necessary for any of the following purposes, namely:—

[5](*a*) for regulating the time and hours at and during which, the speed at which, and the manner and conditions in and on which, vessnels generally or vessels of any class defined in the rules, may enter, leave or be moved in any port subject to this Act;

(*b*) for regulating the berths, stations and anchorages to be occupied by vessels in any such port;

(*c*) for striking the yards and top masts, and for rigging-in the booms and yards, of vessels in any such port, and for swinging or taking in davits, boats and other things projecting from such vessels;

(*d*) for the removal or proper hanging or placing of anchors, spars and other things being in or attached to vessels in any such port;

(*e*) for regulating vessels whilst taking in or discharging passengers, ballast or cargo, or any particular kind of cargo, in any such port, and the stations to be occupied by vessels whilst so engaged;

[6][(*ee*) for regulating the manner in which oil or water mixed with oil shall be discharged in any such port and for the disposal of the same;]

[7][(*eee*) for regulating the bunkering of vessels with liquid fuel in any such port and the description of barges, pipe lines or tank vehicles to be employed in such bunkering;]

LEG. REF.

[1] For instance of such a notification, see *Fort St. George Gazette*, 1909, Pt. I, p. 463.

[2] The word "Local" omitted by A. O., 1937.

[3] The words "with the previous sanction of the Governor-General in Council and" were omitted by sec. 3 of the Indian Ports (Amendment) Act, 1916 (VI of 1916).

[4] For rules for the purpose of minimising the risk to shipping in Bombay Harbour owing to the transportation of dangerous petroleum within the port of Bombay, see *Bombay Government Gazette*, 1909, Pt. I, p. 1711.

For rules for the port of Aden, see *Bombay Government Gazette*, 1911, Pt. I, p. 7416.

[5] For rules under clause (*a*) and (*e*) as to the entry, movement and loading and unloading of vessels in the port of Rangoon, see *Burma Gazette*, 1911, Pt. I, p. 147.

[6] Inserted by sec. 2 of the Indian Ports (Amendment) Act, 1923 (XXXIX of 1923).

[7] Inserted by sec. 2 of the Indian Ports (Amendment) Act, 1925 (IX of 1925).

NOTES.

Sec. 6 (1) (a).—As to legality of Karachi Port Rules, *see* 15 L.R. 201.

(*f*) for keeping free passages of such width as may be deemed necessary within any such port, and along or near to the piers, jetties, landing places, wharves, quays, docks, moorings and other works in or adjoining to the same, and for marking out the spaces so to be kept free;

(*g*) for regulating the anchoring, fastening, mooring and unmooring of vessels in any such port;

(*h*) for regulating the moving and warping of all vessels within any such port and the use of warps therein;

(*i*) for regulating the use of the mooring buoys, chains and other moorings in any such port;

(*j*) for fixing the rates to be paid for the use of such moorings when belonging to the [1][Crown] or of any boat, hawser, or other thing belonging to the [1][Crown];

[2][(*jj*) for regulating the use of piers, jetties, landing places, wharves, quays, warehouses and sheds when belonging to the [1][Crown] and for fixing the rates to be paid for the use of the same;]

(*k*) for licensing and regulating catamarans plying for hire, and flats and cargo, passenger and other boats plying, whether for hire or not, and whether regularly or only occasionally, in or partly within and partly without any such port [3][and for licensing and regulating the crews of any such vessels] and for determining the quantity of cargo or number of passengers [3][or of the crew] to be carried by any such vessels [3][and may by such rules provide for the fees payable in respect of any such license, and in the case of passenger vessels plying for hire, for the rates of hire to be charged and the conditions under which such vessels shall be compelled to ply for hire, and further for the conditions under which any license may be revoked];

(*l*) for regulating the use of fires and lights within any such port;

(*m*) for enforcing and regulating the use of signals or signal lights by vessels by day or by night in any such port;

(*n*) for regulating the number of the crew which must be on board any vessel afloat within the limits of any such port;

(*o*) for regulating the employment of persons engaged in cleaning or painting vessels, or in working in the bilges, boilers or double bottoms of vessels in any such port;

[4][(*p*) [5][* * * *]] for the prevention of danger arising to the public health by the introduction and the spread of any infectious or contagious disease from vessels arriving at, or being in, any such port, and for the prevention of the conveyance of infection or contagion by means of any vessel sailing from any such port, and in particular and without prejudice to the generality of this provision, for—

(i) the signals to be hoisted and the places of anchorage to be taken up by such vessels having any case, or suspected case of any infectious or contagious disease on board, or arriving at such port from a port in which, or in the neighbourhood of which, there is believed to be, or to have been at the time when the vessel left such port, any infectious or contagious disease;

LEG. REF.

[1] For the word "Government" the word "Crown" has been substituted by A.O., 1937.

[2] Inserted by sec. 4 (1) of the Indian Ports (Amendment) Act, 1916 (VI of 1916).

[3] Inserted by sec. 4 (2), Act VI of 1916.

[4] Clause (*p*) was substituted by sec. 2 of the Indian Ports (Amendment) Act, 1911 (IV of 1911).

[5] Words "subject to the control of the Governor-General in Council" omitted by A.O., 1937.

NOTES.

Sec. 6 (1) (k).—Collector has no power to revoke licence. 4 Bom.L.R. 773. As to validity of order making it obligatory on boat owner to ply for hire, *see* 17 M. 397=1 Weir 859. As to causing impediment to service of boat, *see* 1 Weir 860. Disobedience of order of conservator of boats. 17 M. 118=1 Weir 857=4 M.L.J. 38.

(ii) the medical inspection of such vessels and of persons on board such vessels;

(iii) the questions to be answered and the information to be supplied by masters, pilots and other persons on board such veessels;

(iv) the detention of such vessels and of persons on board such vessels;

(v) the duties to be performed in cases of any such disease by masters, pilots and other persons on board such vessels;

(vi) the removal to hospital or other place approved by the health officer and the detention therein of any person from any such vessel who is suffering or suspected to be suffering from any such disease;

(vii) the cleansing, ventilation and disinfection of such vessels or any part thereof and of any articles therein likely to retain infection or contagion, and the destruction of rats or other vermin in such vessels; and

(viii) the disposal of the dead on such vessels; and]

(*q*) for securing the protection from heat of the officers and crew of vessels in any such port by requiring the owner or master of any such vessel—

(i) to provide curtains and double awnings for screening from the sun's rays such portions of the deck as are occupied by, or are situated immediately above, the quarters of the officers and crews;

(ii) to erect windsails so far as the existing portholes or apertures in the deck admit of their being used for ventilating the quarters of the officers and crew;

(iii) when the deck is made of iron and not wood-sheathed, to cover with wooden planks or other suitable non-conducting material such portions of the deck as are situated immediately above the quarters of the officers and crew;

(iv) when the quarters used by the crew and the galley are separated by an iron bulk-head only, to furnish a temporary screen of some suitable non-conducting material between such quarters and the galley.

(1-A) [*Omitted by Act XXVI of* 1938].

(2) The power to make rules under sub-section (1) [1][* * *] is subject to the condition of the rules being made after previous publication:

Provided that nothing in this sub-section shall be construed to affect the validity of any rule in force immediately before the commencement of the Indian Ports Act, 1889, and continued by section 2, sub-section (2), of that Act.

(3) If any person disobeys any rule made under clause (*p*) of sub-section (1), he shall be punishable for every such offence with fine which may extend to one thousand rupees.

(4) If a master fails wholly or in part to do any act prescribed by any rule made under clause (*p*) of sub-section (1), the health-officer shall cause such act to be done, and the reasonable expenses incurred in doing such act shall be recoverable by him from such master.

CHAPTER III.

PORT-OFFICIALS AND THEIR POWERS AND DUTIES.

Appointment of conservator.

7. (1) The [2][* *] Government shall appoint some officer or body of persons to be conservator of every port subject to this Act.

(2) Subject to any direction by the [2][* *] Government to the contrary,—

(*a*) in ports where there is a port-officer, the port-officer shall be the conservator;

LEG. REF.

[1] Omitted by Act XXVI of 1938.

[2] The word "Local" omitted by A.O., 1937.

(*b*) in ports where there is no port-officer, but where there is a harbour-master, the harbour-master shall be the conservator.

(3) Where the harbour-master is not conservator, the harbour-master and his assistants shall be subordinate to, and subject to the control of, the conservator.

(4) The conservator shall be subject to the control of the [1][* *] Government, or of any intermediate authority which [2][the] Government may appoint.

Power of conservator to give and enforce directions for certain specified purposes.

8. (1) The conservator of any port subject to this Act may, with respect to any vessel within the port, give directions for carrying into effect any rule for the time being in force therein under section 6.

(2) If any person wilfully and without lawful excuse refuses or neglects to obey any lawful direction of the conservator, after notice thereof has been given to him, he shall, for every such offence, be punishable with fine which may extend to one hundred rupees, and in the case of a continuing offence with a further fine which may extend to one hundred rupees for every day during which, after such notice as aforesaid, he is proved to have wilfully and without lawful excuse continued to disobey the direction.

(3) In case of such refusal or neglect, the conservator may do, or cause to be done, all acts necessary for the purpose of carrying the direction into execution, and may hire and employ proper persons for that purpose, and all reasonable expenses incurred in doing such acts shall be recoverable by him from the person so refusing or neglecting to obey the direction.

Power to cut warps and ropes.

9. The conservator of any such port may, in case of urgent necessity, cut, or cause to be cut, any warp, rope, cable or hawser endangering the safety of any vessel in the port or at or near to the entrance thereof.

Removal of obstructions within limits of port.

10. (1) The conservator may remove, or cause to be removed, any timber, raft or other thing, floating or being in any part of any such port, which in his opinion obstructs or impedes the free navigation thereof or the lawful use of any pier, jetty, landing-place, wharf, quay, dock, mooring or other work on any part of the shore or bank which has been declared to be within the limits of the port and is not private property.

(2) The owner of any such timber, raft or other thing shall be liable to pay the reasonable expenses of the removal thereof, and if such owner or any other person has without lawful excuse caused any such obstruction or impediment, or causes any public nuisance affecting or likely to affect such free navigation or lawful use, he shall also be punishable with fine which may extend to one hundred rupees.

(3) The conservator or any Magistrate having jurisdiction over the offence may cause any such nuisance to be abated.

Recovery of expenses of removal.

11. If the owner of any such timber, raft or other thing, or the person who has caused any such obstruction, impediment or public nuisance as is mentioned in the last foregoing section, neglects to pay the reasonable expenses incurred in the removal thereof, within one week after demand, or within fourteen days after such removal has been notified in the Official Gazette or in such other manner as the [1][* *] Government by general or special order directs, the conservator may cause such timber, raft or other thing, or the materials of any

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LEG. REF.

[1] The word "Local" omitted by A.O., 1937.

[2] Substituted for word 'that' by A.O., 1937.

NOTES.

Sec. 8.—*See* 17 M. 118=1 Weir 857=4 M.L.J. 38.

public nuisance so removed, or so much thereof as may be necessary, to be sold by public auction;

and may retain all the expenses of such removal and sale out of the proceeds of the sale, and shall pay the surplus of such proceeds, or deliver so much of the thing or materials as may remain unsold, to the person entitled to receive the same;

and, if no such person appears, shall cause the same to be kept and deposited in such manner as the [1][* *] Government directs;

and may, if necessary, from time to time, realize the expenses of keeping the same, together with the expenses of sale, by a further sale of so much of the thing or materials as may remain unsold.

Removal of lawful obstructions.

12. (1) If any obstruction or impediment to the navigation of any port subject to this Act has been lawfully made, or has become lawful by reason of the long continuance of such obstruction or impediment, or otherwise the conservator shall report the same for the information of the [1][* *] Government, and shall, with the sanction of [the][2] Government, cause the same to be removed or altered, making reasonable compensation to the person suffering damage by such removal or alteration.

(2) Any dispute arising concerning such compensation shall be determined according to the law relating to like disputes in the case of land required for public purposes.

Fouling of Government moorings.

13. (1) If any vessel hooks or gets foul of any of the buoys or moorings laid down by or by the authority of the [1][* *] Government in any such port, the master of such vessel shall not, nor shall any other person, except in case of emergency, lift the buoy or mooring for the purpose of unhooking or getting clear from the same without the assistance of the conservator;

and the conservator, immediately on receiving notice of such accident, shall assist and superintend the clearing of such vessel;

and the master of such vessel shall, upon demand, pay such reasonable expenses as may be incurred in clearing the same.

(2) Any master or other person offending against the provisions of this section shall, for every such offence, be punishable with fine which may extend to one hundred rupees.

Raising or removal of wreck impeding navigation within limits of port.

14. (1) If any vessel is wrecked, stranded or sunk in any such port so as to impede, or be likely to impede, the navigation thereof, the conservator may cause the vessel to be raised, removed or destroyed.

(2) If any property recovered by a conservator acting under sub-section (1) is unclaimed or the person claiming it fails to pay the reasonable expenses incurred by the conservator under that sub-section and a further sum of twenty per cent. of the amount of such expenses, the conservator may sell the property by public auction, if the property is of a perishable nature, forthwith, and, if it is not of a perishable nature, at any time not less than six months after the recovery thereof.

(3) The expenses and further sum aforesaid shall be payable to the conservator out of the sale-proceeds of the property, and the balance shall be paid to the person entitled to the property recovered, or, if no such person appears and claims the balance, shall be held in deposit for payment, without interest, to any person thereafter establishing his right thereto:

LEG. REF.

[1] The word 'Local' omitted by A.O., 1937.

[2] Substituted for word 'that' by A.O., 1937.

Provided that the person makes his claim within three years from the date of the sale.

Power to board vessels and enter buildings.

15. (1) The conservator or any of his assistants may, whenever he suspects that any offence against this Act has been, or is about to be, committed, or whenever it is necessary for him so to do in the performance of any duty imposed upon him by this Act,

and the person appointed under this Act to receive any port-dues, fees or other charges, payable in respect of any vessel, may, whenever it is necessary for him so to do in the performance of any duty imposed upon him by this Act;

either alone or with any other person, board any vessel, or enter any building or place, within the limits of any port subject to this Act.

(2) If the master of the vessel, or any person in possession or occupation of the building or place, without lawful excuse, refuses to allow any such person as is mentioned in sub-section (1) to board or enter such vessel, building or place in the performance of any duty imposed upon him by this Act, he shall for every such offence be punishable with fine which may extend to two hundred rupees.

Power to require crews to prevent or extinguish fire.

16. (1) For the purpose of preventing or extinguishing fire in any port subject to this Act, the conservator or port-officer may require the master of any vessel within the port to place at his disposal such number as he requires, not exceeding three-fourths, of the crew then under the orders of such master.

(2) Any master refusing or neglecting to comply with such requisition shall be punishable with fine which may extend to five hundred rupees, and any seaman then under his orders who, after being directed by the master to obey the orders of the conservator or port-officer for the purpose aforesaid, refuses to obey such orders, shall be punishable with fine which may extend to twenty-five rupees.

Appointment and powers of health-officer.

17. (1) The [1][* *] Government may appoint at any port subject to this Act an officer to be called the health-officer.

(2) A health-officer shall, subject to the control of the [1][* *] Government, have the following powers, within the limits of the port for which he is appointed, namely:—

(*a*) with respect to any vessel, the powers conferred on a shipping-master by the Indian Merchant Shipping Act, 1859,[2] section 71;

(*b*) power to enter on board any vessel and medically examine all or any of the seamen or apprentices on board the vessel;

(*c*) power to require and enforce the production of the log-book and any other books, papers or documents which he thinks necessary for the purpose of enquiring into the health and medical condition of the person on board the vessel;

(*d*) power to call before him and question for any such purpose all or any of those persons and to require true answers to any questions which he thinks fit to ask;

(*e*) power to require any person so questioned to make and subscribe a declaration of the truth of the statements made by him.

Indemnity of Government against act or default of port official or pilot.

18. The Goverment shall not be responsible for any act or default of any conservator, port-officer or harbour-master, of any port subject to this Act, or of any deputy or assistant of any of the authorities aforesaid, or of any person acting under the control or direction of any such

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LEG. REF.

[1] The word 'Local' omitted by A. O., 1937.

[2] *See* now sec. 91 of the Indian Merchant Shipping Act, 1923 (XXI of 1923).

authority, deputy or assistant, or for any act or default of any pilot, or for any damage sustained by any vessel in consequence of any defect in any of the moorings, hawsers or other things belonging to the Government which may be used by the vessel:

Provided that nothing in this section shall protect the [1][Crown] from a suit in respect of any act done by or under the express order or sanction of the Government.

CHAPTER IV.

RULES FOR THE SAFETY OF SHIPPING AND THE CONSERVATION OF PORTS.

General Rules.

Injuring buoys, beacons and moorings.

19. (1) No person shall, without lawful excuse lift, injure, loosen or set adrift any buoy, beacon or mooring fixed or laid down by, or by the authority of, the [2][*] Government in any port subject to this Act.

(2) If any person offends against the provisions of this section, he shall for every such offence be liable, in addition to the payment of the amount of damage done, to fine which may extend to two thousand rupees, or to imprisonment for a term which may extend to two years.

Wilfully loosening vessel from moorings.

20. If any person wilfully and without lawful excuse loosens or removes from her moorings any vessel within any such port without leave or authority from the owner or master of the vessel, he shall, for every such offence, be punishable with fine which may extend to two hundred rupees, or with imprisonment for a term which may extend to six months.

Improperly discharging ballast.

21. (1) No ballast or rubbish, and no other thing likely to form a bank or shoal or to be detrimental to navigation, shall, without lawful excuse, be cast or thrown into any such port or into or upon any place on shore from which the same is liable to be washed into any such port, either by ordinary or high tides, or by storms or land-floods [3][and no oil or water mixed with oil shall be discharged in or into any such port, to which any rules made under clause (*ee*) of sub-section (1) of section 6 apply otherwise than in accordance with such rules.]

(2) Any person who by himself or another so casts or throws any ballast or rubbish or any such other thing [3][or so discharges any oil or water mixed with oil], and the master of any vessel from which the same is so cast, [4][thrown or discharged], shall be punishable with fine which may extend to five hundred rupees, and shall pay any reasonable expenses which may be incurred in removing the same.

(3) If, after receiving notice from the conservator of the port to desist from so casting or throwing any ballast or rubbish or such other thing [3][or from so discharging any oil or water mixed with oil], any master continues so to cast, [5][throw or discharge the same], he shall also be liable to simple imprisonment for a term which may extend to two months.

(4) Nothing in this section applies to any case in which the ballast or rubbish or such other thing is cast or thrown into [6][or the oil or water mixed with oil is discharged in or into] any such port with the consent in writing of the conser-

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LEG. REF.

[1] Substituted for the words 'Secretary of State for India in Council' by A. O., 1937.

[2] The word "Local" omitted by A. O., 1937.

[3] Inserted by sec. 3 of the Indian Ports (Amendment) Act, 1923 (XXXIX of 1923).

[4] These words were substituted for the words "or thrown" by sec. 3, Act XXXIX of 1923.

[5] These words were substituted by sec. 3 of the Indian Ports (Amendment) Act, 1923 (XXXIX of 1923).

[6] Inserted by sec. 3, Act XXXIX of 1923.

vator, or within any limits within which such act may be authorized by the [1][*] Government.

Graving vessel within prohibited limits.

22. If any person graves, breams or smokes any vessel in any such port contrary to the directions of the conservator, or at any time or within any limits at or within which such act is prohibited by the [1][*] Government, he and the master of the vessel shall for every such offence be punishable with fine which may extend to five hundred rupees each.

Boiling pitch on board vessel within prohibited limits.

23. If any person boils or heats any pitch, tar, resin, dammer, turpentine, oil, or other such combustible matter on board any vessel within any such port, or at any place within its limits where such act is prohibited by the [1][*] Government, or contrary to the directions of the conservator, he and the master of the vessel shall for every such offence be punishable with fine which may extend to two hundred rupees each.

Drawing spirits by unprotected artificial light.

24. If any person, by an unprotected artificial light, draws off spirits on board any vessel within any port subject to this Act, he and the master of the vessel shall for every such offence be punishable with fine which may extend two hundred rupees each.

Warping.

25. (1) Every master of a vessel in any port subject to this Act shall, when required so to do by the conservator, permit warps or hawsers to be made fast to the vessel for the purpose of warping any other vessel in the port, and shall not allow any such warp or hawser to be let go until required so to do.

(2) A master offending against sub-section (1) shall be punishable for every such offence with fine which may extend to two hundred rupees.

Leaving out warp or hawser after sunset.

26. (1) A master of a vessel shall not cause or suffer any warp or hawser attached to his vessel to be left out in any port subject to this Act after sunset in such a manner as to endanger the safety of any other vessel navigating in the port.

(2) A master offending against sub-section (1) shall be punishable for every such offence with fine which may extend to two hundred rupees.

Discharge of fire-arms in port.

27. If any person, without lawful excuse, discharges any fire-arm in any port subject to this Act, or on or from any pier, landing-place, wharf or quay thereof, except a gun loaded only with gunpowder for the purpose of making a signal of distress, or for such other purpose as may be allowed by the [1][*] Government, he shall for every such offence be punishable with fine which may extend to fifty rupees.

Penalty on master omitting to take order to extinguish fire.

28. If the master of any vessel in which fire takes place, while lying in any such port, wilfully omits to take order to extinguish the fire or obstructs the conservator or the port-officer, or any person acting under the authority of the conservator or port-officer, in extinguishing or attempting to extinguish the fire, he shall be punishable with imprisonment which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

LEG. REF.

[1] The word "Local" omited by A. O., 1937.

NOTES.

Sec. 22.—Master, when liable for servant's act. *See* 9 Cal. 849.

Unauthorized person not to search for lost stores.

29. (1) No person, without the permission of the conservator, shall, in any port subject to this Act, creep or sweep for anchors, cables or other stores lost or supposed to be lost therein.

(2) If any person offends against the provisions of sub-section (1), he shall be punishable with fine which may extend to one hundred rupees.

Removing stones or injuring shores of port prohibited.

30. (1) No person without the permission of the conservator shall in any port subject to this Act remove or carry away any rock, stones, shingle, gravel, sand or soil or any artificial protection from any part of the bank or shore of the port;

and no person shall sink or bury in any part of such bank or shore, whether the same is public or private property, any mooring-post, anchor or any other thing, or do any other thing which is likely to injure or to be used so as to injure such bank or shore, except with the permission of the conservator, and with the aid or under the inspection of such person, if any, as the conservator may appoint to take part in or overlook the performance of such work.

(2) If any person offends against sub-section (1), he shall for every such offence be punishable with fine which may extend to one hundred rupees and shall pay any reasonable expenses which may be incurred in repairing any injury done by him to the bank or shore.

Special Rules.

Moving of vessels without pilot or permission of harbour-master.

31. (1) No vessel of the measurement of two hundred tons or upwards shall enter, leave or be moved in any port to which this section has been specially extended without having a pilot, harbour-master or assistant of the port officer or harbour master on board;

and no vessel of any measurement less than two hundred tons and exceeding one hundred tons shall enter, leave or be moved in any such port without having a pilot, harbour-master or assistant of the port-officer or harbour-master on board, unless authority in writing so to do has been obtained from the conservator or some officer empowered by him to give such authority:

[1][Provided that the [2][Government] may, by notification in the Official Gazette, direct that in any port specified in such notification the provisions of this sub-section shall not apply to sailing vessels of any measurement not exceeding a measurement so specified.]

[3][(2) Notwithstanding anything in sub-section (1), the owner or master of a vessel which is by that sub-section required to have a pilot, harbour-master or assistant of the port officer or harbour-master on board, shall be answerable for any loss or damage caused by the vessel or by any fault of the navigation of the vessel, in the same manner as he would have been if he had not been so required by that sub-section:

Provided that the provisions of this sub-section shall not take effect till the first day of January, 1918, or such earlier date as the Central Government may notify in that behalf in the Official Gazette.

[4][(3)] If any vessel, except in case of urgent necessity, enters, leaves or is moved in the port contrary to the provisions of sub-section (1) the master of the vessel shall for every such offence be punishable with fine which may

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LEG. REF.

[1] Inserted by sec. 2 of the Indian Ports (Amendment) Act, 1925 (XXXVI of 1925).

[2] Substituted for 'Governor-General in Council' by A. O., 1937.

[3] Inserted by sec. 5 (*i*) of the Indian Ports (Amendment) Act, 1916 (VI of 1916).

[4] Re-numbered by sec. 5 (*ii*) of the Indian Ports (Amendment) Act, 1916 (VI of 1916).

extend to two hundred rupees, unless upon application to the proper officer the master was unable to procure a pilot, harbour-master or assistant of the port-officer or harbour-master to go on board the vessel.

[1][* * * * * *]

Provision of certain vessels with fire-extinguishing apparatus.

32. (1) Every vessel exceeding the measurement of two hundred tons and lying in any port to which this section has been specially extended, shall be provided with a proper force-pump and hose and appurtenances for the purpose of extinguishing any fire which may occur on board.

(2) The master of such a vessel who having been required by the conservator to comply with the provisions of sub-section (1), neglects or refuses, without lawful excuse, so to do for the space of seven days after such requisition, shall be punishable with fine which may extend to five hundred rupees.

CHAPTER V.

PORT-DUES, FEES AND OTHER CHARGES.

Levy of port dues.

33. (1) [2][Subject to the provisions of sub-section (2)], in each of the ports mentioned in the first schedule such port-due, not exceeding the amount specified for the port in the third column of the schedule as the [3][*] Government directs, shall be levied on vessels entering the port and described in the second column of the schedule, but not oftener than the time fixed for the port in the fourth column of the schedule.

[4][(2) The [3][*] Government may, by notification in the Official Gazette,[5] alter or add to any entry in the first schedule relating to ports [6][in British India or, as the case may be, in the Province] and this power shall include the power to regroup any such ports:

[7](* * * * * * *).

[8][(3)] Whenever the [3](*) Government [9](* *) declares any other port to be subject to this Act, it may, [9](* *) by the same or any subsequent declaration, further declare,—

(*a*) in the terms of any of the entries in the second column of the first schedule, the vessels which are to be chargeable with port-dues on entering the port,

(*b*) the highest rates at which such dues may be levied in respect of vessels chargeable therewith, and

(*c*) the times at which such vessels are to be so chargeable:

[10](* * * * * * *).

[8][(4)] All port-dues now leviable in any port shall continue to be so leviable until it is otherwise declared in exercise of the powers conferred by this section.

[8][(5)] An order increasing or imposing port-dues under this section shall not take effect till the expiration of sixty days from the day on which the order was published in the Official Gazette.

LEG. REF.

[1] Sub-secs. (4) and (5), as re-numbered by Act. VI of 1916, were repealed by sec. 2 (2) of the Indian Ports (Amendment) Act, 1925 (XXXVI of 1925).

[2] Inserted by sec. 6 of the Indian Ports (Amendment) Act, 1916 (VI of 1916).

[3] The word 'Local', omitted by A. O., 1937.

[4] This sub-section was inserted by sec. 6 (*ii*) of the Indian Ports (Amendment) Act, 1916 (VI of 1916).

[5] For such alterations in Pt. II of the First Schedule to the Act, *see* Fort St. George Gazette, 1925, Pt. I, p. 587.

[6] Substituted for 'within its own province' by A. O., 1937.

[7] Proviso to sub-sec. (2), sec. 33 omitted by A. O., 1937.

[8] Re-numbered by sec. 6 (*iv*) of the Indian Ports (Amendment) Act, 1916 (VI of 1916).

[9] The words "with the previous sanction of the Governor-General in Council" and "with the like sanction" were omitted by sec. 6 (*iii*), *ibid.*

[10] The proviso was added by sec. 6 (*iii*), *ibid*; and the same was omitted by A. O., 1937.

Variation of port-dues by Government.

34. The [1][* *] Government may [2][after consulting the authority appointed under section 36] exempt, [3][subject to such conditions, if any, as it thinks fit to impose, any vessel or class of vessels] entering a port subject to this Act from payment of port-dues and cancel the exemption, or may vary the rates at which port-dues are to be levied in the port, in such manner as having regard to the receipts and charges on account of the port, it thinks expedient by reducing or raising the dues, or any of them [2][or may extend the periods for which any vessel or class of vessels entering a port shall be exempt from liability to pay port-dues] :

Provided that the rates shall not in any case exceed the amount authorized to be taken by or under this Act.

Fees for pilotage and certain other services.

35. (1) Within any port subject to this Act, fees may be charged for pilotage, hauling, mooring, re-mooring, hooking, measuring and other services rendered to vessels, at such rates as the [1][*] Government may direct.

[4][* * * * * *].

(2) The fees now chargeable for such services shall continue to be chargeable unless and until they are altered in exercise of the power conferred by sub-section (1).

Receipt, expenditure and account of port charges.

36. (1) The [1][*] Government shall appoint some officer or body of persons at every port at which any dues, fees or other charges are authorised to be taken by or under this Act to receive the same and, subject to the control of the [1][*] Government, to expend the receipts on any of the objects authorized by this Act.

(2) Such officer or body shall keep for the port a distinct account, to be called the port fund account, showing, in such detail as the [1][*] Government prescribes, the receipts and expenditure of the port, and shall publish annually as soon after the first day of April as may be practicable an abstract, in such form as [5][the] Government prescribes, of the account for the past financial year.

[6][* * * *].

(4) All money received under this Act at or on account of any port subject to this Act, excluding receipts on acount of pilotage but including—

(*a*) fines,

(*b*) proceeds of waifs, and

(*c*) any balance of proceeds of a sale under section 14 where no right to the balance has been established on a claim made within three years from the date of the sale,

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LEG. REF.

[1] The word 'Local' omitted by A. O., 1937.

[2] Inserted by sec. 7 of Act VI of 1916.

[3] Substituted for the words "the vessels" by *ibid.*

[4] The proviso to S. 35 (1) was omitted by S. 8, Act VI of 1916 and the Proviso added by Act XI of 1929, omitted by A. O., 1937.

[5] Substituted for 'that' by A. O., 1937.

[6] Sub-sec. (3) of S. 36 was omitted by S. 9, Act VI of 1916.

NOTES.

Sec. 36.—PORT OFFICER DISMISSING CLERK—IF ACTS ON BEHALF OF SECRETARY OF STATE.— The Port officer, in his capacity as officer in charge of the Port office and the clerks employed in the Port office, is not a man appointed under a certain Act to carry out the provisions of that Act, but is the agent or servant of the Local Government appointed by the Local Government to carry out the duties prescribed in s. 36 of the Indian Ports Act. All his actions under s. 36 must be attributed to him as a Government servant and not as a private individual, and his actions as a Government servant must be regarded as being actions performed on behalf of the Secretary of State. Where therefore a Port officer employs a clerk and subsequently dismisses him, he must be regarded as having acted for the Secretary of State, 12 R. 556=1934 R. 381.

shall be credited in the port fund account of the port.

(5) All expenses incurred for the sake of any such port, excluding expenses on account of pilotage but including—

(*a*) the pay and allowances of all persons upon the establishment of the port,

(*b*) the costs of buoys, beacons, lights and all other works maintained chiefly for the benefit of vessels being in or entering or leaving the port or passing through the rivers or channels leading thereto,

(*c*) pensions, allowances and gratuities of persons who have been employed in the port under this or any other enactment relating to ports and port-dues or such portion of those pensions, allowances and gratuities as the [1][*], Government may by rule determine,

(*d*) with the previous sanction of the [1][*] Government, contributions towards the support of public hospitals or dispensaries suitable for the reception or relief of seamen or otherwise towards the provision of sanitary superintendence and medical aid for the shipping in the port and for seamen whether ashore or afloat belonging to vessels in the port, and

(*e*) with the like sanction, contributions towards sailors' homes, institutes, rest-houses and coffee-houses and for other purposes connected with the health, recreation and temporal well-being of sailors,

shall be charged to the port fund account of the port.

(6) Subject to the provisions of any local law as to the disposal of any balance from time to time standing to the credit of a port fund account, any such balance may be temporarily invested in such manner as the [1][*] Government may direct.

Grouping of ports.

37. (1) The Provincial Government may direct that for the purposes of the last foregoing section any number of ports [2][in the Province not being major ports] shall be regarded as constituting a single port, and thereupon all moneys to be credited to the port fund account under sub-section (4) of that section shall form a common port fund account which shall be available for the payment of all expenses incurred for the sake of any of the ports:

[3][* * * * *].

(2) Where ports are grouped by or under this Act, the following consequences ensue, namely:—

(*a*) the Provincial Government, in the exercise of its control over expenditure debitable to the common port fund account of the group, may, [4][*], make rules with respect to the expenditure of the fund for the sake of the several ports of the group on the objects authorized by this Act [5][*]; and

(*b*) the Provincial Government may exercise its authority under section 34 as regards all the ports in the group collectively or as regards any of them separately.

Receipts for port-charges.

38. The person to whom any dues, fees or other charges authorized to be taken by or under this Act are paid shall grant to the person paying the same a proper voucher in writing under his hand, describing the name of his office, the port or place at which the dues, fees or other charges are paid, and the name, tonnage and other proper description of the vessel in respect of which the payment is made.

LEG. REF.

[1] The word 'Local' omitted by A.O., 1937.
[2] Inserted by *ibid.*
[3] The proviso was omitted by *ibid.*
[4] Words 'subject to the control of the Governor-General in Council' omitted by *ibid.*
[5] Words 'and shall cause effect to be given to any direction which the Governor-General in Council may deem it necessary to issue with respect to such expenditure' omitted by *ibid.*

Master to report arrival.

39. (1) Within twenty-four hours after the arrival within the limits of any port subject to this Act of any vessel liable to the payment of port-dues under this Act the master of the vessel shall report her arrival to the conservator of the port.

(2) A master failing without lawful excuse to make such report within the time aforesaid shall for every such offence be punishable with fine which may extend to one hundred rupees.

(3) Nothing in this section applies to tug-steamers, ferry-steamers or river steamers plying to and from any of the ports subject to this Act or to ballam boats plying to and from the port of Chittagong.

Conservator may in certain cases ascertain draught and charge expense to master.

40. If any vessel liable to the payment of port-dues is in any such port without proper marks on the stem and stern posts thereof for denoting her draught, the conservator may cause the same to be ascertained by means of the operation of hooking, and the master of the vessel shall be liable to pay the expenses of the operation.

Ascertainment of tonnage of vessel liable to port-dues.

41. In order to ascertain the tonnage of any vessel liable to pay port-dues the following rules shall be observed, namely :—

(1) (*a*) If the vessel is a British registered vessel or a vessel registered under the Indian Registration of Ships Act, 1841, or the Indian Registration of Ships Act (1841) Amendment Act, 1850, or under any other law for the time being in force for the registration of vessels in British India, the conservator may require the owner or master of the vessel or any person having possession of her register to produce the register for inspection.

(*b*) If the owner or master or such person neglects or refuses to produce the register or otherwise to satisfy the conservator as to what is the true tonnage of the vessel in respect of which the port-dues are payable, he shall be punishable with fine which may extend to one hundred rupees, and the conservator may cause the vessel to be measured, and the tonnage thereof to be ascertained, according to the mode of measurement prescribed by the rules for the time being in force for regulating the measurement of British vessels, and in such case the owner or master of the vessel shall also be liable to pay the expenses of the measurement.

(2) If the vessel is not a British registered vessel or a vessel registered under the Indian Registration of Ships Act, 1841, or the Indian Registration according to the mode of measurement prescribed by the rules for the time being in force for the registration of vessels in British India, and the owner or master thereof fails to satisfy the conservator as to what is her true tonnage according to the mode of measurement prescribed by the rules for the time being in force for regulating the measurement of British vessels, the conservator shall cause the vessel to be measured and the tonnage thereof to be ascertained, according to the mode afoersaid, and in such case the owner or master of the vessel shall be liable to pay the expenses of the measurement.

(3) If the vessel is a vessel of which the tonnage cannot be ascertained, according to the mode of measurement mentioned in clauses (1) and (2), the tonnage of the vessel shall be determined by the conservator on such an estimate as may seem to him to be just.

Distraint and sale or refusal to pay port charges.

42. If the master of any vessel in respect of which any port-dues, fees or other charges are payable under this Act, refuses or neglects to pay the same on demand, the authority appointed to receive such port-dues, fees or other charges may distrain or arrest the vessel, and the tackle, apparel and furniture belonging thereto, or any part thereof, and detain the same until the amount due is paid;

and in case any part of the port-dues, fees or other charges or of the costs of the distress or arrest or of the keeping of the vessel or other thing distrained or arrested, remains unpaid for the space of five days next after any such distress or arrest, may cause the vessel or other thing distrained or arrested to be sold, and with the proceeds of such sale may satisfy the port-dues, fees or other charges and the costs including the costs of sale remaining unpaid, and shall render the surplus, if any, to the master of the vessel upon demand.

No port-clearance to be granted until port-charges are paid.

43. The officer of [1][the Crown] whose duty it is to grant a port-clearance for any vessel shall not grant such clearance—

(*a*) until her owner or master, or some other person, has paid or secured to the satisfaction of such officer the amount of all port-dues, fees and other charges, and of all fines, penalties and expenses to which the vessel or her owner or master is liable under this Act;

(*b*) until all expenses, which by the [2]Merchant Shipping Act, 1894, section 207, are to be borne by her owner, incurred since her arrival in the port from which he seeks clearance, have been paid.

Port-charges payable in one port recoverable at any other port.

44. (1) If the master of any vessel in respect of which any such sum as is mentioned in the last foregoing section is payable causes her to leave any port without having paid the sum, the authority appointed to receive port-dues, fees and other charges at the port under this Act may require in writing the authority appointed to receive port-dues, fees and other charges under this Act at any other port in British India to which she may proceed, or in which she may be, to levy the sum.

(2) The authority to whom the requisition is directed shall proceed to levy such sum in the manner prescribed in section 42, and a certificate purporting to be made by the authority appointed to receive port-dues, fees and other charges at the port where such sum as is mentioned in the last foregoing section became payable, stating the amount payable, shall be sufficient *prima facie* proof of such amount in any proceeding under section 42 and also (in case the amount payable is disputed) in any subsequent proceeding under section 59.

Penalty for evading payment of port-charges.

45. (1) If the master of a vessel evades the payment of any such sum as is mentioned in section 43, he shall be punishable with fine which may extend to five times the amount of the sum.

(2) In any proceeding before a Magistrate on a prosecution under sub-section (1), any such certificate as is mentioned in section 44, sub-section (2), stating that the master has evaded such payment, shall be sufficient *prima facie* proof of the evasion, unless the master shows to the satisfaction of the Magistrate that the departure of the vessel without payment of the sum was caused by stress of weather, or that there was lawful or reasonable ground for such departure.

(3) Any Magistrate having jurisdiction under this Act in any port to which the vessel may proceed, or in which she may be found, shall be deemed to have jurisdiction in any proceeding under this section.

46. A vessel entering any port subject to this Act [3][* * *] in ballast and

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LEG. REF.

[1] Substituted for 'Government' by A. O., 1937.

[1] Coll. Stats., Vol. II.

[2] Words 'other than a port in Burma', omitted by A.O., 1937.

Port-due on vessels in ballast.

not carrying passengers shall be charged with a port-due at a rate to be determined by the [1][*] Government and not exceeding three-fourths of the rate with which she would otherwise be chargeable.

Port-due on vessels not discharging or taking in cargo.

47. When a vessel enters a port subject to this Act, but does not discharge or take in any cargo or passengers therein (with the exception of such unshipment and reshipment as may be necessary for purposes of repair), she shall be charged with a port-due at a rate to be determined by the [1][* *] Government and not exceeding half the rate with which she would otherwise be chargeable.

Port-due not to be chargeable in certain cases.

48. No port-due shall be chargeable in respect of—

(*a*) any pleasure-yacht, or

(*b*) any vessel which, having left any port, is compelled to re-enter it by stress of weather or in consequence of having sustained any damage, or

(*c*) any vessel which, having entered any port within the territories administered by the Governor of Fort Saint George in Council, leaves it within forty-eight hours without discharging or taking in any passengers or cargo.

Power to impose hospital port-dues.

49. (1) The [2][Central Government] may, by notification in the Official Gazette, order that there shall be paid in respect of every vessel entering any port subject to this Act, within a reasonable distance of which there is a public hospital or dispensary suitable for the reception or relief of seamen requiring medical aid, such further port-dues not exceeding one anna per ton as the [2][Central Government] thinks fit.

(2) Such port-dues shall be called hospital port-dues, and the [2][Central Government] shall, in making any order under sub-section (1), have regard to any contributions made under section 36, sub-section (5), clause (*d*).

(3) An order imposing or increasing hospital port-dues shall not take effect till the expiration of sixty days from the day on which the order was published in the Official Gazette.

(4) Whenever the [2][Central Government] is satisfied that proper provision has been made by the owners or agents of any class of vessels for giving medical aid to the seamen employed on board such class of vessels, or that such provision is unnecessary in the case of any class of vessels, it may, by notification in the Official Gazette, exempt such class of vessels from any payment under this section.

Application and account of hospital port-dues.

50. (1) Hospital port-dues shall be applied, as the [2][Central Government] may direct, to the support of any such hospital or dispensary as aforesaid, or otherwise for providing sanitary superintendence and medical aid for the shipping in the port in which they are levied and for the seamen belonging to the vessels therein, whether such seamen are ashore or afloat.

(2) The [2][Central Government] shall publish annually in the Official Gazette, as soon after the first day of April as may be, an account, for the past

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LEG. REF.

[1] The word 'Local' was omitted by A. O., 1937.

[2] The words "Central Government" substituted for "Local Government" by *ibid.*

financial year, of the sums received as hospital port-dues at each port where such dues are payable, and of the expenditure charged against those receipts.

(3) Such account shall be published as a supplement to the abstract published under section 36, sub-section (2).

CHAPTER VI.

HOISTING SIGNALS.

Master to hoist number of vessel.

51. (1) The master of every inward or outward bound vessel, on arriving within signal distance of any signal-station established within the limits of the river Hooghly, or within the limits of any part of a river or channel leading to a port subject to this Act, shall, on the requisition of the pilot in charge of the vessel, signify the name of the vessel by hoisting the number by which she is known, or by adopting such other means to this end as may be practicable and usual, and shall keep the signal flying until it is answered from the signal-station.

(2) If the master of a vessel arriving as aforesaid offends against sub-section (1), he shall be punishable for every such offence with fine which may extend to one thousand rupees.

Pilot to require master to hoist number.

52. (1) Every pilot in charge of a vessel shall require the number of the vessel to be duly signalled as provided by the last foregoing section.

(2) When, on such requisition from the pilot, the master refuses to hoist the number of a vessel, or to adopt such other means of making her name known as may be practicable and usual, the pilot may, on arrival at the first place of safe anchorage, anchor the vessel and refuse to proceed on his course until the requisition has been complied with.

Penalty on pilot disobeying provisions of this Chapter.

53. Any pilot in charge of a vessel who disobeys, or abets disobedience to, any of the provisions of this Chapter, shall be punishable with fine which may extend to five hundred rupees for each instance of such disobedience or abetment, and, in addition, shall be liable to have his authority to act as a pilot withdrawn.

CHAPTER VII.

PROVISIONS WITH RESPECT TO PENALTIES.

Penalty for disobedience to rules and orders of the Government.

54. If any person disobeys and rule or order which a [1][* *] Government has made in pursuance of this Act and for the punishment of disobedience to which express provision has not been made elsewhere in this Act, he shall be punishable for every such offence with fine which may extend to one hundred rupees.

Offences how triable, and penalties how recovered.

55. All offences against this Act shall be triable by a Magistrate, and any Magistrate may, by warrant under his hand, cause the amount of any fine imposed upon the owner or master of any vessel, for any offence committed on board of the vessel or in the management thereof or otherwise in relation thereto, whereof the owner or master is convicted, to be levied by distress and sale of the vessel, and the tackle, apparel and furniture thereof, or so much thereof as is necessary.

LEG. REF.

[1] Word 'Local' omitted by A. O., 1937.

56. (1) In case of any conviction under this Act, the convicting Magistrate may order the offender to pay the costs of the conviction in addition to any fine or expenses to which he may be liable.

Costs of conviction.

(2) Such costs may be assessed by the Magistrate and may be recovered in the same manner as any fine under this Act.

57. (1) If any dispute arises as to the sum to be paid in any case as expenses or damages under this Act, it shall be determined by a Magistrate upon application made to him for that purpose by either of the disputing parties.

Ascertainment and recovery of expenses and damages payable under this Act.

(2) Whenever any person is liable to pay any sum, not exceeding one thousand rupees, as expenses or damages under this Act, any Magistrate, upon application made to him by the authority to whom the sum is payable, may, in addition to or instead of any other means for enforcing payment, recover the sum as if it were a fine.

58. Whenever any fine, expenses or damages is or are levied under this Act by distress and sale, the cost of the distress and sale may be levied in addition to such fine, expenses or damages, and in the same manner.

Cost of distress.

59. If any dispute arises concerning the amount leviable by any distress or arrest under this Act or the costs payable under the last foregoing section, the person making the distress or using the arrest may detain the goods distrained or arrested, or the proceeds of the sale thereof, until the amount to be levied has been determined by a Magistrate, who, upon application made to him for that purpose, may determine the amount, and award such costs to be paid by either of the parties to the other of them as he thinks reasonable, and payment of such costs, if not paid on demand, shall be enforced as if they were a fine.

Magistrate to determine the amount to be levied in case of dispute.

60. (1) Any person offending against the provisions of this Act in any port subject to this Act shall be punishable by any Magistrate having jurisdiction over any district or place adjoining the port.

Jurisdiction over offences beyond local limits of jurisdiction.

(2) Such Magistrate may exercise all the powers of a Magistrate under this Act, in the same manner and to the same extent as if the offence had been committed locally within the limits of his jurisdiction, notwithstanding that the offence may not have been committed locally within such limits, and, in case any such Magistrate exercises the jurisdiction hereby vested in him, the offence shall be deemed, for all purposes, to have been committed locally within the limits of his jurisdiction.

61. (1) No conviction, order or judgment of any Magistrate under this Act shall be quashed for error of form or procedure, but only on the merits, and it shall not be necessary to state, on the face of the conviction, order or judgment, the evidence on which it proceeds.

Conviction to be quashed on merits only.

(2) If no jurisdiction appears on the face of the conviction, order or judgment, but the depositions taken supply that defect, the conviction, order or judgment shall be aided by what so appears in the depositions.

CHAPTER VIII.

SUPPLEMENTAL PROVISIONS.

Hoisting unlawful colours in port.

62. (1) If any vessel belonging to any of His Majesty's subjects, or sailing under British colours, hoists, carries or wears, within the limits of any port subject to this Act, any flag, jack, pennant or colours, the use whereof on board such vessel has been prohibited by the [1]Merchant Shipping Act, 1894, or any other Statute now or hereafter to be in force, or by any proclamation made or to be made in pursuance of any such Statute, or by any of His Majesty's regulations in force for the time being, the master of the vessel shall, for every such offence, be punishable with fine which may extend to fifty rupees.

(2) Such fine shall be in addition to any other penalty recoverable in respect of such an offence.

(3) The conservator of the port, or any officer of His Majesty's Navy or [2][the Royal Indian Navy], may enter on board any such vessel and seize and take away any flag, jack, pennant or colours so unlawfully hoisted, carried or worn on board the same.

Foreign deserters.

63. Any Magistrate, upon an application being made to him by the Consul of any foreign Power to which section 238 of the [1]Merchant Shipping Act, 1894, has, by an Order in Council, been, or shall hereafter be, declared to be applicable, or by the representative of such Consul, and upon complaint on oath of the desertion of any seaman, not being a slave, from any vessel of such foreign Power, may, until a revocation of such Order in Council has been publicly notified, issue his warrant for the apprehension of any such deserter, and, upon due proof of the desertion, may order him to be conveyed on board the vessel to which he belongs, or, at the instance of the Consul, to be detained in custody until the vessel is ready to sail, or, if the vessel has sailed, for a reasonable time not exceeding one month:

Provided that a deposit be first made of such sum as the Magistrate deems necessary for the subsistence of the deserter during the detention and that the detention of the deserter shall not be continued beyond twelve weeks.

Application of sections 10 and 21.

64. (1) The provisions of sections 10 and 21 shall be applicable to all ports heretofore or hereafter declared by the [3][*] Government to be ports for the shipment and landing of goods but not otherwise subject to this Act, and may be enforced by any Magistrate to whose ordinary jurisdiction any such port is subject.

(2) Any penalties imposed by him, and any expenses incurred by his order, under the said provisions shall be recoverable respectively in the manner provided in sections 55 and 57.

(3) In any of the said ports for the shipment and landing of goods the consent referred to in section 21, sub-section (4), may be given by the principal officer of customs at such port or by any other officer appointed in that behalf by the [3][*] Government.

LEG. REF.

[1] Coll. Stats., Vol. II.
[2] Substituted for 'Indian Marine Service' by A. O., 1937.
[3] Word 'Local' omitted by A. O., 1937.

Grant of sites for sailors' institutes.

65. Any local authority in which any immovable property in or near a port is vested may, [1][with the previous sanction, in the case of a cantonment authority or the port authority of a major port, of the Central Government, and in other cases of the Provincial Government] appropriate and either retain and apply, or transfer by way of gift or otherwise, the whole or any part of the property as a site for, or for use as, a sailors' home or other institution for the health, recreation and temporal well-being of sailors.

Exercise of powers of conservator by his assistants.

66. (1) All acts, orders or directions by this Act authorized to be done or given by any conservator may, subject to his control, be done or given by any harbour-master or any deputy or assistant of such conservator or harbour-master.

(2) Any person authorised by this Act to do any act may call to his aid such assistance as may be necessary.

Service of written notices of directions.

67. Any written notice of a direction given under this Act, left for the master of any vessel with any person employed on board thereof, or affixed on a conspicuous place on board of the vessel, shall, for the purposes of this Act, be deemed to have been given to the master thereof.

Publication of orders of Government.

68. Every declaration, order and rule of a [2][*] Government made in pursuance of this Act shall be published in the Official Gazette, and a copy thereof shall be kept in the office of the conservator and at the custom-house, if any, of every port to which the declaration, order or rule relates, and shall there be open at all reasonable times to the inspection of any person without payment of any fee.

Authorities exercising jurisdiction in ports to co-operate in manoeuvres for defence of port.

[3][68-A. Every authority exercising any powers or jurisdiction in, or relating to, any port to which this Act for the time being applies shall, if so required by an officer authorised by general or special order of the Central Government in this behalf, co-operate in such manner, as such officer may direct, in carrying out any manoeuvres in connection with any scheme or preparations for the defence of the said port in time of war, and for this purpose shall, if so required, temporarily place at the disposal of such officer the services of any of its staff and the use of any of its vessels, property, equipment or other material:

Provided, firstly, that if any vessels are placed at the disposal of such officer in accordance with this section, the Central Government shall, in respect of the period during which they are so at [its] disposal, bear the running expenses of such vessels, and be responsible for any damage thereto.

Explanation.—The expression 'running expenses' in this proviso includes all outlay incurred in connection with the use of the vessels other than any charges for their hire, or for the wages of the officers and crews of such vessels:

Provided, secondly, that any officer making a requisition under this section shall exercise his powers in such a way as to cause as little disturbance to the

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LEG. REF.

[1] Substituted for ' with the previous sanction of the Local Government' by A. O., 1937.

[2] Word "Local" omitted by A.O., 1937.

[3] Ss. 68-A and 68 B were inserted by S. 11 of the Indian Ports (Amendment), Act 1916 (VI of 1916).

ordinary business of the port as is compatible with the exigencies of the efficient carrying out of the manoeuvres:

Provided, thirdly, that no suit or other legal proceeding shall lie against any authority for any default occurring by reason only of compliance with a requisition under this section.

Duties of the said authorities in an emergency.

68-B. Whenever the Central Government is of opinion that an emergency has arisen which renders it necessary that the duties imposed for the purposes specified in section 68-A on the authorities therein mentioned, or other duties of a like nature, should be imposed on such authorities continuously during the existence of the emergency, [1][it] may, by general or special order, authorise any officer to require the said authorities to perform such duties until the Central Government is of opinion that the emergency has passed, and the said authority shall comply accordingly, and the provisions of the said section shall apply subject to the following modification, namely:—

The Central Government shall pay any authority, on whom a requisition has been made, such compensation for any loss or damage attributable to such requisition, and for any services rendered or expenditure incurred in complying therewith as, in default of agreement, shall be decided to be just and reasonable, having regard to the circumstances of the case, by the arbitration of a person to be nominated in this behalf by the Central Government and the decision of such person shall be final.]

69. [*Repeal.*] *Rep. by the Repealing Act* (*I of* 1938), *S.* 2 *and Sch.*

THE FIRST SCHEDULE.

PORTS, VESSELS CHARGEABLE, RATE OF PORT-DUES AND FREQUENCY OF PAYMENT.

(*See sections* 1 *and* 33.)

PART I.—BENGAL.

Name of port.	Vessels chargeable.	Rate of port-dues.	Due how often chargeable in respect of same vessel.
1	2	3	4
Calcutta ..	Sea-going vessels of twenty tons and upwards.	[2][Not exceeding four annas per ton: provided that in the case of *dhonis* and country vessels employed in the coasting trade or in trade exclusively between India and Burma, the rate shall be one-half the rate chargeable in respect of other vessels.	Whenever the vessel enters the port except in the case of mail-steamers, coasting-vessels and vessels engaged in trade exclusively between India and Burma, which shall not be chargeable more than once in sixty days.]

LEG. REF.

[1] Substituted by A.O., for "he".

[2] Substituted by Notification of the Government of India in the Commerce Department, No. 19-P. (27) 37 dated 7th August, 1937, for the original entrie .

Name of port. 1	Vessels chargeable. 2	Rate of port-dues. 3	Due how often chargeable in respect of same vessel. 4
Calcutta—(*Contd*) ..	Tug-steamers and river steamers.	Not exceeding four annas per ton.	Once between the 1st January and the 30th June, and once between the 1st July and the 31st December, in each year.
Cuttack Ports,—namely, False Point and Pooree.	Sea-going vessels of ten tons and upwards.	Not exceeding four annas per ton.	Whenever the vessel enters any one of the ports except in the case of mail-steamers and coasting-vessels, which shall not be chargeable more than once in sixty days.
Balasore Ports,—namely, Balasore, Churaman, Laichhunpur, Chanua, Subarnarekha, Dhamra (Chandbally) and Sartha.	Ditto ..	Ditto ..	Whenever the vessel enters any one of the ports, except in the case of mail-steamers and coasting-vessels, which shall not be chargeable more than once in thirty days.

PART II.—MADRAS PRESIDENCY.

Name of port. 1	Vessels chargeable. 2	Rate of port-dues. 3	Due how often chargeable in respect of same vessel. 4
Madras ..	Sea-going vessles of fifteen tons and upwards.	*Foreign Vessels.* (*a*) In the case of a foreign ship or steamer, engaged in trade with the Straits Settlements or Ceylon calling at Madras, not exceeding four annas a ton.	The payment of the due at the port will exempt the ship or steamer for a period of sixty days from liability to pay the due again.
		(*b*) In the case of any other foreign ship or steamer calling at Madras, not exceeding four annas a ton.	The due is payable on each entry into the port.
		Coasting Vessels. (*c*) In the case of a coasting ship calling at Madras, not exceeding one and a half annas a ton.	The payment of the due at the port will exempt the ship for a period of sixty days from liability to pay the due again.
		(*d*) In the case of a coasting steamer calling at Madras, not exceeding three annas a ton.	The due is payable once in thirty days.

Name of port.			Vessels chargeable.	Rate of port-dues.	Due how often chargeable in respect of same vessel.
1			2	3	4
Eastern Group					
District.	Port.				
Ganjam.	1. Gopalpur		Sea-going vessels of fifteen tons and upwards.	*Foreign Vessels.* (*a*) In the case of a foreign ship or steamer, enagaged in trade with the Straits Settlements, calling at any one port in the Eastern group, not exceeding three annas a ton.	The payment of the due at the port will exempt the ship or steamer for a period of sixty days from liability to pay the due again at that port.
	2. Baruva			(*b*) In the case of any other foreign ship or steamer calling at any one port in the Eastern group, not exceeding three annas a ton.	The due is payable on each entry into the port.
Vizagapatam.	3. Calingapatam			(*c*) In the case of a foreign ship or steamer, engaged in trade with the Straits Settlements, calling at more than one port in the Eastern group, not exceeding four and a half annas a ton.	The payment of the due at the first port called at in the group will exempt the ship or steamer for a period of sixty days from liability to pay the due again at that or any other port in the group.
	4. Bimlipatam				
	5. [1][* * *]				
Godavari.	6. Cocanada				
	7. Coringa				
Kistna.	8. Narasapur			(*d*) In the case of any other foreign ship or steamer calling at more than one port in the Eastern group, not exceeding four and a half annas a ton.	The due is payable once for the voyage.
	9. Perupalem				
	10. Masulipatam				
	11. Nagayalanka			*Coasting Vessels.* (*e*) In the case of a coasting ship calling at any port, not exceeding one and a half annas a ton.	The payment of the due at the port will exempt the ship for a period of sixty days from liability to pay the due again at that port.
	12. Kottapalem				
Guntur.	13. Moratata				
	14. Gangadipalem				
	15. Nizampatnam			(*f*) In the case of a coasting steamer, calling at one or more ports in the Eastern group, not exceeding three annas a ton.	The payment of the due at the first port called at in the group will exempt the steamer for a period of thirty days from liability to pay the due again at that or any other port in the group.
	16. Ipurupalem				
	17. Motupalle				
	18. Kottapatnam				
Nellore.	19. Iskaalle			*Foreign Vessels.* (*a*) In the case of a foreign ship or steamer, engaged in trade with the Straits Settlements, calling at any one port in the Eastern group, not exceeding three annas a ton.	The payment of the due at the port will exempt the ship or steamer for a period of sixty days from liability to pay the due again at that port.

LEG. REF.

[1]For the omission of the port of Vizagapatam, see *Fort St. George Gazette*, 1925 Pt. I, p. 587.

Name of port.	Vessels chargeable.	Rate of port dues.	Due how often chargeable in respect of same vessel.
1	2	3	4
Eastern Group—cont.			
District. / Port.			
Chinglepu	20. Covelong .	Sea going vessels of fifteen tons and upwards. — *Foreign Vessels.* — (*b*) In the case of any other foreignship or steamer calling at any one port in the Eastern group, not exceeding three annas a ton.	The due is payable on each entry into the port.
South Arcot.	21. Cuddalore .	(*c*) In the case of a foreign ship or steamer, engaged in trade with the S raits Settlements, calling at more than one port in the Eastern group, not exceeding four and a half annas a ton.	The payment of the due at the first port called at in the group will exempt the ship or steamer for a period of sixty days from liability to pay the due again at that or a y other port in the group.
South Arcot.	22. Porto Novo .		
South Arcot.	[1]23. *Thandavarayasolaganpettai.*		
Tanjore.	24. Tirumalavasal.		
Tanjore.	25. Tranquebar .		
Tanjore.	26. Nagore .	(*d*) In the case of any other foreign ship orsteamer calling at more than one port in the Eastern group, not exceeding four and a half annas a ton.	The due is payable once for the voyage.
Tanjore.	27. Negapatam .		
Tanjore.	28. Velankani .		
Tanjore.	29. Topputurai .	*Coasting Vessels.*	
Tanjore.	30. Point Calimere	(*e*) In the case of a coasting ship calling at any port, not exceeding one and a half annas a ton.	The payment of the due at the port will exempt the ship for a period of sixty days from liability to pay the due again at that port.
Tanjore.	31. Mutuget .		
Tanjore.	32. Adirampatnam		
Tanjore.	33. Gopalapatnam .	(*f*) In the case of a coasting steamer calling at one or more ports in the Eastern group, not exceeding three annas a ton.	The payment of the due at the first port called at in the group will exempt the steamer for a period of thirty days from liability to pay the due again at that or any other port in the group.
Tanjore.	34. Kattumavedi .		
Tanjore.	35. Krishnajipatnam.		
Tanjore.	36. Ammapatnam .		
Tanjore.	37. Kottaipatnam .		
Tanjore.	38. Sundarapandiyapatnam.		
Madura.	39. Vattanam .	*Foreign vessels.* — (*a*) In the case of a foreign ship or steamer, engaged in trade with the Straits Settlements, calling at any one port in the Eastern group, not exceeding three annas a ton.	The payment of the due at the port will exempt the ship or steamer for a period of sixty days from liability to pay the due again at that port.
Madura.	40. Tondi .		
Madura.	41. Pudupatnam .	(*b*) In the case of any other foreign ship or steamer calling at any one port in the Eastern group, not exceeding three annas a ton	The due is payable on each entry into the port.
Madura.	42. Karangadu .		

LEG. REF.

[1] The Act has been withdrawn from this port, see *Fort St. George Gazette*, 1909, Pt. I, p. 257.

Name of port.	Vessels chargeable.	Rate of port-dues.	Due how often chargeable in respect of same vessel.
1	2	3	4
Eastern Group—contd.			
District. / Port.			
Madura—*concld.* 43. Tirupalankudi. 44. Devipatnam 45. Mudiyanpatnam. 46. Alagayankolam. 47. Attankarai 48. Emanangundu. 49. Pamban 50, Rameswaram 51. Mandapam 52 Vedalai 53. Muttupettai 54. Kilakarai 55. Ervadi 56. Valinokkam	Sea-going vessels of fifteen tons and upwards.	*Foreign Vessels.* (*c*) In the case of a foreign ship or steamer, engaged in trade with the Straits Settlements, calling at more than one port in the Eastern group, not exceeding four and a half annas a ton.	The payment of the due at the first port called at in the group will exempt the ship or steamer for a period of sixty days from liability to pay the due again at that or any other port in the group.
		(*d*) In the case of any other foreign ship or steamer calling at more than one port in the Eastern group, not exceeding four and a half annas a ton.	The due is payable once for the voyage.
		Coasting Vessels. (*e*) In the case of a coasting ship calling at any port, not exceeding one and a half annas a ton.	The payment of the due at the port will exempt the ship for a period of sixty days from liability to pay the due again at that port.
Tinnevelly. 57. Vembar 58. Vaippar 59. Tuticorin 60. Ovary 61. Kayalpatnam 62. Kulasekharapatnam.		(*f*) In the case of a coasting steamer calling at one or more ports in the Eastern group, not exceeding three annas a ton.	The payment of the due at the first port called at in the group will exempt the steamer for a period of thirty days from liability to pay the due again at that or any other port in the group.
Malabar. *Western Group.* 63. Cochin 64. Chavakad 65. Velivangod 66. Ponani 67. Kuttayi 68 Parapanna 69 Tanur 70. Parpanangadi		*Foreign Vessels.* (*a*) In the case of a foreign ship or steamer, engaged in trade with the Straits Settlements, calling at any one port in the Western group, not exceeding three annas a ton.	The payment of the due at the port will exempt the ship or steamer for a period of sixty days from liability to pay the due again at that port.
		(*b*) In the case of any other foreign ship or steamer calling at any one port in the Western group, not exceeding three annas a ton.	The due is payable on each entry into the port.

Name of port. 1	Vessels chargeable. 2	Rate of port-dues. 3	Due how often chargeable in respect of same vessel. 4
Western Group—c ntd.			
District. / Port.			
Malabar—*concld.*	Sea-going vessels of fifteen tons and upwards.	*Foreign Vessels.*	
71. Ferokh 72. Beypore 73. Calicut		(*c*) In the case of a foreign ship or steamer, engaged in trade with the Straits Settlements, calling at more than one port in the Western group, not exceeding four and a half annas a ton.	The payment of the due at the first port called at in the group will exempt the ship or steamer for a period of sixty days from liability to pay the due again at that or any other port in the group.
74. Kapatta 75. Quilandi			
76. Kottakkal 77. Badagara 78. Muttankal 79. Chompayi		(*d*) In the case of any other foreign ship or steamer calling at more than one port in the Western group, not exceeding four and half annas a ton.	The due is payable once for the voyage
80. Kallayi 81. Talayi		*Coasting Vessels.*	
82. Tellicherry 83. Cannanore		(*e*) In the case of a coasting ship calling at any port, not exceeding one and a half annas a ton.	The payment of the due at the port will exempt the ship for a period of sixty days from liability to pay the due again at that port.
84. Pudiangudi 85. Azhikal			
86. Ettikulam 87. Kavvayi		(*f*) In the case of a coasting steamer calling at one or more ports in the Western group, not exceeding three annas a ton.	The payment of the due at the first port called at in the group will exempt the steamer for a period of thirty days from liability to pay the due again at that or any other port in the group.
South Canara.		*Foreign Vessels.*	
88. Hosdrug 89. Baikal 90. Kasaragod 91. Kumbale 92. Manjesvara		(*a*) In the case of a foreign ship or steamer, engaged in trade with the Straits Settlements, calling at any one port in the Western group, not exceeding three annas a ton.	The payment of the due at the port will exempt the ship or steamer for a period of sixty days from liability to pay the due again at that port.
93. Mangalore 94. Mulki 95. Padubidri		(*b*) In the case of any other foreign ship or steamer calling at any one port in the Western group, not exceeding three annas a ton.	The due is payable on each entry into the port.

Name of port,	Vessels chargeable.	Rate of port-dues.	Due how often chargeable in respect of same vessel.
1	2	3	4
Western Group—concld.			
District. / Port.			
South Canara.—concld	Sea-going vessels of fifteen tons and upwards.	*Foreign Vessels.*	
96. Ermala 97. Uchhila 98. Kaph 99. Malpe		(*c*) In the case of a foreign ship or steamer, engaged in trade with the Straits Settlements, calling at more than one port in the Western group not exceeding four and a half annas a ton.	The payment of the due at the first port called at in the group will exempt the ship or steamer for a period of sixty days from liability to pay the due again at that or any other port in the group.
100. Hangarakatta or Barkur.		(*d*) In the case of any other foreign ship or steamer calling at more than one port in the Western group not exceeding four and a half annas a ton.	The due is payable once for the voyage.
		Coasting Vessels,	
101. Coondapoor		(*e*) In the case of a coasting ship calling at any port, not exceeding one and a half annas a ton.	The payment of the due at the port will exempt the ship for a period of sixty days from liability to pay the due again at that port.
102. Nyakinakatte (Nayakkankottai.) 103. Baindur 104. Siruru		(*f*) In the case of a coasting steamer calling at one or more ports in the Western group, not exceeding three annas a ton.	The payment of the due at the first port called at in the group will exempt the steamer for a period of thirty days from liability to pay the due again at that or any other port in the group.

Explanations to Part II of the First Schedule.

Explanation 1.—In this Part of the schedule—

[1][(*a*) "ship" means a vessel propelled solely by wind power and "steamer" any vessel other than a ship];

(*b*) "coasting ship" or "coasting steamer" means respectively a ship or steamer which at any port discharges cargo exclusively from, or takes in cargo exclusively for, any port in the island of Ceylon or any part of India, between the westernmost part of Sind and the south-easternmost part of Burma; and "coasting steamer" includes a coasting steamvessel having a general pass under section 164 of the Sea Customs Act, 1878;

LEG REF.

[1] Substituted by Act Madras I of 1925, S. 2.

[1][(*bb*) in so far as the ports of Madras, Vizagapatam and Cochin are concerned "coasting ship" and "coasting steamer" mean, respectively, a ship or steamer which at the port of Madras, Vizagapatam or Cochin discharges cargo exclusively from, or takes in cargo exclusively for, any port in the island of Ceylon or any part of India and Burma, between the western most part of Sind and the south-eastern most part of Burma; and "coasting steamer" includes a coasting steam-vessel having a general pass under section 164 of the Sea Customs Act, 1878;]

(*c*) "foreign ship" or "foreign steamer" means respectively a ship or steamer not being a coasting ship or coasting steamer:

Provided that, for the purpose of the levy of port-dues, a vessel shall not be deemed, during one and the same voyage, to be both a coasting ship or steamer and a foreign ship or steamer, but port-dues shall, in respect of such voyage, be leviable on such vessel either as a coasting or as a foreign ship or steamer, whichever rate is the higher.

Explanation 2.—Ports enclosed in double brackets in the first column of the schedule shall be treated as if they were only one port; every vessel in respect of which such dues have been charged and taken at one of the bracketed ports being exempted from the payment of port-dues on entering another port bracketed with it within the period specified in the fourth column of the schedule.

PART III.—BOMBAY PRESIDENCY.

Name of port. 1	Vessels chargeable. 2	Rate of port-dues. 3	Due how often chargeable in respect of same vessel. 4
Bombay ..	Sea-going vessels of ten tons and upwards (except fishing-boats).	Not exceeding four annas per ton.	Once in the same month.
Nothern Group of Ports.	[2][Tug-boats, ferry-boats and river-boats, whether propolled by steam or other mechanical means.]	Not exceeding four annas per ton.	Once between the 1st January and the 30th June, and once between the 1st July and 31st December in each year.
1. Goga ..	Sea-going vessels of ten tons and upwards (except fishing-boats).	Not exceeding three annas per ton: provided that a coasting steamer whenever it enters any port may be charged at a rate to be determined by the [3][* *] Government and not exceeding the highest rate of port-dues leviable at any port of the group to which such port belongs and	Once in thirty days at the same port: provided that no coasting vessel or coasting steamer, having paid port-dues at any port, shall be chargeable with port-dues again at the same or any other port of the same group within thirty days.
2. Dhulera (*Whittle Bandar*).			
3. Tankari ..			
4. Dehegam ..			
5. Kavi ..			
6. Dehej ..			
7. Broach ..			
8. Bhagwa ..			
9 Surat ..			
10. Matwad ..			
11. Balsar ..			
12 Umarsadi ..			
13. Kolak ..			
14. Kalai ..			
15. Maroli ..			
16. Umbargam ..			
17. Gholwad ..			
18. Dahanu Creek ..			
19. Tarapur ..			
20 Olivara Navapur			
21. Satpati Creek ..			
22. Mahim (Kelva).			

LEG. REF.

[1] Inserted by Notification of the Govt. of India in the Commerce Department, No. 19 P. (27) 37 dated 7th Aug. 1937.

[2] Substituted by Notification of the Govt. of Bombay in the Marine Department No, 459, dated 27th March, 1923. for "Tug, steamers, ferry-stamers and river steamers."

[3] Word 'Local' omitted by A.O., 1937.

Name of port. 1	Vessels chargeable. 2	Rate of port-dues. 3	Due how often chargeable in respect of same vessel. 4
23. Kelva ..		an addition of one-half of such highest rate.	
24. Dantiora ..			
25. Arnala ..			
Southern Group of Ports			
1. Bandra ..	Sea-going vessels of ten tons and upwards (except fishing-boats).	Not exceeding three annas per ton: provided that a coasting steamer whenever it enters any port may be charged at a rate to be determined by the [1] [* *] Government and not exceeding the highest rate of port-dues leviable at any port of the group to which such port belongs. and an addition of one-half of such highest rate.	Once in thirty days at the same port: provided that no coasting vessel or coasting steamer, having paid port-dues at any port, shall be chargeable with port-dues again at the same or any other port of the same group within thirty days.
2. Vesava ..			
3. Manori ..			
4. Utan ..			
5. Bassein ..			
6. Bahivadi ..			
7. Kalyan ..			
8. Thana ..			
9. Mahul ..			
10. Trombay ..			
11. Panwel ..			
12. Mora ..			
13. Karanja ..			
14 Thal ..			
15 Alibag ..			
16. Revdanda ..			
17. Mandad ..			
18. Bankot ..			
19. Kelshi ..			
20. Harnai ..			
21. Dabhoi ..			
22. Borya ..			
23. Jaygad ..			
24. Varavda ..			
25. Ratnagiri ..			
26 Purangad ..			
27. Jayatapur ..			
28 Vijaydurg ..			
29. Devgad ..			
30. Achra ..			
31. Malwan ..			
32. Nivti ..			
33. Vengurla ..			
34. Redi ..			
35. Kirnapani ..			
36. Tilmati ..			
37. Sadashivgad ..			
38. Karwar, including Baitkhol.			
39. Bingi ..			
40. Chendya ..			
41. Belikeri ..			
42. Ankola ..			
43. Gangavali ..			
44. Tadri ..			
45. Kumpta ..			
46. Honawar ..			
47. Manki ..			
48. Murdeshwar ..			
49. Shirali ..			
50 Bhatk ..			

LEG. REF.

[1] Word 'Local' omitted by the A,O,, 1937.

Name of port.	Vessels chargeable.	Rate of port-dues.	Due how often chargeable in respect of same vessel.
1	2	3	4
Karachi ..	Sea-going vessels of ten tons and upwards (except fishing-boats).	Not exceeding four annas per ton.	Once in three months.
	[1][Tug-boats, ferry-boats, and river-boats, whether propelled by steam or othar mechanical means].	Ditto.	Once between the 1st January and the 30th June and once between the 1st July and the 31st December, in each year.
[2][* * *	*	*	*]

[*Part IV.—Burma*] *Rep. by A.O.*, 1937.

PART V.—EASTERN BENGAL AND ASSAM.

Name of port.	Vessels chargeable.	Rate of Port dues.	Due how often charge able in respect of same vessel.
1	2	3	4
Chittagong ..	Sea-going vessels of ten tons and upwards, not being ballam-boats.	Not exceeding four and a half annas per ton.	[3][Whenever the vessel enters the port, except in the case of mail steamers coasting, vessels, and vessels engaged in trade exclusively between India and Burma, which shall not be chargeable more than once in sixty days.]
	Tug-steamers and river steamers.	Not exceeding four and a half annas per ton.	Once between the 1st January and the 30th June, and once between the 1st July and the 31st December. in each year.
	Ballam boats.	Not exceeding one anna per ton.	Whenever the vessel enters the port.

LEG. REF.

[1] Substitutcd by Notification of the Govt. of Bombay in the Marine Department, No. 459, dated 13th July, 1923 for "Tug-steamers and river-steamers"

[2] Entries relating to Aden omitted by A. O., 1937.

[3] Substituted by Notification of the Govt. of Bengal in the Department of Commerce and Labour, No. 17 Mne.. datcd 14th August, 1937. for the original entry.

THE SECOND SCHEDULE.

ENACTMENTS REPEALED.

Rep. by the Repealing Act (I of 1938), S. 2.

THE INDIAN POST OFFICE ACT (VI OF 1898).

Year.	No.	Short title.	Amendment..
1898	VI	The Indian Post Office Act, 1898.	Repealed in part, XIII of 1898, S. 18; X of 1914. Amended, II of 1903; III of 1912; XIV of 1914; VI of 1921; XV of 1921; XII of 1922 S. 4; XIV of 1922; The Indian Finance Act, 1924; XVI of 1924; XIII of 1925; XIX of 1926; V of 1927; V of 1928; VI of 1929; II of 1930; XV of 1930. *See* the Indian Finance Acts, 1931; VII of 1933; IX of 1934; V of 1935 and Finance Acts 1936 to 1942.

PREFATORY NOTE.—The following is the Statement of Objects and Reasons appended to the Indian Post Office Bill:—

The present Post Office Act was enacted in 1866 and has been amended since that date by the addition of three sections only. In 1882, section 60-A was added by Act III of 1882 authorising any officer of the Post Office empowered in this behalf by the Governor-General in Council to search for newspapers regarding which a notification has been published under the Sea Customs Act. In 1895, Section 66 was added by Act III of that year providing powers, in accordance with the general policy of the postal union, for dealing with fictitious or previously used postage stamps of other countries found on letters or other articles received from abroad, and last year a further section was added by Act XVI of 1896 authorising the recovery of customs duty, when paid in advance by the post office in the same manner as postage under the Act. During the last 30 years, certain defects and omissions in the Act of 1866 have been brought to light and experience has shown that express provisions of law as contained in the Act in respect of various matters are not suited to the present requirements of postal work. It has also been found that further protection is needed by the post office and further powers to enable its officers for instance to deal with articles posted in contravention of the Act. Various schemes moreover which have been introduced of late years such as postal insurance and the value payable and money order systems have remained outside the provisions of the Act and now require to be based on a legislative enactment. Finally, with the development of the post office and the knowledge of the course of English postal legislation, the necessity for some new penalties has become apparent. The present Bill proposes to supply the defects and omissions which have been brought to notice in the Act of 1866 and to confer the protection and powers which have been found necessary in the extension and increase of postal business. It includes within its scope postal insurance, the value-payable post and the post office money order system and declares and limit the liability of Government in respect of these matters. The Bill is to a large extent an enabling bill reserving to Government the power of dealing by rule with numerous questions of postal practice and procedure and affecting the public. A number of the sections of the Post Office Act, 1866, have been omitted as unnecessary; the drafting of the sections retained has been in a great measure revised, and the subject-matter has been re-arranged.

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THE FIRST SCHEDULE.—Inland Postage rates.

THE SECOND SCHEDULE.—[*Repealed.*]

THE INDIAN POST OFFICE ACT (VI OF 1898),[1]

[22*nd March*, 1898.

An Act to consolidate and amend the law relating to the Post Office in India.

WHEREAS it is expedient to consolidate and amend the law relating to the Post Office in India; It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Short title, extent, application and commencement.

1. (1) This Act may be called THE INDIAN POST OFFICE ACT, 1898.

(2) It extends to the whole of British India, inclusive of [2][* * * *], British Baluchistan, the Sonthal Parganas and the Pargana of Spiti; and it applies also to—

(*a*) all Native Indian subjects of Her Majesty in any place without and beyond British India;

(*b*) all other British subjects within the territories of any Native Prince or Chief in India; and

(*c*) all servants of the Queen, whether British subjects or not, within the territories of any Native Prince or Chief in India.

LEG. REF.

[1] For statement of Objects and Reasons, *see* Gazette of India, 1807. Pt. V, p. 385: for Report of the Select Committee, see *ibid.*, 1898, Pt. V. p. 211; for Proceedings in Counci see *ibid.*, 1897, Pt. VI, p. 249; *ibid.*, 1898, Pt. VI, pp. 23, 99 and 285 to 289

[2] Repealed by the Burma Laws Act (XIII of 1898).

(3) It shall come into force on the first day of July, 1898.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) the expression "Director-General" means the Director-General of [1][Posts and Telegraphs];

(*b*) the expression "inland," used in relation to a postal article, means—

(i) posted in British India and addressed to any place in British India or to any place for which a Post Office is established by the [2][Central Government or the Crown Representative] beyond the limits of British India; or

(ii) posted at any Post Office established by the [2][Central Government or the Crown Representative] beyond the limits of British India and addressed to any place for which any such Post Office is established or to any place in British India:

[3][Provided that the expression "inland" shall not apply to any class of postal articles which may be specified in this behalf by the Central Government by notification in the Official Gazette, when posted in or at or addressed to any places or post offices which may be described in such notification;]

(*c*) the expression "mail bag" includes a bag, box, parcel or any other envelope or covering in which postal articles in course of transmission by post are conveyed, whether it does or does not contain any such article;

(*d*) the expression "mail ship" means a ship employed for carrying mails, pursuant to contract or continuing arrangement, by the Central Government or Her Majesty's Government or the Government of any British possession or foreign country;

(*e*) the expression "officer of the Post Office" includes any person employed in any business of the Post Office or on behalf of the Post Office;

(*f*) the expression "postage" means the duty chargeable for the transmission by post of postal articles;

(*g*) the expression "postage stamp" means any stamp provided by the Central Government for denoting postage or other fees or sums payable in respect of postal articles under this Act, and includes adhesive postage stamps and stamps printed, embossed, impressed or otherwise indicated on any envelope, wrapper, post card or other article;

(*h*) the expression "post office" includes every house, building, room, carriage or place used for the purposes of the Post Office, and every letter-box provided by the Post Office for the reception of postal articles;

(*i*) the expression "postal article" includes a letter, postcard, newspaper, book, pattern or sample packet, parcel and every article or thing transmissible by post;

(*j*) the expression "Postmaster-General" includes a Deputy Postmaster-General or other officer exercising the powers of a Postmaster-General; and

(*k*) the expression "Post Office" means the department [4][established for the purpose of carrying the provisions of this Act into effect and] presided over by the Director-General.

LEG. REF.

[1] Substituted for the words 'the Post Office of India' by Act XIV of 1914.

[2] Substituted for 'Governor-General in Council' by A. O., 1937.

[3] Added by Act II of 1903, S. 2.

[4] Added by Act XIV of 1914, S. 3.

Meanings of "in course of transmission by post" and "delivery".

3. For the purposes of this Act,—

(*a*) a postal article shall be deemed to be in course of transmission by post from the time of its being delivered to a post office to the time of its being delivered to the addressee or of its being returned to the sender or otherwise disposed of under Chapter VII;

(*b*) the delivery of a postal article of any description to a postman or other person authorized to receive postal articles of that description for the post shall be deemed to be a delivery to a post office; and

(*c*) the delivery of a postal article at the house or office of the addressee, or to the addressee or his servant or agent or other person considered to be authorized to receive the article according to the usual manner of delivering postal articles to the addressee, shall be deemed to be delivery to the addressee.

CHAPTER II.

PRIVILEGE AND PROTECTION OF THE GOVERNMENT.

Exclusive privilege of conveying letters reserved to the Government.

4. (1) Wherever within British India posts or postal communications are established by the Central Government, the Central Government shall have the exclusive privilege of conveying by post, from one place to another, all letters, except in the following cases, and shall also have the exclusive privilege of performing all the incidental services of receiving, collecting, sending, despatching and delivering all letters, except in the following cases, that is to say:—

(*a*) letters sent by a private friend in his way, journey or travel, to be delivered by him to the person to whom they are directed, without hire, reward or other profit or advantage for receiving, carrying or delivering them;

(*b*) letters solely concerning the affairs of the sender or receiver thereof, sent by a messenger on purpose; and

(*c*) letters solely concerning goods or property, sent either by sea or by land to be delivered with the goods or property which the letters concern, without hire, reward or other profit or advantage for receiving, carrying or delivering them:

Provided that nothing in the section shall authorize any person to make a collection of letters excepted as aforesaid for the purpose of sending them otherwise than by post.

(2) For the purposes of this section and section 5, the expression "letters" includes postcards.

Certain persons expressly forbidden to convey letters.

5. Wherever within British India posts or postal communications are established by the Central Government, the following persons are expressly forbidden to collect, carry, tender or deliver letters, or to receive letters for the purpose of carrying or delivering them, although they obtain no hire, reward or other profit or advantage for so doing, that is to say:—

(*a*) common carriers of passengers or goods, and their servants or agents, except as regards letters solely concerning goods in their carts or carriages; and

(*b*) owners and masters of vessels sailing or passing on any river or canal in British India, or between any ports or places in British India, and their servants or agents, except as regards letters solely concerning goods on board, and except as regards postal articles received for conveyance under Chapter VIII.

Exemption from liability for loss, misdelivery, delay or damage.

6. [1][The Crown] shall not incur any liability by reason of the loss, misdelivery or delay of, or damage to, any postal article in course of transmission by post, except in so far as such liability may in express terms be undertaken by the Central Government as hereinafter provided; and no officer of the Post Office shall incur any liability by reason of any such loss, misdelivery, delay or damage, unless he has caused the same fraudulently or by his wilful act or default.

CHAPTER III.

POSTAGE.

Power to fix rates of inland postage.

7. (1) The Central Government may, by notification in the Official Gazette fix the rates of postage and other sums to be charged in respect of postal articles sent by the inland post under this Act, and may make rules as to the scale of weights, terms and conditions subject to which the rates so fixed shall be charged:

Provided that the highest rate of postage, when prepaid, shall not exceed the rate set forth for each class of postal articles in the first schedule.

(2) Unless and until such notification as aforesaid is issued, the rates set forth in the said schedule shall be the rates chargeable under this Act.

(3) The Central Government may, by notification in the Official Gazette, declare what packets may be sent by the inland post as book, pattern and sample packets within the meaning of this Act.

Power to make rules as to payment of postage and fees in certain cases.

8. The Central Government may, by rule,—

(*a*) require the prepayment of postage on inland postal articles or any class of Inland postal articles, and prescribe the manner in which prepayment shall be made;

(*b*) prescribe the postage to be charged on inland postal articles when the postage is not prepaid or is insufficiently prepaid;

(*c*) provide for the redirection of postal articles and the transmission by post of articles so redirected, either free of charge or subject to such further charge as may be specified in the rules; and

(*d*) prescribe the fees to be charged for the "express delivery" of postal articles, in addition to, or instead of, any other postage chargeable thereon under this Act.

Explanation.—"Express delivery" means delivery by a special messenger or conveyance.

Power to make rules as to registered newspapers.

9. (1) The Central Government may make rules providing for the registration of newspapers for transmission by inland post as registered newspapers.

(2) For the purpose of such registration, every publication, consisting wholly or in great part of political or other news, or of articles relating thereto, or to other current topics, with or without advertisements, shall be deemed a newspaper, subject to the following conditions, namely:—

(*a*) that it is published in numbers at intervals of not more than thirty-one days; and

(*b*) that it has a *bona fide* list of subscribers,

(3) An extra or supplement to a newspaper, bearing the same date as

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LEG. REF.

[1]Substituted for 'Secretary of State for India in Council' by A. O., 1937.

NOTES.

Sec. 6.—Goods sent by value-payable parcel—Destruction of label—Sale by dead letter office—Liability of Post Office. 79 I.C. 334 = 46 A. 455 = 1924 A. 692 (1). On this section, *see also* 1 M.H.C.R. 200.

the newspaper and transmitted therewith, shall be deemed to be part of the newspaper:

Provided that no such extra or supplement shall be so deemed unless it consists wholly or in great part of matter like that of the newspaper and has the title and date of publication of the newspaper printed at the top of each page.

Explanation.—Nothing in this section or in the rules thereunder shall be construed to render it compulsory to send newspapers by the inland post.

Power to declare rates of foreign postage.

10. (1) Where arrangements are in force with the United Kingdom, or with any British possession or foreign country, for the transmission by post of postal articles between British India and the United Kingdom or such possession or country, the Central Government may, in conformity with the provisions of such arrangements, declare what postage rates and other sums shall be charged in respect of such postal articles, and may make rules as to the scale of weight, terms and conditions subject to which the rates so declared shall be charged.

(2) Unless and until such declaration as aforesaid is made, the existing rates and regulations shall continue in force.

Liability for payment of postage.

11. (1) The addressee of a postal article on which postage or any other sum chargeable under this Act is due, shall be bound to pay the postage or sum so chargeable on his accepting delivery of the postal article, unless he forthwith returns it unopened:

Provided that, if any such postal article appears to the satisfaction of the Postmaster-General to have been maliciously sent for the purpose of annoying the addressee, he may remit the postage.

(2) If any postal article on which postage or any other sum chargeable under this Act is due, is refused or returned as aforesaid, or if the addressee is dead or cannot be found, then the sender shall be bound to pay the postage or sum due thereon under this Act.

Recovery of postage and other sums due in respect of postal articles.

12. If any person refuses to pay any postage or other sum due from him under this Act in respect of any postal article, the sum so due may, on application made by an officer of the Post Office authorised in this behalf by the written order of the Postmaster-General, be recovered for the use of the Post Office from the person so refusing, as if it were a fine imposed under this Act by any Magistrate having jurisdiction where that person may for the time being be resident; and the Postmaster-General may further direct that any other postal article, not being on Her Majesty's Service, addressed to that person shall be withheld from him until the sum so due is paid or recovered as aforesaid.

Customs duty paid by the Post Office to be recoverable as postage.

13. When a postal article, on which any duty of customs is payable, has been received by post from any place beyond the limits of British India, and the duty has been paid by the postal authorities at any customs port or elsewhere, the amount of the duty shall be recoverable as if it were postage due under this Act.

Post Office marks *prima facie* evidence of certain facts denoted.

14. In every proceeding for the recovery of any postage or other sum alleged to be due under this Act in respect of a postal article,—

(*a*) the production of the postal article, having thereon the official mark of the Post Office denoting that the article has been refused, or that the addressee is dead or cannot be found, shall be *prima facie* evidence of the fact so denoted, and

(*b*) the person from whom the postal article purports to have come shall, until the contrary is proved, be deemed to be the sender thereof.

Official mark to be evidence of amount of postage.

15. The official mark on a postal article denoting that any postage or other sum is due in respect thereof to the Post Office of British India or to the Post Office of the United Kingdom or of any British possession or foreign country, shall be *prima facie* evidence that the sum denoted as aforesaid is so due.

CHAPTER IV.

POSTAGE STAMPS.

Provision of postage stamps and power to make rules as to them.

16. (1) The Central Government shall cause postage stamps to be provided of such kinds and denoting such values as [1][it] may think necessary for the purposes of this Act.

(2) The Central Government may make rules as to the supply, sale and use of postage stamps.

(3) In particular and without prejudice to the generality of the foregoing power, such rules may—

(*a*) fix the price at which postage stamps shall be sold;

(*b*) declare the classes of postal articles in respect of which postage stamps shall be used for the payment of postage or other sums chargeable under this Act;

(*c*) prescribe the conditions with regard to perforation, defacement and all other matters subject to which postage stamps may be accepted or refused in payment of postage or other sums;

(*d*) regulate the custody, supply and sale of postage stamps;

(*e*) declare the persons by whom and the terms and conditions subject to which postage stamps may be sold; and

(*f*) prescribe the duties and remuneration of persons selling postage stamps.

Postage stamps to be deemed to be stamps for the purpose of revenue.

[2][17. (1)] Postage stamps provided under section 16 shall be deemed to be stamps issued by Government for the purpose of revenue within the meaning of the Indian Penal Code, and, subject to the other provisions of this Act, shall be used for the prepayment of postage or other sums chargeable under this Act in respect of postal articles, except where the Central Government directs that prepayment shall be made in some other way.

[2][(2) Where the Central Government has directed that prepayment of postage or other sums chargeable under this Act in respect of postal articles may be made by prepaying the value denoted by the impressions of stamping machines issued under [1][its] authority, the impression of any such machine shall likewise be deemed to be a stamp issued by Government for the purpose of revenue, within the meaning of the Indian Penal Code.]

CHAPTER V.

CONDITIONS OF TRANSMISSION OF POSTAL ARTICLES.

Redelivery to sender of postal article in course of transmission by post.

18. (1) The Central Government may, by rule, provide for the redelivery to the sender, without reference to the consent of the addressee and subject to such conditions (if any) as may be deemed fit, of any postal article in course of transmission by post.

LEG. REF.

[1] Substituted by A. O., 1937.

[2] S. 17 re-numbered as S. 17 (1) and sub-s. (2) added by Act XVI of 1924, S. 2.

(2) Save as provided by any rules that may be made under sub-section (1), the sender shall not be entitled to re-call a postal article in course of transmission by post.

Transmission by post of anything injurious prohibited.

19. (1) Except as otherwise provided by rule and subject to such conditions as may be prescribed thereby, no person shall send by post any explosive, dangerous, filthy, noxious or deleterious substance, any sharp instrument not properly protected, or any living creature which is either noxious or likely to injure postal articles in course of transmission by post or any officer of the Post Office.

(2) No person shall send by post any article or thing which is likely to injure postal articles in course of transmission by post or any officer of the Post Office.

Transmission by post of anything indecent, etc., prohibited.

20. No person shall send by post—

(*a*) any indecent or obscene printing, painting, photograph, lithograph, engraving, book or card, or any other indecent or obscene article, or

(*b*) any postal article having thereon, or on the cover thereof, any words, marks or designs of an indecent, obscene, seditious, scurrilous, threatening or grossly offensive character.

Power to make rules as to transmission by post of postal articles.

21. [1][(1) The Central Government may make rules as to the transmission of articles by post.

(2) In particular and without prejudice to the generality of the foregoing power such rules may—

(*a*) specify articles which may not be transmitted by post;

(*b*) prescribe conditions on which articles may be transmitted by post;

(*c*) provide for the detention and disposal of articles in course of transmission by post in contravention of rules made under clause (*a*) or clause (*b*);

(*d*) provide for the granting of receipts for, and the granting and obtaining of certificates of, posting and delivery of postal articles and the sums to be paid, in addition to any other postage, for such receipts and certificates; and

(*e*) regulate covers, forms, dimensions, maximum weights, and enclosures, and the use of postal articles, other than letters, for making communications.]

(3) Postal articles shall be posted and delivered at such times and in such manner as the Director-General may, by order, from time to time appoint.

Power to postpone despatch or delivery of certain postal articles.

22. (1) Where the despatch or delivery from a post office of letters would be delayed by the despatch or delivery therefrom at the same time of book, pattern or sample packets and parcels, or any of them, such packets or parcels, or any of them, may, subject to such rules as the Central Government may make in this behalf, be detained in the Post Office so long as may be necessary.

(2) Where separate parcel posts are established, parcels may be forwarded and conveyed by them, being detained, if necessary, in the Post Office for that purpose.

LEG. REF.

[1]Substituted by Act III of 1912, S. 2.

NOTES.

Sec. 19: SCOPE AND APPLICATION OF SECTION.

See 37 A. 289=13 A.L.J. 356=28 I.C. 655 (sending cocaine by post); 32 C. 247 (sending obscene matter in post card). On this section, *see also* 28 A. 100; 3 A. 837; 20 B. 193.

Power to deal with postal articles posted in contravention of Act.

23. (1) Any postal article sent by post in contravention of any of the provisions of this Act may be detained and either returned to the sender or forwarded to destination, in each case charged with such additional postage (if any) as the Central Government may, by rule, direct.

(2) Any officer in charge of a Post Office or authorized by the Postmaster-General in this behalf may open or unfasten any newspaper or any book, pattern or sample packet, in course of transmission by post, which he suspects to have been sent by post in contravention of [1][section 20, clause (*a*), or of] section 21 or of any of the provisions of this Act relating to postage.

(3) Notwithstanding anything in sub-section (1)—

(*a*) any postal article sent by post in contravention of the provisions of section 19 may, under the authority of the Postmaster-General, if necessary, be opened and destroyed; and

[2][(*b*) any postal article sent by post in contravention of the provisions of section 20 may be disposed of in such manner as the Central Government may by rule direct.]

Power to deal with postal articles containing goods contraband or liable to duty.

24. [2][Except as otherwise provided in this Act, where a postal article suspected to contain any goods of which the import by post or the transmission by post is prohibited by or under any enactment for the time being in force,] or anything liable to duty, is received for delivery at a post office, the officer in charge of the post office shall send a notice in writing to the addressee inviting him to attend, either in person or by agent, within a specified time at the post office, and shall in the presence of the addressee or his agent, or if the addressee or his agent fails to attend as aforesaid then in his absence, open and examine the postal article:

Provided, first, that, if the Director-General so directs in the case of any post office or class of post offices, the officer in charge of the Post Office shall call in two respectable persons as witnesses before he opens a postal article in the absence of the addressee or his agent:

Provided, secondly, that in all cases a postal article, after being opened under this section, shall be delivered to the addressee, unless it is required for the purpose of any further proceeding under this or any other law or enactment for the time being in force, and that the opening of the postal article and the circumstances connected therewith shall be immediately reported to the Postmaster-General.

[3]* * *.

Power to deliver such articles to Customs authority.

[4][24-A. The Central Government may, by general or special order, empower any officer of the Post Office, specified in such order, to deliver any postal article, received from beyond the limits of British India and suspected to contain anything liable to duty, to such Customs authority as may be specified in the said order, and such Customs authority shall deal with such article in accordance with the provisions of the Sea Customs Act, 1878, or of any other law for the time being in force.]

Power to intercept notified goods during transmission by Post.

25. Where a notification has been published under section 19 of the Sea Customs Act, 1878, in respect of any goods of any specified description, [5][or where the import or export into or from British India of goods of any specified description has been prohibited or restricted

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LEG. REF.

[1]Inserted by Act III of 1912.
[2]Substituted by Act III of 1912.
[3]Last proviso omitted by Act XV of 1921.
[4]Inserted by Act XV of 1921.
[5]Inserted by Act II of 1930, S. 40 and Sch. II.

by or under any other enactment for the time being in force] any officer of the Post Office empowered in this behalf by the Central Government may search, or cause search to be made, for any such goods in course of transmission by post, and shall deliver [1][all postal articles reasonably believed or found to contain such goods] to such officer as the Central Government may appoint in this behalf, and such goods may be disposed of in such manner as the Central Government may direct.

[2][In carrying out any such search, such officer of the Post Office may open or unfasten, or cause to be opened or unfastened, any newspaper or any book, pattern or sample packet in course of transmission by post.]

Power to intercept postal articles for public good.

26. (1) On the occurrence of any public emergency, or in the interest of the public safety or tranquillity, the Central Government, or a Provincial Government, or any officer specially authorized in this behalf by the [3][Central or the Provincial Government], may, by order in writing, direct that any postal article or class or description of postal articles in course of transmission by post shall be intercepted or detained or [1][shall be disposed of in such manner as the authority issuing the order may direct.]

(2) If any doubt arises as to the existence of a public emergency or as to whether any act done under sub-section (1) was in the interest of the public safety or tranquillity, a certificate [4][of the Central Government or, as the case may be, of the Provincial Government] shall be conclusive proof on the point.

Power to deal with postal articles from abroad bearing fictitious or previously used stamps.

27. (1) Where a postal article is received by post from any place beyond the limits of British India—

(*a*) bearing a fictitious postage stamp, that is to say, any facsimile or imitation or representation of a postage stamp, or

(*b*) purporting to be prepaid with any postage stamp which has been previously used to repay any other postal article,

the officer in charge of the post office at which the postal article is received, shall send a notice to the addressee inviting him to attend, either in person or by agent, within a specified time at the post office to receive delivery of the postal article.

(2) If the addressee or his agent attends at the post office within the time specified in the notice and consents to make known to the officer in charge of the post office the name and address of the sender of the postal article and to redeliver to the officer aforesaid the portion of the postal article which bears the address and the fictitious or previously used postage stamp, or, if the postal article is inseparable from the stamp, the entire postal article, the postal article shall be delivered to the addressee or his agent.

(3) If the addressee or his agent fails to attend at the post office within the time specified in the notice, or, having attended within that time, refuses to make known the name and address of the sender or to redeliver the postal article or portion thereof as required by sub-section (2), the postal article shall not be delivered to him, but shall be disposed of in such manner as the Central Government may direct.

Explanation.—For the purposes of this section, the expression "postage stamp" includes any postage stamp for denoting any rate or duty of postage of

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LEG. REF.

[1]Substituted by Act III of 1912.

[2]Inserted by Act III of 1912.

[3]Substituted by the A.O., 1937 for 'Governor-General in Council'.

[4]Substituted for 'signed by a Secretary to the Government of India or to the Local Government' by the A.O., 1937.

any part of Her Majesty's dominions or of any [1][Indian] State, or foreign country [2][and the impression of any stamping machine provided or authorised for the like purpose by or under the authority of the Government of such part, State or country.]

Prohibition of transmission by post of certain newspapers.

[3][27-A. No newspaper printed and published in British India without conforming to the rules laid down in the Press and Registration of Books Act, 1867, shall be transmitted by post.

Power to detain newspapers and other articles being transmitted by post.

27-B. (1) Any Officer of the Post Office authorised by the Post-Master General in this behalf may detain any postal article in course of transmission by post which he suspects to contain—

(*a*) (i) any newspaper or book as defined in the Press and Registration of Books Act, 1867; or

(ii) any document, containing any seditious matter, that is to say, any matter the publication of which is punishable under section 124-A of the Indian Penal Code; or

(*b*) any newspaper as defined in the Press and Registration of Books Act, 1867, edited, printed or published otherwise than in conformity with the rules laid down in that Act;

and shall deliver any postal article so detained to such officer as the Provincial Government may appoint in this behalf.

(2) Any Officer detaining any postal article under the provisions of sub-section (1) shall forthwith send by post to the addressee of such article notice of the fact of such detention.

(3) The Provincial Government shall cause the contents of any postal article detained under sub-section (1) to be examined, and, if it appears to the Provincial Government that the article contained any newspaper, book or other document, of the nature described in clause (*a*) or clause (*b*) of sub-section (1), may pass such orders as to the disposal of the article and its contents as it may deem proper, and, if it does not so appear, shall release the article and its contents, unless the same be otherwise liable to seizure under any law for the time being in force:

Provided that any person interested in any article detained under the provisions of clause (*a*) of sub-section (1) may, within two months from the date of such detention, apply to the Provincial Government for release of the same and the Provincial Government shall consider such application and pass such orders thereon as it may deem to be proper:

Provided also that, if such application is rejected, the applicant may, within two months from the date of the order rejecting the application, apply to the High Court for release of the article and its contents on the ground that the article did not contain any newspaper, book or other document containing any seditious matter.

(4) In this section "document" includes also any painting, drawing or photograph, or other visible representation.

Procedure for disposal by High Court of applications for release of newspapers and articles so detained.

27-C. Every application made under the second proviso to sub-section (3) of section 27-B shall be heard and determined in the manner provided by Sections 99-D to 99-F of the Code of Criminal Procedure, 1898, by a Special Bench of the High Court constituted in the manner provided by Section 99-C of that Code.

LEG. REF.

[1]Substituted for the word Native' by the A. O., 1937.

[2]The words "and the impression.....country:" were inserted by Act XVI of 1924, S. 3.

[3]Ss. 27-A to 27-D were inserted by Act XIV of 1922.

27-D. No order passed or action taken under section 27-B shall be called in question in any Court otherwise than in accordance with the second proviso to sub-section (3) of that section.]

Jurisdiction barred.

CHAPTER VI.

REGISTRATION, INSURANCE AND VALUE-PAYABLE POST.

28. The sender of a postal article may, subject to the other provisions of this Act, have the article registered at the Post Office at which it is posted, and require a receipt therefor; and the Central Government may, by notification in the Official Gazette, direct that, in addition to any postage chargeable under this Act, such further fee as may be fixed by the notification shall be paid on account of the registration of postal articles.

Registration of postal articles.

29. (1) The Central Government may make rules as to the registration of postal articles.

Power to make rules as to registration.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(*a*) declare in what cases registration shall be required;

(*b*) prescribe the manner in which the fees for registration shall be paid; and

(*c*) direct that twice the fee for registration shall be levied on the delivery of a postal article required to be registered on which the fee for registration has not been prepaid.

(3) Postal articles made over to the Post Office for the purpose of being registered shall be delivered, when registered, at such times and in such manner as the Director-General may, by order, from time to time appoint.

30. The Central Government may, by notification in the Official Gazette direct—

Insurance of postal articles.

(*a*) that any postal article may, subject to the other provisions of this Act, be insured at the Post Office at which it is posted, against the risk of loss or damage in course of transmission by post, and that a receipt therefor shall be granted to the person posting it; and

(*b*) that, in addition to any postage and fees for registration chargeable under this Act, such further fee as may be fixed by the notification shall be paid on account of insurance of postal articles.

31. The Central Government may, by notification in the Official Gazette declare in what cases insurance shall be required, and direct that any postal article containing anything required to be insured, which has been posted without being insured, shall be returned to the sender or shall be delivered to the addressee, subject to the payment of such special fee as may be fixed by the notification:

Power to require insurance of postal articles.

Provided that the levy of such special fee as aforesaid shall not impose any liability upon the [1][Central Government or the Secretary of State] in respect of the postal article.

32. (1) The Central Government may make rules as to the insurance of postal articles.

Power to make rules as to insurance.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(*a*) declare what classes of postal articles may be insured under section 30;

LEG. REF.

[1]Substituted for "Secretary of State for India in Council" by the A.O.,, 1937.

(*b*) fix the limit of the amount for which postal articles may be insured; and

(*c*) prescribe the manner in which the fees for insurance shall be paid.

(3) Postal articles made over to the Post Office for the purpose of being insured shall be delivered, when insured, at such places and times and in such manner as the Director-General may, by order, from time to time appoint.

Liability in respect of postal articles insured.

33. Subject to such conditions and restrictions as the Central Government may, by rule, prescribe, the [1][Central Government] shall be liable to pay compensation, not exceeding the amount for which a postal article has been insured, to the sender thereof for the loss of the postal article or its contents, or for any damage caused to it in course of transmission by post:

Provided that the compensation so payable shall in no case exceed the value of the article lost or the amount of the damage caused.

Transmission by post of value-payable postal articles.

34. The Central Government may, by notification in the Official Gazette direct that, subject to the other provisions of this Act and to the payment of fees at such rates as may be fixed by the notification, a sum of money specified in writing at the time of posting by the sender of a postal article shall be recoverable on the delivery thereof from the addressee, and that the sum, so recovered, shall be paid to the sender:

Provided that [2][neither the Central Government nor the Secretary of State shall] incur any liability in respect of the sum specified for recovery, unless and until that sum has been received from the addressee.

Explanation.—Postal articles sent in accordance with the provisions of this section may be described as "value-payable" postal articles.

Power to make rules as to value-payable postal articles.

35. (1) The Central Government may make rules as to the transmission by post of value-payable postal articles.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(*a*) declare what classes of postal articles may be sent as value-payable postal article;

(*b*) direct that no postal article shall be so sent unless the sender declares that it is sent in execution of a *bona fide* order received by him;

(*c*) limit the value to be recovered on the delivery of any value-payable postal article [*][3];

(*d*) prescribe the form of declaration to be made by the senders of value-payable postal articles, and the time and manner of the payment of fees;

[4][(*e*) provide for the retention and re-payment to the addressee in cases of fraud of money recovered on the delivery of any value-payable postal article; and

(*f*) prescribe the fees to be charged for inquiries into complaints regarding the delivery of or payment for value-payable postal articles.]

(3) Postal articles shall be made over to the Post Office for the purpose of being sent as "value-payable," and shall be delivered, when so sent, at such

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LEG. REF.

[1]Substituted by the A.O., 1937, for 'Secretary of state for India in Council.'.

[2]Substituted by the A.O., 1937 for "the Secretary of State for India in Connecil shall not".

[3]The word "and" omitted by Act III of 1912.

[4]Inserted by Act III of 1912.

NOTES.

Sec. 34.—*See* L.R. 5 A. (Civil) 384=46 A. 455=1924 A. 692 under S. 6, *supra*; 15 M. L.J. 226 (Liability of Post Office for not collecting money for value payable insured parcel).

Sec. 34 (Proviso).—*See* 15 M.L.J. 226.

Sec. 35.—*See* 33 M. 511=20 M.L.J. 402 and cases referred to therein. *See* same case as to the scope of rules and circulars under this Act.

times and in such manner as the Director-General may, by order, from time to time appoint.

[1][(4) No suit or other legal proceeding shall be instituted against the [2][Central Government, the Secretary of State] or any officer of the Post Office in respect of anything done, or in good faith purporting to be done, under any rule made under clause (*e*) of sub-section (2).]

Power to give effect to arrangements with other countries.

36. (1) Where arrangements are in force with the United Kingdom, or with any British possession, [3][Indian] State or foreign country, for the transmission by post of registered, insured or value-payable postal articles between British India and the United Kingdom or such possession, State or country, the Central Government may make rules to give effect to such arrangements.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may prescribe—

(*a*) the form of declaration to be made by the senders of such postal articles as aforesaid; and

(*b*) the fees to be charged in respect thereof.

CHAPTER VII.

UNDELIVERED POSTAL ARTICLES.

Power to make rules as to disposal of undelivered postal articles.

37. (1) The Central Government may make rules as to the disposal of postal articles which for any reason cannot be delivered (hereinafter referred to as "undelivered postal articles").

(2) In particular and without prejudice to the generality of the foregoing power such rules may—

(*a*) prescribe the period during which undelivered postal articles at a post office shall remain in that office; and

(*b*) provide for the publication of lists of undelivered postal articles, or of any class of undelivered postal articles.

(3) Every undelivered postal article, after being detained at a post office for the period prescibed by rule under the foregoing provisions of this section, shall be either forwarded, free of further charge, to the post office at which it was posted, for return to the sender, or sent to the office of the Postmaster-General.

Disposal of undelivered postal articles at office of Postmaster-General.

38. (1) Every postal article received at the office of the Postmaster-General under sub-section (3) of section 37 shall be dealt with as follows:—

(*a*) if practicable, it shall be re-directed and forwarded by post to the addressee; or,

(*b*) if it cannot be re-directed and forwarded as aforesaid, it shall be opened by some officer, appointed by the Postmaster-General in this behalf and bound to secrecy, in order to ascertain the name and address of the sender.

(2) If the name and address of the sender are so ascertained, it shall be returned by post to the sender, free of further charge or subject to such further charge as the Central Government may, by rule, direct.

Final disposal of undelivered postal articles.

39. Undelivered postal articles, which cannot be disposed of under the foregoing provisions, shall be detained in the office of the Postmaster-General for such further period (if any), and shall be dealt with in such manner, as the Central Government may, by rule, direct:

LEG. REF.

[1]Inserted by Act III of 1912.

[2]Substituted for 'the Secretary of State for India in Council' by the A.O., 1937.

[3]Substituted for 'Native' by the A.O., 1937.

Provided that—

(*a*) letters and postcards shall be destroyed;

(*b*) money or saleable property, not being of a perishable nature, found in any undelivered postal article, shall be detained for a period of one year in the Office of the Postmaster-General, and, if on the expiration of that period no person has established his right thereto, shall, if money, be credited to the Post Office, and, if saleable property, be sold, the sale proceeds being credited to the Post Office.

CHAPTER VIII.

SHIP-LETTERS.

Duty of master of ship, departing from any port in British India and not being a mail ship, to convey mail bags.

40. The master of a ship, not being a mail ship, about to depart from any port in British India to any port within, or any port or place beyond, British India, shall receive on board any mail bag tendered to him by any officer of the Post Office for conveyance, granting a receipt therefor in such form as the Central Government may, by rule, prescribe, and shall, without delay, deliver the same at the port or place of destination.

Duty of master of ship arriving at any port in British India in respect of postal articles and mail bags on board.

41. (1) The master of a ship arriving at any port in British India shall without delay, cause every postal article or mail bag on board which is directed to that port and is within the exclusive privilege conferred on the Central Government by section 4, to be delivered either at the Post Office at that port or to some officer of the Post-Office authorized in this behalf by the Post-Master-General.

(2) If there is on board any postal article or mail bag which is directed to any other place within British India and is within the exclusive privilege aforesaid, the master shall, without delay, report the fact to the officer in charge of the post office at the port of arrival and act according to the directions he may receive from such officer, and the receipt of such officer shall discharge him from all further responsibility in respect of the postal article or mail bag.

Allowance of gratuities for conveyance of postal articles by ships other than mail ships.

42. The Central Government may, by notification in the Official Gazette, declare what gratuities shall be allowed to masters of ships, not being mail ships, in respect of postal articles received by them for conveyance on behalf of the Post Office; and the master of a ship, not being a mail ship, about to leave any port in British India as aforesaid shall, if he receives on board a mail bag for conveyance, be entitled to demand and obtain immediately the amount of the gratuity payable under this section in respect of the mail bag and its contents.

CHAPTER IX.

MONEY ORDERS.

Power to maintain money order system and to make rules as to remittances thereby.

43. (1) The Central Government may provide for the remitting of small sums of money through the Post Office by means of money orders, and may make rules as to such money orders.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may prescribe—

(*a*) the limit of amount for which money orders may be issued;

(*b*) the period during which money orders shall remain current; and

(*c*) the rates of commission or the fees to be charged on money orders or in respect thereof.

Power for remitter to recall money order or alter name of payee.

44. (1) Subject to such conditions as the Central Government may, by rules made under section 43, prescribe in respect of the levy of additional rates of commission or fees or any other matters, a person remitting money through the Post Office by means of a money order may require that the amount of the order, if not paid to the payee, be repaid to him or be paid to such person other than the original payee as he may direct.

(2) If neither the payee nor the remitter of a money order can be found, and if within the period of one year from the date of the issue of the order no claim is made by such payee or remitter, the amount of such order shall not be claimable from the Government.

Power to provide for the issue of postal orders.

45. The Central Government may authorize the issue, in such form as may be suitable, of money orders, to be called postal orders or by such other designation as may be deemed appropriate, for certain fixed amounts, and may make rules as to the rates of commission to be charged thereon and the manner in which, and conditions subject to which, they may be issued, paid and cancelled:

Provided that no such order shall be issued for an amount in excess of ten rupees.

Power to give effect to arrangements with other countries.

46. (1) Where arrangements are in force with the United Kingdom or with any British possession, [Indian State][1] or foreign country, for the issue and payment through the Post Office of money orders between British India and the United Kingdom or such possession, State or country, the Central Government may make rules to give effect to such arrangements.

(2) In particular and without prejudice to the generality of the foregoing power such rules may prescribe—

(*a*) the manner in which, and the conditions subject to which, such orders may be issued and paid in British India; and

(*b*) the rates of commission to be charged thereon.

Recovery of money order paid to the wrong person.

47. If any person, without reasonable excuse, the burden of proving which shall lie on him, neglects or refuses to refund—

(*a*) any amount paid to him in respect of a money order by an officer of the Post Office in excess of what ought to have been paid to him in respect thereof, or

(*b*) the amount of a money order paid by an officer of the Post Office to him, instead of to some other person to whom it ought to have been paid,

such amount shall be recoverable by an officer of the Post Office authorized by the Postmaster-General in this behalf from the person so neglecting or refusing as if it were an arrear of land-revenue due from him.

Exemption from liability in respect of money orders.

48. No suit or other legal proceeding shall be instituted against the [Crown][2] or any officer of the Post Office in respect of—

(*a*) anything done under any rules made by the Central Government under this Chapter; or

(*b*) the wrong payment of a money order caused by incorrect or incomplete information given by the remitter as to the name and address of the

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LEG. REF.

[1] Substituted by the A.O., 1937 for "Native State.

[2] Substituted by the A.O., 1937 for "Secretary of State in Council".

NOTES.

Sec. 44 (1).—Money remitted by money order through the Post Office does not cease to be the property of the remitter until it is actually paid to the remittee. 52 I.C. 925=12 Bur.T.L. 105.

payee, provided that, as regards incomplete information, there was reasonable justification for accepting the information as a sufficient description for the purpose of identifying the payee; or

(*c*) the payment of any money order being refused or delayed by, or on account of, any accidental neglect, omission or mistake, by, or on the part of, an officer of the Post Office, or for any other cause whatsoever other than the fraud or wilful act or default of such officer; or

(*d*) any wrong payment of a money order after the expiration of one year from the date of the issue of the order; [1][or

(*e*) any wrong payment or delay in payment of a money order beyond the limits of British India by an officer of any Post Office, not being one established by the Central Government].

CHAPTER X.

PENALTIES AND PROCEDURE.

Offences by Officers of the Post Office.

Penalty for misconduct of person employed to carry or deliver mail bags or postal articles.

49. Whoever, being employed to carry or deliver any mail bag or any postal article in course of transmission by post,—

(*a*) is in a state of intoxication while so employed, or

(*b*) is guilty of carelessness or other misconduct, whereby the safety of any such mail bag or postal article as aforesaid is endangered, or

(*c*) loiters or makes delay in the conveyance or delivery of any such mail bag or postal article as aforesaid, or

(*d*) does not use due care and diligence safely to convey or deliver any such mail bag or postal article as aforesaid,

shall be punishable with fine which may extend to fifty rupees.

Penalty for voluntary withdrawal from duty, without permission or notice, of person employed to carry or deliver mail bags or postal articles.

50. Whoever, being employed to carry or deliver any mail bag or any postal article in course of transmission by post, voluntarily withdraws from the duties of his office without permission or without having given one month's previous notice in writing, shall be punishable with imprisonment which may extend to one month, or with fine which may extend to fifty rupees, or with both.

LEG. REF.

[1] Inserted by Act III of 1912, S. 8.

NOTES.

Secs. 49 and 50.—Subordinate Magistrate can commit for offence under S. 49. *See* 5 B.H.C. (Cr.) 36; 3 B.H.C. (Cr.) 8. There must be a fraudulent intention in the act of the accused before he can be convicted under the above section. 19 W.R. (Cr.) 4. Alternative charges under this Act and Penal Code are not legal. *See* 10 I.C. 168=12 Cr.L.J. 224 (Sind).

SENTENCE.—Solitary confinement cannot be awarded as part of a sentence passed under this section. 24 P.R. 1879 (Cr.). Separate sentences for offences arising out of the same transaction are not proper. 2 Weir 454=1 M.H.C.R. 83.

ILLUSTRATIVE CASES—A *postmaster absenting himself from the station* without giving notice is guilty of an offence. 1 Weir 72. *See also* 1 Weir 860. A person is punishable under S. 262, I.P.Code, for *using a postage stamp twice*. 5 C. P.L.R. 43 (Cr.).

NON-TRACING ADDRESSEE—LIABILITY OF THE POST OFFICE.—Where the article sent was never lost in the course of transmission, but all that happened was that by reason of the label having been torn it was not possible to deliver it to the addressee, *held*, that S. 6 or S. 34 did not exempt the Post Office from liability. 79 I.C. 334=46 A. 455=1924 A. 692.

DISCOVERY OF POSTAL ARTICLE OUTSIDE POST OFFICE—FINDER GIVING IT BACK TO POST MASTER IN COURSE OF TRANSMISSON.—*M*, a servant of *K*, having discovered a number of letters lying in a khola opposite a post office, handed them over to his master. One of the letters was addressed to *P* and *K* took it to the addressee who stated that the letter had never been delivered to him. The matter was reported to the Post Master *F*, who took possession of the letters saying that he would take necessary action in the matter. No action being taken by *F*, the matter was reported to the PostMaster-General with the result

51. Whoever, being employed to carry or deliver any postal article in course of transmission by post and required while so employed to keep any register, makes, or causes or suffers to be made, any false entry in the register with intent to induce the belief that he has visited a place, or delivered a postal article, which he has not visited or delivered, shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one hundred rupees, or with both.

Penalty for making false entry in register kept by person employed to carry or deliver postal articles

52. Whoever, being an officer of the Post Office, commits theft in respect of, or dishonestly misappropriates, or, for any purpose whatsoever, secretes, destroys or throws away, any postal article in course of transmission by post or anything contained therein, shall be punishable with imprisonment for a term which may extend to seven years, and shall also be punishable with fine.

Penalty for theft, dishonest misappropriation, secretion, destruction, or throwing away, of postal articles.

53. Whoever, being an officer of the Post Office, contrary to his duty, opens, or causes or suffers to be opened, any postal article in course of transmission by post, or wilfully detains or delays, or causes or suffers to be detained or delayed, any such postal article, shall be punishable with imprisonment for a term which may extend to two years, or with fine, or with both:

Penalty for opening, detaining or delaying postal articles.

NOTES.

that *F* was sent up for trial. The Magistrate framed two alternate charges against him, first under S. 52, Post Office Act and the other under S. 201, Penal Code. The Magistrate found *F* guilty only under S. 201. It was contended that the charge framed by the Magistrate was defective and prejudiced the accused, the alternate charge was illegal and contravened the provisions of S. 236, Cr. P. Code. *Held*, that the first charge was not defective, as the postal articles in question were "in course of transmission by post" according to S. 3, when they were made over to *F* by *K* and, therefore, the mere fact that the letters had been posted when *F* was not thePost Master of the Post Office was immaterial. The framing of the charge in the alternative under S. 201 did not contravene S. 236, Cr. P. Code. 1930 L. 460.

Sec. 52.—The opening of a newspaper by a person employed in the Post Office and replacing it in its envelope, does not constitute an offence. 19 W.R. (Cr.) 4. Secreting two letters to give to the delivery peon and share with him the bearing postage. 14 M. 229=1 Weir 860. A branch Post Master who was also a dealer in goods opened an envelope containing a railway receipt addressed to him and took delivery of goods but he showed in the books of the Post Office that the letter was not delivered owing to the absence of the addressee. Some time after he paid the money due to the Post Office and entered delivery of the letter. *Held*, that under those circumstances the Post Master was liable to be convicted under S. 52. 8 L. 662; 1928 L. 92=109 I.C. 236. For an offence under S. 52 some contents should be extracted from the parcel and not merely examined. 1938 M.W.N. 962=1939 Mad. 283.

Secs. 52 and 53.—The respondent, a postman, was charged by the police with an offence under S. 52 for secreting two postal articles in course of transmission by post and was committed for trial by the Court of Session. There was no complaint by order or authority from the Director General of Posts and Telegraphs or Post Master General. A preliminary objection was taken that the acts also constituted an offence under S. 53 of the Act of detaining postal articles, which under S. 72 of the Act could not be taken cognizance of without such complaint. *Held*, that the offence under S. 52 could be taken cognizance of without any complaint and the commitment was legal. The fact that the acts also constituted a minor offence under S. 53 was no bar to the trial of the offence under S. 52 of the Act. 53 L.W. 70=(1941) 1 M.L.J. 44.

SENTENCE.—Where a Sub-Post Master of 13 years' service taking possession of the V.P.P. cover addressed to him and also of the railway receipt, obtained delivery of the goods, but in order to put off payment manipulated the register mantained in the Post Office, sentence of one year's rigorous imprisonment and a fine of Rs. 100 was adequate punishment. 52 Mad. 534=1929 Mad. 447=56 M. L.J. 551.

EVIDENCE.—Statements made by the postman in course of departmental enquiry are not good evidence. 26 I.C. 307=16 Cr.L.J. 3. Conviction not to be based on mere suspicion. On this section, *see also* 2 Weir 454=1 M.H. C.R. 83.

Sec. 53.—*See* 19 W.R. (Cr.) 4; 5 B.H.C. (Cr.) 36, *supra*; 1 Weir 72; *ibid.* 862 ("Prepare," meaning of).

Provided that nothing in this section shall extend to the opening, detaining or delaying of any postal article under the authority of this Act or in obedience to the order in writing of the Central Government or the direction of a comptent Court.

Penalty for fraud in connection with official marks and for receipt of excess postage.

54. Whoever, being an officer of the Post Office,—

(*a*) fraudulently puts any wrong official mark on a postal article, or

(*b*) fraudulently alters, removes or causes to disappear any official mark which is on a postal article, or,

(*c*) being entrusted with the delivery of any postal article, knowingly demands or receives any sum of money in respect of the postage thereof which is not chargeable under this Act,

shall be punishable with imprisonment for a term which may extend to two years, and shall also be punishable with fine.

Penalty for fraudulently preparing, altering, secreting or destroying Post Office documents.

55. Whoever, being an officer of the Post Office entrusted with the preparing or keeping of any document, fraudulently prepares the document incorrectly, or alters or secretes or destroys the document, shall be punishable with imprisonment for a term which may extend to two years, and shall also be punishable with fine.

Penalty for fraudulently sending unpaid postal articles.

56. Whoever, being an officer of the Post Office, sends by post, or puts into any mail bag, any postal article upon which postage has not been paid or charged in the manner prescribed by this Act, intending thereby to defraud the Government of the postage on such postal article, shall be punishable with imprisonment for a term which may extend to two years, and shall also be punishable with fine.

Punishment of offences committed in India outside British India.

57. (1) Whoever, being an officer of the Post Office employed in any place in India beyond the limits of British India in which posts are established by the [1][Central Government or the Crown Representative], or being appointed to sell postage stamps in any such place, commits therein an offence punishable under this Act, shall be punishable either in the place where the offence was committed by any Court or officer duly empowered by the [1][Central Government or the Crown Representative] to take cognizance of offences committed in that place, or in any part of British India by any Court of competent jurisdiction as if the offence had been committed in that part.

(2) The provisions of section 188 of the Code of Criminal Procedure, 1898, shall not apply to any offence referred to in this section.

Other Offences.

Penalty for contravention of section 4.

58. (1) Whoever—

(*a*) conveys, otherwise than by post, a letter within the exclusive privilege conferred on the Central Government by section 4, or

(*b*) performs any service incidental to conveying, otherwise than by post, any letter within the exclusive privilege aforesaid, or

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LEG. REF.

[1] Substituted by A.O., 1937.

NOTES.

Sec. 55.—*See* 1 Weir 862.

SANCTION CAN BE OBTAINED AFTER COGNIZANCE OF THE OFFENCE.—Although S. 72 requires sanction before a postal employee can be prosecuted under S. 55 still as long as sanction is obtained, it does not matter whether it is obtained before the Court takes cognizance of the effence or not. 52 Mad 534=30 Cr.L.J. 929=1929 Mad. 447=56 M.L.J. 551.

(*c*) sends, or tenders or delivers in order to be sent, otherwise than by post, a letter within the exclusive privilege aforesaid, or

(*d*) makes a collection of letters excepted from the exclusive privilege aforesaid for the purpose of sending them otherwise than by post,

shall be punishable with fine which may extend to fifty rupees for every such letter.

(2) Whoever, having already been convicted of an offence under this section, is again convicted thereunder, shall, on every such subsequent conviction, be punishable with fine which may extend to five hundred rupees.

Penalty for contravention of section 5.

59. (1) Whoever, in contravention of the provisions of section 5, carries, receives, tenders or delivers letters, or collects letters, shall be punishable with fine which may extend to fifty rupees for every such letter.

(2) Whoever, having already been convicted of an offence under this section, is again convicted thereunder, shall, on every such subsequent conviction, be punishable with fine which may extend to five hundred rupees.

Penalty for breach of rules under section 16.

60. Whoever, being appointed to sell postage stamps,—

(*a*) takes from any purchaser for any postage stamp or quantity of postage stamps a price higher than that fixed by any rule made under section 16, sub-section (3), clause (*a*), shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to two hundred rupees, or with both; or

(*b*) commits a breach of any other rule made under section 16, shall be punishable with fine which may extend to two hundred rupees.

Penalty for contravention of section 19 or 20

61. (1) Whoever, in contravention of the provisions of section 19 or section 20, sends or tenders or makes over in order to be sent by post any postal article or anything, shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

(2) The detention in the Post Office of any postal article on the ground of its having been sent in contravention of the provisions of section 19 or section 20, shall not exempt the sender from any proceedings which might have been taken if the postal article had been delivered in due course of post.

Penalty for defiling or injuring post office letter-boxes.

62. Whoever places in or against any letter-box provided by the Post Office for the reception of postal articles any fire, match or light any explosive, dangerous, filthy, noxious or deleterious substance, or any fluid, or commits a nuisance in or against any such letter-box, or does anything likely to injure any such letter-box or its appurtenances or contents, shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

NOTES.

Sec. 60 (a).—*See* 13 A.L.J. 356=28 I.C. 655 =37 A. 289, cited under S. 61, *infra*.

Sec. 61: ILLUSTRATIVE CASES.—The circulation, by post, of a postcard containing an advertisement regarding a patent medicine in language of an obscene character is an offence under S. 61. 32 C. 247=2 Cr. L. J. 201. A person who sends cocaine by post is not guilty under this section, though he may be convicted under S. 60. 13 A.L.J. 356=21 I.C. 655=37 A. 289. *See also* 10 C.W.N. 1029= 4 Cr.L.J. 170 (transmission of obscene article). 'Indecent' means immodest and offending against the recognized standard of decency and suggestive of or tending to obscenity. 31 P.L.R. 129=1930 Lah. 552.

Penalty for affixing without authority thing to, or painting, tarring or disfiguring, post office or post office letter-box.

63. Whoever, without due authority, affixes any placard, advertisement, notice, list, document, board or other thing in or on or paints, tars or in any way disfigures any Post Office or any letter-box provided by the Post Office for the reception of postal articles, shall be punishable with fine which may extend to fifty rupees.

Penalty for making false declaration.

64. Whoever, being required by this Act to make a declaration in respect of any postal article to be sent by post or the contents or value thereof, makes in his declaration any statement which he knows, or has reason to believe, to be false, or does not believe to be true, shall be punishable with fine which may extend to two hundred rupees, and, if the false declaration is made for the purpose of defrauding the Government, with fine which may extend to five hundred rupees.

Penalty for master of ship failing to comply with the provisions of section 40 or 41.

65. Whoever, being the master of a ship,—

(*a*) fails to comply with the provisions of section 40, or,

(*b*) without reasonable excuse, the burden of proving which shall lie on him, fails to deliver any postal article or mail bag or to comply with the directions of the officer in charge of the Post Office at a port of arrival, as required by section 41,

shall be punishable with fine which may extend to one thousand rupees.

Penalty for detention of letters on board vessel arriving in port.

66. (1) Whoever, being either the master of a ship arriving at any port in British India or any one on board, knowingly has in his baggage or in his possession or custody, after the postal articles on board or any of them have been sent to the Post Office at the port of arrival, any postal article within the exclusive privilege conferred on the Central Government by section 4, shall be punishable with fine which may extend to fifty rupees for every such postal article as aforesaid.

(2) Whoever, being such master or other person as aforesaid, detains any such postal article as aforesaid after demand made for it by an officer of the Post Office, shall be punishable with fine which may extend to one hundred rupees for every such postal article.

Penalty for detaining mails or opening mail bag.

67. Whoever, except under the authority of this Act [1][or of any other Act for the time being in force] or in obedience to the order in writing of the Central Government or the direction of a competent Court, detains the mails or any postal article in course of transmission by post or on any pretence opens a

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LEG. REF.

[1] Inserted by Act XV of 1921, S. 4.

NOTES.

Sec. 64: ORDER TO SEND A PARCEL BY VALUE-PAYABLE POST INSURED—*Bona fides* of sender—Rule 133. 6 A.L.J. 481=9 Cr.L.J. 537=2 I.C. 228. An order to send the article cannot be inferred merely because the addressee did not refuse to receive nor return by post any of the previous issues sent to him, and did not make a protest even after he received intimation that he had been enrolled as a subscriber and that the issue in question would be sent by Value-Payable Post. 33 M. 511=20 M.L.J. 402=5 I.C. 738.

WANT OF SANCTION.—Where the accused was proved to have sent blank papers in an insured cover addressed to himself and claimed the value of the currency notes which he alleged had been enclosed in the cover and he was prosecuted for offences under S. 64 of the Post Office Act and Ss. 420 and 511, I.P. Code and convicted for the latter offences only, *held*, that it was doubtful if an offence under S. 64 of the Post Office Act had been committed, and that at any rate the prosecution under S. 64 was rendered unsustainable for want of sanction under S. 72. *Held also*, that the conviction for the major offences under the Penal Code was perfectly valid. 9 P. 126=11 Pat. T. 224=31 Cr.L.J. 934.

mail bag in course of transmission by post, shall be punishable with fine which may extend to two hundred rupees:

Provided that nothing in this section shall prevent the detention of an officer of the Post Office carrying the mails or any postal article in course of transmission by post, on a charge of having committed an offence declared to be cognizable by the Code of Criminal Procedure, 1898, or any other law for the time being in force.

Penalty for retaining postal articles wrongly delivered or mail bags.

68. Whoever fraudulently retains, or wilfully secretes or makes away with, or keeps or detains, or, when required by an officer of the Post Office, neglects or refuses to deliver up, any postal article in course of transmission by post which ought to have been delivered to any other person, or a mail bag containing a postal article, shall be punishable with imprisonment for a term which may extend to two years, and shall also be punishable with fine.

Penalty for unlawfully diverting letters.

69. Whoever, not being an officer of the Post Office, wilfully and maliciously, with intent to injure any person, either opens or causes to be opened any letter which ought to have been delivered, or does any act whereby the due delivery of a letter to any person is prevented or impeded, shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both:

Provided that nothing in this section shall apply to a person who does any act to which the section applies, if he is a parent, or in the position of a parent or guardian, of the addressee, and the addressee is a minor or a ward.

General.

Penalty for abetting, or attempting to commit offences under Act.

70. Whoever abets the commission of any offence punishable under this Act or attempts to commit any offence so punishable, shall be punishable with the punishment provided for that offence.

Property in cases of offences to be laid in the Post office.

71. In every prosecution for an offence in respect of a mail bag or of any postal article sent by post, it shall be sufficient, for the purpose of the charge, to describe the mail bag or postal article as being the property of the Post Office, and it shall not be necessary to prove that the mail bag or postal article was of any value.

Authority for prosecutions under certain sections of Act.

72. No Court shall take cognizance of an offence punishable under any of the provisions of sections 51, 53, 54, clauses (*a*) and (*b*), 55, 56, 58, 59, 61, 64, 65, 66 and 67 of this Act, unless upon complaint made by order of, or under authority from, the Director-General or a Post Master-General.

NOTES.

Sec. 72.—A prosecution under S. 61 of the Act, although authorized by the Post Master-General, is illegal, unless such prosecution takes place on a complaint as defined in S. 4, Cl. (*h*) of the Cr. P. Code. 10 C.W.N. 1029=4 C.L.J. 170. *See also* 125 I.C. 770=11 Pat. L.T. 224=31 Cr. L.J. 934. It is not necessary that sanction to prosecute under S. 72 must precede a prosecution under S. 55, and a conviction under the latter section is valid even though the sanction to prosecute was obtained only after the prosecution was launched. 52 M. 534=1929 M. 447=56 M.L.J. 551.

Secs 72, 52 and 53.—Offence under S. 52 could be taken cognizance of without any complaint. The fact that the acts also constituted a minor offence under S. 53 was no bar to the trial of the offence under S. 52. I.L.R. (1941) Mad. 345=53 L.W. 70=1941 Mad. 392 =(1941) 1 M.L.J. 44.

CHAPTER XI.
SUPPLEMENTAL.

Zamindari and other district posts.

73. (1) The Central Government may make rules for the management of any zamindari or other district posts.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may declare what portions of this Act shall be applicable to zamindari and other district posts and to the persons employed in connection therewith.

General power to make rules and provisions as to rules under Act.

74. (1) In addition to the powers hereinbefore conferred, the Central Government may make rules to carry out any of the purposes and objects of this Act.

(2) In making any rule under this Act, the Central Government may direct that a breach of it shall be punishable with fine which may extend to fifty rupees.

(3) All rules made by the Central Government under this Act shall be pubished in the Official Gazette and, on such publication, shall have effect as if enacted by this Act.

Delegation of powers, other than rule-making powers, to Director-General.

75. The Central Government may, by notification in the Official Gazette authorize, either absolutely or subject to conditions, the Director-General to exercise any of the powers conferred upon the Central Government by this Act, other than a power to make rules.

76. [*Repeal.*] *Rep. by the Repealing and Amending Act* (*X of* 1914), *S. 3 and Sch. II.*

Saving.

77. Nothing in this Act shall derogate from or affect the provisions of the East India Company Act, 1780, or any enactment amending or extending the same.

THE FIRST SCHEDULE.

[*This Schedule is substituted every year by the Annual Finance Acts.*]

(*See Section 7, Finance Act,* 1942.)

INLAND POSTAGE RATES.

Letters.	
For a weight not exceeding one tola	..One and a half annas.
For every tola, or fraction thereof, exceeding one tola	.. Half an anna.
Post Cards.	
Single	.. Nine pies.
Reply	.. One and a half annas.
Book, Pattern and Sample Packets.	
For the first five tolas or fraction thereof	..Nine pies.
For every additional two and a half tolas, or fraction thereof, in excess of five tolas	.. Three pies.
Registered Newspapers.	
For a weight not exceeding ten tolas	.. Quarter of an anna.
For a weight exceeding ten tolas and not exceeding twenty tolas	.. Half an anna.
For every twenty tolas, or fraction thereof, exceeding twenty tolas	.. Half an anna.
In the case of more than one copy of the same issue of a registered newspaper being carried in the same packet—	
For a weight not exceeding ten tolas	..Half an anna.
For every additional five tolas, or fraction thereof, in excess of ten tolas	..Quarter of an anna.
Provided that such packet shall not be delivered at any addressee's residence but shall be given to a recognised agent at the post office.	

NOTES.

Sec. 74.—Rules framed under the Act—Effect of. *See* 5 I.C. 728=7 M.L.T. 69. *See also* 1937 Mad. 797.

Parcels.

For a weight not exceeding forty tolas .. .. .. Four annas.
For every forty tolas, or fraction thereof, exceeding forty tolas .. Four annas.

THE SECOND SCHEDULE.

ENACTMENTS REPEALED. [*Repealed by the Repealing and Amending Act X of* 1914.]

THE POST OFFICE CASH CERTIFICATES ACT (XVIII OF 1917).[1]

[Amended by Act XXXII of 1920.]

PREFATORY NOTE.—The following is the Statement of Objects and Reasons annexed to the Bill:—

The form of Post Office Cash Certificates contains the following inscription printed thereon: "Not transferable except with the permission of the Post Master-General," and non-transferability has from the first been a condition attaching to these Certificates. This restriction, however, in the absence of specific legislation, would not be operative against the general right of transfer of all actionable claims conferred by section 130 of the Transfer of Property Act, 1882. The present Bill provides for the validation of the abovementioned restriction, except where the Cash Certificates form part of the estates of deceased persons, or are necessarily transferable by operation of law, *e.g.*, as in the case of the holder's insolvency. Opportunity has at the same time been taken to place the payment of Cash Certificates belonging to the estates of deceased persons on the same footing as Government Savings Bank deposits forming part of the estates of such persons.—(*Fort St. George Gazette,* Part III, 2nd October, 1917, p. 451.)

[19*th September,* 1917.

An Act to restrict the transfer of Post Office 5*-year Cash Certificates and to provide for the payment of Certificates standing in the name of deceased persons.*

WHEREAS it is expedient to restrict the transfer of Post Office 5-year Cash Certificates and to provide for the payment of certificates standing in the name of deceased persons; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE POST OFFICE CASH CERTIFICATES ACT, 1917.

Prohibition of transfer of Post Office 5-year Cash Certificates without the consent of an authorised officer.

2. (1) Notwithstanding any provision in any enactment or any rule of law for the time being in force to the contrary, no transfer (whether made before or after the commencement of this Act), of a Post Office 5-year Cash Certificate shall be valid without the previous consent in writing of [2][an officer of the Post Office authorized by general or special order of the Central Government in that behalf].

(2) In this section "transfer" means a transfer *inter vivos* and does not include a transfer by operation of law.

Payment on death of holder of Post Office 5-year Cash Certificate.

3. (1) If a person dies and is at the time of his death the holder of a Post Office 5-year Cash Certificate, payment of the sum for the time being due on such certificate may be made in the manner provided in the Government Savings Banks Act, 1873, for the payment of deposits belonging to the estates of deceased persons, and the provisions of sections 4 to 9 of the said Act shall apply accordingly as if the holder of such certificate were a depositor in a Government Savings Bank and the sum for the time being due on such certificate were a deposit in such a Bank [3][and as if for the

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LEG. REF.

[1] For statement of Objects and Reasons, *see* Gazette of India, 1917, Part V, p. 75; and for Proceedings in Council, *see* ibid., 1917, Part VI, pp. 705 and 929.

[2] Substituted for the words "the Post master-General for the area in which the Pos Office of issue is situate" by Act XXXII o 1920, S. 2.

[3] Inserted by *ibid.*, S. 3.

words 'three thousand' in sections 4 and 8 of the said Act the words 'five thousand' were substituted]:

Provided that the powers conferred by the said provisions on the Secretary of a Government Savings Bank shall be exercisable by the Post Master-General for the area within which the post office of issue of such certificate is situate:

Provided, further that, where in any one case payment is to be made of certificates issued from more post offices than one, the said powers shall be exercisable by the Post Master-General for the area in which any of the said post offices is situate.

(2) Nothing in sub-section (1) shall be deemed to require any person to accept payment of the amount due on a Post Office 5-year Cash Certificate before the same has reached maturity.

THE POWERS-OF-ATTORNEY ACT (VII OF 1882).[1]

[Repealed in Art. XII of 1891; VI of 1900, S. 48.]

[*24th February*, 1882.

An Act to amend the law relating to Powers-of-Attorney.

For the purpose of amending the law relating to Powers-of-Attorney; It is hereby enacted as follows :—

Short title.

1. This Act may be called THE POWERS-OF-ATTORNEY ACT, 1882.

LEG. REF.

[1] For Statement of Objects and Reasons, see *Gazette of India*, 1881, Pt. V, p. 1473; for Proceedings in Council, see *ibid*, 1881, Supplement, p. 1409, and *ibid.*, 1882, Supplement, p. 204.

Act VII of 1882 has been declared in force in the Sonthal Parganas by S. 3 of the Sonthal Pargans Settlement Regulation (III of 1872) as amended by the Sonthal Parganas Justice and Laws Regulation (III of 1899), Beng. Code.

NOTES.

Secs. 1 to 3: POWER-OF-ATTORNEY.—Where an act purporting to be done under a power-of-attorney is challenged, the authority in question should be found within the instrument either in express terms or by necessary implication. 43 C. 527=43 I.A. 48=30 M.L.J. 232 (P.C.) [Reversing 23 I.C. 516]. *See also* 1893 A. C. 170, Foll. A power-of-attorney authorising the agent to manage the business of the principal to institute suits and oppose all suits that might be brought by or against the principal in respect of the business does not confer on the agent the power to compromise a suit. 23 C. L.J. 436=34 I.C. 394=20 C.W.N. 943. Though *registration* of special power-of-attorney is not compulsory, yet the Court is not bound to presume its genuineness unless it is registered. 43 C. 884=20 C.W.N. 287. A power given to an attorney to execute deeds of sale does not authorise him to execute agreements to sell. Where a power by two brothers was given to a third brother to mortgage family property, and he mortgaged the same to pay debts binding on the family such mortgage is valid. 1927 P. C. 111=53 M.L.J. 592 (P.C.); 13 I.C. 637=16 C.L.J. 119; *see also* 1939 Mad. 802=(1939) 2 M.L.J. 600; 1938 Cal. 573=42 C.W.N. 718

CONSTRUCTION OF POWERS-OF-ATTORNEY.—*See* 1935 O. W. N. 490=1935 O. 305; 155 I. C. 607=1935 N. 127; 44 L. W. 603=(1937) 1 M.L.J. 23; 19 N. L. J. 207. Power to carry on business, if includes power to enter into forward contracts. 10 I.C. 895. Construction of powers—Appeal if part of preceeding to recover debt. 53 I.C. 748. *Power of-attorney should be strictly construed*, and general powers of borrowing should be restricted to matters *ejusdem generis* with those already stated. 39 M. 1918: *see also* 38 M. 832=26 M.L.J. 185. Authority given by Board of directors of company to a director to attend to all the affairs and Court proceedings relating to company includes authority to file insolvency petition against debtor. 52 L.W. 474=1940 Mad. 958 =(1940) 2 M.L.J. 495. Authority to sue for and demand monies, institute legal proceedings and settle claims etc., does not confer power to assign decree obtained by his principal. 49 L.W. 375 =1939 Mad. 543. As to attorney's power to delegate functions to another, *see* 20 N.L.J. 200 =1937 Nag. 379. Where a person carrying on trade in the shape of export and import of goods executes a power-of-attorney giving his agent authority to purchase goods on his behalf, such a power cannot be held to include a power to borrow money, nor to receive deposits from others and carry on a banking business on behalf of the principal, involving also the liability to pay interest on the deposits received. 44 L.W. 603=(1937) 1 M.L.J. 23. Power to sign a mortgage does not include power to contract debt. 3 P.L.T. 442=1922 P. 559. *Joint*

Local extent. Commencement.

It applies to the whole of British India; and it shall come into force on the first day of May, 1882.

Execution under powers-of-attorney.

2. The donee of a power-of-attorney may, if he thinks fit, execute or do any assurance, instrument or thing in and with his own name and signature, and his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument and thing so executed and done, shall be as effectual in law as if it had been executed or done by the donee of the power in the name, and with the signature and seal, of the donor thereof.

This section applies to powers-of-attorney created by instruments executed either before or after this Act comes into force.

Payment by attorney under power, without notice of death, etc., good.

3. Any person making or doing any payment or act in good faith, in pursuance of a power-of-attorney, shall not be liable in respect of the payment or act by reason that, before the payment, or act, the donor of the power had died or become lunatic, of unsound mind, or bankrupt or insolvent

NOTES.

power—Death of one—Survivor—When can execute. 37 M. 199=41 I.A. 51=26 M.L.J. 411 (P.C.). Revocation of power. 105 P.L.R. 1917=40 I.C. 280.

CONSTRUCTION OF POWER.—*Illustrative Cases.*—From the fact that a person holding power-of-attorney is directed to appear in person and to appoint a substitute for himself, it follows that he is given power to appoint a pleader. 1931 A.L.J. 904=1931 A. 320 (1). *See also* 19 N.L. J. 207. There is no rule of construction which permits a document contrary to its actual wording to be read as though it followed a proposed precedent, unless between the parties it has been rectified or at least is such as would by the Court be rectified. The general words in the later clauses of the power-of-attorney should be read with the special powers given in the earlier clauses and cannot be construed so as to enlarge the restricted powers there mentioned. 142 I. C. 660=64 M.L.J. 184 (P.C.). Authority of agent—Power to "endorse" and "accept" does not include power to "back" bills. 1933 P.C. 78=64 M.L.J. 184 (P.C.). Power to surrender shares of the principal does not include power to refuse newly issued shares to which his principal was entitled. I.L.R. (1938) 2 Cal. 190=1938 Cal. 423. Where a power-of-attorney executed by a mortgagee gives the attorney power "to execute or enforce powers of sale or other rights, powers of receiving incident to such mortgages, charges or securities," the attorney can exercise a power to appoint a receiver of the mortgaged properties. 40 C.W. N. 1270=1936 C. 646. As to power of agent to refer matter for arbitration, *see* 41 P.L.R. 580 =1939 Lah. 154; 1940 Mad. 650. Where a power-of-attorney began by stating that the executant could not himself prosecute his suit and therefore empowered the agent to attest and present the pleas, etc., and the final clause said "in short the agent is authorised to take all proceedings connected with the litigation." *Held*, that the agent had been given full authority to lodge an appeal, if necessary, because the appeal was merely the continuation of the suit. 132 I. C. 895=32 P.L.R. 7; 1940 Mar.L.R. 28 (Civ.); 1936 Lah. 583. Where an agent is authorized by a power-of-attorney only to conduct an appeal, such agent has no power to file application for leave to appeal *in forma pauperis*, on behalf of the applicant pauper and presentation thereof by him is not proper. 1937 L. 318. But *see* 1936 L. 583=165 I.C. 274. Power to conduct proceedings in Court does not confer power to present document before Sub-Registrar for registration. 1938 Lah. 255. As to right of audience of such person in Court, *see* (1937) 2 M.L.J. 552 (F.B.). Where the Bank by a power-of-attorney authorised its agent to sign any agreements, generally sign for the Bank, and take any legal proceedings on behalf of the Bank. *Held*, that the agent had authority to enter into a reference to an arbitration. 192 I. C. 758=1941 Pesh. 3. *See also* 194 I.C. 826.

DEATH OF PERSON GIVING—EFFECT.—A power-of-attorney in favour of counsel ceases to be in force on the death of the party. Where the counsel desires to act for the widow of the deceased, he should get a fresh power. 133 I. C. 877=32 P.L.R. 389. Principal just before leaving India empowering agent to act during his absence—Subsequent return and again leaving India—Agency not terminated—Agent has power to act during the second absence also. I.L.R. (1938) 2 Cal. 190=1938 Cal. 423.

RIGHT OF AGENT TO ACT AS GUARDIAN ON BEHALF OF PRINCIPAL.—A suit was instituted by the general attorney of a minor principal's guardian, without the guardian's knowledge and permission, both on his own behalf and for the minor's guardian, professedly as the guardian's authorized agent. *Held*, that the minor not being fully represented, the judgment cannot be conclusive as against him. 128 I.C. 763=1930 A. 875.

STAMP—STAMP RULES OF 1925, R. 10.—Under R. 10 of the Indian Stamp Rules of 1925 read with Appendix III to those rules, a power-of-attorney has to be stamped either with an engraved stamp or by the affixation and impressing of a label on it by the proper officer. 43 P.L.R. 499=1941 Lah. 345.

Sec. 3.—S. 3 does no more than indemnify the holder of a power-of-attorney for actions done by him in good faith, if the determination of his power by the death of the person granting it was unknown to him at the time. 1934 N. 274

or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy, insolvency or revocation was not, at the time of the payment or act, known to the person making or doing the same.

But this section shall not affect any right against the payee of any person interested in any money so paid; and that person shall have the like remedy against the payee as he would have had against the payer, if the payment had not been made by him.

This section applies only to payments and acts made or done after this Act comes into force.

Deposit of original instruments creating powers-of-attorney.

4. (*a*) An instrument creating a power-of-attorney, its execution being verified by affidavit, statutory declaration or other sufficient evidence, may, with the affidavit or declaration, if any, be deposited in the High Court within the local limits of whose jurisdiction the instrument may be.

(*b*) A separate file of instruments so deposited shall be kept and any person may search that file, and inspect every instrument so deposited; and a certified copy thereof shall be delivered out to him on request.

(*c*) A copy of an instrument so deposited may be presented at the office and may be stamped or marked as a certified copy, and, when so stamped or marked, shall become and be a certified copy.

(*d*) A certified copy of an instrument so deposited shall, without further proof, be sufficient evidence of the contents of the instrument and of the deposit thereof in the High Court.

[1](*e*) The High Court may, from time to time, make rules for the purposes of this section, and prescribing, with the concurrence of the Provincial Government, the fees to be taken under clauses (*a*), (*b*) and (*c*).[2]

(*f*) [3][* * * * *]

(*g*) This section applies to instruments creating powers-of-attorney executed either before or after this Act comes into force.

Power of attorney of married woman.

5. A married woman, whether a minor or not, shall, by virtue of this Act, have power, as if she were unmarried and of full age, by a non-testamentary instrument, to appoint an attorney on her behalf, for the purpose of executing any non-testamentary instrument or doing any other act which she might herself execute or do; and the provisions of this Act, relating to instruments creating powers-of-attorney shall apply thereto.

This section applies only to instruments executed after this Act comes into force.

6. [*Act XXVIII of* 1866, *S.* 39 *repealed.*] *Repealed by the Repealing and Amending Act* (*XII of* 1891).

LEG. REF.

[1]For instances of rules made and fees prescribed under this clause, *see* Mad. R. and O.; Bom. R. and O.; Bur. R. M.

[2]For Madras High Court-Fees Rules made under this Act and the Indian High Courts Act, 1861 (24 and 25 Vict., c. 104), see *Fort St. George Gazette*, now replaced by Acts of 1925.

[3]This was repealed by the Lower Burma Courts Act (VI of 1900), S. 48 and Sch. II.

NOTES.

Sec. 5 : SCOPE.—The words of the section are prefectly general and so notwithstanding S. 183 of the Contract Act, minor married women are empowered to appoint attorneys on their behalf to execute such documents and do such acts as they are themselves competent to execute or do. So, the husband of a minor married woman acting under a power-of-attorney from her can apply under S. 73 (1) of the Registration Act. 1933 M. 407=64 M.L.J. 449.

THE PRESIDENCY SMALL CAUSE COURTS ACT (XV OF 1882).

Year.	No.	Short title.	Amendment.
1882	XV	The Presidency Small Cause Courts Act.	Repealed in part, XII of 1891; VII of 1896; V of 1908; XII of 1927. Repealed in part and amended, I of 1895; X of 1914, Amended. VII of 1892, S. 12; III of 1899; IV of 1906; IX of 1912; Madras Act V of 1916; XXIII of 1917; XXXVIII of 1920; Madras Act III of 1927. (*See* Madras Act III of 1922); Govt. of India (Adaptation of Indian Laws) Order, 1937.

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THE PRESIDENCY SMALL CAUSE COURTS ACT (XV OF 1882).[1]

[17*th March*, 1882.

An Act to consolidate and amend the law relating to the Courts of Small Causes established in the Presidency-towns.

Preamble.

WHEREAS it is expedient to consolidate and amend the law relating to the Courts of Small Causes established in the towns of Calcutta, Madras and Bombay; it is hereby enacted as follows:

CHAPTER I.

PRELIMINARY.

Short title.

1. This Act may be called THE PRESIDENCY SMALL CAUSE COURTS ACT, 1882;

Commencement.

and it shall come into force on the first day of July, 1882.

But nothing herein contained shall affect the provisions of the Army Act [2][* *] section 151 or the rights or liabilities of any person under any decree passed before that day.

2. [*Repeal of enactments*]. Repealed by Act I of 1938.

3. [*Amendments of Acts.*] Repealed by Act I of 1938.

"Small Cause Court" defined

4. In this Act, "the Small Cause Court" means the Court of Small Causes constituted under this Act in the town of Calcutta, Madras or Bombay, as the case may be [3][and the expression "Registrar" includes a Deputy Registrar.]

CHAPTER II.

CONSTITUTION AND OFFICERS OF THE COURT.

Courts of Small Causes established.

5. There shall be in each of the towns of Calcutta, Madras and Bombay a Court, to be called the Court of Small Causes of Calcutta, Madras or Bombay, as the case may be.

Court to be deemed under superintendence, etc., of High Court.

6. The Small Cause Court shall be deemed to be a Court subject to the superintendence of the High Court of Judicature at Fort William, Madras or Bombay, as the case may be, within the meaning of the Letters Patent, respectively, dated the twenty-eighth day of December, 1865, for such High Courts, and within the meaning of the Code of Civil Procedure [4][and to be a Court subordinate to the High Court within the meaning of section 6 of the Legal Practitioners Act, 1879], and the High Court, shall have, in respect

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EEG. REF.

[1]For Statement of Objects and Reasons, see *Gazette of India*, 1880, Pt. V. p. 376; for first Report of the Select Committee, see *ibid.*, 1881, Pt. V, p. 381; for further Report of the Select Committee, see *ibid.*, 1882, Pt. V, p. 3: for Proceedings in Council, see *ibid.*, Supplement, 1880, pp. 1394 and 1433; *ibid.*, 1882, Supplement, p. 204; and *ibid.*, 1882, Extra Supplement, p. 43.

[2]The figures "1881" were repealed by the Repealing and Amending Act (XII of 1891).

[3] These words were added to S. 4 by S. 2 of the Presy. S. C. Courts Act (III of 1899).

[4] These words were added by S. 2 of the Presy. S.C. Courts Act (I of 1895).

NOTES.

Sec. 1.—Powers of Full Bench of Small Cause Court. *See* 22 I.C. 32=18 C.L.J. 594.

Sec. 6.—There can be no doubt that both the Supreme Court and the High Court have

of the Small Cause Court, the same powers as it has under the twenty-fourth and twenty-fifth of Victoria, Chapter 104, section 15, in respect of Courts subject to its appellate jurisdiction.

Appointment of Judges.

7. [1][There shall be appointed from time to time a Chief Judge of the Small Cause Court, and as many other Judges as the Provincial Government thinks fit.]

Rank and precedence of Judges.

8. The Chief Judge shall be the first of the Judges in rank and precedence.

The other Judges shall have rank and precedence as the Provincial Government may, from time to time, direct.

Performance of duties of absent Judge.

[2][8-A. (1) During any absence of the Chief Judge or any Judge of the said Court, or during the period for which any Judge is acting as Chief Judge, the Provincial Government may appoint any person, having [3][the requisite qualifications], to act as Chief Judge or Judge of the said Court, as the case may be.

(2) Every person so appointed shall be authorized to perform the duties of the Chief Judge or a Judge of the said Court until the return of the absent Chief Judge or Judge, or of the Judge acting as Chief Judge, or until the Provincial Government sees cause to cancel the appointment of such acting Chief Judge, or Judge, as the case may be.

Procedure and practice of Small Cause Court.

[4][9. (1) The High Court may, from time to time, by rules, having[5] the force of law—

(*a*) prescribe the procedure to be followed and the practice to be observed by the Small Cause Court either in supersession of or in addition to any provisions which were prescribed with respect to the procedure or practice of the Small Cause Court on or before the thirty-first day of December, 1894, in or under this Act or any other enactment for the time being in force; and

[6][(*aa*) empower the Registrar to hear and dispose of undefended suits and interlocutory applications or matters, and]

LEG. REF.

[1] Sec. 7 substituted for old S. 7 by A.O., 1937.

[2] S. 8-A was substituted by S. 3 of the Presy. S. C. Courts Act (III of 1899) for the original S. 8-A, inserted by Act I of 1895, S 4.

[3] Substituted for "Qualifications required by S. 7" by A.O., 1937.

[4] This section was substituted for the original S. 9 by Act I of 1895, S. 5. All rules made by the High Court under this section shall be deemed to have been validly made. *See* S. 2 of Act I of 1914.

[5] For notifications prescribing such rules in (1) Bengal, see *Calcutta Gazette*, 1900, Pt. I, p. 929:

(2) Bombay, *see* Bom. R. and O.; *Bombay Gazette*, 1900, Pt. I. p. 131;

(3) Madras, *see* Mad. R. and O.; *Fort St. George Gazette*, 1906, P. II, Supp., p. 1.

[6] (*aa*) was added by S. 4 of the Presidency Small Cause Courts Act (III of 1899).

NOTES.

always exercised powers of superintendence over the Presidency Small Cause Court. But these powers are not derived from any of the sources mentioned in S. 6 of the Act; and apart from that section, it is doubtful whether the High Court was intended to have any power of judicial superintendence over the Presidency Small Cause Court. I.L.R. (1938) 2 Cal. 162 =42 C.W.N. 602=1938 Cal. 671.

Sec. 9.—Rules framed under the Act—Power of Presy. S. C. Court's Judge to stay suit to enable parties to refer to arbitration. 30 Bom. L.R. 661. Service of summons by registered post can be legitimately inferred from the evidence of the postal peon that the postal cover was tendered by him to the defendant and he refused to accept it. In such a case, a mere denial by the defendant that it was ever delivered to him is not sufficient. He must prove that it was never tendered to him and that he never refused it. 44 C.W.N. 999=1940 Cal. 536.

Secs. 9 and 38.—The object of the R. 92 was to remove the difficulty by which a preliminary hearing was precluded for finding out whether there were grounds for the application as indicated in the rule. 47 C. 763=60 I.C. 917. S. 9 empowers the High Court to make rules only with reference to matters of practice or procedure; no power is given to make such rules with regard to the matter of substantive rights. *See* 38 M. 823=26 M.L.J. 227.

(*b*) cancel or vary any such rule or rules.

Rules made under this section may provide, among other matters, for the exercise by one or more of the Judges of the Small Cause Court of any powers conferred on the Small Cause Court by this Act or any other enactment for the time being in force.

(2) The law, and any rules and declarations made, or purporting to be made, thereunder, with respect to procedure or practice, in force or treated as in force in the Small Cause Court on the thirty-first day of December, 1894, shall be in force, unless and until cancelled or varied by rules made by the High Court under this section.]

Chief Judge to distribute business of Court.

10. Subject to such rules, the Chief Judge may, from time to time, make such arrangements as he thinks fit for the distribution of the business of the Court among the various Judges thereof.

Procedure in case of difference of opinion.

11. Save as hereinafter otherwise provided, when two or more of the Judges sitting together differ on any question, the opinion of the majority shall prevail ; and if the Court is equally divided, the Chief Judge, if he is one of the Judges so differing, or, in his absence, the Judge first in rank and precedence of the Judges so differing, shall have the casting voice.

Seal to be used.

12. The Small Cause Court shall use a seal of such form and dimensions, as are for the time being prescribed by the Provincial Government.

Appointment of Registrar and other officers.

13. [1][There shall be appointed an officer to be called the Registrar of the Court who shall be the chief ministerial officer of the Court ; there shall also be appointed a Deputy Registrar and as many clerks, bailiffs, and other ministerial officers as may be necessary for the administration of justice by the Court and for the exercise and performance of the powers and duties conferred and imposed on it by this Act or any other law for the time being in force.

The Registrar and other officers so appointed shall exercise such powers and discharge such duties, of a ministerial nature, as the Chief Judge may, from time to time, by rule direct.

Registrar may be invested with powers of a Judge in suits not exceeding twenty rupees.

14. The Provincial Government may invest the Registrar with the powers of a Judge under this Act for the trial of suits in which the amount or value of the subject-matter does not exceed twenty rupees. And subject to the orders of the Chief Judge, any Judge of the Small Cause Court may, whenever he thinks fit, transfer from his own file to the file of the Registrar any suit which the latter is competent to try.

[2][*Explanation.*—For the purposes of this section an application for possession under section 41 shall be deemed to be a suit.]

Judge or other officer not to practise or trade.

15. No Judge or other officer appointed under this Act shall, during his continuance as such Judge or officer, either by himself or as a partner of any other person, practise or act, either directly or indirectly, as an advocate, attorney, vakil or other legal practitioner, or be concerned, either on his own account or for any other person, or as the partner of any other person, in any trade or profession.

LEG. REF.

[1] S. 13 substituted for old section by A.O., 1937.

[2] The explanation was added by S. 6 of the Presy. S. C. Courts Act, 1895 (I of 1895).

NOTES.

Sec. 12.—For notifications under this section in—

(1) Bombay, *see* Bom. R. and O

(2) Madras, *see* Mad. R. and O.

Any such Judge or officer so practising, acting or concerned shall be deemed to have committed an offence under section 168 of the Indian Penal Code.

Nothing herein contained shall be deemed to prohibit any such Judge or officer from being a member of any company incorporated or registered under Royal Charter, Letters Patent, Act of Parliament or Act of any British Indian legislature.

CHAPTER III.

LAW ADMINISTERED BY THE COURT.

Questions arising in suits, etc., under Act to be decided according to law administered by High Court.

16. All questions, other than questions relating to procedure or practice, which arise in suits or other proceedings under this Act in the Small Cause Court shall be dealt with and determined according to the law for the time being administered by the High Court in the exercise of its ordinary original civil jurisdiction.

CHAPTER IV.

JURISDICTION IN RESPECT OF SUITS.

Local limits of jurisdiction of Court.

17. The local limits of the jurisdiction of each of the Small Cause Courts shall be the local limits for the time being of the ordinary original civil jurisdiction of the High Court.

Suits in which Court has jurisdiction.

18. Subject to the exceptions in section 19, the Small Cause Court shall have jurisdiction to try all suits of a civil nature—

when the amount or value of the subject-matter does not exceed two thousand rupees ; and—

(*a*) the cause of action has arisen, either wholly or in part, within the local limits of the jurisdiction of the Small Cause Court, and the leave of the Court has, for reasons to be recorded by it in writing, been given before the institution of the suit ; or

(*b*) all the defendants, at the time of the institution of the suit, actually and voluntarily reside, or carry on business or personally work for gain, within such local limits ; or

(*c*) any of the defendants at the time of the institution of the suit, actually and voluntarily resides, or carries, on business or personally works for gain, within such local limits, and either the leave of the Court has been given before the institution of the suit, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution :

NOTES.

Sec. 16.—The law of limitation is dealt with in the Limitation Act and all questions relating to limitation must be decided with reference to the provisions of that Act, subject of course to the express provisions of any special or local law. S. 16 of the Presy. Small Cause Courts Act in no way affects the provisions of the Limitation Act, and in the case of execution of a decree of the Presy. Small Cause Courts Act, the limitation applicable is that provided by Art. 182 of the Limitation Act. S. 16 has not the effect of making the decree by a Presy. Small Couse Court a decree of a High Court for purposes of limitation. 7 Cut. L.T. 45.

Sec. 18.—[*See also* notes under S. 19.] Where a cause of action arose wholly outside the jurisdiction of a S. C. Court, it cannot entertain a suit against the Secretary of State on the ground that he carries on business (*i.e.*) that he conducts the management of a State Railway in the head office thereof, which is situate within the jurisdiction of the S. C. Court. 97 I.C. 246 =43 C.L.J. 574. The provisions of S. 18 with reference to the limitation of pecuniary jurisdiction are not applicable to a *claim case* in the course of execution. 36 C.W.N. 397=1932 C. 661. Where property exceeding Rs. 2,000 in value is attached and the decretal amount for which the decree amount can be executed also exceeds Rs. 2,000 it would not be open to the S. C. Court to entertain claim suits in such cases. 58 C. 1251. It is doubtful whether in a case where the value of property is above Rs. 2,000 but the decree amount is for a lesser figure. the S. C. Court has jurisdiction. (38 A. 72 and 35 C. 202, Ref.) 58 Cal. 1251=1932 C. 67. Value of subject-matter—Claim for declaration of title to entire property. 59 C. 1092= 1932 C. 629.

[1][Provided that where the cause of action has arisen wholly within the local limits aforesaid, and the Court refuses to give leave for the institution of the suit, it shall record in writing its reasons for such refusal.]

Explanation I.—When in any suit the sum claimed is, by a set-off admitted by both parties, reduced to a balance not exceeding two thousand rupees, the Small Cause Court shall have jurisdiction to try such suit.

Explanation II.—Where a person has a permanent dwelling at one place and also a lodging at another place for a temporary purpose only, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary lodging.

Explanation III.—A Corporation or Company shall be deemed to carry on business at its sole or principal office in British India, or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

Plaintiff may abandon suit against defendant resident out of jurisdiction.

[2][18-A. The Small Cause Court may allow a plaintiff at or before the first hearing of a suit in which a joint and several liability is alleged on a cause of action arising either wholly or in part within the local limits of the jurisdiction of the Court to abandon the suit as against any defendant who does not reside or carry on business or personally work for gain within such local limits, and to sue for a decree against such defendants only as do so reside, carry on business or personally work for gain.]

Suits in which Court has no jurisdiction.

19. The Small Cause Court shall have no jurisdiction in—

(*a*) suits concerning the assessment or collection of the revenue ;

[3][(*b*) suits concerning any act done by or by order of the Central Government, the Crown Representative or the Provincial Government] ;

(*c*) suits concerning any act ordered or done by any Judge or judicial officer in the execution of his office, or by any person in pursuance of any judgment or order of any Court or any such Judge or judicial officer ;

(*d*) suits for the recovery of immovable property ;

(*e*) suits for the partition of immovable property ;

(*f*) suits for the foreclosure or redemption of a mortgage of immovable property ;

(*g*) suits for the determination of any other right to or interest in immovable property ;

(*h*) suits for the specific performance or rescission of contracts ;

(*i*) suits to obtain an injunction ;

(*j*) suits for the cancellation or rectification of instruments ;

(*k*) suits to enforce a trust ;

(*l*) suits for a general average loss and suits on policies of insurance on sea-going vessels ;

(*m*) suits for compensation in respect of collisions on the high seas ;

LEG. REF.

[1] This proviso was added by S. 7, Act I of 1895.

[2] S. 18-A was added by S. 8, *ibid.*

[3] Substituted by A. O., 1937.

NOTES.

Sec. 19.—A Small Cause Court has no jurisdiction to entertain a suit under O. 21, R. 63, C. P. Code, by the unsuccessful party in a claim petition under O. 21, R. 58, C. P. Code, in the City Civil Court, the aim and object of the suit being to release the property from an attachment made by an order of the City Civil Court, because in the event of success it would involve the setting aside of an order made by the City Civil Court over which the Small Cause Court has no jurisdiction or control. 44 L.W. 150=1936 M.W.N. 790=1936 Mad. 551.

Sec. 19 (f), (g) and (h).—A suit to recover arrears of maintenance does not fall under Cl. (*f*), (*g*) or (*h*) of S. 19. 10 M.L.T. 331=12 I.C. 426.

Sec. 19 (g).—Suit for recovery of stones forming part of well alleged to be removed by defendant—Defendant setting up title—Suit is of S. C. nature. 43 M. 903=39 M.L.J. 490.

Sec. 19 (h).—Parsi husband and wife—Reference to arbitration as to amount of maintenance—Award—Suit on—Cognizable by S. C. Court. 45 B. 318=59 I.C. 189.

(*n*) suits for compensation for the infringement of a patent, copyright or trade mark ;

(*o*) suits for a dissolution of partnership or for an account of partnership transactions ;

(*p*) suits for an account of property and its due administration under the decree of the Court ;

(*q*) suits for compensation for libel, slander, malicious prosecution, adultery or breach of promise of marriage ;

(*r*) suits for the restitution of conjugal rights, [1][* * * *] or for a divorce ;

(*s*) suits for declaratory decrees ;

(*t*) suits for possession of a hereditary office ;

(*u*) suits against Sovereign Princes or Ruling Chiefs, or against Ambassadors or Envoys of Foreign States ;

(*v*) suits on any judgment of a High Court ;

(*w*) suits the cognizance whereof by the Small Cause Court is barred by any law for the time being in force.

Return of plaint.

[2][19-A. Whenever the Court finds that for want of jurisdiction it cannot finally determine the question at issue in the suit, it may at any stage of the proceedings return the plaint to be presented to a Court having jurisdiction to determine the question. When the Court so returns a plaint, it shall comply with the provisions of the second paragraph of section 57 of the Code of Civil Procedure[3] and make such order with respect to costs as it may think just, and the Court shall for the purposes of the Indian Limitation Act, 1877,[4] be deemed to have been unable to entertain the suit by reason of defect of jurisdiction. When a plaint so returned is afterwards presented to a High Court, credit shall be given to the plaintiff for the amount of the court-fee paid in the Small Cause Court in respect of the plaint in the levy of any fees which according to the practice of the High Court are credited to the Government.]

Court may by consent try suits beyond pecuniary limits of jurisdiction.

20. When the parties to a suit, which, if the amount or value of the subject-matter thereof did not exceed two thousand rupees, would be cognizable by the Small Cause Court, have entered into an agreement[5] in writing that the Small Cause Court shall have jurisdiction to try such suit, the Court shall have jurisdiction to try the same, although the amount or value of the subject-matter thereof may exceed two thousand rupees.

LEG. REF.

[1] The words "for the recovery of a wife" were repealed by Act X of 1914.

[2] S. 19-A was added by S. 9 Act I of 1895.

[3] *See* now Act V of 1908, Sch. I, O. VII, R. 10 (2).

[4] *See* now Act IX of 1908.

[5] As to additional fee payable on the filing of such agreement, *see* S. 71, *infra*.

NOTES.

Sec. 19 (o).—Partnership—Agreement to purchase motor bus to ply between places on hire purchase—Monthly profits to be shared equally—One partner advancing his share and also share of other partner as advance and further sum—Latter using it not for partnership purposes—Suit by former—Right to decree—Jurisdiction of Small Cause Court exists to try such suit. 1936 Mad. 673.

Sec. 19 (s).—A suit to establish a right given to the unsuccessful party in claim proceedings under the C. P. Code, involves in every case a prayer for the setting aside of a summary order of a Civil Court. Such a suit cannot be regarded as a suit for a mere declaration and is not excluded from the jurisdiction of a S. C. Court under S. 19 (*s*). 39 M. 219=28 M.L.J. 600. *See also* 50 L.W. 133=1939 M. 610=(1939) 1 M.L.J. 776 ; I.L.R. (1937) Bom. 807=39 Bom. L.R. 890=1937 Bom. 490. But *see* 44 L.W. 150 =1936 M. 551, where it was held that an unsuccessful party in a claim petition in the City Civil Court under O. 21, R. 58, C. P. Code, was not entitled to sue under O. 21, R. 63 in the S. C. Court. Suit by servant for salary—Matter referred to arbitration—Decree in terms of award is within jurisdiction of S. C. Court. 1939 Cal. 489.

Every such agreement shall be filed in the Small Cause Court, and, when so filed, the parties to it shall be subject to the jurisdiction of the Court, and shall be bound by its decision in such suit.

Suits by and against officers of Court.

21. All suits to which an officer of the Small Cause Court is, as such, a party, except suits in respect of property taken in execution of its process, or the proceeds or value thereof [1][and all suits whereof the amount or value of the subject-matter exceeds one thousand rupees] may be instituted in the High Court at the election of the plaintiff as if this Act had not been passed.

Costs when plaintiff sues in High Court in other cases cognizable by Small Cause Court.

22. If any suit cognizable by the Small Cause Court, other than a suit to which section 21 applies, is instituted in the High Court, and if in such suit the plaintiff obtains, in the case of a suit founded on contract, a decree for any matter of an amount or value less than [2][one thousand] rupees, and in the case of any other suit a decree for any matter of an amount or value of less than three hundred rupees, no cost shall be allowed to the plaintiff;

and if in any such suit the plaintiff does not obtain a decree, the defendant shall be entitled to his costs as between attorney and client.

The foregoing rules shall not apply to any suit in which the Judge who tries the same certifies that it was one fit to be brought in the High Court.

CHAPTER V.

PROCEDURE IN SUITS.

23. [*Portions of Civil Procedure Code extending to Court.*] *Repealed by Act I of* 1895, *S.* 12.

No written statement except in cases of set-off.

24. Except in cases of set-off under the Code of Civil Procedure, section 111,[3] no written statement shall be received unless required by the Court.

Return of documents admitted in evidence.

25. When a period of eight days from the decision of a suit has expired without any application for a new trial or re-hearing of such suit having been made, or when any such application has been made within such period and such application has been refused, or the new trial or re-hearing (as the case may be) has ended,

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LEG. REF.

[1]Inserted by S. 10 Act I of 1895.

[2]Substituted for the words "two thousand" by S. 11, *ibid.*

[3]*See* now C.P.Code (1908), Sch. I, O. 8, R. 6.

NOTES.

Sec. 22.—The criterion to be applied for the purpose of ascertaining whether S. 22 applies is not the amount which a plaintiff claims, but the amount which he in fact recovers. 32 C.W.N. 984. Discretion of Court to declare a suit to be fit to be brought in the High Court. 32 C.W.N. 984. Where the decree in a suit was for a sum below one thousand rupees, *held*, that the provisions of S. 22 would apply. 56 C. 575=1929 C. 641. A suit for an account without claim to a specific sum which is within the competence of the S.C. Court, cannot lie in that Court, and even if it lies, it is a fit case to be certified to be brought in the High Court and costs will be awarded on the High Court scale. 43 C. 190= 31 I.C. 662. When a suit triable by a S.C. Court is tried by the High Court and dimissed, the Judge can certify the case was one fit to be tried by the High Court in which case the provisions of S. 22 do not apply and the Court has got power in a proper case to deprive the successful party of his costs. 48 B. 531=26 Bom.L. R. 382. Suit for ejectment and rent in High Court, Original Side—Possession delivered during progress of suit—Effect—Rent decreed but costs disallowed—Validity of order. 51 B. 885= 1927 B. 556. Suit for ejectment is a summary proceeding to which S. 22 has no application and in such a case, order of High Court disallowing costs is not legal. 51 Bom. 885. Where order as to costs involves a question of principle, appeal lies. As to whether proceedings in S.C. Court are cheaper than in High Court, *see* the observations of Martin, C.J., in 51 B. 885. Discretion of Court to declare a suit to be fit to be brought in the High Court. 55 C. 1292 =1929 C. 63. Suit on promissory note—Provisions of O. 37, R. 2 (2) invoked—Plaintiff's right to costs—Need for certificate of Judge. 33 C.W.N. 95.

any person, whether a party to the suit or not, desirous of receiving back any document produced by him in the suit and placed on the record, shall, unless the document is impounded under section 143 of the Code of Civil Procedure,[1] be entitled to receive back the same :

Provided that a document may be returned at any time before any of such events on such terms as the Court may direct : provided also that no document shall be returned which, by force of the decree, has become void or useless.

On the return of a document which has been admitted in evidence, a receipt shall be given, by the party receiving it, in a receipt-book to be kept for the purpose.

Compensation payable by plaintiff to defendant in certain cases.

26. In any suit in which the defendant appears and does not admit the claim, and the plaintiff does not obtain a decree for the full amount of his claim, the Small Cause Court may in its discretion order the plaintiff to pay to the defendant, by way of satisfaction for his trouble and attendance, such sum as it thinks fit.

When any claim preferred, or objection made, under section 278 of the Code of Civil Procedure[2], is disallowed, the Small Cause Court may in its discretion order the person preferring or making such claim or objection to pay to the decree-holder, or to the judgment-debtor, or to both, by way of satisfaction as aforesaid, such sum or sums as it thinks fit.

And when any claim or objection is allowed the Court may award such compensation by way of damages to the claimant or objector as it thinks fit ; and the order of the Court awarding or refusing such compensation shall bar any suit in respect of injury caused by the attachment.

Any order under this section may, in default of payment of the amount payable thereunder, be enforced by the person in whose favour it is made against the person against whom it is made as if it were a decree of the Court.

Decree-holder to accompany officer executing warrant.

27. Whenever the Small Cause Court issues a warrant for the arrest of a judgment-debtor or the attachment of his property, the decree-holder, or some other person on his behalf, shall accompany the officer of the Court entrusted with the execution of such warrant, and shall point out to such officer the judgment-debtor or the property to be attached, as the case may be.

Things attached to immovable property and removeable by tenant to be deemed movable in execution.

28. When the judgment-debtor under any decree of the Small Cause Court is a tenant of immovable property, anything attached to such property, and which he might before the termination of his tenancy lawfully remove without the permission of his landlord, shall, for the purpose of the execution of such decree [3][and for the purpose of deciding all questions arising in the execution of such decree], be deemed to be movable property and may, if sold in such execution, be severed by the purchaser, but shall not be removed by him from the property until he has done to the property whatever the judgment-debtor would have been bound to do to it if he had removed such thing.

LEG. REF.

[1] *See* now C.P.Code (1908), Sch. I. O. 13, R. 8.

[2] *See* now C.P.Code (1908), Sch. I, O. 21, R. 58.

[3] Inserted by S. 2, Act IV of 1906.

NOTES.

Sec. 26—Where the Small Cause Court in dismissing a suit has not awarded compensation to the defendant under S. 26, it would be wrong on principle for the High Court in revision to interfere and pass an order for compensation, although in its opinion it is a fit case for awarding substantial compensation. 42 C.W.N. 658.

Sec. 28.—The amendment of 1906, which gave the Court jurisdiction to decide all questions arising in execution of a decree, even though the subject-matter was a tiled hut and therefore immovable property simply removed the bar contained in S. 19 (*g*) and not the bar contained in S. 18. The S.C.Court has no jurisdiction to entertain a claim for the determination of any right or interest in a tiled hut when its value exceeds Rs. 2,000. 59 C. 1092 = 36 C.W.N. 333 = 1932 C. 629. The section only applies when the judgment-debtor is a tenant of immoveable pro-

Discharge of judgment-debtor on sufficient security.

29. Whenever any judgment-debtor, who has been arrested or whose property has been seized in execution of a decree of the Small Cause Court, offers security to the satisfaction of such Court for payment of the amount which he has been ordered to pay and the costs, the Court may order him to be discharged, or the property to be released.

Court may in certain cases suspend execution of decree.

30. Whenever it appears to the Small Cause Court that any judgment-debtor under its decree is unable, from sickness, poverty or other sufficient cause, to pay the amount of the decree, or, if such Court has ordered the same to be paid in instalments, the amount of any instalment thereof, it may, from time to time, for such time and upon such terms as it thinks fit, suspend the execution of such decree and discharge the debtor, or make such order as it thinks fit.

Execution of decree of Small Cause Court by other Courts.

31. If the judgment-debtor under any decree of the Small Cause Court has not, within the local limits of its jurisdiction, movable property sufficient to satisfy the decree, the Court may, on the application of the decree-holder, send the decree for execution—

(*a*) in the case of execution against immovable property situate within such local limits—[1][to the Madras City Civil Court or the High Court of Judicature at Fort William or Bombay, as the case may be] ;

(*b*) in all other cases—to any Civil Court within the local limits of whose jurisdiction such judgment-debtor, or any movable or immovable property of such judgment-debtor, may be found.

Procedure when decree transferred.

The procedure prescribed by the Code of Civil Procedure[2] for the execution of decrees by Courts other than those which made them shall be the procedure followed in such cases.

Minors may sue in certain cases as if of full age.

32. Notwithstanding anything contained in the Code of Civil Procedure[2] as applied by this Act, any minor may institute a suit for any sum of money not exceeding five hundred rupees, which may be due to him under section 70 of the Indian Contract Act, 1872, for wages or piece work, or for work as a servant, in the same manner as if he were of full age.

Power to delegate non-judicial duties.

33. Any non-judicial or quasi-judicial act which the Code of Civil Procedure[2] as applied by this Act requires to be done by a Judge, and any act which may be done by a Commissioner appointed to examine and adjust accounts under section 394 of that Code as so applied, may be done by the Registrar of the Small Cause

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LEG. REF.

[1] Substituted for the words "to the High Court" by VII of 1892, S. 12.

[2] See now the Code of Civil Procedure (V of 1908),

NOTES.

perty at the time of attachment and not when he has ceased to be a tenant at that time. 59 C. 1092=36 C.W.N. 333=1932 C. 629. Where in execution of a decree of the Presidency Small Cause Court, the superstructure of the judgment debtor who is a tenant of immovable property is attached, and a claim preferred by a third party is allowed, a suit to set aside the order allowing the claim is cognizable by the Small Cause Court, because the superstructure which the judgment-debtor is entitled to remove without the consent of his landlord is movable property by reason of S. 28 for the purpose of deciding all questions arising in execution of the decree. The City Civil Court has no jurisdiction to entertain such a suit to set aside a claim order under S. 3 of the Madras City Civil Court Act. Nor would S. 5 of the City Civil Court Act enable the City Civil Court to entertain the suit which is cognizable by the S. C. Court. For purposes of S. 28 of the Presidency Small Cause Courts Act, there is no distinction between question arising "in" execution and questions arising "out of" execution. 50 L.W. 133=1939 Mad. 610=(1939) 1 M.L.J. 776. *See also* 1936 Mad 551.

Secs. 31 and 35.—*See* 1937 Rang 214.

Secs 31 (a) and 47.—In the classes of suits provided for under Ss. 47 and 49, the High Court is the proper forum. By S. 12 of the City Civil Court Act, the City Civil Court is substituted for the High Court only under S. 31 (*a*). 37 I.C. 436=4 L.W. 402.

Court or by such other officer of that Court as that Court may, from time to time, appoint in this behalf.

The High Court may, from time to time, by rule[1], declare what shall be deemed to be non-judicial and quasi-judicial acts within the meaning of this section.

Registrar to hear and determine suits like a Judge.

34. The suits cognizable by the Registrar under section 14 shall be heard and determined by him in like manner in all respects as a Judge of the Court might hear and determine the same :

Proviso.

Provided that, subject to the control of the Chief Judge, any Judge of the Court may, whenever he thinks fit, transfer to his own file any suit on the file of the Registrar.

Registrar may execute all decrees with the same powers as a Judge.

35. The Registrar may receive applications for the execution of decrees of any value passed by the Court, and may commit and discharge judgment-debtors, and make any order in respect thereof which a Judge of the Court might make under this Act.

Decrees and orders of Registrar to be subject to new trial as if made by a Judge.

36. Every decree and order made by the Registrar in any suit or proceeding shall be subject to the same provisions in regard to new trial as if made by a Judge of the Court.

[2][CHAPTER VI.

NEW TRIALS AND APPEALS.

General finality of decrees and orders of Small Cause Court.

37. Save as otherwise provided by this Chapter or by any other enactment for the time being in force, every decree and order of the Small Cause Court in a suit shall be final and conclusive.

New trial of contested cases.

38. Where a suit has been contested, the Small Cause Court may, on the application of either party, made within eight days from the date of the decree or order in the suit (not being a decree passed under section 522[3] of the Code of Civil Procedure) order a new trial to be held, or alter, set aside or reverse the decree or order, upon such terms as it thinks reasonable, and may, in the meantime, stay the proceedings.

LEG. REF.

[1]For rules in Madras declaring certain duties to be non-judicial or quasi-judicial acts which may be done by the Registrar, *see* Mad. R. and O.

[2] Substituted for the original Chapter VI by S. 13, Act I of 1895.

[3] *See* now the Code of Civil Procedure (Act V of 1908), Sch. II, S. 16.

NOTES.

Sec. 35.—The Registrar, under S. 35, has jurisdiction to pass an order under S. 52 (2), C. P. Code. He has exactly the same powers as the Judge and can exercise those powers in execution. 41 L.W. 350=1935 M. 298 (1).

Secs. 35 and 31.—The language of S. 35 is sufficiently wide to empower the Registrar to make any order in respect of execution matters "which a Judge of the Court might make under this Act." An order for transfer of a decree to another Court for execution made by the Registrar on an application of the decree-holder under S. 31 is a Judicial order on an application made in accordance with law. I.L.R. (1940) 2 Cal. 252=71 C.L.J. 535=1940 Cal 557.

Secs. 37 and 38: SCOPE OF.—Complaint under S. 476-B, Cr. P.Code, forwarded by a S.C. Judge—Appeal—Forum—Decree if appealable —"Principal Court having ordinary original jurisdiction," meaning of. 48 M. 395=48 M.L. J. 290. The finality conferred by S. 37 to a "suit" cannot be extended to a claim case, even though R. 102 (till recently R. 96) of the Calcutta Rules of Practice says that a claim "shall be treated as a suit." That rule only means that the claim case should be tried like ordinary suits and not in a summary manner. But that does not mean that the claim case is itself a suit, still less a new and independent suit to which the provisions of S. 38 are to be independently applied. 59 C. 827=36 C.W.N. 397=1932 C. 661. But *see* 58 C. 1251.

Sec. 38.—The wording of S. 38 of the Act is wide enough to cover appellate jurisdiction both on fact and on law. But it is well settled that the Court can, under the section, only exercise revisional jurisdiction, that it has no jurisdiction to decide questions of fact. The Court can, however, order a new trial where the judgment was manifestly against the weight of evidence. This only means that a new trial may be granted when the trial is one to which no reasonable

Explanation.—Every suit shall be deemed to be contested in which the decree is made otherwise than by consent of or in default of appearance by the defendant.

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man ought to have come and not merely because the Court to whom application is made takes a different view of the evidence. Where a Full Bench of two Judges ordered a new trial on the ground of discovery of new evidence and subsequently a Full Bench of three Judges set aside the previous order, it was held that the Full Bench of three Judges had acted without jurisdiction because it was an interference on facts and that their order should be set aside n revision. *Held also*, that while the section contemplated successive applications for new trial, it did not permit successive applications for orders to cancel earlier orders granting new trial. 57 C. 612=34 C.W.N. 413=1930 C. 806. The Full Bench of the Presidency Small Cause Court exercising its powers under S. 38 of the Act is not a Court of appeal and cannot therefore arrogate to itself the powers of an appellate Court. Its jurisdiction is merely revisional in nature, and it can only interfere when it finds some question of law or usage having the force of law to have been wrongly decided, or when it holds that the verdict of the trial Judge was not based upon any legal evidence or possibly when it finds that no reasonable person could have arrived at the conclusion to which the trial Judge has arrived. In no other circumstances can the Full Bench interfere with a finding of fact. Nor can a retrial be ordered unless the trial has been vitiated by some legal effect in omitting to observe some rule of procedure or on account of some mistake in appreciating or applying the correct rule of substantive law, or the discovery of some important matter of evidence which may necessitate a further re-hearing or reconsideration. It has no powers to order an amendment of the plaint, but it can order a retrial if an amendment setting up a new and inconsistent case is allowed by the trial Court. 1938 M.W.N. 542=1938 Mad. 669. To fall within the scope of S. 38 an order must not only be made in the suit, but it must be the order made in the suit. This means that it must be an order which in some way or other disposes of the suit, for example, an order dismissing a suit for default. Unless it is the order made in a suit in this sense, the Court has no power to deal with it under S. 38. It is clear that an order made in execution proceedings, such as an order under O. 21, R. 2, C. P. Code, cannot be the order made in the suit in this sense. I. L.R. (1938) 2 Cal. 637=1938 Cal. 862. Proceedings under O. 21, R. 50 (2) and (3) of the Civil Procedure Code are proceedings in a "suit" within the meaning of S. 38 of the Presy. S. C. Courts Act. S. 38 applies to such proceedings and the full Court has therefore jurisdiction to entertain an application for a new trial from an order passed in proceedings under O. 21, R. 50 (2) and (3), C. P. Code. 44 Bom.L.R. 124. *See also* 44 Bom.L.R. 120. A proceeding in which leave is applied for to execute the decree under O. 21, R. 50 (2) is not a suit within the meaning of S. 38. 32 Bom.L.R. 1009=1930 B. 412. The powers conferred by S. 38 are not restricted to interference with only question of law. The S. C. Court has power to reverse a decree on a question of fact. 42 B. 80=43 I.C. 486. The S.C. Court is competent to make a reference under S. 69 on an application under S. 38 of the Act. 50 C. 919=27 C.W.N. 883. The proviso to R. 92 published in the *Calcutta Gazette* of the 16th July, 1917, is not *ultra vires*; but so far as applications under S. 38 of the Act are concerned, the preliminary hearing must be before a Bench formed on the lines laid down in R. 95. 47 C. 763=60 I.C. 917=24 C.W.N. 783. Whether the jurisdiction conferred on the S.C. Court under S. 38 is revisional or appellate, *see* 47 C. 763. On an application for a new trial the Full Bench of a S.C. Court can interfere with the finding of the original Court on a question of fact. 22 I.C. 32=18 C.L.J. 594. [The Madras view is different. *See* 40 M. 355=32 M.L.J. 213 (F.B.).] When a Judge of the Presy. S.C. Court has refused to stay the proceedings under S. 19, Arbitration Act, or under Cl. (18) of Sch. II of the C. P. Code, and exercises the discretion in a particular way and one of the parties who wished the matter to be referred to arbitration acquiesces in the order, leads evidence and takes the chance of success in the first Court, the Full Court cannot interfere with the discretion and stay the suit. 35 Bom.L.R. 287=1933 B. 202. Per *Barlee, J.*—The order of the trial Court refusing to refer the dispute to the arbitrators is immediately appealable to the Chief Court. 35 Bom.L.R. 287 =1933 B. 202. *See also* 1942 M.W.N. 110 (competency of a new trial application on an order in uncontested suit amended under S. 19, Madras Agricultural Relief Act). The Court may order a new trial if the judgment is manifestly against the evidence; the power of the Court is not limited to the question of law only. 38 C. 425=12 I.C. 11. A full Bench of the Presy. S.C. Court sitting under the section cannot decide question of fact, where it first arises before it in consequence of its finding on another question of law or fact. 40 M. 355= 32 M.L.J. 213 (F.B.). *See also* 22 I.C. 32=18 C.L.J. 594; 1941 Mad. 769=(1942) 2 M.L.J. 571. The Full Bench of Presy. S. C. Court acting under S. 38 is not an appellate Court and is competent to allow the withdrawal of a suit. 36 I.C. 1003=5 L.W. 147. Where an application for a new trial under S. 38 of the Presidency Small Cause Courts Act is actually heard by two Judges of the Court and the judgment is prepared and signed by those two Judges, but by some error the judgment thus completed is also signed by the third Judge who has had nothing whatever to do with the trial of the case, this error cannot be taken to detract from the validity of the judgment, and the superfluous initials of the third Judge cannot be said to make the judgment a judgment of that Judge also who has initialled it in error. 1941 Mad. 769=(1941) 2 M.L.J. 571. An application under S. 38 need not be confined to the prayer for the relief of a new trial but may

Removal of certain causes into High Court.

39. (1) In any suit instituted in a Small Cause Court in which the amount or value of the subject-matter exceeds the sum of one thousand rupees, the defendant or any one of the defendants may, before the day fixed by the summons for the appearance of the defendant or within eight days after the service of the summons on him, whichever period shall last expire, apply *ex parte* on an affidavit setting forth the facts on which he relies for his defence to a Judge of the High Court for an order removing the cause into the High Court.

[1][(2) Unless the Judge is of opinion that the application has been made solely for the purpose of delay, the applicant shall be entitled to such order as of right :

Provided that the removal directed by such order shall, unless the Judge otherwise directs, be conditional upon the applicant giving security, to the approval of the Judge, within a reasonable time to be prescribed in the order for the payment of the amount claimed and of the costs which may become payable by him to the plaintiff in respect of the said suit.]

(3) If the applicant fail or neglect to complete the required security (if any) within the prescribed time (if any), the said order shall be discharged and the suit shall proceed in the Small Cause Court as if such order had never been made.

(4) If the plaintiff in any case which has been removed under this section into the High Court has abandoned a portion of his claim in order to be able to bring the suit within the jurisdiction of a Small Cause Court, he shall be permitted to revive the portion of his claim so abandoned.

Rules with respect to suits removed under the last foregoing section.

40. (1) When a suit has been removed into the High Court under the last foregoing section, it shall be heard and disposed of by such Court in the exercise of its original jurisdiction, and the said Court shall have all the same powers and jurisdiction in respect thereof as if it had been originally instituted in such Court.

(2) In every suit so removed as aforesaid the affidavit filed under section 39, sub-section (1), shall be treated as a written statement of the defendant tendered under section 110[1] of the Code of Civil Procedure unless the Court shall otherwise order.

(3) In every suit so removed as aforesaid credit shall be given to the plaintiff for the amount of the Court-fee paid in the Small Cause Court in respect of the plaint in the levy of any fees which according to the practice of the High Court are payable to the Government.

LEG. REF.

[1]This sub-section was substituted for the original sub-s. (2) by S. 3 of Act IV of 1906.

[1]*See* now C. P. Code, (Act V of 1908), Sch. I, O. 8, R. 11.

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also include prayers for modifying or reversing the decree or order. 33 I.C. 929=30 M.L.J. 207. S. 38 does not confer appellate powers; and hence a person against whom an order is passed may apply to the High Court for revision under S. 115, C. P. Code. 2 L.W 719=30 I. C. 488. Even when a decree is amended as to costs, the eight days' period under S. 38 will be reckoned from the date of the original decree. 1 L.W. 855=25 I.C. 647. Full Bench has jurisdiction to direct amendment of plaint. 22 I.C. 241. Where two or more Judges of a Presy. S.C. Court sit to exercise jurisdiction under S. 38, they are sitting "in a suit" within S. 69 of the Act from which a reference lies to the High Court. 38 M. 438=21 I.C. 302. If it comes to the conclusion that the findings of fact by the trial Court are unsupported by evidence and are such as to justify interference in revision, the proper procedure is not to give fresh findings of fact (which are in conflict with those of the trial Judge) but to order a retrial at which the facts may be gone into afresh. 1941 Mad. 769=(1941) 2 M.L.J. 571. Reference to arbitration by S.C. Judge—Decree modifying the award—Application to the Full Bench maintainable. *See* 1926 M. 878=51 M.L.J. 498.

Secs. 39 and 40.—Suits below Rs. 1,000 in value do not come within Ss. 39 and 40. For suits over Rs. 1,000 transferred to the High Court the Court-fees payable would be the ordinary fees leviable on the original side. 22 L. W. 15=1925 M. 1216. *See also* 91 I.C. 751.

Sec. 40.—The High Court has jurisdiction to entertain an application under S. 19, Arbitration Act, for stay of a S.C. suit upon a contract containing an agreement to refer disputes to

CHAPTER VII.

RECOVERY OF POSSESSION OF IMMOVEABLE PROPERTY.

Summons against person occupying property without leave.

41. When any person has had possession of any immoveable property situate within the local limits of the Small Cause Court's jurisdiction and of which the annual value at a rack-rent, does not exceed [1][two] thousand rupees, as the tenant, or by permission, of another person, or of some person through whom such other person claims,

and such tenancy or permission has determined or been withdrawn,

and such tenant or occupier or any person holding under or by assignment from him (hereinafter called the occupant) refuses to deliver up such property in compliance with a request made to him in this behalf by such other person,

such other person (hereinafter called the applicant) may apply[2] to the Small Cause Court for a summons against the occupant, calling upon him to show cause, on a day therein appointed, why he should not be compelled to deliver up the property.

Service of summons.

42. The summons shall be served on the occupant in the manner provided by the Code of Civil Procedure for the service of a summons on a defendant.

LEG. REF.

[1]The word "two" was substituted for the word "one" by Act IX of 1912.

[2]For fee on such application, *see* S. 71, *infra*.

N. B.—Ss. 41 and 43 have been virtually amended and supplemented in the City of Madras by Madras Act III of 1922.

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arbitration. The application in the High Court is an appearance sufficient to satisfy the provisions of the Act and the R. 43 of the Calcutta Rules. 56 C. 755=33 C.W.N. 888.

Sec. 41.—Proceedings under Ss. 41 to 49 are not suits within the meaning of C. P. Code. The decision in such proceedings is not a decree under S. 2 (2), C. P. Code, and orders passed in such proceeding cannot be regarded as a decision or order on questions of title as contemplated by Art. 13 of the Limitation Act. On the other hand, under O. 21, Rr. 59 to 63 and Rr. 99 and 101, there is an enquiry, though summary, of the right of parties and an adjudication, which cannot be said of proceedings under the Act. 1929 M. 69=56 M.L.J. 199. Ejectment proceedings under Chapter VII of the Act are not suits within the meaning of S. 2 of the Amendment Act of 1916. Therefore, the Chief Justice of the High Court has no power to transfer such proceedings to City Civil Court. 25 L.W. 115=1927 M. 321. Proceedings under the section are permissive and not compulsory. 51 B. 885=105 I.C. 395=1927 B. 556. The mortgagee of property is not a person, through whom the purchaser of the property at a private sale claims within the meaning of S. 41. The mere fact that there is a covenant in the mortgage deed that the mortgagor would execute the necessary sale deed in the event of the mortgagee exercising the power of sale will not make any difference. The mortgagor cannot be said to be the tenant of, or in possession by permission of, the purchaser, unless the purchaser has done some act to indicate as permission having been granted subsequent to the sale. 1930 M. W.N. 652. The petitioner executed in favour of the respondent a mortgage deed which was in some respects a combination of simple and usufructuary mortgages. The mortgagee was to have possession of the property subject to certain stipulations regarding interest. On the same day, a deed of rental agreement was entered into between them under which the mortgagor was to remain in possession of the property mortgaged on payment by him of a certain amount as rent per mensem, and the lease was to enure for a term of 3 years subject to certain conditions, one of them being that in case of failure to pay rent as stipulated therein, the lessor was entitled to possession of the property without giving notice to quit. The respondent applied for ejectment of the petitioner on the allegation that rent had fallen into arrears. *Held*, that the petitioner was a tenant under S. 41 and that the suit was maintainable. 1932 M. 318=62 M.L.J. 346. A sub-tenant is an "occupant" and the owner can sue him in ejectment in the S. C. Court. 49 B. 685=89 I.C. 88.

Secs. 41 and 43.—In a writ of possession the order to give possession authorises and requires the removal by bailiff of all persons from the premises by force, if need be, to vacate the same. 19 C W.N. 273=42 C. 313. A suit to eject a tenant is maintainable in City Civil Court, though an application is cognisable by the S. C. Court. 43 M.L.J. 288=1922 M. 445. It is not within the jurisdiction of the City Civil Court to set aside an order in ejectment made by the Presy. S. C. Court. 37 I.C. 436=4 L. W. 402. Chap. VI does not apply to S. 41. Under S. 41, the Court can deliver possession only when the tenancy has determined, and where the Court has delivered possession before the tenancy has determined, its order is wrong and open to revision. 23 I.C. 572=26 M.L.J. 467.

Sec. 42.—*See* 7 M.L.T. 385=6 I.C. 722.

Order for possession.

43. If the occupant does not appear at the time appointed and show cause to the contrary, the applicant shall, if the Small Cause Court is satisfied that he is entitled to apply under section 41, be entitled to an order addressed to a bailiff of the Court directing him to give possession of the property to the applicant on such day as the Court thinks fit to name in such order.

Explanation.—If the occupant proves that the tenancy was created or permission granted by virtue of a title which determined previous to the date of the application, he shall be deemed to have shown cause within the meaning of this section.

Such order to justify bailiff entering on property and giving possession. Bar to proceedings against Judge or Officer for issuing, etc., order or summons.

44. Any such order shall justify the bailiff to whom it is addressed in entering after the hour of six in the morning and before the hour of six in the afternoon upon the property named therein, with such assistants as he thinks necessary, and giving possession of such property to the applicant: and no suit or prosecution shall be maintainable against any Judge or officer of the Small Cause Court by whom any such order as aforesaid was issued, or against any bailiff or other person by whom the same was executed, or by whom any such summons as aforesaid was served for the issue, execution or service of any such order or summons, by reason only that the applicant was not entitled to the possession of the property.

Applicant, if entitled to possession, not to be deemed trespasser for any error in proceedings. Occupant may sue for compensation.

45. When the applicant, at the time of applying for any such order as aforesaid, was entitled to the possession of such property, neither he nor any person acting in his behalf shall be deemed, on account of any error, defect or irregularity in the mode of proceeding to obtain possession thereunder, to be a trespasser; but any person aggrieved may bring suit for the recovery of compensation for any damage which he has sustained by reason of such error, defect or irregularity;

when no such damage is proved, the suit shall be dismissed; and when such damage is proved but the amount of the compensation assessed by the Court does not exceed ten rupees, the Court shall award to the plaintiff no more costs than compensation, unless the judge who tries the case certifies that in his opinion full costs should be awarded to the plaintiff.

Liability of applicant obtaining order when not entitled.

46. Nothing herein contained shall be deemed to protect any applicant obtaining possession of any property under this Chapter from a suit by any person deeming himself aggrieved thereby, when such applicant was not at the time of applying for such order as aforesaid entitled to the possession of such property.

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Sec. 43.—A Presy. S.C. Court cannot grant an extension of time fixed in an order for recovery of possession made under S. 43. 45 B. 1048=62 I.C. 45. *See also* 46 C.W.N. 11. Ordinarily a tenant must deliver possession before he can dispute his landlord's title, and this estoppel ordinarily continues even beyond the term of the tenancy unless the tenant first delivers possession. Eviction or something equivalent to it must take place before the lessee can deny the title of the lessor. This rule is not modified by S. 43 of the Madras Presidency Small Cause Courts Act. It merely lays down the procedure to be adopted by the Court in applications for recovery of possession of immovable property. If the occupant has proved that the tenancy has been determined and that his lessor had no right to possession, then it is sufficient cause for the purpose of the section, why the Court should not pass an order for possession. The section does not purport to lay down any law modifying the ordinary law with regard to relations between landlord and tenant. Though a landlord has obtained an order under S. 43 of the Act against his tenant, that would not affect a sub-tenant under the tenant, and the latter would be entitled to retain possession until he is ousted by regular proceedings. 1940 Mad. 700=(1940) 1 M.L.J. 605.

Secs. 46 to 49.—No suit can be brought in any Court for superseding order under Chapter VII except in the manner provided by Ss. 46 to 49 of the Act. 37 I.C. 436=4 L.W. 402.

And when the applicant was not, at the time of applying for any such order as aforesaid, entitled to the possession of such property, the application for such order, though no possession is taken thereunder, shall be deemed to be an act of trespass committed by the applicant against the occupant.

Application for order in such case an act of trespass.

47. Whenever on an application being made under section 41 the occupant binds himself, with two sureties, in a bond for such amount as the Small Cause Court thinks reasonable, having regard to the value of the property and the probable costs of the suit next hereinafter mentioned, to institute without delay a [1]suit in the High Court against the applicant for compensation for trespass and to pay all the costs of such suit in case he does not prosecute the same or in case judgment therein is given for the applicant, the Small Cause Court shall stay the proceedings on such application until such suit is disposed of.

Stay of proceedings on occupant giving security to bring suit against applicant.

If the occupant obtains a decree in any such suit against the applicant, such decree shall supersede the order (if any) made under section 43.

Nothing contained in section 22 shall apply to suits under this section.

48. In all proceedings under this Chapter, the Small Cause Court shall, as far as may be and except as herein otherwise provided, follow the procedure prescribed for a Court of first instance by the Code of Civil Procedure.

Proceedings to be regulated by Code of Civil Procedure.

49. Recovery of the possession of any immoveable property under this Chapter shall be no bar to the institution of a suit in the High Court[2] for trying the title thereto.

Recovery of possession no bar to suit to try title.

CHAPTER VIII.

DISTRESSES.

50. This Chapter extends to every place within the local limits of the ordinary original civil jurisdictions of the High Courts of Judicature at Fort William, Madras and Bombay. But nothing contained in this Chapter applies,—

Local extent of Chapter. Saving of certain rents.

(*a*) to any rent due to Government ;

(*b*) to any rent which has been due for more than twelve months before the application mentioned in section 53.

51. [3][Four or more persons shall be appointed bailiffs and appraisers for the purposes of this Chapter.]

Appointment of bailiffs and appraisers.

52. The persons so appointed [4][* * * *] shall be deemed to be public servants within the meaning of the Indian Penal Code.

Appointees to be public servants.

LEG. REF.

[1]Words "suit against the applicant, in the High Court, or in the Madras City Civil Court as the case may be" substituted by Madras Act III of 1927, for words "suit in the applicant". S. 47 has been amended in its application to the Presidency-town of Madras by Madras Act III of 1927, S. 2 (*b*).

[2]S. 49 has been amended in its application to the Presidency town of Madras by Madras Act III of 1927, S. 2 (*b*). Words "or in the Madras City Civil Court, as the case may be" were inserted by Madras Act III of 1927.

[3] S. 51 substituted for old section by A.O. 1937.

[4]Words "shall give security to be approved by the said Judges, faithfully to discharge the duties of their office, and they" omitted by *ibid.*

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Sec. 47.—When proceedings of a summary nature are taken under S. 41 to eject an occupant. and the occupant applies for stay of proceedings, the Court has no discretion to refuse it on the ground that it was not supported by an affidavit. 44 M.L.J. 386=1923 M. 323. There is nothing in S. 47 to warrant the interpretation that the application for stay should be made at an early stage in the proceedings. 1923 M. 323.

Sec. 48—A Presy. S. C. Court has no power to review an order made in a proceeding under Chapter VI of the Act. 45 B. 972=61 I.C. 567. S. 48 applies the provisions of the C. P. Code to proceedings under Chapter VII and the langugage of it is wide enough to include a power to act under O. 21, R. 98: 45 M.L.J. 66=1924 M. 74.

Application for distress warrant.

53. Any person claiming to be entitled to arrears of rent of any house or premises to which this Chapter extends, or his duly constituted attorney, may apply to any Judge of the Small Cause Court, or to the Registrar of the Small Cause Court, for such warrant as is hereinafter mentioned.

The application shall be supported by an affidavit or affirmation to the effect of the form (marked A) in the third schedule hereto annexed.

Issue of distress warrant.

54. The Judge or Registrar may thereupon issue a warrant under his hand and seal and returnable within six days, to the effect of the form (marked B) contained in the same schedule, addressed to any one of such bailiffs.

The Judge or Registrar may, at his discretion, upon personal examination of the person applying for such warrant, decline to issue the same.

Time for distress.

55. Every distress under this Chapter shall be made after sunrise and before sunset, and not at any other time.

What places bailiff may force open.

56. The bailiff directed to make the distress may force open any stable, out-house or other building, and may also enter any dwelling house, the outer door of which may be open and may break open the door of any room in such dwelling-house for the purpose of seizing property liable to be seized under this Chapter :

Provided that he shall not enter or break open the door of any room appropriated for the zenana or residence of women, which by the usage of the country is considered private.

Property which may be seized.

57. In pursuance of the warrant aforesaid the bailiff shall seize the movable property found in or upon the house or premises mentioned in the warrant and belonging to the person from whom the rent is claimed (hereinafter called the debtor) or such part thereof as may, in the bailiff's judgment, be sufficient to cover the amount of the said rent, together with the costs of the said distress :

Provided that the bailiff shall not seize—

(*a*) things in actual use ; or

(*b*) tools and implements not in use, where there is other moveable property, in or upon the house or premises sufficient to cover such amount and costs ; or

(*c*) the debtor's necessary wearing apparel ; or

(*d*) goods in the custody of the law.

Impounding distress.

58. The bailiff may impound or otherwise secure the property so seized in or on the house or premises chargeable with the rent.

Inventory.

Notice of intended appraisement and sale.

59. On seizing any property under section 57 the bailiff shall make an inventory of such property and shall give a notice in writing to the effect of the form (marked C) in the third schedule hereto annexed to the debtor, or to any other person upon his behalf in or upon the said house or premises.

Copies of inventory and notice to be filed.

The bailiff shall, as soon as may be, file in the Small Cause Court copies of the said inventory and notice.

60. The debtor or any other person alleging himself to be the owner of any

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Secs. 59, 60 and 66.—Where a tenant has allowed his goods to be distrained upon for arrears of rent and desires to get rid of the distress by complying with the notice in form C, he has to pay the item of expenses under the head "commission," as well as the costs of affidavit and warrant to distrain, *i.e.*, the costs of the distress, though he is not bound to pay the costs of the order to sell comprised in the third column of form E. 39 Bom.L.R. 152 = 1937 B. 196 = I.L.R. (1937) Bom. 320.

Secs. 60 and 61.—The effect of Ss. 60 and 61 is that S. 60 provides for summary and immediate relief against distraint, and allows a debtor to come in and obtain time, and also

Applications to discharge or suspend warrant.

property seized under this Chapter, or the duly constituted attorney of such debtor or other person, may, at any time within five days from such seizure, apply to any Judge of the said Court to discharge or suspend the warrant, or to release a distrained article, and such Judge may discharge or suspend such warrant or release such article accordingly, upon such terms as he thinks just,

and any of the Judges of the said Court may in his discretion give reasonable time to the debtor to pay the rent due from him.

Upon any such application, the costs attending it and attending the issue and execution of the warrant shall be in the discretion of the Judge and shall be paid as he directs.

Claim to goods distrained made by a stranger.

61. If any claim is made to, or in respect of, any property seized under this Chapter, or in respect of the proceeds or value thereof, by any person not being the debtor, the Registrar of Small Cause Court, upon the application of the bailiff who seized the property, may issue a summons calling before the Court the claimant and the person who obtained the warrant.

And thereupon any suit which may have been brought in the High Court in respect of such claim shall be stayed and any Judge of the High Court, on proof of the issue of such summons and that the property was so distrained, may order the plaintiff to pay the costs of all proceedings in such suit after the issue of such summons.

And a Judge of the Small Cause Court shall adjudicate upon such claim and make such order between the parties in respect thereof and of the costs of the proceedings as he thinks fit ;

and such order shall be enforced as if it were an order made in a suit brought in such Court.

The procedure in Small Cause Courts in cases under this section shall conform, as far as may be, to the procedure in an ordinary suit in such Courts.

Power to award compensation to debtor or claimant.

62. In any case under section 60 or section 61, the Judge by whom the case is heard may award such compensation by way of damages to the applicant or claimant (as the case may be) as the Judge thinks fit,

and may for that purpose make any enquiry he thinks necessary ;

and the order of the Judge awarding or refusing such compensation shall bar any suit for the recovery of compensation for any damage caused by the distress.

Power to transfer to High Court cases involving more than one thousand rupees.

63. In any case under section 60 or section 61, if the value of the subject-matter in dispute exceeds one thousand rupees, the applicant or claimant may apply to the High Court to transfer the case to itself, and the High Court, on being satisfied that it is expedient that the case should be disposed of by itself, may direct the case to be transferred accordingly, and

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allows the owner to procure immediately a release of the property upon terms; while S. 61 provides for the adjudication of the claimant's right and title to the property. The disposal of an application under S. 60 does not preclude the claimant from applying under S. 61. The mere fact that the summons or notice did not proceed in the peculiar way prescribed in the first portion of sec. 61 does not, where a trial takes place both parties having had notice, having filed pleadings, having appeared, evidence having been taken, deprive the Court of jurisdiction or vitiate the trial under that section. It does not call for interference in revision. 59 C. 311=36 C.W.N. 530=1932 C. 441. The Small Cause Court's powers in execution are limited to movables, but subject to this limitation, that Court, like any other Court has always power to execute its own decrees and in case of a claim preferred to attached property, the power and duty to deal with the claim or objection though the property may be valued more than Rs. 2,000 by the claimant. The decision of the Small Cause Court on a claim case is, subject to a new trial, final. 59 C. 827=36 C.W N. 397=1932 Cal. 661.

Sec. 63.—*See* 38 Mad. 438=21 I.C. 302.

may thereupon alter or set aside any order passed in the case by a Judge of the Small Cause Court and may make such order therein as the High Court thinks fit.

Every application under this section shall be made within seven days from the date of the seizure of the subject-matter in dispute.

In granting applications under this section, the High Court may impose such terms as to payment of, or giving security for, costs or otherwise as it thinks fit.

The procedure in cases transferred under this section shall conform, as far as may be, to the procedure in suits before the High Court in the exercise of its ordinary original civil jurisdiction ; and orders made under this section may be executed as if they were made in the exercise of such jurisdiction, and every such order awarding or refusing compensation shall bar any suit for the recovery of compensation for any damage caused by the distress which gave rise to the case wherein such order was made.

64. In default of any order to the contrary by a Judge of the Small Cause Court or by the High Court, any two of the said bailiffs may, at the expiration of five days from a seizure of property under this Chapter, arpraise the property so seized, and give the debtor notice in writing to the effect of the form (marked D) in the third schedule hereto annexed.

Appraisement.

Notice of sale.

The bailiffs shall file in the Small Cause Court a copy of every notice given under this section.

65. In default of any such order to the contrary, the distrained property shall be sold on the day mentioned in such notice, and the said bailiffs shall, on realizing the proceeds, pay over the amoun thereof to the Registrar of the Small Cause Court ; and such amount shall be applied first in payment of the costs of the said distress and then in satisfaction of the debt ; and the surplus, if any, shall be returned to the debtor :

Sale.

Application of proceeds.

Provided that the debtor may direct that the sale shall take place in any other manner, first giving security for any extra costs thereby occasioned.

66. No costs of any distress under this Chapter shall be taken or demanded except those mentioned in the part (marked E) of the third schedule hereto annexed.

Costs of distresses.

[1][* * * * *]

67. The Registrar of the Small Cause Court shall keep a book in which all sums received as costs upon distresses made under this Chapter, and all sums paid as remuneration to the said bailiffs, and all contingent charges incurred in respect of such distresses, shall be duly entered.

Account of costs and proceeds.

He shall also enter in the said book all sums realised by sale of the property distrained and paid over to landlords under the provisions of this Chapter.

68. No distress shall be levied for arrears of rent except under the provisions of this Chapter ;

Bar of distresses except under this Chapter.

and any person, except a bailiff appointed under section 51, levying or attempting to levy any such distress, shall, on conviction before a Presidency Magistrate, be liable to be punished with fine which may extend to five hundred rupees and with imprisonment for a term which may extend to three months, in addition to any other liability he may have incurred by his proceedings.

Penalty for making illegal distresses.

LEG. REF.

[1] Para. 2 of sec. 66 omitted by A. O., 1937.

NOTES.

Sec. 66.—The practice prevailing in the Small Cause Court in cases in which a landlord

CHAPTER IX.

REFERENCES TO HIGH COURT.

Reference when compulsory.

69. [1][(1) If two or more Judges of the Small Cause Court sit together in any suit, or in any proceeding under Chapter VII of this Act, and differ in their opinion as to any question of law or usage having the force of law or the construction of a document which construction may affect the merits, or

if in any suit or in any such proceeding, in which the amount or value of the subject-matter exceeds five hundred rupees, any such question arises upon which the Court entertains reasonable doubt, and either party so requires,

the Small Cause Court shall draw up a statement of the facts of the case and the point on which there is a difference of opinion or on which doubt is entertained, and refer such statement with its own opinion on the point for the opinion of the High Court; and the provisions of sections 619 to 621 of the Code of Civil Procedure[2] shall, so far as they are applicable, be deemed to apply as if such reference had been made under section 617[3] of the said Code.

(2) When the Small Cause Court refers any question for the opinion of the High Court as provided in sub-section (1), it shall either reserve judgment or give judgment contingent upon such opinion.]

Security to be furnished on such reference by party against whom contingent judgment given.

70. When judgment is given under section 69 contingent upon the opinion of the High Court, the party against whom such judgment is given shall at once furnish security, to be approved by the Small Cause Court, for the costs of the reference to the High Court and for the amount of such Judgment :

Provided that no security for the amount of such judgment shall be required in any case in which the Judge who tried the case has ordered such amount to be paid into Court, and the same has been paid accordingly.

If no such security given, party to be deemed to have submitted to judgment.

Unless such security as aforesaid is at once furnished, the party against whom such contingent judgment has been given shall be deemed to have submitted to the same.

CHAPTER X.

FEES AND COSTS.

Institution-fee.

71. A fee not exceeding—

(*a*) when the amount or value of the subject-matter does not exceed five hundred rupees—the sum of two annas in the rupee on such amount or value,

(*b*) when the amount or value of the subject-matter exceeds five hundred rupees—the sum of sixty-two rupees eight annas, and one anna in the rupee on the excess of such amount or value over five hundred rupees.

LEG. REF.

[1] This section was substituted for the original sec. 69 by sec. 4 of the Presidency Small Cause Courts Act (IV of 1906).

[2] *See* now C. P. Code, (Act V of 1908), Sch. I, O. XLVI, Rr. 3 to 5.

[3] *See* now *ibid.*, Sch. I, O. XLVI, R. 1.

NOTES.

applies for a distress warrant of requiring the landlord to pay into Court in advance the whole of the sums which may become payable in respect of the costs of the warrant is illegal. The costs are dealt with by the Act and the scheme is to get them either under a notice in Form C from the tenant or on a sale under sec. 66. I.L.R. (1937) Bom. 320=39 Bom.L.R. 152=1937 Bom. 196.

Sec. 69—The Judges of the Presidency Small Cause Court can make a reference to the High Court under sec. 69, though an application under sec. 38 has not been disposed of. 33 I.C. 929=30 M.L.J. 207. Sec. 69 permits a reference to the High Court only when the referring Court entertains a reasonable doubt on the point referred. 17 I.C. 93. Sec. 59 authorises a reference when two or more Judges of Small Cause Court sit together in any suit and differ in their opinion as to any question of law or usage having the force of law or the construction of a document which construction may affect the merits. 57 Cal. 919=27 C.W.N. 888. On this section, *see also* 1915 M.W.N. 785=32 I.C. 610 ; 17 I.C. 93 ; 33 Bom. 708=3 I.C. 960.

shall be paid on the plaint in every suit, and every application under [1][* *] section 41 ; and no such plaint or application shall be received until such fee has been paid.

An additional fee of ten rupees shall be paid on the filing of every agreement under section 20.

Fees for processes.

72. The fees specified in the third and fourth columns of the fourth schedule hereto annexed shall be paid previous to the issue in any suit or in any proceeding under Chapter VII of this Act of the processes, to which the said columns respectively relate, by the persons on whose behalf such processes are issued, when the amount or value of the subject-matter exceeds the sum specified in the first column, but does not exceed the sum specified in the second column of the said schedule.

Repayment of half-fees on settlement before hearing.

73. Whenever any such suit or proceeding is settled by agreement of the parties before the hearing, half the amount of all fees paid up to that time shall be repaid by the Small Cause Court to the parties by whom the same have been respectively paid.

Fees and costs of poor persons.

74. The Small Cause Court may, whenever it thinks fit, receive and register suits instituted, and applications under section 41 made, by poor persons, and may issue processes on behalf of such persons, without payment or on a part-payment of the fees mentioned in sections 71 and 72.

Power to vary fees.

75. The Provincial Government may, from time to time, by notification in the Official Gazette, vary the amount of the fees payable under sections 71 and 72 :

Provided that the amount of such fees shall in no case exceed the amount prescribed by the said sections.

Expense of employing legal practitioners.

76. The expense of employing an advocate, vakil, attorney or other legal practitioner incurred by any party shall not be allowed as costs in any suit or in any proceeding under Chapter VII of this Act, in the Small Cause Court in which suit or proceeding the amount or value of the subject-matter does not exceed twenty rupees, unless the Court is of opinion that the employment of such practitioner was under the circumstances reasonable.

Sections 3, 5 and 25 of Court-Fees Act, 1870, saved.

77. Nothing contained in this Chapter shall affect the provisions of sections 3, 5 and 25 of the Court-Fees Act, 1870.

CHAPTER XI.

MISCONDUCT OF INFERIOR MINISTERIAL OFFICERS.

78. [*Power to fine officers*] *Rep. by A.O.* 1937.

Default of bailiff or other officer in execution of order or warrant.

79. If any clerk, bailiff or other inferior ministerial officer of the Small Cause Court who is employed as such in the execution of any order or warrant loses by neglect, connivance or omission an opportunity of executing such order or warrant, he shall be liable, by order of the Chief Judge, on the application of the person injured by such neglect, connivance or omission to pay such sum, not exceeding in any case the sum for which the said order or

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LEG. REF.

[1] The words and figures "sec. 38 or" were repealed by Act VII of 1896. For modifications with which S. 71 applies to Bengal, *see* S. 16 of the Bengal Court-Fees (Amendment) Act (IV of 1922).

NOTES.

Sec. 75.—For notifications under sec. 75 in—(1) Bombay, *see* Bom. R. and O.; (2) Madras, *see* Mad. R. and O.

warrant was issued, as, in the opinion of the Chief Judge, represents the amount of the damage sustained by such person thereby.

Extortion or default of officers.

80. If any clerk, bailiff or other inferior ministerial officer of the Small Cause Court is charged with extortion or misconduct while acting under colour of its process, or with not duly paying or accounting for any money levied by him under its authority, the Court may inquire into such charge, and may make such order for the repayment or payment of any money so extorted, or of any money so levied as aforesaid, and of damages and costs, by such officer, as it thinks fit.

Court empowered to summon witnesses, etc.

81. For the purposes of any inquiry under this Chapter, the Small Cause Court shall have all the powers of summoning and enforcing the attendance of witnesses and compelling the production of documents which it possesses in suits under this Act.

Enforcement of order.

82. Any order under this Chapter for the payment or repayment of money may, in default of payment of the amount payable thereunder, be enforced by the person to whom such amount is payable as if the same were a decree of the Small Cause Court in his favour.

CHAPTER XII.

CONTEMPT OF COURT.

83 to 86. *Rep. by the Repealing and Amending Act X of* 1914 *S.* 3 *and Sch II.*

Imprisonment or committal of person refusing to answer or produce document.

87. If any witness before the Small Cause Court refuses to answer such questions as are put to him, or to produce any document in his possession or power which the Court requires him to produce, and does not offer any reasonable excuse for such refusal, the Court may sentence him to simple imprisonment, or commit him to the custody of an officer of the Court, for any term not exceeding seven days, unless in the meantime such person consents to answer such questions or to produce such document, as the case may be, after which, in the event of his persisting in his refusal, he may be dealt with according to the provisions of section [1][480 or section 482 of the Code of Criminal Procedure, 1898].

Appeal from orders under section 87.

88. Any person deeming himself aggrieved by an order under [2][* * *] section 87 may appeal to the High Court, and the provisions of the [3][Code of Criminal Procedure, 1898], relating to appeals shall, so far as may be, apply to appeals under this section.

CHAPTER XIII.

MISCELLANEOUS.

Persons by whom process may be served.

89. Notices to produce documents, summonses to witnesses, and all other processes issued in the exercise of any jurisdiction conferred on the Small Cause Court by this Act, except summonses to defendants and writs of execu-

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LEG. REF.

[1] Substituted for the words "83 or S. 85" by Act X of 1914,

[2] The words "section 83 or" were repealed by *ibid.*

[3] Substituted by *ibid.* for the words "Presidency Magistrates Act, 1877."

NOTES.

Sec. 88.—*See* 22 I.C. 775=26 M.L.J. 227; 38 Mad. 823 (new trial); 22 I. C. 241 (revision). *See also* 1935 Mad. 763=1935 M.W.N. 333 (Review).

Sec. 89.—*See* 44 C.W.N. 999=1940 Cal 536, cited under sec. 9, *supra.*

tion may, if the Court by general or special order so directs, be served by such persons as the Court, from time to time, appoints in this behalf.

Registers and returns.

90. The Small Cause Court shall keep such registers, books and accounts and submit to the High Court such statements and returns as may, subject to the approval of the Provincial Government, be [1]prescribed by the High Court.

Court to furnish records, etc., called for by Provincial Government or High Court.

91. The Small Cause Court shall comply with such requisitions as may, from time to time, be made by the Provincial Government or High Court for records, returns and statements in such form and manner as such Government or Court, as the case may be, thinks fit.

Holidays and vacations.

92. The Small Cause Court shall, at the commencement of each year, draw up a list of holidays and vacations to be observed in the Court, and shall submit the same for the approval of the Provincial Government.

Such list, when it has received such approval, shall be published in the Official Gazette, and the said holidays and vacations shall be observed accordingly.

Certain persons exempt from arrest by Court.

93. The Governor-General and Members of his Council, the Governors of Fort St. George [2][Bombay and Fort William in Bengal,] [3][* *] and the Chief Justices and Judges of the High Courts established under the twenty-fourth and twenty-fifth of Victoria, Chapter 104,[4] shall not be liable to arrest by order of the Small Cause Court.

No suit to lie upon decree of Court.

94. No suit shall lie on any decree of the Small Cause Court.

Place of imprisonment.

95. Any person ordered by the Small Cause Court to be imprisoned may be imprisoned in such place as the Provincial Government, from time to time, appoints in this behalf.

Tender in suit for anything done under Act.

96. If any person against whom any suit is brought for anything purporting to be done by him under this Act has, before the institution of the suit, tendered sufficient amends to the plaintiff, the plaintiff shall not recover.

Limitation of prosecutions.

97. All prosecutions for anything purporting to be done under this Act must be commenced within three months after the offence was committed.

SCHEDULE I.

ENACTMENTS REPEALED.

[*Repealed by Act I of* 1938, *S.* 2 *and Sch.*]

LEG. REF.

[1] Fot rules prescribing such registers, etc., in Madras, *see* Mad. R. & O.

[2] These words were substituted by Act VII of 1912 for the words "and Bombay."

[3] The words "and the members of their respective Councils" omitted by A. O., 1937. The words "Lieutenant-Governor of Bengal" were rep. by Act VII of 1912.

[4] The Indian High Courts Act, 1861, rep. by G. of I. Act 1915.

NOTES.

Sec. 94.—*See* 14 C.W.N. 695=5 I.C. 648.

Sec. 97.—Filing false affidavit in a judicial proceeding—"Act purporting to be done under the Act"—Whether prosecution for it should be commenced within 3 months of the offence, *see* (1942) 1 M.L.J. 105.

SCHEDULE II.

PORTIONS OF CIVIL PROCEDURE CODE EXTENDING TO COURT.

[*Repealed by Act I of* 1895, *S.* 12].

SCHEDULE III.

FORMS.

A

(*See Section* 53.)

In the Small Cause Court for
A.B.——————(plaintiff),
versus
C.D.——————(defendant)

A.B., of——————in the town of ——————maketh oath (*or* affirms) and saith that C.*D.*——————, of——————, is justly indebted to——————in the sum of Rs.——————for arrears of rent of the house and premises No.——————, situated at——————, in the town of——————, due for——————months, to wit from——————to——————at the rate of Rs.——————per mensem.

Sworn (*or* affirmed) before me the——————day of——————188 .

Judge [or *Registrar.*]

B.

[*See section* 54.]

In the Small Cause Court for

FORM OF WARRANT.

I hereby direct you to distrain the movable property of *C.D.*, on the house and premises situate at No.——————, in the town of——————, for the sum of——————Rs. and the costs of the distress, according to the provisions of Chapter VIII of the Presidency Small Cause Courts Act, 1882.

Dated day of 18 .

(*Signed and sealed.*)

To *E.F., Bailiff and Appraiser.*

C

[*See section* 59]

In the Small Cause Court for

FORM OF INVENTORY AND NOTICE.

[*State particulars of property seized.*]

Take notice that I have this day seized the movable property contained in the above inventory for the sum of——————Rs. being the amount of——————month's rent due to *A. B.*, at——————last, and that unless you pay the amount thereof, together with the costs of this distress, within five days from the date hereof, or obtain an order from one of the Judges or the Registrar of the Small Cause Court to the contrary, the same will be appraised and sold pursuant to the provisions of Chapter VIII of the Presidency Small Cause Courts Act, 1882. dated the day of 18

(Signed) *E.F.,*
Bailiff and Appraiser.

To *C.D.*

D

[*See section* 64]

In the Small Cause Court for

Take notice that we have appraised the movable property seized on the——————day of——————, under the provisions of Chapter VIII of the Presidency Small Cause Courts Act, 1882, of which seizure and property a notice and inventory were duly served upon you [*or* upon ——————on your behalf, *as the case may be*] under date the——————, and that the said property will be sold on the——————[*two clear days at least after the date of the notice*] at——————pursuant to the provisions of the said Act. Dated this day of 18 .

(Signed) *E.F.,*
G.H.,
Bailiffs and Appraiser

To *C.D*

E

[*See section* 66]

In the Small Cause Court for

SCALE OF FEES TO BE LEVIED IN DISTRAINTS FOR HOUSE-RENT.

Sums sued for.			Affidavit and warrant to distrain.			Order to sell.			Commission.			TOTAL.		
Rs.		Rs.	Rs.	A.	P.	Rs.	A.	P.	Rs.	A.	P.	Rs.	A.	P.
1 and under	5	...	0	4	0	0	8	0	0	8	0	1	4	0
5	,, 10	...	0	8	0	0	8	0	1	0	0	2	0	0
10	,, 15	...	0	8	0	0	8	0	1	8	0	2	8	0
15	,, 20	...	0	8	0	1	0	0	2	0	0	3	8	0
20	,, 25	...	0	12	0	1	0	0	2	8	0	4	4	0
25	,, 30	...	1	0	0	1	0	0	3	0	0	5	0	0
30	,, 35	...	1	0	0	1	0	0	3	8	0	5	8	0
35	,, 40	...	1	0	0	1	8	0	4	0	0	6	8	0
40	,, 45	...	1	4	0	2	0	0	4	8	0	7	12	0
45	,, 50	...	1	8	0	2	0	0	5	0	0	8	8	0
50	,, 60	...	2	0	0	2	0	0	6	0	0	10	0	0
60	,, 80	...	2	8	0	2	8	0	6	8	0	11	8	0
80	,, 100	...	3	0	0	3	0	0	7	0	0	13	0	0
Upwards of	100	...	3	0	0	3	0	0	7 per centum			...		

The above scale includes all expenses, except in suits where the tenant disputes the landlord's claim and witnesses have to be subpoenaed, in which case each subpoena for sums under Rs. 40 must be paid for at four annas each, and twelve annas above that amount ; and also where peons are kept in charge of property distrained [1][four annas per day must be paid per man.]

SCHEDULE IV.

[*See Section* 72].

FEES FOR SUMMONSES AND OTHER PROCESSES.

When the amount or value of the subject-matter exceeds.	But does not exceed.	Fee for summonses.	Fee for other processes.
Rs.	Rs.	Rs. A. P.	Rs. A. P.
0	10	0 2 0	0 2 0
10	20	0 4 0	0 4 0
20	50	0 8 0	0 8 0
50	100	1 0 0	1 0 0
100	200	1 4 0	2 0 0
200	300	1 8 0	3 0 0
300	400	1 12 0	4 0 0
400	500	2 0 0	5 0 0
500	600	2 4 0	6 0 0
600	700	2 8 0	7 0 0
700	800	2 12 0	8 0 0
800	900	3 0 0	9 0 0
900	1,000	3 4 0	10 0 0
1,000	1,100	3 6 0	10 8 0
1,100	1,200	3 8 0	11 0 0
1,200	1,300	3 10 0	11 8 0
1,300	1,400	3 12 0	12 0 0
1,400	1,500	3 14 0	12 8 0
1,500	1,600	4 0 0	13 0 0
1,600	1,700	4 2 0	13 8 0
1,700	1,800	4 4 0	14 0 0
1,800	1,900	4 6 0	14 8 0
1,900	2,000	4 8 0	15 0 0

LEG. REF.

[1] In their application to the Court of Small Causes of Calcutta, these words have been substituted by the words "such sum not exceeding eight annas per day as may be fixed from time to time by the Chief Judge must be paid per man" by Ben. Act XX of 1932.

[1][* * * *]

THE PRESIDENCY-TOWNS INSOLVENCY ACT (III OF 1909).

Year.	No.	Short title.	Amendments.
1909	III	The Presidency-Towns Insolvency Act, 1909.	Rep. in part, X of 1914. Amended, XI of 1920; IX of 1926; XI of 1927; XIX of 1927; III of 1929; X of 1930; and Government of India (Adaptation of Indian Laws) Order 1937.

PREFATORY NOTE: NATURE OF MODERN LAW OF DEBTORS AND CREDITORS.—The present law of debtors and creditors is a modern creation originating in the necessities of a widely spread industrial life. "Modern commerce is necessarily founded largely on credit, and credit could not have existed without the power of enforcing the fulfilment of financial contracts. On the other hand, remedies against a debtor's person and still more against the persons of his family are not only inconsistent with the growth of opinion among civilised communities, but are in themselves, worse than futile, inasmuch as they strike at the root of all personal effect on the part of a debtor to retrieve his position and render a return to solvency impossible. Hence, the necessity of devising some system which is just to creditors, while not unduly harsh upon debtors, which discriminates between involuntary inability to meet obligations and wilful refusal or neglect and which secures to creditors as between themselves an equitable share of such of the debtor's assets as may be available for the payment of his liabilities. Thus, while the law of bankruptcy has been largely the product of commercial development, it has necessarily been of slow and gradual growth, tentative in its character, and subject to oscillation between the extremes of conflicting interest, according to the temporary and varying predominance of each of these interests from time to time. No intelligible grasp of the principles which underlie the history of bankruptcy legislation, and no satisfactory explanation of the fluctuating tendencies which have marked its progress are possible without bearing these considerations in view.

HISTORY OF INSOLVENCY LEGISLATION IN BRITISH INDIA: (*a*) PRESIDENCY-TOWNS AND RANGOON; (*b*) MOFUSSIL.—Jurisdiction to grant relief to insolvent debtors in India was first derived from the Acts of Parliament passed in the year 1800, being 39 and 40 Geo. III, c. 79. It empowered the Supreme Courts at Fort William and Madras and the Recorder's Court at Bombay to make rules and orders for granting to insolvent debtors in India the relief intended by an Act of Parliament called the Lord's Act passed in the year 1759, being 32 Geo. II, c. 28. The statute 9 Geo. IV, c. 73, marks the beginning of special insolvency legislation for India. Though presided over by a Judge of the Supreme Court the insolvent Court had by this statute a distinct and separate existence and appeals lay from its decision to the Supreme Court. This statute passed originally only for four years, was extended from time to time up to 1848, when it was repealed and the Indian Insolvency Act—11 and 12 Vict., c. 21—was passed which remained in force in the Presidency-towns and Rangoon till the first day of January, 1910, when it was repealed by the Presidency-Towns Insolvency Act, 1909. Various attempts had been made before this to reform the insolvency law prevailing in the Presidency-towns and Rangoon. The history of the various attempts to reform the existing law dates back to 1870, when Sir James Stephen proposed to enact a new law for the whole of India. This proposal was thought to be too ambiguous; the mofussil was not at that time ready for a bankruptcy law and the Bill was dropped. But when thirteen years later proposals to make some small amendments in the Act of 1848, were circulated, it appeared from the comments on those proposals that there was a widespread demand for an entirely new Act for the Presidency-towns.

LEG. REF.

[1]Sch. V has been inserted in the Act in its application to the Court of Small Causes of Calcutta by Ben. Act VIII of 1934.

The matter was accordingly taken by Sir Courtney Ilbert, the law Member at the time, and in 1885 a Bill was drafted and circulated framed on the lines of the Act which had been passed in England, two years before the Act of 1883, in which the present law of bankruptcy was and still is consolidated. The opinions on that Bill show a general agreement that the Act of 1848, was out of date and ineffective. There was, as indeed was unavoidable, a considerable difference of opinion as to details, but on the whole the Bill was favourably received. The mercantile communities of the Presidency-towns who are specially interested approved of it. The Bill was modified in some respects to meet criticisms, and on 29th of May, 1886, was introduced in this Council. There, for some reason which is not known, the matter seems to have stopped. Whether the legislature was engrossed in other projects or whether the very technical character of the subject chilled the enthusiasm of the Council was not known, but the only action taken was that in 1892, a Select Committee considered the Bill at one meeting and did no more, and that in 1899, a second Committee again took up the Bill and after one meeting reported that it should not be proceeded with until some modifications had been made. Since then no further steps had been taken, but in the interval the Provincial Insolvency Act has been passed with the result, as the Chief Justice of Madras has pointed on, that the law of insolvency is enlightened and up to date in the mofussil, while in the Presidency-towns it continues to be antiquated and inefficient. Writing in 1902, the Bengal Chamber of Commerce again urged the matter on the attention of the Government and the Presidency-towns Insolvency Act was finally enacted by the legislature. (*See* Statement of Objects and Reasons.)

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THE PRESIDENCY-TOWNS INSOLVENCY ACT (III OF 1909)[1].

[12*th March*, 1909.

An Act to amend the Law of Insolvency in the Presidency towns [2][* [.

WHEREAS it is expedient to amend the law relating to insolvency in the Presidency-towns and the [5][town of Karachi]; It is hereby enacted as follows:—

PRELIMINARY.

Short title and commencement.

1. (1) This Act may be called THE PRESIDENCY-TOWNS INSOLVENCY ACT, 1909.

(2) It shall come into force on the first day of January, 1910.

Definition.

2. In this Act, unless there is anything repugnant in the subject or context,—

LEG. REF.

[1]For Statement of Objects and Reasons, see *Gazette of India*, 1908, Pt. V, p. 275; for Report of Select Committee, see *ibid.*, 1909, Pt. V, p. 3; and for Proceedings in Council, see *ibid.*, 1908 Pt. VI, pp. 41 and 182 and *ibid.*, 1909, Pt. VI, pp. 12 and 22.

[3]Inserted by Act IX of 1926. Which in turn was substituted by A.O. 1937,

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Sec. 1.—OLD AND NEW ACT.—Where an adjudication has been made under the old Insolvency Act (11 and 12 Vict. c. 21) all questions arising in the course of the insolvency, except questions of pure procedure, will be governed by the old Act. 19 I.C. 57=15 Bom.L.R. 113. On this section, *see also* 112 I.C. 541 (F.B.).

SCHEME AND POLICY OF THE ACT.—Any transaction between the insolvent and the creditor conducted behind the back of the Official Assignee and without informing the Court is null and void as wholly repugnant to the scheme of the Act. 27 Bom.L.R. 419=87 I.C. 929. Presenting petition to recover debt cheaply and expeditiously is an abuse of process of Court and petition should be dismissed. 48 M. 267=47 M.L.J. 710.

SCOPE AND OBJECT OF THE ACT.—The Pre-T. INS. Act has for its object, not so much the relief of insolvent debtors, as the prevention of insolvent trading and the protection of the public. A debtor is adjudicated for his own demerits, and the merits of the petitioning creditor are not material. 39 C.W.N. 324. There is no such thing as a petition under the Insolvency Rules of the Calcutta High Court in connection with a notice of motion. There must be an affidavit in support of the motion not a petition. *See* 40 C.W.N. 1031.

CONSTRUCTION OF ACT — ENGLISH LAW.—Where the provisions and the wordings of the Pres. T. Ins. Act are almost the same as those of the English Bankruptcy Act, the rulings of the English Courts on the latter Act are to be followed in interpreting the Indian Act, 1931 S. 44; 1931 S. 70. Rules made under insolvency jurisdiction must be strictly followed. 40 C.W.N. 1031.

A SUGGESTION FOR AMENDMENT.—It is desirable to have this Act amended so as to insert a provision corresponding to S. 78 (2) of the Prov. Ins. Act. 35 Bom.L.R. 12=1933 B. 91=58 B. 505. R. 202 (2) of the Rangoon High Court Rules framed under the Pres. T. Ins. Act is not *ultra vires*, 8 R. 514=1913 R. 61.

ESTOPPEL.—The law of estoppel does not operate to prevent the provisions of this Act having effect. 46 L.W. 515=I.L.R. (1938) Mad. 123=1937 Mad. 961.

COSTS.—In insolvency proceedings, unless an order is made to the contrary, only half the attorney's fees should be allowed as costs

(*a*) "creditor" includes a decree-holder;

(*b*) "debt" includes a judgment-debt, and "debtor" includes a judgment-debtor;

[1](*bb*) "judge" includes a Judicial Commissioner and an Additional Judicial Commissioner;

(*bbb*) "limits" of the ordinary original civil jurisdiction" means, in respect of the Court of the Judicial Commissioner of sind, the limits of the municipal district of Karachi as from time to time constituted under the Bombay District Municipal Act, 1901, the Port of Karachi, the Cantonment of Karachi and Manora, and any area within the original civil jurisdicton of the Court notified in this behalf by the Provincial Government;]

(*c*) "official assignee" includes an acting official assignee [2][and a deputy official assignee whether permanent or acting];

(*d*) "prescribed" means prescribed by rules;

(*e*) "property" includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit;

(*f*) "rules" means rules made under this Act;

(*g*) "secured creditor" includes a landlord who under any enactment for the time being in force has a charge on land for the rent of that land;

(*h*) "the Court" means the Court exercising jurisdiction under this Act; and

(*i*) "transfer of property" includes a transfer of any interest therein and any charge created thereon.

PART I.

CONSTITUTION AND POWERS OF COURT.

Jurisdiction.

Courts having jurisdiction in insolvency.

3. The Courts having jurisdiction in insolvency under this Act shall be—

LEG. REF.

[1] Inserted by Act IX of 1926.

[2] Added by Act X of 1930.

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whether or not the costs are made payable out of the estate. 44 M.L.J. 411=17 L.W. 350. *See also* 56 C. 667=1928 C. 786 (F.B.).

Sec. 2 (a).—The term "creditor" does not include his *benamidar*. 34 I.C. 71=20 C.W.N. 995.

Sec. 2 (b): DEBTOR.—Infant cannot be debtor, and so cannot be adjudicated insolvent. *See* 43 C. 1157=20 C.W.N. 1065. On this section, *see also* 34 A. 26; 11 I.C. 14; 29 C. 533; 36 C. 941.

Sec. 2 (c).—The necessity for this amendment has been explained as follows:—"There is no specific provision in this Act for the appointment of a Deputy Official Assignee who could discharge all the duties and exercise all the functions of the Official Assignee. The insolvency work of the High Courts has increased since 1909 and the necessity of affording relief to the Official Assignees has been felt. It is therefore proposed to give power to the Chief Justices of the High Courts to appoint one or more Deputy Official Assignees with the necessary powers." (Statement of Objects and Reasons to Act X of 1930).

Sec. 2 (e).—"Property is that property only over which a person has absolute and unconditional power of disposal. 6 L. 1=47 M.L.J. 857 (P.C.). Insolvent's credit and reputation are not part of the Insolvent's property within S. 2 (*e*) and so the damages caused by loss of credit and reputation do not vest in the O.A. but remain vested in the insolvents in spite of the bankruptcy. The insolvents therefore can maintain and carry on a suit for damages caused to their reputation and credit in their personal capacity. The principle applicable to the individuals is also applicable to two or three persons carrying on business under a firm name. 1930 R. 289. Even though the Co-operative Bank has a statutory lien on the shares held by its members and it is provided by Statute that the interest of its members shall not be liable to attachment, sale or the claims of the O. A. or Receiver, still the shares are "the property" of the insolvents within the meaning of S. 2 (*e*) of the Act, since, subject to the lien, the insolvents have a disposing power over the shares and its profits. 27 S.L.R. 224=1933 S. 355.

Sec. 2 (g).—"Secured creditor," meaning of. *See* 31 Bom.L.R. 35. A Bank claiming a lien on the share of its insolvent member is a "secured creditor." 27 S.L.R. 224=1933 S. 355.

(*a*) the High Court of Judicature at Fort William, Madras, [1][and Bombay],

(*b*) [the Court of the Judicial Commissioner of Sind].

Jurisdiction to be exercised by a single Judge.

4. All matters in respect of which jurisdiction is given by this Act shall be ordinarily transacted and disposed of by or under the direction of one of the Judges of the Court, and the Chief Justice or [3][Judicial Commissioner] shall, from time to time, assign a Judge for that purpose.

Exercise of jurisdiction in chambers.

5. Subject to the provisions of this Act and of rules, the Judge of a Court exercising jurisdiction in insolvency may exercise in chambers the whole or any part of his jurisdiction.

Delegation of powers to officers of Court.

6. (1) The Chief Justice or [3][Judicial Commissioner] may, from time to time direct that, in any matters in respect of which jurisdiction is given to the Court by this Act, an officer of the Court appointed by him in this behalf shall have all or any of the powers in this section mentioned; and any order made or act done by such officer in the exercise of the said powers shall be deemed the order or act of the Court.

(2) The powers referred to in sub-section (1) are the following, namely:—

(*a*) to hear insolvency petitions presented by debtors, and to make orders of adjudication thereon;

(*b*) to hold the public examination of insolvents;

(*c*) to make any order or exercise any jurisdiction which is prescribed as proper to be made or exercised in chambers;

(*d*) to hear and determine any unopposed or *ex parte* application;

(*e*) to examine any person summoned by the Court under section 36.

(3) An officer appointed under this section shall not have power to commit for contempt of Court.

Power of Court to decide all questions arising in insolvency.

7. Subject to the provisions of this Act, the Court shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may

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LEG. REF.

[1] Substituted by Act IX of 1926, and again substituted for words 'Bombay and Rangoon' by A.O., 1937.

[2] Substituted by Act IX of 1926.

[3] Substituted by Act IX of 1926.

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Sec. 3 (b).—S. 3 makes the High Court the only Court competent to exercise insolvency jurisdiction. 22 L.W. 362=1925 M. 243. Procedure prescribed by Rr. 79 to 83 of the Insolvency Rules must be followed by the Calcutta High Court on its Original Side. 35 C.W.N. 567.

Sec. 4.—A Judge of High Court sitting in the Ins. Court exercises original jurisdiction and therefore cannot determine any questions which are excluded from the jurisdiction of the Civil Courts by the Madras Estates Land Act, which is a special Act. 13 L.W. 374=61 I.C. 991. *See also* 1937 Rang. 237.

Sec. 5.—Mortgage by insolvent—Good faith—Absence of intention to delay or defeat creditors—Mortgage, if an act of insolvency. 53 I.C. 175.

Sec. 6.—As to attorney's right of audience, *see* 37 B. 494=19 I.C. 421.

Sec. 6 (2) (d) and (e).—Registrar if a Court, *see* 56 C. 667=115 I.C. 39 (F.B.). Under S. 6 (2) (*d*) and (*e*) the Registrar in insolvency can deal with an application under S. 36 (1). 66 I.C. 715=25 C.W.N. 750. *See also* Calcutta Insolvency Rules No. 5; 54 C. 858; 106 I.C. 326=1928 C. 50.

Sec. 7.—Scope of section. *See* 4 R. 157; 30 C.W.N. 346=1926 C. 596. *See also* 61 M.L.J. 763=1932 C. 66. S. 7 is applicable only to cases where there has been an adjudication in insolvency. It is not applicable to proceedings to administer a deceased debtor's estate initiated under S. 108. 63 M.L.J. 810=56 M. 273=1933 M. 74. The Indian legislature has always the right to legislate in respect of pro-

deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case:

[1][Provided that, unless all the parties otherwise agree, the power hereby given shall, for the purpose of deciding any matter arising under section 36, be exercised only in the manner and to the extent provided in that section.]

LEG. REF.

[1] Proviso to S. 7 added by Act XIX of 1927.

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perty, whether within or without British India which can be made available for distribution amongst the creditors in accordance with the principles of International Law provided such property can be made available by enforcing an order *in personam* against the possessor thereof. 148 I.C. 941=1934 S. 44. The Ins. Court in Madras can adjudicate upon claims of third parties relating to immovable properties which are outside the limits of the ordinary original jurisdiction of the High Court. 40 M. 810=36 I.C. 524. *See also* 27 S.L.R. 275. This section gives jurisdiction to the High Court in *garnishee proceedings* where the garnishee lives outside the jurisdiction. *See* 1928 M. 732 (F.B.) following 40 M. 810 and 37 C. 418 (P.C.). The question of the O.A's. *title by reputed ownership* is a question arising in insolvency proceedings and would fall to be decided under S. 7. 1932 S. 207. An application by a stranger claiming a *lien* on certain property of the insolvent on the ground that the applicant was given a lien on the property by the insolvent does not lie under S. 7. 1932 S. 207. Where the O.A. summons a person alleged to be indebted to the insolvent estate as a witness under S. 36 of the Act and that witness disputes his indebtedness to the insolvent, the Ins. Court has no jurisdiction to make an order for payment of the amount by him and the O.A. must only proceed by way of suit to recover the amount. 52 M. 717 =57 M.L.J. 145 (F.B.). *Obiter.*—The O.A. is entitled to proceed by way of motion under S. 7 of the Act in those cases where he has a money claim against a stranger to the insolvency. It is then for the Ins. Court to say whether the matter is one which it is reasonable having regard to the convenience of all concerned, to deal with on a motion, or whether it should be dealt with in a regular suit. 52 M. 717=57 M.L.J. 145 (F.B.). The Civil Court can try a suit for possession by a stranger against the O. A. who claims that the property is his. S. 7 is an enabling section and S. 36 does not take away the jurisdiction of existing Court. 35 B. 473=12 I.C. 391. No suit lies to set aside an order made by the Ins. Court disallowing a claim made to goods seized by the O.A. after adjudication. 44 I.C. 847=40 M. 1173. *See also* 47 I.C. 298. Powers of Ins. Court—Questions affecting title to property of insolvent—Jurisdiction to determine—Effect of the decision of the Ins. Court. *See* 65 I.C. 244=42 M.L.J. 141. *See also* 14 Rang. 652=1937 Rang. 214. *Joint family manager*—Insolvency—O.A's right—Possession of joint property. *See* 43 M.L.J. 569= 68 I.C. 898. Although owing to the division of status brought about by a suit for partition instituted by the sons after their father's insolvency, the father and the O.A. lose the right of private sale of the family property including the shares of the sons, it is open to the O. A. to obtain a declaration against the sons and get the family property including their shares therein sold by or through Court. S. 7 gives the widest powers to the Ins. Court to go into such a question and to declare the liability of the son's shares in the family property for the proved and just debts of the father insolvent and make all necessary orders for their realisations. 54 M. 739=61 M.L.J. 66=1931 M. 317. Wide as the provisions of S. 7 are, it does not follow that every dispute between the O.A. and the Hindu sons can be dealt with under that section. So long as the son himself chooses to appear before the Ins. Court and raise questions as to the binding nature of the father's debt, it may be decided. Where he does not do so, the questions cannot be decided behind the back of the son at the instance of the O.A. And there is no procedure for compelling the son to appear before the Ins. Court and have the question adjudicated. 55 M. 558=1932 M. 381=63 M. L.J. 37. *See also* 1932 S. 50; 1932 S. 208. Procedure to be adopted by O.A. in case of property of insolvent standing benami in name of wife. *See* 54 C. 251. Where the insolvent effects a fraudulent transfer to his wife the O. A. can sue under S. 7 to have it declared void. But he cannot sue under the section for a declaration that he has a disposing power over the remaining property belonging to the sons of the insolvent. 25 S.L.R. 521=1932 S. 50. Fraudulent transfer by O. A.—Ins. Court can order transferee with notice to reconvey. 83 I.C. 174; 27 M.L.J. 66.

APPLICATION TO SET ASIDE SEVERAL TRANSACTIONS BY INSOLVENTS WITH DIFFERENT PERSONS.—There are no specific rules prescribing the form in which an application should be made when it is sought to impugn a transaction by an insolvent on the grounds mentioned in Ss. 55 and 56. But the Court is bound in some measure to observe the ordinary principles as to framing suits laid down by the C. P. Code. So an application under S. 7 by which the Court is required to investigate a number of different transactions between the insolvents and different persons is defective; it is like joining different causes of action against different defendants and, on grounds of practical convenience, cannot be permitted. 60 C. 1367=1934 C. 232.

PAYMENT OF MONEY TO CREDITOR AFTER ADJUDICATION—RIGHT TO SET ASIDE BY APPLICATION OR REGULAR SUIT.—Where, after the order of adjudication, a creditor receives payment of money in discharge of his debt, the O. A. is entitled to have the payment set aside by an application under S. 7 and he need not resort to a regular suit. Whether the creditor can get and retain money which belongs to the estate

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in payment of his debt in excess of what he would get by way of rateable distribution, is a question which should properly be decided by a Bankruptcy Court and not by a separate suit. 148 I.C. 941=1934 S. 44. *See also* 14 R. 652.

Sec. 7 (Proviso).—As to the effect of the proviso *see* 62 M.L.J. 103=55 M. 385. Denial of joint family—Power of Ins. Court to decide issue as to status. 62 M.L.J. 103. Where in an application under S. 7, the O. A. does not claim a higher or a better title than the insolvent, the question whether the Ins. Court should exercise its jurisdiction under the section or should refuse to do so and refer the O. A. to a regular suit must depend upon the facts of each case and no hard and fast rule can be laid down in that behalf. In this case, the proceedings started on an application under S. 7 were already three years old and property in dispute was situate and parties resided within the jurisdiction of the Court to which the application was made under S. 7. No prejudice could be caused to the party against whom the action was taken, if he was required to defend his title to the property in such proceedings instead of in a regular suit. *Held*, that the Ins. Court should not decline to exercise its jurisdiction under S. 7. (1932 S. 50, Not Appr.) 1932 S. 208. The Ins. Court has jurisdiction under S. 7 to decide disputes falling within the purview of the section between the O. A. and third parties, even though the O. A. does not claim a higher and better title. 1932 S. 208 =27 S.L.R. 275.

APPLICATION BY CREDITOR UNDER Ss. 55 AND 56, IF BARRED.—The proviso to S. 7 is no bar to an application by a creditor under Ss. 55 and 56 of the Act to set aside certain transactions by the insolvent as void against the O. A., because it cannot properly be described as "arising under S. 36." 60 C. 1367=1934 C. 232.

Secs. 7 and 8.—There is no right of appeal on the point of jurisdiction only against a mere declaratory order of an Insolvency Court containing a direction to the Official Assignee, with regard to his capacity to make the joint family property of the insolvent available for the payments of his debts except such debts as are tainted with immorality, as no substantial matter in dispute can be said to have been decided by the order of the Court. 166 I.C. 68= =1936 Rang. 525.

Secs. 7, 17 and 60.—Under S. 7 only those orders can be made which are necessary for the purpose of the insolvency, that is to say, for facilitating the distribution of the assets among the creditors. A pension payable by Government to an insolvent is not "property" of the insolvent within the meaning of S. 17 of the Act. The Court has no jurisdiction under S. 60 (2) to order the insolvent to pay any portion of such a pension to the Official Assignee for distribution among the creditors, as although the insolvent's pension can properly be described as "income" within the meaning of that provision, it is not liable to attachment in execution of a decree. It follows from the above that the Court has no power under S. 7 of the Act to direct a creditor of an insolvent to return to the insolvent the pension pay order and pension papers deposited by the latter as security for a loan. I.L.R. (1939) 2 Cal. 434 =43 C.W.N. 1194=1940 Cal. 192.

Secs. 7 and 36.—Ss. 7 and 36 give the Court power to examine any person touching the property of the insolvent. In such a case, the fact that the properties about which the wife of the insolvent is sought to be examined are properties standing in her name and that she claims the properties as her own is immaterial. Also, an order for examination cannot be refused under those circumstances, merely because litigation may ultimately ensue between the O. A. and the person sought to be examined. But the person examined is entitled to all the privileges conferred on a witness by the Evidence Act, and he cannot be compelled to answer any question which the Evidence Act allows him not to answer.29 L.W. 40=1929 M. 183. S. 36 (5) of the Act relates only to property admittedly belonging to the insolvent and not property the ownership of which is in dispute. Where a person is summoned and examined under S. 36 for the purpose of establishing that property had been purchased by the insolvent in the witness's name *benami*, but the witness denies that assertion and claims the property as having been purchased out of his or her own funds, subsequent proceedings by the Official Assignee against witness under S. 7 of the Act for a declaration that the properties are the properties of the insolvent are not barred by reason of the previous examination under S. 36. The words "any matter arising under S. 36" appearing in the proviso to S. 7, do not necessarily mean any matter which has been the subject of examination under S. 36. I.L.R. (1938) Mad. 72=1937 Mad. 775=(1938) 2 M. L.J. 377. *See also* I.L.R. (1941) Kar. 455=1942 S. 21. Where certain persons have been examined under S. 36 and have denied the possession of books of account, the remedy of the O. A. is to proceed by way of suit and not proceed under S. 7, even assuming that an application under that section is maintainable in law. 63 M.L.J. 810. Before a third party can be called upon to produce books of account in his custody, the O. A. must make out a *prima facie* case that the third party had such books in his custody. The report of the O.A. is no legal evidence in support of his application. 63 M. L.J. 810; I.L.R. (1941) Kar. 455. Where the O.A. seeks to set aside a transaction falling under S. 56 and not covered by S. 36 of the Act, it is open to the Court to exercise a discretion whether to try this matter on a notice of motion in the Ins. Court or to relegate the O.A. to a suit in the Civil Courts. It is not correct to say that the Ins. Court has *exclusive* jurisdiction in the matter of setting aside a fraudulent transfer. (50 M. 776, Diss. from.) 34 Bom.L. R. 1166=1932 B. 566. O.A., in making the application under Ss. 7 and 36, acts only in his capacity as representing the insolvent's estate and not on the strength of any right or claim hostile to the insolvent. 59 M. 1020=1936 M. 778=71 M.L.J. 289 (F.B.). An application by

Appeal.

Appeals in insolvency.

8. (1) The Court may review, rescind or vary any order made by it under its insolvency jurisdiction.

(2) Orders in insolvency matters shall, at the instance of any person aggrieved, be subject to appeal as follows, namely:—

(*a*) an appeal from an order made by an officer of the Court empowered under section 6 shall lie to the Judge assigned under section 4 for the transaction and disposal of matters in insolvency and no further appeal shall lie except by leave of such Judge;

(*b*) save as otherwise provided in clause (*a*), an appeal from an order made by Judge in the exercise of the jurisdiction conferred by this Act shall lie in the same way and be subject to the same provisions as an appeal from an order made by a Judge in the exercise of the ordinary original civil jurisdiction of the Court.

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the O.A. under Ss. 7 and 36, against a mortgagee from the insolvent, after the mortgage has been annulled at the instance of the O.A. for mesne profits is governed by Art. 109 of the Limitation Act. He can recover only mesne profits for three years preceding the date of his application. 59 M. 1020 (F.B.).

Sec. 8.—A person, who was aggrieved within the meaning of S. 8 by an order of the Ins. Court, applied for review, instead of appealing against the order, though he had notice of insolvency proceedings. *Held*, in the absence of sufficient grounds, power of review under S. 8 would not be exercised. 163 I.C. 122=1936 S. 71. S. 8 makes it clear that the Court has power to review its orders like the order of adjudication passed without hearing the Counsel, but the powers of Court in such matters are vested in the Judge appointed by the Chief Justice under S. 4 of the Act. Where the application for review came up for hearing before the Judge, who should have decided it, but was heard and decided by the Judge who had ceased to be the Insolvency Judge. *Held*, that he had no jurisdiction to deal with it in the absence of authorization by the Chief Justice. 171 I.C. 666=1937 Rang. 237. Under S. 8 (1) read with S. 90, a Court, exercising insolvency jurisdiction has the power of review conferred on a Court of ordinary original jurisdiction by O. 47, C. P. Code. But while the jurisdiction to review conferred by O. 47, C. P. Code, is of a restricted nature, the power of an Insolvency Court under S. 8 (1) to review, rescind or vary an order made by it is not so restricted, but is far wider. I.L.R. (1940) Kar. 513; 1932 Bom. 568 Art. 181 of the Limitation Act, and not Art. 173 or 162, will apply to an application for review under S. 8 (1) of the Presidency Towns Insolvency Act. 7 R. 201 =118 I.C. 615=1929 R. 229. *See also* 1941 Sind. 1. Neither Art. 162, nor Art. 173 Limitation Act applies for an application for review under S. 8 (1) of the Presidency Towns Insolvency Act. Art. 181 also will not apply as it is confined to applications under the Code of Civil Procedure. There is no period of limitation for such an application, but no application for review ought to be entertained under S. 8 (1) to save the time, provided for appeal when the application for review is filed for the purpose of extending the time for appealing. I.L.R. (1940) Kar. 513. It is open to the High Court in its discretion to extend the time prescribed for appealing against an adjudication order, if necessary. 29 C.W.N. 884=89 I.C. 584. There is no right of appeal on the point of jurisdiction only against a mere declaratory order of an Insolvency Court containing a direction to the O.A. with regard to his capacity to make the joint family property of the insolvent available for the payments of his debts, except such debts as are tainted with immorality, as no substantial matter in dispute can be said to have been decided by the order of the Court. 1936 R. 525. The right time for the minor sons of the insolvent to raise the question as to the jurisdiction of the Court to make any declaration binding on them arises if and when the O.A. proceeds against their shares for the payment of any specific debt of the insolvent and Insolvency Court assumes jurisdiction to decide whether their shares are liable, or not for the satisfaction of that particular debt. 1936 R. 525. Registrar in insolvency has jurisdiction to pass order of rescission of discharge under S. 8 (1). 54 C. 858. An interim protection order made as an original order by judge exercising jurisdiction under the Act is appealable, and it is a judicial order. 40 B. 461=31 I.C. 507. Order by Judge in insolvency refusing to issue a commission is not appealable, *see* 4 Bur.L.J. 254=3 R. 605=1926 R. 64. S. 8 (1) gives the Court an unlimited power to review, rescind or vary and S. 90 (1) cannot operate to limit that power by importing the provisions of O. 47, R. 1 of the Code. 7 R. 201=1929 R. 229; 34 Bom.L.R. 1175=1932 B. 569. *See also* I.L.R. (1940) Kar. 513. Application to Judge to discharge Registrar's order, if appeal—Order of Judge treating it as review, if appealable. 56 C. 667=115 I.C. 39. A third person whose title to property is affected by an adjudication order is a person aggrieved by it and is entitled to appeal from it. But he is not entitled in any appeal under Cl. (2) of S. 8 to succeed on the basis merely of absence of notice by the Insolvency Court before it passed the order appealed against. He can only urge that the circumstances of the case are such that it is highly inequitable and unjust that an order

PART II.

PROCEEDINGS FROM ACT OF INSOLVENCY TO DISCHARGE.

Acts of insolvency.

Acts of insolvency.

9. A debtor commits an act of insolvency in each of the following cases, namely:—

(*a*) if, in British India or elsewhere, he makes a transfer of all or

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so vitally affecting his interests should have been passed behind his back and without notice to him and in circumstances when he had no means of knowing of the existence of the proceedings in which that order was passed against him. 32 S.L.R. 672=1938 Sind 82. It is necessary and desirable that in appeals against an order of adjudication, notice of the appeal should be served on the O. A. 29 C.W.N. 884=89 I.C. 584. Power of Insolvency Court to rescind or vary its orders—Joint Hindu family—Adjudication of adult sons as insolvents—Minor son's shares, if vest in O. A. 84 I.C. 128=1924 M. 791. *See also* 51 M. 417 (F.B.). Insolvency petition by or against partner of firm pending in High Court—Insolvency petition by or against another partuer filed in District Court subsequently—Transfer of, to High Court—Jurisdiction. *See* 48 M. 514=48 M.L.J. 228. An order of a Judge refusing to review an order made in insolvency jurisdiction is appealeable under S. 8 (2) (*b*), and the direction in S. 28 (2) (*b*) does not import that an appeal lies only if conditions exist which make an order made by a Judge in the exercise of original jurisdiction appealable. (3 Rang. 603 and 6 Rang. 363, Diss. from.) 60 Bom. 792=38 Bom.L.R. 575=1936 Bom. 321. On this section, *see also* 23 M.L.J. 221=12 M.L.T. 169; 7 I.C. 765; 11 Bom.L.R. 1032.

"PERSON AGGRIEVED."—*See* 53 C. 866=99 I. C. 736=1927 C. 163; *See also* 1928 C. 50. Insolvent is not a person aggrieved and has no right of appeal. 97 I.C. 486=1926 M. 1214. Third persons whose title to property is affected by order of adjudication and on whom any real hardship is effected, are "aggrieved persons" within the meaning of the Act. Their remedy against the order of adjudication is to move the Court which passed the order of adjudication, under S. 8, cl. (1) or to appeal against that order under cl. (2) (*b*). *See* 30 S.L. R. 281=1936 Sind. 246; 1941 Sind. 1.

Part II (Secs. 9 to 45).—The mere fact that Ss. 9 to 45 are headed "Proceedings from act of insolvency to discharge" does not limit their application to the stage and time of obtaining the order of discharge. 37 C.W.N. 718=57 C. L.J. 467=1933 C. 699.

Sec. 9. PLEADINGS.=The act of insolvency need not be stated *verbatim* in the words of S. 9. It will be enough if the petition and affidavit read together sufficiently disclose the meaning of the section. 37 M. 555=19 I.C. 19=24 M. L.J. 562. The creditor has not only to put forward in his petition a specific act of insolvency as contained in S. 9, but he has also to prove that an act of insolvency has actually been committed. The creditor's petition also according to S. 13 must be verified by an affidavit or affidavits of some person on his behalf having knowledge of the fact. 1933 R. 280=149 I.C. 1036. *See also* 50 B. 694=1926 B. 405; 28 Bom. L.R. 680=1926 B. 383.

CONSTRUCTION OF SECTION.—Per *Rankin, C.J.*—"If there is one thing more than another upon which the Court is obliged and entitled to treat the words of the statute with great strictness, it is the definition of *acts of insolvency* in an Insolvency Act." 34 C.W.N. 1051=1931 C. 167.

ACT OF INSOLVENCY.—The principle of the Ins. Law is that, in order to adjudicate a man insolvent, the act of insolvency relied on must be some act which can be definitely brought home to him. 49 M.L.J. 709. An act of insolvency must be strictly proved. 34 Bom. L.R. 1162. *See also* 11 R. 96. Act of insolvency committed during pendency of order of adjudication—Whether can be the basis of fresh application for adjudication. *See* 32 C.W.N. 716. Where the debtor sold his property and soon after it made payments to some creditors, *held* that the sale and payments made must be considered together in judging the intention of the insolvent and that these transactions must inevitably defeat or delay those creditors who did not receive any share in the sale price, and as such it was an act of insolvency 1935 S. 53.

TRANSFER FOR PAST DEBTS—ENGLISH LAW.—The transfer by a debtor of the whole or substantially the whole of his property in consideration of a past debt is an act of bankruptcy under the English law as well as under S. 9 (*b*) of the Indian Act. But a transfer made in pursuance of an antecedent *bona fide* agreement that security should be given for a loan may not amount to a fraudulent transfer or fraudulent preference, it being incumbent on the person setting up the prior agreement to prove not only that the agreement did exist in fact, but also that it was in all respects a *bona fide* agreement. There must be no secret or expressed bargain or understanding that the giving of the security should be delayed until the debtor had reached a state of insolvency, for that would bring the transfer within this section. 13 R. 192. *See also* 1935 S. 53.

ACTS OF INSOLVENCY—STATEMENTS AND PROOF.—A Court is not competent to adjudicate a party insolvent for an act of insolvency not specified as in S. 9. So also it is not permissible for a creditor to make in his petition allegations which are not acts of insolvency within S. 9 and then try to prove by evidence that as a matter of fact an act of insolvency within S. 9 has been committed. The petition for the adjudi-

substantially all his property to a third person for the benefit of his creditors generally;

(*b*) if, in British India or elsewhere, he makes a transfer of his property or of any part thereof with intent to defeat or delay his creditors;

(*c*) if, in British India or elsewhere, he makes any transfer of his property or of any part thereof, which would, under this or any other enactment for the time being in force, be void as a fraudulent preference if he were adjudged an insolvent;

(*d*) if, with intent to defeat or delay his creditors,—

(i) he departs or remains out of British India;

(ii) he departs from his dwelling-house or usual place of business or otherwise absents himself;

(iii) he secludes himself so as to deprive his creditors of the means of communicating with him;

(*e*) if any of his property has been sold or attached for a period of not less than twenty-one days in execution of the decree of any Court for the payment of money;

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cation of the debtor by a creditor must be definite and precise as to what available acts of insolvency were committed. 1934 S. 177.

CO-JUDGMENT-DEBTORS.—An act of insolvency by a co-judgment-debtor does not amount to one by the judgment-debtor himself. 14 I.C. 576=16 C.W.N. 733.

PARTNERSHIP.—Under S. 9 where one partner departs from his usual place of business it is a matter personal to him and the firm cannot be adjudged insolvent. 24 Bom. L.R. 861=1923 B. 107. A *joint family firm* can be adjudged insolvent, though that will not imply the adjudication of a minor member or even an adult member who has taken no active part in the management and whose liability will extend only to the extent of his interest in the joint family property. 25 S.L.R. 322=1931 S. 179.

PRINCIPAL AND AGENT.—An act of the agent authorized by the principal and of which he has cognizance, can also bind the principal; but it cannot be laid down that in all circumstances the act of an agent closing down the principal's place of business should be treated as the act of the principal. The decision must depend on the particular, facts of each case. 49 M.L.J. 709; 10 R. 215=1932 R. 101.

Sec. 9 (b): TRANSFER ON WHOLE, AND TRANSFER OF PART, OF PROPERTY—DISTINCTION. —*See* 34 Bom. L.R. 1162=1932 B. 580. *See also* 1937 Rang. L.R. 65=1937 Rang. 372.

Sec. 9 (c): TRANSFER BY DEBTOR OF WHOLE OF HIS PROPERTY.—It would not be safe to infer that every transfer of the whole of a debtor's property is of necessity fraudulent. The sale however will constitute an act of insolvency, if the seller intends to defeat or delay his creditors. Whether he does or does not in fact entertain such an intention is a matter of fact which is not the subject of any immutable presumption of law; it must be inferred from the circumstances of each particular case. 1935 S. 53.

ACT CONSTITUTING FRAUDULENT REFERENCE—IF MUST BE VOLUNTARY.—The act which constitutes a fraudulent preference must no doubt be a voluntary act, not an act done under pressure. An act under pressure is not an act of freewill. 1935 S. 53. *See also* 13 R. 192.

Sec. 9 (d) (ii).—In considering the question whether insolvent secluded himself or departed from his usual place of business with intent to defeat or delay his creditors, each of the facts taken singly or by itself, is not sufficient. The Court should take comulative effect of these facts and to censider whether an inference can justifiably be drawn that in so departing or concealing himself, he did so with such an intent. 167 I.C. 96=1937 R. 16.

Sec. 9 (d) (iii) and Expl.—*See* 49 Mad. 189 =1926 Mad. 206.

Sec. 9 (e).—Sec. 9 (*e*) must be strictly construed in favour of the debtor to whom the matter of adjudication as an insolvent under the Insolvency law is one of vital importance. Any inconvenience arising out of such a construction is for the Legislature to consider and remedy, if they think proper, by amendment, it is not for the Court to enlarge the meaning of the words used by the Legislature. An attachment in execution of an award is not an attachment in execution of the decree of a Court within the meaning of sec. 8 (*e*) for the purpose of creating an act of insolvency. 178 I.C. 653=1938 Sind 220. Where a debtor was arrested at the suit of a particular creditor and when brought before the Court under sec. 55, C. P. Code, he stated through his counsel that, he wished to apply for an adjudication in insolvency and also applied for order under sec. 55 (4) and the Court passed a conditional order, *held*, that the application of the debtor amounted to an act of insolvency on the basis of which another creditor could apply for his adjudication. 34 C.W.N. 401=1930 C. 555. Sec. 9 (*e*) merely lays down that, if the property has been attached for 21 days or more, there has been an act of

(*f*) if he petitions to be adjudged an insolvent;

(*g*) if he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts;

(*h*) if he is imprisoned in execution of the decree of any Court for the payment of money.

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bankruptcy. The act becomes complete at the conclusion of 21 days. Thus a creditor is not entitled to present a petition to adjudicate a person insolvent beyond three months after the person's property is attached for 21 days, though the property is under attachment at the time of the presentation of the petition. 57 Cal. 1274; 1931 Mad. 366=61 M.L.J. 27; 26 Bom.L.R. 1455=1927 Bom. 633; 1929 Rang. 313. The continuance of the attachment is not a continuing act of insolvency. 57 Cal. 1274. *See also* 61 M.L.J. 27. No Court would adjudicate a debtor insolvent unless it is satisfied that an act of insolvency specified under S. 9 was clearly established by the petitioning creditor. Where the petition of the attaching creditor is founded on an alleged attachment as specified in S. 9 (*e*) of the Act, the property which is said to be attached must be such property of the debtor as can under law be attached in execution of a decree against him. Where a licensee or lessee from the Government of India for the manufacture of salt deposits a sum of money with the Salt and Excise Department of the Central Government in pursuance of a condition precedent upon which he is granted the licence, as security for securing Government interests and for securing the due fulfilment and observance by the lessee of the covenants and agreements on his part, such a deposit is not liable to attachment in execution of a decree against him, because the amount cannot be regarded as a debt due to him until all the transactions connected with the licence or lease are closed. An attachment of such deposit under O. 21, R. 52, C. P. Code, is not a legal attachment which would amount to an act of insolvency under S. 9 (*e*) of the Presidency Towns Insolvency Act. I.L.R. (1941) Kar. 50=1941 Sind 193 Succeisive attachments—Last attachment—If can be relied on for founding insolvency petition. 1940 M. 990=52 L.W. 474=191 I.C. 687=(1940) 2 M.L.J. 495. The Court cannot treat a man as a debtor within the meaning of the Presidency-Towns Insolvency Act unless he is either a subject of British India or has committed or suffered within British India an act of insolvency. A judgment-debtor who is a foreign subject, whose property has been attached for a period of not less than twenty-one days in execution of a decree of the High Court for payment of money and who has within a year before the date of the presentation of the insolvency petition carried on business through an agent within the limits of the ordinary original civil jurisdiction of the High Court is not a debtor governed by the Presidency-Towns Insolvency Act, if he was not within the jurisdiction of the High Court at the time when his goods were seized in execution and the High Court has therefore no jurisdiction to adjudge him insolvent. I.L.R. (1938) Bom. 301=40 Bom.L.R. 33=1938 Bom. 161. Where property has been attached before judgment and the plaintiff obtains a decree for money subsequently, if he applies for an order of the Court directing the sale of the property attached, the attachmeut automatically becomes from that moment an attachment in execution of the decree, and would sustain an application for adjudication of the judgment-debtor as an insolvent under S. 9 (*e*) of the Act, where such application is presented after 21 days of the application for sale. 55 L.W. 205=(1942) 1 M. L.J. 428. *Unsatisfied execution*—Application for adjudication—Discretion of Court—Practice. 34 Bom.L.R. 1436.

Secs. 9 (e) and 12.—The three months required by S. 12 begins on the expiry of 21 days. In reckoning the 21 days the date of attachment is not to be computed. 29 Bom. L.R. 1455=1927 B. 633=52 B. 126. Attachment in execution of a decree of any Court does not include attachment on execution of award. It cannot form the basis of insolvency petition—Award whether amounts to decree. 32 C.W.N. 608=1928 C. 840.

Sec. 9 (f).—The mere fact of the presentation of petition by insolvent is enough to make an order of adjudication, as the presentation itself is deemed an act of insolvency. *See* 30 C.W.N. 173=1926 C. 640.

Sec. 9 (g).—In order to constitute an act of insolvency, mere suspension of payment is not enough, but there must also be notice by debtor to creditors about such suspension of payments. 50 B. 624=1926 B. 405. A mere declaration of inability to pay does not of itself constitute an act of insolvency. 1936 C. 269. Where under S. 9 (*g*), both written and oral notices of suspension of payment of debts were alleged, and it was found that the correspondence comprising of written notice was of informal nature, it cannot be held that the conversations at the interviews were notices definite, formal and deliberate, intended to be understood in that sense. 1936 C. 269. It is an act of insolvency under S. 9 (*g*) if a debtor gives notice to his creditor that he has suspended or is about to suspend payment of his debts generally. But the suspension is a suspension of the payment of his debts generally and of a particular debt due to a particular creditor. The fact that the debtor and one of his creditors have agreed that the default by the debtor in the payment of an instalment due under a mortgage executed by him to that creditor should be treated as an act of insolvency does not make it incumbent upon the Court as an act of insolvency on which that creditor can found a petition for adjudication of the debtor. What the Court has to consider is the alleged act of insolvency is one as defined by the Act, and the Court in deciding the question can only look at the provisions of the Act. The agreement between the parties cannot be deemed to constitute the non-payment an act of insolvency. Nor does the

Explanation.—For the purposes of this section, the act of an agent may be the act of the principal, even though the agent have no specific authority to commit the act.

Order of adjudication.

Power to adjudicate.

10. Subject to the conditions specified in this Act, if a debtor commits an act of insolvency, an insolvency petition may be presented either by a creditor or by the debtor, and the Court may on such petition make an order (hereinafter called an order of adjudication) adjudging him an insolvent.

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agreement estop the debtor from raising a contention to the contrary, because the law of estoppel does not operate and cannot operate to prevent the provisions of the Presidency-Towns Insolvency Act having effect. I.L.R. (1938) Mad. 123=46 L.W. 515=1937 Mad. 961. In order that a notice of suspension may amount to an act of insolvency, it should have been made within three months before the presentation of petition and it must amount to a deliberate and intentional notice on behalf of the debtor that he has suspended or is about to suspend payment of his debts to his creditors generally. Unless the statement itself is capable *per se* of conveying the intention that the debtor has suspended or intends to suspend or is about to suspend payment of his debts, it is unnecessary to consider the surrounding circumstances. 11 R. 96=1933 R. 41=143 I.C. 775.

SUSPENSION OF PAYMENT—DISHONOURING OF CHEQUE.—The dishonouring of cheques upon perfectly solvent current accounts is a suspension of payment. A suspension of payment can obviously be either a permanent suspension or a temporary suspension. Whatever reasons may be advanced as to the cause of a suspension, even when those reasons allege that payment will, in all probability, be renewed at some future date, such action on the part of a bank or a firm taking deposits must amount to a suspension. 1933 R. 363=12 R. 64.

SUSPENSION OF PAYMENT—NOTICE BY CLERK—VALIDITY.—A person who is acting merely as a clerk has no authority, either express or implied, to act as agent, far less to do acts, such as giving notice of suspension of payment on behalf of the principals of the firm. 1933 R. 280=149 I.C. 1036. *See also* 12 R. 64.

SUSPENSION OF PAYMENT—WHAT AMOUNTS TO.—When a banking firm closes its doors and gives notice to its creditors that it is not going to make any further payments to its customers, this can be said to amount to an act of insolvency amounting to suspension of payment. But where a banker tells his customers, "I am unable to meet your demands owing to the peculiar circumstances, *viz.*, that you are all demanding instant payment of your dues; but give me time to satisfy you that I am perfectly solvent," that cannot amount to a suspension of payment. 1933 R. 280. Where a member of a joint family firm instituted a suit for partition and the managing members were themselves appointed receivers and they sent a circular to the creditors that they were not in a position to pay the debts, the whole proceedings from the institution of the partition suit constitute an act of insolvency. The firm should be deemed to carry on business so long as the business debts remain undischarged in spite of the institution of the suit and in sending the intimation to the creditors in pursuance of the wishes of the partners, the receivers were only acting as the agents of the firm. (48 Mad. 795, Foll.) 25 S.L.R. 322=1931 S. 179. *See also* 49 M.L.J. 457.

Secs. 9 (g) and 13 (4): RELATIVE SCOPE.—S. 13 (4) (*b*) provides that the Court shall dismiss a petition for adjudication if the debtor appears and satisfies the Court that he is able to pay his debts. But S. 9 (*g*) contemplates something entirely different. Not only must the debtor be unable to pay his debts, but he must also convey to the creditor his intention not to pay. 1936 C. 269.

Sec. 9, Expl.—The position of an agent or Aiyar of a Chettyar private Bank in Rangoon is very similar to the position of a Bengali gumashta, and he has authority to issue notice of suspension of payment. 12 R. 64=1933 R. 363. The mere fact of a person being an agent of a Chettyar firm cannot in law entitle him to allow a creditor to obtain an order of adjudication, because he, the agent, purports to commit an act of insolvency within the meaning of S. 9. It is incumbent on the Court to require proof from the adjudicating creditor that the agent who is alleged to have committed the act of insolvency was expressly or impliedly authorised to do so or that the ordinary course of the business that he carried on for his principal, or that the nature of such business was sufficient to justify the Court holding that the agent's acts should be considered, in the circumstances, to be the acts of his principal. 1933 R. 280=149 I.C. 1036. Where members of a joint Hindu family carry on partnership business and if the elder member of the family who is also the managing partner of the firm makes a fraudulent transfer of the firm property to pay a debt due by the firm, the act of insolvency constituted by the transfer is an act of insolvency on the part of the other partners also as the managing partner is an agent within the meaning of Explanation to S. 9. 32 S.L.R. 672=1938 Sind 82.

Sec. 10.—*See* 16 C.W.N. 733; 15 C.W.N. 413=7 I.C. 394. A petition for adjudication of an insolvent under S. 10 must contain clear and precise allegations of fact upon proof of which the Court would be enabled and entitled to adjudge a person insolvent. The act of insolvency therefore must be referred to clearly and without ambiguity by the creditor in the

Explanation.—The presentation of a petition by the debtor shall be deemed an act of insolvency within the meaning of this section, and on such petition the Court may make an order of adjudication.

Restrictions on jurisdiction.

11. The Court shall not have jurisdiction to make an order of adjudication, unless—

(*a*) the debtor is, at the time of the presentation of the insolvency petition, imprisoned in execution of the decree of a Court for the payment of money in any prison to which debtors are ordinarily committed by the Court in the exercise of its ordinary original jurisdiction; or

(*b*) the debtor, within a year before the date of the presentation of the insolvency petition, has ordinarily resided or had a dwelling-house or has carried on business either in person or through an agent within the limits of the ordinary original civil jurisdiction of the Court; or

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petition itself. Where an act of insolvency is not stated in the petition but is stated in the verifying affidavit, the affidavit in verification of the petition cannot be considered as part of petition and the petition must fail. (1935 Rang. 352, Rel. on.) 167 I.C. 585=1937 Rang. 53. *See also* (1941) 2 M.L.J. 598=54 L.W. 438, *contra*.

Secs. 10 and 14: DISQUALIFIED PROPRIETOR CAN BE ADJUDICATED INSOLVENT.—If a debtor who applies to be adjudicated insolvent satisfies the conditions laid down by the Presidency-Towns Insolvency Act, he is entitled to be adjudged insolvent under that Act notwithstanding that his estate or part of it is already in the hands of the Court of Wards. I.L.R. (1941) 1 Cal. 318=1941 Cal. 505.

Secs. 10 and 17.—The O. A. ought to be made a party to an appeal from an order of adjudication. 34 C.W.N. 1051=130 I.C. 877 =1931 C. 167. In an adjudication order the exact acts of insolvency together with the dates should be carefully particularised. 35 C.W.N. 567. *See also* 11 R. 96.

Sec. 11: SCOPE OF.—The words "either personally or through an agent" were introduced for the purpose of removing a doubt which might otherwise have existed as to the jurisdiction of the Insolvency Court over foreigners carrying on business within the jurisdiction of the Insolvency Court by the employment of agents or managers properly and strictly so called, and not for including purchases and sales made by employing a commission agent. The business contemplated by the section should be carried on within the limits of the Court either personally by the defendant or by his agent properly and strictly so called and under his effective control, but not by a general agent who carries on business in his own name for diverse constituents on payment to him of a commission. 112 I.C. 134=1929 S. 24. The words "carrying on business", in S. 11 of the Act, mean the same thing as under the Letters Patent of 1865, namely, entering into transactions which may result in personal liabilities. 39 C.W.N. 324. It was alleged in a petition by a creditor that the debtor carried on business within the jurisdiction of Court, but that allegation was not proved. It was, however, admitted and found that the debtor worked for gain at the said place at the material times and also resided within jurisdiction. *Held*, that defect in the pleadings and the variation between the allegations in the pleading and proof were not fatal, and that the Court could disregard the erroneous allegation made in the petition and that it was sufficient, for the Court to assume jurisdiction, that the debtor resided and worked for gain within the jurisdiction. 39 C.W.N. 324. Carrying on business—Meaning of—Family trading firm—Suit for partition—Appointment of receiver—Effect of—Insolvency petition filed more than one year after—Firm if can be adjudged insolvent—R. 47 of the Insolvency Rules—If *ultra vires*. 48 M. 795= 49 M.L.J. 457; 134 I.C. 996=1931 S. 179. On this section, *see also* 21 B. 405; 10 I. C. 786; 8 C.L.R. 14; 11 Beng.L.R. (App.) 26.

Sec. 11 (b).—The Act contemplates the possibility of the debtor ordinarily residing in one place and having a dwelling-house in another, and it is sufficient for the requirements of S. 11 (*b*) that the debtor has a dwelling-house with in the High Courts' jurisdiction limits available for his occupation asdwelling should he choose to dwell there, although he has ordinarily resided elsewhere and has not actually dwelt in the house within the year previous to the presentation of insolvency petition. 58 M.L.J. 189=1930 M. 544. The debtor's motive in taking up his residence in a particular place cannot affect the question whether he is to be deemed to have "ordinarily resided" there. 58 M.L.J. 189. *See also* 42 C. W.N. 350. Where a railway servant stationed at Jamalpur stays in a room rented by him in Calcutta during week-ends and certain other occasions, he has a dwelling-house in Calcutta within the meaning of S. 11 of the Act. 42 C. W.N. 350. A person who carries on a retail business in piece-goods outside Calcutta cannot be said to be residing or carrying on business in Calcutta, within the meaning of S. 11 merely because he comes to Calcutta once or twice a month for the purpose of purchasing stock through his broker and for the purpose of paying for the stock so purchased, and resides there for four or five days on each occasion. 46 C.W. N. 664. The Insolvency Court ought not to make an adjudication except upon a proper petition and when it appears that the adjudication has been wrongfully made, the Court must rescind it. A debtor's petition to be adjudicated as insolvent in which the allegation of inability to

(*c*) the debtor personally works for gain within those limits; or

(*d*) in the case of a petition by or against a firm of debtors the firm has carried on business within a year before the date of the presentation of the insolvency petition within those limits.

Conditions on which creditor may petition.

12. (1) A creditor shall not be entitled to present an insolvency petition against a debtor unless—

(*a*) the debt owing by the debtor to the creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to such creditors, amounts to five hundred rupees, and

(*b*) the debt is a liquidated sum payable either immediately or at some certain future time, and

(*c*) the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition.

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pay his debts is a mis-statement made either deliberately or due to carelessness or to an honest mistake is not a proper petition. 1930 M. 544=58 M.L.J. 189. A debtor who is confined in the Rangoon Central Jail for upwards of 12 months prior to date of the petition must be deemed to have "ordinarily resided" in Rangoon so as to give jurisdiction to the High Court to entertain the petition. 13 R. 192.

BUSINESS BY COMMISSION AGENTS—JURISDICTION.—Where the business carried on at Karachi was a business not of a firm out of British India but of the commission agents who *inter alia* made transactions on behalf of the firm and all the transactions were invariably made by the commission agents in their own respective names and they were personally responsible to the local dealers, the mere fact that the firm out of British India employed the services of these agents to sell goods sent to them from up-country or to enter into forward contracts of sale and purchase on behalf of the firm, would not by itself be sufficient to give jurisdiction to the Karachi Court. 27 S. L. R. 298=1933 S. 202.

Sec. 11 (c).—The question whether insolvent personally works for gain in a particular place is primarily a question of fact. A person may be working for gain in more than one place. The place where the payment is made to the insolvent is not the test but one of the factors for consideration. The more important thing is where the money is actually received by the debtor and so available for the creditors. There must also be some degree of permanency in the relation between the debtor and places where he is alleged to work for gain. 34 Bom. L.R. 844=1932 B. 432.

Sec. 11 (d) : APPLICABILITY—APPLICATION AGAINST FIRM OF DEBTORS AND INDIVIDUAL PERSON—TEST OF JURISDICTION.—Cl. (*d*) of S. 11 applies where the application is against a firm of debtors and not against an individual debtor. It is necessary in order to give the Court jurisdiction to pass an order of adjudication, that the firm of debtors carried on business within a year of the date of the application within the Court's jurisdiction. And the onus is on the applicant to prove the fact. The question for determination in such a case however is not whether the debt of the petitioning creditor arose within the jurisdiction of the Court, but whether the debtor firm carried on business within a year of the date of application within the jurisdiction of the Court. To give jurisdiction the business should be carried on either personally or by an agent, properly and strictly so called, but not by a general agent, carrying on business, in his own name, for diverse constituents on commission. The debtor firm had a servant permanently employed within the jurisdiction of the Court. The servant used to watch over the interests of his master, give directions for sale when instructed to do so, bring brokers to the general agent, check weighments, hand over railway receipts and see that the goods were sold at the best available price, make entries in his books and keep his master informed; and a partner of the firm used to come every few months for a few days in connection with the business of the firm. *Held*, that the debtor firm carried on business within the jurisdiction of the Court. 27 S.L.R. 157=1933 S. 250.

Sec. 12.—An insolvent can question the right of the petitioning creditor to figure as creditor, and the O.A. after insolvency can enquire and strike out his name, if necessary, from the creditor's list. 37 I.C. 71=20 C.W.N. 995. The jurisdiction in bankruptcy is entirely discretionary. And in exercising the discretion, the Court is bound to look into the circumstances as a whole. 39 C.L.J. 512.

Sec. 12 (1) (c).—The three months required by S. 12 begins on the expiry of the twenty-one days mentioned in S. 9 (*c*). In reckoning the twenty-one days, the day on which the attachment is levied is not to be computed. 29 Bom. L.R. 1455=1927 B 633. *See also* 1937 Rang 16. Where an application for amendment is filed more than three months after the alleged act of insolvency is committed, such an application is not within time under S. 12 (*c*), and so the effect of granting an amendment is to give the petitioning creditors rights which they would not have had, had they sought to file their petition on the date when they applied for the amendment. Hence the amendment should not be permitted in such circumstances. 1934 S. 177. Where the respondent executed a mortgage of his shop in favour of his brother more than three months before the presentation of petition but possession in pursuance thereof was transferred within 3 months. *Held*, the transaction must be taken as a whole, because

(2) If the petitioning creditor is a secured creditor, he shall in his petition either state that he is willing to relinquish his security for the benefit, of the creditors in the event of the debtor being adjudged insolvent or give an estimate of the value of the scurity. In the latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same way as if he were an unsecured creditor.

Proceedings and order on creditor's petition.

13. (1) A creditor's petition shall be verified by affidavit of the creditor, or of some person on his behalf having knowledge of the facts.

(2) At the hearing the Court shall require proof of—

(*a*) the debt of the petitioning creditor, and

(*b*) the act of insolvency or, if more than one act of insolvency is alleged in the petition, some one of the alleged acts of insolvency.

(3) The Court may adjourn the hearing of the petition and order service thereof on the debtor.

(4) The Court shall dismiss the petition—

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the transfer of possession was only a necessary corollary of the mortgage, and as it was executed more than three months before the presentation of petition, it could not be an available act of insolvency on which a petition could be founded. 167 I.C. 96=1937 R. 16.

Sec. 12 (2).—A creditor presenting an insolvency petition against a debtor must prove the existence of a debt of Rs. 500 or upwards not only at the time when the petition is presented, but at the time of the hearing of the petition and at the moment of time immediately prior to the making of an order of adjudication. I.L.R. (1938) 1 Cal. 13=1939 Cal. 35. If a petitioning creditor omits inadvertently, and not deliberately, to include or mention a security, it does not necessarily follow that the proceedings should be wholly set aside. 61 C. 924.

Secs. 12 and 13.—Where a creditor's petition for adjudication states that the debtor has given notice to his creditors that he has suspended or is about to suspend payment of his debts, and the affidavit verifying the petition shows that this is in fact the case, there is sufficient compliance with the laws requirements. The petition and the affidavit should be read together, and if the petitioning creditor sets out in detail the facts on which he is relying, the debtor can have no complaint whether the information is contained in the petition or the affidavit. 54 L. W. 438=(1941) 2 M.L.J. 598. *See* 167 I.C. 585 =1937 Rang. 53, *contra*.

Sec. 13: PARTNERS—SEPARATE ADJUDICATIONS ON SAME DEBT—VALIDITY.—The petitioning creditor had filed a suit against the son of the applicant individually and obtained a decree; but he afterwards learnt that the applicant was also a partner with his son and proceeded against him under the insolvency law on the same debt. In a notice of motion taken out by the applicant to set aside the adjudication order passed against him, it was contended that on account of the decree obtained against his son as a partner, there was no debt due and payable by him and that it was not competent to the petitioner to get him adjudicated. *Held* that, though the remedy to sue may be barred by limitation, yet the debt was not extinguished. If, therefore, it was proved that the debt in dispute was a partnership debt, its existence would suffice to support an adjudication order against both father and son. 35 Bom.L.R. 881=1933 B. 407.

Sec. 13 (2).—Under S. 13 (2) the Court must be satisfied as to the validity of the debt of the petitioning creditor before it makes an order of adjudication. The question which arises in insolvency is not merely one between the petitioning creditor and the debtor. The rights of other creditors of the debtor have to be considered. The Court must therefore consider whether the petitioning creditor has in fact a good debt, and it is not bound by any decree as between the petitioning creditor and the debtor. The debtor may be estopped from disputing the decree, but the Insolvency Court is not estopped. The Court must be satisfied about the validity of the debt in the interests of the other creditors. 42 Bom.L.R. 1078. A petitioning creditor may rely on the decree which he has obtained against the debtor as evidence of his debt, but it is not conclusive. The Insolvency Court has to be satisfied, in spite of *prima facie* evidence contained in the decree, that the debt of the petitioning creditor exists. 42 Bom.L.R. 1078=1941 Bom. 62=I.L.R. (1941) Bom. 156.

Sec. 13 (3).—The omission to serve the notice contemplated by S. 13 (3) is a formal defect or irregularity within the meaning of S. 118. 66 I.C. 886=34 C.L.J. 349. The burden lies upon the creditor to establish that the insolvent has waived the defect in the proceeding arising out of the omission to serve the initial notice. 66 I.C. 886=34 C.L.J. 349,

Sec. 13 (4)—The words 'other sufficient cause' should not be construed *ejusdem generis*. The widest possible interpretation should be put on these words. 1936 M. 27=70 M.L.J. 545. A creditor's petition for adjudication will be rejected when his conduct is vexatious and oppressive and an abuse of the process of the Court. The discretion will generally be used in favour of the debtor in cases where there is a principle of estoppel operating against the creditor and also when the petitioning creditor has been guilty of fraudulent or impro-

(*a*) if it is not satisfied with the proof of the facts referred to in sub-section (2); or

(*b*) if the debtor appears and satisfies the Court that he is able to pay his debts, or that he has not committed an act of insolvency or that for other sufficient cause no order ought to be made.

(5) The Court may make an order of adjudication if it is satisfied with the proof above referred to, or if on a hearing adjourned under sub-section (3) the debtor does not appear and service of the petition on him is proved, unless in its opinion the petition ought to have been presented before some other Court having insolvency jurisdiction.

(6) Where the debtor appears on the petition and denies that he is indebted to the petitioner, or that he is indebted to such an amount as would justify the petitioner in presenting a petition against him, the Court, on such security (if any) being given as the Court may require for payment to the petitioner of the debt which may be established against the debtor in due course of law, and of the costs of establishing the debt, may, instead of dismissing the petition, say all proceedings on the petition for such time as may be required for trial of the question relating to the debt.

(7) Where proceedings are stayed, the Court may, if by reason of the delay caused by the stay of proceedings or for any other cause it thinks just, make an order of adjudication on the petition of some other creditor, and shall thereupon dismiss, on such terms as it thinks just, the petition on which proceedings have been stayed as aforesaid.

(8) A creditor's petition shall not, after presentation, be withdrawn without the leave of the Court.

Conditions on which debtor may petition.

14. [1][(1)] A debtor shall not be entitled to present an insolvency petition unless—

(*a*) his debts amount to five hundred rupees, or

(*b*) he has been arrested and imprisoned in execution of the decree of any Court for the payment of money, or

(*c*) an order of attachment in execution of such a decree has been made and is subsisting against his property.

[1][(2) A debtor in respect of whom an order of adjudication, whether made under this Act or under the Provincial Insolvency Act, 1920, has been annulled owing to his failure to apply or to prosecute an application for his discharge shall not be entitled to present an insolvency petition without the leave of the Court

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LEG. REF.

[1] The original S. 14 was re-numbered as sub-S. (1) and sub-S. (2) inserted by Act IX of 1927.

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per conduct. 70 M.L.J. 545. The onus of proving that the debtor is able to pay the debt so that the creditor's petition may be dismissed is on the debtor himself. 60 C. 345=1933 C. 417. As to the meaning of the words "ability to pay debts" see *ibid*.

Sec. 13 (6).—It is only when the petitioning creditor's debt is denied that the Court can stay proceedings under S. 13 (6). 40 I.C. 207=19 Bom.L.R. 365. S. 13 (6) only contemplates that there should be a stay for such period as may be necessary for the determination of other matter in issue between parties and that ultimately there shall be a trial on the question relating to the debt. The sub-section never contemplates that a conditional order of adjudication should be added by way of sanction, to an order for furnishing security in connection with the postponement of the trial of the question as to the existence of the debt. Such an order cannot be supported and will be set aside. 61 C. 924.

Sec. 13 (8).—Ss. 13 (8) and 15 (2) apply to pending insolvency petitions before an order of adjudication is made, and therefore an adjudicated insolvent cannot be permitted to withdraw his petition on the ground that he has settled with the creditors. 38 B. 200=20 I.C. 859.

Secs. 14 and 15.—An Insolvency Court can annul an adjudication order made by it if it thinks that it was got by an abuse of the power of Court. 44 C. 899=39 I.C. 199.

by which the order of adjudication was annulled. Such Court shall not grant leave unless it is satisfied either that the debtor was prevented by any reasonable cause from presenting or prosecuting his application, as the case may be, or that the petition is founded on facts substantially different from those contained in the petition on which the order of adjudication was made.]

Proceedings and order on debtor's petition.

15. (1) A debtor's petition shall allege that the debtor is unable to pay his debts, and, if the debtor proves that he is entitled to present the petition, the Court may thereupon make an order of adjudication, unless in its opinion the petition ought to have been presented before some other Court having insolvency jurisdiction.

(2) A debtor's petition shall not, after presentation, be withdrawn without the leave of the Court.

[1][(3) On the making of the order admitting his petition, a debtor shall—

(*a*) unless the Court otherwise directs, produce all his books of account, and

(*b*) file such lists of creditors and debtors and afford such assistance to the Court as may be prescribed,

failing which the Court may dismiss his petition.]

Dictionary powers as to appointment of interim receiver.

16. The Court may, if it is shown to be necessary for the protection of the estate, at any time after the presentation of an insolvency petition and before an order of adjudication is made, appoint the official assignee to be interim receiver of the property of the debtor, or of any part thereof, and direct him to take immediate possession thereof or any part thereof, and the official assignee shall thereupon have such of the powers conferable on a receiver appointed under the Code of Civil Procedure, 1908, as may be prescribed.

Effect or order of adjudication.

17. On the making of an order of adjudication, the property of the insolvent wherever situate shall vest in the official assignee and shall become divisible among his creditors, and thereafter, except as directed by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt or shall commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose:

LEG. REF.

[1] Inserted by Act XIX of 1927, S. 3. [*See also* notes under S. 13, *supra*.

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Sec. 15 (1).—The words "ought to have been presented before some other Court" mean "ought as a matter of convenience to have been presented before some other Court". 34 Bom.L.R. 844.

Sec. 15 (3).—An order under S. 15 should be made in the ordinary course, unless it is clear that there has been an abuse of the process of the Court. 18 I.C. 544. A debtor has the right to be adjudicated when he has satisfied the condition laid down in the section. *See* 30 C.W.N. 173=1926 C. 640. A debtor who has been adjudicated insolvent on his own petition cannot even with the leave of the Court withdraw his petition. The only way by which this purpose can be effected is by annulling the adjudication. 3 R. 313=90 I.C. 969. *See also* 38 B. 200 cited under S. 13 (8).

Sec. 17: SCOPE OF SECTION.—There is no warrant for holding that S. 17 applies only to proceedings against the property of the insolvent and that therefore no leave of the Court is necessary for commencing a suit to enforce a personal remedy against an insolvent. There is no doubt a distinction between the language employed in the section on the one hand, and that employed in the corresponding sections of the English Bankruptcy Act and the Provincial Insolvency Act on the other, in that S. 17 of the former Act refers only to remedies against the property of the insolvent, while the latter Acts refer to remedy against the property or person of the debtor. But the latter portion of S. 17 relating to "suit and proceedings" is quite general; and having regard to the principle underlying the section, there is no justification for drawing a distinction between suits relating to the property of the insolvent and suits against the person of the insolvent, provided of course the suit or proceedings relate to any claim provable in insolvency. It was not intended

Provided that this section shall not affect the power of any secured creditors to realize or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed.

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that the insolvent should be sued in a Court of law in respect of any claim provable in insolvency. I.L.R. (1938) Mad. 897=47 L.W. 532=1938 Mad. 643=(1938) 1 M.L.J. 467. Under S. 17 the property of the insolvent situate in any part of the British India vests in the O. A. on adjudication. 18 I.C. 908=40 C. 78. An order of adjudication should specify the acts of insolvency on which it is made, as the insolvency relates back to the dates of the acts of insolvency which are found to have been proved. 40 Cal. 78. After the separation of Burma from India, an order of adjudication made in India is not sufficient to vest, under S. 17, in an Official Assignee in India immovable property of the insolvent in Burma. 1938 Rang.L.R. 166=1938 Rang 324. On passing of the adjudication order, the property of the debtor vests in O.A., whether it is situate in British India or not and whether O. A. is in a position to get possession or such property as is situate outside British India or not. Movable properties are *prima facie* governed by the law of the insolvent's domicile. (1926 B. 276 and 1926 C. 898, Ref.) 148 I.C. 941 (2)=1934 S. 44. Where a decree is passed against a person who is subsequently adjudicated an insolvent, the right to have it set aside for fraud ceases to be exercisable by the insolvent after his insolvency but passes to the O.A. [(1910) 2 K.B. 229, Foll.] 36 Bom.L.R. 79=1934 B. 84. Any person wishing to seek any remedy against the insolvent who is so adjudicated should apply for leave to do so in insolvency side of High Court; hence a S. C. Court has no jurisdiction to entertain an application for execution after adjudication without High Court's leave. 31 I.C. 192=39 M. 689. An insolvent, from the time of adjudication until his final discharge, holds the position of an express trustee for his creditors and he cannot plead *adverse possession* against the O. A. 29 I.C. 168=17 M.L.T. 347.

A person who has broken a particular provision of law should not be enabled by the same provisions of law to prevent the Courts from interfering in the matter. Where therefore the decree-holder admits having broken the provisions of S. 17, when he brought his suit against the defendant who had become an insolvent, he cannot be allowed to hold up that section as a bar against an appeal from the decree by the defendant. 151 I.C. 579=1934 A. 1011. Insolvent whether can prefer appeal—Prosecution of appeal after annulment of adjudication. 31 Bom.L.R. 357.

APPLICATION OF SECTION.—S. 17 does not apply to a suit instituted in the Revenue Court to set aside an illegal distraint by the O. A. for rent due to the insolvent. 18 I.C. 722=24 M.L.J. 350. Transfer by debtor before adjudication—Suit by creditor under S. 53, T. P. Act, after adjudication—Leave of Insolvency Court—Necessity. *See* (1941) 2 M.L.J. 684 (F.B.). *See also* 40 Bom.L.R. 935=1938 Bom. 469.

CONTEMPT OF COURT.—The insolvent's property vested in the O.A. is not in *custodio legis*, and there is no contempt of Court in instituting a suit against that officer with respect to that property. 24 M.L.J. 350.

WHAT PROPERTY VESTS IN OFFICIAL ASSIGNEE.—Property means property divisible amongst creditors. 6 L. 1=47 M.L.J. 857 (P.C.). Movable and immovable properties of the insolvent situate in a foreign country—Law applicable to. *See* 43 C.L.J. 436=1926 C. 898; 35 C.W.N. 506. As to pension payable to insolvent by Government, *see* 43 C.W.N. 1194=1940 Cal. 192. Joint Hindu family—Adjudication of adult sons as insolvents—Minor sons' shares do not vest in O.A. *See Ibid.*; 19 L.W. 415; 94 I.C. 175=24 A.L.J. 417. But *see* 3 L. 329, where it was held that on the insolvency of a father governed by the Mitakshara law, the whole of the joint family property including the interest of his sons vests in the O.A. On *insolvency of coparcener*, interest of others or even of sons of insolvent does not vest in O.A.—Cases under S. 60, C. P. Code, are no useful guide for the purpose. 6 L. 1=47 M.L.J. 857 (P.C.). An order of adjudication can be made against a firm in the firm's name and will operate on the firm property of each partner. 25 I.C. 222. Where a firm is adjudicated by two Courts, the adjudication order which is prior in time vests the property of the insolvent in the O.A. of that Court. The priority of vesting does not depend on the date of the commission of the acts of bankruptcy on which the proceedings were started. (42 M. 121, Foll.) 59 C. 1161=36 C. W. N. 546. The leave contemplated under S. 17 is leave which ought to be obtained before commencement of suit and cannot be granted after the same is filed. 40 B. 235=31 I.C. 948. *See also* 34 Bom.L.R. 649=1932 B. 338. Leave obtained subsequently cannot cure the defect when the leave is granted after the expiry of the period of limitation. 1937 A.L.J. 94=1937 A. 271. [*Note.*—See, however, to the contrary, the decision under S. 28 (2) of the Provincial Insolvency Act in 34 Bom.L.R. 683.] A suit by a creditor of the insolvent on behalf of himself and all the other creditors of the insolvent for a declaration that a deed of trust executed by the insolvent prior to his adjudication in favour of himself and his relations is void against his creditors under S. 53, T. P. Act, is a suit which falls within the general prohibition enacted in S. 17 of the Presy. T. Insol. Act, and is not maintainable without leave of the Insolvency Court. 40 Bom.L.R. 935=1938 Bom. 469. *See also* (1941) 2 M.L.J. 684 (F.B.). No cause of action survives against a person regarding his property who becomes an insolvent and whose property vests in the O. A. 39 B. 568=28 I.C. 506. The insolvent's credit and reputation are not part of the insolvent's property within S. 2 (*e*), and so right to sue for compensation for damage caused by loss

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of credit and reputation does not vest in the O. A., but remains vested in the insolvent in spite of the bankruptcy. The insolvent therefore can maintain and carry on the suit for such damages in his personal capacity. The principle applicable to individuals is also applicable to two or three persons carrying on business under a firm name. 1930 R. 289. Adjudication order does not operate to vest the insolvent's immovable property situated in a Foreign State in the O. A., or, when there has been a *composition scheme* approved of by the Court, in the trustees of the composition under the order approving the scheme. 35 C.W.N. 506. In the case of a defaulting member of the Bombay Native Share and Stock Brokers' Association, who is expelled from the Association, no interest in his card remains in himself and so none can pass to his assignee whether his expulsion does or does not take place prior to the commencement of his insolvency. S. 12, T. P. Act, has no application to the card of a member of the Association. 34 Bom.L.R. 1178=1932 P.C. 186=63 M.L.J. 623 (P.C.). Where an occupancy is not transferable, it cannot be sold in execution of a decree and accordingly does not vest in O. A. 121 I.C. 876 =1930 S. 75. The rules of the Provident Fund of a company provided that a member was entitled to receive the amount only on his retirement or discharge and that in case he transferred his interest during services, he was liable to forfeit his rights for the amount to the company. A member while in service was adjudged insolvent on his own petition and his rights vested in the O.A. *Held*, that the effect of his petition was to transfer or assign immediately his property to the O.A. and that it was equivalent to a voluntary transfer by the debtor to the O.A. within the meaning of the provident fund rule. 60 C. 926=37 C.W.N. 1050=1933 C. 701.

Sec. 17: PROPERTY ABANDONED BY OFFICIAL ASSIGNEE—IF RE-VESTS IN INSOLVENT.—Where a particular item of property belonging to the insolvent, which has vested in the Official Assignee by virtue of the operation of S. 17, is abandoned by him as being of no value at all, it does not, without any action on the part of the Official Assignee, become re-vested in the insolvent either during the currency of his insolvency or after his discharge. (39 A. 223, Diss. from.) I.L.R. (1937) 2 Cal. 386=41 C.W.N. 875. S. 17 is not an absolute bar to execution of a decree. Leave to execute can be obtained. Where a judgment-debtor is adjudged an insolvent and the adjudication is subsequently cancelled, the time during which the insolvency proceedings were pending cannot be deducted in computing the period of limitation for an application to execute the decree. The Presy. T. Insol. Act contains no provision similar to the one enacted by S. 78 (2) of the Provincial Insolvency Act, and the equitable rule contained in S. 78 (2) of the latter Act cannot therefore be invoked in the case of an insolvency under the Presy. T. Insol. Act. 1937 M.W.N. 1182.

ARREST OF JUDGMENT DEBTOR.—The word "other legal proceedings" in S. 17 includes an application for arrest in execution of a decree, and no such application can be made against an insolvent after an order of adjudication has been made except with the leave of the Court. 55 I.C. 250. In a suit to enforce the mortgage rights of the insolvent the O. A. is a necessary party and he will not be bound by the decree passed therein unless he was a party to the suit. 1929 Rang. 222.

Per *Curiam*.—The case is analogous to that of a suit brought against a man who was dead at the time of its institution. In such a case it would be incumbent on the plaintiff not merely to write to the legal representatives enquiring whether they wished to defend the suit but to place them on the record. 7 Rang. 201=1929 Rang. 229.

Sec. 17(Proviso).—The proviso to sec. 17 merely preserves to the creditor his power to realise or otherwise deal with the property. It has no bearing on the question as to what he could claim against the other assets of the company. 7 Rang. 514=1930 Rang. 20. O.A. is bound by all the equities which affect an insolvent: hence a valid charge, created by parol by a debtor in respect of a mortgage-debt due to him, binds, on his insolvency, the O. A. 123 I. C. 297=1930 Sind 77. Leave of the Court under S. 17 is necessary to institute a suit to realise the mortgage security. *Held*, also, that the proviso to that section will apply only to cases where the security is sought to be realised without a recourse to a suit. 7 Rang. 201=1929 Rang. 229. Leave to file suit against insolvent—Notice to insolvent whether an essential prerequisite. 117 I.C. 570.

SECURED CREDITORS, RIGHTS OF.—The power of a secured creditor to realise his security under the proviso to S. 17 covers his suit to enforce his right under a mortgage. 38 Bom. 359=21 I.C. 714. A secured creditor can institute a suit to realise his securities without leave of the Court. 45 I.C. 918. *See also* 38 Bom. 359. Rights of secured creditor described. 60 C. 1298=37 C. W.N. 973. The matter therefore of mortgage suits is one which lies apart from insolvency proceedings and although it might be possible for an O. A. to apply to the Court to be made a party in a mortgage suit it would be seldom that it would be in the interests of the estate for the O. A. to take such action. Therefore on general principles if action is to be taken at all, it is the insolvent who is the person to take action in regard to mortgage decrees. 151 I.C. 579= 1934 All. 1011. Where the secured creditor seeks to enforce his remedy against the security, it is necessary, that the O. A. should be impleaded as party but leave of the Court is not necessary. Where the O. A. was not impleaded in certain proceedings in execution taken at the instance of the secured creditor: *Held*, that the effect was that the equity of redemption was not represented, but the O. A. was the only person who could contest the execution. 60 Cal. 1298=37 C.W.N. 973.

INTEREST ON SECURED DEBTS.—A secured creditor can claim interest at the contract rate beyond the date of adjudication of the insolvent and up to the time of realisation. 2 Rang. 127= 83 I.C. 576. The refusal of discharge to an insolvent is not necessarily a determination of

18. (1) The Court may, at any time after the making of an order of adjudication, stay any suit or other proceeding pending against the insolvent before any Judge or Judges of the Court or in any other Court subject to the superintendence of the Court.

Stay of proceedings.

(2) An order made under sub-section (1) may be served by sending a copy thereof, under the seal of the Court, by post to the address for service of the plaintiff or other party prosecuting such suit or proceeding, and notice of such order shall be sent to the Court before which the suit or proceeding is pending.

(3) Any Court in which proceedings are pending against a debtor may, on proof that an order of adjudication has been made against him under this Act, either stay the proceedings or allow them to continue on such terms as it may think just.

[1][18-A. (1) The Court may, at any time after the presentation of an insolvency petition, stay any insolvency proceedings pending against the debtor in any Court subject to the superintendence of the Court, and may, at any time after the making of an order of adjudication, annul an adjudication against the debtor made by any such Court.

Control over insolvency proceedings in Subordinate Courts.

LEG. REF.

[1] Inserted by Act X of 1930.

NOTES.

the insolvency proceedings and therefore a suit against an insolvent after adjudication and after such refusal is also barred by S. 17. 2 Rang. 643=84 I.C. 909.

Secs. 17 and 18.—Both secs. 17 and 18 contemplate *direct* proceedings against the insolvent and have no application to a proceeding for revocation of a probate of a will of a person whose heir-at-law is an adjudicated insolvent. The adjudication of the heir as insolvent does not, therefore, take away the right of his creditor to apply for revocation of the grant made in favour of a third person of a probate of a will which substantially deprives the heir of his inheritance. Nor does the subsequent discharge of the insolvent have any effect on the creditor's right to proceed with his application for revocation. I.L.R. (1940) 1 Cal. 33=71 C.L.J. 25=44 C.W.N. 149=1940 Cal. 296. Proceedings in execution of decree—Subsequent adjudication order—Effect of—Procedure. 3 Rang 187=89 I.C. 381.

Secs. 17 and 52.—S. 52 is an independent section by itself and is an exception to S. 17, so that if a creditor having a charge over debts due to the insolvent fails to perfect his title by giving notice to the debtors to the insolvent, the trustee in insolvency is entitled to those debts, as property in the reputed ownership of the insolvent. 25 S.L.R. 310. *See also* 43 C.W.N. 290 (solicitor's lien .

Sec. 18.—As to object of section, *see* 49 Mad. 788. S. 18 only applies to a case where the judge exercising insolvency jurisdiction has already made an order of adjudication. It does not enable a judge of the High Court sitting in insolvency to stay insolvency proceedings before a mofussil Court even before he has passed the order of adjudication. 31 C.W.N. 847=1927 Cal. 620. Under S. 18, the Insolvency Judge in a High Court has power to transfer a suit against the insolvent pending in a mofussil Court. 22 L.W. 326=90 I.C. 1054 (1). *See also* 1926 Mad. 150. The District Court is not subject to superintendence of the Commissioner in Insolvency, and consequently the latter cannot stay insolvency proceedings in the former. 24 Bom.L.R. 872=1921 Bom. 390. Where a suit is filed against the insolvent after the date of the order of adjudication, the Court is not bound to dismiss the case; it has power under S. 18 (3) to stay such a proceeding. 31 Bom.L.R. 981=1929 Bom. 398. A *partition suit* which the sons file to separate the property of the insolvent from the properties of other sharers is not a suit involving a claim against the insolvent, except in so far as it may involve a claim to account or a claim for money decree against the insolvent. The Insolvency Court has no jurisdiction to stay such a suit for partition. 55 Mad. 558=63 M.L.J. 37. Stay of proceeding—"Other proceeding," meaning of—Proceeding against some debtor before District Court—Stay of, by High Court exercising insolvency jurisdiction. *See* 56 Cal. 712=113 I.C. 860. The words of S. 18 (3) justify a stay of proceedings in an action which was not pending at the time of the order of adjudication. 41 Bom. 312=33 I.C. 694.

Sec. 18-A.—The necessity for the enactment of this new section has been explained as follows:—

"It has been held by some of the High Courts that S. 18 (1) of the Presidency Towns Insolvency Act does not empower a judge of the High Court sitting in insolvency to stay proceedings pending in respect of the same debtor in a Court subject to the superintendence of the High Court under the Provincial Insolvency Act. The need for such power has been felt, particularly in Calcutta where a common practice prevails whereby debtors, who have carried on business in Calcutta, retire to some part of the

(2) Where an adjudication is annulled under sub-section (1), all sales and dispositions of property and payments duly made and all acts done by the Court whose order is annulled, or by the receiver appointed by it or other person acting under his authority, shall be valid, but the property vested in such Court or receiver shall vest in the official assignee, and the Court may make such direction in regard to the custody of such property as it thinks fit.

(3) Notice of the order annulling an adjudication under sub-section (1) shall be published in the Official Gazette and in such other manner as may be prescribed.

Power to appoint special manager.

19. (1) If in any case the Court, having regard to the nature of the debtor's estate or business or to the interests of the creditors generally, is of opinion that a special manager of the estate or business ought to be appointed to assist the official assignee, the Court may appoint a manager thereof accordingly to act for such time as the Court may authorize, and to have such powers of the official assignee as may be entrusted to him by the official assignee or as the Court may direct.

(2) The special manager shall give security and furnish accounts in such manner as the Court may direct, and shall receive such remuneration as the Court may determine.

Advertisement of order of adjudication.

20. Notice of every order of adjudication, stating the name, address and description of the insolvent, the date of the adjudication, the Court by which the adjudication is made and the date of presentation of the petition, shall be published [1][* * * *] in the Official Gazette and in such other manner as may be prescribed.

Annulment of Adjudication.

Power of Court to annul adjudication in certain cases.

21. (1) Where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent are paid in full, the Court may, on the application of any person interested, by order annul the adjudication [2][and the Court may, of its own motion or on application made by the official assignee or any creditor, annul any adjudication made on the petition of a debtor who was, by reason of the provisions of sub-section (2) of section 14, not entitled to present such petition].

LEG. REF.

[1] Words "in the Gazette of India and" omitted by the A. O., 1937.

[2] Added by Act XI of 1927.

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province sufficiently remote and get an accommodating creditor to present a petition in insolvency against them in a District Court. This is done with the object of discouraging Calcutta creditors from prosecuting their claims or securing a searching investigation of the debtor's conduct and affairs. The clause gives power to the judge of a High Court sitting in insolvency to stay or annul insolvency proceedings pending under Provincial Insolvency Act in any Court subject to its superintendence in respect of the same debtor. It also empowers him to give necessary directions for the administration of the debtor's estate in the High Court." (Statement of Objects and Reasons to Act X of 1930).

STAY OF PROCEEDINGS in mofussil Court—Grounds. *See* 35 C.W.N. 566=1931 Cal. 775.

Sec. 21.—ENQUIRY FOR ANNULMENT OF ADJUDICATION—SCOPE—Per *Bagulay, J.*—If, in the opinion of the Court, on the date of the filing of the application for adjudication, there existed other good grounds for the adjudication, any such grounds may be gone into in the inquiry which is to be opened with regard to the annulment of the adjudication, and, if they are proved, at the subsequent inquiry, there is no reason why the Court should not come to the conclusion that on the date of the filing of the application, the debtor ought to have been adjudged insolvent; and, if matters cannot be carried as far as that, the existence of perfectly good grounds for the debtor's adjudication, existing on the date of the filing of the application for adjudication, would be very good grounds for the Court to refuse to exercise its discretion in favour of the debtor. *Semble.*—The word 'may' in the section does not mean 'must'. 1933 R. 363. *See also* 1928 M. 394=

(2) For the purposes of this section, any debt disputed by a debtor shall be considered as paid in full, if the debtor enters into a bond, in such sum and with such sureties as the Court approves, to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt, with costs, and any debt due to a creditor who cannot be found or cannot be identified shall be considered as paid in full if paid into Court.

Concurrent proceedings in British Courts.

22. Where it is proved to the satisfaction of the Court that insolvency proceedings are pending in any other British Court whether within or without British India against the same debtor and that the property of the debtor can be more conveniently distributed by such other Court, the Court may annul the adjudication or may stay all proceedings thereon.

Proceedings on annulment.

23. (1) Where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done, by the official assignee or other person acting under his authority, or by the Court, shall be valid, but the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such terms and subject to such conditions (if any) as the Court may declare by order.

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108 I.C. 208. [*See also* cases under Ss. 13 and 15, *supra*.] Annulment of adjudication may be ordered if adjudication order was obtained by an abuse of the process of Court. 27 C.W.N. 739; 44 C. 899. Effect of annulment. 1931 R. 191. In an application to annul an adjudication, the insolvent must satisfy the Court that he has completely satisfied the debts as they stood before bankruptcy, *i.e.*, he must have paid the principal and interest also on the interest-bearing sums. 60 I.C. 943=47 C. 914. *See also* 40 I.C. 207=19 Bom.L.R. 35. A judge, in considering an annulment, is exercising a discretion whether his former order should be maintained. This discretion must be exercised upon certain materials in the evidence. In considering such a question, he should not conduct a roving inquiry into the financial position of the debtor, but he should scrutinize closely the actual position of the adjudicating firm at the time that the alleged suspension took place and, within limits, should also consider the surrounding circumstances of the suspension and the manner in which the notice of suspension is alleged to have been given. 1933 R. 363=12 R. 64. A creditor filed a petition for adjudication alleging that a certain act was the statutory notice of suspension of payment. In so doing, he was under a misconception of law, as the real notice was some other act. At the time of inquiry of petition under S. 21, he sought to amend his petition. *Held*, the amendment must be allowed. 12 R. 64. Full discharge of debts by payment of four annas in the rupee is not a full payment within the section and does not entitle the insolvent for an order annulling the order of adjudication. 43 M. 71=37 M.L.J. 244. Normally on an annulment of adjudication by reason of the default of the insolvent, his property should be vested in the O. A. or proper officer under the Act in force and is so vested in him for the benefit of the creditors. 60 C. 259=1933 C. 386. Appeal by debtor to Privy Council pending—Execution for costs of High Court decree—Adjudication—Proper procedure. 34 Bom.L.R. 1436.

"OUGHT NOT TO HAVE BEEN ADJUDGED INSOLVENT".—Meaning of—Debtor not proved to have been unable to pay debts—Ground for annulment—Discretion of Court to extend time for filing application to annul adjudication. 1928 M. 394=108 I.C. 208.

Sec. 22.—"THE SAME DEBTOR".—Meaning of—Two persons adjudicated in one Court and one of them in another—If Court can annul order under S. 22. 19 L.W. 316=46 M.L.J. 580. Staying proceedings under this section is in the discretion of the trial Court, and where this discretion has been judicially exercised it will not be easily interfered with by a Court of appeal. 31 C.W.N. 1002=1927 P.C. 162=53 M.L.J. 114 (P.C.).

Sec. 23 (1).—As to the effect of annulment of adjudication, *see* 60 C. 259=1933 C. 386. *See also* under S. 21. Under S. 23 (1) the effect of the annulment of an adjudication is to divest the Official Assignee of the debtor's property, which reverts to the debtor unless the Court by order appoints some one in whom it shall vest, not necessarily the Official Assignee. Where the Court annulling an adjudication directed that the assets should remain in the hands of the Official Assignee subject to the further order of the Court. *Held*, that the effect of that order was not to vest the debtor's property in the Official Assignee under S. 23 (1) but to cause such property to revert to the debtor on condition that the assets already in the hands of the Official Assignee were to remain in his hands subject to the further order of the Court. I.L.R. (1941) 1 Cal. 509. 1942 Cal. 150= When an order of adjudication is annulled by the Court as a result of its approv-

(2) Where a debtor has been released from custody under the provisions of this Act and the order of adjudication is annulled as aforesaid, the Court may, if it thinks fit, recommit the debtor to his former custody, and the jailor or keeper of the prison to whose custody such debtor is so recommited shall receive such debtor into his custody according to such recommitment, and thereupon all processes which were in force against the person of such debtor at the time of such release as aforesaid shall be deemed to be still in force against him as if such order had not been made.

(3) Notice of the order annulling an adjudication shall be published [1][* * * *] in the Official Gazette and in such other manner as may be prescribed.

Proceedings consequent on order of adjudication.

Insolvent's schedule.

24. (1) Where an order of adjudication is made against a debtor, he shall prepare and submit to the Court a schedule verified by affidavit, in such form and containing protection of the insolvent from arrest or detention.

(2) The schedule shall be so submitted within the following times, namely:

(*a*) if the order is made on the petition of the debtor, within thirty days from the date of the order,

(*b*) if the order is made on the petition of a creditor, within thirty days from the date of service of the order.

(3) If the insolvent fails, without reasonable excuse, to comply with the requirements of this section, the Court may, on the application of the official assignee or of any creditor, make an order for his committal to the civil prison.

(4) If the insolvent fails to prepare and submit any such schedule as aforesaid, the official assignee may, at the expense of the estate, cause such a schedule to be prepared in manner prescribed.

Protection order.

25. (1) Any insolvent who shall have submitted his schedule as aforesaid may apply to the Court for protection, and the Court may, on such application, make an order for the petition of the insolvent from arrest or detention.

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[1]Words "in the Gazette of India and" omitted byA,O., 1937.

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ing a composition scheme under S. 30 (1), it is not necessary that the Court should make a vesting order in order that the properties may vest in the particular person appointed by the Court. The effect of S. 23 (1) is that upon the Court making an appointment under the section, the property of the debtor *ipso facto* vests in the person or persons appointed. 40 C.W.N. 1029. Where the order directs that the O.A. shall make over the assets to certain trustees named in the proposal of composition, who were to be appointed for carrying out the scheme of composition, the effect of the order is to appoint those persons as trustees under S. 23 (1), and the property of the debtor *ipso facto* vests in them. The fact that no deed of conveyance is executed in their favour as provided for in the proposal does not affect the title of the trustees to deal with the property. 40 C.W.N. 1029.

Sec. 25.—The pendency of an insolvency proceeding under this Act does not of itself, in the absence of a protection order under S. 25, bar the remedy of a decree-holder to execute the decree by arrest of the judgment-debtor. 47 I.C. 798. A creditor can pursue an insolvent, who has acted recklessly and dishonestly, by attachment and imprisonment according to law, even if the latter is unable to pay. 40 B. 461 = 39 I.C. 507. Arrears of maintenance due to the wife of an insolvent, against whom an order of maintenance under S. 488 of the Cr. P. Code has been passed, are a debt provable in insolvency, and it is competent to the Court to grant the insolvent a protection order in respect of such arrears. 44 L.W. 292 = 1936 M. 793 = 71 M.L.J. 430. *See also* 191 I.C. 198 = 42 Cr.L.J. 101; 42 Bom.L.R. 742 = 1940 Bom. 344. A Co-operative Credit Society, having obtained an award against a debtor under S. 54, Bombay Act (VII of 1925) adopted the alternative course of recovering the debt through the Collector as arrears of land revenue under S. 59 of the Act. The Collector ordered the detention of the debtor in civil prison, who as a counter move filed a petition for insolvency. *Held*, that it would be an improper exercise of discretion to refuse to grant interim protection to the debtor against arrest or detention for a debt due to the Society, and to permit his being detained in prison, and at the same time to take possession of his property for rateable distribution amongst his

(2) A protection order may apply either to all the debts mentioned in the schedule or to any of them as the Court may think proper, and may commence and take effect at and for such time as the Court may direct, and may be revoked or renewed as the Court may think fit.

(3) A protection order shall protect the insolvent from being arrested or detained in prison for any debt to which such order shall apply, and any insolvent arrested or detained contrary to the terms of such order shall be entitled to his release:

Provided that no such order shall operate to prejudice the right of any creditor in the event of such order being revoked or the adjudication annulled.

(4) Any creditor shall be entitled to appear and oppose the grant of a protection order, but the insolvent shall be *prima facie* entitled to such order on production of a certificate signed by the official assignee that he has so far conformed to the provisions of this Act.

(5) The Court may make a protection order before an insolvent has submitted his schedule if it thinks it necessary to do so in the interests of the creditors.

Meetings of creditors.

26. (1) At any time after the making of an order of adjudication against an insolvent, the Court, on the application of a creditor or of the official assignee, may direct that a meeting of creditors shall be held to consider the circumstances of the insolvency and the insolvent's schedule and his explanation thereof and generally as to the mode of dealing with the property of the insolvent.

(2) With respect to the summoning of and proceedings at a meeting of creditors the rules in the First Schedule shall be observed.

Public examination of the insolvent.

27. (1) Where the Court makes an order of adjudication it shall hold a public sitting on a day to be appointed by the Court, of which notice shall be given to creditors in the prescribed manner, for the examination of the insolvent, and the insolvent shall attend thereat, and shall be examined as to his conduct, dealings and property.

(2) The examination shall be held as soon as conveniently may be after the expiration of the time for the filing of the insolvent's schedule.

(3) Any creditor who has tendered a proof or a legal practitioner on his behalf may question the insolvent concerning his affairs and the causes of his failure.

(4) The official assignee shall take part in the examination of the insolvent; and for the purpose thereof, subject to such directions as the Court may give, may be represented by a legal practitioner.

(5) The Court may put such questions to the insolvent as it may think expedient.

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creditors, merely and solely because the Society has chosen the alternative remedy of enforcing the claim by approaching the Collector. 24 S.L. R. 396=1930 S. 263. *See also* 12 Bom.L.R. 517=7 I.C.448. Exercise of discretion by trial Court in the matter of granting or refusing protection will not be lightly interfered with in appea l.164 I. C. 364=1936 R. 329. A protection order under S. 25 (3) does not protect the debtor from being proceeded against in a Criminal Court. It will not protect him against the special statutory power of committal given to a Criminal Court under S. 488 (3), Cr. P. Code, for failure to comply with an order for maintenance. 42 Bom.L.R. 742=1940 Bom. 344. *See also* 1936 Mad. 793=71 M.L.J. 430; 42 Cr.L. J. 101=191 I.C. 198.

Sec. 27 (1).—If a creditor wants a public examination of the insolvent, he should apply before the insolvent applies for discharge. 26 Bom.L.R. 627=1924 B. 512. *See also* 35 C.W. N. 564. As to the admissibility of statement made by the insolvent in proceedings under S. 104 of the Act, *see* 32 C.W.N. 1140=48 C.L. J. 534=1929 C. 80.

(6) The insolvent shall be examined upon oath, and it shall be his duty to answer all such questions as the Court may put or allow to be put to him. Such notes of the examination as the Court thinks proper shall be taken down in writing and shall be read over either to or by the insolvent and signed by him, and may thereafter be used in evidence against him and shall be open to the inspection of any creditor at all reasonable times.

(7) When the Court is of opinion that the affairs of the insolvent have been sufficiently investigated, it shall, by order, declare that his examination is concluded, but such order shall not preclude the Court from directing further examination of the insolvent whenever it may deem fit to do so.

(8) Where the insolvent is a lunatic or suffers from any such mental or physical affliction or disability as, in the opinion of the Court, makes him unfit to attend his public examination, or is a woman who according to the customs and manners of the country, ought not to be compelled to appear in public, the Court may make an order dispensing with such examination, or directing that the insolvent be examined on such terms, in such manner and at such place as to the Court seems expedient.

Composition and Schemes of Arrangement.

Submission of proposal and acceptance by creditors.

28. (1) An insolvent may, at any time after the making of an order of adjudication, submit a proposal for a composition in satisfaction of his debts, or a proposal for a scheme of arrangement of his affairs in the prescribed form, and such proposal shall be submitted by the official assignee to a meeting of creditors.

(2) The official assignee shall send to each creditor who is mentioned in the schedule, or who has tendered a proof before the meeting, a copy of the insolvent's proposals with a report thereon, and if on the consideration of such proposal the majority in number and three-fourths in value of all the creditors whose debts are proved resolve to accept the proposal, the same shall be deemed to be duly accepted by the creditors.

(3) The insolvent may at the meeting amend the terms of his proposal if the amendment is in the opinion of the official assignee calculated to benefit the general body of creditors.

(4) Any creditor who has proved his debt may assent to or dissent from the proposal by a letter, in the prescribed form, addressed to the official assignee so as to be received by him not later than the day preceding the meeting, and any such assent or dissent shall have effect as if the creditor had been present and had voted at the meeting.

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Sec. 27 (6).—The notes of the public examination of the insolvent, though admissible against him under S. 27 (6), are not admissible against a creditor who had no opportunity to cross-examine. 36 I.C. 689=24 C.L.J. 149.

Secs. 28 and 27.—A composition in the absence of public examination of the insolvent, in a case where the debts are large, is not consistent with an efficient administration of the Act. Unless there is an examination and investigation, no creditor can know whether it is to his interest to accept the scheme. 59 C. 1436.

Sec. 28.—Details of proposal. should be clear and specific. *See* 59 C. 1436. The voting letter does not come into operation imme diately it is filed before the O. A. and may therefore be revoked at or before the meeting but before the proposal or the amended proposal, if any, is considered, and the votes counted, *e.g.*, at an adjourned meeting. 26 S.L.R. 339.

Secs. 28 and 30.—A creditor releasing a surety of an insolvent debtor is not liable to return the money received by him from the surety. Part-payment of a surety debt is part-performance of the contract and a partial discharge thereof. 44 M. 381=63 I.C. 173=40 M.L.J. 404.

29. (1) The insolvent or the official assignee may after the proposal is accepted by the creditors apply to the Court to approve it, and notice of the time appointed for hearing the application shall be given to each creditor who has proved.

Approval of proposal by Court.

(2) Except where an estate is being summarily administered or special leave of the Court has been obtained, the application shall not be heard until after the conclusion of the public examination of the insolvent. Any creditor who has proved may be heard by the Court in opposition to the application notwithstanding that he may at a meeting of creditors have voted for the acceptance of the proposal.

(3) The Court shall before approving the proposal hear a report of the official assignee as to the terms thereof and as to the conduct of the insolvent and any objections which may be made by or on behalf of any creditor.

(4) Where the Court is of opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors or in any case in which the Court is required to refuse the insolvent's discharge, the Court shall refuse to approve the proposal.

(5) Where any facts are proved on proof of which the Court would be required either to refuse, suspend or attach conditions to the debtor's discharge, the Court shall refuse to approve the proposal unless it provides reasonable security for payment of not less than four annas in the rupee on all the unsecured debts provable against the debtor's estate.

(6) No composition or scheme shall be approved by the Court which does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of an insolvent.

(7) In any other case the Court may either approve or refuse to approve the proposal.

30. (1) If the Court approves the proposal, the terms shall be embodied in an order of the Court, and an order shall be made annulling the adjudication, and the provisions of section 23, sub-sections (1) and (3), shall thereupon apply, and the composition or scheme shall be binding on all the creditors so far as relates to any debt due to them from the insolvent and provable in insolvency.

Order on approval.

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Sec. 29 (4).—The interests of the creditors is not the sole concern of the Court in approving schemes of composition, and it is the duty of the Court to refuse to annul an adjudication if such an annulment would not be in the interest of the public or of commercial morality. 5 R. 241=1927 R. 176. A Court is not bound to accept a composition simply because none of the creditors appeared to oppose its approval. 107 I.C. 433=1928 S. 90=23 S.L. R. 192. The Court could not order that the administration of the scheme was to remain in the hands of the O. A. where the scheme provided that the trustee should administer it. 5 R. 241=1927 R. 176.

Sec. 30.—S. 30 is merely enabling and does not exclude the jurisdiction of ordinary Courts. 48 M. 521=48 M.L.J. 252. The jurisdiction of the Insol. Court is not exhausted owing to the annulment of the adjudication. Thus the Court has jurisdiction to give effect to the scheme it has approved. 35 C. W. N. 506=1932 C. 124. *See also* 31 I. C. 192. As to arrangement by insolvent with creditors, *see* 43 M. 71=37 M.L.J. 244. The debtors are entitled to the *unclaimed balance* which is in the hands of the O. A. as trustee of the fund put up in connection with the composition arrangement. 60 C. 313=1933 C. 387. On acceptance of composition scheme and annulment of adjudication, property *ipso facto* vests in the person appointed, and no separate vesting order is necessary. 40 C.W.N. 1029. Where after the insolvency of a debtor, the creditor proceeds against the debtor and the sureties for the realization of the debt and an award is drawn up without objection from the debtor, the contract of suretyship merges into the award so that after the passing of the award the creditor's rights against the sureties arise under the award and not the original contract of suretyship. The sanction of any subsequent scheme of composition or the annulment of the insolvency proceedings following it, does not make any difference to those rights nor does it operate to absolve the sureties' liability under the award. These rights of the creditor are not affected by the provisions of S. 30 and if the

(2) The provisions of the composition or scheme may be enforced by the Court on application by any person interested, and any disobedience of an order of the Court made on the application shall be deemed a contempt of Court.

Power to re-adjudge debtor insolvent.

31. (1) If default is made in the payment of any instalment due in pursuance of any composition or scheme, approved as aforesaid, or if it appears to the Court that the composition or scheme cannot proceed without injustice or undue delay or that the approval of the Court was obtained by fraud, the Court may, if it thinks fit, on application by any person interested, re-adjudge the debtor insolvent and annul the composition or scheme, and the property of the debtor shall thereupon vest in the official assignee but without prejudice to the validity of any transfer or payment duly made or of anything duly done under or in pursuance of the composition or scheme.

(2) Where a debtor is re-adjudged insolvent under sub-section (1), all debts provable in other respects which have been contracted before the date of such re-adjudication shall be provable in the insolvency.

Limitation of effect of composition or scheme.

32. Notwithstanding the acceptance and approval of a composition or scheme, the composition or scheme shall not be binding on any creditor so far as regards a debt or liability from which, under the provisions of this Act, the insolvent would not be discharged by an order of discharge in insolvency, unless the creditor assents to the composition or scheme.

Control over person and property of insolvent.

Duties of insolvent as to discovery and realization of property.

33. (1) Every insolvent shall, unless prevented by sickness or other sufficient cause, attend any meeting of his creditors which the official assignee may require him to attend, and shall submit, to such examination and give such information as the meeting may require.

(2) The insolvent shall—

(*a*) give such inventory of his property, such list of his creditors and debtors, and of the debts due to and from them respectively,

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debt under the award has been duly proved in the insolvency proceedings the creditor is entitled to put the award into execution and have it executed against the sureties. 183 I.C. 766=1939 Cal. 352.

Secs. 30 and 32.—Acceptance of a scheme of composition operates as a discharge of the insolvent from all debts provable in insolvency though not brought before the Ins. Court. 92 I.C. 535=1926 A. 293.

Sec. 31.—When a debtor is "adjudicated" or "re-adjudicated" or "freshly adjudicated" under S. 31, such adjudication is not independent of the original insolvency. 105 I.C. 90=54 C. 650=1928 C. 21. His legal position is analogous to that of an insolvent who has obtained his discharge, but, whose discharge is ultimately cancelled during the period between the date when he obtained his discharge and the date when the discharge is cancelled. 54 C. 650. Where a scheme has been approved and subsequently is annulled and the debtor dies after the scheme has been approved and before it is annulled, S. 93 applies; and notwithstanding the death of the debtor, any person interested has *locus standi* to apply that the debtor be re-adjudged an insolvent for the purpose of the further administration in insolvency of the deceased debtor's estate. 105 I.C. 90=54 C. 650. An order under S. 31 releases the trustees from their bond. 1937 Cal. 532. An assignee of a joint debt from one of the two joint creditors of the debtor whose proof of claim was never formally admitted by the Official Assignee, is not a 'person interested' within the purview of S. 31 (1) and he is not, therefore, entitled to apply to the Court for the re-adjudication of the debtor and annulment of the scheme of composition. I.L.R. (1938) 1 Cal. 493=1939 Cal. 119. Where a person who is found to be a creditor has been denied participation in the dividend paid by reason of a fraud practised upon the Court by the insolvent, it must be held that the payment of dividend to the other creditors is not a payment "duly made" within the meaning of S. 31. In such a case the Court, on the application of the creditor who has not participated, can order the other creditors who have been paid to pay back to the Official Assignee, such amount each as would be necessary to make up the proper dividend payable to the creditor concerned on the amount of his claim. 54 L.W. 560=1942 Mad. 103=(1941) 2 M.L.J. 847.

(*b*) submit to such examination in respect of his property or his creditors,

(*c*) wait at such times and places on the official assignee or special manager,

(*d*) execute such powers-of-attorney, transfers and instruments, and

(*e*) generally do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors,

as may be required by the official assignee or special manager or may be prescribed or be directed by the Court by any special order or orders made in reference to any particular case, or made on the occasion of any special application by the official assignee or special manager, or any creditor or person interested.

(3) The insolvent shall aid, to the utmost of his power, in the realization of his property and the distribution of the proceeds among his creditors.

(4) If the insolvent wilfully fails to perform the duties imposed upon him by this section, or to deliver up possession to the official assignee of any part of his property, which is divisible amongst his creditors under this Act and which is for the time being in his possession or under his control, he shall, in addition to any other punishment to which he may be subject, be guilty of a contempt of Court, and may be punished accordingly.

Arrest of insolvent.

34. (1) The Court may, either of its own motion, or at the instance of the official assignee or of any creditor, by warrant addressed to any police-officer or prescribed officer of the Court, cause an insolvent to be arrested, and committed to the civil prison or if in prison to be detained until such time as the Court may order, under the following circumstances, namely:—

(*a*) if it appears to the Court that there is probable reason for believing that he has absconded or is about to abscond with a view of avoiding examination in respect of his affairs, or of otherwise avoiding, delaying or embarrassing proceedings in insolvency against him; or

(*b*) if it appears to the Court that there is probable reason for believing that he is about to remove his property with a view of preventing or delaying possession being taken of it by the official assignee, or that there is probable reason for believing that he has concealed or is about to conceal or destroy any of his property or any books, documents or writings which might be of use to his creditors in the course of his insolvency; or

(*c*) if he removes any property in his possession above the value of fifty rupees without the leave of the official assignee.

(2) No payment or composition made or security given after arrest made under this section shall be exempt from the provisions of this Act relating to fraudulent preferences.

Re-direction of letters.

35. Where the official assignee has been appointed interim receiver, or an order of adjudication is made, the Court, on the application of the official assignee, may, from time to time, order that for such time, not exceeding three months, as the Court thinks fit, all post letters, whether registered or unregistered, parcels and money orders

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Sec. 33 (2) (c).—The O. A.'s order to insolvent to attend his office in pursuance of S. 33 (2) (*c*) need not necessarily be in writing; even a verbal order is valid and there is a duty upon the insolvent to comply therewith. 56 I. C. 337=47 C. 56.

Sec. 33 (4).—O. A. is not entitled to an anticipatory order calling upon insolvent to pay to him for the benefit of his creditors a portion of the money in deposit to the credit of the insolvent (Railway servant) in the Railway Provident Fund, directly the insolvent receives it. 44 L.W. 286=1936 M. 855=71 M.L.J. 415. *See also* (1938) 2 M.L.J. 609 (reversing 1938 M. 609) (contempt proceedings against agent of insolvent obstructing realization of insolvents estate).

Sec. 34.—*See* 24 I.C. 513; 6 L.B.R. 142=16 I.C. 87.

addressed to the debtor at any place or places mentioned in the order for re-direction, shall be re-directed, or delivered by the Postal authorities in British India, to the official assignee, or otherwise as the Court directs; and the same shall be done accordingly.

Discovery of insolvent's property.

36. (1) The Court may, on the application of the official assignee or of any creditor who has proved his debt, at any time after an order of adjudication has been made, summon before it in such manner as may be prescribed the insolvent or any person known or suspected to have in his possession any property belonging to the insolvent, or supposed to be indebted to the insolvent or any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property; and the Court may require any such person to produce any documents in his custody or power relating to the insolvent, his dealings or property.

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Sec. 36: SCOPE AND APPLICATION.—S. 36 does not contemplate a roving inquiry into the affairs of the insolvent, but where the O.A. only desires to inquire into a specific matter, *viz.*, a debt which he is informed is due from the applicant to the insolvent, then S. 36 may be *invoked*. 152 I.C. 878=1934 S. 158. S. 36 is very wide and there is nothing in the Act limiting the Court's powers thereunder to the period before the discharge. But these powers should not be used unduly or unnecessarily long after the discharge. 40 I.C. 94=44 C. 374. *See also* I. L.R. (1941) Kar. 455. Under S. 36 the Court has power to direct examination either of a third party or of the insolvent. There is nothing to prevent the Court from examining the insolvent after his discharge. 37 C.W.N. 718= 60 C. 936=1933 C. 699. Orders under S. 36 are purely discretionary. In the first instance they are intended to be made for the benefit of the general body of creditors, and secondly to enable the O.A. to establish the rights against the creditors, or the creditors in the insolvency who are brought upon the scene by means of fraudulent preferences or fraudulent tactics resorted to, who usually are the relatives and friends of the insolvent, prior to the insolvency. At the same time it is clear that the law never contemplated that the provisions of S. 36 should be used for the purposes of a fishing cross-examination in order to prepare for future litigation. 31 Bom.L.R. 420=1929 B. 230 (2). S. 36 confers upon the Court a power which is general in its character. Whenever the circumstances are such as to bring the section into operation, the Court can require the person concerned to be examined and it is no ground for limiting the order that information to be obtained on the examination may result in litigation against the person examined. One of the objects of the section is to enable the O.A. to discover whether he ought to engage in litigation on behalf of the estate or not. The examination may be ordered when the circumstances bring the case within S. 36, sub-S. (1). *Prima facie* the Court ought not to make an order under S. 36, unless there is ground for thinking that the order is likely to be of some use. 57 B. 665= 35 Bom.L.R. 546=1933 B. 309. S. 36 was only intended for the purpose of enabling the O.A. to get hold of the properties belonging to the insolvent in the possession of third persons. It is only on the admission of those persons that the Court can order them to give up the properties. The section was not intended for the purpose of enabling the O.A. to cross-examine a claimant and get from him the proof of his case. 7 R. 675. Before a third party can be called upon to produce books of account in his custody, the O.A. must make out a *prima facie* case that the third party had such books in his custody. The report of the O.A. is no legal evidence in support of his application. 63 M. L.J. 810. It is very important having regard to the somewhat drastic provisions of S. 36 that applications thereunder should set out fully and in detail the object of the proposed examination. Where the O.A. stated that a certain person was capable of giving information regarding the dealings with the properties of the insolvents and swore that the matters stated were true to be best of his information and belief, *held*, that the verification was sufficient and that the application need not be verified by affidavit. *Held*, also that in such a general application the person sommoned could be examined regarding his indebtedness to the insolvent; where the O.A. improperly exercises his power of examination, the person summoned may object and refuse to answer. 33 C.W.N. 679. The general practice is to examine the insolvent under S. 36 but the Court can also examine though S. 36 does not apply. Examination of an insolvent under S. 36 and without any objection on his part is voluntary and is admissible under S. 103 of the Act. 47 C. 254=24 C.W.N. 425. S. 132 (1), C. P. Code, does not apply to examinations under S. 36 (1) of this Act and the Court may in suitable case summon before it a *pardanashin* lady who is known or suspected to have in her possession any property belonging to the insolvent. S. 37 gives the Court power, if it thinks fit, instead of summoning such a *pardanashin* lady to Court, to issue commissions or letters of request. That power however is discretionary. 56 C. 865 =33 C.W.N. 681=1929 C. 528. A witness examined under S. 36 is not entitled to the costs of employing attorney or counsel. 53 I.C. 362 =46 C. 795. The Court has no jurisdiction to determine questions of title as between the O.A. and a stranger to the insolvency, where, *prima facie* the title is in the stranger. 24 I.C. 239= 37 M.L.J. 66. The Ins. Court has no jurisdic-

(2) If any person so summoned, after having been tendered a reasonable sum, refuses to come before the Court at the time appointed, or refuses to produce any such document, having no lawful impediment made known to the Court at the time of its sitting and allowed by it, the Court may, by warrant, cause him to be apprehended and brought up for examination.

(3) The Court may examine any person so brought before it concerning the insolvent, his dealings or property, and such person may be represented by a legal practitioner.

(4) [1][If on his examination any such person admits] that he is indebted to the insolvent, the Court may, on the application of the official assignee, order him to pay to the official assignee, at such time and in such manner as to the Court seems expedient, the amount in which he is indebted, or any part thereof, either in full discharge of the whole amount or not, as the Court thinks fit, with or without costs of the examination.

(5) [1][If on his examination any such person admits] that he has in his possession any property belonging to the insolvent, the Court may, on the application of the official assignee, order him to deliver to the official assignee that property, or any part thereof, at such time, in such manner and on such terms as to the Court may seem just.

LEG. REF.

[1]Substituted by Act XIX of 1927 and intended to bring the law into conformity with Calcutta practice.

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tion under S. 36 to summon the son at the instance of the O.A. who wants to decide the binding nature of the debt between the father and the son. 55 M. 558=1932 M. 381=63 M. L.J. 37. The words "any creditor who has proved his debt" in S. 36 mean not merely a creditor who has lodged proof of his debt but a creditor whose proof has been admitted by the O.A. 26 C.W.N. 744=1923 C. 305. Where a creditor has complied with the formalities and given the required proof of a debt, he is "a creditor who has proved his debt" within the meaning of S. 36. It is not necessary that the O.A. should have admitted the claim. 33 C.W. N. 709=1929 C. 703. Transfer by administrator of estate of deceased insolvent—Right of creditor to set aside. *See* 5 R. 375. As to private examination of witnesses, *see* 54 C. 251. Where certain persons have been examined under S. 36 and have denied the possession of books of account, the remedy of the O.A. is to proceed by way of suit and not proceed under S. 7, even assuming that an application under the section is maintainable in law. 56 M. 273=63 M.L.J. 810. As to the admissibility of statements made by the insolvent in proceedings under S. 104 of the Act, *see* 32 C.W.N. 1140=1929 C. 80. The deposition of the immediate alience from the insolvent, when examined under S. 36 is not evidence admissible against a subsequent alienee, who had taken the property from the deponent subsequent to the adjudication. 36 C.W.N. 337=1932 C. 621. Examination of wife of insolvent as witness—Same person claiming title to property—Likelihood of litigation between her and O.A.—Procedure—Applicability of provisions of Evidence Act. *See* 29 L.W. 40=1929 M. 183.

APPLICALION BY HINDU JOINT FAMILY—PROCEEDINGS IF NULL AND VOID.—An order under S. 36 is a nullity when it is made in proceedings initiated by a Hindu joint family business and is liable to be vacated. 39 C.W.N. 275.

Sec. 36 (4) and (5)—[*See* Notes under S. 7 *supra*.] Scope of cls. (4) and (5). *See* 30 C.W. N. 346=1926 C. 597. S. 36 (4) and (5) is intended to provide a summary procedure for ordering payment of debts due and delivery of property of the insolvent where there is no dispute. 27 Bom.L.R. 551=88 I.C. 77. The question whether the insolvent is a member of a joint family or whether the business carried on by the insolvent is a business of a joint Hindu family are not matters falling within sub-s. (4) or (5) of S. 36, and they can be decided by the Ins. Court under S. 7. 34 L.W. 849=1931 M. M.N. 1253. As to the validity of an application by creditor and sub-s. (5), *see* 98 I.C. 723 ; 30 C. W.N. 914=1926 C. 1097. Debtor to insolvent's estate residing over 200 miles from Court-house —Power of Court to issue summons compelling him to attend and give evidence. 54 M.L.J. 715. Answer given by a witness at a private examination under S. 36 would be evidence against the witness in the bankruptcy or other civil proceeding. 30 C.W.N. 346=1926 C. 597.

Sec. 36 (5).—The Court cannot act under S. 36 (5) unless there is a clear admission by the person examined. Prior to his adjudication, the insolvent executed a deed of composition of which *S* was one of the trustees. That deed provided that the debtors assigned to the trustees certain properties which included certain piecegoods pledged by the insolvent with a Bank. It further provided that the trustees should be at liberty to raise or advance money in order to clear those goods lying in deposit with the Bank and to sell them and reimburse themselves. Upon his examination under S. 36, *S* said that the insolvent owned him a certain sum, that he received some piecegoods from the Bank after paying it whatever was due and that on the sale of the goods there was a profit of a certain sum. Further he said that he did not make over the money to the Official Assignee,

(6) Orders made under sub-sections (4) and (5) shall be executed in the same manner as decrees for the payment of money, or for the delivery of property, under the Code of Civil Procedure, 1908, respectively.

(7) Any person making any payment or delivery in pursuance of an order made under sub-section (4) or sub-section (5) shall by such payment or delivery be discharged from all liability whatsoever in respect of such debt or property.

Power to issue commissions.

37. The Court shall have the same powers to issue commissions and letters of request for the examination on commission or otherwise of any person liable to examination under section 36, as it has for the examination of witnesses under the Code of Civil Procedure, 1908.

Discharge of Insolvent.

Discharge of insolvent.

38. (1) An insolvent may, at any time after the order of adjudication, apply to the Court for an order of discharge, and the Court shall appoint a day for hearing the application, but, save where the public examination of the insolvent has been dispensed with

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first, because he did not demand the money, and, secondly, because the insolvent was owing money to him. He also stated that the goods were not received by him as a trustee. *Held*, that the deposition of *S* contained a clear admission that he had in his possession property belonging to the insolvent, namely, the profit realised upon the sale of the goods. I.L.R. (1938) 2 Cal. 633=1939 Cal. 286. *See also* (1938) 2 M.L.J. 377=1937 Mad. 775=46 L.W. 327. "*Property belonging to the insolvent*"—Meaning of—Examination under—Property in name of witness alleged to be *benami* for insolvent—Denial—Subsequent application under S. 7, for declaration that property is insolvent's not barred. *See* 46 L. W. 327=1937 Mad. 775.

Secs. 36 and 7, proviso.—There is no ambiguity whatever in the language used in S. 36 of the Act, by the Legislature, and the only matters which arise under S. 36 for purposes of the proviso to S. 7 of the Act as amended in 1927, are alleged indebtedness to the insolvent by a third party and alleged possession by a third party of any property belonging to the insolvent. The proviso to S. 7 would not therefore come into operation unless the proceedings under S. 7 involve the decision of such a matter arising under S. 36. If the third party summoned under S. 36 admits his indebtedness to the insolvent or admits his possession of property belonging to the insolvent, the Court has power to deal with him under Cls. (4) and (5) of S. 36. If the person summoned under S. 36 denies his indebtedness to the insolvent or denies that he has in his possession or power any property belonging to the insolvent, the Court has no power under S. 36 to deal further with that person under S. 36 and is precluded from deciding such matters in insolvency jurisdiction by the proviso to S. 7, unless all the parties agree. Where, however, the question is not whether the person summoned is indebted to the insolvent or whether he is in his possession of, or has in his power, any property belonging to the insolvent, but whether the person summoned has a title to certain disputed property, the proviso to S. 7 is no bar to the jurisdiction of the Insolvency Court dealing with and disposing of the matter involved. A matter may be said to arise under S. 36 of the Act, although no person may have been summoned and examined under that action. Similarly, even if a person has been summoned and examined under S. 36, the mere fact of his examination would not bring into operation the proviso to S. 7 unless the matter of the examination is such as arises under S. 36, and thus relates to the indebtedness to the party examined to the insolvent, or to the fact of possession by him of property belonging to the insolvent. Where the dispute between the Official Assignee and the person examined is not matter of possession but a matter of title to property, the matter is not one arising under S. 36, and the jurisdiction of the Insolvency Court under S. 7 is not ousted by the proviso to that section. 1942 Sind. 21=I.L.R. (1941) Kar. 455. *See also* cases under S. 7 *supra*. The effect of the proviso added to S. 7, by the amendment of 1927, is that when a person who is examined under S. 36 denies the claim of the Official Assignee with regard to any property in his possession, the Official Assignee can proceed against him only by way of suit, unless that person submits to the jurisdiction of the Insolvency Court. The proviso however will not apply when there has been no such examination. In such a case the Insolvency Court has a discretion. The Insolvency Court will, however, refuse to exercise jurisdiction as against a stranger to the insolvency unless he submits to its jurisdiction and will not decide complicated questions of title between the Official Assignee and a stranger. Such questions must be left to be decided in a suit in the ordinary tribunal, if the parties so desire. 44 Bom.L.R. 171.

Sec. 38.—*See* 53 I.C. 627=21 Bom.L.R. 980 =44 B. 555. Object of insolvency law—Duty of Court in respect of application for discharge. 165 I.C. 384=1936 R. 412.

under the provisions of this Act, the application shall not be heard until after such examination has been concluded. The application shall be heard in open Court.

(2) On the hearing of the application, the Court shall take into consideration any report of the official assignee as to the insolvent's conduct and affairs and, subject to the provisions of section 39, may—

(*a*) grant or refuse an absolute order of discharge, or

(*b*) suspend the operation of the order for a specified time, or

(*c*) grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the insolvent, or with respect to his after-acquired property.

Cases in which the Court must refuse an absolute discharge.

39. (1) The Court shall refuse the discharge in all cases where the insolvent has committed any offence under this Act, or under sections 421 to 424 of the Indian Penal Code, and shall on proof of any of the facts hereinafter mentioned either—

(*a*) refuse the discharge; or

(*b*) suspend the discharge for a specified time; or

(*c*) suspend the discharge until a dividend of not less than four annas in the rupee has been paid to the creditor; or

(*d*) require the insolvent as a condition of his discharge to consent to a decree being passed against him in favour of the official assignee for any balance or part of any balance of the debts provable under the insolvency which is not satisfied at the date of his discharge; such balance or part of any balance of the debts to be paid out of the future earnings or after-acquired property of the insolvent in such manner and subject to such conditions as the Court may direct; but in that case the decree shall not be executed without leave of the Court, which leave may be given on proof that the insolvent has since his discharge acquired property or income available for payment of his debts.

(2) The facts hereinbefore referred to are—

(*a*) that the insolvent's assets are not of a value equal to four annas in the rupee on the amount of his unsecured liabilities, unless he satisfies the Court that the fact that the assets are not of such value, has arisen from circumstances for which he cannot justly be held responsible;

(*b*) that the insolvent has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose

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Sec. 39.—*See* 17 Bom.L.R. 989=40 B. 461; 1936 Rang. 412. Where an insolvent who carried on a huge business failed to produce his books of account and pleaded that he was illiterate, *held*, that a strong presumption arises that the insolvent did keep accounts and suppressed them so as to prevent an investigation into his insolvency, and that it was gross neglect if he really failed to keep accounts in a business of such magnitude and that in any event the Court would be justified in refusing his discharge. 1927 R. 126=5 R. 50. Where for some time before the order of adjudication was made, the insolvent had acted in a manner which made him a menace to the commercial community and to the public at large, had on the eve of insolvency put the whole of his assets out of the reach of his creditors, deliberately destroyed his account books and was likely, if made once more a free man, to prey upon credulous members of the public and it was further proved that in spite of his insolvency, he has been driving about in a motor car registered under a false name, *held*, the Court should refuse the insolvent his application for discharge, having regard to the interests of the public. [In re *Gaskell*, (1904) 2 K.B. 478 at 482, Ref. to.] 9 R. 333=1931 R. 275. Where an order, suspending the discharge of insolvent accompanied by an appropriation order, is passed under S. 39 against an insolvent, the mere fact that the insolvent is subsequently warned by his employers that he would be dismissed unless he obtains a discharge, is no ground for granting him a discharge and exempting him from further payments under the appropriation order. The Insolvency Court cannot in administration of the law yield to the pressure of the insolvent's employers. 166 I.C. 935=1937 R. 22. *See also* 166 I.C. 787=1937 R. 14; 1941 Rang. 26.

his business transactions and financial position within the three years immediately preceding his insolvency;

(*c*) that the insolvent has continued to trade after knowing himself to be insolvent;

(*d*) that the insolvent has contracted any debt provable under this Act without having at the time of contracting it any reasonable or probable ground of expectation (the burden of proving which shall lie on him) that he would be able to pay it;

(*e*) that the insolvent has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities;

(*f*) that the insolvent has brought on or contributed to his insolvency by rash or hazardous speculations or by unjustifiable extravagance in living, or by gambling, or by culpable neglect of his business affairs;

(*g*) that the insolvent has put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any suit properly brought against him;

(*h*) that the insolvent has, within three months preceding the time of presentation of the petition incurred, unjustifiable expense by bringing a frivolous or vexatious suit;

(*i*) that the insolvent has within three months preceding the date of the presentation of the petition, when unable to pay his debts as they become due, given an undue preference to any of his creditors;

(*j*) that the insolvent has concealed or removed his books or his property or any part thereof or has been guilty of any other fraud or fraudulent breach of trust.

(3) The power of suspending and of attaching conditions to an insolvent's discharge may be exercised concurrently.

(4) On any application for discharge, the report of the official assignee shall be *prima facie* evidence and the Court may presume the correctness of any statement contained therein.

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Sec. 39 (1) (c): Where a Court acts under S. 39 it isincumbent upon it strictly to comply with the provisions of S. 39 in passing an order Under S. 39 (1) (*c*) the Court is not empowered to suspend the discharge until a dividend of more than four annas in the rupee has been paid. Hence an order suspending the insolvent's discharge 'until twelve annas in the rupee is paid' is not in accordance with law. 1935 R. 200. *See also* 1941 Rang. 26. A dividend can only be paid to a creditor who has proved his debt [S. 69 (1)]. It is only by virtue of the position acquired by his proof (so far as it has been admitted) that a creditor can receive a dividend at all. 14 R. 374=1936 R. 190.

Sec. 39 (2) (a), (d) and (f).—The mere fact that the Insolvency Court refuses a protection order to the insolvent while suspending the discharge for reasons mentioned in Cls. (*a*), (*d*) and (*f*) is not a sufficient reason for the Court to accede to the request of a creditor to commit the insolvent to jail. 38 Bom.L.R. 1204=1937 B. 144. The object of the order of the discharge is to enable a person to recommence with a clean state and it is desirable that he should be given the opportunity of making a fresh start. But, on the other hand, it is undesirable that a man who has brought himself within the ambit of the Act, should, as it were, walk through the Bankruptcy Court without some period during which his discharge shall be suspended. Hence, in a case falling under S. 39 (2), Cls. (*a*), (*d*) and (*e*) Court's order should be an order suspending the discharge for a specific time. 193 I. C. 764=1941 Rang. 127.

Sec. 39 (2) (b).—Where a large proprietor of agricultural land leases out his land to tenants, makes advances to them, collects their crops in payment of his rent and repayment of advances, and sells the produce with the intention of thereby gaining and continuing to gain his livelihood, his activities amount to carrying on a business. But in the absence of evidence that it is usual and proper to keep certain books in a business of this kind, the conclusion must be that it is unusual and unnecsssary for him to keep books. S. 39 (2) (*b*) of the Act has, therefore, no application to such a case. 14 R. 758 =1937 R. 128.

Secs. 39 and 42.—When the discharge has been refused under S. 39 (1), it is open to the insolvent, with the Court's permission, to renew his application for discharge under S. 42 (1). S. 39 contemplates the refusal of a discharge in two contingencies: (1) where the insolvent has been convicted of any of the offences referred to in the section; and (2) when any of the facts referred to in S. 39 (2) of the Act are

Hearing of application for discharge.

40. Notice of the appointment by the Court of the day for hearing the application for discharge shall be published in the prescribed manner, and sent one month at least before the day so appointed to each creditor who has proved, and the Court may hear the official assignee, and may also hear any creditor. At the hearing the Court may put such questions to the insolvent and receive such evidence as it may think fit.

Power to annul adjudication on failure to apply for discharge.

41. If an insolvent does not appear on the day so appointed for hearing his application for discharge or if an insolvent shall not apply to the Court for an order of discharge within such time as may be prescribed, the Court, on the application of the official assignee or of a creditor, or of its own motion, may annual the adjudication or make such other order as it may think fit, and the provisions of section 23 shall apply on such annulment.

Renewal of application and variation of terms of order.

42. (1) Where the Court refuses the discharge of the insolvent, it may, after such time and in such circumstances as may be prescribed, permit him to renew his application.

(2) Where an order of discharge is made subject to conditions and, at any time after the expiration of two years from the date of the order, the insolvent shall satisfy the Court that there is no reasonable probability of his being in a position to comply with the terms of such order, the Court may modify the terms of the order, or of any substituted order, in such manner and upon such conditions as it may think fit.

Duty of discharged insolvent to assist in realization of property.

43. A discharged insolvent shall, notwithstanding his discharge, give such assistance as the official assignee may require in the realization and distribution of such of his property as is vested in the official assignee, and, if he fails to do so, shall be guilty of a contempt of Court; and the

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found to exist. In the first contingency the Court has no option but to refuse an order of discharge. In the second contingency the Court has a discretion to grant or refuse such an order. S. 42 is general in its terms and cannot be restricted in its application to the second contingency referred to above without doing violence to the plain and unambiguous language of the section. 188 I.C. 778=1940 Sind 85.

Sec. 40.—As to whether attendance of insolvent in person at the hearing is necessary, *see* 161 I.C. 590=1936 R. 62.

Sec. 41: SCOPE OF SECTION.—Where adjudication is annulled by reason of the default of the insolvent, the insolvent is to lose the benefit of the insolvency, but he is not to benefit by the annulment. The annulment is not for his advantage. 60 C. 259=1933 C. 386. The Registrar in insolvency has jurisdiction to make the order of annulment under S. 41: 27 C.W.N. 916=1924 C. 83. Normally on an annulment of adjudication by reason of the default of the insolvent, his property should be vested in the O.A. or proper officer under the Act in force and is so vested in him for the benefit of the creditors. 60 C. 259=1933 C. 386. If the order of discharge is not completed by the insolvent within one week, it is the duty of the Registrar to have that order drawn up in order that it might be gazetted. If the Registrar did not perform this duty in completing the order made on an application for discharge and the O.A. took no steps to have it completed, it does not follow that the insolvent continues to be undischarged for all time and the O.A. is not entitled to claim a sum of money coming to the insolvent eight years after the order was made as his after-acquired property. 36 C.W.N. 532. Calcutta High Court Insolvency Rules, R. 138-A—Applicability. *See* 36 C.W.N 532.

Sec. 42.—In enacting S. 42 it was the intention of the Legislature to afford relief to insolvents who had been refused a discharge, whatever the reason may have been for the refusal, and to invest the Insolvency Courts in India with a discretion in the matter of granting or refusing a discharge. similar to that exercised by Judges in England under the English Bankruptcy Law. 188 I.C. 778=1940 Sind 85. (Refusal under S. 39 (1)).

Sec. 43: APPLICABILITY—PARTNERS.—S. 43 applies as much to partners as to other co-contractors. A judgment against one partner is no bar to a subsequent suit on the contract or obligation against the other partners so long as the debt is not extinguished, as the liability of partners is a joint and several one. 145 I.C. 619=35 Bom.L.R. 881=1933 B. 407. Although under S. 43 it is the duty of the discharged

Court may also, if it thinks fit, revoke his discharge, but without prejudice to the validity of any sale, disposition, or payment duly made or thing duly done subsequent to the discharge, but before its revocation.

Fraudulent settlements.

44. In either of the following cases, that is to say:—

(1) in the case of a settlement made before and in consideration of marriage where the settlor is not, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement; or

(2) in the case of any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest (not being money or property of or in right of his wife);

if the settlor is adjudged insolvent or compounds or arranges with his creditors, and it appears to the Court that the settlement, covenant or contract was made in order to defeat or delay creditors, or was unjustifiable having regard to the state of the settlor's affairs at the time when it was made, the Court may refuse or suspend an order of discharge or grant an order subject to conditions or refuse to approve a composition or arrangement.

Effect of order of discharge.

45. (1) An order of discharge shall not release the insolvent from—

(*a*) any debt due to the Crown;

(*b*) any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party; or

(*c*) any debt or liability in respect of which he has obtained forbearance by any fraud to which he was a party; or

(*d*) any liability under an order for maintenance made under section 488 of the Code of Criminal Procedure, 1898.

(2) Save as otherwise provided by sub-section (1), an order of discharge shall release the insolvent from all debts provable in insolvency.

(3) An order of discharge shall be conclusive evidence of the insolvency and of the validity of the proceedings therein.

(4) An order of discharge shall not release any person who, at the date of the presentation of the petition, was a partner or co-trustee with the insolvent, or was jointly bound or had made any joint contract with him, or any person who was surety, or in the nature of a surety, for him.

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insolvent to assist the Official Assignee in the realization of his property, this does not mean that acts done by him subsequent to his discharge are rendered thereby invalid, but only that in some circumstances the discharge may be revoked. An order of conditional discharge is not a contingent order but an absolute one. 1938 Rang.L.R. 19=1938 Rang. 11.

Sec. 44.—The onus of proving the transaction to be fraudulent is on the person impeaching it, even if the debtor was insolvent at the time and knew himself to be so. 86 I.C. 514=1925 R. 201.

Sec. 45.—Composition deed—Essential test—Sanctioned by Court and adjudication cancelled in consequence thereof—Secured debtor whose name is mentioned in the schedule, not paid debt according to composition rate—Value of security insufficient to make up amount of his debt at composition rate—Remedy. 48 M. 521=48 M.L.J. 252. On this section, *see also* 59 I.C. 444: 30 I.C. 839.

Sec 45 (1) (b).—If an executor fails to account for money which came into his hands, it must be inferred that he is guilty of fraudulent breach of trust in the sense that it must be assumed that he has applied it to his own use. That being so, he is not released from his liability to make good that money under S. 45 (1) (*b*) by an order of discharge in insolvency. 42 C.W.N. 965.

Sec. 45 (2).—Order of discharge cannot take away the statutory right of the decree-holder to apply for a decree under O. 34, R. 6, C.P. Code, which right accrued subsequently. 54 A. 428=1932 A. 336.

PART III.

ADMINISTRATION OF PROPERTY.

Proof of debts.

Debts provable in insolvency.

46. (1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or breach of trust shall not be provable in insolvency.

(2) A person having notice of the presentation of any insolvency petition by or against the debtor shall not prove for any debt or liability contracted by the debtor subsequently to the date of his so having notice.

(3) Save as provided by sub-sections (1) and (2), all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent, or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable in insolvency.

(4) An estimate shall be made by the official assignee of the value of any debt or liability provable as aforesaid which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value:

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Sec. 46.—The jurisdiction of the O.A. to inquire into debts cannot be used as a device to escape the execution of a decree where the only debts of the insolvent is the decree and there are no other debts. Where, after the passing of an *ex parte* decree, an application for arrest was taken out against the debtor who thereupon successfully applied to be adjudicated an insolvent and the O.A. impugned the decree debt on the ground that summons had not been properly served on the debtor but it appeared that there was defence on the merits. *Held*, that the Ins. Court could not invalidate the decree or hold that the debt was not binding on the debtor. 1930 M. 751=59 M.L.J. 321.

Sec. 46 (3).—While a father's debt is alive in insolvency, any remedy against the sons in insolvency is not barred. That the debts as against the father are alive is all that is necessary to enable the O.A. to make the son's shares liable for them in insolvency by appropriate proceedings. 1931 M. 317=61 M.L.J. 66. Where a Hindu son who has taken the separate property of his deceased father and also his undivided property is adjudicated insolvent, a simple money creditor of the deceased father is entitled to prove the father's debt in the insolvency of the son under S. 46. The creditor is not, however, entitled to claim priority over the creditors of the son in the insolvency of the son in respect of his debt. There is nothing to prevent a creditor of the son from getting satisfaction out of the father's property which has devolved on the son, and no distinction can be drawn between a father's creditor and a son's creditor. 52 L.W. 89=1940 Mad. 837=(1940) 2 M.L.J. 621. If the last day when the debt could have been enforced was a public holiday and on the next reopening day the debtor is adjudicated an insolvent, the debt is provable in insolvency. It is not necessary for the creditor for the purpose of keeping his debt alive, to file a suit on the re-opening day after the intervention of the insolvency. 55 M. 630=62 M.L.J. 256 (F.B.). A creditor can prove for a debt which was barred by limitation at the date of the order of adjudication, but was not so barred at the date of the act of insolvency on which the adjudication was founded. 60 Bom. 444 =38 Bom.L.R. 71=1936 B. 130. Arrears of maintenance due under order under S. 488, Cr.P. Code, is a debt provable in insolvency. 44 L.W. 292=1936 M. 793=71 M.L.J. 430.

SECURED CREDITOR—REMEDY—ENFORCEMENT OF SECURITY.—A secured creditor who comes in under the insolvency has only three courses open to him, namely; (1) that he may realise the security and then prove for the balance, (2) he may surrender the security and prove for the whole debt and (3) he may state the whole valuation at which he assessed the security and then prove for the balance after deducting the assessed value. The provisions of S. 46 refer to a creditor who has taken any of the three courses and does not refer to one who wants to enforce his security. 60 C. 1298=37 C.W.N. 973.

Secs. 46 (3) and 45 (2).—Subsequent to the adjudication of the insolvent, the respondent obtained leave to sue the O.A. and the mortgagor insolvent under S. 17 and got an order that the costs of the application be tacked on to the mortgage debt. He then brought a suit on the mortgage and was awarded a mortgage decree and a personal decree for the balance ineluding the cost of the application for leave to sue. Before execution, the insolvent was discharged and the latter contended that the decree could not be executed after his discharge. *Held*, (1) that the obligation to pay the costs was one which accrued after the date of adjudication and in respect of which there could be no proof in insolvency under S. 46 (3); (2) that the order of discharge did not therefore release the insolvent from the debt. 33 Bom.L.R. 1101=1931 B. 554.

Provided that if in his opinion the value of the debt or liability is incapable of being fairly estimated he shall issue a certificate to that effect, and thereupon the debt or liability shall be deemed to be a debt not provable in insolvency.

Explanation.—For the purposes of this section "liability" includes any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring, before the discharge of the debtor, and generally it includes any express or implied engagement, agreement or undertaking to pay, or capable of resulting in the payment of money, or money's worth, whether the payment is, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any contingency or contingencies; as to mode of valuation, capable of being ascertained by fixed rules, or as matter of opinion.

Mutual dealings and set-off.

47. Where there have been mutual dealings between an insolvent and a creditor proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set-off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively:

Provided that a person shall not be entitled under this section to claim the benefits of any set-off against the property of an insolvent in any case where he had, at the time of giving credit to the insolvent, notice of the presentation of any insolvency petition by or against him.

Rules as to proof of debts.

48. With respect to the mode of proving debts, the right of proof by secured and other creditors, the admission and rejection of proofs, and the other matters referred to in the second schedule, the rules in that schedule shall be observed.

Priority of debts.

49. (1) In the distribution of the property of the insolvent, there shall be paid in priority to all other debts—

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Sec. 47.—No judgment-debtor can be permitted to place himself in a more favourable position *vis a vis* his fellow debtors by purchasing after adjudication, the liabilities of the insolvent and then setting off his rights thus procured against his original debt to the insolvent's estate. Recognition of such action would cut across all the canons of Ins. Law. 8 R. 419 =1931 R. 25. *See* 19 I.C. 57=15 Bom.L.R. 113; 6 R. 46=1928 R. 111. The words "mutual dealings" refer to mutual dealings at the time of the insolvency and cannot refer to a purchase by one of the debtors of a claim against the insolvent long after the insolvency. 9 R. 373 =1931 R 193.

Secs. 47 and 55.—If an assignment of a policy of insurance by an insolvent is declared void as against the Official Assignee under S. 55 the position is the same as if there never had been any assignment and the life policy reverts to and is the property of the insolvent. As such the Official Assignee does not obtain the policy by a separate and distinct title but as property of the insolvent which vests in him under S. 17 of the Act. The insurance company is therefore entitled to set off under S. 47 of the Act the monies due to it from the insolvent upon the marine policies effected by him against the amount of the surrender value of the life policy which it is liable to pay to the Official Assignee. 46 C.W.N. 510.

Sec. 48.—Rejection of proof—Insolvency of firm—Suit by creditor against partner—Compromise—Acceptance of smaller sum than due—Release of partner and the whole of the assets. Release operates in favour of insolvent firm and the rejection by the O.A. of the proof by the creditor for the balance of the debt is correct. 32 Bom.L.R. 1656. As to proof by scheduled creditor, *see* 27 S.L.R. 224=1933 S. 355.

Sec. 49 (1)—Crown debts are entitled to preference—Debts due to Government Soap Factory are Crown debts. 45 M. 156=16 L. W. 46. The expression "*a debt due to the Crown or to any local authority*" includes not only a debt which has become due to the Crown but also a debt which is provable within the meaning of S. 46 (3), whether such demand has become provable or not and whether it is in point of law strictly a debt or not. 174 I.C. 157=1938

(*a*) all debts due to the Crown or to any local authority;

(*b*) all salary or wages of any clerk, servant or labourer in respect of services rendered to the insolvent during four months before the date of the presentation of the petition, not exceeding three hundred rupees for each such clerk, and one hundred rupees for each such servant or labourer; and

(*c*) rent due to a landlord from the insolvent: provided the amount payable under this clause shall not exceed one month's rent.

(2) The debts specified in sub-section (1) shall rank equally between themselves, and shall be paid in full, unless the property of the insolvent is insufficient to meet them, in which case they shall abate in equal proportions between themselves.

(3) Subject to the retention of such sums as may be necessary for the expenses of administration or otherwise, the debts specified in sub-section (1) shall be discharged forthwith in so far as the property of the insolvent is sufficient to meet them.

(4) In the case of partners the partnership property shall be applicable in the first instance in payment of the partnership debts, and the separate property of each partner shall be applicable in the first instance in payment of his separate debts. Where there is a surplus of the separate property of the partners, it shall be dealt with as part of the partnership property; and where there is a surplus of the partnership property, it shall be dealt with as part of the respective separate property in proportion to the rights and interests of each partner in the partnership property.

(5) Subject to the provisions of this Act, all debts proved in insolvency shall be paid rateably according to the amounts of such debts respectively and without any preference.

(6) Where there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date on which the debtor is adjudged an insolvent at the rate of six per centum per annum on all debts proved in the insolvency.

Rent due before adjudication.

50. After an order of adjudication has been made, no distress for rent due before such order shall be made upon the goods or effects of the insolvent, unless the order be annulled, but the landlord or party to whom the rent may be due shall be entitled to prove in respect of such rent.

Property available for payment of debts.

Relation of assignee's title.

51. The insolvency of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to and to commence at—

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Sind 49. The words of S. 49 (1) are wide and all debts due to the Crown or any local authority are to be paid in priority to all other debts. The Port trust is a local authority within the meaning of S. 49 and is entitled to priority in respect of money due to it under an indemnity bond executed to it by the insolvent prior to his adjudication. Such money though not a debt ascertained at the date of the adjudication is a debt provable in insolvency. I. L.R. (1937) Mad. 178=44 L.W. 328=1936 Mad. 789. Partnership—Insolvency of partners —Right of creditors to proceed against separate assets—Election. 19 L.W. 46=79 I.C. 966.

Sec. 49 (5).—Where a company in liquidation turns out to be solvent in the sense that after payment of all its liabilities there are surplus assets left, creditors whose debts carry interest by agreement or otherwise are entitled out of the surplus assets to payment of interest accruing after the commencement of the liquidation until payment is made of the principal debts at the rate at which by agreement or otherwise interest on such debts is payable. 9 R. 318=1931 R. 334.

Sec. 51: SCOPE—The creditor is not bound immediately an act of insolvency comes to his knowledge to take action. Three months time is given for reflection and possibly for the debtor to restore his position *qua* the creditors. 1936 M. 27=70 M.L.J. 545. If there are several

(*a*) the time of the commission of the act of insolvency on which an order of adjudication is made against him, or

(*b*) if the insolvent is proved to have committed more acts of insolvency than one, the time of the first of the acts of insolvency proved to have been committed by the insolvent within three months next preceding the date of the presentation of the insolvency petition:

Provided that no insolvency petition or order of adjudication shall be rendered invalid by reason of any act of insolvency committed anterior to the debt of the petitioning creditor.

Description of insolvent's property divisible amongst creditors.

52. (1) The property of the insolvent divisible amongst his creditors, and in this Act referred to as the property of the insolvent, shall not comprise the following particulars, namely:—

(*a*) property held by the insolvent on trust for any other person;

(*b*) the tools (if any) of his trade and the necessary wearing apparel, bedding, cooking vessels, and furniture of himself, his wife, and children, to a value, inclusive of tools and apparel and other necessaries as aforesaid, not exceeding three hundred rupees in the whole.

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acts of insolvency relied on for adjudication of a debtor, one of them being a transfer to a creditor by the insolvent, which is impugned as a fraudulent preference, the transfer must be held to be *ipso facto* void, when there is an act of insolvency mentioned in the petition which is anterior in time to the transfer. 30 S.L.R. 281=1936 Sind. 246. "*Relation-back*" does not make the transfer "void" because, if void, it would have always been void. Nor is it strictly "voidable" which denotes the operation of some form of election in the trustee. What, in fact, happens is that, where the trustee's title relates back under the Act, that post-dated statutory title destroys and overrides any existing title and brings the property back into the estate, whence it is deemed never to have departed. While, therefore, an act of bankruptcy has always been held "void" as such; what really is meant is that the title of the transferee under the transfer is displaced by the statutory title of the trustee and the reason for that is that the "relation-back" provisions of the statute so operate as to destroy at the instant of the transfer the transferor's own title and (subject to the protective provisions) the title of those claiming through him. The transfer is "voidable" only in the sense that the statute steps in and destroys its effect and not in the sense in which in law, the expression "voidable" is usually employed, nnmely that of being capable of being avoided at the volition or election of soms person. If the trustee does not, in fact claim the property that only amounts to the trustee leaving with the transferee property which is not really his and to which he has no title. No real question of "election' arises, except so far as the trustee may elect whether or not physically to take the property which has become his. 1937 Rang.L. R. 65=1937 Rang. 372.

ADJUDICATION IN BRITISH INDIA—PROPERTY OF INSOLVENT IN FOREIGN STATE ATTACHED BY FOREIGN COURT PRIOR TO ADJUDICATION.—Where the law of insolvency in a foreign State is identical with the law of British India, an adjudication order made in British India would, in ordinary circumstances, vest in the O. A. the property of the insolvent in that State. But if a creditor has, before the date of the adjudication, duly obtained an attachment of that property through the foreign Court, it would not vest in the O. A. as, at the date of the adjudication, the insolvent could not himself have assigned it because of the attachment. S. 51 of the Act cannot be invoked in favour of the O. A. so as to relate back his title to the time of the commission of the act of insolvency which is prior to the attachment. 39 C.W.N. 1135=62 C. 659. On this section *see also* 1941 Cal. 112.

Secs. 51 and 17.—Where a firm is adjudicated by two Courts, the adjudication order which is prior in time vests the property of the insolvent in the O. A. of that Court. The priority of vesting does not depend on the date of the commission of the act of bankruptcy on which the proceedings were started. 59 C. 1161=36 C.W.N. 546.

Secs. 51 and 57.—Under S. 51 the title of the O. A. commences at the date of the commencement of the insolvency. But S. 57, *inter alia*, provides that any transfer by the insolvent for valuable consideration, provided that it takes place before the date of the order of adjudication and that the transferee in question has not at the time had notice of the presentation of any insolvency petition, shall not be invalidated by any provisions in the Act, Ss. 51 and 57 thus present an anomaly which the legislature will have to deal with. The relevant sections of the English Act on the point are not inconsistent. 41 C.W.N. 105=I.L.R. (1937) 1 Cal. 557=170 I.C. 672.

Sec. 52 (1).—Money deposited in Court by appellant pending appeal is payable to respondent and is not appellant's money. 84 I.C. 922 =1925 C. 416. Section does not apply to *floating charges* created by a company registered under Companies Act prior to its liquidation in

(2) Subject as aforesaid, the property of the insolvent shall comprise the following particulars, namely:—

(*a*) all such property as may belong to or be vested in the insolvent at the commencement of the insolvency or may be acquired by, or devolve on him before his discharge;

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favour of its bank. 85 I.C. 626=20 L.W. 861. S. 52 is an independent section by itself and is an exception to S. 17, so that if a creditor having a charge over debts due to the insolvent fails to perfect his title by giving notice to the debtors of the insolvent, the trustee in insolvency is entitled to those debts as property in the repudiated ownership of the insolvent. 1931 S. 44. Goods entrusted to the persons as agents for sale, and stored by them as the goods of their principal, are goods held by them on trust in the fiduciary capacity of agents within S. 52 (1) (*a*), and consequently do not pass on their insolvency to the O. A., unless the principal permits the agents to have a possession not consistent with the ordinary usage of trade, thus raising a reputation of ownership in the bankrupt. The burden of proving circumstances of reputed ownership lies on the O. A. 1931 S. 70. As to exceptions to the general rule that chattels in possession of a trustee are in his possession as legal owner and so excluded from the operation of reputed ownership. *See* 59 C. 818 =1932 C. 680. Sale of goods—Buyer executing promissory note and deed of trust as regards goods—Insolvency of buyer—Rights of seller—Trust not made in good faith—Validity. 56 C. 1074. *See also* 59 C. 818=1932 C. 680. Insolvency—Hindu father adjudicated insolvent—Sons' shares do not vest in Official Assignee. 47 M.L.J. 857 (P.C.). *See also* 93 I.C. 612; 94 I. C. 175=24 A.L.J. 417. Hindu father, insolvency of—Interest of sons does not vest in the O. A., but he can sell the sons' interest as father could have done for paying debts. Even if there is a partition suit, provision should be made for such of the father's debts as are binding on the sons. 7 L. 376=93 I.C. 612=1926 L. 264. In a suit by the sons for partition of the joint family properties, they will not be entitled to a decree in respect of the properties already sold by the O.A. 40 C.W.N. 1382=63 I.A. 384=1936 P.C. 277= 71 M.L.J. 812 (P.C.). Where goods sold by an insolvent prior to his insolvency are allowed to remain in his own shops until the date of his insolvency, they are in the "possession, order and disposition" of the insolvent within S. 52. 29 I.C. 947. *See also* 22 M.L.J. 441=15 I.C. 371. Property hypothecated—Possession with insolvent with permission of creditor if passes to O.A.—Withdrawal of consent—Effect. *See* 1924 R. 27=1 R. 153. Acquisitions by an insolvent after the insolvency and before his discharge (a merely personal discharge) are made as agent of the O.A., and as such the possession of the insolvent is not adverse to that of the O.A. and the latter's claim to such after acquisition even after 12 years' possession by the insolvent is not barred. 22 I.C. 271. The word "*trust*" in S. 52 (1) (*a*) is not confined to express trusts, but includes all kinds of property held by the insolvent in a fiduciary capacity as property held as commission agent. 5 R. 73= 1927 R. 140; 43 L.W. 345=1936 M. 21. *See also* 31 S.L.R. 391=1937 Sind 37; 46 L.W. 260=1937 M. 833=(1938) 1 M.L.J. 293. A mere entry by a firm in their books of account crediting a certain sum to a particular deity by way of charity does not constitute the firm trustees for the deity in respect of that sum which is continued to be used by the firm in its business as before. Consequently on the insolvency of the firm the deity is not entitled to payment of that sum in full. 42 C.W.N 1125=40 Bom.L.R. 1236=1938 P.C. 259= (1939) 1 M.L.J. 192 (P.C.). The rules of the Provident Fund of a company provided that a member was entitled to receive the amount only on his retirement or discharge and that in case he transferred his interest during services, he was liable to forfeit his rights for the amount to the company. A member, while in service, was adjudged insolvent on his own petition and his rights vested in the O.A. *Held*, that the effect of his petition was so transfer or assign immediately his property to the O.A. and that it was equivalent to a voluntary transfer by the debtor to the O.A, within the meaning of the Provident Fund Rule. 60 C. 926=37 C.W.N. 1050=1933 C. 701. *See also* 1938 M.W. N. 1332. The absence of intervention by the Official Assignee before Provident Fund money reaches the insolvent's hands might affect the vesting of the money, but when it comes into the possession of the insolvent it is nevertheless his property, the property of an insolvent divisible among his creditors within the meaning of S. 52 (2) (*a*). 176 I.C. 460=1938 Rang. 245. S. 52 (1) (*a*) does not apply to a case where an executor does not have in his hands at the time of his insolvency any specific cash or chattels representing the estate of the testator. Where, therefore, the executor had already mixed the money representing the estate of the testator with his own money and it eventually became dissipated and is impossible to trace, S. 52 (1) (*a*) has no application. 42 C.W.N. 965. Dealings between stock-brokers—Sums due to defaulter insolvent paid to Association—Right of O.A. to recover the same from person liable and Association—Doctrine of "an artificial fund'. Applicability of. 53 B. 508= 31 Bom.L.R. 406=1929 B. 236.

Sec. 52 (2) (a).—As regards the after-acquired property, subject to the right and claim of the O.A., the undischarged bankrupt has the power, so long as the O.A. does not interfere, to buy and sell and give discharge and do all other acts as he could have done and had done before the intervention of the O.A. 61 C. 281=38 C.W.N. 283=1934 C. 529. Where the undischarged insolvent acquires a property and transfers it to a certain company in the course of transaction by him with the company, in which, dealings of the company with the insolvent are *bona fide* and for value, such property does not vest in the O.A., until he inter-

(*b*) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge; and

(*c*) all goods, being at the commencement of the insolvency in the possession, order or disposition of the insolvent, in his trade or business by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof:

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venes in the matter. 8 R. 665=1931 R. 74 (2). Member of Bombay Stock Exchange—Card of membership—Rights of O.A; *See* 59 I.A. 318=34 Bom.L.R. 1178=63 M.L.J. 623 (P.C.). *See also* 33 Bom.L.R. 39.

COSTS TO UNDISCHARGED INSOLVENT IN SUIT FOR PERSONAL WRONG.—Although damages obtained by an undischarged insolvent in respect of a personal wrong and costs awarded to him in such a suit are property of the insolvent which is capable of passing to his assignee in insolvency under the Act, such property will not pass under that Act to the O.A. until he has intervened and claimed it. 12 R. 428=1934 R. 333.

Sec. 52 (2) (b).—Notwithstanding the suit for partition and the consequent division in status, the right of the father to have his just debts paid out of the entire family property subsists, and where the father has been adjudicated insolvent, such right vests in the O.A. as "property of the insolvent divisible among his creditors." 33 L.W. 323=1931 M. 317. *See also* 71 M.L.J. 812 (P.C.) and 7 L. 376, noted *supra*.

Sec. 52 (2) (c).—Doctrine of reputed ownership, explained. 167 I.C. 505 (2)=1937 S. 37. The doctrine applies only when the goods are proved to be in the possession of the insolvent with the consent of the true owners. A countermanding order to deliver the goods to the vendor re-vests the property in the vendor before it gets into possession of the insolvent and thus prevents the applicability of this doctrine. 30 S.L.R. 148=1936 S. 106. In order to attract the doctrine, it must be proved that the true owner parted with possession of the goods under circumstances from which he must have known, if he had considered the matter, that the goods will be used in the trade or business of the bankrupt, that they were so used, and that they were in his possession, order, or disposition at the date of the presentation of the insolvency petition. 117 I.C. 158=1929 S. 167. "True owner" for the purpose of S. 52 includes a person having a lien or an equitable charge, as well as a person having a legal title. 56 M. 177=1933 M. 207=64 M. L.J. 320. *See also* 45 M.L.J. 817=47 M. 215. It includes also a beneficiary entitled to immediate possession of goods. 167 I.C. 505 (2)=1937 S. 37. S. 52 does not apply to property which is not in the possession, order and disposition of the debtor, either at the date of the presentation of the petition or the date of the adjudication. The appointment of Receiver removes the property from the possession of the insolvent. 52 M. 938=1929 M. 184=56 M.L.J. 95. Where a trustee is authorised by the terms of the trust to invest the trust funds in his own business and pay interest thereon, and he so uses it, the trust funds cannot be traced by the *cestui que trust* as the relationship between them is, by virtue of such liberty, converted into one of debtor and creditor. The funds will be available for the benefit of the general body of creditors as property subject to the reputed ownership of the trustee. 1931 M. 251=60 M.L.J. 355. But *see* 60 I.A. 203, *infra*. Trust created by agreement between vendor and vendee making vendee trustee "for goods or their sale proceeds" in the hands of vendee, is nothing more than a mere eyewash intended to defeat the provisions regarding the doctrine of reputed ownership, and it being against the provisions of S. 4, Trusts Act, cannot be enforced against the Official Assignee. 167 I.C. 505 (2)=1937 S. 37. When property possessed by the bankrupt in his character as trustee has become so amalgamated with his general property that it can no longer be identified, the representative of the trust has no lien upon the movable assets of the debtor and he cannot claim to be paid before the other creditors. 1937 S. 37. Where a certain amount is a trust in the hands of the trustees to be invested in their business and is so invested, it must be taken to have remained a part of the assets of that business and to have been there at the date of their insolvency, the beneficiaries being entitled at all times to a charge upon such assets in the hands of the firm. Upon the insolvency of the trustees, the assets no doubt pass to the O.A. but they pass subject to the charge. 60 I.A. 203=56 M. 570=65 M.L.J. 1 (P.C.). Where a secured creditor holds a charge or a lien or a mortgage on debts due to a person in the course of a trade or business, and the charge-holder omits to perfect his title by giving notice to the original debtor and leaves them in the possession, order or disposition of that person under such circumstances so as to allow him to deal with them in any way he likes and that person is afterwards adjudicated insolvent, the O.A. has a right to step in and claim the debt for the general body of the creditors in preference to the right of the secured creditors under the doctrine of reputed ownership in S. 52 (*c*) proviso. S. 17 proviso, does not help the creditor as S. 52 (*c*) is an exception to S. 17. 1931 S. 44; 117 I.C. 158=1929 S. 167. The equity of redemption in goods pledged by the insolvent is not 'goods' within the meaning of that term in S. 52 (2) (*c*) and the fact that pledgee or charge-holder leaves the power to sell such goods with the insolvent does not render the pledge or charge invalid. 42 M.L.J. 155=45 M. 238. Pledge of goods by

Provided that things in action other than debts due or growing due to the insolvent in the course of his trade or business shall not be deemed goods within the meaning of clause (*c*):

Provided also that the true owner of any goods which have become divisible among the creditors of the insolvent under the provisions of clause (*c*) may prove for the value of such goods.

Effect of insolvency on antecedent transactions.

Restriction of rights of creditor under execution.

53. (1) Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the official assignee, except in respect of assets realized in the course of the execution by sale or otherwise before the date of the order of adjudication, and before he had notice of the presentation of any insolvency petition by or against the debtor.

(2) Nothing in this section shall affect the right of a secured creditor in respect of property against which a decree is executed.

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insolvent—Pawnor being in possession—Third party's rights as hypothecatee not disclosed—Relative rights. 60 C. 262=1933 C. 366. *See also* 56 M. 177=64 M.L.J. 320. Constructive possession with pledgee—Goods in the custody of carrier—No notice to carrier of rights of pledgee—If, and when, material. 56 M. 177=64 M.L.J. 320. True owner—If includes owner of equitable charge—Consent of garnishee—Withdrawal. 45 M.L.J. 817=47 M. 215. Goods held by insolvent as commission agent is not held with reputed ownership. 100 I.C. 1017=1927 R. 133. In S. 52 (2) (*c*) the word is "consent", and unless a withdrawal of consent is communicated to the person from whom consent is withdrawn, such withdrawal will not be effective. 1931 S. 40. The question whether in a particular case a demand is made and so the consent is withdrawn is a question of fact, depending on the circumstances of each case. The demand must be effective, *bona fide*, and should be pursued with a view to take possession of the mortgaged goods. It should not be merely a casual demand and then let the goods remain in the possession of the apparent owner. 1931 S. 40. *See also* 5 R. 73=1927 R. 140. On this section, *see also* 30 C.W.N. 898=1926 C. 618.

Secs. 52 and 60.—S. 60 does not interfere with the provisions of S. 52. Where the salary of an insolvent who is a public servant falls below Rs. 100 per mensem, a "prospective order' for payment of a portion of his salary to meet the debts due to his creditors cannot be passed under S. 60. But such salary, though below Rs. 100, becomes the insolvent's property when paid to him, and therefore falls within S. 52 of the Act. It would then be open in law to the Official Assignee to apply, after the salary has been received, for an order directing a portion of it to be paid over to him for the benefit of the creditors. Unless the circumstances are exceptional, the Court might refuse to pass such an order in view of the principle embodied in S. 60 of the Act and S. 60, C. P. Code. I. L.R. (1942) Mad. 199=54 L.W. 420=1941 M. 906=(1941) 2 M.L.J. 591; (1941) 2 M.L.J. 845.

Sec. 53 (1).—S. 53 (1) does not apply to an administration of the insolvent estate of a deceased person under Ss. 108 and 109 of the Act. An attachment only prevents alienation and does not confer any title or create any charge or lien on the attached property. 43 I.C. 348=44 C. 1016. *See also* (1940) 2 M.L.J. 979=52 L.W. 894. S. 53 (1) should be so construed as not to apply to notice of presentation of an insolvency petition which has been disposed of and on which no adjudication can follow; but the language might not be restricted so as to exclude notice of the presentation of an insolvency petition on which adjudication may follow. Where a petition in insolvency is presented by the creditor executing his decree and is dismissed, and amounts are paid to the creditor subsequent to the dismissal, but on the appeal of the creditor. the petition is restored, the case falls within S. 53 (1); and the payment is clearly bad as against the Official Assignee. 41 Bom.L.R. 506. Where a receiver is appointed at the instance of an equitable mortgagee, the income realised from the mortgaged properties should in law be considered as earmarked for his use and treated as additional security for the amount due to the mortgagee and the latter is entitled, when he is not able to realise his decree amount by the sale of the mortgaged properties, to proceed against the income in the hands of the receiver in preference to the Official Assignee in whom the properties of the mortgagor might have subsequently vested. 54 M. 565=1931 M. 626=61 M.L.J. 111. Where steps are taken by the Court for the purpose of obtaining a sum of money into its own possession under a perfectly legal application for execution, which the decree holder is in law entitled to make, the fact that instead of issuing a precept under S. 46 or a garnishee order under R. 104, O. 21, C. P. Code, the Court issues a process under R. 46 of the same order does not make the receipt of the money by the Court otherwise than in the course of the execution. 9 Luck. 278=1934 Oudh 11.

MONEY RECEIVED BY CHEQUE BY EXECUTING COURT IS "ASSETS REALISED".—S. 53 does not say that the assets must be realized by the

(3) A person who, in good faith purchases the property of a debtor under a sale in execution, shall in all cases acquire a good title to it against the official assignee.

Duties of Court executing decree as to property taken in execution.

54. Where execution of a decree has issued against any property of a debtor which is saleable in execution, and before the sale thereof notice is given to the Court executing the decree that an order of adjudication has been made against the debtor, the Court shall, on application, direct the property, if in the possession of the Court, to be delivered to the official assignee, but the costs of the execution shall be a first charge on the property so delivered, and the official assignee may sell the property or an adequate part thereof for the purpose of satisfying the charge.

Avoidance of voluntary transfer.

55. Any transfer of property, not being a transfer made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, shall, if the transferor is adjudged insolvent within two years after the date of the transfer, be void against the official assignee.

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decree-holder. Money received in the form of a cheque by the executing Court can be treated as "assets realized." 9 Luck. 278=1934 O. 11. The meaning of the word "assets" in S. 53 is limited to money or cash which is capable of immediate distribution among the decree-holders. S. 73, C. P. Code, has not widened the scope of the section because the words "assets held by a Court" must mean "money held by a Court" or it is only money and not goods which can be the subject of rateable distribution. The order for rateable distribution no doubt operates so as to create title in the decree-holders to the subject-matter of the order, but money alone can be the subject-matter of the order. Rateable distribution only comes into operation after the sale has been held and the goods converted into money (27 Cal. 351; 18 Cal. 242 and 28 Bom. 264, Rel. on). I.L.R. (1939) 2 C. 143=43 C.W.N. 1197=1939 Cal. 530. The general rule is clearly established that mere attachment of property does not constitute a charge and does not constitute the attaching creditor a secured creditor within the meaning of S. 53 (2). 41 Bom.L.R. 506.

Secs. 53 (3) and 51: PROTECTION OF PURCHASER—BURDEN OF PROOF.—Under S. 53 (3) if it can be shown that a purchaser in execution proceedings has purchased in good faith prior to the order of adjudication, his purchase cannot be assailed on grounds based on S. 51. The party seeking to validate on otherwise invalid purchase by relying on S. 53 (3) must show that he is covered by it. 194 I.C. 423=1941 Cal. 112.

Sec. 54.—Attachment before judgment followed by the decree—Subsequent adjudication of judgment-debtor as insolvent prior to sale—Duty of Sheriff to hand over attached goods to Official Assignee—Claim by Sheriff to puondage—Sustainability. 40 C.W.N. 1317. Receiver appointed in execution—Judgment-debtor subsequently adjudicated insolvent—Costs, charges and expenses incurred by receiver—If can be recovered from insolvent's estate. *See* I.L.R. (1941) 2 Cal. 37.

Sec. 55.—The Official Assignee who seeks to set aside transfers on the ground that they are not *bona fide* should be scrupulously accurate in the statements by which he hopes to establish his title. 40 C.W.N. 1012=1936 C. 212. The burden is on the Official Assignee to prove that the transactions sought to be set aside by him were not made in good faith and for valuable consideration. 36 C.W.N. 337; 58 I.A. 115; 40 C.W.N. 1012=162 I.C. 650=1936 C. 212. Amendment of section as regards burden of proof suggested. 162 I.C. 202=1936 R. 145. It is not necessary for the Official Assignee to prove absence of both good faith and valuable consideration, but he must discharge the burden of proving the absence only of one of these elements in order to succeed. 14 R. 109=1936 R. 98; 43 M. 739=39 M.L.J. 345; 50 M. 948; 60 C. 1278; 51 I.C. 591; 42 M. 510=36 M.L.J. 190. "In good faith"—What amounts to—Transfer of all available property—If valid—Onus of proof. 29 C.W.N. 374=87 I.C. 392. *See also* 10 R. 219=1932 R. 86; 9 R. 170 (P.C.). To bring a case under S. 55, valuable consideration and good faith have to be proved. Absence of good faith could be proved by showing that the transaction was a sham one or that there was a resulting trust in favour of the insolvent, but the same could be proved by other circumstances also. 50 M. 498=1927 M. 1013=53 M.L.J. 890. In order that a trust deed executed by a debtor for the benefit of creditors within two years prior to his adjudication may be valid, it is necessary that the transfer of property should be in favour of (1) a purchaser, (2) in good faith, and (3) for valuable consideration. The burden is on the trustees under the deed of trust to make out that the transfer satisfied all the three conditions. 1931 M. 366. Where it appeared that the insolvent transferred property

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to his guarantor in business transaction and the latter took the sale without knowledge that the transferor was insolvent. *Held*, that in the absence of proof that the transfer was not made in good faith, the transaction should be upheld. 60 I.A. 362=38 C.W.N. 117=66 M.L.J. 1 (P.C.); 40 Bom.L.R. 884. S. 55 does not apply to property over which an insolvent in his capacity as *karta* of a joint family or trustee has a disposing power, at any rate with regard to the shares of other persons interested in it. 46 C.W.N. 256. Where a transfer by an insolvent prior to adjudication is held to be void on the application of the O.A. a subsequent transfer by such transferee is also void, even if the subsequent transferee acts *bona fide*. 165 I.C. 273=1936 S. 148. *See also* 40 C.W.N. 1012=1936 C. 212. A transfer effected prior to insolvency, upon which the order of adjudication is passed, must be held to be fraudulent and void, and the remedy, if any, of the transferee against the O.A. is to get the order of adjudication annulled before the O.A. can be called upon to prove that the transfer is fraudulent. 165 I.C. 273=1936 S. 148. *See also* 1937 Rang.L.R. 65=1937 Rang. 372; 40 Bom.L.R. 884; 1937 Rang. 113. "Void" in S. 55 means "voidable" at the instance of the O. A. 20 I.C. 485=25 M.L.J. 308. Application under S. 56 can be made only by O. A. 70 I.C. 463 (1)=26 C.W.N. 803. An Ins. Court can make an enquiry as to whether the transfer of the insolvent is fraudulent and void against the O. A. subject to the right of the party affected to bring a regular suit. An insolvent's examination is not evidence against the transfer. 46 I.C. 196=22 C.W.N. 335. A transfer cannot be said to have been made "in good faith" within the meaning of S. 55, if it is made in fraud of the bankruptcy laws. 42 M. 510=36 M.L.J. 190. The voidability of a transaction by virtue of S. 55 can be gone into only by the Ins. Court, and the same cannot be raised by way of defence in a suit upon the mortgage executed by the insolvent. 50 M. 776=53 M.L.J. 209. Decree-holder insolvent—Execution by private transferee—Objection not raised—Effect. *See* 1933 P. 130. When a special forum is constituted by a special Act, questions arising under that Act must, in the absence of anything to the contrary in the Act or in any other enactment, be determined by the forum constituted by the Act, so that any question as to the voidability of a transaction in so far as it is raised by the O. A. under the special provisions of that Act has to be determined by the Court constituted under that Act, which would have jurisdiction to determine that question. 50 M. 776=1927 M. 684=53 M.L.J. 209. But *see contra* 34 Bom.L.R. 1156=1932 B. 566. A single application by the O. A. to set aside a number of alienations made by the insolvent within a period of about a fortnight is maintainable and is not bad for multifariousness, where it is alleged that the transactions impeached are the outcome of a general scheme of fraud and conspiracy entered into between the insolvent and the alienees. 44 L.W. 872=71 M.L.J. 788.

DECREE-HOLDER INSOLVENT—EXECUTION BY PRIVATE TRANSFEREE—OBJECTION NOT RAISED—EFFECT.—Where a judgment debtor is a party to the execution proceedings and is apprised of the assignment of the decree by the original decree-holder who is adjudged insolvent, in favour of a private person, as well as of the application of the transferee to be substituted in place of the original decree-holder and to carry on the execution and he raises no objection at the time, the O.A. not taking any steps to take possession of the decree and execute it himself, he (judgment-debtor) cannot object to the execution and say that the O. A. alone is entitled to execute the decree. It is for the O.A. or the creditors of the insolvent to object to the money due under the decree being paid to the transferee of the original decree-holder, and therefore S. 55 does not bar execution of the decree by a private transferee. In the absence of any evidence one way or the other, it is not open to the Court to hold that a transfer of a decree made by a person within two years prior to his adjudication was not in good faith and for valuable consideration, in direct conflict with the recitals in the deed of assignment and the circumstances set forth therein. It is also not sufficient for the judgment-debtor to say that the transaction was colourable and collusive and that the decree had vested in the O.A. by operation of law. He has to show not only that the O. A. was entitled to intervene but also he had intervened, or that he intended to intervene. 146 I.C. 389=1933 P. 130.

TRANSACTION VOID UNDER THIS SECTION—VALIDITY UNDER S. 53, PROVINCIAL INSOLVENCY ACT.—By virtue of the important words being exactly the same in S. 55, Presy. T. Ins. Act and in S. 53, Prov. Ins. Act, if an hypothecation bond comes within the meaning of S. 55. Presy. T. Ins. Act, it would certainly be void under S. 53, Prov. Ins. Act. 1933 R. 424.

REMISSION OF DEBT BY INSOLVENT—IF VOID.—The expression "transfer" in S. 55 is not limited to any particular form of alienation of his property. It covers all sorts of devices that may be practised or suffered by the insolvent to deprive his creditors of the benefit of his property. A remission of a debt by the insolvent without consideration is as much a voluntary transfer under S. 55, as under the English Law. S. 55 would override in an insolvency matter the provisions of S. 63 of the Contract Act. 58 M. 702=69 M.L.J. 360.

Secs. 55, 56 and 57.—Apart from Ss. 55 and 56 of the Act, an act of insolvency can only be avoided if the adjudication is based on it or it is affected by a relation back of the assignee's title provided in S. 51. An act of bankruptcy is not *ipso facto* void and the lapse of the period within which it can be availed of to support an application for adjudication will place it beyond attack. (50 M. 541; 42 M.L.J. 252, Ref. to.) 130 I.C. 753=1931 M. 366. An application under Ss. 55 and 56 to set aside certain transactions by the insolvents can be made by the creditor, if the O.A. declined to move in the matter. 60 C. 1367=149 I. C. 995=1934 C. 232. *See also* 130 I. C. 753=1931 M. 366. Where a person makes a transfer to one of the creditors who is related to him and at the time of the transfer the transferor is unable to pay his debts as they become due from his own money and there is no evidence of any threat of any criminal proceedings or any coercive action taken or threatened by the transferee

56. (1) Every transfer of property, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the official assignee.

Avoidance of preference in certain cases.

(2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the insolvent.

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creditor, the transfer in these circumstances amounts to fraudulent preference within the meaning of S. 56. 32 S.L.R. 672=1938 Sind 82.

Sec. 56 : CREDITORS.—An acceptor or endorser of a negotiable instrument which has not yet reached maturity is a creditor. 19 I.C. 57=15 Bom.L.R. 113. As to right of creditors to apply under this section, *see* 40 C.W.N. 1031.

FRAUDULENT PREFERENCE—TEST OF—PRESSURE —DEMAND.—The mere making of a preferential payment is not a fraudulent preference. The substantial motive of the debtor in making it must be looked at. If the substantial motive is to prefer the creditor, the payment is a fraudulent preference. If the substantial motive is reparation for past wrong, or to avoid evil consequences to the debtor himself the payment is not a fraudulent preference. The word "preference" imports the voluntary act of a person who has a choice in the matter. In particular circumstances, when a creditor makes a demand for payment, with or without a threat of launching legal proceedings to recover the debt, the effect of the demand upon the mind of the debtor is such that he is no longer to be regarded as making the payment voluntarily or exercising free-will in the sense of electing to do something which he need not do. If a demand has that effect upon the mind of the debtor, a transfer executed in favour of a creditor in those circumstances is not a fraudulent preference under S. 56. On the other hand, a demand by the creditor is not always evidence of pressure. [Ex parte *Tayler* : In re *Goldsmith*, 18 Q.B.D. 295 and *Sharp* v. *Jackson*, (1899) A. C. 419, Rel. on.] 11 R. 489=1934 R. 17. To find out whether a particular payment amounted to fraudulent preference, one must look to the mind of the bankrupt at the time and see if the dominant view was to give preference to a particular creditor. 18 L. W. 696=1924 M. 180. In a case of fraudulent preference, the view of preferring need not be the whole view, but it must be the dominant view. It is for those who assert that there is a fraudulent prefernce to make out a *prima facie* case. If such a case is made out, it can be rebutted by proof that the explanation of the preference is that there was a dominant intention in the mind of the insolvent other than a desire to prefer a particular creditor. If there is such a dominant intention, the *prima facie* case is rebutted. *Held*, on the facts, that fraudulent preference was not made out. 7 R. 201=1929 R. 229. *See also* 60 C. 1278. When there is no evidence to prove that the insolvent was unable to pay his debts at the time and the only facts proved are that the properties of the insolvent were under attachment in execution of a decree and that in order to avoid the threatened execution sale, the insolvent made the transfer under pressure, it cannot be said that there is a fraudulent preference. Such a transfer is protected under S. 57 of the Act. 40 C.W.N. 1031. Where one of the acts of insolvency relied on in the petition is a transfer in favour of a creditor, that creditor cannot, in an application by the O.A. under S. 56 to set aside the transfer, urge in defence that the transfer in his favour by the insolvent is valid and not void as against the O. A., unless and until he gets the order of adjudication vacated under S. 8 of the Act. 30 S.L.R. 281=1936 Sind 246. *See also* 1937 Rang. 65 ; 1937 Rang. 372. Until the O.A. intervenes all transactions by a bankrupt after his bankruptcy with any person dealing with him *bona fide* and for value in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the O.A. 5 R. 229=103 I.C. 174=1927 R. 190. Under S. 56 the onus of proof is on the party alleging the transfer to be fraudulent. (*Ibid.*) Administration of estate of deceased involvent—Transfer by administrator—Right of creditors to set aside. 5 R. 375. Insolvency of Hindu father —Power of O.A. over the interest of the sons —Partition suit. *See* 28 Punj.L.R. 245. *See also* 29 I.C. 204 ; 20 I.C. 482=25 M.L.J. 320 ; 30 Bom.L.R. 290=54 M.L.J. 337 (P.C.).

Secs. 56 and 57.—Where the O.A. seeks to set aside a transaction falling under S. 56 and not covered by S. 36, it is open to the Court to exercise a discretion whether to try this matter on a notice of motion in the Ins. Court or to relegate the O.A. to a suit in the Civil Courts. It is not correct to say that the Ins. Court has exclusive jurisdiction in the matter of setting aside a fraudulent transfer. (50 M. 776, Diss. from.) 34 Bom. L.R. 1166 =1932 B. 566. Where one of the acts of insolvency on which an order of adjudication is based is fraudulent preference of one creditor over others, the order, so long as it exists, is conclusive against the creditor who is preferred that that act of insolvency has in fact been committed, although he is not a party to the adjudication proceedings. If he is dissatisfied with the adjudication order being based on the ground that the transfer to him is a fraudulent

Protection of *bona fide* transactions.

57. Subject to the foregoing provisions with respect to the effect of insolvency on an execution and with respect to the avoidance of certain transfers and preferences, nothing in this Act shall invalidate in the case of an insolvency—

(*a*) any payment by the insolvent to any of his creditors;

(*b*) any payment or delivery to the insolvent;

(*c*) any transfer by the insolvent for valuable consideration; or

(*d*) any contract or dealing by or with the insolvent for valuable consideration:

Provided that any such transaction takes place before the date of the order of adjudication, and that the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor.

Realization of Property.

Possession of property by official assignee.

58. (1) The official assignee shall, as soon as may be, take possession of the deeds, books and documents of the insolvent and all other parts of his property capable of manual delivery.

(2) The official assignee shall, in relation to and for the purpose of acquiring or retaining possession of the property of the insolvent, be in the same position as if he were a receiver of the property appointed under the Code of Civil Procedure, 1908, and the Court may, on his application, enforce such acquisition or retention accordingly.

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preference, he can appeal from that order. If he does not do so, the order would operate against him as *res judicata* in an application by the Official Assignee to set aside the transfer as a fraudulent preference under S. 56 of the Presidency Towns Insolvency Act. 45 C.W.N. 441.

Sec. 57.—The provisions of S. 57 are not restricted to transactions carried out between the date of the petition in insolvency and that of the adjudication. 41 C.W.N. 105=I.L.R.(1937) 1 Cal. 557. The words *bona fide* in the marginal note to S. 57 must be taken to be part of the section itself; and the only meaning which can be given to those words is absence of knowledge of the presentation of an insolvency petition. I.L.R. (1937) 1 Cal. 557=41 C.W.N. 105=170 I.C. 672. A purchaser of property from a benamidar for the dues subsequent to his adjudication in insolvency does not acquire any title to the property as against the O.A., even though the purchase was *bona fide* and for value and without notice. 20 C.W.N. 554 =34 I.C. 435. Intimation of insolvency to the creditor without leading to an inference that the debtor will suspend payment is not an act of insolvency. It is such an act if such an inference can be drawn. 35 I.C. 942=39 M. 250. *See also* 43 B. 890=53 I.C. 197. *Bona fide* transferee for value after act of insolvency and before adjudication, if void. *See* 42 M.L.J. 155 =45 M. 238. Jurisdiction to decide question of invalidity of transfer by insolvent on the ground of fraud, collusion, want of good faith or want of *bona fides*—Suit in Civil Court on mortgage by insolvent—Plea of fraud, collusion, want of consideration and want of good faith raised by O.A. The Civil Court should give the mortgagee a decree leaving it open to the O.A. to apply to the Ins. Court to set aside the transaction as void against him. 41 C.W.N. 105= I.L.R. (1937) 1 Cal. 557. *See also* 1939 Sind 196; As to burden of proof, *see* 185 I.C. 778=1939 Sind 381.

Sec. 57 (c)—A *chose in action*, if it is a debt due to the insolvent in his trade or business, comes within the words of goods and chattels· 1931 S. 44.

Sec. 57, Proviso.—Payment to creditor after annulment of adjudication and before appellate order setting aside annulment—Title of O.A. *See* 12 R. 577.

Sec. 58.—The High Court in insolvency has jurisdiction to commit to prison for contempt not only the insolvent, but other persons who deliberately aid the insolvent in defying an order of the Court deliberately passed in the exercise of insolvency jurisdiction. The Court's powers are not limited by S. 58. The wife and son of the insolvent, though they are not parties to the proceedings, can be proceeded against, if they at the instigation of the insolvent refuse to vacate possession of the properties of the insolvent as ordered by the Court. I.L.R. (1939) Mad. 19=48 L.W. 462=1938 Mad. 927 =(1938) 2 M.L.J. 609 (reversing 46 L.W. 900 =1937 M.W.N. 1251).

Sec. 58 (2).—The O.A. cannot apply under S. 58 (2) to direct a third person to produce books of account alleged to be in his custody. 36 L.W. 703=63 M.L.J. 810. Court has no

(3) Where any part of the property of the insolvent consists of stock, shares in ships, shares, or any other property transferable in the books of any company, office or person, the official assignee may exercise the right to transfer the property to the same extent as the insolvent might have exercised it, if he had not become insolvent.

(4) Where any part of the property of the insolvent consists of things in action, such things shall be deemed to have been duly transferred to the official assignee.

(5) Any transurer of other officer, or any banker, attorney or agent of an insolvent, shall pay and deliver to the official assignee all money and securities in his possession or power as such officer, banker, attorney or agent, which he is not by law entitled to retain as against the insolvent or the official assignee. If he fails so to do, he shall be guilty of a contempt of Court, and shall be punishable accordingly on the application of the official assignee.

Seizure of property of insolvent.

59. (1) The Court may grant a warrant to any prescribed officer of the Court or any police officer above the rank of a constable to seize any part of the property of an insolvent in the custody or possession of the insolvent or of any other person, and with a view to such seizure to break open any house, building or room of the insolvent where the insolvent is supposed to be, or any building or receptacle of the insolvent where any of his property is supposed to be.

(2) Where the Court is satisfied that there is reason to believe that property of the insolvent is concealed in a house or place not belonging to him, the Court may, if it thinks fit, grant a search warrant to any such officer as aforesaid who may execute it according to its tenor.

Appropriation of portion of pay or other income to creditors.

60. (1) Where an insolvent is an officer of the Army or Navy or of [1][the Royal Indian Navy], or an officer or clerk or otherwise employed or engaged in the civil service of the Crown, the official assignee shall receive for distribution amongst the creditors so much of the insolvent's pay or salary liable to attachment in execution of a decree as the Court may direct.

(2) Where an insolvent is in the receipt of a salary or income other than as aforesaid, the Court may, at any time after adjudication and from time to time, make such order as it thinks just for the payment to the official assignee, for distribution among the creditors of so much of such salary or

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LEG. REF.

[1] Substituted for "His Majesty's Royal Indian Marine Service" by A.O., 1937.

NOTES.

power under Cl. (2) to remove from possession person claiming adversely to the insolvent. *See* 49 M. 762=1926 M. 363=50 M.L.J. 180. In a case where the title of the insolvent to certain property is disputed, the Insolvency Court can authorise the O.A. to take charge of the property pending settlement of the dispute. (37 C. 713, Foll.) 54 M. 1006=1931 M. 672=61 M. L.J. 812.

Sec. 58 (4).—The O. A. is entitled under R. 202 (2) of the Rangoon High Court Rules framed under the Act to his commission over the entire sale proceeds of a property equitably mortgaged and auctioned free from mortgage with the consent of the mortgagee. 8 R. 514 =1931 R. 61.

Sec. 58 (5).—*See* 48 L.W. 462=(1938) 2 M. L.J. 609 (reversing 1938 Mad. 175). The provisions of Cl. (5) of S. 58 are penal in their nature and cannot be construed as applying to any particular case unless it is quite clear that no other construction of the section is possible. 5 R. 244=1927 R. 193. They cannot be applied to the powers of the O.A. prior to the adjudication when he is acting, not under the powers devolving on him by operation of the Act itself, but under the powers specially conferred on him by his appointment as interim receiver under S. 16. 1927 R. 193.

Secs. 58 and 59.—S. 59 is only an enabling section and not a prohibiting section and it does not involve any prohibition to the O.A. to obtain possession in any manner he likes. Nor does Cl. (2) of S. 58 prohibit the O.A. from taking a police officer with him in the course of his duties. 1930 M. 458=59 M.L.J. 501.

Sec. 60.—As to how salary should be appor-

income as may be liable to attachment in execution of a decree, or of any person thereof.

Vesting and transfer of property.

61. The property of the insolvent shall pass from official assignee to official assignee and shall vest in the official assignee for the time being during his continuance in office, without any transfer whatever.

Disclaimer of onerous property.

62. (1) Where any part of the property of an insolvent consists of land of any tenure burdened with onerous covenants, of shares or stocks in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money, the official assignee may, notwithstanding that he may, have endeavoured to sell or have taken possession of the property, or exercised any act of ownership in relation thereto, but subject always to the provisions hereinafter contained in that behalf, by writing signed by him, at any time within twelve months after the insolvent has been adjudged insolvent, disclaim the property:

Provided that, where any such property has not come to the knowledge of the official assignee within one month after such adjudication as aforesaid, he may disclaim the property at any time within twelve months after he has first become aware thereof.

(2) The disclaimer shall operate to determine, as from the date thereof, the rights, interest and liabilities of the insolvent and his property in or in res-

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tioned, *see* 165 I.C. 384=1936 R. 412. S. 60 is not at all concerned with attachments. When a Court makes an order of allocation under S. 60 it does neither in fact nor in form direct the attachment of the property (or salary as the case may be) of the insolvent. Neither S. 60 (1) (*i*), C. P. Code, nor the proviso thereto, can be invoked for the purpose of enabling an insolvent to get rid of a liability placed upon him by an order under S. 60 of this Act. 54 L.W. 570 =(1941) 2 M.L.J. 845. *See also* (1941) 2 M.L.J. 591=1941 M. 506. Where an employee borrows money agreeing to repay it in monthly instalments and authorises his employer to withhold a part of his salary every month and to pay it to his creditor until his debt is discharged, it can at best amount only to a contract to assign the future salary as and when it is earned. There is no completed assignment or charge, and the creditor cannot enforce the transaction as against future salary as against the Official Assignee on the insolvency of the employee. But if the employer goes to pay the creditor even after the insolvency of the employee and the creditor who has paid value receives it without notice of the insolvency, the Official Assignee cannot recover back from the creditor the payments received by him after the insolvency. Under S. 60 of the Presidency Towns Insolvency Act only so much of the salary as is ordered to be paid by the Court under S. 60 (2) to the Official Assignee vests in him, and the balance is at the absolute disposal of the insolvent. Though the creditor cannot be allowed to have any advantage over the other creditors of the debtor-insolvent, once an allocation is made under S. 60 (2), the rest of the salary is absolutely at the disposal of the insolvent and even if the whole of it is spent by the insolvent, the Official Assignee cannot complain and he cannot therefore recover from the creditor the payments made to him out of the salary after insolvency. 1940 M.W.N. 1167=I.L.R. (1941) Mad. 61= 1941 Mad. 297=(1941) 1 M.L.J. 703.

See. 60 (2).—The term income in S. 60 (2) must be construed as *ejusdem generis* with "salary" and the Court has jurisdiction under S. 60 (2) in respect only of the insolvent's salary or income in the nature of a salary. 9 R. 138=1931 R. 79 (1). The insolvent was a daily piece-work labourer in the mills of the appellant company, the wages being calculated on the quantity of work turned out by him every day, but paid monthly. *Held*, his wages did not constitute 'salary or income.' 1936 M. 907=71 M.L.J. 432. Court has no power to make order for payment by insolvent of any portion of pension payable to him by Government. 43 C.W.N. 1194=1940 Cal. 192.

Sec. 61.—Right of action accruing subsequent to adjudication, in respect of after-acquired property—Insolvent, the proper person to sue and not the trustee in bankruptcy. 46 C. 156=22 C.W.N. 1018=48 I.C. 622.

Sec. 62.—A disclaimer by O.A. of the lease-hold interest of an insolvent is a creature of statute with statutory consequences and is not quite the same thing as a surrender which is governed by the law of landlord and tenant. 63 C. 1123=40 C.W.N. 846.

Secs. 62 and 66.—Tenancy of insolvent—Vesting in O. A.—Disclaimer—Right of landlord to obtain possession by order of Ins. Court. 26 Bom.L.R. 628=48 Bom. 580. The effect of a disclaimer of a lease-hold interest of the insolvent by the O.A. under S. 62 is that, as between the lessor and the lessee-insolvent, the interest of the insolvent in the lease is determined and the reversion becomes accelerated. There is no

pect of the property disclaimed, and shall also discharge the official assignee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the insolvent and his property and the official assignee from liability, affect the rights or liabilities of any other person.

Disclaimer of leaseholds.

63. Subject always to such rules as may be made in this behalf, the official assignee shall not be entitled to disclaim any leasehold interest without the leave of the Court; and the Court may, before or on granting such leave, require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such orders with respect to fixtures, tenant's improvements and other matters arising out of the tenancy, as the Court thinks just.

Power to call on official assignee to disclaim.

64. The official assignee shall not be entitled to disclaim any property in pursuance of section 62 in any case where an application in writing has been made to the official assignee by any person interested in the property requiring him to decide whether he will disclaim, and the official assignee has for a period of twenty-eight days after the receipt of the application, or such extended period as may be allowed by the Court, declined or neglected to give notice that he disclaims the property; and in the case of a contract, if the official assignee, after such application as aforesaid, does not within the said period or extended period disclaim the contract, he shall be deemed to have adopted it.

Power for Court to rescind contract.

65. The Court may, on the application of any person who is, as against the official assignee, entitled to the benefit or subject to the burden of a contract made with the insolvent, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as to the Court may seem equitable, and any damages payable under the order to any such person may be proved by him as a debt under the insolvency.

Power for Court to make vesting order in respect of disclaimed property.

66. (1) The Court may, on the application of any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in, or delivery thereof to, any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just; and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any transfer for the purpose:

Provided always, that where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the insolvent, whether as under-lessee or as mortgagee except

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need for a vesting order under S. 66 in favour of the lessor. 63 C. 1123=40 C.W.N. 846.

Secs. 66 and 73.—Where a person jointly leased certain property, and after the lessees mortgaged their interest, he became insolvent, nd shortly after, the O.A. disclaimed the lease and the mortgagees applied to rank as creditors, *eld*, that after the disclaimer, the mortgagees had no interest in the property, and that they could claim a dividend. *Held also*, that there being a dispute the O.A. should reserve a portion of the assets and that the mortgagees could come in to prove their claim before the last date fixed in the notice. Meaning of "secured creditor" stated. 53 B. 290=117 I.C. 440=1929 B. 107.

upon the terms of making such person subject to the same liabilities and obligations as the insolvent was subject to under the lease in respect of the property at the date when the insolvency petition was filed, and any under-lessee or mortgagee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and if there is no person claiming under the insolvent who is willing to accept an order upon such terms, the Court shall have power to vest the insolvent's interest in the property in any person liable either personally or in a representative character, and either alone or jointly with the insolvent, to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances and interests created therein by the insolvent.

(2) The Court may, if it thinks fit, modify the terms prescribed by the foregoing proviso so as to make a person in whose behalf the vesting order may be made subject only to the same liabilities and obligations as if the lease had been assigned to him at the date when the insolvency petition was filed and (if the case so requires) as if the lease had comprised only the property comprised in the vesting order.

Persons injured by disclaimer may prove.

67. Any person injured by the operation of a disclaimer under the foregoing provisions shall be deemed to be a creditor of the insolvent to the amount of injury, and may accordingly prove the same as a debt under the insolvency.

Duty and powers of official assignee as to realization.

68. (1) Subject to the provisions of this Act, the official assignee shall, with all convenient speed, realize the property of the insolvent, and for that purpose may—

(*a*) sell all or any part of the property of the insolvent;

(*b*) give receipts for any money received by him;

and may, by leave of the Court, do all or any of the following things, namely:—

(*c*) carry on the business of the insolvent so far as may be necessary for the beneficial winding up of the same;

(*d*) institute, defend or continue any suit or other legal proceeding relating to the property of the insolvent;

(*e*) employ a legal practitioner or other agent to take any proceedings or do any business which may be sanctioned by the Court;

(*f*) accept as the consideration for the sale of any property of the insolvent a sum of money payable at a future time or fully paid shares, debentures or debenture stock in any limited company subject to such stipulations as to security and otherwise as the Court thinks fit;

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Sec. 68.—The O.A. requiring the completion of a contract for sale of goods entered into by the defendants with the insolvent before adjudication must elect within a reasonable time to take up the contract, and should make the tender of cash before requiring performance. 18 I.C. 756=17 C.W.N. 578. The leave of the Court which is referred to in S. 68 means a particular leave obtained to do a particular thing or things. 18 I.C. 756=17 C.W.N. 578. O.A.'s rights are higher than those of Administrator-General with grant of letters of administration. 38 M. 500=22 I.C. 566. A suit relating to the property of the insolvent as contemplated by S. 69 (1) means a suit which, if successful, will increase the assets distributable amongst the creditors or the defence of which may prevent the assets being diminished. A right to institute an appeal which merely relates to a money decree against an insolvent is not a suit or legal proceeding relating to the property of the insolvent and does not fall within the powers given to the Official Assignee by S. 68 of the Act. 43 Bom. L.R. 644=1941 B. 293=I.L.R. (1941) Bom. 603.

(*g*) mortgage or pledge any part of the property of the insolvent for the purpose of raising money for the payment of his debts or for the purpose of carrying on the business;

(*h*) refer any dispute to arbitration, and compromise all debts, claims and liabilities, on such terms as may be agreed upon;

(*i*) divide in its existing form amongst the creditors, according to its estimated value, any property which, from its peculiar nature or other special circumstances, cannot readily or advantageously be sold.

(2) The official assignee shall account to the Court and pay over all moneys and deal with all securities in such manner as is prescribed or as the Court directs.

Distribution of property.

Declaration and distribution of dividends.

69. (1) The official assignee shall, with all convenient speed, declare and distribute dividends amongst the creditors who have proved their debts.

(2) The first dividend (if any) shall be declared and be distributed within [1][one year] after the adjudication, unless the official assignee satisfies the Court that there is sufficient reason for postponing the declaration to a later date.

(3) Subsequent dividends shall, in the absence of sufficient reason to the contrary, be declared and be payable at intervals of not more than six months.

(4) Before declaring a dividend, the official assignee shall cause notice of his intention to do so to be published in the prescribed manner, and shall also send reasonable notice thereof to each creditor mentioned in the insolvent's schedule who has not proved his debt.

(5) When the official assignee has declared a dividend, he shall send to each creditor who has proved a notice showing the amount of the dividend, and when and how it is payable, and, if required by any creditor, a statement in the prescribed form as to the particulars of the estate.

Joint and separate properties.

70. Where one partner in a firm is adjudged insolvent, a creditor to whom the insolvent is indebted jointly with the other partners in the firm or any of them shall not receive any dividend out of the separate property of the insolvent until all the separate creditors have received the full amount of their respective debts.

Calculation of dividends.

71. (1) In the calculation and distribution of dividends, the official assignee shall retain in his hands sufficient assets to meet—

(*a*) debts provable in insolvency and appearing from the insolvent's statements or otherwise to be due to persons resident in places so distant that in the ordinary course of communication they have not had sufficient time to tender their proofs;

(*b*) debts provable n insolvency the subject of claims not yet determined;

(*c*) disputed proofs or claims; and

(*d*) the expenses necessary for the administration of the estate or otherwise.

LEG. REF. Act III of 1929.

[1] Substituted for the words "six months" by

(2) Subject to the provisions of sub-section (1), all money in hand shall be distributed as dividends.

Right of creditor who has not proved debt before declaration of a dividend.

72. Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid out of any money for the time being in the hands of the official assignee any dividend or dividends which he may have failed to receive, before that money is applied to the payment of any future dividend or dividends, but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein.

Final dividend.

73. (1) When the official assignee has realized all the property of the insolvent, or so much thereof as can, in his opinion, be realized without needlessly protracting the proceedings in insolvency, he shall, with the leave of the Court, declare a final dividend; but, before so doing, he shall give notice in manner prescribed to the persons whose claims to be creditors have been notified to him but not proved that, if they do not prove their claims, to the satisfaction of the Court, within the time limited by the notice, he will proceed to make a final dividend wthout regard to their claims.

(2) After the expiration of the time so limited, or, if the Court on application by any such claimant grants him further time for establishing his claim, then on the expiration of that further time, the property of the insolvent shall be divided among the creditors who have proved their debts, without regard to the claims of any other persons.

No suit for dividend.

74. No suit for a dividend shall lie against the official assignee, but, where the official assignee refuses to pay any dividend, the Court may, on the application of the creditor who is aggrieved by such refusal, order him to pay it, and also to pay out of his own money interest thereon at such rate as may be prescribed for the time that it is withheld, and the costs of the application.

Power to allow insolvent to manage property, and allowance to insolvent for maintenance or service.

75. (1) Subject to such conditions and limitations as may be prescribed, the official assignee may appoint the insolvent himself to superintend the management of the property of the insolvent or of any part thereof, or to carry on the trade (if any) of the insolvent, for the benefit of his creditors, and in any other respect to aid in administering the property in such manner and on such terms as the official assignee may direct.

NOTES.

Sec. 72.—Under S. 72 the Court ought not in general to interfere with a part distribution, 104 I.C. 378=29 Bom.L.R. 1167. Thus in a case where the Court has distributed dividends only amongst the people then known, but, in fact there is some other person who is to blame for not having made known his claim, then it may be fair to say it is not the fault of anybody except himself that he did not share in the dividend up to that date. 29 Bom.L.R. 1167. But where the Court itself had made a mistake through its officer in declaring the dividend overlooking the claim filed by one of the creditors, it has jurisdictlon to direct a refund of the excess dividend paid and order a fresh distribution in favour of the person who filed his claim. *Held also*, that the refund of money could also be supported on the principle of S. 72 of the Contract Act. 29 Bom.L.R. 1167.

Sec. 73.—Bombay Ins. Rules 119 and 122—Mortgagee of lessee under insolvent—Repudiation by O.A.—Proof of claim—Notice. *See* 31 Bom.L.R. 35.

Sec. 75.—The word "support" in S. 75 (2) cannot be restricted to such support as is immediately necessary to maintain life. The word justifies the Court in making an allowance in order to enable the insolvent to defend a criminal case pending against him. 59 M. 862=1936 M. 414=70 M.L.J. 563. Where an application is made by the insolvent for such an order, supported by his own affidavit and by the report of the O.A. stating that the criminal proceedings should be properly defended, and the only opposition to that application is by the petitioning creditor, who is not in any way shown to represent the general body of creditors, the Ins. Judge is justified in making an order. 70 M.L.J. 563=1936 Mad. 414. The Court is also

(2) Subject as aforesaid, the Court may, from time to time, make such allowance as it thinks just to the insolvent out of his property, for the support of the insolvent and his family, or in consideration of his services, if he is engaged in winding up his estate, but any such allowance may at any time be varied or determined by the Court.

Right of insolvent to surplus.

76. The insolvent shall be entitled to any surplus remaining after payment in full of his creditors, with interest, as provided by this Act and of the expenses of the proceedings taken thereunder.

PART IV.

OFFICIAL ASSIGNEES.

Appointment and removal of official assignee of insolvents' estate.

77. [1][(1) (*a*) The Chief Justice of the High Court at Madras may from time to time appoint substantively or temporarily such person as he things fit to the office of official assignee of insolvents' estates and such person or persons as he thinks fit to the office of the deputy official assignee for the said Court and may with the concurrence of a majority of the other Judges of the Court, remove the person for the time being holding any of the said offices for any cause appearing to the Court sufficient.

(*b*) The Provincial Government of Bengal shall, after consultation with, and with the concurrence of, the Chief Justice of the High Court at Calcutta, appoint substantively or temporarily a person to the office of official assignee of insolvents' estates for the said Court and may, after the like consultation and with the like concurrence, appoint substantively or temporarily a person or persons to the office of the deputy official assignee for the said Court.

(*c*) For the High Court at Bombay, the Provincial Government of Bombay, and for the Court of the Judicial Commissioner of Sind, the Provincial Government of Sind, may from time to time appoint substantively or temporarily such person as the Provincial Government thinks fit to the office of official assignee of insolvents' estates and such person or persons as the Provincial Government thinks fit to the office of the deputy official assignee.]

[2][(1-A) Subject to rules made under section 112, the Deputy Official Assignee shall have all the powers and shall discharge all the duties and in exercise of such powers and in the discharge of such duties shall be subject to all the liabilities of the official assignee under this Act.]

(2) Every official assignee [2][and every deputy official assignee] shall give such security and shall be subject to such rules and shall act in such manner as may be prescribed.

(3) Notwithstanding anything in sub-section (1), the persons substantively or temporarily holding the office of official assignee immediately before the commencement of this Act in the Courts for the relief of Insolvent Debtors at Calcutta, Madras and Bombay, respectively, under the Indian Insolvency Act, 1848, [3][* * *] shall, without further appointment for that purpose, become the official assignees, substantive or temporary, as the case may be, under this Act in the High Courts at Fort William, Madras and Bombay [3][* * *] respectively.[4]

[5][(4) On and after the first day of April nineteen hundred and thirty-seven the powers conferred by this section on the Chief Justice of the High Court at Bombay and on the Judicial Commissioner of Sind shall be powers of

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LEG. REF.

[1] Substituted by Supplementary Order in Council, 1937.

[2] Inserted by Act X of 1930.

[3] Reference to Court of Lower Burma omitted by A.O., 1937.

[4] Sec. 77-A has been inserted for Bombay and Karachi by Bom. Act XX of 1933 and amended by Bom. Act III of 1935.

[5] Sub-s. (4) of S. 77 added by A.O., 1937.

NOTES.

justified in scrutinising the amount asked for and allowing such amount as it thinks fit to allow in its discretion. 1936 M. 414=70 M.L.J. 563.

the Provincial Government of Bombay and of the Provincial Government of Sind respectively.]

Power to administer oath,

78. An official assignee may, for the purpose of affidavits verifying proofs, petitions or other proceedings under this Act, administer oaths.

Duties as regards the insolvent's conduct.

79. (1) The duties of an official assignee shall have relation to the conduct of the insolvent as well as to the administration of his estate.

(2) In particular it shall be the duty of the official assignee—

(*a*) to investigate the conduct of the insolvent and to report to the Court upon any application for discharge, stating whether there is reason to believe that the insolvent has committed any act which constitutes an offence under this Act or under sections 421 to 424 of the Indian Penal Code in connection with his insolvency or which would justify the Court in refusing, suspending or qualifying an order for his discharge;

(*b*) to make such other reports concerning the conduct of the insolvent as the Court may direct or as may be prescribed; and

(*c*) to take such part and give such assistance in relation to the prosecution of any fraudulent insolvent as the Court may direct or as may be prescribed.

Duty to furnish list of creditors.

80. The official assignee shall, whenever required by any creditor so to do and on payment by the creditor of the prescribed fee, furnished and send to the creditor by post a list of the creditors showing in the list the amount of the debt due to each of the creditors.

Remuneration.

[1]81. (1) Such remuneration shall be paid to the official assignee as may be prescribed.

(2) No remuneration whatever beyond that referred to in sub-section (1) shall be received by an official assignee as such.

Salary, allowances and pension of official assignee and deputy official assignee.

[2][8]-A. The salary, allowances and pension of the official assignee or any deputy official assignee shall be paid by the Provincial Government.]

Misfeasance.

[3]82. The Court shall call the official assignee to account for any misfeasance, neglect or omission which may appear in his accounts or otherwise, and may require the official assignee to make good any loss which the estate of the insolvent may have sustained by reason of the misfeasance, neglect or omission.

LEG. REF.

[1] For Ss. 81, 81-A and 81-B substituted for original S. 81 and for Secs. 82 (2) and (3), 82-A, 82-B and 82-C inserted after S. 82 renumbered as S. 82 (1) and for S. 84-A inserted after S. 84 by the Bengal Act 18 of 1936, see Ben. Code.

[2] S. 81-A. Substituted by Supp. Order in Council, 1937.

[3] Ss. 82 and 83 have been substituted in Bombay by Bombay Act XX of 1933 and amended by Bombay Act III of 1935.

NOTES.

Sec. 79.—In deciding what is the duty of the O. A. with regard to a contested action in which he is concerned as a trustee, the Court must consider not merely whether he has a cause of action or right or defence or answer which would prevail at law or in equity as between ordinary litigants, but also what in point of honesty the trustee ought to do in respect of the facts of the case. 8 R. 665=1931 R. 74 (2). Where a certain company possessed a moral or equitable claim to a certain sum, which represented money that had been entrusted by the company to the insolvent to be applied by him for a specific purpose as their agent and the insolvent has no beneficial interest in the sum except to the extent of his commission, *held*, that the O.A. is justified in refusing to intervene and claim the amount as against the company. 8 R. 665=1931 R. 74 (2).

Sec. 81.—O.A. when entitled to commission. *See* 43 C.L.J. 580=1926 C. 1033. Where an adjudication order obtained on a petition by a creditor is annulled, the O.A. is not entitled to a commission. He is certainly entitled to demand from the adjudicating creditor all the out of pocket expenses he may have incurred. 1933 R. 280.

Sec. 82.—Misfeasance, neglect or omission—Distribution of assets without disposing of claims—Personal liability of O,A. *See* 70 I.C. 507=26 C.W.N. 653.

Name under which to sue or be sued.

83. The official assignee may sue and be sued by the name of "the official assignee of the property of, an insolvent", inserting the name of the insolvent, and by that name may hold property of every description, make contracts, enter into any engagements binding on himself and his successors in office, and do all other Acts necessary or expedient to be done in the execution of his office.

Office vacated by insolvency.

84. If an order of adjudication is made against an official assignee, he shall thereby vacate the office of official assignee.

Discretionary powers and control thereof.

85. (1) Subject to the provisions of this Act and to the directions of the Court the official assignee shall, in the administration of the property of the insolvent and in the distribution thereof amongst his creditors, have regard to any resolution that may be passed by the creditors at a meeting.

(2) The official assignee may, from time to time, summon meetings of the creditors for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors, by resolution at any meeting, or the Court may direct, or whenever requested in writing to do so by one-fourth in value of the creditors who have proved.

(3) The official assignee may apply to the Court for directions in relation to any particular matter arising under the insolvency.

(4) Subject to the provisions of this Act, the official assignee shall use his own discretion in the management of the estate and its distribution among the creditors.

Appeal to Court.

86. If the insolvent or any of the creditors or any other person is aggrieved by any act or decision of the official assignee, he may appeal to the Court, and the Court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just.

NOTES.

Sec. 85.—Application by O. A. for payment of moneys to insolvent for enabling him to defend criminal case—Power of Court to order payment. 1936 M. 414=70 M.L.J. 563.

Sec. 86.—S. 86 relates only to the validity of any act or decision of the O.A. The words "as it thinks fit" merely refer to any incidental or consequential order necessary for giving effect to the rest of the order but cannot refer to a claim for damages for wrongful trespass to goods. The Ins. Court has no jurisdiction to entertain a claim for damages. 124 I.C. 144= 1930 M. 458=59 M. L.J. 501. S. 86 expressly includes an insolvent in the category of persons entitled to appeal to the Court against an order or act of the Official Assignee, and as a sale of the insolvent's property is an act on the part of the Official Assignee, an insolvent would undoubtedly be entitled to invoke the provision of the section if he can be said to be a person aggrieved in any way. A person aggrieved must be a man who has suffered a legal grievance. As the insolvent has no legal right to interfere with the administration of the estate by the Official Assignee, he can have no legal grievance if the property is sold by the Assignee in due course of administration. He will have no right to complain merely on the ground hat if the property was sold in a different manner it would have fetched a better price and might have benefited him in the long run. But he will have a legal grievance if the property is not sold by the Official Assignee in the due discharge of his duties; as for example when it is done fraudulently or illegally or when the Assignee acts in excess of his authority. 44 C. W.N. 665. Administration of estate of deceased insolvent—Transfer by administrator—O. A. refusing to take action to set aside transfer—Remedy of creditor. 5 R. 375.

Sec. 86 and Sch. II, R. 25.—A claim that certain property has not vested in the Official Assignee at all or a claim to have a charge upon property which has vested in him cannot under the Presidency Towns Insolvency Act be dealt with by the Official Assignee as a tribunal. The Official Assignee in such a matter is a party litigant. Even if the matter could be regarded as a mere question of admitting or rejecting a proof, when the Official Assignee acts under R. 25 of the Second Schedule, the appeal under S. 86 from the "act or decision" of the Official Assignee to the Judge should be by motion and the oral evidence necessary should be taken before the Insolvency Judge himself. 42 C.W.N. 1125=48 L.W. 466=40 Bom.L.R. 1236=1938 P. C. 259=(1939) 1 M. L.J. 192 (P.C.).

Control of Court.

87. (1) If any official assignee does not faithfully perform his duties and duly observe all the requirements, imposed on him by any enactment, rules or otherwise, with respect to the performance of his duties, or if any complaint is made to the Court by any creditor in regard thereto, the Court shall enquire into the matter and take such action thereon as may be deemed expedient.

(2) The Court may, at any time, require any official assignee to answer any enquiry made by it in relation to any insolvency in which he is engaged, and may examine him or any other person on oath concerning the insolvency.

(3) The Court may also direct an investigation to be made of the books and vouchers of the official assignee.

PART V.

COMMITTEE OF INSPECTION.

Committee of Inspection.

88. The Court may, if it so thinks fit, authorise the creditors who have proved to appoint from among the creditors or holders of general proxies or general powers-of-attorney from such creditors, a committee of inspection for the purpose of superintending the administration of the insolvent's property by the official assignee:

Provided that a creditor, who is appointed a member of a committee of inspection, shall not be qualified to act until he has proved.

Control of committee of inspection over official assignee.

89. The Committee shall have such powers of control over the proceedings of the official assignee as may be prescribed.

PART VI.

PROCEDURE.

Powers of Court.

90. (1) In proceedings under this Act the Court shall have the like powers and follow the like procedure as it has and follows in the exercise of its ordinary original civil jurisdiction:

Provided that nothing in this sub-section shall in any way limit the jurisdiction conferred on the Court under this Act.

(2) Subject to the provisions of this Act and rules, the costs of and incidental to any proceeding in the Court shall be in the discretion of the Court.

NOTES.

Sec. 90.—As to whether S. 90 controls S. 8 (1) of the Act. *See* 7 R. 201 *and also* 56 C. 667 =115 I.C. 39. As to scope of section. 7 Rang. 201. When an insolvency petition pending before the High Court was transferred to District Court, the latter could not try or dispose of the petition. 38 M. 472=25 M.L.J. 299. The jurisdiction conferred by this Act and the Pro. Ins.Act are quite distinct. 38 M. 472.As to power of High Court in its insolvency jurisdiction to order a transfer or withdrawal of proceedings in insolvency from a Subordinate Court, *see* 27 Bom.L.R. 1207=49 Bom. 788. When the O.A. takes possession of an outsider's property and such outsider sets up a paramount title, the judge can inquire summarily and on motion similar to the procedure laid down in O. 21, Rr. 58, 59 and 60 without compelling the person aggrieved to have recourse to the expensive remedy of a regular suit. 9 I.C. 344=13 Bom. L.R. 13. The language of S. 90 (1) is wide enough to confer on the Court the power of granting an injunction restraining proceedings in a foreign Court by creditors of an insolvent who is so adjudicated in a British Court, and the more so when the parties sought to be restrained carry on business within the Court's jurisdiction, even if they do not reside there and have assets within its jurisdiction which can by attached in the case of any breach of the injunction. Order for injunction refused on the particular facts. 35 C.W.N. 506. *See also* 39 C. W.N. 1135=62 C. 659. Extraordinary jurisdiction to call up case pending in mofussil Court, cannot be invoked by judge of High Court sitting in insolvency. *See* 31 C.W.N. 847=1927 Cal. 629.

Cl. (2).—The O. A. cannot be regarded as a "Court" while enquiring into claims made against the estate of an insolvent pending the insolvency and so the Ins. Court has no jurisdiction to award the costs of and incidental to such enquiry. 34 Bom.L.R. 1175=1933 B. 569.

(3) The Court may at any time adjourn any proceedings before it upon such terms, if any, as it thinks fit to impose.

(4) The Court may at any time amend any written process or proceeding under this Act upon such terms, if any, as it thinks fit to impose.

(5) Where by this Act or by rules the time for doing any act or thing is limited ,the Court may extend the time either before or after the expiration thereof, upon such terms, if any, as the Court thinks fit to impose.

(6) Subject to rules, the Court may in any matter take the whole or any part of the evidence either *viva voce* or by interrogatories, or upon affidavit, or by commission.

(7) For the purpose of approving a composition or scheme by joint debtors the Court may, if it thinks fit, and on the report of the official assignee that it is expedient so to do, dispense with the public examination of one of the joint debtors if he is unavoidably prevented from attending the examination by illness or absence abroad.

(8) For the purposes of this Act the [1][Court of the Judicial Commissioner of Sind] shall have all the powers to punish for contempt of Court which are possessed by the High Courts of Judicature at Fort William, Madras and Bombay, respectively.

Consolidation of petitions.

91. Where two or more insolvency petitions are presented against the same debtor or against joint debtors, or where joint debtors file separate petitions, the Court may consolidate the proceedings or any of them on such terms as the Court thinks fit.

Power to change carriage of petition.

92. Where the petitioner does not proceed with due diligence on his petition the Court may substitute as petitioner any other creditor to whom the debtor is indebted in the amount required by this Act in the case of a petitioning creditor.

Continuance of proceedings on death of debtor.

93. If a debtor by or against whom an insolvency petition has been presented dies, the proceeding the proceedings under an insolvency petition, either orders, be continued as if he were alive.

Power to stay proceedings.

94. The Court may, at any time, for sufficient reason, make an order staying the proceedings under an insolvency petition, either altogether or for a limited time on such terms and subject to such conditions as the Court thinks just.

Power to present petition against a partner.

95. Any creditor whose debt is sufficient to entitle him to present an insolvency petition against all the partners in a firm may present a petition against any one or more partners in the firm without including the others.

Power to dismiss petition against some respondents only.

96. Where there are more respondents than one to a petition, the Court may dismiss the petition as to one or more of them without prejudice to the effect of the petition as against the other or others of them.

LEG. REF.

[1] Substituted by Act IX of 1926, S. 8 and Act XXXIV of 1926, S. 3.

NOTES.

Sec. 90, Cl. (4).—After an order of adjudication has been made on specific acts of insolvency contained in affidavits filed in support of the creditor's petition the Court is not empowered to allow evidence to be given of acts of suspension of payment other than those contained in the petition and the affidavits filed. 1933 R. 280.

AMENDMENT—POWERS OF COURT.—A Court has wide powers to grant amendment under S. 90, cl. (4), and there would appear to be no objection to make an amendment where there is no question as to infraction of the law of limitation. 1935 S. 53.

Sec. 93.—Applicability of section—Scheme of composition—Subsequent annulment—Death of debtor in the interval—Who can apply for re-adjudication. 54 C. 650=105 I.C. 90.

Separate insolvency petitions against partners.

97. Where an order of adjudication has been made on an insolvency petition against or by one partner in a firm, any other insolvency petition against or by a partner in the same firm shall be presented in or transferred to the Court in which the first mentioned petition is in course of prosecution; and such Court may give such directions for consolidating the proceedings under the petitions as it thinks just.

Suits by official assignee and insolvent's partners.

98. (1) Where a partner in a firm is adjudged insolvent, the Court may authorize the official assignee to continue or commence and carry on any suit or other proceeding in his name and that of the insolvent's partner; and any release by the partner of the debt or demand to which the proceeding relates shall be void.

(2) Where application for authority to continue or commence any suit or any other proceeding has been made under sub-section (1) notice of the application shall be given to the insolvent's partner and he may show cause against it, and on his application the Court may, if it thinks fit, direct that he shall receive his proper share of the proceeds of the proceeding, and if he does not claim any benefit therefrom he shall be indemnified against costs in respect thereof as the Court directs.

Proceedings in partnership name.

99. (1) Any two or more persons, being partners, or any person carrying on business under a partnership name, may take proceedings or be proceeded against under this Act in the name of the firm:

Provided that in that case the Court may, on application by any person interested, order the names of the persons who are partners in the firm, or the name of the person carrying on business under a partnership name, to be disclosed in such manner and verified on oath or otherwise, as the Court may direct.

(2) In the case of a firm in which one partner is an infant, an adjudication order may be made against the firm other than the infant partner.

Warrants of insolvency Courts.

100. (1) A warrant of arrest issued by the Court may be executed in the same manner and subject to the same conditions as a warrant of arrest issued under the Code of Criminal Procedure, 1898, may be executed.

(2) A warrant to seize any part of the property of an insolvent, issued by the Court under section 59, sub-section (1), shall be in the form prescribed,

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NOTES.

Sec. 97.—Section provides that where insolvency proceedings are pending against one partner in a firm, any other insolvency petition shall be filed or transferred to the Court in which the first mentioned petition is in course of prosecution. 48 M. 514=48 M.L.J. 228. The section covers insolvency petitions presented under the Pro. Ins. Act to a Court which is subject to the superintendence of High Court. 48 M. 514. Substitution of another creditor—Permissibility —Time limit. 26 S.L.R. 162.

Sec. 98.—Under S. 98, the Court may authorise the O.A. to continue or commence any suit or proceeding in his name and that of the insolvent's partner and any release by the partner is void. But it does not appear that the O.A. can take possession of the goods of the partnership without the consent of the other partner or partners in whose possession they may happen to be. 124 I.C. 144=1930 M. 458=59 M.L.J. 501.

Sec. 99.—Applicability of the sections to a joint family firm. 25 S.L.R. 322=1931 S. 179. A joint Hindu family carrying on a business as such is not a "firm" within the meaning of that term as used in S. 99 and the members of the family are not "partners" of such a "firm." 14 Rang. 122=1936 Rang. 160. In proceedings taken for the adjudication of a joint family firm, it is not necessary to serve individual notices upon each member of the family. 14 R. 122. A Hindu trading family or a joint family business is not competent to initiate proceedings under the Act as it is not a firm or partnership. 39 C.W.N. 275; 162 I.C. 184=1936 R. 160. R. 47 of the Madras Ins. Rule does not apply to a petition to declare that a given person is a partner in a firm against which a petitio n has been presented In such a case the power is given in S. 99. But such an order passed under R 47 is not bad for irregularity of procedure. 22 I.C. 14

and sections 77 (2), 79, 82, 83, 84 and 102 of the said Code shall, so far as may be, apply to the execution of such warrant.

(3) A search warrant issued by the Court under section 59, sub-section (2), may be executed in the same manner and subject to the same conditions as a search warrant for property supposed to be stolen may be executed under the said Code.

PART VII.

LIMITATION.

Limitation of appeals.

101. The period of limitation for an appeal from any act or decision of the official assignee or from an order made by an officer of the Court empowered under section 6 shall be twenty days from the date of such act, decision or order, as the case may be.

PART VIII.

PENALTIES.

Undischarged insolvent obtaining credit.

102. An undischarged insolvent obtaining credit to the extent of fifty rupees or upwards from any person without informing such person that he is an undischarged insolvent shall, on conviction by a Magistrate, be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.

Punishment of insolvent for certain offences.

103. Any person adjudged insolvent who—

(*a*) fraudulently with the intent to conceal the state of his affairs or to defeat the objects of this Act,

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NOTES.

Sec. 101.—The period of 20 days provided by S. 101 runs from the date of the matter being completed and the report signed and not from the date of the finding being filed or signed. 60 I.C. 889=47 C. 721. The words "Official Assignee" in S. 101 cannot be construed to include trustees under a deed of composition. Moreover an application calling upon such trustees to admit a claim cannot rightly and properly be called an appeal from their decision within the meaning of S. 101. 173 I. C. 906=1937 C. 336.

Sec. 102.—S. 102 applies only to undischarged insovent adjudicated under the Act. 53 C. 929=1927 C. 149. The appellant an undischarged insolvent personated another person of the same name and obtained credit for more than Rs. 50 without disclosing his insolvency. *Held* that he was guilty of an offence under S. 102. 3 Bur.L.J. 329=1925 R. 176. An undischarged insolvent who obtains goods from another person on *jangad* (sale or return) without disclosing the fact that he is an undischarged insolvent commits the offence of "obtaining credit" within the meaning of S. 102. 58 B. 646=36 Bom.L.R. 731=152 I.C. 706.

AFTER-ACQUIRED PROPERTY — UNDISCHARGED INSOLVENT—MORTGAGE BY—IF AN OFFENCE.—An undischarged insolvent is entitled to deal with the property acquired by him after the order of adjudication by way of mortgage. The term "obtaining credit" is not the same thing as a mortgage which is not merely a promise by debtor to pay the loan but a conveyance as well. So the transfer of the property by way of mortgage in raising the loan on hypothecation of immovable property acquired by the insolvent after the adjudication order does not stand on the same footing as obtaining credit merely as mentioned in S. 102. The insolvent cannot therefore be convicted under S. 102 for having made such a mortgage without disclosing his insolvency. 61 C. 281=38 C.W.N. 283.

Sec. 103.—SCOPE OF SECTION.—Per *Rupchand J. C.*—Before an insolvent can be put on his trial before a Magistrate two conditions must be proved to exist *viz.*, that there are grounds to believe that the debtor has been guilty of an offence under the Act and secondly that the circumstances are such as to render a prosecution desirable. 1933 S. 381. S. 103 does not provide for the imposition of a fine and consequently such a sentence will be valid under the law. 48 C.L.J. 534=113 I.C. 851=1929 C. 80. Sub-ss. (*a*) (*iii*) and (*b*) (*ii*) of S. 103 deal with specific and distinct offences, the former of making false entry and the latter of making away with or charging or mortgaging or concealing, property. A joinder in one trial of three charges each constituting specific offences under both sub-sections is therefore illegal under S. 233, Cr. P. Code and the conviction is unsustainable. 151 I.C. 934=36 Bom.L.R. 639. Unless the Judge is satisfied that the money transferred was money belonging to the debtor he ought not to sanction the prosecution of the insolvent for an offence under S. 103 (*b*) (*ii*). Unless the Judge has clearly in his mind that some definite offence has been committed in the course of "the subsequent dealings of the insolvent" he is not

(i) has destroyed or otherwise wilfully prevented or purposely withheld the production of any book, paper or writing relating to such of his affairs as are subject to investigation under this Act, or

(ii) has kept or caused to be kept false books, or

(iii) has made false entries in or withheld entries from, or wilfully altered or falsified, any book, paper or writing relating to such of his affairs as are scbject to investigation under this Act, or

(*b*) fraudulently with intent to diminish the sum to be divided amongst his creditors or of giving an undue preference to any of the said creditors,

(i) has discharged or concealed any debt due to or from him, or

(ii) has made away with, charged, mortgaged, or concealed any part of his property of what kind soever,

shall on conviction be punishable with imprisonment for a term which may extend to two years.

Disqualifications of insolvent.

[1][103-A(1) Where a debtor is adjudged or re-adjudged insolvent under this Act, he shall, subject to the provisions of this section, be disqualified from—

(*a*) being appointed or acting as a Magistrate;

(*b*) being elected to any office of any local authority where the appointment to such office is by election, or holding or exercising any such office to which no salary is attached; and

(*c*) being elected or sitting or voting as a member of any local authority.

(2) The disqualifications which an insolvent is subject to under this section shall be removed, and shall cease if—

LEG. REF.

[1]Inserted by Act XI of 1920.

NOTES.

justified in sanctioning the prosecution merely because in the event it might turn out that the Magistrate can elicit from the evidence adduced in the course of the prosecution that an offence under the Ins. Act has been committed. 1933 R. 253.

Secs. 103 and 104.—Where a *prima facie* case is clearly made out at the preliminary inquiry, an order for proceedings being taken under S. 103 is certainly justified. 1933 S. 381. Offences, under the Ins. Act—Notice of charges—Framing of charges—Discrepancy. 47 C. 254=24 C.W.N. 425. There is no provision made in the section for imposition of a fine, and consequently an order imposing a fine for a conviction under the section is wrong. 32 C.W.N. 1140. S. 103 applies to offences committed both before and after the adjudication and also to cases of wilfully withholding the production of books even after they have come to the possession of the O.A. 32 C.W.N. 1140. A charge under S. 103 must be in pursuance of notice required to be issued under S. 104. 56 I.C. 577=24 C.W.N. 418. To constitute an offence under S. 103, the intent to give undue preference or diminish the divisible assets is essential, and unless this is shown to be the material result of the accused's action, such an intent cannot be inferred. 27 I.C. 753. Where it was proved that furniture was entrusted to a person by the O.A. for the purpose of continuing his business and that he in breach of the trust disposed of the furniture to various persons *held*, that assuming that the facts amount to an offence under S. 103 (*b*) (2), it cannot be said that the Magistrate had no jurisdiction over the case. 105 I.C. 448=1927 M. 1018. There is no fraudulent preference where an insolvent arranges with each of his creditors for payment of a definite fraction of their dues where he alleges that others also have received the same, but the creditors never acted upon it. 11 I.C. 809; 4 Bur.L.T. 200. Where the accused was proceeded against for charges under S. 103, *held*, that the Magistrate should try the case against the accused and that he has no power to commit him to the High Court Sessions for trial. 56 C. 785=1929 C. 777. On this section *see also* 25 M.L.J. 577. To support a conviction under S. 103 a charge must be made against the insolvent and the same must be proved beyond reasonable doubt before it can be made a ground for refusing to discharge the insolvent under S. 39 (1). 5 R. 50=1927 R. 126.

Sec. 103-A.—S. 103-A of the Act is not impliedly repealed by S. 12 of the Rangoon City Municipal Act. It is quite possible to read the two sections together by saying that their combined effect is that an undischarged insolvent is disqualified for election, but that his disqualification only ceases when he gets his discharge *plus* the certificate mentioned in S. 103-A. It may not be necessary that there should be a separate document headed "certificate"; but there must be somewhere in the record a statement by the Court granting the discharge that the insolvency of the insolvent was caused by misfortune without any misconduct on his part. 1941 Rang.L.R. 615.

(*a*) the order of adjudication is annulled under sub-section (1) of section 21, or

(*b*) he obtains from the Court an order of discharge, whether absolute or conditional, with a certificate that his insolvency was caused by misfortune without any misconduct on his part.

(3) The Court may grant or refuse such certificate as it thinks fit.]

Procedure on charge under section 103.

[1][104. (1) Where the Court is satisfied, after such preliminary inquiry, if any, as it thinks necessary, that there is ground for inquiring into any offence referred to in section 103 and appearing to have been committed by the insolvent, the Court may record a finding to that effect and make a complaint of the offence in writing to a Presidency Magistrate or a Magistrate of the first class having jurisdiction, and such Magistrate shall deal with such complaint in the manner laid down in the Code of Criminal Procedure, 1898.

(2) Any complaint made by the Court under sub-section (1) may be signed by such officer of the Court as the Court may appoint in this behalf.].

Criminal liability after discharge or composition.

105. Where an insolvent has been guilty of any of the offences specified in section 102 or section 103, he shall not be exempt from being proceeded against therefor by reason that he has obtained his discharge or that a composition or scheme of arrangement has been accepted or approved.

LEG. REF.

[1] Substituted by Act IX of 1926 S. 9.

NOTES.

Sec. 104.—EFFECT OF AMENDMENT.—Complaint filed after the Amending Act of 1926 (S. 104) came into force—Ins. proceedings initiated prior to amendments—Enquiry is governed by Act amended. 32 C.W.N. 1140. The O. A's report is evidence of the matter reported only when the matter is one with regard to which the O. A. is directed or empowered by the Act to make a report. It is not evidence in a criminal proceeding. 20 I.C. 482=25 M.L.J. 230. Depositions under S. 36 cannot be admitted in evidence but the record of insolvent's examination under S. 27 is evidence which can be taken into consideration against him in proceedings under S. 104 of the Act as criminal proceedings in the Presidency Magistrate's Court are under S. 103 proceedings under the Act. *Held also* that the amended Act is applicable to a proceeding started on 12th July 1927. 48 C.L.J. 534=1929 C. 80

COMPLAINT UNDER THE SECTION—CONSIDERATIONS—NOTICE TO INSOLVENT—DESIRABILITY.—In considering whether a complaint should be made under S. 104 the Court has not only to take into account the probability of the criminal proceedings being successful or the reverse. but also must determine upon a consideration of the case as a whole ,whethe it is desirable in the public interest that an example should be made of an insolvent whose conduct has been so bad that criminal proceedings ought to be taken against him as deterrent against the same or similar offences being committed by other insolvents. In any case the Judge is at liberty to proceed under S. 104 with or without a preliminary enquiry being made. Further, an application under S. 104 is not one in which the insolvent, against whom proceedings are proposed, is entitled to take part, unless invited to do so by the Court but it cannot be said that where an insolvent is not heard on an application under S. 104 the insolvent is not thereby prejudiced in any way, because in the event of proceedings by way of prosecution being instituted he has , of course, ample opportunity of appearing and defending himself in those proceedings when launched. It depends on the circumstances ; and it may often be of great importance to the insolvent that he should have an opportunity of explaining to the Court the reasons why he contends that the Court should not proceed to the extreme limit of making a complaint under S. 104 against him in a Criminal Court, 1935 R. 324.

EXERCISE OF POWERS UNDER THE SECTION.—St is open to the Court at any stage of the proceedings after the adjudication order has been passed and even after discharge, to exercise the discretion with which it is vested under S. 104. It is not necessary, and in many cases, it would be undesirable, that the Court should order that a complaint be made under S. 104 at the hearing of an application for discharge. Different considerations arise when the Court is called upon to decide whether, and if so upon what terms, an insolvent should be granted his discharge, and whether the Court should exercise the powers which it possesses under S. 104 ; 1935 R. 524.

PART IX.

SMALL INSOLVENCIES.

Summary administration in small cases.

106. (1) Where the Court is satisfied by affidavit or otherwise, or the official assignee reports to the Court, that the property of an insolvent is not likely to exceed in value three thousand rupees or such other less amount as may be prescribed, the Court may make an order that the insolvent's estate be administered in a summary manner, and thereupon the provisions of this Act shall be subject to the following modifications, namely:—

(*a*) no appeal shall lie from any order of the Court, except by leave of the Court;

(*b*) no examination of the insolvent shall be held except on the application of a creditor or the official assignee;

(*c*) the estate shall, where practicable, be distributed in a single dividend; ..

(*d*) such other modifications as may be prescribed with the view of saving expense and simplifying procedure:

Provided that nothing in this section shall permit the modification of the provisions of this Act relating to the discharge of the insolvent.

(2) The Court may at any time, if it thinks fit, revoke an order for the summary administration of an insolvent's estate.

PART X.

SPECIAL PROVISIONS.

Exemption of corporation, etc., from insolvency proceedings.

107. No insolvency petition shall be presented against any corporation or against any association or company registered under any enactment for the time being in force.

Administration in insolvency of estate of person dying insolvent.

108. (1) Any creditor of a deceased debtor whose debt would have been sufficient to support an insolvency petition against the debtor, had he been alive, may present to the Court within the limits of whose ordinary original civil jurisdiction the debtor resided or carried on business for the greater part of the six months immediately prior to his decease a peti-

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NOTES.

Sec. 106.—Where the Ins. Court refused leave to appeal under S. 106 (*a*), it is open to the unsuccessful party to apply to the Court of appeal for special leave to appeal. 25 Bom.L. R. 161=1923 B. 245. A Court has jurisdiction to order the public examination of an insolvent on the application made by the creditors even after the insolvent has applied for a discharge, though the Court will countenance such an attempt when the creditors purposely delay applying for such examination as an indirect method of obtaining the postponement of the insolvent's discharge. 120 I.C. 94=1930 S. 76. Under S. 106 (1) (*a*) it is quite clear that where an insolvent's estate has been ordered to be administered in a summary manner, no appeal lies from any order of the Court except by leave of Court, and so where no leave is obtained the appeal cannot be entertained. 51 L.W. 433=1940 Mad. 572=(1940) 1 M.L.J. 533.

Sec. 107.—*See* 38 M. 500.

Sec. 108.—S. 7 is applicable only to cases where there has been an adjudication in insolvency. It is not applicable to proceedings to administer a deceased debtor's estate initiated under S. 108. 36 L.W. 703=63 M.L.J. 810 (15 Q.B.D. 195, Rel. on). On this section, *see* 15 C.W.N. 359; 27 M.L.J. 66. A creditor is not entitled to an administration order *ex debito justitiae* upon proof of the statutory conditions precedent, but the Court has a discretion to disallow the petition of the creditor when it finds that sufficient cause is shown for dismissing the petition. 29 S.L.R. 410=1936 S. 175, The jurisdiction of the Ins. Court to administer the estate of a deceased debtor is limited to cases in which the debtor has resided or personally carried on business within its limits. 29 S.L.R. 410=1936 S. 175. The mere fact that a person is a partner in a business carried on in a particular place does not constitute his carrying on business at that place within the meaning of S. 108. 1936 S. 175. There is no

tion in the prescribed fom praying for an order for the administration of the estate of the deceased debtor under this Act.

(2) Upon the prescribed notice being given to the legal representative of the deceased debtor, the Court may, upon proof of the petitioner's debt unless the Court is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased, make an order for the administration in insolvency of the deceased debtor's estate, or may upon cause shown dismiss the petition with or without costs.

(3) A petition for administration under this section shall not be presented to the Court after proceedings have been commenced in any Court of justice for the administration of the deceased debtor's estate; but that Court may in that case, on proof that the estate is insufficient to pay its debts, transfer the proceedings to the Court exercising jurisdiction in insolvency under this Act, and thereupon the last mentioned Court may make an order for the administration of the estate of the deceased debtor, and the like consequences shall ensue as under an administration order made on the petition of a creditor.

Vesting of estate and mode of administration.

109. (1) Upon an order being made for the administration of a deceased debtor's estate under section 108, the property of the debtor shall vest in the official assignee of the Court and he shall forthwith proceed to realize and distribute the same in accordance with the provisions of this Act.

(2) With the modification hereinafter mentioned, all the provisions of Part III, relating to the administration of the property of an insolvent, shall, so far as the same are applicable, apply to the case of scch administration order in like manner as to an order of adjudication under this Act.

(3) In the administration of the property of the deceased debtor under an order of administration, the official assignee shall have regard to any claims by the legal representative of the deceased debtor to payment of the proper funeral and testamentary expenses incurred by him in and about the debtor's estate; and those claims shall be deemed a preferential debt under order, and be payable in full, out of the debtor's estate, in priority to all other debts.

(4) If, on the administration of a deceased debtor's estate, any surplus remains in the hands of the official assignee after payment in full of all the debts due from the debtor together with the costs of the administration and interest as provided by this Act in case of insolvency, such surplus shall be paid over to the legal representative of the deceased debtor's estate, or dealt with in such other manner as may be prescribed.

110. (1) After notice of the presentation of a petition under section 108

NOTES.

difference between the administration of the estate of an insolvent who is alive and the administration of the estate of a person who dies insolvent but was not adjudicated before his death. The administration in insolvency of a deceased debtor's estate under S. 108 of the Presidency-Towns Insolvency Act must necessarily mean that the uncharged assets of the estate are to be utilised for the general body of creditors, and as a mere attachment creates, no charge, an attaching creditor against the estate is in no better position than any other ordinary creditor I.L.R. (1941) Mad. 398=52 L.W. 894=1941 Mad. 183=(1940) 2 M.L.J. 979.

Sec. 109.—Under S. 109, the property vests in the O.A. the moment an administration order under S. 108 is pronounced. The drawing up of the order does not delay the vesting nor a direction by the Judge that the order (pronounced by him) should not be drawn up for some time. So another person subsequently appointed administrator in an administration suit has no power over the estate or to sue for the recovery of sums of money due to it. 59 C. 1475=36 C.W.N. 861.

Sec. 110.—A transfer of property made by the administrator of an insolvent's estate can be avoided only by the O.A. under S. 110 and

Payments or transfer by legal representatives.

no payment or transfer of property made by the legal representatives shall operate as a discharge to him as between himself and the official assignee.

(2) Save as aforesaid nothing in section 108 or section 109 or this section shall invalidate any payment made or act or thing done in good faith by the legal representative or by a District Judge acting under the powers conferred on him by section 64 of the Administrator-General's Act, 1874, before the date of the order for administration.

Saving of jurisdiction of Administrator-General.

111. The provisions of sections 108, 109 and 110 shall not apply to any case in which probate or letters of administration to the estate of a deceased debtor have been granted to an Administrator-General.

PART XI.

RULES.

Rules.

[1]112. (1) The Courts having jurisdiction under this Act may from time of time make rules for carrying into effect the objects of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for and regulate—

(*a*) the fees and percentages to be charged under this Act and the manner in which the same are to be collected and accounted for and the account to which they are to be paid;

(*b*) the investment, whether separately or collectively, of unclaimed dividends, balances and other sums appertaining to the estates of insolvent debtors whether adjudicated insolvent under this or any former enactment; and the application of the proceeds of such investment;

(*c*) The proceedings of the official assignee in taking possession of and realising the estates of insolvent debtors;

(*d*) [2][* * * *]

(*e*) the receipts, payments and accounts of the official assignee;

(*f*) the audit of the accounts of the official assignee;

(*g*) the payment of the [2][* * * * * * *] costs of the audit of his accounts out of the proceeds of the investments in his hands;

(*h*) the payment of the costs incurred in the prosecution of fraudulent debtors and in legal proceedings taken by the official assignee under the direction of the Court out of the proceeds aforesaid;

(*i*) the payment of any civil liability incurred by an official assignee acting under the order or direction of the Court;

(*j*) the proceedings to be taken in connection with proposals for composition and schemes of arrangement with the creditors of insolvent debtors;

LEG. REF.

[1] This section has been amended in Bombay by Bom. Act XX of 1933 and Bom. Act III of 1935, and in Calcutta by Beng. Act XVIII of 1936.

[2] Cl. (*d*) and portion in cl. (*g*) omitted by A. O., 1937.

NOTES.

not by the creditors. 5 R. 375=104 I.C. 89 =1927 R. 284. Ss. 36 and 56 do not apply to cases where the estate of a deceased is being administered in insolvency and a creditor cannot on the O. A's refusal to take action obtain the leave of the Court and apply to set aside a transfer. 1827 Rang. 294. As soon as the O. A. refused to take action, it is open to the creditor to appeal to the Court against the decision under S. 86. 1927 Rang. 284.

Sec. 112.—The O. A. is entitled under, R. 202 (2) of the Rangoon High Court Rules framed under this Act, to his commission over the entire sale proceeds of a property equitably mortgaged and auctioned free from mortgage with the consent of the mortgagee. 129 I.C. 497 =8 R. 514. No creditor can take the benefit of composition, unless he has proved his debt before the approval of such composition in view of R. 154 of the Karachi Town Ins. Rules. Hence where a creditor has not lodged his proof with the O. A. and he has not proved his debt under the Act, he cannot proceed against the surety under the composition. 1935 S. 137.

(*k*) the intervention of the official assignee at the hearing of applications and matters relating to insolvent debtors and their estates;

[1][(*kk*) filing of lists of creditors and debtors and the affording of assistance to the Court by a petitioning debtor];

(*l*) the examination by the official assignee of the books and papers of account of undischarged insolvent debtors;

(*m*) the service of notices in proceedings under this Act;

(*n*) the appointment, meetings and procedure of committees of inspection;

(*o*) the conduct of proceedings under this act in the name of a firm;

(*p*) the forms to be used in proceedings under this Act;

(*q*) the procedure to be followed in the case of estates to be administered in a summary manner;

(*r*) the procedure to be followed in the case of estates of deceased persons to be administered under this Act;

[2][(*s*) the distribution of work between the official assignee and his deputy or deputies];

[and, in the case of the High Court at Madras, may also provide for and regulate the remuneration of the official assignee and the payment of the costs, charges and expenses of his establishment][3]

"Sanction to rules".

113. [Rules made under the provisions of this Part shall be subject to the previous sanction of the [Provincial Government][4]

114. Rules so made and sanctioned shall be published [5][* *] in the Official Gazette, [5][* *] and shall thereupon have the same force and effect with regard to proceedings under this Act in the Court which made them as if they had been enacted in this Act.

PART XII.

SUPPLEMENTAL.

Exemption from duty of transfers, etc., under this Act.

115. (1) Every transfer, mortgage, assignment, power-of- attorney, proxy paper, certificate, affidavit, bond or other proceedings, instrument or writing whatsoever before or under any order of the Court, and any copy thereof shall be exempt from payment of any stamp or other duty whatsoever.

(2) No stamp duty or fee shall be chargeable for any application made by the official assignee to the Court under this Act, or for the drawing and issuing of any order made by the Court on such application.

LEG. REF.

[1] Cl. (*kk*) added by Act XIX of 1907.
[2] Cl. (*s*) added by Act X of 1930.
[3] Added by Order in Council, 1937.
[4] S. 113 substituted for old S. 113 by A.O., 1937.
[5] Words 'in the Gazette of India or,' and 'as the case may be' omitted by A.O., 1937.

NOTES.

Sec. 113.—As to formalities and procedure in respect of a petition by creditor laid down by R. 81 (Calcutta High Court), *see* 1936 C. 269 =166 I.C. 657.

Sec. 115.—S. 115 exempts from stamp duty in some cases the copy of the order appealed against. *See* 43 M. 747=39 M.L.J. 135. The purpose of S. 115 is clearly to save as much as possible of the insolvent's estate for distribution among the creditors. I.L.R. (1939) 1 Cal 56= 42 C.W.N. 1146=1938 Cal. 755. A copy of the notes of the insolvent's examination under S. 27 of the Act is a copy of proceedings before the Court within the meaning of S. 115 (1): *See* 1938 Cal. 755=42 C. W. N. 1146=I. L. R. (1939) 1 Cal. 56.

116. (1) A copy of the Official Gazette containing any notice inserted in pursuance of this Act shall be evidence of the facts stated in the notice.

The Gazette to be evidence.

(2) A copy of the Official Gazette containing any notice of an order of adjudication shall be conclusive evidence of the order having been duly made, and of its date.

117. Any affidavit may be used in a Court having jurisdiction under this Act if it is sworn—

Swearing of affidavits.

(*a*) in British India, before—

(i) any Court or Magistrate, or

(ii) any officer or other person appointed to administer oaths under the Code of Civil Procedure;

(*b*) in England, before any person authorized to administer oaths in His Majesty's High Court of Justice, or in the Court of Chancery of the County Palatine of Lancaster, or before any Registrar of a Bankruptcy Court or before any officer of a Bankruptcy Court authorized in writing in that behalf by the Judge of the Court or before a Justice of the Peace for the county or place where it is sworn;

(*c*) in Scotland or in Ireland, before a Judge Ordinary, Magistrate or Justice of the Peace; and

(*d*) in any other place, before a Magistrate or Justice of the Peace or other person qualified to administer oaths in that place (he being certified to be a Magistrate or Justice of the Peace, or qualified as aforesaid, by a British Minister or British Consul or British Political Agent or by a notary public).

118. (1) No proceeding in insolvency shall be invalidated by any formal defect or by any irregularity unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that Court.

Formal defect not to invalidate proceedings.

(2) No defect or irregularity in the appointment of an official assignee or member of a committee of inspection shall vitiate any act done by him in good faith.

119. Where an insolvent is a trustee within the Indian Trustee Act, 1866, section 35 of that Act shall have effect so as to authorize the appointment of a new trustee in substitution for the insolvent (whether voluntarily resigning or not), if it appears expedient to do so, and all provisions of that Act and of any other Act relative thereto, shall have effect accordingly.

Application of Trustee Act to insolvency of trustee.

NOTES.

Sec. 116.—An order of application of a person as insolvent is not as regards the particular acts of bankruptcy on which it is founded final and conclusive as against third parties. 50 M. 541=101 I.C. 12; 1927 M. 526=52 M.L.J. 352. *See also* 45 C.W.N. 441. Thus the Notification issued under S. 116 is conclusive only with regard to the order having been duly made and as regards the other facts it is only evidence of such facts. 50 M. 541. To render the decision regarding such acts of bankruptcy binding on third persons the O. A. should adopt the procedure prescribed by the Act. 50 M. 541. An order of adjudication is duly published in the Gazette as required by S. 116 (2) unless vacated by a competent Court, is binding on all persons and is conclusive evidence against them that the acts of insolvency mentioned in the petition were committed by the debtor. S. 116 (2) does not restrict its effect to the petitioning creditor and debtor only why there is no reason it should not extend to third parties also. 30 S.L.R. 281; 1936 S. 246. On this section *see also* 45 C.W.N. 441.

Sec. 118.—*See* 30 C.W.N. 914=1926 C. 1097.

120. Save as herein provided, the provisions of this Act relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge shall bind the Crown.

Certain provisions to bind the Crown.

121. Nothing in this Act, or in any transfer of jurisdiction effected thereby, shall take away or affect any right of audience that any person may have had immediately before the commencement of this Act or shall be deemed to confer such right in insolvency matters on any person who had not a right of audience before the Courts for the Relief of Insolvent Debtors.

Saving for existing rights of audience.

122. Where the official assignee has under his control any dividend which has remained unclaimed for fifteen years from the date of declaration or such less period as may be prescribed, he shall pay the same to the account and credit of the [Provincial Government][1] unless the Court otherwise directs.

Lapse and credit to Government of unclaimed dividends.

123. Any person claiming to be entitled to any moneys paid to the account and credit of the [Provincial Government][1] under section 122, may apply to the Court for an order for payment to him of the same; and the Court, if satisfied that the person claiming is entitled, shall make an order for payment to him of the sum due:

Claims to moneys credited to Government under section 122.

Provided that, before making an order for the payment of a sum which has been carried to the account and credit of the [1][Provincial Government] the Court shall cause a notice to be served on such officer as the [1][Provincial Government] may appoint in this behalf, calling on the officer to show cause, within one month from the date of the service of the notice, why the order should not be made.

124. (1) No person shall, as against the official assignee, be entitled to withhold possession of the books of accounts belonging to the insolvent or to set up any lien thereon.

Access to insolvent's books.

(2) Any creditor of the insolvent may, subject to the control of the Court, and on payment of such fee, if any, as may be prescribed, inspect at all reasonable times, personally or by agent, any such books in the possession of the official assignee.

125. Such fees and percentages shall be charged for and in respect of proceedings under this Act as may be prescribed.

Fees and percentage.

126. All Courts having jurisdiction under this Act shall make such orders and do such things as may be necessary to give effect to section 118 of the Bankruptcy Act, 1883 and to section 50 of the Provincial Insolvency Act, 1907.

Courts to be auxiliary to each other.

LEG. REF.

[1] Substituted for "Government of India" by A. O. 1937.

NOTES.

Sec. 121.—The Attorneys of the High Court have right of audience before the Officer appointed by the Chief Justice under S. 6 of the Act. S. 121 preserves this right of audience possessed by attorneys. 37 B. 464=19 I.C. 421=15 Bom.L.R. 217.

Sec. 125.—S. 125 does not give the Court power to prescribe a fee in respect of a matter covered by S. 115 of the Act. I.L.R. (1939) 1 Cal. 56=42 C.W.N. 1146=1938 Cal. 755.

Sec. 126.—*See* 38 C. 542=12 I.C. 14. Rangoon High Court—Power to call upon the Madras High Court to act in aid—(English) Bankruptcy Act, 1914, S. 122—Scope. *See* 34 L.W. 765.

Repeal of enactments.

127. (1) [1][* * * * *].

Saving.

(2) [2][* * *] The proceedings under an insolvency petition under the Indian Insolvency Act, 1848, pending at the commencement of this Act shall, except so far as any provisions of this Act is expressly applied to pending proceedings, continue, and all the provisions of the said Indian Insolvency Act shall, except as aforesaid, apply thereto as if this Act had not been passed.

THE FIRST SCHEDULE.

(*See* section 26.)

MEETINGS OF CREDITORS.

1. MEETINGS OF CREDITORS.—The Official Assignee may at any time summon a meeting of creditors, and shall do so whenever so directed by the Court or by the creditors by resolution at any meeting or whenever requested in writing by one-fourth in value of the creditors who have proved.

2. SUMMONING OF MEETINGS.—Meetings shall be summoned by sending notice of the time and place thereof to each creditor at the address given in his proof, or, if he has not proved, at the address given in the insolvent's schedule, or such other address as may be known to the official assignee.

3. NOTICE OF MEETINGS.—The notice of any meeting shall be sent off not less than seven days before the day appointed for the meeting and may be delivered personally or sent by prepaid post letter, as may be convenient. The official assignee may, if he thinks fit, also publish the time and place of any meeting in any local newspaper or in the Official Gazette.

4. DUTY OF INSOLVENT TO ATTEND IF REQUIRED.—It shall be the duty of the insolvent to attend any meeting which the official assignee may, by notice, require him to attend, and any adjournment thereof. Such notice shall be either delivered to him personally or sent to him at his address by post at least three days before the date fixed for the meeting.

5. PROCEEDING NOT TO BE AVOIDED FOR NON-RECEIPT OF NOTICE.—The proceedings held and resolutions passed at any meeting shall, unless the Court otherwise orders, be valid notwithstanding that any creditor has not received the notice sent to him.

6. PROOF OF ISSUE OF NOTICE.—A certificate of the official assignee that the notice of any meeting has been duly given shall be sufficient evidence of such notice having been duly sent to the person to whom the same was addressed.

7. COSTS OF MEETING.—Where on the request of creditors the official assignee summons a meeting, there shall be deposited with the written request the sum of five rupees for every twenty creditors for the costs of summoning the meeting, including all disbursements:

Provided that the official assignee may require such further sum to be deposited as in his opinion shall be sufficient to cover the costs and expenses of the meeting.

8. CHAIRMAN.—The official assignee shall be the chairman of any meeting.

9. RIGHT TO VOTE.—A creditor shall not be entitled to vote at a meeting unless he has duly proved a debt provable in insolvency to be due to him from the insolvent, and the proof has been duly lodged one clear day before the time appointed for the meeting.

10. NO VOTE IN RESPECT OF CERTAIN DEBTS.—A creditor shall not vote at any such meeting in respect of any unliquidated or contingent debt, or any debt the value of which is not ascertained.

11. SECURED CREDITOR.—For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance, if any, due to him after deducting the value of his security. If he votes in respect of his whole debt, he shall be deemed to have surrendered his scurity, unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence.

12. PROOF IN RESPECT OF NEGOTIABLE INSTRUMENTS.—Where a creditor seeks to prove in respect of a bill of exchange, promissory note, or other negotiable instrument or security on which the insolvent is liable such bill of exchange, note, instrument or security must,

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LEG. REF.

[1]Repealed by Act X of 1914, Sch. II. it ran thus:—"The enactments mentioned in Sch. III are hereby repealed to the extent specified in the fourth column thereof."

[2] The words "Notwithstanding the repeal effected by the Act" were repealed by Act X of 1914, Sch. II.

subject to any special order of the Court made to the contrary, be produced to the official assignee before the proof can be admitted for voting.

13. POWER TO REQUIRE CREDITOR TO GIVE UP SECURITY.—It shall be competent to the official assignee, within twenty-eight days after a proof estimating the value of a security has been made use of in voting at any meeting, to require the creditor to give up the security for the benefit of the creditors, generally, on payment of the value so estimated.

14. PROOF BY PARTNER.—If one partner in a firm is adjudged insolvent, any creditor to whom that partner is indebted jointly with the other partners in the firm or any of them, may prove his debt for the purpose of voting at any meeting of creditors and shall be entitled to vote thereat.

15. POWER OF OFFICIAL ASSIGNEE TO ADMIT OR REJECT PROOF.—The official assignee shall have power to admit or reject a proof for the purpose of voting, but his decision shall be subject to appeal to the Court. If he is in doubt whether the proof of a creditor should be admitted or rejected, he shall mark the proof as objected to, and shall allow the creditor to vote, subject to the vote being declared invalid in the event of the objection being sustained.

16. PROXY.—A creditor may vote either in person or by proxy.

17. INSTRUMENT OF PROXY.—Every instrument of proxy shall be in the prescribed form and shall be issued by the official assignee.

18. GENERAL PROXY.—A creditor may give a general proxy to his attorney or to his manager or clerk, or any other person, in his regular employment. In such case the instrument of proxy shall state the relation in which the person to act thereunder stands to the creditor.

19. PROXY TO BE DEPOSITED ONE DAY BEFORE DATE OF MEETING.—A proxy shall not be used unless it is deposited with the official assignee one clear day before the time appointed for the meeting at which it is to be used.

20. OFFICIAL ASSIGNEE AS PROXY.—A creditor may appoint the official assignee to act as his proxy.

21. ADJOURNMENT OF MEETING.—The official assignee may adjourn the meeting from time to time and from place to place, and no notice of the adjournment shall be necessary.

22. MINUTE OF PROCEEDINGS.—The official assignee shall draw up a minute of the proceedings at the meeting and shall sign the same.

THE SECOND SCHEDULE.

(*See* section 48)

PROOF OF DEBTS.

Proofs in ordinary cases.

1. TIME FOR LODGING PROOF.—Every creditor shall lodge the proof of his debt as soon as may be after the making of an order of adjudication.

2. MODE OF LODGING PROOF.—A proof may be lodged by delivering or sending by post in a registered letter to the official assignee an affidavit verifying the debt.

3. AUTHORITY TO MAKE AFFIDAVIT.—The affidavit may be made by the creditor himself or by some person authorized by or on behalf of the creditor. If made by a person so authorized, it shall state his authority and means of knowledge.

4. CONTENTS OF AFFIDAVIT.—The affidavit shall contain or refer to a statement of account showing the particulars of the debt, and shall specify the vouchers, if any, by which the same can be substantitated. The official assignee may at any time call for the production of the vouchers.

5. AFFIDAVIT TO STATE IF CREDITOR HOLDS SECURITY.—The affidavit shall state whether the creditor is or is not a secured creditor.

6. COSTS OF PROVING DEBTS.—A creditor shall bear the cost of proving his debt unless the Court otherwise specially orders.

7. RIGHT TO SEE AND EXAMINE PROOF.—Every creditor who has lodged a proof shall be entitled to see and examine the proofs of other creditors at all reasonable times.

8. DEDUCTION TO BE MADE FROM PROOF.—A creditor in lodging his proofs shall deduct from his debt all trade discounts, but he shall not be compelled to deduct any discount, not exceeding five per centum on the net amount of his claims, which he may have agreed to allow for payment in cash.

Proof by secured creditors.

9. PROOF WHERE SECURITY REALISED.—If a secured creditor realises his security, he may prove for the balance due to him, after deducting the net amount realized.

10. PROOF WHERE SECURITY IS SURRENDERED.—If a secured creditor surrenders his security to the official assignee for the general benefit of the creditors, he may prove for his whole debt.

11. PROOF IN OTHER CASES.—If a secured creditor does not either realise or surrender his security, he shall, before ranking for dividend, state in his proof the particulars of his security, the date when it was given and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.

12. (1) VALUATION OF SECURITY.—Where a security is so valued the official assignee may at any time redeem it on payment to the creditor of the assessed value.

(2) If the official assignee is dissatisfied with the value at which a security is assessed he may require that the property comprised in any security so valued be offered for sale at such times and on such terms and conditions as may be agreed on between the creditor and the official assignee, or as, in default of agreement, the Court may direct. If the sale is by public auction the creditor, or the official assignee on behalf of the estate, may bid or purchase:

Provided that the creditor may at any time, by notice in writing, require the official assignee to elect whether he will or will not exercise his power of redeeming the security or requiring it to be realized, and if the official assignee does not within six months after receiving the notice, signify in writing to the creditor his election to exercise the power, he shall not be entitled to exercise it; and the equity of redemption, or any other interest in the property comprised in the security which is vested in the official assignee, shall vest in the creditor, and the amount of his debt shall be reduced by the amount at which the security has been valued.

13. AMENDMENT OF VALUATION.—Where a creditor has so valued his security, he may at any time amend the valuation and proof on showing to the satisfaction of the official assignee or the Court, that the valuation and proof were made *bona fide* on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation; but every such amendment shall be made at the cost of the creditor, and upon such terms as the Court shall order, unless the official assignee shall allow the amendment without application to the Court.

14. REFUND OF EXCESS RECEIVED.—Where a valuation has been amended in accordance with the foregoing rule, the creditor shall forthwith repay any surplus dividend which he has received in excess of that to which he would have been entitled on the amended valuation, or, as the case may be, shall be entitled to be paid out of any money for the time being available for dividend any dividend or share of dividend which he has failed to receive by reason of the inaccuracy of the original valuation, before that money is made applicable to the payment of any future dividend, but he shall not be entitled to disturb the distribution of any dividend declared before the date of the amendment.

15. AMENDMENT WHERE SECURITY SUBSEQUENTLY REALIZED.—If a creditor after having valued his security subsequently realizes it, or if it is realised under the provisions of rule 12, the net amount realized shall be substituted for the amount of any valuation previously made by the creditor and shall be treated in all respects as an amended valuation made by the creditor.

16.—EXCLUSION FROM SHARING IN DIVIDEND.—If a secured creditor does not comply with the foregoing rules, he shall be excluded from all share in any dividend.

17. LIMIT OF RECEIPT.—Subject to the provisions of rule 12, a creditor shall in no case receive more than sixteen annas in the rupee and interest as provided by this Act.

NOTES.

Sch. II, Cl. 11.—The shares standing in the name of the wife of the insolvent are *prima facie* her property and a lien over the property of a stranger is in no sense a lien over the property of a debtor so as to attract the applicability of the rules pertaining to proof or claims by secured creditors. 27 S.L.R. 224=1933 S. 355. Certain shares of a Co-operative Bank were held by the insolvents, a trading firm. The bank proved their claim without disclosing their lien or giving credit for the shares. On an application by the O.A.it was contended by them at (*i*) under the provisions of S. 26 of the Bom bay Co-operative Societies Act, 1925, the shares were exempt from attachment at sale or the claims of O. A. that the provisions of the Ins. law relating to proof by secured creditors applied only to property which vested in the O.A. (*ii*) that under bye-law 8 of the Bank, a member may be expelled and his shares forfeited on his insolvency. *Held*, (*i*) that the shares which stood in the names o fthe insolvents were indubitably their property over which the insolvents had a disposing power subject to the lien; (*ii*) that on their insolvency they had not been in fact expelled of their shares forfeited so far and bye-law 8 was of no avail; that if necessary the value of the shares may be indirectly made available for the benefit of the creditors by making it a condition to the discharge of the insolvents; that they should dispose of them and pay their value to the O.A. and that therefore the bank should be directed to value or relinquish their security. 27 S.L.R. 224=1933 S. 355.

Sch. II, Cl. 12 (2) (Proviso).—The failure of the O. A. to signify this election to exercise the powers to redeem the property within the time allowed puts an end to his equity of redemption which without more vests in the mortgagee, 26 S.L.R. 29=1932 S. 73.

Taking accounts of Property mortgaged, and of the Sale thereof.

18. INQUIRY INTO MORTGAGE, ETC.—Upon application by any person claiming to be a mortgagee of any part of the insolvent's real or leasehold estate and whether such mortgage is by deed or otherwise, and whether the same is of a legal or equitable nature, or upon application by the official assignee with the consent of such person claiming to be a mortgagee as aforesaid, the Court shall proceed to inquire whether such person is such mortgagee and for what consideration and under what circumstances; and if it is found that such person is such mortgagee, and if no sufficient objection appears to the title of such person to the sum claimed by him under such mortgage, the Court shall direct such accounts and inquiries to be taken as may be necessary for ascertaining the principal, interest and costs due upon such mortgage, and of the rents and profits, or dividends, interest or other proceeds received by such person or by any other person by his order or for his use in case he has been in possession of the property over which the mortgage extends, or any part thereof, and the Court, if satisfied that there ought to be a sale, shall direct notice to be given in such newspapers as the Court thinks fit, when and where, and by whom and in what way the said premises or property, or the interest therein so mortgaged, are to be sold, and that such sale be made accordingly, and that the official assignee (unless it is otherwise ordered) shall have the conduct of such sale; but it shall not be imperative on any such mortgagee to make such application. At any such sale the mortgagee may bid and purchase.

19. CONVEYANCE.—All proper parties shall join in the conveyance to the purchaser, as the Court directs.

20. PROCEEDS OF SALE.—The monies to arise from such sale shall be applied, in the first place, in payment of the costs, charges and expenses of and occasioned by the application to the Court, and of such sale and commission (if any) of the official assignee, and in the next place in payment and satisfaction, so far as the same extend, of what shall be found due to such mortgagee, for principal, interest and costs, and the surplus of the sale monies (if any) shall then be paid to the official assignee. But if the monies to arise from such sale are insufficient to pay and satisfy what is so found due to such mortgagee, then he shall be entitled to prove as a creditor for such deficiency, and receive dividends thereon rateably with the other creditors but so as not to disturb any dividend when already declared.

21. PROCEEDINGS ON INQUIRY.—For the better taking of such inquiries and accounts, and making a title to the purchaser, all parties may be examined by the Court upon interrogatories or otherwise as the Court thinks fit, and shall produce before the Court upon oath all deeds, papers, books and writings in their respective custody or power relating to the estate or effect of the insolvent as the Court directs.

Periodical payments.

22. PERIODICAL PAYMENTS.—When any rent or other payment falls due at stated periods, and the order of adjudication is made at any time other than one of those periods, the person entitled to the rent or payment may prove for a proportionate part thereof up to the date of the order as if the rent or payment grew due from day to-day.

Interest.

23. (1) INTEREST.—On any debt or sum certain whereon interest is not reserved or agreed for, and which is overdue when the debtor is adjudged an insolvent and which is provable under this Act, the creditor may prove for interest at a rate not exceeding six per centum per annum—

NOTES.

Sh. II, Cl. 18.—The power under Art. 18 of Sch. II of the Act involves also the power to consider the validity of the sale. If a proper case is made out for setting aside the sale, the Ins. Court can set it aside. If there is no reason to set it aside, it will merely confirm the sale. The Ins. Court has also jurisdiction to order delivery of possession to the auction purchaser at such sale where the parties concerned submitted the Court's jurisdiction and co-operated in procuring the order for sale. 53 M. 233=-1930 M. 785 (2)=58 M.L.J. 98. Where a reference is made to Registrar, under S. 18, on the application by some persons who allege themselves to be mortgagees, the Registrar cannot deal with the question of validity of the mortgage though the parties consent. 60 I.C. 889=47 C. 721. A purchaser from a person subsequently adjudicated an insolvent is not a necessary or proper party to the proceedings under cl. 18, and he cannot intervene therein unless his purchase is challenged. He, not being an adverse party, cannot cross-examine the applicant to establish the claim against the estate of the insolvent. 36 I.C. 689=24 C.L.J. 149. On this R. 18, *see also* 30 C.W.N. 898=1926 C. 618.

Sch. II, Cl. 23 (2).—When the question of allowing interest to creditors under a scheme of composition entered into by an insolvent with his creditor arises, the terms of the composition itself must be taken into consideration and if the scheme of composition itself contains something inconsistent with R. 23 (2), the terms of the scheme should prevail and the rule is not applicable. 1930 R. 296. A secured creditor, though he can claim interest up to the date of payment when he seeks to recover what is due to him from the proceeds of the sale of the

(*a*) if the debt or sum is payable by virtue of a written instrument at a certain time, from the time when such debt or sum was payable to the date of such adjudication; or

(*b*) if the debt or sum is payable otherwise, from the time when a demand in writing has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment to the date of such adjudication.

(2) Where a debt which has been proved in insolvency includes interest or any pecuniary consideration in lieu of interest, the interest or consideration shall, for the purposes of divided, be calculated at a rate not exceeding six per centum per annum, without prejudice to the right of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled after all the debts proved have been paid in full.

Debt payable at a future time.

24. DEBT PAYABLE IN FUTURE.—A creditor may prove for a debt not payable when the debtor is adjudged an insolvent as if it were payable presently, and may receive dividends equally with the other creditors, deducting therefrom only a rebate of interest at the rate of six per centum per annum computed from the declaration of a dividend to the time when the debt would have become payable, according to the terms on which it was contracted.

Admission or rejection of proofs.

25. ADMISSION OR REJECTION OF PROOF.—The official assignee shall examine every proof and the grounds of the debt, and in writing admit or reject it in whole or in part, or require further evidence in support of it. If he rejects a proof, he shall state in writing to the creditor the grounds of the rejection.

26. COURT MAY EXPUNGE PROOF IMPROPERLY RECEIVED.—If the official assignee thinks that a proof has been improperly admitted, the Court may, on the application of the official assignee, after notice to the creditor who made the proof, expunge the proof or reduce its amount.

27. POWER FOR COURT TO EXPUNGE OR REDUCE PROOF.—The Court may also expunge or reduce a proof upon the application of a creditor if the official assignee declines to interfere in the matter, or in the case of a composition or a scheme upon the application of the insolvent.

THE THIRD SCHEDULE.

[*Repealed by Act X of* 1914, *Sch. II.*]

THE PRESS AND REGISTRATION OF BOOKS ACT (XXV OF 1867).

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THE PRESS AND REGISTRATION OF BOOKS ACT (XXV OF 1867)[1]

Year.	No.	Short title.	Amendments.
1867	XXV	The Press and registration of Books Act 1867.	Rep in part, Act XIV of 1870; Act III of 1914. *See* Act; I of 1910. Rep in part and amended, Act X of 1890; Act XII of 1891; Act X of 1914. Amendad Act XI of 1915; Act XXXVIII of 1920; Act XIV ot 1922; Act XI of 1923.

[22*nd March*, 1867.

An Act for the Regulation of Printing Presses and Newspapers, for the preservation of copies of Books printed in British India, and for the registration of such books.

WHEREAS it is expedient to provide for the regulation of printing-pres-

LEG. REF.

[1] Short title "The Press and Registration of Books Act, 1867", was given by the Indian Short Titles Act, 1897 (XIV of 1897),

For Statement of Objects and Reasons. *see* Gazette of India, 1867, p. 191; and for Proceedings in Council, see *ibid.*, Supplement, pp. 72, 156 and 299.

This Act was declared, by the Laws Local Extent Act, 1874 (XV of 1874), Sec. 3, to be in force in the whole of British India, except as regards the Scheduled Districts.

It has been applied to the Santhal Parganas by the Santhal Parganas Settlement Regulation III of 1872, Sec. 3, as amended by the Santhal Parganas Justice and Laws Regulation, 1899 (III of 1899), Bihar and Orissa Code; and to Upper Burma (except the Shan States) by the Burma Laws Act 1898 (XIII of 1898), sec. 4 (1) and Sch. I, Burma Code.

It has been applied, by notification under sec. 3 (*a*) of the Scheduled Districts Act, 1874 (XIV of 1874) to the following Scheduled Districts, namely:—

the Province of Sindh, *see* Gazette of *India*, 1890, Pt. I, p. 672;

Aden, *see* Gazette of India, 1879, Pt. I, p. 434;

The Territory of Peint, *see* Gazette of India, 1887, Pt. I, p. 144;

Peint is now no longer a Scheduled District and all the enactments in force in the Nasik District of the Bombay Presidency amomg them Act XXV of 1867 now in force in this territory, *see* the Peint Laws Act, 1894 (Bom. Act II of 1894), Bom. Code;

the Island of Perim, *see* Gazette of India, 1887 Pt. I, p. 5;

that portion of the Jalpaiguri District which was formerly the Jalpaiguri, Sub-division and now forms the western portion or the District of Jalpaiguri and extends as far east as the Teesta River, the hills west of Teesta River in the District of Darjeeling, the Darjeeling Tarai, the Damson Sub-division of the Darjeeling District, the Districts of Hazaribagh, Lohardaga [now called the Ranchi District, *see* Calcutta Gazette, 1899, Pt. I, p. 44] and Manbhum and Pargana Dhalbhum and the Kolhan in the District of Singbhum, *see* Gazette of India, 1881, Pt. I, pp. 74 and 304; the Western Duars of the Jalpaiguri District, see *ibid.*, 1910, pt. I, p. 1160;

the Districts of Kaman and Garhwall, *see* Gazette of India, 1876, Pt. I, p. 605;

the scheduled portion of the Mirzapur District, *see* Gazette of India, 1879, Pt. I, p. 383;

Pargana Jaunsar Bawar in the Dehra Dun District, *see* Gazette of India, 1879, Pt. I, p. 382;

the Districts of Hazara, Peshawar, Kohat,

Preamble.

ses and of periodicals containing news, for the preservation of [1][*] copies of every book printed or lithographed in British India, and for the registration of such books; it is hereby enacted as follows:—

PART I.

PRELIMINARY.

Interpretation clause.

1. In this Act, unless there shall be something repugnant in the subject or context,—

"Book."

"Book" includes every volume, part or division of a volume, and pamphlet, in any language, and every sheet of music, map, chart or plan separately printed or lithographed:

[*British India.*] *Omitted by the Government of India* (*Adaptation of Indian Laws*) *Order*, 1937.

"Editor".

[2]["Editor" means the person who controls the selection of the matter that is published in a newspaper:]

"Magistrate".

"Magistrate" means any person exercising the full powers of a [3]Magistrate, and includes a [4]Magistrate of Police [5][* * * * *]:

"Newspaper".

[2]["Newspaper" means any printed periodical work containing public news or comments on public news:]

[*Number* and *Gender.*] *Repealed by Act X of* 1914.

[*Local Government.*] *Omitted by Government of India* (*Adaptation of Indian Laws*) *Order*, 1937.

2. [*Repeal of Act XI of* 1835.] *Rep. by Act XIV of* 1870.

LEG. REF.

Bannu, Dera Ismail Khan and Dera Ghazi Khan *see* Gazette of India 1886 Pt. I, p. 48; portions of the Districts of Hazara, Bannu, Dera Dsmail Khan and Dera Ghazi Khan and the Districts of Peshawar and Kohat now form part of the North-West Frontier Province, *see* Gazette of India 1901, P.t. I, p. 857 and *ibid.*, 1902 Pt. I, p. 575, but its application to that part of the Hazara Distrcit known as Upper Tanawal is barred by the Hazara (Upper Tanawal) Regulation (II of 1900), Punj. and N.W. Code;

the Districts of Kamrup Nowgong, Darrang Sibsagar, Lakhimpu, Goalpara (excluding the Eastern Duars) and Cachar (excluding the North Cachar Hills) *see* Gazette of India, 1878, Pt. I, p. 533;

the Garo Hills, the Khasi and Jaintia Hills, the Naga Hills, the North Cachar Hills in the Cachar District and the Eastern Duars in the Goalpara District, *see* Gazette of India, 1897 Pt. I p. 299.

the District of Sylhet, *see* Gazette of India, 1879, Pt. I, p. 631.

It has been declared by notification under S. 3 (*b*) of the Scheduled Districts Act (XIV of 1874) not to be in force in the Scheduled Districts of Lahaul in the Punjab, *see* Gazette of India 1886, Pt. I, p. 301.

It has been extended by notification under S. 5 of the Scheduled Districts Act, 1875 (XIV of 1874) to the Tarai District of the Provinces of Agra, *see* Gazette of India 1876, Pt. I, p. 506 to the District of Coorg, see *ibid*, 1918, Pt. II, p. 1730.

[1] The word "three" in the preamble was repealed by S. 1 of the Press and Registration of Books Act, Amendment Act (X of 1890).

[2] This definition was inserted by S. 3 and First Schedule of the Press Law Repeal and Amendment Act, (XIV of 1922).

[3] Now Magistrate of the first class, *see* the Code of Criminal Procedure, (Act V of 1898), S. 3.

[4] Now Presidency Magistrate, *see* the Press and Registration of Books Act (1867) Amendment Act (X of 1890), S. 3 and the Code of Criminal Procedure (Act V of 1898).

[5] Words "and a Justice of the Peace" were repealed by Act (X of 1890).

NOTES.

Sec. 1 : "BOOK OR PAMPHLET"—MEANING OF — A document consisting of only one sheet cannot be called a pamphlet. The press and Registration of Books Act does not contemplate a single sheet of paper in which a writer publishes an article relating to some current topic should be regarded as a book of which a copy is required to be delivered to the officer concerned under the Act. 21 P.L.T. 675=1940 P.W.N. 606=1940 Pat. 613.

PART II.

OF PRINTING-PRESSES AND NEWSPAPERS.

Particulars to be printed on books and papers.

3. Every book or paper printed within British India shall have printed legibly on it the name of the printer and the place of printing, and (if the book or paper be published) [1][the name] of the publisher and the place of publication.

4. No person shall, within British India, keep in his possession any press

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LEG. REF.

[1] Inserted by the Amending Act, (XII of 1891).

NOTES.

Sec. 3: 'PAPER PRINTED'—Meaning of. 38 Bom.L.R. 115=166 I.C. 263=1937 Bom. 28. If term is syonymous with 'newspaper'. (*Ibid.*) 'Publisher' meaning of. (*Ibid.*) If includes mere seller or distributor. (*Ibid.*) Where a person is proceeded against under S. 12 of the Act there must be evidence to show that the paper had been printed in British India. The burden is on the prosecution to prove the same, where the accused appears to be a mere school boy who may not know where the leaflets have been printed. 35 C.W.N. 778=134 I.C. 1197=1931 C. 641. The word 'paper' in S. 3 does not mean a newspaper of a periodical nature and will cover the case of a manifesto by a new political party. 1939 A.M.L.J. 87.

SCOPE OF THE SECTION.—The intention of the section, in requiring that the name of the printer and the place of printing and the name of the publisher and the place of the publication should be printed legibly on every book or paper was to inform the public who the responsible printer or publisher was and to convey that information on the face of the paper. Words, which contained no such information, would not amount to a sufficient compliance with the requirements of S. 3. The intention was not simply to provide some facility or other, but to provide a specific facility on the face of the paper. Where a newspaper was printed and published bearing the following words, "printed and published at Cochin for the Malabar Economic Company at the said Company's Goshree Vilasam Press." *Held*, that these words were not a sufficient compliance with the requirements of S. 3 inasmuch as there was no name of the printer as required by the Act. 16 M. 443=3 M.L.J. 201=1 Weir 862. Under S. 3, it is not necessary that the actual name of the printer should be given. So long as a name or style, which sufficiently designates the printer, is given' it does not matter that it is not the actual name of the printer. It is sufficient that it is the name under which he chooses to do business and is generally known. Unless it can be said that the words do not convey to an ordinary reader the information required by the Act, the conviction for a non-compliance of the provisions of S. 3 cannot be supported. 16 M. 443=3 M.L.J. 201=1 Weir 862. The printer of a book is bound to imprint his name and the place of printing. under the provisions of S. 3, even if he has printed only a portion of the book. 14 Bom. L.R. 40=13 I.C. 827=13 Cr.L.J. 139. Where a copy of a vernacular newspaper contained the following words printed on the Margin of the front page "ba ihtimam Ram Saran Datt printer, Hindustan Steam Press, Lahore men, Lala Bhawani Das Manager ke liye chapa". *Held*, that they do not contain a clear intimation as to the publisher, as required by S. 3 of the Act. 5 P.R. 1909, (Cr.)=10 Cr.L.J. 195=2 I.C. 978.

Secs. 3, 5 and 12.—The word "publisher" has been used in the Act in a restricted sense, and does not include a vendor of a newspaper or book. S. 12 read with S. 3 clearly indicates that such persons are not included in the word "publisher" for S. 3 enjoins the printing of the names of the printer and publisher. 23 C. 414. The word "publish" in S. 12 of the Act must be read in conjunction with the reference to a "publisher" in S. 3 and in S. 5 of the Act. The "publisher" of a paper referred to in Ss. 3 and 5 is the man who publishes it in the ordinary sense of the term, that is to say, arranges with the proprietor for its distribution, and a mere seller or distributor of the paper is not a "publisher" under either of those sections. The only person who can be convicted as being guilty of publishing under S. 12 is the person who is performing the act of a publisher within Ss. 3 and 5, and not the person who merely sells it or distributes it. 38 Bom.L.R. 1115=1937 Bom. 28. A man who causes a book to be printed and offers it to the public for sale is a publisher within the meaning of Ss. 3 and 12. 1887 A.W.N. 95. The rule in S. 3 of the Act requires that every paper printed and published in British India shall have legibly printed on it the name of the printer and the place of printing and the name of the publisher and place of publication, as such. An omission to comply with S. 3 is punishable under S. 12. Ss. 3 and 12 do not deal with intention. Printers and publishers cannot be allowed to select for themselves the description to be used in professing to comply with the Act, but they must use the descriptions prescribed by the Act. 5 P.R. 1909, (Cr.)=10 Cr.L.J. 195=2 I.C. 978.

Secs. 3, 4 and 5: 'PRINTING'—'PRINTING PRESS'—'NEWSPAPER'—CYCLOSTYLING—RONEO DUPLICATOR.—The word *'printing'* in the Act must be construed in its strict and narrow sense, namely, *typography*. It does not include *cyclostyling*. A *Roneo duplicator* cannot be considered a "printing press" within the meaning of sec. 4. A *newspaper*, as defined in the Act, means a printed periodical and not any publication produced by type-writing, duplicating, cyclostyling or such method. 27 N.L.R 270=134 I.C. 854=1931 N.177. *See also* 10 P. 492=133 I.C. 682=1931 P. 351 (2). Printing Press, what is, *see* 12 Lah. 483.

Sec. 4.—OBJECT AND SCOPE.—S. 4 appears to have been enacted with a double motive. The

Keeper of printing press to make declaration.

for the printing of books or papers, who shall not have made and subscribed the following declaration before the Magistrate within whose local jurisdiction such press may be:—

"I, *A. B.*, declare that I have a press for printing at—."

And this last blank shall be filled up with a true and precise description of the place where such press may be situate.

Rules as to publication of printed periodicals containing public news.

5. No [1][newspaper] shall be published in British India, except in conformity with the rules hereinafter laid down:

LEG. REF.

[1]Substituted for the words 'printed periodical work containing public news or comments on public news" by Act XIV of 1922.

NOTES.

first is that the executive authorities shall note where the press is situated and the second is that they shall know who is the person in charge. A removal of the premises clearly deprives the executive authorities of their knowledge as to the location of the press. But the same cannot be said where there is a change in the personnel of the keeper of the press. 130 I.C. 380=1931 O. 81. The Act does not require a new declaration in cases where a press, as to which the printer has made the declaration prescribed by S. 4 is changed to another locality within the same local jurisdiction as the former place. 9 P.R. 1889, (Cr.). There is no clause in S. 4 (corresponding to the provision in S. 5) requiring a new declaration as often as a change of place takes place. 9 P.R. 1889, (Cr.).

"FOR THE PRINTING OF BOOKS OR PAPERS".—The question whether a printing press is or is not within S. 4 is a question of the use to which the printing press is in fact put or intended to be put by the possessor. The words "for the printing of books or papers" modify the verb "keep" and not the noun "press." They refer to the object of the possessor of the machine. 10 P. 492=133 I.C. 682=1931 P. 351 (2). *See also* 134 I.C. 854=1931 N. 177.

"PAPERS".—The word "papers" in Ss. 3 and 4 are papers containing news which are intended to be circulated and are practically, if not exactly, synonymous with the word "newspaper" as defined in S. 1 of the Act. 10 P. 492=1931 P. 351 (2).

"PRINTING" CYCLCSTYLE MACHINE.—The word "printing" includes the multiplication of copies by means of cyclostyle machine. 10 Pat. 492. But *see* 1931 N. 177. No *fresh declaration* need be filed in the case of any press which has once been declared and which continues at the same address though there is a change in the person of the keeper of the press. 130 I.C. 380=1931 O. 81. The Act does not provide for a change in the person of the keeper of the press. 130 I.C. 380=1931 O. 81. The proceedings of a Magistrate in refusing to authenticate a declaration under sec. 6 is a purely *ministerial action* with which the High Court cannot interfere. 21 P.R. 1918 (Cr.)=45 I.C. 525=137 P.L.R. 1918.

PRESUPMPTION AND PROOF.—The initial presumption about knowledge in the case of periodicals does not arise in the case of a pamphlet alleged to contain seditious matter. 1931 L. 182 =12 L. 483=131 I.C. 273. Per *Shah, A.C.J.*—There is no presumption as regards a book, that the persons whose name appears as the author is the author thereof. The statement from the manager of the Press cannot be treated as evidence of the facts stated therein. The declaration under sec. 4 is not evidence of his knowledge of the contents, though it is a fact which along with other evidence in the case must be considered in deciding the question of fact. The fact of a person being the keeper of the Press and the printer of the pamphlet by itself does not imply any knowledge of the contents. Some evidence which would indicate a knowledge of the contents on his part is necessary. There is no provision in the Act as to the presumption to be drawn from a declaration made under S. 4 and the names of the printer and publisher printed under S. 3 as there is under S. 7 as regards declaration made under S. 5. The knowledge of the contents so far as is necessary has to be proved like any other fact. Per *Crump, J.* —A printed book of itself proves nothing relevant to the present enquiry. There is no presumption that it is written by the man who is described as the author, unless it is one of that limited class of books covered by S. 87 of the Indian Evidence Act. The written information given by the manager of the Press is not given in the discharge of any duty, for neither the Act nor the Rules under the Act as those now stand impose any such obligation. A keeper of a considerable Press may not know the contents of each and every book printed at his Press. Without details as to the connection of the keeper with the actual business it is impossible to make any such presumption. The declaration under S. 3 or the written information supplied by the manager carries the matter no further. Without knowledge a man cannot be guilty of abetment. 47 B. 438=25 Bom.L.R. 97=76 I.C. 294=1923 B. 255.

Sec. 5.—'Publisher' meaning of. 38 Bom.L.R. 1115=166 I.C. 263=1937 B. 28. Although S. 499 requires proof of publication in order to support a conviction for defamation, the intention of the Act was to constitute the declarations made by a person that he was the printer and publisher of a newspaper into *prima facie* evidence of the publication and to throw on the accused the burden of showing that the actual

[1][(1) Every copy of every such newspaper shall contain the name of the person who is the editor thereof printed clearly on such copy as the name of the editor of that newspaper:]

[2](2) The printer and the publisher of every such [3][newspaper] shall appear [4][in person or by agent authorised in this behalf in accordance with rules made under section 20, before a District, Presidency or Sub-divisional Magistrate within whose local jurisdiction such newspaper shall be printed or published, or such printer or publisher resides], and shall make and subscribe, in duplicate, the following declaration:

"I, *A.B.*, declare that I am the printer (*or* publisher, *or* printer and publisher) of the [3][newspaper] entitled—and printed (*or* published, or printed and published, *as the case may be*) at—".

And the last blank in this form of declaration shall be filled up with a true and precise account of the premises where the printing or publication is conducted:

[2](3) As often as the place of printing *or* publication is changed, a new declaration shall be necessary:

[2](4) As often as the printer or the publisher who shall have made such declaration as is aforesaid shall leave British India, a new declaration from a printer or publisher resident within the said territories shall be necessary.

[5][Provided that no person who has not attained majority in accordance with the provisions of the Indian Majority Act, 1875, or of the law to which he is subject in respect of the attainment of majority, shall be permitted to make the declaration prescribed by this section, nor shall any such person edit a newspaper.]

Authentication of declaration.

6. Each of the two originals of every declaration so made and subscribed as is aforesaid, shall be authenticated by the signature and official seal of the Magistrate before whom the said declaration shall have been made.

Deposit.

One of the said originals shall be deposited among the records of the office of the Magistrate, and the other shall be deposited among the records of the High Court of Judicature, or [6][other principal Civil Court of original jurisdiction for the place where] the said declaration shall have been made.

Inspection and supply of copies.

The officer in charge of each original shall allow any person to inspect that original on payment of a fee of one rupee, and shall give to any person applying a copy of the said declaration, attested by the seal of the Court which has the custody of the original, on payment of a fee of two rupees.

LEG. REF.

[1] This clause was inserted by Act XIV of 1922

[2] These clauses were re-numbered by *ibid.*

[3] Substituted for words "periodical work" by *ibid.*

[4] Substituted for words "before the Magistrate within whose local jurisdiction such work shall be published" by *ibid.*

[5] Proviso inserted by *ibid.*

[6] Substituted for words "other Court within the local limits of whose ordinary original civil jurisdiction" by Act X of 1890.

NOTES.

publisher of the libel was not the person mentioned in the declaration. 9 M. 387=1 Weir 576=1 Weir 865. The presumption could be rebutted if such person showed that he entrusted in good faith the temporary management of the newspaper to a competent person during his absence and that the libel was published without his authority, knowledge or consent. 9 M. 387=1 Weir 576=1 Weir 865.

Office copy of declaration to be *prima facie evidence*.

7. In any legal proceeding whatever, as well civil as criminal, the production of a copy of such declaration as is aforesaid, attested by the seal of some Court empowered by this Act to have the custody of such declarations, [1][or, in the case of the editor, a copy of the newspaper containing his name printed on it as that of the editor], shall be held (unless the contrary be proved) to be sufficient evidence, as against the person whose name shall be subscribed to such declaration, [1][or printed on such newspaper, as the case may be], that the said person was printer or publisher, or printer and publisher (according as the words of the said declaration may be) of every portion of every [2][newspaper] whereof the title shall correspond with the title of the [2][newspaper] mentioned in the declaration [1][or the editor of every portion of that issue of the newspaper of which a copy is produced].

New declaration by persons who have signed declaration and subsequently ceased to be printers or publishers.

8. Provided always that any person who may have subscribed any such declaration as is aforesaid, and who may subsequently cease to be the printer or publisher of the [2][newspaper] mentioned in such declaration, may appear before any Magistrate, and make and subscribe in duplicate the following declaration:—

"I, *A.B.*, declare that I have ceased to be the printer (*or* publisher, *or* printer and publisher) of the [2][newspaper] entitled—".

Authentication and filing.

Each original of the latter declaration shall be authenticated by the signature and seal of the Magistrate before whom the said latter declaration shall have been made, and one original of the said latter declaration shall be filed along with each original of the former declaration.

Inspection and supply of copies.

The officer in charge of each original of the latter declaration shall allow any person applying to inspect that original on payment of a fee of one rupee, and shall give to any person applying a copy of the said latter declaration, attested by the seal of the Court having custody of the original, on payment of a fee of two rupees.

Putting copy in evidence.

In all trials in which a copy, attested as is aforesaid, of the former declaration shall have been put in evidence, it shall be lawful to put in evidence a copy, attested as is afore-

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LEG. REF.

[1]Inserted by Act XIV of 1922.

[2]Substituted for words "periodical work" at *ibid.*

NOTES.

Sec. 7.—*See* 155 I.C. 450=1935 Nag. 90. A person, who subscribes to the declaration under the Act, must be presumed, under this section, to be cognisant of all that he has printed and published and, in the absence of any evidence to the contrary, his liability in the matter cannot be gainsaid. 7 C.L.J. 49=7 Cr.L.J. 10=35 C. 141. This section, which applies both to civil and criminal proceedings, makes the printer or publisher responsible for whatever may appear in a newspaper whoever the writer of the article in it may be; and, therefore, a prosecution may proceed against the printer, unless he can prove absence from the newspaper office in good faith and without knowledge that the seditious articles would be published during his absence. But it is not absence in good faith for a printer, to go away knowing very well what is going to happen in his absence, and for the purpose of shirking his liability. 35 C. 945=8 Cr.L.J. 438. The registered printer of a paper, so long as he continues such printer, cannot escape from criminal liability for publication therein, of a seditious article by the plea that he was temporarily absent from the station when the article was printed, or that he was ignorant of the contents thereof, or that he had no intention of committing any offence. 1 P.R. 1905=2 Cr.L.J. 31=69 P.L.R. 1905. Where certain articles appearing in a newspaper are seditious, the declared printer would be responsible for the said articles, unless he can make out on sufficient evidence, that he had in fact nothing to do with them. 38 C. 227=10 I.C. 954=12 Cr.L.J. 354. Where a person allows his name to remain in the record as a printer and does not make out the *bona fides* of his absence from the place of publication he would be deemed to be responsible for the articles. 38 C. 227. On this section, *see also* 32 Mad. 338; 1 P.R. 1905 (Cr.)=2 Cr.L.J. 31.

said, of the latter declaration, and the former declaration shall not be taken to be evidence that the declarant was, at any period subsequent to the date of the latter declaration, printer or publisher of the [1][newspaper] therein mentioned.

Person whose name has been incorrectly published as editor may make a declaration before a Magistrate.

[2][8-A. If any person, whose name has appeared as editor on a copy of a newspaper, claims that he was not the editor of the issue on which his name has so appeared, he may, within two weeks of his becoming aware that his name has been so published, appear before a District, Presidency or Sub-Divisional Magistrate and make a declaration that his name was incorrectly published in that issue as that of the editor thereof, and if the Magistrate after making such inquiry or causing such inquiry to be made as he may consider necessary is satisfied that such declaration is true, he shall certify accordingly, and on that certificate being given the provisions of section 7 shall not apply to that person in respect of that issue of the newspaper.

The Magistrate may extend the period allowed by this section in any case where he is satisfied that such person was prevented by sufficient cause from appearing and making the declaration within that period.]

PART III.[3]

DELIVERY OF BOOKS.

Copies of books printed after commencement of Act to be delivered *gratis* to Government.

9. Printed or lithographed copies of the whole of every book which shall be printed or lithographed in British India after this Act shall come into force, together with all maps, prints or other engravings belonging thereto, finished and coloured in the same manner as the best copies of the same, shall, notwithstanding any agreement (if the book be published) between the printer and publisher thereof, be delivered by the printer at such place and to such officer as the Provincial Government shall by notification[4] in the Official Gazette, from time to time direct, and free of expense to the Government, as follows, that is to say:—

(*a*) in any case, within one calendar month after the day on which any such book shall first be delivered out of the press, one such copy, and

(*b*) if within one calendar year from such day the Provincial Government shall require the printer to deliver other such copies not exceeding two in number, then within one calendar month after the day on which any such requisition shall be made by the Provincial Government on the printer, another such copy, or two other such copies, as the Provincial Government may direct,

the copies so delivered being bound, sewed or stitched together and upon the best paper on which any copies of the book shall be printed or lithographed.

The publisher or other person employing the printer shall, at a reasonable time before the expiration of the said month, supply him with all maps, prints and engravings finished and coloured as aforesaid, which may be necessary to enable him to comply with the requirements aforesaid.

Nothing in the former part of this section shall apply to—

LEG. REF.

[1] Substituted for words "periodical work" by Act XIV of 1922.

[2] Section was inserted by *ibid*.

[3] This Part was substituted for the original Part III (relating to the delivery to the Local Government of all published books, etc., and to the payment therefor and disposal of the copies) by Act (X of 1890).

[4] For such officers, *see* the various local Rules and Orders.

NOTES.

Sec. 9.—A document consisting of only one sheet cannot be called a pamphlet. The Press and Registration of Books Act does not contemplate a single sheet of paper in which a writer publishes an article relating to some current topic should be regarded as a book of which a copy is required to be delivered to the officer concerned under the Act. 21 Pat.L.T. 675=1940 Pat. 613.

(*i*) any second or subsequent edition of a book in which edition no additions or alterations either in the letter-press or in the maps, book prints or other engravings belonging to the book have been made, and a copy of the first or some preceding edition of which book has been delivered under this Act, or

(*ii*) any [1][newspaper] published in conformity with the rules laid down in section 5 of this Act.

Receipt for copies delivered under S. 9.

10. The officer to whom a copy of a book is delivered under the last foregoing section shall give to the printer a receipt in writing therefor.

Disposal of copies delivered under S. 9.

11. The copy delivered pursuant to clause (*a*) of the first paragraph of section 9 of this Act shall be disposed of as the Provincial Government shall from time to time determine. Any copy or copies delivered pursuant to clause (*b*) of the said paragraph shall be transmitted to the British Museum or the Secretary of State for India, or to the British Museum and the said Secretary of State, as the case may be.

Copies of newspaper printed in British India to be delivered *gratis* to Government.

[2][11-A. The printer of every newspaper in British India shall deliver at such place and to such officer as the Provincial Government may, by notification in the Official Gazette, direct, and free of expense to the Government, two copies of each issue of such newspaper as soon as it is published.]

PART IV.

PENALTIES.

Penalty for printing contrary to rule in S. 3.

12. Whoever shall print or publish any book or paper otherwise than in conformity with the rule contained in section 3 of this Act shall, on conviction before a Magistrate, be punished by fine not exceeding [3][two thousand] rupees, or by simple imprisonment for a term not exceeding [4][sixth months], or by both.

Penalty for keeping press without making declaration required by S. 4.

13. Whoever shall keep in his possession any such press as aforesaid, without making such a declaration as is required by section 4 of this Act, shall, on conviction before a Magistrate, be punished by fine not exceeding [3][two thousand] rupees, or by simple imprisonment for a term not exceeding [4][six months], or by both.

LEG. REF.

[1] Substituted for the words " periodical work " by Act XIV of 1922.

[2] Section inserted by *ibid.*

[3] These words in this section and in S. 13 were substituted for words " five thousand " by *ibid.*

[4] These words in this section and in S. 13 were substituted for words ' two years ' by *ibid.*

NOTES.

Sec. 12.—*See* 141 I.C. 685=34 Cr.L.J. 262=1933 Rang. 4. The word '*publish*' in this section has to be read in conjunction with the reference to a '*publisher*' in Ss. 3 and 5. A mere seller or distributor would not come under the term. 38 Bom.L.R. 1115=166 I.C. 163=1937 Bom. 28. Where a person is proceeded against under S. 12 there must be evidence to show that the paper had been printed in British India. The burden is on the prosecution to prove the same where the accused appears to be a mere school boy who may not know where the leaflets had been printed 35 C.W.N. 778=134 I.C. 1197=1931 Cal. 641. (*See also* notes under S. 3, *supra*).

Sec. 13.—In order to sustain a conviction under S. 13 it is necessary to find that the Press was in a sufficiently fit condition to enable the printing of books or papers thereby. It is for the prosecution to establish that it was in workable order. 57 Cal. 460=34 C.W.N. 142=1929 Cal. 635. Where it appeared that the executive authorities knew that a certain person was the owner of the Press but the District Magistrate himself allowed him to submit a declaration signed by his manager and when the latter resigned the owner himself submitted a declaration describing the Press as his, *held*, that the owner of the Press had not committed any offence. 130 I.C. 380=1931 O. 81. As to burden of proof, *see* 57 Cal. 460=34 C.W.N. 142=1929 Cal. 635. On this section, *see also* 9 P.R. 1889 (Cr.).

Punishment for making false statement.

14. Any person who shall, in making any declaration under the authority of this Act, make a statement which is false, and which he either knows or believes to be false or does not believe to be true, shall, on conviction before a Magistrate, be punished by fine not exceeding [1][two thousand] rupees, and imprisonment for a term not exceeding [2][six months].

Penalty for printing or publishing periodicals without conforming to rules.

15. Whoever shall [3][edit] print or publish any [4][newspaper] without conforming to the rules hereinbefore laid down, or whoever shall [3][edit] print or publish, or shall cause to be [5][edited] printed or published, any [6][newspaper], knowing that the said rules have not been observed with respect to [6](that newspaper) shall, on conviction before a Magistrate, be punished with fine not exceeding [1][two thousand] rupees, or imprisonment for a term not exceeding [2][six months], or both.

Penalty for not delivering books or not supplying printer with maps.

[7][16. If any printer of any such book as is referred to in section 9 of this Act shall neglect to deliver copies of the same pursuant to that section, he shall for every such default forfeit to the Government such sum not exceeding fifty rupees as a Magistrate having jurisdiction in the place where the book was printed may, on the application of the officer to whom the copies should have been delivered or of any person authorized by that officer in this behalf, determine to be in the circumstances a reasonable penalty for the default, and, in addition to such sum, such further sum as the Magistrate may determine to be the value of the copies which the printer ought to have delivered.

If any publisher or other person employing any such printer shall neglect to supply him, in the manner prescribed in the second paragraph of section 9 of this Act, with the maps, prints or engravings which may be necessary to enable him to comply with the provisions of that section, such publisher or other person shall for every such default forfeit to the Government such sum not exceeding fifty rupees as such a Magistrate as aforesaid may, on such an application as aforesaid, determine to be in the circumstances a reasonable penalty for the default, and, in addition to such sum, such further sum as the Magistrate may determine to be the value of the maps, prints or engravings which such publisher or other person ought to have supplied.

Penalty for failure to supply copies of newspapers *gratis* to Government.

[8][16-A. If any printer of any newspaper published in British India neglects to deliver copies of the same in compliance with section 11-A, he shall, on the complaint of the Officer to whom copies should have been delivered or of any person authorised by that officer in this behalf, be punishable, on conviction by a Magistrate having jurisdiction in the place where the newspaper was printed, with fine which may extend to fifty rupees for every default.]

LEG. REF.

[1] Substituted for words "five thousand" by Act (XIV of 1922).
[2] Substituted for words "two years" by *ibid.*
[3] Inserted by *ibid.*
[4] Substituted for "words such periodical work" as is herein before described" by *ibid.*
[5] Substituted for words "such periodical work" by *ibid.*
[6] Substituted for words "that work" by *ibid.*
[7] Section was substituted for the original S. 16 by Act X of 1890.
[8] Section was inserted by Act (XIV of 1922).

NOTES.

Sec. 14.—Any false statement made in the course of a declaration is made punishable under the section. But it must be made and submitted before a Magistrate. 73 I.C. 689=1923 Lah. 440.

Sec. 16.—The words "delivered out of the Press' are not equivalent to "printed". The work of printing might be completed before any copy was actually delivered out of the Press. 49 All. 315=99 I.C. 1032=1927 All 237. S. 16 does not provide for conviction and sentence. 191 I.C. 106=21 P.L.T. 675=1940 Pat. 613.

[1][17. Any sum forfeited to the Government under [2][section 16] may be recovered, under the warrant of the Magistrate determining the sum, or of his successor in office, in the manner authorised by the [3]Code of Criminal Procedure for the time being in force, and within the period prescribed by the Indian Penal Code, for the levy of a fine.

Recovery of forfeitures and disposal thereof and of fines.

[4][* * * * * *].

PART V.

REGISTRATION OF BOOKS.

18. There shall be kept at such office, and by such officer as the Provincial Government shall appoint in this behalf a book to be called a Catalogue of Books[5] printed in British India, wherein shall be registered a memorandum of every book which shall have been delivered [6][pursuant to clause (*a*) of the first paragraph of section 9] of this Act. Such memorandum shall (so far as may be practicable) contain the following particulars (that is to say):—

Registration of memoranda of books.

(1) the title of the book and the contents of the title-page, with a translation into English of such title and contents, when the same are not in the English language;

(2) the language in which the book is written:

(3) the name of the author, translator or editor of the book or any part thereof;

(4) the subject;

(5) the place of printing and the place of publication;

(6) the name or firm of the printer and the name or firm of the publisher;

(7) the date of issue from the press or of the publication;

(8) the number of sheets, leaves or pages;

(9) the size;

(10) the first, second or other number of the edition;

(11) the number of copies of which the edition consists;

(12) whether the book is printed or lithographed;

(13) the price at which the book is sold to the public; and

(14) the name and residence of the proprietor of the copyright or of any portion of such copyright.

Such memorandum shall be made and registered in the case of each book as soon as practicable after the delivery of the [7](copy thereof pursuant to clause (*a*) of the first paragraph of section 9).

[8][* * * * .*].

LEG. REF.

[1] Section was substituted for the original S. 17 by Act X of 1890.

[2] Substituted for words "the last foregoing section" by Act XI of 1923. Sch. I.

[3] *See* the Code of Criminal Procedure, 1898 (Act V of 1898).

[4] Omitted by the A. O., 1937.

[5] For notifications directing by whom and where the catalogue of books under this section is to be kept, *see* the different Local Rules and Orders.

[6] Substituted for words and figure "pursuant to S. 9" by Act X of 1890.

[7] Substituted for words "copies thereof in manner aforesaid" by Act X of 1890.

[8] Last paragraph of S. 18 relating to the effect of registration was repealed by Copyright Act, 1914 (III of 1914).

NOTES.

Sec. 18.—Catalogue of books kept at Bombay—Jurisdiction of Calcutta High Court to order expunging of registry in such books. *See* 9 C.W.N. 591=1 C.L.J. 278. *See also* 10 C.W.N. 134=33 Cal. 571. A person by translating a book into another language does not render himself guilty of an infringement of copyright. 14 Bom. 586. Translations are not copies and a person by translating a book does not infringe the author's copyright. 19 Bom. 557.

19. The memoranda registered during each quarter in the said Catalogue shall be published in the Official Gazette as soon as may be after the end of such quarter, and a copy of the memoranda so published shall be sent to the said Secretary of State, and to the [1][Central Government], respectively.

Publication of memoranda registered.

PART VI.

MISCELLANEOUS.

20. The Provincial Government shall have power to make such [2]rules as may be necessary or desirable for carrying out the objects of this Act, and from time to time to repeal, alter and add to such rules.

Power to make rules.

All such rules, and all repeals and alterations thereof, and additions thereto, shall be published in the Official Gazette.

Publication.

21. [3][The Provincial Government may, by notification in the Official Gazette] exclude any class of books [4][or papers] from the operation of the whole or any part or parts of this Act.

Power to exclude any class of books from operation of Act.

22. [*Continuance of parts of Act.*] *Repealed by Act X of* 1890.

23. [*Commencement.*] *Repealed by Act XIV of* 1870.

THE PROFESSIONS TAX LIMITATION ACT (XX OF 1941).

STATEMENT OF OBJECTS AND REASONS.—"By section 142-A of the Government of India Act, 1935, which was inserted in that Act by the India and Burma (Miscellaneous Amendments) Act, 1940, Parliament's intentions regarding item 46 (Taxes on professions, trades, callings and employments) in the Provincial Legislative List in Schedule VII of the Government of India Act, 1935, are clarified. The new section, while continuing the right of Provinces to impose a tax on professions, trades, callings and employments, limits the incidence of that tax in respect of any one person to a maximum of Rs. 50 per annum, save in the case of those Provinces in which a tax on professions, trades, callings and employments was levied at a higher rate prior to 31st March, 1939. In such cases exemption is granted from the operation of the limit of Rs. 50.

The result of this is therefore that, whereas in most Provinces taxes on professions, trades, callings and employments are limited to the maximum of Rs. 50 per annum in respect of any one person, in the Madras Presidency the maximum rate is as high as Rs. 1,000 per annum in the city of Madras and Rs. 550 per annum in the districts outside the city. There may be other Provinces in which, by the proviso to sub-section (2) of section 142-A of the Government of India Act, 1935, the maximum of Rs. 50 per annum does not apply.

There is a widespread demand in the Madras Presidency that the profession tax, which is levied by municipalities and local boards under Provincial legislation, and is based solely on income, should be subject to the maximum of Rs. 50 per annum. This Bill seeks to give effect to that demand and extends the limit now laid down in sub-section (1) of section 142-A of the Government of India Act, 1935, to those Provinces in which, owing to the proviso to sub-section (2) of section 142-A the limit of Rs. 50 does not now apply. It is desirable that there should be uniformity in this matter, and this Bill seeks to establish that uniformity for all Provinces."

LEG. REF.

[1] Substituted by A. O., 1937 for words Government of India" which had been substituted for the original words "Secretary to the Government of India in the Home Department" by Act X of 1914.

[2] For such rules, *see* the different Local Rules and Orders.

[3] Substituted by A. O., 1937.

[4] Inserted by First Schedule of the Repealing and Amending Act, 1915 (XI of 1915).

THE PROFESSIONS TAX LIMITATION ACT (XX OF 1941).

[*26th November*, 1941.

An Act to limit to a maximum of fifty rupees per annum the amount payable in respect of any person by way of tax on professions, trades, callings or employments.

WHEREAS by section 142-A of the Government of India Act, 1935, it is provided that no Provincial law relating to taxes for the benefit of a Province, or of a municipality, district board, local board, or other local authority therein, in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income and that the total amount of such tax payable in respect of any one person shall not, after the 31st day of March, 1939, exceed fifty rupees per annum;

AND WHEREAS it is further provided in the said section that any such tax which was in force during the financial year ending with the 31st day of March, 1939, may continue to be lawfully levied at a rate higher than fifty rupees per annum unless provision to the contrary is made by the Federal Legislature;

AND WHEREAS it is expedient that provision shall be made whereby the total amount payable in respect of any such person by way of such tax shall not exceed fifty rupees per annum;

It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE PROFESSIONS TAX LIMITATION ACT, 1941.

(2) It extends to the whole of British India.

(3) It shall come into force on the 1st day of April, 1942.

Limitation of tax.

2. Notwithstanding the provisions of any law for the time being in force, any taxes payable in respect of any one person to a Province, or to any one municipality, district board, local board or other local authority in any province, by way of tax on professions, trades, callings or employments, shall from and after the commencement of this Act cease to be levied to the extent to which such taxes exceed fifty rupees per annum.

Saving.

3. The provisions of section 2 shall not apply to any tax specified in the Schedule.

THE SCHEDULE.

(*See* section 3.)

Taxes to which section 2 does not apply.

1. The tax on professions, trades and callings, imposed through fees for annual licences, under Chapter XII of the Calcutta Municipal Act, 1923.

2. The tax on trades, professions and callings, imposed under clause (*f*) of sub-section (1) of section 123 of the Bengal Municipal Act, 1932.

3. The tax on trades and callings carried on within the municipal limits and deriving special advantages from, or imposing special burdens on, municipal services, imposed under clause (*ii*) of sub-section (1) of section 128 of the United Provinces Municipalities Act, 1916.

4. The tax on persons exercising any profession or art, or carrying on any trade or calling, within the limits of the municipality, imposed under clause (*b*) of sub-section (1) of section 66 of the Central Provinces Municpalities Act, 1922.

THE PROMISSORY NOTES (STAMP) ACT (XI OF 1926).

[*2nd March*, 1926.

An Act to provide for the validation of certain promissory notes.

WHEREAS it is expedient to provide for the validation of certain promissory notes stamped with postage stamps of the denomination of two or four annas; it is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE PROMISSORY NOTES (STAMP) ACT, 1926.

(2) It extends to the whole of British India, including British Baluchistan and Sonthal Parganas.

Validation of certain promissory notes.

2. A promissory note payable on demand for an amount exceeding two hundred and fifty rupees, executed after the 30th day of September, 1923, and before the 5th day of January, 1925, and stamped with an adhesive stamp or adhesive stamps inscribed for postage and of the value required by the law in force at the time the promissory note was executed, shall not, by reason only of the fact that the stamp or the stamps or any of them is or are of a description other than that required by such law, be deemed for any of the purposes of the Indian Stamp Act, 1899, or of the rules made thereunder, not to have been duly stamped.

THE PROPERTY IN LAND ACT (IV OF 1837).[1]

Year.	No.	Short title.	Amendment.
1837	IV	The Property in Land Act.	Repealed in part XVI of 1874.

Short title given, Act XIV of 1897.
Formal words in sections 1 and 2 rep., Act XVI of 1874.
Declared in force—
throughout B.I., except as regards the Scheduled Districts, Act XV of 1874, S. 3; in the Sonthal Parganas, Reg. III of 1872, S. 3 as amended by Reg. III of 1899, S. 3.

[17*th April*, 1837.

All subjects of Crown empowered to hold land.

1. [2][* * *] It shall be lawful for any subject of His Majesty to acquire and hold in perpetuity, or for any term of years, property in land, or in any emoluments issuing out of land, in any part of the territories of the East India Company.[3]

Rules applied to holding under Act.

2. [4][* * *] All rules which prescribe the manner in which such property as is aforesaid may now be acquired and held by Natives of the said territories[5] shall extend to all persons who shall, under the authority of this Act, acquire or hold such property.

LEG. REF.

[1] Short title, "The Property in Land Act, 1837." *See* the Indian Short Titles Act (XIV of 1897). This Act appears to have been passed pursuant to the Government of India Act, 1833 (3 & 4 Will. 4, c. 85), S. 86.

[2] The words "It is hereby enacted that, after the 1st day of May next" in S. 1 were repealed by the Repealing Act (XVI of 1874).

[3] For the old law, *see* the Bengal Land Revenue Regulation (II of 1793), Ss. 17 and 46, repealed by the Repealing Act (VIII of 1868), S. 1, and the Repealing Act (XVI of 1874) S. 1 respectively.

[4] The words "And it is hereby enacted that" were repealed by Act XVI of 1874.

[5] For definitions of the term "Natives of India", *see* the Government of India Act, 1870 (33 Vict., c. 3), S. 6, and the Army Act (44 & 45 Vict., c. 58), S. 190 (22), printed, Collection of Statutes relating to India Ed. 1881, Vol. II, p. 879, and Supplement, p. 118. *See also* the Landholders, Public Charges and Duties Act (II of 1853).

THE PROTECTIVE DUTIES CONTINUATION ACT (VIII OF 1941).

[31*st March*, 1941.

An Act to extend the date up to which certain duties characterised as protective in the First Schedule to the Indian Tariff Act, 1934, *shall have effect.*

WHEREAS it is expedient to extend the date up to which certain duties characterised as protective in the First Schedule to the Indian Tariff Act, 1934, shall have effect;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE PROTECTIVE DUTIES CONTINUATION ACT, 1941.

Amendment of the First Schedule, Act XXXII of 1934.

2. In the First Schedule to the Indian Tariff Act, 1934, in Item No. 17, and in Item No. 61 (5), and in Items Nos. 63 (2), 63 (3), 63 (6), 63 (9), 63 (10), 63 (12), 63 (15), 63 (17), 63 (19), 63 (20), 63 (21), 63 (25) and 63 (27), and in Item No. 74, for the entry or entries in the seventh column "March 31st, 1941" the entry or entries "March 31st, 1942", shall be substituted.

Amendment of section 3, Act XIII of 1932.

3. In section 3 of the Sugar Industry (Protection) Act, 1932, for the figure "1941" the figure "1942" shall be substituted.

THE PROTECTIVE DUTIES CONTINUATION ACT (XI OF 1942).

An Act to extend the date up to which certain duties characterised as protective in the First Schedule to the Indian Tariff Act, 1934, *shall have effect.*

WHEREAS it is expedient to extend the date up to which certain duties characterised as protective in the First Schedule to the Indian Tariff Act, 1934, shall have effect; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE PROTECTIVE DUTIES CONTINUATION ACT, 1942.

Amendment of the First Schedule, Act XXXII of 1934.

2. In the First Schedule to the Indian Tariff Act, 1934, in Items Nos. 10 (1), 11 (1), 17, 43, 44, 44 (1), 46, 46 (1), 47, 47 (1), 47 (6), 48, 48 (1), 48 (3), 48 (4), 48 (5), 48 (7), 48 (9), 48 (10), 49 (5), 51 (2), 51 (3), 61 (5), 63 (2), 63 (3), 63 (6), 63 (9), 63 (10) 63 (12), 63 (15), 63 (17), 63 (19), 63 (20), 63 (21), 63 (25), 63 (27) and 74, for the entry or entries in the seventh column "March 31st, 1942", the entry or entries "March 31st, 1944", shall be substituted.

Amendment of section 3, Act XIII of 1932.

3. In section 3 of the Sugar Industry (Protection) Act, 1932, for the figure "1942" the figure "1944" shall be substituted.

THE PROVIDENT FUNDS ACT (XIX OF 1925).

Year.	No.	Short title.	Amendment.
1925	XIX	The Provident Funds Act, 1925	Repealed in part, XII of 1927; Amended, XXVIII of 1925; VII of 1927; I of 1930; Government of India (Adaptation of Indian Laws) Order, 1937.

PREFATORY NOTE.—The following is the Statement of Objects and Reasons annexed to the Bill (*Fort St. George Gazette, 23rd September*, 1924, pp. 270-271) :—

The Provident Funds Act at present provided that any sums standing to the credit of the depositors in Provident Funds to which the Act applies at the decease of the depositor and which are payable under the rules of the Fund, to the widow or children of the deceased shall vest in such widow or children. Such sums do not, therefore, form part of the estate of the deceased, and the interest of the widow or children are thereby fully protected. It is considered that this provision is unduly restricted and that the same degree of protection should be accorded to other dependents of the deceased besides his widow and children. Otherwise, the accumulations of a depositor, who dies before such accumulations are disbursed to him, may be held to be liable to meet the debts of the deceased, and the object of the Provident Fund in question may be frustrated.

2. The Act protects compulsory deposits in a Provident Fund from attachment but not from assignments which may have been made to take effect on the depositor's retirement or on his death. On the other hand, the rule regulating the General Provident Fund, which is one of the most important funds to which the Act applies, provides that Government will not be bound by or recognize any assignment or encumbrance executed or attempted to be created which affects the disposal of the accumulations of a depositor who dies before retirement. The validity of this provision is open to question. It is considered that, in order to give effect to the object for which Provident Funds have been constituted, it should be made clear that, with certain exceptions, in spite of debts, liabilities, assignments, or any form of encumbrance, the depositor, on retirement or after retirement but before actual disbursement, should receive in fact the accumulations at his credit in the fund. The exceptions proposed to this provision are as follows:—

(*i*) The rights of third parties obtained before the proposed amendments come into operation should be protected; and

(*ii*) in the case of contributory Provident Funds, the authority by which the fund was constituted should be entitled to withhold amounts not exceeding the total contributions made by the authority and the interest on increment on such contributions, if these amounts are due to the authority under a liability incurred by the depositor, or if the depositor is dismissed from the authority's employment or resigns his employment within five years of the commencement thereof.

3. Again, under the Act as it stands, apart from the amounts which vest in the widow or children of a depositor, the disbursement of the accumulations in a fund at the time of the death of a depositor is impossible if the total assets exceeds Rs. 2,000 without the production of probate or letters of administration or a succession certificate. It is considered desirable to make such disbursement of the accumulations if the amount does not exceed Rs. 5,000 instead of Rs. 2,000 at present. A corresponding provision is contained in the Government Savings Bank Act under which the amount of a deposit which can be disbursed in this manner is Rs. 3,000 as compared with Rs. 1,600 before the Act was amended in 1917. Similarly, under the Indian Securities Act, 1920, on the death of a person who was entitled to a Government security or securities, the prescribed officer may now determine who is the person entitled to the security or securities, if they do not in the aggregate exceed Rs. 5,000 without the production of probate, letters of administration or a succession certificate.

4. It has further been considered desirable to provide definitely in the Act for the rights of nominees and also to indicate that a deposit is compulsory deposit within the meaning of the Act and continues to be so far so long as it remains in the hands of the administrators of the fund on the condition that the amount withdrawn shall be expended on the taking out of, or on contributions towards, an insurance policy.

5. In order to give effect to these suggestions and as also to certain other minor points, it is considered desirable to amend the existing Act and to re-enact it in a consolidated form.

Effect of subsequent Legislation:—Rep. in part Act XII of 1927; Amended by Act XXVIII of 1925; Act VII of 1927; and Act I of 1930. For statement of objects and reasons, *see* Gazette of India, 1924, part V, p. 122. Act brought into force on 1st April, 1926.

THE PROVIDENT FUNDS ACT (XIX OF 1925).

[*27th August*, 1925.

An Act to amend and consolidate the law relating to Government and other Provident Funds.

WHEREAS it is expedient to amend and consolidate the law relating to Government and other Provident Funds; It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE PROVIDENT FUNDS ACT, 1925.

(2) It extends to the whole of British India, including British Baluchistan.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Definitions.

2. In this Act unless there is anything repugnant in the subject or context,—

(*a*) "compulsory deposit" means a subscription to, or deposit in, a Provident Fund which, under the rules of the Fund, is not, until the happening of some specified contingency, repayable on demand otherwise than for the purpose of the payment of premia in respect of a policy of life insurance, [1][or the payment of subscriptions or premia in respect of a family pension fund] and includes any contribution [1][* * *] and any interest or increment which has accrued under the rules of the fund on any such subscription, deposit or contribution and also any such subscription, deposit, contribution, interest or increment remaining to the credit of the subscriber or depositor after the happening of any such contingency;

(*b*) "contribution" means any amount credited in a Provident Fund, by [2][any authority administering the fund], by way of addition to, [3][a subscription to, or deposit or balance at the credit of an individual account in,] the fund

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LEG. REF.

[1] In cl. (*a*) after the words "life insurance," the words "or the payment of subscriptions or premia in respect of a family pension fund" have been inserted; and the words "credited in respect of any such description or deposit" have been omitted by Act I of 1930.

[2] The words "any authority administering the fund" were substituted for "the authority by which the fund has been constituted" by Act XXVIII of 1925.

[3] For the words "or otherwise in respect of a subscription to, or deposit in," the words "a subscription to, or deposit or balance at the credit of an individual account in," have been substituted by Act I of 1930.

NOTES.

Sec. 1.—The provisions of the Act relating to the right of nominees to receive the provident fund are not to be read, as though they were controlled by, or subject to any other law for the time being in force, or subject to any disposition, whether testamentary or otherwise, by the subscriber or depositor. Unless the nomination is cancelled by the subscriber or varied by a nomination in favour of another person, the nominee, on the death of the subscriber must be regarded as having had conferred on him or her an absolute right to receive the Provident Fund. The fact that letters of administration or probate is granted to a different person does not prevent the nominee from claiming under the Act the full amount of the sum due on death of a subscriber to the fund. 139 I.C. 775=1932 S. 115. *See also* 1941 Rang. 239; 1941 Rang. 256. A nomination of a person to receive Provident Fund money from a corporation is not a will, a gift or a trust, in favour of the nominee and on the subscriber's death, it becomes part of his undisposed of estate. 108 I.C. 894=1928 L. 773. Where a person assigned the whole of his Provident Fund in favour of an illegitimate son in the presence of the widow and two daughters, *held*, that the assignment was *ultra vires* and that the fund must be divided between the widow and the daughters in accordance with R. 10 (2). 64 I. C. 62=13 Bur.L.T. 212. Rights of subscribers —Bank employees subscribing to Provident Fund started by the Bank—Liquidation of the Bank—Priority of Provident Fund subscribers to shareholders and simple creditors. 23 C.W.N. 721. Rules of the Provident Fund Committee of E. I. R. Co.—When can be relied on in defence —R. 26, construction of. 8 Pat.L.T. 431=1927 P. 93. *Retrospective effect* of Act. *See* 115 I.C. 271. Though the Act is not in force in Marwar, the Provident Fund Rules of 1925 promulgated by the Darbar contain certain provisions similar to those in this Act. 1939 Mar.L.R. 110 (Civ.).

NOMINEE—RIGHT TO ATTACH FUND IN EXECUTION.—A decree-holder as a nominee of the depositor cannot attach the Provident Fund in execution of the decree passed in his favour. The effect of the nomination, if any, is that he becomes the owner of the fund in the eye of the law, and by attaching it, he is not attaching the property of the judgment-debtor, but his own. 36 P.L.R. 145=1934 L. 153.

Sec 2 (a) : "COMPULSORY DEPOSIT"—MEANING OF.—*See* 18 S.L.R. 311=1924 S. 57. A deposit is a "compulsory deposit" within the meaning of S. 3 (1) of the Act only so long as it remains in the Fund. The moment it is paid to the subscriber, it ceases to retain its character of a compulsory deposit, it is no longer immune from attachment or in case of subsequent insolvency from the claims of the O.A. 1931 M. 797 =61 M.L.J. 354. *See also* 11 R. 93; 1939 Rang.L.R. 504; 1941 Rang. 256; 1941 Rang. 239.

and "Contributory Provident Fund" means a Provident Fund the rules of which provide for the crediting of contributions;

(*c*) "dependant" means any of the following relatives of a deceased subscriber to, or a depositor in, a Provident Fund, namely, a wife, husband, parent, child, minor brother, unmarried sister and a deceased son's widow and child, and, where no parent of the subscriber or depositor is alive, a paternal grandparent;

(*d*) "Government Provident Fund" means a Provident Fund, other than a Railway Provident Fund, constituted by the authority of the [1][the Secretary of State, the Central Government, the Crown Representative or any Provincial Government] for any class or classes of its employees or [2][of persons employed in educational institutions, or employed by bodies existing solely for educational purposes], [3][and references in this Act to the Government shall be construed accordingly];

(*e*) "Provident Fund" means a fund in which subscriptions or deposits of any class or classes of employees are received and held on their individual accounts, and includes any contributions [4][* * *] and any interest or increment accruing on such subscriptions, deposits or contributions under the rules of the Fund;

(*f*) [5]["Railway administration" means—

(i) any company administering a railway or a tramway in British India either under a special Act of Parliament or an Indian law, or under contract with the Crown, or

(ii) the manager of any railway or tramway administerd by the Federal Railway Authority or by a Provincial Government,

and includes, in any case referred to in sub-clause (ii), the Federal Railway Authority or the Provincial Government, as the case may be;]

LEG. REF.

[1]Substituted for 'Government' by A.O., 1937

[2]Substituted by Act VII of 1927.

[3]Inserted by A.O., 1937.

[4]The words "credited in respect of such subscriptions or deposits" have been omitted by Act I of 1930.

[5]Cl. (*f*) substituted for old cl. (*f*) by A.O., 1937.

NOTES.

Sec. 2 (c).—Per *Stuart, C.J.*—A married sister is not a 'dependent' within the meaning of S. 2 (*c*) and having married, she cannot return to the status of an unmarried sister on widowhood so as to come within the meaning of the word "dependents" 122 I.C. 322=1930 O. 145 (F.B.). The term 'child' in S. 2 (*c*) is not confined to sons and daughters below the age of majority. That being so, the married daughters of a deceased depositor answer the description of 'child' and are, therefore, dependents as defined in S. 2 of the Act. I.L.R. (1940) 1 Cal. 476=44 C.W.N. 407=1940 Cal. 395. *See also* 142 I.C. 359=1933 S. 101.

Sec. 2 (d).—S. 2 (*d*) requires that the 'fund' should be constituted by the authority of the Government. The mere fact that the Provident Fund Rules framed by a private body have been approved by the Government, is not sufficient to show that the fund to which the rules relate was constituted by the Government in the absence of proof that the Government made any rules requiring the private body to maintain the Provident Fund. 1941 Lah. 168.

Sec. 2 (e).—"Provident fund" as defined by S. 2 (*e*) can only cover a fund organised by an employer for the benefit of his employees. 1939 Mad. 485. In a certain rule of the Benefit Fund Rules and Regulations of a company, there occurred the following words "In addition thereto he may receive from the Directors, etc." *Held*, that these words meant "he may be paid by the Directors or alternatively, the Directors may pay him". They imply permission given by the rules to the Directors to take this course if they think fit to do so, but negative the idea of any compulsion or obligation placed upon the Directors. These words do not give the employee any right to make a claim, but only enable the Directors to pay him certain money if they think fit to do so. 172 I.C. 574=1937 Rang. 339. The officers of the Court of Wards fall within the class of Government employees. So, the accumulated balance at the credit of the manager of Court of Wards in a Zamindar's estate to the Provident Fund is exempted from income-tax under I. T. Act. S. 4, cl. 3 (*v*). 10 P. 315=12 Pat.L.T. 384=1931 P. 451.

Sec. 2 (f).—A license granted to a company on certain conditions does not create contractual relationship. An electric supply and traction company administering a tramway in British India under a license granted under the Tramways Act, is not a 'Railway administration' within the purview of S. 2 (*f*), Provident Funds Act, as the Tramways Act is not a special Act but an Act dealing with the construction of

(*g*) "Railway Provident Fund" means a Provident Fund constituted by the authority of a railway administration for any class or classes of its employees.

Protection of compulsory deposits.

3. (1) A compulsory deposit in any Government or Railway Provident Fund shall not in any way be capable of being assigned or charged and shall not be liable to attachment under any decree or order of any Civil, Revenue or Criminal Court in respect of any debt or liability incurred by the subscriber or depositor, and neither the official assignee nor any receiver appointed under the Provincial Insolvency Act, 1920, shall be entitled to, or have any claim on, any such cumpulsory deposit.

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tramways in general and as the license granted to the company under the Tramways Act is a unilateral act which cannot be regarded as a contract between the company and the Local Government. 175 I.C. 26=1937 Lah. 915.

Sec. 2 (g).—As to contributions by Railway servants to Provident Fund, *see* 29 B. 259 ; 26 M 440; 7 Bom.L.R. 618.

Secs. 2 and 3.—Money due to a Government servant from the General Provident Fund is a compulsory deposit and on the insolvency of the servant, the O.A. is not entitled to demand from him the money comprised in such deposit. 11 R. 93. It may be that if the moneys came into the hands of the insolvent and the O A. then took steps before his disposal of the moneys to realise the same, the insolvent might be ordered to pay up the sums for the general benefit of his creditors. 11 R. 93=143 I.C. 771=1933 R. 148.

Sec. 3 : SCOPE OF SECTION.—*See* 32 C.W.N. 515. Cl. (1) of sec. 3 is intended to protect compulsory deposits only so long as they remain deposited in the fund. 1928 Mad. 484=55 M. L.J. 38. Under sec. 3 the provident fund money continues to retain its character of a compulsory deposit only so long as it remains in the hands of the provident fund trustees. Once it is paid out, it loses that character and may be attached in the hands of the party to whom it has been paid. 44 C.W.N. 637. As soon as the money deposited in a Provident Fund reaches the hands of the depositor or employee on withdrawal, it can be attached in execution of a decree against him. 40 C.W.N. 1406. The money would not retain the character of a provident found money, and as soon as the clerk or peon as agent of the depositor receives the money, in the eye of law it has reached the hands of the depositor, and would be no longer exempt from attachment in execution of a decree against him. 40 C.W.N. 1406. *See also* 17 Pat. L.T. 731. The O. A. is not entitled to apply to the Court under sec. 33 of the Presy. T. Ins. Act for an anticipatory order calling upon the insolvent to pay to the O. A., for the benefit of his creditors a portion of the money in deposit directly the insolvent receives it. Such an order, if made, would be entirely contrary to the spirit and intention of the Provident Funds Act. 1936 Mad. 855=71 M.L.J. 415. Money to the credit of an undischarged insolvent in the Provident Fund of a District Council is not a compulsory deposit within meaning of sec. 3 (1), unless and until the protection of sec.3 (1) has been extended to such fund by the Local Government. Before the extension of the protection to such fund, the Official Assignee has claim to such deposit. 176 I.C. 460=1938 Rang. 245. Compulsory deposit made in the General Provident Fund is not liable to attachment, even after the retirement of the contributor from service. R. 10 General Provident Fund Rules, is merely a rule of procedure directing the Accounts Officer how to proceed on receipt of a notice of attachment. It does not legalize a notice of attachment and consequently does not have the intention of making the deposit attachable after retirement. 27 A.L.J. 670=1929 All. 417. Under the section the Receiver of the creditor has no right to the Provident Fund of the insolvent and his disposal of it is not fraudulent and punishable under the Pro. Ins. Act, sec. 43. 44 Bom. 673=56 I.C. 450=22 Bom.L.R. 322. Under sec. 3 (1) money in such fund is protected from attachment by creditors even after the death of the subscriber. If a Court attaches such property, it amounts to an usurpation of authority and the High Court will interfere in revision. 46 Cal. 962=54 I.C. 439=24 C.W.N. 288. Money standing to the credit of a retired employee, if attachable. 1922 Cal. 196. Optional subscriber—Deposit made by—Attachment—Legality of—C.P. Code, S. 60 —Provident Fund Rules. 3 P. 74=80 I.C. 424=1924 P.C. 524 (2) (P.C.). *See also* 5 B.L.R. 454; 6 B.L.R. 921=29 Bom. 259. A Hindu wife who has obtained a decree for separate maintenance against her husband is not "judicially separated" from the husband within the meaning of note I to R. 17 of the Provident Fund Rules. The words "judicially separated" are expressions of the law with a distinct and exact technical meaning and it is impossible in technical language to speak of a Hindu wife or husband as being judicially separated from one another. A Hindu wife who has been put to the necessity of having to sue for separate maintenance owing to her husband's conduct should not for any purpose be considered as outside the list of those who are entitled to benefit under the rules, and she is not excluded by her husband's mistress whom he has nominated afresh after his wife's suit for maintenance. 51 L.W. 575=1940 Mad. 590=(1940) 1 M.L.J. 715. Under S. 3 deposit made by optional subscriber is exempt from attachment and S. 60, C. P. Code, does not stand in the way. 3 Pat. 74. The Act does not empower the Government to prescribe by rules the procedure which shall be followed for the recovery of debts due by depositors for which a decree has been obtained in the

(2) Any sum standing to the credit of any subscriber to, or depositor in, any such Fund at the time of his decease and payable under the rules of the Fund to any dependant of the subscriber or depositor, or to such person as may be authorized by law to receive payment on his behalf, shall, subject to any deduction authorized by this Act and, save where the dependant is the widow or child of the subscriber or depositor, subject also to the rights of an assignee under an assignment made before the commencement of this Act, vest in the dependant, and shall, subject as aforesaid, be free from any debt or other liability incurred by the deceased or incurred by the dependant before the death of the subscriber or depositor.

NOTES.

Civil Court. 1924 P.C. 524 (P.C.)=3 Pat. 74. The following also are exempt from attachment —Provident Fund established by Corporation of Calcutta. 33 Cal. 641=12 C.W.N. 633. Railway Provident Fund. 26 Mad. 440; 29 Bom. 259. An employee of a Railway Company cannot create an equitable assignment of the provident funds held by the railway by agreeing to transfer the funds when they would be received by the employee. 181 I.C. 78=1939 Rang. 97. *See also* 1941 Mad. 297. Under S. 3 the amount lying to the credit of a railway servant in the Railway Provident Eund is exempt from attachment and the Official Assignee of an insolvent railway servant has no claim on that amount, although when once the money is paid to the insolvent it is liable to the attached or claimed by the Official Assignee. But the Official Assignee is not entitled to apply to the Court under S. 33 of the Presidency Town Insolvency Act for an anticipatory order calling upon the insolvent to pay to the Official Assignee for the benefit of his creditors a portion of the money in deposit directly the insolvent receives it. Such an order, if made, would be entirely contrary to the spirit and intention of the Provident Funds Act. The Court has no doubt a discretion under S. 33 of the Presidency Towns Insolvency Act to make such an order if it thinks fit; but it will not do so when it would create a dangerous precedent and deprive railway servants of the benefit of the Provident Funds Act. 167 I.C. 155 (2)=44 L.W. 286=1936 Mad. 855=71 M.L.J. 415. *See also* 1941 Mad. 297. Applicability of section to Provident Fund of aided college—Notification by Government subsequent to starting of Fund by college—Effect of—Immunity from attachment—If ceases on payment to depositor. *See* 17 Pat.L.T. 731. Decree absolute for divorce directing judgment-debtor to secure to his wife a certain amount and to execute proper instrument—Judgement-debtor not complying with direction—Power of Court to execute on behalf of judgment-debtor special power of attorney authorising wife to withdraw amount decreed out of provident fund of judgment-debtor. *See* 1937 O.W.N. 863=1938 O. 48.

Sec. 3 (2).—*See* 64 I.C. 62, cited under S. 1; 1928 M.W.N. 402. In order that S. 3 (2) may apply, it must be shown that under the rules of the provident fund the amount standing to the credit of the deceased in the provident fund is payable to the dependant of the subscriber. 44 C. W.N. 636. Under S. 3, cl. (2), the money vests in the dependant of the subscriber or depositor and where the dependant is the widow or child of the subscriber or depositor, without being subject to any right of an assignee under an assignment made before the commencement of the Act. Where the Railway Company insisted on the widow of the deceased employee obtaining letters of administration in order to get the Provident Fund money, *held*, that it was wrong of the company to have refused to pay her without the letters of administration. The only thing which the railway authorities might insist on is the proof of identity. 33 C.W.N. 1148. The amount standing to the credit of a deceased subscriber in a Provident Fund vests in the dependant and does not form part of the estate of the deceased divisible among his heirs or subscribers according to the personal law. The dependant-nominee is absolutely entitled to receive the amount free from any debt or other liability of the deceased. 37 Bom.L.R. 370=1935 B. 234. Private Provident Fund—No automatic vesting —Need for letters of administration—Court-fee. 116 I.C. 467. Whether immunity under this section to amount of fund which had accumulated in Provident Fund privately started by an aided college, prior to notification by Government, *see* 17 P.L.T. 731.

Secs. 3 (2) and 4.—The provident fund amount which stood to the credit of the deceased judgment-debtor at the time of his decease and which, on his decease, was paid over to his minor son as his dependant cannot be deemed to have devolved on the son by right of inheritance. It vests by statute. It cannot therefore be regarded as the assets of the deceased depositor in the hands of his son and cannot be proceeded against for the realisation of a decree-debt due by the father. (46 C. 962, Foll.) 57 M. 440=65 M.L.J. 207=1934 M. 173. There is no provision to be found in the Act which says that only a dependant may be lawfully nominated. S. 4 on the contrary clearly implies that a nomination may be made in favour of a person other than a dependant. 49 L.W. 496=1939 Mad. 489=(1939) 1 M.L.J. 620.

Secs. 3 and 5.—As to construction and relative scope of S. 3 (2) and S. 5 (1), *see* 1936 A.M.L.J. 29. "Representative," meaning of. *See* 1928 C. 542=115 I.C. 271. Where under the Rules and Regulations of a Railway Provident Fund, the amount of a depositor is made payable to the *nominee* by a declaration made by the depositor under the rules, the nominee becomes the person authorised to receive payment of the amount. Under S. 3 (2) of the Act the amount vests in such nominee absolutely free from any debt or other liability incurred by the deceased depositor or incurred by the nominee before the death of the subscriber or

Provisions regarding repayments.

4. (.) When under the rules of any Government or Railway Provident Fund the sum standing to the credit of any subscriber or depositor, or the balance thereof after the making of any deduction authorized by this Act, has become payable, the officer whose duty it is to make the payment shall pay the sum or balance, as the case may be, to the subscriber or depositor, or, if he is dead, shall—

(*a*) if the sum or balance, or any part thereof, vests in a dependant under the provisions of section 3, pay the same to the dependant or to such person as may be authorized by law to receive payment on his behalf; or

(*b*) if the whole sum or balance, as the case may be, does not exceed five thousand rupees, pay the same, or any part thereof, which is not payable under clause (*a*), to any person nominated to receive it under the rules of the Fund, or, if no person is so nominated, to any person appearing to him to be otherwise entitled to receive it; or

(*c*) in the case of any sum or balance, or any part thereof, which is not payable to any person under clause (*a*) or clause (*b*) pay the same,—

(i) to any person nominated to receive it under the rules of the Fund, on production by such person of probate or letters of administration evidencing the grant to him of administration to the estate of the deceased or a certificate granted under the Succession Certificate Act, 1889, or under the Bombay Regulation VIII of 1827, entitling the holder thereof to receive payment of such sum, balance or part, or

(ii) where no person is so nominated, to any person who produces such probate, letters or certificate:

Provided that, where the whole or any part of any sum standing to the credit of the subscriber or depositor has been assigned to any other person before the commencement of this Act, and notice in writing of the assignment has been received by the officer from the assignee, the officer shall, after making any deduction authorised by this Act and any payment due under clause (*a*) to or on behalf of the widow or children of the subscriber or depositor—

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depositor. The nominee can therefore dispose of such sum by will. 1937 A.L.J. 581 = 1937 All. 562. Calcutta Provident Fund Rules, R. 19—Scope and effect—Payment by Corporation to alleged guardian of minor—Suit by minor on attaining majority—Sum recoverable—Suit not exempted under S. 5 : 113 I.C. 116.

DECEASED MAHOMEDAN—RIGHTS OF NOMINEE. —The Act is not intended to affect the rights of the dependants of the subscriber or depositor to share the fund *inter se* in accordance with the personal law of the deceased, except to the extent expressly mentioned in S. 5, Cl. (2) of the Act, that is to say, to protect the fund from assignment by the subscriber and from attachment by creditors who have advanced money to him or to his dependants during his lifetime. Hence, where the subscriber is a Mahomedan, a nominee of his, though, as such, he has an absolute right to receive the money, does not thereby become the absolute owner thereof. Thus, it is rather unfortunate that a Mahomedan should not be able to give directions that the fund should after his death be distributed amongst his dependants in a manner inconsistent with the Mahomedan Law of intestate succession, although a non-Mahomedan may do so by signing a nomination paper made out in a form which amounts to a valid will according to the personal law applicable to him. But that is a point for the legislature to consider. 1935 S. 73.

Sec. 4.—*See* 1928 M.W.N. 402. Under S. 4 the rights of nominees, which include the rights of the nominee's representatives, are expressly postponed to the rights of dependants. The amount standing to a depositor's credit should, therefore, be paid to his dependant in the first instance, and only in his absence to the nominee. If the Rules relating to a provident fund are inconsistent with the Act, the Act overrides the Rules. I.L.R. (1940) 1 Cal. 476 = 44 C.W.N. 407 = 1940 Cal. 395.

Cl. (1) (c) (ii).—The married sisters of the deceased are not "dependants" as defined in S. 2 (*c*) of the Act. Where they are not nominees, they can only get the money by producing probate, letters of administration or a succession certificate, and court-fee is payable on the deceased's provident fund as being his property. 1933 S. 101 = 26 S.L.R. 101. The Provident Funds Act does not prohibit the appointment of a receiver of the sum lying to the credit of a deceased in the provident fund. Under ordinary circumstances such sum would be paid to the person who has taken out letters of administration to the estate of the deceased. But where

(i) if the subscriber or depositor or, if he is dead, the person to whom in the absence of any valid assignment the sum or balance would be payable under this sub-section gives his consent in writing, pay the sum or part or the balance thereof, as the case may be, to the assignee, or

(ii) if such consent is not forthcoming, withhold payment of the sum, part or balance, as the case may be, pending a decision of a competent Civil Court as to the person entitled to receive it.

(2) The making of any payment authorised by sub-section (1) shall be a full discharge to the Government or the railway administration, as the case may be, from all liability in respect of so much of the sum standing to the credit of the subscriber or depositor as is equivalent to the amount so paid.

Rights of nominees.

5. (1) Subject to the provisions of this Act, but otherwise notwithstanding anything contained in any law for the time being in force or any disposition, whether testamentary or otherwise, by a subscriber to, or depositor in, a Government or Railway Provident Fund of the sum standing to his credit in the Fund, or of any part thereof, any nomination, duly made in accordance with the rules of the Fund, which purports to confer upon any person the right to receive the whole or any part of such sum on the death of the subscriber or depositor, shall be deemed to confer such right absolutely, until such nomination is varied by another nomination made in like manner or is expressly cancelled by the subscriber or depositor by notice given in such manner and to such authority as is prescribed by those rules.

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there is a suit pending and where a decree may be passed against the estate of the deceased, there can be no bar or difficulty in the way of appointing a receiver, if it is necessary, to preserve the estate of the deceased so that the plaintiff, if he gets a decree, may be able to realise his decretal dues. 44 C.W.N. 636. *See also* 1939 Mad. 485.

Secs. 4 and 5.—In the absence of a provision in the form of declaration with regard to the Provident Fund that the heir of the nominee should receive the provident fund, the first dependant of the subscriber has the prior right thereto. 116 I.C. 591=1929 S. 158.

Sec. 5.—The effect of S. 5 is to enable a Burman Buddhist to make a nomination, though such a nomination being in the nature of a testamentary disposition, is prohibited by his personal law. A nomination made prior to the Act takes effect only thereafter if the person making the nomination dies subsequently and in such a case the nominee and not the personal heir is entitled to succeed. 6 R. 682=1929 R. 54. According to S. 5 the person nominated by the subscriber to the provident fund in the declaration form takes an absolute interest in the property and though the Act is not in force in Marwar the Provident Fund Rules of 1925 promulgated by the Darbar contain a provision similar to the one made in S. 5 in the British Indian Enactment. 1939 Mar.L.R. 110 (Civ.). Provident fund and gratuity do not form part of a deceased's estate. 177 I.C. 416=1938 Sind 160. S. 5 does not in any way detract from the effect of Ss. 180 and 181 of the Succession Act. 1939 M.W.N. 280=1939 Mad. 485. S. 5 (1) has no application when there are no rules of the provident fund providing for payment to a nominee. 44 C.W.N. 636. Where a person is nominated under the rules framed under the Act to receive the fund on the death of the employer, the nominee does not take the fund absolutely, but only on behalf of the estate. 1924 S. 57. The right to receive the amount on death which is conferred absolutely on the nominee by S. 5 of the Act is a vested right which passes to the heirs of the nominee at his death in case the nominee dies before the depositor, without the latter varying or expressly cancelling the nomination. The nominee is a person who is intended to acquire a title in the money and not merely a person designated to give a valid quittance to the holder of the Fund. Nor is the nominee merely a person who is to receive the money in the first instance and administer it for the benefit of the dependants or heirs of the deceased depositor. 59 M. 855=1936 M. 477=71 M.L.J. 790. S. 5 applies only to Government and Railway Provident Fund and not to the Fund of a private company. Provident Fund monies standing to the credit of an employee of such a private company are the property of that employee and pass on his death to his heirs, whoever may be the nominee. The monies are part of the employee's estate and subject to the personal law of succession to which he was subject. I.L.R. (1939) Kar. 432=1939 Sind 107. *But see* 1939 Cal. 642. Construction—"Confer such right absolutely"—Meaning—Right of nominee—If free from liability to pay debts of deceased depositor—S. 3 (2)—Distinction in case of dependant. 1936 A.M.L.J. 29. Where the deceased has nominated a certain person to whom a certain sum lying to his credit in the Railway Provident Fund is to be paid after his death, such sum does not form part of the estate of the deceased and it

(2) Notwithstanding anything contained in the Succession Certificate Act, 1889, or the Bombay Regulation VIII of 1827, any such person shall, on the death of the subscriber or depositor, be entitled to the grant of a certificate under that Act, or that Regulation, as the case may be, entitling him to receive payment of such sum or part, and such certificate shall not be deemed to be invalidated or superseded by any grant to any other person of probate or letters of administration to the estate of the deceased.

Power to make deductions.

6. When the sum standing to the credit of any subscriber or depositor in any Government or Railway Provident Fund which is a contributory Provident Fund becomes payable, there may, if the authority [1][specified in this behalf in the rules of the Fund] so directs, be deducted therefrom and paid [2][Government or the Railway administration, as the case may be]—

(*a*) any amount due under a liability incurred by the subscriber or depositor to [2][Government or the Railway administration, as the case may be] but not exceeding in any case the total amount of any contributions credited to the account of the subscriber or depositor and of any interest or increment which has accrued on such contributions; or

(*b*) where the subscriber or depositor has been dismissed from [3][his employment] for any reasons specified in this behalf in the rules of the Fund, or where he has resigned such employment within five years of the commencement thereof, the whole or any part of the amount of any such contributions, interest and increment.

Protection for acts done in good faith.

7. No suit or other legal proceeding shall lie against any person in respect of anything which is in good faith done or intended to be done under this Act.

LEG. REF.

[1] The words "specified in this behalf in the rules of the Fund" were substituted for "by which the Fund has been constituted" by Act XXVIII of 1925.

[2] The words "Government or the Railway administration, as the case may be" were substituted for "that authority" by Act XXVIII of 1925.

[3] The words "his employment" were substituted for "the employment of that authority" by Act XXVIII of 1925.

NOTES.

cannot be disposed of by the deceased in his will. 187 I.C. 886=1939 Cal. 642. S. 5 (1) contemplates that the original nomination made by a subscriber will entitle the original nominee to receive the provident fund money absolutely until such nomination has been varied in the manner indicated therein. It contemplates that the variation or cancellation is to be made by the subscriber himself and not by anybody after his death. Consequently, a will made by the subscriber varying his original nomination and despatched to the Provident Fund authority by the executor after his death, cannot have the effect of cancelling such nomination. 42 C.W.N. 1143. *M* signed a declaration form of the General Provident Fund constituting *B*, his minor nephew as his nominee for receiving the amount to his credit. Heirs of *M* brought a suit against *B* for recovery of their share of the amount under Hindu Law. *Held* that the form of declaration amounted both to a declaration of nominee and a will. *B* was expressly constituted the nominee as the sole legatee in respect of the fund and suit by heirs of *M* did not lie. 1930 L. 437 (2). The amount of the Provident Fund standing to the credit of a subscriber or depositor under the Act remains his property till his death, and does not vest in and become the property of the nominee at the time of nomination. The nominee takes by succession after the death of the depositor and consequently is not entitled to get a succession certificate in respect of the amount without payment of the court-fee payable under Art. 12, Sch. I of the Court-Fees Act. I.L.R. (1939) Kar. 359 =1939 Sind 52.

Sec. 5 (2): CONSTRUCTION AND SCOPE—SECOND-CERTIFICATE—IF BARRED.—The effect of S. 5 (2) is that the nomination will entitle the nominee to a certificate without any proof of his right thereto, such as an applicant for a succession certificate has otherwise to establish. But it does not go further and mean that the other provisions of the Act, which may afford as a bar, will also be operative. Therefore, the fact that a certificate has been previously granted to another does not bar the grant of the certificate to the nominee. 39 C.W.N. 117=1935 C. 271 (1).

Sec. 7.—The question whether a person or a corporation acted in good faith within the meaning of S. 7 is always a question of fact and cannot be re-agitated in second appeal. 41 C. W.N. 524=65 C.L.J. 259=1937 Cal. 314. Where a railway company pays the provident fund money of its deceased employee to his widow with the full knowledge of the fact that there is a nominee in existence and that tha

Power to apply the Act to the provident Funds.

[1][8. (1)] The [2][appropriate Government] may, by notification in the Official Gazette, direct that the provisions of this Act shall apply[3] to any Provident Fund established for the benefit of its employees by any local authority within the meaning of the Local Authorities Loans Act, 1914, and, on the making of such declaration, this Act shall apply accordingly, as if such Provident Fund were a Government Provident Fund and such local authority were the Government.

[4][(2) The [2][appropriate Government] may, by notification in the Official Gazette direct that the provisions of this Act shall apply to any Provident Fund established for the benefit of the employees of any of the institutions specified in the schedule, or of any group of such institutions, and, on the making of such declaration, this Act shall apply accordingly, as if such Provident Fund were a Government Provident Fund and the authority having custody of the Fund were the Government:

Provided that section 6 shall apply as if the authority making the contributions referred to in that section were the Government.

(3) The [2][appropriate Government] may, by notification in the Official Gazette, add to the Schedule the name of any public institution he may deem fit, and any such addition shall take effect as if it had been made by this Act.]

[5][(4) In this section "the appropriate Government" means—

(*a*) in relation to a cantonment authority, a port authority for a major port, and any institution which, or the objects of which, appear to the Central Government to fall within List I in the Seventh Schedule to the Government of India Act, 1935, the Central Government; and

(*b*) in other cases, the Provincial Government.

Explanation.—"The Provincial Government" in relation to an institution registered under the Societies' Registration Act, 1860, means the Provincial Government of the Province in which the society is registered.]

Savings as to estates of soldiers.

9. Nothing in section 4 or section 5 shall apply to money belonging to any estate for the purpose of the administration of which the Regimental Debts Act, 1893, applies.

Repeals.

10. [*Repealed by Act XII of* 1927.]

THE SCHEDULE.

ENACTMENTS REPEALED [*Repealed by Act XII of* 1927.]

SCHEDULE [*Added by Act I of* 1930].

LIST OF INSTITUTIONS.

[See *sub-section* (2) *of section* 8.]

1. The Pasteur Institute of India, Kasauli.
2. The Calcutta Improvement Tribunal.
3. A Court of Wards.
4. The Indian Central Cotton Committee.
5. The Trustees for the European Hospital for mental diseases at Ranchi.
6. The National Association for supplying female medical aid to the women of India.
7. A College affiliated to a University established by Statute.

LEG. REF.

[1] Original S. 8 was renumbered as sub-S. (1) by Act I of 1930.

[2] Substituted by A. O., 1937.

[3] For extension of the provisions of this Act to provident Funds established by local authorities see Gen. R. and O., Vol. 5, pp. 640 and 641.

[4] Inserted by Act I of 1930.

[5] Inserted by A. O., 1937.

NOTES.

nominee has, at the company's own request, filed a suit in order that the conflicting claims of himself and the widow might be determined by a competent Court, the company, in making the payment, does not act in good faith and is, therefore, not entitled to the indemnity or protection afforded by S. 7. 1937 Cal. 314=41 C.W.N. 524.

Sec. 8.—S. 8 only appears to permit the extension of the application of the Act to funds established by an authority or institution for the benefit of its employees. It cannot have any application at all to a mutual benefit fund or to the share capital of co-operative credit societies. 1939 M.W.N. 280=1939 Mad. 4 5.

THE PROVIDENT INSURANCE SOCIETIES ACT (V OF 1912).

[*Repealed by Act IV of* 1938.]

THE PROVINCIAL INSOLVENCY ACT (V OF 1920).

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THE PROVINCIAL INSOLVENCY ACT (V OF 1920).

Year.	No.	Short title.	Amendment.
1920	V	The Provincial Insolvency Act, 1920.	Amended, XXXVIII of 1920; IX of 1926; XXXIX of 1926; XI of 1927; X of 1930; X of 1935; XXXIV of 1939; Government of India (Adaptation of Indian Laws) Order, 1937. Repealed in part, XII of 1927; VIII of 1930.

[25*th February*, 1920.

An Act to consolidate and amend the law relating to Insolvency in British India, as administered by Courts having jurisdiction outside the Presidency-towns and the Town of [*Karachi*].[1]

WHEREAS it is expedient to consolidate and amend the law relating to insolvency in British India, as administered by Courts having jurisdiction outside Presidency-towns and the [2][town of Karachi]; It is hereby enacted as follows:

Short title and extent.

1. (1) This Act may be called THE PROVINCIAL INSOLVENCY ACT, 1920.

LEG. REF.

[1] Substituted by A.O., 1937 for 'Rangoon.'

[2] Substituted by A.O., 1937 for words "town of Rangoon and Karachi" which had been substituted by Act IX of 1926, S. 11.

NOTES.

Sec. 1.—The object of the Act is to make all the property of the insolvent divisible among all his creditors. 15 P.L.T. 502=1934 P. 514. The insolvency law is mainly an administrative or adjective law, a law of machinery to bring about certain results, namely, the satisfaction of the insolvent's debts. The provisions contained in the Act are therefore of a general character. 53 A. 239=1931 A. 162 (F.B.). This Act is a complete code in itself and prescribes its own period of limitation. So, the provisions of the Lim. Act are not applicable to proceedings under this Act. 5 R. 384=104 I.C. 816=1927 R. 263. *See also* 1930 M.W.N. 651. The Act is based on the English Bankruptcy Act, and English cases are consequently valuable authorities on questions arising under this Act. 14 P.L.T. 691=1933 P. 461. There is no period prescribed by the Act for creditors to be brought on schedule of creditors. Such matters are left to the discretion of the Ins. Court. 5 R. 384 =1927 R. 263. But proof of debt may be disallowed on account of gross delay and laches of creditors. 1927 Rang. 263. As to applicability of new Act when insolvency petition was presented under the Old Act, *see* 18 L.W. 836=1924 M. 368. *Also* 1928 C. 221; 22 L.W. 542=49 M.L.J. 595; 26 S.L.R. 204. The District Court of Secunderabad is a foreign Court and not a Court in British India for the purpose of this Act and, consequently, the adjudication of a person as insolvent by that Court does not put an end to all execution proceedings against him in British India. 1929 M. 900=57 M.L.J. 393. There is no provision in the Act for the setting aside of an order of adjudication of an insolvent passed *ex parte*. Application for setting aside such an order has to be made under O. 9, R. 13 and is governed by Art. 164 of the Lim. Act. 33 P.L.R. 698. There is no provision in the Act empowering the Court at the time of adjudicating a person an insolvent to pass an order requiring him to pay certain amount into Court in payment of his debts. 1930 R. 236. Though this Act does not expressly empower the Court to pass an order staying the insolvency proceedings, still it is competent to pass such an order in the exercise of its inherent jurisdiction on the analogy of somewhat similar provision contained in S. 94, Prov. T. Ins.

(2) It extends to the whole of British India, except the Scheduled districts.

Definition.

2. (1) In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "creditor" includes a decree-holder, "debt" includes a judgment-debt and "debtor" includes a judgment-debtor;

(*b*) "District Court" means the principal Civil Court of original jurisdiction in any area outside the local limits for the time being of the Presidency-towns [1][2* * * and the limits of the ordinary original civil jurisdiction of the Court of the judicial commissioner of Sind as defined in section 2 of the Presidency-towns Insolvency Act, 1909];

(*c*) "prescribed" means prescribed by rules made under this Act;

(*d*) "property" includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit;

(*e*) "secured creditor" means a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor; and

(*f*) "transfer of property" includes a transfer of any interest in property and the creation of any charge upon property.

(2) Words and expressions used in this Act and defined in the Code of Civil Procedure, 1908, and not hereinbefore defined shall have the same meanings as those respectively attributed to them by the said Code.

LEG. REF.

[1] Substituted by Act IX of 1926, S. 11.

[2] Omitted by A.O., 1937.

NOTES.

Act. 130 I.C. 559=1931 S. 65. *See also* 1934 L. 468.

Sec. 2 (1) (a).—Sole proprietor of business transferring business *bona fide* to firm becomes creditor of the firm. 162 I. C. 618=1936 L. 760. A decree against debtor after adjudication is not binding on receiver. 84 I. C. 1008=1923 A. 33 (1). The lax use of the word "debtor" throughout the Provincial Insolvency Act has given rise to difficulties. In many sections it is used as meaning the debtor, while in others it is used as meaning the insolvent. Strictly speaking, a debtor and an insolvent are different persons. An insolvent under the Act means a person against whom an order of adjudication has been made: a debtor is a person who has made himself amenable to adjudication but who has not yet been adjudicated. I.L.R. (1938) M. 1063=47 L.W. 705=1938 M. 449=(1938) 1 M.L.J. 471.

Sec. 2 (d).—Share in undivided joint family property is property. 26 O.C. 384=1923 O. 154. *See also* 48 A. 343=1926 A. 262; 1933 A.L.J. 943=1933 A. 841. But *see contra* 48 I.C. 526; 2 P. 724=1924 P. 259. On this point, *see also* 5 P. 476=1926 P. 438=8 P.L.T. 278; 49 M. 849=1926 M. 994=51 M.L.J. 269. "*Property*" includes partner's *right to sue for accounts* of a dissolved partnership. 1925 S. 72; and also right to sue for breach of contract. 1937 A.L.J. 304=1937 A. 317. Includes *share in partnership business.* 18 L.W. 868=45 M.L.J. 829. The *power of a Hindu father to dispose of the family property* to satisfy his legitimate debts is included in the definition of the term "property". 55 B. 110=32 Bom.L. R. 1362=1931 B. 50; 1935 M. 255=68 M.L. J. 357. *See also* 1940 Sind. 141; 1937 Rang. 165. Whether son's share in joint family property is father's property where father is adjudicated, *see* 85 I.C. 88=1925 P. 127; 54 Cal. 931; 1923 S. 20; 6 Lah. 1; 49 M. 849. *See also* 5 P. 476 =1926 P. 438: 48 A. 343=1926 A. 262. Effect same as under Presy. T. Ins. Act. 89 I.C. 1022 =6 L. 493. *See contra* 49 Bom. 785=89 I.C. 996. *See also* 85 I.C. 434=1925 M. 249; 68 I.C. 179. Objections by sons against their shares being also liable must be enquired into and decided in the insolvency proceedings. 18 L.W. 282= 1924 M. 147. Trust property in the hands of an insolvent cannot be treated as part of his estate. 148 I.C. 550=1934 L. 683.

Sec. 2 (e): SECURED CREDITOR.—*See* 137 I. C. 208 (2)=1932 A. 550 (1). The word 'holding' used in the definition of the term 'secured creditor' is in the present tense and thus necessarily connotes the idea of a mortgage, charge or lien which exists and excludes that of the mortgage, charge or lien which is to come into existence at some future time. 1937 Lah. 494.

Sec. 2 (2).—Proceedings of Collector in recovering loans under the Land Improvement Loans Act is neither a suit nor execution of any decree. 5 R. 806=109 I.C. 144=1928 R. 81.

VESTING IN OFFICIAL RECEIVER.—Property does not vest in the O. R. immediately on the order of adjudication. It vests in him only on an order of the Court under S. 56. Receiver acting under S. 80 (1) (*a*) is not a "Court." 43 M. 869=39 M.L.J. 438; 85 I.C. 439=47 M.L.J. 749.

PART I.

CONSTITUTION AND POWERS OF COURT.

Insolvency jurisdiction.

3. (1) The District Courts shall be the Courts having jurisdiction under this Act:

Provided that the Provincial Government may, by notification in the Official Gazette, invest any Court subordinate to a District Court with jurisdiction in any class of cases, and any Court so invested shall within the local limits of its jurisdiction have concurrent jurisdiction with the District Court under this Act.

(2) For the purposes of this Act, a Court of Small Causes shall be deemed to be subordinate to the District Court.

Power of Court to decide all questions arising in insolvency.

4. (1) Subject to the provisions of this Act, the Court shall have full power to decide all questions whether of title or priority, or of any nature whatsoever, and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.

NOTES.

Sec. 3 (1).—S. 3 merely enacts that the ordinary jurisdiction in insolvency shall be in the District Court. It does not exclude the extraordinary civil jurisdiction of the High Court. No existing jurisdiction in a High Court can be taken away by the legislature except by the use of express terms or by praying in aid a necessary implication. Before the Provincial Insolvency Act came into existence the High Court of Judicature at Lahore had jurisdiction to transfer proceedings in insolvency Court to itself for disposal, and since there is no deprivation of the High Court of its jurisdiction in express terms in S. 3 there cannot be any necessary implication that the jurisdiction in the High Court has been taken away. 17 L. 582 = 1936 L. 608. Appeal lies only to a District Court from an order of a Subordinate Court though they have concurrent jurisdiction. 63 I.C. 848. A District Judge cannot transfer petition to a Subordinate Judge for disposal. 45 M L.J. 689 = 1924 M. 398. S. 3 merely enacts that the ordinary jurisdiction in insolvency shall be in the District Court. It does not exclude the extraordinary civil jurisdiction of the High Court. No existing jurisdiction in a High Court can be taken away by the legislature except by the use of express terms or by praying in aid a necessary implication. Before the Pro. Ins. Act came into existence, the High Court at Lahore had jurisdiction to transfer proceedings in Insolvency Court to itself for disposal, and since there is no deprivation of the High Court of its jurisdiction in express terms in S. 3, there cannot be any necessary implication that the jurisdiction in the High Court has been taken away. 17 L. 582 = 1936 L. 608.

Proviso.—The object of the proviso is to enable Local Government by conferring jurisdiction upon Subordinate Courts to relieve the District Court of pressure of too much work under this Act. 51 B. 809 = 104 I.C. 780 = 1927 B. 460. Effect of Government notification under this proviso is to confer a special jurisdiction over the entire district. 1927 Bom. 4 0. *See also* 45 L.W. 313 = (1937) 1 M.L.J. 654. The expression "value not exceeding fifteen thousand rupees" in Notification No. 37 issued by the Governor-in-Council under S. 3 (1), Pro. Ins. Act, refers to a case in which the debts of the insolvent do not amount to over fifteen thousand rupees. According to this construction the Court may or may not possess jurisdiction to hear an insolvency proceeding at any particular time according to the amount of the debts of the insolvent, that at that particular date, may appear to be outstanding. "Debts of the insolvent" must clearly mean the debts admitted or proved in the proceedings, the expression cannot include secured or doubtful debts which may or may not become provable at some subsequent stage. [Advisability of amending either the Burma Courts Act or the Pro. Ins. Act suggested.] 14 R. 280 = 1936 R. 223 (S.B.).

Sec. 4: SCOPE.—The provisions of S. 4 contain mere alterations in procedure and have therefore *retrospective effect*. The Insolvency Court can decide as to the validity of a gift made before the Act. 28 N.L.R. 89. A creditor's application under S. 4, praying for a declaration that a certain transaction is benami, is not barred merely because leave of the Insolvency Court has not been formally obtained under S. 28 (2). When the Insolvency Court entertains and hears the application and proceeds to give a decision upon it, it must be deemed that the Court has impliedly granted such leave. 40 L.W. 693 = 67 M.L.J. 616. S. 4 is very wide in its scope and gives the Court the same powers as are conferred by the English Bankruptcy Act. 97 I.C. 321; 1927 S. 66; 1930 L. 122. *See also* 1937 L. 242. *See* S. 102, English Bankruptcy Act. Thus Insolvency Court can enquire into the validity of consent decree. 93 I.C. 331 = 1926 S. 133; plea of sons of insolvent that there was a division between father and sons. 23 L.W. 80 = 1926 M. 360. An insolvency proceeding is a suit.

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9 P. 664=1930 P. 588. The provisions of C. P. Code, are applicable to enquiries by Insolvency Courts. 19 A.L.J. 862=63 I.C. 601. A thorough enquiry is necessary under this section as an order passed under it is final and binding on the parties. A summary order, passed without any referenee to this section and without the Court applying its mind properly to all the implications of its order, cannot under any circumstances be treated as a proper and valid order under the section. 36 P.L.R. 205=1934 L. 1006. *See also* 63 I.C. 519=19 A.L.J. 497. The words "*subject to the provisions of this Act*" mean "excluding questions otherwise provided for by the provisions of this Act." So, an order annulling a sale by the insolvent is one provided for by S. 53, to which S. 4 has no application. Consequently the second proviso to S. 75 does not apply and no second appeal is competent from the order of annulment. 1931 M. 745=61 M.L.J. 820. *See also* 59 C. 1135=36 C.W.N. 492. As to *difference between powers of the Court under the old and new Act*, see 45 M. 434=42 M.L.J. 185. S. 4 empowers the Ins. Court to decide questions of title affecting third parties. 31 C.W.N. 502=1927 C. 474; 1926 L. 679; 61 M.L.J. 763; 1934 L. 936 (2). The Court has jurisdiction to pass an order for payment to the Receiver of mesne profits against a third party to the insolvency, for the period during which he was in possession of property in pursuance of a transfer by the insolvent which had been set aside under S. 53. 34 L.W. 788=61 M.L.J. 763. Under S. 4 the Ins. Court has full power to decide the question whether the O.R. is entitled to the assets realised by the decree-holder from the insolvent. (1930 L. 39, overruled.) 14 L. 724=34 P.L.R. 1076. It has exclusive jurisdiction under S. 4 to decide questions of title and other questions necessary for the determination of the disputes between the parties. 105 I.C. 50=1927 O. 357. The exercise of the jurisdiction which the Ins. Court derives from S. 4 is purely discretionary and whether in any particular case, an Ins. Court should refuse to exercise its jurisdiction depends upon the facts of such case. 1933 S. 185=144 I.C. 678; 15 L. 294=1934 L. 365. *See also* 156 I.C. 677=1935 M. 720. Even if a judge, for some reason or other, declines to decide the question of title under S. 4 on general principles, his successor cannot be precluded from going into the question of title and deciding it under that section. 1934 L. 936. Suit by transferee to establish the validity of his transfer. S. 4 gives the Court, subject to the provisions of the Act, full power to decide all questions. The Court can decide that a deed of wakf executed by the insolvent was fictitious. 1931 O. 124=8 O.W.N. 147. Per *Pullan, J.*—It is improper to hold that S. 4 supersedes S. 53 and that a Court can set aside a transfer, which has been made more than two years before adjudication. This rule must, however, be confined to cases where there has been a transfer, and it has no application where the transfer was intended to be inoperative from the beginning and the insolvent had remained in possession of the property. 1931 O. 124 *See also* 1936 L. 149; 1936 O.W.N. 960; 161 I.C. 687=1936 R. 54; 1927 S. 66; 1934 L. 365; 1935 L. 60. The jurisdiction conferred under S. 4 on the Ins. Court is not limited in any way by S. 53 or S. 54. The Court can declare under S. 4 that certain transfers are invalid and not binding on the O.R. Thus it can declare the later transactions by the transferees from the isolvent as invalid. 1932 M.W.N. 821. *See also* 1937 M. 32; 1939 A.L.J. 359=1939 A. 431. But *see* 11 P. 9=1932 P. 129. Court can direct a secured claimant to prove his claim and grant an injunction to protect his claim. No appeal lies from such an order. 32 C.W.N. 427. An order refusing to annul a transfer is covered by S. 75 (3) and is appealable only with the leave of the Court. 33 P.L.R. 971. The decision of the Insolvency Court amounts to conclusive proof as to the title in respect of the specific things claimed by the applicant, not merely as against him but absolutely within the meaning of S. 41, Evidence Act. In other words the decision is a decision *in rem* and is valid against all persons. 173 I.C. 354=1937 R. 369. Where a transfer by an insolvent is declared void under S. 4 of the Act, by the Insolvency Court on the ground of fraud, subsequent transfer made by the transferee of the insolvent is also void and cannot stand. 174 I.C. 697=1937 L. 323. If the former transfer by the insolvent is found to be void ihe subsequent transfers also fall along with it. (1935 L. 368, Rel. on) 190 I.C. 327=1940 L. 124.

POWER OF COURT.—*See* 1938 M. 884=(1938) 2 M.L.J. 390; 1936 O.W.N. 960 (Power to allow amendment of petition); 1937 P. 643; 1939 M 896=(1939) 1 M.L.J. 203 (Power to order refund of sale proceeds to O.R). S. 4 confers on the Court very wide powers, which are sufficient to enable the Court to inquire into the question as to the liability of a transferee of the insolvent for mesne profits of the property, on the transfer being annulled. Whether it should inquire into it or not is a matter for the discretion of the Court. 172 I.C. 573=20 N.L.J. 271=1938 N. 50. S. 4 confers very wide powers on the Insolvency Court to try all questions of title, priority, etc. 190 I.C. 327=1940 L. 124. A purchaser preferred a claim to certain property on the basis of his purchase from the insolvent after the property was attached in execution of a money-decree. That claim was not investigated but was dismissed for default. It was held that as the order dismissing the claim for default was neither final nor conclusive it was not only expedient but necessary that the question of title to the property in question should be decided in proceedings under S. 4 of the Act. 182 I.C. 455=1938 C. 373. A proceeding under S. 4 can be conducted by the receiver alone, and not by a creditor. If the receiver declines to start proceedings under that section, the procedure to be followed is for the creditor to apply to the Court to direct the receiver to institute such proceedings, and the Court can pass a conditional order making it a condition precedent that the creditor so applying should put the receiver in funds and properly indemnify him against the costs of the action. 75 C.L.J. 263. An order to an interim receiver to enter upon the property of third person is clearly not one within the scope of S. 4. Where an application for adjudication is

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admitted and the opposite party is appointed interim receiver, the Ins. Court cannot inquire, before the order of adjudication is made, whether a transfer by the applicants to a third person is a genuine one or not. And it is premature for the receiver to start proceedings under S. 4 before the order of adjudication. 39 C.W.N. 1167=1935 C. 558. S. 4 itself does not say anything as to the stage up to which the Court is competent to take proceedings under S. 4, but under sub-S. (2), the intention of the legislature seems to be that the Ins. Judge should not take action under S. 4 after the property has been sold. That should be the ordinary practice and a convenient practice. But where a minor is adjudicated an insolvent and the order has been found to be illegal, and where the property was taken possession of by the O.R. and even when it was sold, the minor could not raise any objection under S. 4 and owing to his minority he could not contest the validity of the order adjudicating him an insolvent. S. 4 is wide enough to cover the case as it is the duty of the Ins. Judge to do justice between the parties and to restore to the person his property which has been seized under an illegal order; specially when the order has been cancelled by the judge. 162 I.C. 481=1936 L. 376. When the Ins. Court is called upon to exercise its jurisdiction under S. 4, it would, except under very special circumstances, refuse to exercise that jurisdiction; where a suit instituted on the same date as the application made before it, is liable to be defeated by the plea of limitation, it would not afford relief to the aggrieved party who resorts to this section when the enforcement of such relief before an ordinary tribunal is statute-barred. 115 I.C. 330=1929 S.94. Attachment order passed by Court—Claim contesting validity —Time limit. 1932 A.L.J. 391=1932 A. 408. Before the Ins. Court exercises the discretion vested in it by S. 4 to entertain an application for declaration that certain properties belong to the insolvents, it should be satisfied that it is expedient to withdraw the case from the jurisdiction of the ordinary tribunals and to decide it in a summary way. 120 I.C. 513=1930 S. 97. Proceedings under S. 4 of the Act are not restricted to the decision of the title to property within the territorial jurisdiction of the Court, but also to property situated outside the jurisdiction. 114 I.C. 112=1929 S. 135. The section confers jurisdiction on the Ins. Court to decide all questions of title which may arise in any case of insolvency to make a complete distribution of the property. It is true that the jurisdiction of the Ins. Court is not exclusive. But if he places the matter before the Ins. Court and that Court decides to determine the question, its decision is final and binding for all purposes as between the debtor and the debtor's estate on the one hand and all claimants against him or the estate on the other hand. The only remedy open to the party aggrieved by the decision is to prefer an appeal under S. 75 against it, but he cannot reagitate the question by bringing a regular suit. 119 I.C. 733=1929 L. 761. *See also* 1930 L. 180=1933 N. 373. The terms of S. 4 (1) are very wide. The phrase, "or of any nature whatsoever," though very wide, must be read in conjunction with the earlier part of the section which refers to "question whether of title or priority" and with the opening words of the section "subject to the provisions of this Act." In other words the phrase must be subject to the limitation of *ejusdem generis*, or to the limitation to orders not specifically provided for in the Act. To give a more extended meaning to it so as to include all questions of whatsoever nature in the section would render nugatory the provisions of S. 75 (1) of the Act. 1937 A.L.J. 1071=I.L.R. (1938) A. 50=1938 A. 28. It is contrary to all judicial principle that when an Official Receiver has allowed an order to be passed against him *ex parte* in proceedings under O. 21, R. 93, C. P. Code by an executing Court, and has applied unsuccessfully to have that order set aside or reviewed, and fails to avail himself of his remedy by way of appeal or revision, he should be permitted to make use of S.4, to reagitate a question which has been finally decided against him. The language of S. 4 though wide and comprehensive is not comprehensive enough to cover the case of a dispute between the Official Receiver, as representing the insolvent judgment-debtor's estate, and a person who has no connection whatever with the insolvency, such as an auction-purchaser in execution. 55 L.W. 117=(1942) 1 M.L.J. 238. A stranger who claims the property taken possession of by the O.R. both against him and the insolvent can institute a suit to establish his right independently of S. 4. But the insolvent himself is amenable, so far as the question of title to the property or its liability to be sold is concerned, only to the jurisdiction of the Ins. Court. He cannot invoke the aid of the ordinary Courts to establish his right against the O. R., *e.g.*, for a declaration that he is an 'agriculturist' as defined in the Punjab Alienation of Land Act and that certain lands of his are not saleable. 140 I.C. 808=1933 L. 65. Where certain property is sold by the insolvent to a stranger more than three years prior to his insolvency, the purchaser gets an absolute title to the property against the O.R. and the sale is unimpeachable. If the O.R. subsequent to the insolvency sells the same property to another ignoring the prior sale and dismisses the claim of the prior purchaser, a question of title arises in insolvency as between the two purchasers; and the Ins. Court, if it deems it expedient to decide it for the purpose of doing complete justice, has power to decide that question under S. 4. 1936 M. 955=71 M.L.J. 656. On the insolvency of a Hindu son, the O.R. sold his interest in certain property of the joint family. The insolvent's father thereupon sued for a declaration that the property belonged to him exclusively and that his son, the insolvent, had no interest in it. He did not however seek to set aside the sale by the Receiver or pray for possession. There was no decision at all by the Ins. Court either under S. 4 or by way of appeal from the Receiver's sale under S. 68. *Held* that the suit for a mere declaration was maintainable, and the O.R's. sale was only a private sale. 1935 M. 297=68 M.L.J. 229. *See also* 63 C. 194=40 C.W.N. 808. As to maintainability of app-

(2) Subject to the provisions of this Act and notwithstanding anything contained in any other law for the time being in force, every such decision shall be final and binding for all purposes as between, on the one hand, the debtor and the debtor's estate, and, on the other hand, all claimants against him or it and all persons claiming through or under them or any of them.

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lication under this section by a person aggrieved by the seizure of his property by the O.R. alleging the same to belong to the insolvent, *see* 149 I.C. 43=1934 R. 97; 1938 Nag. 320. Sale of property by Receiver after third person's objections setting up his title, is dismissed for default—Application by purchaser for delivery of possession—Objection by a third person reiterating his title—Power of Court. *Held*, that before the question of title was decided, either by a decree in a separate suit or by an order under S. 4, the appellant could not be dispossessed from the property. 1935 A.L.J. 484=1935 A. 546. An application to the District Judge to set aside a sale of the O.R., even if it be deemed to be one under S. 4, must be filed within 21 days from the date of the sale. 1935 L. 60. But *see* 1936 L. 149. The provisions of this section must be read along with the provisions of S. 28 of the Act: the Court consequently has jurisdiction only over properties of the insolvent which vest either in the Court or in the receiver. 1930 P. 305 (2). But *see* 1930 A. 552. Under S. 4 (1), the powers of the Court of Insolvency are very wide, and do not in any way militate against S. 28 (2)=125 I.C. 28=1930 A. 552. By virtue of the father's power of disposition vesting in the receiver, he is entitled to seize the son's shares and hence he has also the right to ask for annulment of the sale of the son's shares. The remedy of the receiver lies in the Ins. Court and not in ordinary Civil Court. 152 I.C. 1026=1934 N. 271. The Court in order to decide whether a debtor petitioner is unable to pay his debts has power to go into the question of the existence of the alleged debts if disputed. 33 P.L.R. 422=1932 L 620 (1).

DUTY OF COURT.—The receiver is an officer of the Court, and as soon as the Court finds that he has wrongly been given possession and ought not to remain in possession, the Court should direct him to deliver possession to the proper person. If the Ins. Court, owing to a mistaken view of the law, does not pass such an order, the person aggrieved may appeal and the appellate Court should pass the order and appeal should not be dismissed merely because insolvent delays in asking to be put in possession. 1929 N. 338. Where an estate has devolved on insolvents by inheritance and there are creditors of the deceased and also creditors of the insolvents, the question of priority between the two has to be decided by the Ins. Court. 125 I.C. 28=1930 A. 552. An application for declaration that an execution purchase made pending annulment is invalid comes under this section. 1929 M.W.N. 809. The Court under S. 4 would only decide questions of title which it may deem expedient and necessary to decide. It would not summarily order a disputed debt to be deposited or enter into an enquiry about the same. 18 N.L. J. 14. As to power of Court to order refund of money wrongly paid, *see* 1936 N. 28.

Sec. 4 (2).—A decision under this section is final and cannot be re-opened by a civil suit. 1923 A. 293 (2); 1922 A. 128. *See also* 108 I. C. 156=1928 A. 158: 1936 N. 112; 41 P.L.R. 302=1939 L. 87; 1938 L. 490. But an appeal lies under S. 75 (2). 19 A.L.J. 862=63 I.C. 601. The summary enquiry under S. 24 as to whether a debtor is entitled to present a petition has nothing to do with S. 4 of the Act, which section only comes into play after adjudication in disputes between the debtor's estate represented by a receiver and the claims of one or all of his creditors. Consequently, a finding in an enquiry under S. 24 that a certain debt is fictitious is not final and does not operate as *res judicata* under S. 4 of the Act. I.L.R. (1938) L. 535=1938 L. 490. A stranger claimant is at liberty to raise his claim in a civil suit provided his rights have not been determined and decided under this section. 72 I.C. 320=26 C.W.N. 921; 1922 A 128; 49 A. 71=1927 A. 66. *See also* 34 P.L.R. 31=1933 L. 65. Per *Dalal and King, JJ., Sen. J., contra.*—If the matter is once decided even as against a stranger by the Ins. Court, the jurisdiction of the Civil Court would be barred under S. 11, C. P. Code. S. 4 deals with jurisdiction and this jurisdiction will be circumscribed only by such subsequent sections as deal with the jurisdiction of the Court. Ss. 53 and 54 do not deal with the jurisdiction of the Ins. Court, but only lay down rules as to the manner in which evidence should be considered in certain cases arising in that Court. Those sections, therefore, do not control the provisions of S.4, though S. 56 does. Ins. Court can try the issue whether the insolvent is entitled to the property or not after proper opportunity is given to the other side to plead to the application. 51 A. 550=1929 A. 105 (F.B.). *See also* (1942) 1 M.L.J. 238. An Ins. Court can try questions relating to a transfer made more than two years before the date of adjudication. 51 All. 550. *See also* 142 I.C. 97=1933 Pesh. 46; 59 C. 1135=36 C.W.N. 492. So also in the case of a *deed of gift*. 28 N.L.R. 89. S. 4 does not give the Ins. Court a wider power than that which is contained in S. 53 to annul transfers. *Held*, that a *deed of release* executed more than two years before the adjudication could not be set aside. 123 I.C. 217=1930 O. 314. But *see* 51 A. 550=1929 A. 105 (F.B.): 1936 O. W.N. 960; 1938 N. 148. Power of Court under S. 4 is subject to the provisions of S. 56 (3), *i.e.*, respecting the rights of persons whom the insolvent has no right to remove from possession. 49 M. 792=50 M.L.J. 180. *See also* 51 A. 550=1929 A. 105. The powers of the Court under S. 4 are not controlled by S. 59. 18 N. L.J. 14. As to property in possession of a stranger claiming adversely to the insolvent, *see* 18 N.L.J. 14; 24 A.L.J. 897; 140 I.C. 808=1933 L. 65. The sanction of Ins. Court is unnecessary to establish claim in a Civil Court, 87 I.C. 1000

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=1925 N. 363. As to rights of mortgagee when mortgagor is insolvent, *see* 1925 M. 452 (1). Where large properties were willed to the son burdened with a small trust, on the insolvency of the son, his interest would vest in O.R. 1928 M. 190=54 M.L.J. 272. In 1921, a husband executed a document providing for the maintenance and residence of his wife, in consideration of her having given her consent to his second marriage, necessary under the custom of the caste. The deed provided that she was to be given a particular house for her residence. She was accordingly in possession of that house. In 1927, the husband was adjudicated insolvent and the O.R. applied under S. 4 to get possession of the house. *Held*, that the agreement was valid and binding, having been entered into for valuable consideration and performed by one party; and though unregistered, the arrangement being one that needed no writing at all, the title of the wife could be proved otherwise and that the O.R. was not entitled to get possession. 34 Bom.L.R. 1317. Where consideration has passed before the Sub-Registrar, the presumption is that the transaction was intended to be operative until and unless that presumption is displaced by cogent evidence. The mere fact that the insolvent was a relation of the vendees or that the transaction took place when vendor was on the eve of insolvency are not sufficient to rebut this presumption. The transanction in such a case is neither bogus nor sham and cannot be set aside even under S. 4. 150 I.C. 308=1934 Pesh. 30. Adjudication of Hindu father—Sale of property — Obstruction by son—Removal of—Powers of Ins. Court. 143 I.C. 833=1933 M. 609 (45 M. 434 ; 51 M. 567, Dist.). If an adjudication of title will not remove a person from possession because the insolvent has not a present right to it, it should not be decided upon by that Court. 18 L.W. 884=1924 M. 387 (1). Where the title of the insolvent to property sold is in question, the purchaser is entitled to have the sale set aside and get refund of the purchase-money. 103 I.C. 695=1927 C. 834. Where the son's share was also sold by O.R. in the insolvency of the father, the purchaser is not entitled to delivery of possession of the son's share as well under this section but only by regular suit. 1928 M. 531=51 M. 567=55 M.L.J. 163.

SECURED CREDITOR.—Dispute over distribution of sale proceeds among secured creditors—Court has jurisdiction to decide such dispute. 1930 L. 98. An Ins. Court has jurisdiction to dispose of a matter arising between an insolvent and creditor, even though the creditor is a secured creditor, when the question relates to the amount of the debt. 121 I.C. 181=1930 L. 98. Mortgagee agreeing to sale by Ins. Court and purchasing the property himself must submit to objections to sale and adjudication thereon under this section. 1931 L. 3. *See also* 51 L.W. 429=(1940) 1 M.L.J. 647.

APPEAL.—Where a judge holds that the claim is not maintainable under S. 4, the order can be appealed against under S. 75 read with schedule I. 58 C.L.J. 118=1924 C. 122 (2). A second appeal does not lie against an order avoiding a voluntary transfer .27 N.L.R. 179. A question as to the right of the petitioning creditor to file his petition and the existence of his debts is not one falling under S. 4, and the decision on such a question is therefore not open to second appeal. 59 B. 161=36 Bom.L.R. 1236=1935 B. 80. An order of the District Court dismissing an appeal against an order of the Court of first instance exercising insolvency jurisdiction and adjudging a person as insolvent is final and no second appeal lies. 1932 L. 645 (1). Order of conditional discharge—Appeal—Omission to implead O.R.—Order modified—Second appeal is not maintainable. 132 I.C. 526=1931 L. 647.

The question whether the sale by an insolvent is benami falls under S. 4, and hence a second appeal lies. 173 I.C. 531=1937 L. 441. A prayer contained in an application by the Official Receiver for avoiding certain transfers of debts by insolvent in favour of some of his creditors that the transferees be directed to refund the amounts realised by them, and a further point subsequently raised, that they were personally liable for the entire amounts of the debts transferred to them, are covered not by S. 54 but by S. 4 and the order of the District Judge passed on appeal is, therefore, appealable to the High Court. 171 I.C. 82=1937 L. 913. Where, in a pending insolvency application, the lower Court found that the alleged insolvent had heavy debts to pay, that some of his cheques were returned and his accounts were not forthcoming and after considering the circumstances, appointed an interim receiver in the exercise of the discretion vested in it under S. 20, and this order was confirmed by the District Court: *Held*, that there was no question of jurisdiction, and that there was no ground for interference by the High Court in second appeal. 139 I.C. 44=1932 B. 228. To a petition to set aside or declare as void a deed of transfer made by an insolvent under S. 53 or S. 54, S. 4 of the Act has no application and therefore no appeal lies to the High Court from the appellate order of the District Judge. 1935 M. 432. When a right of appeal is given to one of the ordinary Courts of the country, the procedure, orders and decrees of that Court will be governed by the ordinary rules of the C. P. Code. An appeal to Privy Council is therefore maintainable from the decision of the High Court under S. 75 from the order of the District Judge, under S. 4 (2): 61 I.A. 158=12 R. 194 =66 M.L.J. 404 (P.C.). *Quere.*—If a second appeal is at all incompetent in the above case: 34 Bom.L.R. 382=1932 B. 228.

RES JUDICATA.—A decision of the Insolvency Court in a proceeding under S. 53 as regards the right of a person to retain possession of property as against the Official Receiver operates as *res judicata* in view of S. 4 (2) of the Act. 44 C.W.N. 586=1940 C. 578. *See also* 1937 L. 668 ; 1936 N. 112 ; 1938 L. 490 ; (1942) 1 M.L.J. 238.

PROCEDURE.—The procedure under S. 4 is only a substitute for a regular suit. A party who is bound by a decree or order of a Civil Court is not entitled to re-agitate the same question by another suit, and what cannot be done by another suit cannot be achieved by means of proceedings under S. 4. Where the Official Receiver, therefore is a party to a proceeding before a Civil Court in his capacity as the representative of the estate of

(3) Where the Court does not deem it expedient or necessary to decide any question of the nature referred to in sub-section (1), but has reason to believe that the debtor has a saleable interest in any property, the Court may without further inquiry sell such interest in such manner and subject to such conditions as it may think fit.

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the insolvent, he is not entitled to reopen an adverse decision by the Court in an application under S. 4 of the Act. His remedy is only to appeal as any other party to the proceeding against the order of the Civil Court if he is dissatisfied with it. 1940 M.W.N. 519=1940 M 733. The scope of S. 4 (2) is not limited to the insolvency proceedings only. According to it the decision of the Insolvency Court is final for all purposes. Hence, a decretal debt which has been declared by an Insolvency Court to be fictitious in proceedings on an application by the judgment-debtor for being declared insolvent to which the decree-holder was also a party cannot be recovered by an execution of that decree. The decision of the Insolvency Court is tantamount to a declaration that the decree was non-existent and the finding is binding on the judgment-debtor as well as on the creditor even though the insolvency proceedings have been dismissed. 177 I.C. 204=1938 L. 148. In a question under S. 4 (1) the procedure for a regular suit must be followed. 1928 L. 556. It is not necessary that proceedings under S. 4, in order that they may be valid, should be initiated by a plaint or a regular application. 146 I.C. 912=1933 L. 789. It was open to the Court to take proceedings *suo motu* under S. 4. 1933 L. 789. Though the Ins. Court has powers of execution under Ss. 4 and 5, the procedure is only analogous to and not identical with that under O. 21, C. P. Code. 1933 M. 475.

LIMITATION.—Before a receiver can release the assets, they must be shown to belong to the insolvent. If they do not, the receiver has no present right to remove a stranger in possession, he would have to file a separate suit against him. Even on the view that proceedings under S. 4 of the Insolvency Act should be held to be tantamount to a suit under S. 53 of the T. P. Act, it would follow that such a suit would have to be in time when insolvency proceedings began and this would be six years under Art. 120 of the Limitation Act from the date of accrual of the cause of action. I.L.R. (1940) Nag. 293=1938 N.L.J. 279=1938 N. 546.

Sec. 4 (3).—Where subsequent to the order of an Ins. Court under sub-S. (3) of S. 4 for sale of the interest of the insolvent in certain properties, leaving question of title to be decided by a competent Civil Court, the plaintiff brought a suit for a declaration of his title to those properties though after one year from the date of that order; it is not barred by Art. 13 of the Lim. Act. 36 C.W.N. 621. Sale by O. R.—Application to set aside sale—Limitation. 1935 L. 60.

Secs. 4 and 5.—Joint family—Insolvency of father and sale of insolvent's property by O.R. —Partition suit by sons—Decree—Son's share found liable to father's mortgage debt—Application by O.R. for delivery of possession under S. 4. 147 I.C. 494=1933 M. 475.

SECS. 4 AND 25.—The words 'of any nature whatsoever' used in S. 4 do not include or embrace within its purview the determination of the question whether the debtor has a right to present the petition for insolvency. Such a decision is contemplated only under S. 25 (2). Hence where a District Judge in appeal sets aside the decision of the civil Judge and holds that the applicant was not entitled to present a petition for adjudication and dismisses his application, the order is one under S. 25 (2) of the Act and no second appeal lies to the High Court under S. 75 (1), proviso (2). 196 I.C. 881=1941 O. W. N. 1218. The Insolvency Court has no power or discretion to dismiss an application by a creditor against a debtor on the ground that the questions raised in it are too difficult or complicated for the Insolvency Court to decide, the Insolvency Court cannot refuse to decide the questions or relegate the parties to a regular suit. 54 L.W. 278=1941 M. 895=(1941) 2 M.L.J. 362=I.L.R. (1942) M. 147. Where a subsequent to the adjudication of a Hindu father as an insolvent, one of his creditors files a suit against the father and his sons in respect of a debt incurred by the father for family purposes without obtaining the leave of the Insolvency Court and obtains a decree against the insolvent personally and against the joint family property in the hands of the sons, it cannot be held that the decree in so far as it is against the sons is a nullity because leave of the Insolvency Court is not necessary under S. 28 (2) of the Act to file suit against the undivided sons of the insolvent. It might be open to the sons to say that the suit would not be competent because leave of the Insolvency Court had not been obtained against the father and if the suit could not proceed against the father it could not proceed against them as well, where no such objection was taken by the sons on that ground and they have submitted to a decree being passed, it is not open to the Official Receiver or to any third party to take any objection in regard thereto or to have it declared that the decree is a nullity. The decree having been obtained against the sons without protest and having become final, it is not open to third parties including the Official Receiver to challenge the validity of the decree in proceedings under S. 4 of the Act. 1942 M.W.N. 69=55 L.W. 101=(1942) 1 M.L.J. 177.

Secs. 4 and 28.—An application was made to the Ins. Court under S. 4 praying for a declaration that certain property belonged to the insolvent and for a direction to the O.R. to sell the said property for the benefit of the general body of creditors. The O.R. was made a party to the application and it was alleged in the affidavit, filed in support of the application, that a petition was filed before the O.R. asking him to take up the matter and move the Court, but that he rejected the petition, although all the necessary materials were placed before him. *Held*, (*i*) that the application fell within S. 28 (2) and would not lie without the leave of the

5. (1) Subject to the provisions of this Act, the Court, in regard to pro-

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Court; (*ii*) that the requirements of S. 28 (2) had been sufficiently complied with, because there really was an application before the Court for leave to proceed with the application. Although it is imperative that consent should be obtained before the institution of the proceedings, a good deal has to be said in favour of the view that by implication the leave of the Court was being asked for and that it was not therefore necessary that a formal request should be made for such leave. 1935 M.W.N. 549=69 M. L.J. 137.

Secs. 4 and 52.—Scope—Execution sale—Subsequent adjudication of judgment-debtor on petition presented before—Application by Receiver to avoid sale—Dismissal—Fresh application by insolvent and creditor after several years—If barred by prior dismissal. *See* 155 I.C. 734=1935 P. 273.

Secs. 4 and 53: *See* 1939 A. 431; 1938 L. 73; 1936 O.W.N. 960; 41 Bom.L.R. 1258. Scope—Sham and colourable transfer more than two years before adjudication. S. 53 cannot apply to transfers by the insolvent executed more than two years before the adjudication. But irrespective of S. 53, the Ins. Court has, under S. 4, jurisdiction to annul sham and colourable transfers executed by the insolvent more than two years before the date of the presentation of the application for adjudication. 37 Bom.L.R. 478=1935 B. 316. *See also* 1938 N. 546=1938 N.L.J. 279. It is open to an Insolvency Court to try a question under S. 4 of the Act relating to the fictitious character of the transfer even though it does not fall under S. 53 of the Act. 1941 O.W.N. 752 =1941 O. 403. The remedy in respect of a transfer by an insolvent may be asked for in the alternative, either under S. 53 or under S. 4 if the transaction is proved to be fictitious; but the remedy in respect of a second transfer by the transferee can only be obtained from the Insolvency Court in exercise of its jurisdiction under S. 4. 73 C.L.J. 225=1941 C. 298. Where property has been transferred by the transferee of an insolvent to a third party and the O.R. is aware of the transfer, the dispute is really between the O. R. on the one hand and the subsequent transferee on the other and not between the O. R. and the first transferee who has no longer got any interest in the property left. In order to start a proceeding under S. 4, the application should therefore be by the O.R. against the person who is now claiming title to the property and an adjudication by the Court on such dispute would be final and would bar a second suit and would be binding on the parties to the proceeding. But if the O.R. chooses to proceed under S. 4 against the first transferee who has no interest left in the property and obtains an order against him either *ex parte* or after contest, he cannot use that order as a final adjudication of the matter in dispute as against the real claimant of the title. 1935 A.L.J. 573=1935 A. 671. Ss. 53 and 54 only lay down rules of evidence and are not exhaustive. Even where the transfer by the insolvent is more than two years prior to the date of adjudication, the Ins. Court has jurisdiction to entertain an application by the O. R. to set it aside under S. 4, whether the transfer is void *ab initio* or only voidable. 146 I.C. 530 (2)=64 M. L.J. 397. *See also* 163 I.C. 956=1936 L. 593.

SECS. 4 AND 59.—S. 4 gives jurisdiction to the Insolvency Court to deal with matters which were not previously within its jurisdiction, but a creditor who under the old law could not have filed a suit to establish a right could not be given by its terms any right to move the Insolvency Court. The right of suit to establish a claim to property as part of the insolvent's estate lies in the receiver in exercise of his powers under item (d) of S. 59 of the Act and this is true whether the right is exercise in the Insolvency Court itself by virtue of the jurisdiction conferred on it by S. 4, or by way of separate suit in the appropriate Court. Where, therefore, the Court is called upon to exercise jurisdiction under S. 4 for declaring a transaction as fictitious, it should be for the receiver to move the Court in this behalf, and a creditor should not be allowed to do so in his own name even with the permission of the Court. 73 C.L.J. 225=1941 C. 298.

Secs. 4 and 68.—Where the O.R. passes an order on a claim petition which he has no jurisdiction to pass, even though no appeal is filed under S. 68, an application under S. 4 is not barred, because the remedy under S. 4 is much larger than what could be got under S. 68. In fact the correct procedure is under S. 4 and not by appeal under S. 68: 1933 M. 471=38 L.W. 896.

Secs. 4 and 75.—On the adjudication of a Hindu father, the O. R. obtained an *ex parte* order that his debts were binding on the minor sons. The family property was sold and the purchaser obtained an *ex parte* order for delivery. Then, the minors applied to set aside that order, but the application was styled as one for review of the previous order. The application was dismissed and an appeal therefrom was also dismissed by the District Judge and that it was not competent under O. 47, R. 1. *Held*, that the application, though purporting to be under O. 47, R. 1, must be deemed to be under S. 151 of the C. P. Code; that the order for delivery passed without notice to the sons was void; and that the order dismissing the application by the minor sons was the first valid order which was appealable under S. 75 of the Act. 37 L.W. 720 =1933 M. 345. *See also* 1937 L. 297. Sale of occupancy rights in insolvency—Sale held invalid—Application for refund of purchase money—Dismissal of—Appeal from — Competency of. 34 P.L.R. 183=1933 L. 628.

RIGHT OF APPEAL—ORDER OF DISTRICT JUDGE ON APPEAL—SECOND APPEAL.—The right of appeal under the Act is strictly limited by the provisions of S. 75 and there can be no appeal from a decision of a District Judge passed in an appeal from a decision of a Subordinate Court unless the latter is one under S. 4. 1935 M. 432.

Sec. 5: SCOPE.—Under S. 5 the Ins. Court has the general powers under the C. P. Code, and has power to carry out its own orders. 18 N.L.J. 14. The powers referred to in this rule are to be exercised in proceedings under other provisions of the Act. 46 I.C. 377. By

General powers of Courts.

ceedings under this Act, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction.

(2) Subject as aforesaid, High Courts and District Courts, in regard to proceedings under this Act in Courts subordinate to them, shall have the same powers and shall follow the same procedure as they respectively have and follow in regard to civil suits.

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virtue of the provisions of S. 5 (1) an Insolvency Court under the Provincial Insolvency Act may exercise all the powers which are conferred upon it as a Civil Court of original jurisdiction unless such powers are contrary to the provisions of the Provincial Insolvency Act; but S. 151, C. P. Code, does not confer upon a Court authority to do that which is prohibited by law. A Court has no inherent power to alter or vacate its own order and cannot invoke its inherent powers for this purpose. Consequently, a Provincial Insolvency Court has no inherent power to revoke an order of discharge which it has previously passed. 1940 Rang. L.R. 392=1940 R. 156. One petition can be filed against two joint debtors committing joint acts of insolvency. 84 I.C. 968=1925 R. 36. The Court has power to grant *ad interim* protection. 1925 M. 170. In insolvency cases the High Court has power to act under the C. P. Code only subject to the provisions of the Prov. Ins. Act. Where therefore the Act specifically provides for appeals and revisions in particular manner, any action taken in appeal or revision under the C. P. Code will not be subject to the provisions of the Act, but will be in contravention of those provisions. The Act is a special law and in the absence of any specific provision to the contrary, the C. P. Code, cannot limit or otherwise affect the provisions of the Act. 58 A. 639=1936 A.L.J. 9=1936 All. 80. Power of Original Side of High Court to transfer pending insolvency case from one mofussil Court to another. 4 R. 554; from the mofussil Court to itself. 28 L.W. 369. As to power of insolvency Court to order amendment of the petition, *see* 67 M.L.J. 924. Sec. 21, C. P. Code, is inapplicable to insolvency proceedings. 20 I.C. 270=18 C.W.N. 1050. O. 21, R. 89 does not apply to sales by O. R. 6 R. 768=107 I.C. 172 =1928 R. 60. Insolvency Court has power to grant temporary injunction preventing a creditor from selling the debtor's property. 6 R. 352. Powers in connection with sale of insolvent's property are not the same as under O. 21, C. P. Code. Loss by re-sale cannot be recovered as under O. 21, R. 71. 39 All. 267=37 I.C. 830. *See also* 1936 Nag. 237. But the procedure to effect an attachment is the same as under C. P. Code. 36 All. 65=24 I.C. 752. Insolvency Court can review its own order. 46 Mad. 405=44 M.L.J. 251. *See also* 15 Lah. 698=1934 Lah. 468; 187 I.C. 794 (Power to set aside ex parte order of adjudication on debtor's petition). As regards *powers of District Judge when exercising appellate jurisdiction*, see 44 All. 605=1922 All. 206. District Court cannot stay sale proceeding in Sub-Court. 32 I.C. 897 =3 L.W. 250. Objection to jurisdiction of insolvency Court can be taken on appeal, 20 I.C. 370=18 C.W.N .1050. On this section, *see also* 1927 Cal. 834. Where a judgment-debtor applied to be adjudicated an insolvent and subsequently, but before his actual adjudication as insolvent, the decree-holder realised his decree amount by sale of the property, *held*, that the Insolvency Court had no power to order a refund of the amount by the decree-holder as there was no provision in the Act authorising it to do so, and sec. 144 of the C. P. Code, had no application to such a case. The proper remedy of the O. R. was to institute a suit. 116 I.C. 192. But *see contra* 1932 A.L.J. 1095=1933 All. 117. The provisions of O. 9, R. 13 of the C. P. Code, are applicable to proceedings under the Act. 121 I.C. 303 (1). There is no inherent jurisdiction for the Insolvency Court under sec. 5 to pass a protection order or an order protecting the alleged insolvent from arrest and imprisonment in execution of a money decree otherwise than the provisions of secs. 23 and 31. 148 I.C. 975=1934 Lah. 113 (2). Pending an application for adjudication, warrant for arrest of the alleged insolvent was issued in execution of a money decree; but actual arrest was not effected. He applied to the Insolvency Court for an order of protection. *Held*, that neither S. 23 nor S. 31 applied to the case and that the Court had no inherent jurisdiction to pass the protection order under S. 5 (*Ibid.*) Since the powers given by S. 5 are expressly subject to the provisions of the Act and the provisions of S. 43 (1) are mandatory, they must to that extent be limited. 8 Rang. 187=1930 Rang. 166. S. 5, cl. (2) is subject to the provisions of S. 75, *infra*. 31 C.W.N. 502=1927 Cal. 474. A proceeding instituted against a stranger to the bankruptcy for recovery of money due from him for breach of obligation to the insolvent is not a proceeding under the Provincial Insolvency Act, 1907 and S. 47 of Act of 1907; S. 5 of the present Act has no application to such a case. 1930 A.L.J. 1048=1930 All. 622.

REVIEW.—O. R. has no power to review the order of his predecessor. 1928 Sind 40=105 I.C. 366. Where an application for restoration of a case dismissed for default was not considered on the merits, because there had been a compromise, there was an error patent on the face of the record and the Court can correct it. 28 N.L.R. 295. Review by Insolvency Court—Sufficient cause—*Bona fide* mistake of O. R. 61 M.L.J. 719. In cases relating to insolvency tried by mofussil Courts, they have power to review under O. 47, R. 1, C. P. Code, and the right to set aside orders passed *ex parte* under O. 9. 61 M.L.J. 719.

"SUBJECT AS AFORESAID" in S. 5 (2) means subject to the ordinary civil jurisdiction of the

PART II.

PROCEEDINGS FROM ACT OF INSOLVENCY TO DISCHARGE.

Acts of Insolvency.

Acts of insolvency.

6. A debtor commits an act of insolvency in each of the following cases, namely:—

(*a*) if, in British India or elsewhere, he makes a transfer of all or substantially all his property to a third person for the benefit of his creditors generally;

(*b*) if, in British India or elsewhere, he makes a transfer of his property, or of any part thereof with intent to defeat or delay his creditors;

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District Court in insolvency matters, that is, in all proceedings in insolvency, the proceedings must commence in the District Courts. The High Court undoubtedly can transfer cases to be disposed of in the High Court under its extra-ordinary civil jurisdiction. 17 Lah. 582=1936 Lah. 608.

Secs. 5 and 69.—The Insolvency Court has jurisdiction to issue such processes as prohibition and injunction to prevent alienation of his property by the debtor. Where however the processes issued are full of defects and do not purport to give notice to the debtor of the admission of any insolvency petition at all, the debtor, on whom they are served, is not legally liable to comply with them and cannot be convicted under S. 69 (*a*) on his failure to comply with them. The insolvent might have an idea of what the proceedings really are. but that is not sufficient to fix him with liability in a criminal case. 1936 Nag. 237.

Sec. 6.—Mere admission of inability to pay is not one of the many acts of insolvency enumerated in this section. 1928 Mad. 393. A person cannot be adjudicated an insolvent on the mere ground that his assets are less than his liabilities. 1930 Rang. 147 (1). Dismissal of one application by a creditor or debtor does not bar another application by a different creditor, though a party to the prior petition. 107 I.C. 842=1928 Pat. 116. Assets of insolvent—Onus. 1933 Lah. 582.

Cl. (a).—The transfer to some creditor as trustees for the whole body of creditors is transfer to a third person. 34 I.C. 602=30 M.L.J. 415. Where a person who is in debt transfers all his property to his children, a presumption of fraud arises. 1936 Rang. 493. A creditor who is not a party to a trust deed executed by the debtor for the benefit of his creditors and to whom the trust has not been communicated, can avail himself of the act of insolvency committed by the debtor by the execution of the trust deed and get the payment of his debts out of the trust property. 181 I.C. 854=42 C.W.N. 1131=1938 C. 818. Closing business and asking creditors to communicate with pleaders is an act of insolvency. 97 I.C. 446=1926 Sind 18. Banker when trustee, *see* 32 M. 68.

Cl. (b).—A mere finding that the effect of a transfer would be to defeat one creditor is really quite immaterial. The transfer has got to be made with intent to defeat the creditors as a whole. 1934 R. 242. In an insolvency proceeding started by the creditor, the burden of proving that a mortgage effected by the debtor is fraudulent or without consideration undoubtedly lies upon the creditor. 1934 Rang. 242. Where a transfer of part of the assets to satisfy pre-existing debtors still leaves sufficient assets in the hands of the debtor to enable him to meet his other engagements, such a transfer does not constitute an act of insolvency as it cannot be said of the transfer that it was made with intent to defeat or delay creditors. 162 I.C. 115=1936 R. 129. *Release deed* prior to incurring of debt is not an act of insolvency. 61 I.C. 756=13 L. W. 141. A *collusive suit* and subsequent withdrawal or compromise putting another in possession of property comes under this clause. 29 I.C. 217=13 A.L.J. 434. For *benami transfer*, see 50 I. C. 593=36 M.L.J. 180. Intention to defeat or delay creditors, see 55 I. C. 186. Execution of mortgage for fictitious consideration is an act of insolvency. 1930 A. 282=52 A. 476. Alienation of property how far an act of insolvency. 1933 L. 582. S. 6 applies only when a debtor transfers his property with a view to defeat or delay all the creditors. Where therefore a debtor transfers his property not to a creditor of his and pays out of the sale proceeds some of his creditors, the transfer not being one with intent to defeat or delay all the creditors, the transfer does not amount to an act of insolvency on the part of the debtor within the meaning of S. 6 (*b*) of the Act. 173 I.C. 733=1937 L. 495. *See also* 1940 L. 496. Intent to defeat and delay creditors is to be gathered from the consequences of the debtor's act. If a transfer by the debtor has the effect of substantially reducing the area, which was available to the creditors for realizing their debts, by temporary alienation, and if that transfer by itself is not enough to bring in sufficient money to discharge his existing liabilities the transfer must be deemed to have been made with intent to defeat and delay creditors although the primary motive of the debtor in effecting the transfer might be different. I.L.R. (1939) L. 498=41 P.L.R. 785=1939 L. 349. *See also* 1940 L. 496. The words "with intent to defeat or delay the creditors" or having a "view to give preference to a creditor" are mental acts and can only be determined if one looks into the surrounding circumstances. The true test to apply in such cases is whether the alleged insolvent is in a position to pay his debt, and whether the property which has been transferred bears such a proportion to the whole property that the remaining or the residue of the property is still sufficient, from the point of view of an ordinary businessman to

(*c*) if, in British India or elsewhere, he makes any transfer of his property, or of any part thereof, which would, under this or any other enactment for the time being in force, be void as a fraudulent preference if he were adjudged an insolvent;

(*d*) if, with intent to defeat or delay his creditors,—

(i) he departs or remains out of British India,

(ii) he departs from his dwelling-house or usual place of business or otherwise absents himself,

(iii) he secludes himself so as to deprive his creditors of the means of communicating with him;

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meet the debts of the creditors who remain unsatisfied. 190 I.C. 665=1940 P. 187. If an alienation by a debtor is ineffective by reason of his incompetency to validly deal with the property, it is not a sufficient ground for adjudicating him an insolvent. 35 P.L.R. 522=1934 L. 394. So also in case of alienation of property which is exempt from attachment and sale by a Civil Court or in insolvency proceedings. 148 I.C. 832=1934 L. 507. A *partition by a father* of the joint family property without making adequate provision for the settlement of his debts may amount to a transfer of property with intent to delay and defeat creditors and so constitute an act of insolvency. The fact that the partition is effected by an arbitrator does not justify any conclusion on the point one way or another. 37 P.L.R. 297. A partition between the members of a joint Hindu family with reference to the joint family property cannot be considered to be a transfer with intent to defeat or delay the creditors, where the debt in question is binding only on some of the members and the others are not liable. Cl. (*b*) of S. 6 would apply only to those cases where the transfer is intended to defeat all the creditors as a whole and has no application to a case where it only has the effect of preferring some creditors to others. 1940 O.W.N. 146=1940 O. 205. Concealing property to defeat creditors is not an act of insolvency. 1933 L. 725=34 P.L.R. 987; 15 P.L.T. 461=1934 P. 526.

Sec. 6 (b) and (c).—To make S. 6 (*b*) applicable it has only to be shown that the debtor transferred his properties with intent to defeat or delay his creditor; and to make S. 6 (*c*) applicable, it must be shown that (1) there was a transfer by the debtor to a creditor or creditors; (2) the debtor was unable to pay his debts at the time of the transfer; (3) the transfer was with a view to give the creditor or creditors preference; and (4) the transfer was within three months of the date of presentation of the petition. What has to be considered by the Court is whether, at the time of the transfers complained of, the debtor was or was not in a position to pay his debts and whether the transfers were with a view to give preference to the creditors concerned. Intent to defeat or delay the creditors or to give a preference to a creditor is a mental act and can only be determined if one looks to the surrounding circumstances. A transfer of a considerable portion of his properties by a person in serious pecuniary difficulties, his debts surpassing his assets, in favour of one or some of his creditors, without making any provision for the payment of debts due to others, may be presumed to have been made with intent to defeat or delay creditors or with a view to give preference to a particular creditor. 17 Pat.L.T.. 857=1937 P. 134. In order to establish an act of insolvency under S. 6 (*b*), it is necessary for the petitioning creditor to prove that the transfer or transfers relied on by him were made to defeat or delay the creditors. In order to prove an act of insolvency under S. 6 (*c*) he must establish that the debtor had made transfers with a view to give some of creditors preference over others (such being the dominant motive), and secondly, that when he made the transfers in question he was unable to pay his debts. The mere fact of a transfer or transfers is insufficient for the purpose. 21 P.L.T. 150=1940 P. 411.

Cl. (c).—Meaning of *fraudulent preference*. 11 A.L.J. 545; 19 C.W.N. 157. *See also* 1940 P. 187. If all members of a joint family are guilty of a joint act of fraudulent preference, one petition will do to adjudicate them as insolvents. 44 M. 810=40 M.L.J. 570. Where a creditor presented an application for the adjudication of his debtor on the latter executing a sale-deed in favour of his wife in lieu of her dower debt and the lower Court adjudicated the debtor as insolvent remarking that "transfer of one's tangible property to wife in lieu of dower is always suspect". *Held*, that the order of adjudication was not justified in the absence of a definite finding that the sale in question amounted to a fraudulent preference. 1935 A.L.J. 487=1935 A. 416. Where all the alienations are the result of pressure on the part of the creditors, they cannot be said to be voluntary and the fact that some of these creditors are relatives does not affect the question. 1935 L. 278. *See also* 1937 N. 226. *Evidence of other acts of preference* committed by the debtor shortly before and shortly after the particular act of preference alleged as an act of insolvency, is admissible. 161 I.C. 348=1935 M.W.N. 1159=43 L.W. 516=1936 M. 275. *See also* 44 P.L.R. 96. Where a debtor effects a transfer in favour of his creditor, and another creditor of his applies to adjudicate him insolvent, the petitioning creditor must show that the transfer so made by the debtor has the effect of giving such transferee creditor fraudulent preference over himself and that in effecting the transfer the debtor had that intention. The burden of proving this lies on the petitioning creditor. I.L.R. (1937) N. 403=1937 N. 197.

Cl. (d).—For agent's departure from place of business, *see* 39 M. 693=29 M.L.J. 788. Judgment-debtor concealing himself to avoid arrest. *See* 133 I.C. 626 (L.).

(*e*) if any of his property has been sold in execution of the decree of any Court for the payment of money;

(*f*) if he petitions to be adjudged an insolvent under the provisions of this Act;

(*g*) if he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts; or

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ATTEMPT TO DEPRIVE SINGLE CREDITOR OF FRUITS OF HIS DECREE.—Under S. 6 (*d*) it is an essential feature of an act of insolvency that the act should be done with intent to defeat or delay the creditors generally of the debtor. It is insufficient to allege or to prove that the act was done with intent to defeat or delay any particular creditor. 1935 R. 281. *Avoidence of service* in connexion with one particular execution proceeding is not an act of Insolvency. 1935 R. 281.

Sec. 6 (e).—*See* 24 L.W. 390=1926 M. 976 =51 M.L.J. 326. The expression "decree of any Court for the payment of money' in Cl. (*e*) of S. 6 must be construed to have the same meaning as in Cl. (*h*). It means a decree personally against the person concerned. It does not include a decree for sale on a mortgage. 154 I.C. 908=1935 O.W.N. 374. The decree passed against a person in his capacity as the legal representative of another, is not a decree of the nature contemplated by S. 6 (*e*) and so a sale of the property in execution of such a decree is not an act of insolvency under the Act. I.L.R. (1938) A. 84=1937 A.L.J. 1221 =1938 A. 59. The word 'decree' in S. 6 must be taken in the same sense in which it has been used in C. P. Code, by virtue of S. 2 (2) of the Act. A certificate filed under the provisions of the Public Demands Recovery Act cannot be said to be the formal expression of an adjudication in a suit and is, therefore, not a decree. Accordingly a person commits no act of insolvency when his property is sold in execution of the certificate. 41 C.W.N. 800. *See also* 1941 M. 99. An act of insolvency in S. 6 (*e*) occurs when the property of the insolvent is sold in execution of a decree, and not when the sale is confirmed. 179 I.C. 367= 1938 L. 819. It means a decree capable of execution by the arrest of the person or against the general estate of the person against whom the decree is passed. 1937 M.W.N. 406=45 L.W. 260=1937 M. 433. A sale of a person's property for arrears of rent under the Madras Estates Land Act operates as an act of insolvency under S. 6 (*e*). A decree of rent is a decree for the payment of money notwithstanding that the rent is charged on the holding of the ryot. 52 L.W. 479 (2)=(1940) 2 M.L.J. 555=1941 M. 99. *See also* 41 C.W.N. 860. The words " property has been sold in execution of a decree " in S. 6 (*e*) seem to refer not to an indefeasible sale, but to a sale which has been actually held but which may be set aside as a result of subsequent proceedings. Where there has in fact been a sale in execution, a subsequent deposit whereby the sale is set aside, or a subsequent objection founded on some material irregularity resulting in the setting aside of the sale, will not alter the fact that the property was sold in execution of a decree. The setting aside of the sale in the circumstances cannot, therefore, be a sufficient reason for cancelling in revision an order of adjudication based on such a sale in execution, whether it might or might not be a sufficient reason for an application for the annulment of the insolvency. (1942) 1 M.L.J. 38. *Quaere*: whether an insolvency petition can be maintained on the strength of a sale which is set aside before the insolvency petition is presented. (1942) 1 M.L.J. 38.

Cl. (f).—Full particulars must be stated in the insolvency petition. 33 P.L.R. 992=1932 L. 643 (2). Where the original order of adjudication was annulled but the insolvent again applied for an adjudication, he must have taken to have committed a fresh act of insolvency within the meaning of S. 6 (*f*). 109 I.C. 578. The presentation of the petition of insolvency by debtor is in itself an act of insolvency. He does not cease to be so even if the petition is dismissed and any creditor may present an insolvency petition against a debtor founded on this act of insolvency. But it must be done within three months of the date on which the debtor presented his petition. 37 C.W.N. 535=1933 C. 564. A Judge cannot dismiss a petition because he is not satisfied that the debtor is unable to pay his debts. 12 I.C. 48=15 C.W. N. 990. But a petition should not be the means to collect debts from persons refusing to pay. An abuse of the process of Court cannot be permitted. 21 I.C. 293= 5 M.L.J. 545.

Cl. (g):—NOTICE.—This Act is nothing more than a copy of the Bankruptcy Act of England regarding notice of suspension of payment and that being so, the authorities which have been decided from time to time on this provision in the English Act are necessarily authorities for the Court. 14 P.L.T. 691=1933 P. 461. Notice may be oral but must be unambiguous. 49 A. 321=1927 A. 266; 34 P.L.R. 43=1933 L. 113. When a debtor tells his creditor: "I cannot pay your debts; you can do what you like," that is as emphatic a notice as he could give that he is not going to pay his debts, and constitutes an act of insolvency within the meaning of S. 6 (*g*). 44 L.W. 651=71 M.L.J. 730=1937 M. 13; 1937 A.L.J. 491=I.L.R. (1937) A. 616= 1937 A. 435. Where in response to a letter by one of the creditors, the debtor mentioned his inability to pay and suggested that money might be raised on some shares pledged with the creditor in order to meet the claims of the pressing creditors only and the debtor further expressed his willingness to a scheme of creating a trust for the liquidation of his debts, *held*, that there was no act of insolvency so as to support an insolvency petition. 33 P.L.R. 992. *See also* 34 P.L.R. 43=1933 L. 113. The debtors who had become involved in debts sold their property in order to meet their creditors and offered to make a rateable distribution among their unsecured creditors of the balance of the sale proceeds after satisfying a mortgage debt charged on the property. The intimation

(*h*) if he is imprisoned in execution of the decree of any Court for the payment of money.

Explanation.—For the purposes of this section the act of an agent may be the act of the principal.

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given to one creditor was to the effect that they would not pay anything to him unless he agreed to accept in full settlement the small amount which they offered. *Held*, that the intimation in question amounted to a notice that the debtors had suspended or were about to suspend payment of their debts and that it amounted to an act of insolvency within the meaning of S. 6 (*g*). 1935 M. 589 (2)=69 M. L.J. 184. A debtor does not commit an act of insolvency merely by suspending payment of his debts; under S. 6 (*g*) he commits such act only "if he gives notice to any of his creditors that he has suspended payment or that he is about to suspend payment of his debts" due to his creditors generally and the time, place and particulars of the notice should be accurately described. 12 R. 150=151 I.C. 190=1934 R. 87. Notice need not be express. 9 I.C. 453; 1926 S. 246. Notice need not be in writing or expressed in any particular form. The Act does not prescribe any form of words. 1929 L. 136=112 I.C. 132. The mere service of notice by the Insolvency Court informing the creditors of the date on which the insolvency petition filed by the debtor is to be heard cannot amount to giving notice by the debtor to his creditors that he has suspended payment. I.L.R. (1939) 1 Cal. 425=69 C.L.J. 84=1939 C. 313 "Suspended payments of his debts"—Meaning of. 49 A. 321=1927 A. 266. *See also* 34 P.L.R. 43=1933 L. 113. S. 6 (*g*) contemplates suspension of the payment of the entire debt of the debtor and not simply the debt due to a particular creditor. 41 C.W.N. 349. *Principles* to be applied in determining whether debtor's statement amounts to suspension of payment are as follows: (1) A mere statement by a debtor that he is unable to pay his debts, however insolvent he may be, is not necessarily a notice that he is suspending or about to suspend payment. (2) One has to ascertain what the words used by the debtor would reasonably and ordinarily mean to the mind of a creditor. (3) In construing the statement of the debtor, it has to be seen whether he has clearly indicated that not only is he not going to pay a particular creditor but that he intends to deal with his creditors collectively. 14 Pat.L.T. 691 =1933 P. 461. *See also* 152 I.C. 655=15 P.L. T. 461=1934 P. 526; 112 I.C. 132=1929 L. 136. Closing business and asking creditors to communicate with pleaders of the firm is an act of insolvency. 1927 S. 18. Merely delaying or suspending payment is not such an act, 1931 R. 317. Where a bare declaration of inability to pay debts does not amount to an act of insolvency, it may well be accompanied by such circumstances and might have been in such a context that if the impression produced upon the minds of the creditors receiving it is such as to amount to a statement that the debtor is going to suspend the payment of his debts, it might amount to an act of insolvency. Consequently, a statement by a debtor in reply to demands by creditors that he has placed all his title-deeds in the hands of a third person for the sale of his properties and the discharge of the debts amounts to an act of insolvency. 109 I.C. 83=1928 M. 903. *See also* 1929 L. 136; 34 P. L.R. 43=1933 L. 113. The words to the effect that "If you do not accept my offer I shall have to close my business" proved to have been used by a merchant, mean that he intends to suspend payments unless his request is granted, and in consequence that he commits an act of insolvency. 121 I.C. 865=1930 S. 83. A mere statement by a debtor that he has suspended or that he intends to suspend payment of his debts temporarily amounts to a notice of suspension under S. 6. A mere admission of insolvency is not enough. 1930 Sind 83. A debtor had collected his creditors and had there told them that if they did not want him to sell the "property and pay them individually they could take over" the property and realize their debts by selling it "themselves." *Held*, that this did not amount to a notice to suspend payment within the meaning of Cl. (*g*), S. 6. 144 I.C. 276=34 P.L.R. 682=1933 L. 319. On this clause, *see also* 1933 L. 725 (1)=146 I.C. 628.

EXPLANATION.—Difference between English and Indian Law, *see* 39 M. 693=29 M.L.J. 788. Partners—Joint adjudication of. *See* 22 S.L.R. 32; *Ibid.*, 273. Where a partnership consisting of three brothers who are members of a joint family is in the sole charge and exclusive control of the eldest brother, the acts of insolvency committed by him must be deemed to be the acts of the other brothers also, and they too can be adjudicated insolvents on such acts. If the eldest brother gives notice of suspension of payment of debts, all the partners are liable to be adjudicated on the basis of that notice. 44 L. W. 651=71 M.L.J. 730. *See also* 1940 S. 141; 41 C.W.N. 1288; 1940 M. 241. Acts of insolvency as defined in S. 6 of the Provincial Insolvency Act are acts or things done or suffered to be done creating personal liability. Although the father or manager in a joint Hindu family can act on behalf of the family, the recognised restrictions on his power so to act in his representative capacity as to impose any personal liability on other members of the family render it impossible to treat any act of insolvency committed by him in relation to the affairs of the family generally as an act of insolvency committed by the other members of the family also. Consequently the joint Hindu family cannot as such be adjudicated insolvent; but two or more members of the family who have incurred a joint personal liability may present a joint petition in insolvency or may be proceeded against on one creditor's petition in case the joint act of insolvency can be brought home to them. Minor members must, however, be excluded in any case from insolvency proceedings started at the instance whether of debtors or creditors. 16 P. 724=18 P.L.T. 839=1937 P. 665. Plea of want authority cannot be raised to the prejudice of creditor. 1930 S. 83.

Petition.

7. Subject to the conditions specified in this Act, if a debtor commits an act of insolvency, an insolvency petition may be presented either by a creditor or by the debtor, and the Court may on such petition make an order (hereinafter called an order of adjudication) adjudging him an insolvent.

Petition and adjudication.

Explanation.—The presentation of a petition by the debtor shall be deemed an act of insolvency within the meaning of this section, and on such petition the Court may make an order of adjudication.

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AMENDMENT.—The *Court can allow an amendment* of an insolvency petition presented by a creditor, if it does not introduce a new cause of action or alter the character of the claim but merely corrects a misdescription of the property which had been sold in execution of a money decree against the insolvent. The amendment takes effect *nunc pro tunc*. If the insolvent had accepted the costs of adjournment necessitated by the amendment, he cannot be allowed to challenge the order allowing the amendment by way of appeal. 1937 L. 895. *See also* 43 P.L.R. 363; (1937) 2 M.L.J. 737; 1940 L. 462.

Secs. 6 and 10.—Creditor only jointly entitled to the debt—Effect of—Debtor jointly and severally liable—Pendency of suit on debt—Effect of. *See* 1926 C. 234; 1926 L. 235.

Sec. 7: SCOPE.—Adjudication must necessarily follow on the essential conditions being satisfied. Acts of bad faith are relevant only at the time of discharge. 57 I.C. 977. The act of insolvency of a person commencing in his being arrested and imprisoned in execution of a decree continues throughout the period during which he remains in prison. 1931 L. 112. Under S. 7 of the Provincial Insolvency Act, a debtor who commits an act of insolvency may be adjudged insolvent. The Court has no jurisdiction to decide whether the debtor owned sufficient property to pay his creditors. It is entirely beside the mark in determining whether he ought to be adjudged or not. 173 I.C. 918=39 P.L.R. 292=1937 L. 618. A mortgagee who has obtained a decree on the basis of his mortgage on the property of the judgment-debtor does not cease to be secured creditor and is not thereby precluded from making an application under Ss. 7 and 9. 129 I.C. 557=1931 A. 224. A minor cannot be declared an insolvent. 19 I.C. 704; nor heir of a deceased debtor. 22 I.C. 930. *See* 50 M. 981 =1927 M. 922=53 M.L.J. 403. On this point, *see also* 41 M. 824=37 M.L.J. 473; 49 M. 217 =49 M.L.J. 697. The son of a Hindu father who died after incurring debts upon promissory notes, apart from some special ciecumstances which would make him personally liable for the amily debt cannot be adjudged insolvent on account of his liability as a member of the family to pay these debts out of the family properties. (50 M. 981=53 M.L.J. 403, Foll.) 61 M.L.J. 518. *See also* 12 R. 602=1934 R. 162. A Hindu joint family firm can be adjudicated insolvent under the Provincial Insolvency Act. I.L.R. (1940) Kar. 375=1940 S. 141. A Hindu son who has not incurred any debt himself but is only liable for the debts of the deceased father to the extent of the assets inherited by him, is not in respect of such liability a "debtor" entitled to present a petition in insolvency under the provisions of Ss. 7 and 10 of the Provincial Insolvency Act. I.L.R. (1938) 1 C. 132=66 C.L.J. 346=41 C.W.N. 1288. The mere fact that certain persons are members of a Hindu joint family to which a business belongs cannot make them parties to the contracts entered into by those who conduct the business. In the case of a family business those members only are personally liable for the debts of the business who are in control or management of it, or who have acquiesced in the course of the business in which the particular contract was entered into so as to warrant their being treated as parties to the contract. Unless there is a personal liability in respect of a debt, there is no such relation of debtor and creditor as will serve to support an order of adjudication in insolvency. The other members of the joint family who have not taken part and who have not been proved to have taken part in the conduct of a family business carried on by the manager of the family, cannot therefore be adjudicated insolvent, in respect of a debt incurred by the manager in the conduct of the business. An act of insolvency committed by the manager cannot be treated as one committed by the other members of the family also. It would be pushing the theory of joint family responsibility to extremes to hold that a man can be adjudicated insolvent at the instance of a creditor with whom he has never had any dealings express or implied and for an act which he had never committed or acquiesced in. 50 L.W. 857=1940 M. 241. Joint family members must apply separately to be declared insolvents. 31 C.L.J. 206=58 I.C. 531. An application for insolvency by some of the members of a joint Hindu family does not *ipso facto* result in the insolvency of all the members of the family. 1931 L. 125=131 I.C. 345. A petition was presented for the adjudication of two majors, four minors and two widows as insolvents. The same having been dismissed on the ground that it was wrongly framed, the petitioner appealed and impleaded the two majors and one widow only. The petitioner alleged that those three persons incurred a joint liability and alleged certain acts of insolvency on their part. *Held*, that the proper procedure for the lower Court was to allow the petitioner to amend his petition by striking out the names of unnecessary persons. A single petition for the adjudication of the joint-debtors was sustainable. 130 I.C. 783 (1)=1931 L. 384. A dismissal of one petition for default is not a bar to another. 61 I.C. 870=2 Pat.L.T. 335. On adjudication, petition based on ground of fraudulent alienation may be allowed to be *amended* by adding ground of fraudulent preference, after period of limita-

Exemption of corporation, etc., from insolvency proceedings.

8. No insolvency petition shall be presented against any corporation or against any association or company registered under any enactment for the time being in force.

Conditions on which creditor may petition.

9. (1) A creditor shall not be entitled to present an insolvency petition against a debtor unless,—

(*a*) the debt owing by the debtor to the creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to such creditors, amounts to five hundred rupees, and

(*b*) the debt is a liquidated sum payable either immediately or at some certain future time, and

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tion fixed for main petition. 144 I.C. 44=1933 M. 608. *See also* 67 M.L.J. 924. Court cannot cancel alienations by debtor, O.R. has to take action under S. 53 for their cancellation. 66 I. C. 271=41 M.L.J. 606. Application praying to be adjudicated insolvent should first be granted and then steps to annul transfer of land should be taken. 1930 L. 16=123 I.C. 576. Effect of —Adjudication of firm of—Discharge—Liability of partners for debts incurred prior to adjudication. 25 S.L.R. 422. There is nothing either in this Act or any other provisions of law which debars either creditor or a debtor from proceeding by a fresh application under the Act, even where debtor has been made insolvent under the Punjab Laws Act and has not yet obtained an order of discharge. 164 I.C. 846=1936 L. 407.

Sec. 8 : SCOPE.—*See* 24 C.W.N. 461.

Sec. 9.—A man can only be declared an insolvent if he is not in a position to pay his debts and if a debtor owed Rs. 50,000 and his property were valued at Rs. 51,000, it cannot be held that he was insolvent. 1933 L. 582. On a debtor's application to be adjudicated insolvent only two points arise, namely, whether his debts amount to Rs. 500 or over and whether he is unable to pay his debts. The fact that the debtor has concealed his account books is no ground for dismissing the application. 34 P.L. R. 69=1933 L. 330. There is no legal bar to a single application being made by a creditor for adjudicating two or more persons as insolvent., if they are jointly liable on a debt or have committed a joint act of insolvency. The question however whether such an application should be jointly tried and decided will have to be decided on the facts of each case. 1930 L. 192 (2). An insolvency petition filed by one of several creditor-partners of a firm, notwithstanding that he is described in the body of the petition as the managing partner of the firm, is not legally sustainable when it is not in the firm name or in the names of all its members, nor signed by the petitioning partner on behalf of the firm or its members. Such a petition cannot be permitted to be amended by the addition as party of another creditor-partner when the application for that purpose is made after the expiry of three months since the date of insolvency. And the power of the Court to add parties under the incorporated provisions of the C. P. Code cannot be invoked as it is subject to the time-limit prescribed by S. 9 of this Act. Nor can the provisions of S. 5 of the Limitation Act be applied to such a case because an insolvency peititon is not an "application" within the meaning of S. 78 of this Act. 34 L.W. 799=61 M.L.J. 544. *See also* 55 M. 766=60 M.L.J. 152; I.L.R. (1941) L. 55=43 P.L.R. 363 (allowing amendment of petition). *Distinction between petition and application* pointed out. 55 M. 766=1932 M. 352=63 M.L.J. 152. An order of adjudication based on an act of insolvency which is not relied upon in the application to adjudicate the person as insolvent is illegal. 119 I.C. 46 (1)=1927 M. 910 (1). On an application filed by a creditor for adjudging a person as an insolvent if the latter denies the debt alleged by the creditor to be due to him the Ins. Court is bound to make an enquiry into the existence of the debt and come to a finding on the point. 1927 L. 111. But *see* 59 B. 161=36 Bom.L.R. 1236=1935 B. 80, where it was held that it has a discretion either to decide it itself or to refer the parties to a regular suit.

Sec. 9 (1) (b).—Meaning of '*debt due*'. *See* 68 I.C. 885. For the purpose of S. 9 the 'debt' must be a liquidated sum. Where an employee in a post office is alleged to have embezzled certain amount, the claim by the Government in respect of this amount is in the nature of unliquidated damages. The amount claimed therefore cannot be described to be a debt. 190 I.C. 633=1940 L. 273. Petitioning creditor need not be creditor on the date of adjudication. It is sufficient if he is so on the date of the petition. 50 M. 396=1927 M. 153=51 M.L.J. 680. A creditor is not entitled to maintain a petition under S. 9 if his debt was not in existence on the date of the alleged act of insolvency but was incurred later. 17 L. 580=1936 L. 800. A Muhammadan husband's liability to pay his wife's deferred dower is a 'debt' within the meaning of S. 9 (1) (*b*) in respect of which a petition for adjudication as insolvent could be filed. The interest of the wife is a vested and not a contingent one. It is not liable to be displaced by the happening of any event, not even her own death, because her heirs can claim the money, if she dies. 1941 N.L.J. 181=1941 N. 167. Where a judgment-debtor in a mortgage suit, in which a preliminary decree for foreclosure is passed, obtains a stay of the proceedings by giving security for the standing crops up to the extent of the particular amount, such amount is not a debt which would entitle the decree-holder to present a petition of insolvency against the judgment-debtor when the exact value of the crops is not ascertained at the time the peti-

(*c*) the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition.

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tion is presented and the debt is not consequently a liquidated sum. 168 I.C. 212=1937 N. 60. A sum of money due on a decree obtained by the petitioning creditor against the father of the insolvent, in which the insolvent is substituted as judgment-debtor after the death of his father is not a debt which entitles the petitioning creditor to present an insolvency petition. 168 I.C. 212=1937 N. 60. Effect of postponement of payment of decree debt does not affect capacity of petitioning creditor. 50 M. 396=1927 M. 153=51 M.L.J. 680. A mortgagee who has obtained a decree on the basis of his mortgage does not cease to be a *secured creditor* and is not thereby precluded from making an application under Ss. 7 and 9. 129 I.C. 557=1931 A. 224. *See also* 1937 R. 189; 1937 N. 60. Where there are contracts of sale and purchase, the difference between contract rates is a '*liquidated sum*.' 56 I.C. 158. Cls. (*a*). (*b*) and (*c*) of S. 9 (1) of the Act lay down the three conditions on which a petitioning creditor is entitled to found his petition. The period of three months mentioned in Cl. (*c*) does not refer to the presentation of the petition, but it refers to the act of insolvency on which the petition is to be grounded. The ordinary construction of that clause would be that a person is not entitled to institute a petition for adjudicating a debtor insolvent unless he establishes *inter alia*, that the act of insolvency took place within three months before the presentation of his petition. That clause does not prescribe any period of limitation within which the petitioning creditor is to present his application, and therefore S. 5 of the Limitation Act does not apply to such a petition by virtue of S. 78 of the Act. I.L.R. (1939) 1 C. 425=69 C.L.J. 84=1939 C. 313. *See also* 1936 L. 923; 1933 C. 564. Where in a petition by the creditors under S. 9 (1) to adjudicate certain debtors insolvents, allegations made against the debtors consist of an incomprehensible mixture of Cls. (*b*) and (*c*) of S. 6 and the petition is so framed that it cannot be ascertained whether it alleges that the debtors had made a transfer of part of their property with intent to defeat or delay their creditors jointly or whether they had made a transfer of property which would be void as a fraudulent preference, if they were adjudicated insolvents, the petition ought to be dismissed on this ground alone. 170 I.C. 942 =1937 R. 189.

PROCEDURE.—*See* 96 I.C. 424=1926 L. 638.

SEC. 9 (1) (*c*).—The starting point of limitation or the purpose of calculating the three months prescribed by S. 9 (1) (*c*) is the date of the registration of the deed and not its execution. 150 I.C. 834=1934 N. 171; 1935 L. 55; 1935 L. 565. But *see contra* 1933 L. 821. The period of three months under S. 9 (1) (*c*) must be calculated from the date of commission of the act of insolvency and it is an absolute rule. No extension can be allowed on the ground that the Court was closed for the holidays at the time when the period of three months expired. 45 L.W. 260=1937 M. 433. *See also* 1937 N. 197=I.L.R. (1937) N. 403; 41 P.L.R. 655. No extension of time will be granted, because the petition was presented in a wrong Court. 39 M. 74=29 M.L.J. 451. S. 5, Limitation Act, does not apply to petitions for insolvency. [1932 M. 352, Foll.] 1933 L. 821. Court has no power to excuse delay. 41 M.L.J. 303=72 I.C. 488. *See also* 1936 L. 591. Under S. 16, the Court may substitute another petitioning creditor for the original one even though the creditor who wishes to be substituted had not presented an application within three months of the act of insolvency. 54 A. 72=1932 A. 147. Whether a creditor who was a party to a deed of arrangement can present a petition, construing the deed as an act of insolvency, *see* 48 M. 294=1924 M. 839. Act of insolvency is committed as soon as the property is sold and the period of three months should be calculated from the date of the sale and not from its confirmation. 37 C. W.N. 535=1933 C. 564. A gift is not valid and complete unless it is accompanied by delivery of possession of the subject of gift from the donor to the donee. Hence where a debtor, in order to defeat or delay his creditors, gifts all his property by an oral gift, the act of insolvency occurs on the date when possession of property is handed over to the donee and not when the debtor makes a report of the gift for mutation to the patwari. 41 P.L.R. 355=1939 L. 35. A debtor transferred some of his agricultural property to another on a certain date and applied for mutation. The mutation took place on a different date. Within three months of the date of mutation, a creditor of the transferor applied to Court for getting the transferor declared an insolvent alleging the transfer as an act of insolvency. *Held*, that the date of mutation was not the date of act of insolvency but the date of transfer and as such the application of the creditor was incompetent. 1936 L. 923. Where a mortgage transaction is effected between the debtor and his own son-in-law at a time when the debtor is involved heavily in debt and within 3 months of the application for his being declared an insolvent, the presumption that the mortgage was to defraud his creditors is very naturally raised against him. 32 P.L.R. 637 (2)=1931 L. 667.

AMENDMENT.—The provisions relating to the amendment of pleadings contained in the Code of Civil Procedure would be applicable to petitions in insolvency under the Provincial Insolvency Act. A petitioning creditor ought to be allowed to amend his petition so as to enable him to substitute new grounds or acts of insolvency in the place of those which he had originally set up and which are of no avail to him, if that would cause serious injury and grave injustice to the other party, which cannot be compensated by costs. The Courts, it is true, have wide powers of amendment, but they have to be exercised with care, and judicially. If the effect of an amendment would be to clothe the petitioning creditor with rights which he would not have had if a new petition for insolvency were presented by him on that date on which he applies for

(2) If the petitioning creditor is a secured creditor, he shall in his petition either state that he is willing to relinquish his security for the benefit of the creditors in the event of the debtor being adjudged insolvent, or give an estimate of the value of the security. In the latter case, he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same way as if he were an unsecured creditor.

Conditions on which debtor may petition.

10. (1) A debtor shall not be entitled to present an insolvency petition, unless he is unable to pay his debts, and—

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amendment, the Court ought not to grant leave to amend. An amendment which enables the creditor to allege new acts of insolvency which have become unimpeachable and have ceased to be acts of insolvency under S. 9 and which he neither relied nor intended to rely when presenting his petition cannot therefore be allowed. 46 L.W. 815=1938 M. 53=(1937) 2 M.L.J. 737. A petition was filed under S. 9 for adjudication as insolvent a joint Hindu family firm. In the heading and the body of the petition, however, the names of the proprietors constituting the firm were given. *Held*, that the petition should not be dismissed for this defect but should be allowed to be amended by correcting the heading and the prayer. It was merely a case of correcting the misdescription of the persons sought to be adjudicated insolvents, by transposing the name of the firm, of which they were alleged to be proprietors, from the beginning of the heading to the end and, similarly altering the prayer so as to ask for their adjudication individually, and not of the firm through them. 1940 L. 462= I.L.R. (1941) Lah. 55=43 P.L.R. 363.

LIMITATION.—*See* 1935 L. 565. The period of three months prescribed by S. 9 (1) (*c*) is a condition precedent and not a period of limitation for the filing of the insolvency petition. Where, therefore. the period of three months expires during the vacation of the Court, a petition presented on the reopening day is not a valid petition which can be sustained. S. 10 of the General Clauses Act cannot be relied on so as to extend the time until the reopening day. 69 M.L.J. 283=58 M. 794 (F.B.) [Overruling 1933 M.W.N. 1049]. Petition by creditor filed within three months—Petition returned to be re-filed with necessary documents—Petition re-filed after three months but within time fixed by Court is good. 1936 L. 591.

RULES.—R. 3 merely prescribes the procedure which is to be followed in proceedings under the Provincial Insolvency Act. It does not lay down any rule of substantive law. The question whether a joint Hindu family, or the business carried on by it, can or cannot be adjudicated insolvent is not a question of mere procedure but is one of substantive law. It is therefore not covered by R. 3 and that rule cannot have the effect of impliedly providing for the adjudication of a joint Hindu family, as such or of its trading business as insolvent. The law in the Punjab on this matter is not different from that in other provinces and a joint Hindu family trading firm, as such, cannot be adjudicated insolvent. In such case, therefore, the petition should be made individually against the persons who are alleged to be proprietors of the firm. 1940 L. 462.

Secs. 9 and 13: *Quaere.*—Whether there is no obligation on a petitioning creditor to implead other creditors and whether he only has to comply with the requirements of Ss. 9 and 13 (2), neither of which demands the impleading of other creditors. 1933 L. 642 (2)=34 P.L.R. 827.

Sec. 10: SCOPE.—The word "debtor" in S. 10 may be interpreted in the plural (*see* S. 12 of the General Clauses Act). Therefore a joint petition by three brothers for adjudicating them as insolvents is maintainable, if the other conditions mentioned in S. 10 are satisfied and if it would not be bad for multifariousness. 60 C.L.J. 248=39 C.W.N. 104. When the petition alleges facts entitling applicant to present the petition, petition should, after enquiry, either be dismissed or the debtor adjudicated. 40 A. 665=46 I.C. 733. *See also* 1926 C. 955. A debtor has a statutory right to get himself adjudicated an insolvent if he complies with the provisions of S. 10, and the Court cannot refuse to adjudicate him merely because the petition does not disclose possession of assets by him. [44 C. 535 (P.C.), Rel. on.] 1932 M. 237 =62 M.L.J. 234. In an application for adjudication all that a debtor has to do is to afford *prima facie* proof of his inability to pay his debts and it is not for the Court to hold on a nice calculation of the assets that these will satisfy the debts and therefore adjudication should be withheld. When dealing with an application by the debtor the Court is not required to determine whether or not the debts are fictitious. 31 P.L.R. 1016.

Sec. 10 (1).—Burden of proof is on the debtor. 1924 P. 166. If he is unable to prove that he cannot pay his debts, the Court has power to dismiss his petition under S. 25. 1933 A.L.J. 943=1933 A. 841. Courts should not make a detailed enquiry. 105 I.C. 569= 1928 L. 202. Burden of proving ability to pay debts lies on the creditors. 101 I.C. 624=1927 L. 354. *See also* 9 Pat.L.T. 444=1928 P. 477. Proof of *prima facie* grounds of inability to pay debts is sufficient. (*Vide* S. 24.) 45 M.L.J. 129 =1923 M. 585. *See also* 89 I.C. 325=1924 L. 724: 106 I.C. 574 (1)=1928 L. 237(1). Failure to keep accounts is no disqualification. 98 I.C. 900=1927 L. 27. As to what amounts to inability, *see* 89 I.C. 505=1925 L. 630. *See also* 1928 L. 354: 99 I.C. 7=1927 L. 136. Rent decree is a 'debt'. 60 I.C. 758=19 A.L.J. 273. Where person applies for adjudication, the fact that he cannot sell his land is no ground to hold that the land is not a realizable asset. 1929 L. 573 (1). Where a person owns occupancy rights he cannot be said to be "*unable to pay debts*". 1929 L. 392. *See also* 1934 L 985.

(*e*) his debts amount to five hundred rupees; or

(*b*) he is under arrest or imprisonment in execution of the decree of any Court for the payment of money; or

(*c*) an order of attachment in execution of such a decree has been made, and is subsisting, against his property.

(2) A debtor in respect of whom an order of adjudication [1][whether made under the Presidency-Towns Insolvency Act, 1909, or under this Act] has been annulled, owing to his failure to apply, or to prosecute an application for his discharge, shall not be entitled to present an insolvency petition without the leave of the Court by which the order of adjudication was annulled. Such Court shall not grant leave unless it is satisfied either that the debtor was prevented by any reasonable cause from presenting or prosecuting his application, as the case may be, or that the petition is founded on facts substantially different from those contained in the petition on which the order of adjudication was made.

Courts to which petition shall be presented.

11. Every insolvency petition shall be presented to a Court having jurisdiction under this Act in any local area in which the debtor ordinarily resides or carries on business, or personally works for gain, or if he has been arrested or imprisoned, where he is in custody:

Provided that no objection as to the place of presentment shall be allowed by any Court in the exercise of appellate or revisional jurisdiction unless such objection was taken in the Court by which the petition was heard at the earliest possible opportunity, and unless there has been a consequent failure of justice.

I EG. REF.

[1] Substituted by Act XI of 1927.

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Even where his land consists of occupancy rights which cannot be sold without the consent in writing of the landlords as provided for in S. 56 of the Punjab Tenancy Act, it is a realizable asset of the insolvent, unless he shows that he had applied to the landlord and the landlord had refused to consent to the transfer of these rights. 37 P.L.R. 82=153 I.C. 460=1935 L. 183.

Sec. 10 (1) (a).—The debts may even be joint debts. 99 I.C. 524=1927 L. 108. Petition for adjudication—Value of claim below Rs. 500—Subsequent addition of another creditor to make up amount—Adjudication taking effect from date of addition. 26 A.L.J. 941. *See also* 1926 L. 235. Debt involving personal liability is sufficient for declaring a person insolvent though the decrees got by creditors do not make him so liable. 1929 M. 573=118 I.C. 494. The fact that the insolvent when he filed his previous application was not able to prove that he was unable to pay his debts cannot estop him from proving in the subsequent application that he is unable to pay his debts and so is entitled to be adjudicated as an insolvent. 11 O.W.N. 71=1934 O. 94 (1).

Sec. 10 (1) (b).—*See* 9 I. C. 632. Arrest after presentation of petition cannot form basis of adjudication. 98 I.C. 885=1927 L. 38. Where, in case of an application by a debtor for being adjudicated insolvent, the creditors contend that although the debtor has been re-arrested once in execution, yet there is no reason to believe that he is unable to pay his debts or anything more than unwilling to pay his debts, the Court is entitled and is in fact bound to take evidence tendered to it and then to pass an order refusing to adjudicate the debtor if necessary. (44 I.A. 11, Dist.) 161 I.C. 588=1936 R. 108.

Sec. 10 (2).—This clause implies that apart from annulment a second petition lies. 101 I.C. 349 (1)=1927 M. 579. Under S. 10, it is incumbent upon the Insolvency Judge before granting permission to bring a second application to come to a finding that the conditions of the last part of the section have been fulfilled. Where there has been no application for permission to bring a second application and there has been no such finding by the Insolvency Judge, it cannot be presumed that the Court permitted the second application merely because it referred to the annulment of the previous adjudication in the subsequent order of adjudication. 173 I.C. 650=1937 Pesh. 85 (1). Dismissal of an application for failure to produce evidence does not bar a second one. 109 I.C. 86=1928 L. 374. Reasonable cause. *See* 1928 L. 452; 1929 P. 184. Appeal against order under cl. (2), *see* 1928 P. 23.

Sec. 11.—Mere temporary residence does not give jurisdiction. 20 I.C. 370=18 C.W.N. 1050; 17 C.W.N. 405=14 I.C. 980. Application should be presented at the place where he works and not where his properties are situate. 25 I.C. 41. But when a man resides at different places he can be adjudicated by the Court within whose jurisdiction his properties are. 1925 M.W.N. 797. Proviso—Objection when allowed in appeal. *See* 21 L. W. 52=86 I. C. 229. *See also* 23 L.W. 353.

Verification of petition.

12. Every insolvency petition shall be in writing and shall be signed and verified in the manner prescribed by the Code of Civil Procedure, 1908, for signing and verifying plaints.

Contents of petition.

13. (1) Every insolvency petition presented by a debtor shall contain the following particulars, namely:—

(*a*) a statement that the debtor is unable to pay his debts;

(*b*) the place where he ordinarily resides or carries on business or personally works for gain, or, if he has been arrested or imprisoned, the place where he is in custody;

(*c*) the Court (if any) by whose order he has been arrested or imprisoned, or by which an order has been made for the attachment of his property, together with particulars of the decree in respect of which any such order has been made;

(*d*) the amount and particulars of all pecuniary claims against him, together with the names and residences of his creditors so far as they are known to, or can by the exercise of reasonable care and diligence be ascertained by, him;

(*e*) the amount and particulars of all his property, together with—

(i) a specification of the value of all such property not consisting of money;

(ii) the place or places at which any such property is to be found; and

(iii) a declaration of his willingness to place at the disposal of the Court all such property save in so far as it includes such particulars (not being his books of account) as are exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree;

(*f*) a statement whether the debtor has on any previous occasion filed a petition to be adjudged an insolvent, and (where such a petition has been filed)—

(i) if such petition has been dismissed, the reasons for such dismissal, or

(ii) if the debtor has been adjudged an insolvent, concise particulars of the insolvency, including a statement whether any previous adjudication has been annulled and, if so, the grounds therefor.

(2) Every insolvency petition presented by a creditor or creditors shall set forth the particulars regarding the debtor specified in clause (*b*) of sub-section (1), and shall also specify—

(*a*) the act of insolvency committed by such debtor, together with the date of its commission; and

(*b*) the amount and particulars of his or their pecuniary claim or claims against such debtor.

Withdrawal of petitions.

14. No petition, whether presented by a debtor or by a creditor, shall be withdrawn without the leave of the Court.

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Sec. 12.—Signature and verification. *See* 12 C.W.N. 538. Want of signature is curable at any stage. 25 A. 55.

Sec. 13.—There is no material difference between this section and the old section. 46 B. 757=1922 B. 80. As to when an amendment of the insolvency petition may be permitted and within what limits, *see* 12 R. 150=1934 R. 87.

Sec 13 (1) (c).—Attachment or arrest must be actually pending. 25 A. 204.

Sec. 13 (1) (d).—Where the insolvent goes into the witness box and denies any assets other than those given in the list filed, this should be taken as *prima facie* proof unless there is something on record to be the contrary. 147 I.C. 679 (1)=35 P.L.R. 184 (1). Mention of bogus debts does not entail dismissal of petition. Acts of bad faith have to be dealt with later. 26 I.C. 24; 1930 L. 738 (1). So also mis-statement of debts. 19 I. C. 685. In order to decide whether the debtor applicant is a person who is unable to pay his debts, the value of his interest in the joint family property, which clearly is his "property" should be taken into account. 1933 A.L.J. 943=1933 A. 841.

Sec. 14.—Under S. 14, a petition for adjudication, whether presented by a debtor or a creditor, cannot be withdrawn without the leave

15. Where two or more insolvency petitions are presented against the same debtor, or where separate petitions are presented against joint debtors, the Court may consolidate the proceedings or any of them, on such terms as the Court thinks fit.

Consolidation of petitions.

16. Where the petitioner does not proceed with due diligence on his petition, the Court may substitute as petitioner any other creditor to whom the debtor may be indebted in the amount required by this Act in the case of a petitioning creditor.

Power to change carriage of proceedings.

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of the Court. Leave will not be granted without notice to all the parties concerned. Where the Court passes under a misapprehension, an *ex parte* order granting the application for the withdrawal of the petition, it has got inherent power to set it aside. 39 P.L.R. 182=1937 L. 631. Leave granted to petitioning creditors to withdraw petition—Non-petitioning creditors not given notice of the withdrawal—The non-petitioning creditors had *locus standi* to appeal and the setting aside of the order of withdrawal is proper. 1930 L. 749. The petition can never be withdrawn after passing of an order of adjudication. 35 I.C. 539. Effect of withdrawal: 32 B. 321; 9 Bom.L.R. 1006.

Sec. 15.—*Prima facie* the section refers to consolidation of insolvency petition after they are admitted and presupposes that such petitions are otherwise competent. Where the competency of the petitions is being challenged, it must be inquired into before an order of consolidation can be passed. 130 I.C. 559=1931 S. 65.

Sec. 16.—Object and scope of. *See* 1928 M.W.N. 391=1928 M. 608; 1929 R. 291. The object of S. 16 is to prevent other creditors from being injured by the action of one creditor who by reason of collusion or otherwise may not diligently prosecute his petition; a second creditor who is substituted under S. 16 on the ground that the original petitioning creditor was not prosecuting with due diligence, gets the benefit of the date of the original petition, no matter how much later my be the date of his own introduction into the case. The mere accident of the fact that the creditor who originally filed the petition should turn out not to have been qualified to do so will not prevent the subsequent creditor, who but for that petition might well have filed one himself, from taking advantage of its date. The creditor substituted under S. 16 cannot be compelled to prove the qualification of the original creditor to file the petition. 54 L.W. 548=(1941) 2 M.L.J. 778. *See also* 1938 O.W.N. 871=1938 O. 206. S. 16 imposes only one condition for the substitution of a creditor, namely, that his debt shall be not less than "the amount required by the Act." The Court cannot superimpose an additional condition to the effect that the creditor who wishes to be substituted should have presented an application within three months of the acts of insolvency. 1931 A.L.J. 1089=1932 A. 147. Where a petitioning creditor, who is a representative of the whole body of creditors, comes to an arrangement with the debtor and seeks not to prosecute his application any further, it cannot possibly be said that he is still proceeding with due diligence. On the contrary there is a failure to proceed with due diligence in the highest degree. S. 16 does apply in such a case and an order for substitution should be made. 13 Luck. 757=1938 O. 101. The substitution contemplated by S. 16 of Provincial Insolvency Act is that a creditor who has been substituted in place of the original creditor can in his turn be substituted by another creditor and so on. 14 Luck. 164=1938 O. 206 (F.B.). A creditor whose debt came into existence prior to the petition for adjudication but subsequent to the acts of insolvency alleged by the petitioning creditor, can put in an application under S. 16 for substitution of his name as petitioning creditor. 13 Luck. 757=1938 O.W.N. 230=1938 O. 101. Unless a finding is arrived at by the Insolvency Court that the petitioning creditor is not proceeding on his application with due diligence, no order of substitution can be made because that is a condition precedent under S. 16. Further, when once a Court grants leave to the petitioning creditor to withdraw his petition without making an order under S. 16, it can be reasonably urged that the Court was satisfied with the conduct of the petitioning creditor and did not suspect any want of diligence on his part. 1940 L. 470. An express order of substitution is not necessary under S. 16 but substitution can be inferred from the Court continuing proceedings on the application of the creditor applying to be substituted under that section. 14 Luck. 164 =1938 O.W.N. 871=1938 O. 206 (F.B.). Where the original petition under S. 9 was validly presented, it could not be withdrawn without the leave of the Court. 7 R. 785. It appeared that the petitioner did not proceed with due diligence on the petition and that fraud and collusion were alleged against him. Certain other creditors applied to be substituted as petitioners. *Held*, that the Court could order their substitution at any stage of the pendency of the insolvency proceeding. The effect of the substitution would be that they took the place of the original petitioner *ab initio*, that they were entitled to prosecute the original petition as if it were their own petition and that no question of the necessity for a fresh act of insolvency could arise. 7 R. 785=1929 R. 291. But if once the petition is dismissed, no question of substitution of another creditor arises thereafter, and the only remedy of the latter is by filing a fresh petition. 11 R. 407=1933 R. 251

17. If a debtor by or against whom an insolvency petition has been presented dies, the proceedings in the matter shall, unless the Court otherwise orders, be continued so far as may be necessary for the realisation and distribution of the property of the debtor.

Continuance of proceedings on death of debtor.

18. The procedure laid down, in the Code of Civil Procedure, 1908, with respect to the admission of plaints, shall, so far as it is applicable, be followed in the case of insolvency petitions.

Procedure for admission of petition.

19. (1) Where an insolvency petition is admitted, the Court shall make an order fixing a date for hearing the petition.

Procedure on admission of petition.

(2) Notice of the order under sub-section (1) shall be given to creditors in such manner as may be prescribed.

(3) Where the debtor is not the petitioner, notice of the order under sub-section (1) shall be served on him in the manner providend for the service of summons.

20. The Court when making an order admitting the petition may, and

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Sec. 17—Scope of. *See* I.R. 1932 L. 652 (2). Proceedings do not abate on death of debtor. Personal legal representatives can be brought on record. 9 P.L.R. 1921=59 I.C. 51 (1). *See also* 15 L. 698=1934 L. 463; 44 Bom.L.R. 132. But *see* 1933 L. 997. Adjudication after death is valid. 51 M. 495=55 M.L.J. 235 *Also* 51 M. 344=54 M.L.J. 585; 33 P.L.R. 151. But it is not necessary to bring representatives on record. 66 I.C. 593. Representatives of the debtor must be allowed to cross-examine creditors in respect of their claims. (*Vide* S. 24.) 57 I.C. 810=48 C. 87. Receiver is not divested by or on death of insolvent. 9 I.C. 633; 88 I.C. 558; 44 Bom.L.R. 132. Appeal against adjudication abates on the death of the insolvent. 9 L. 306=1928 L. 119 (1). Where the Ins. Court refused to adjudicate a debtor as insolvent and the creditors having appealed the debtor died during its pendency: *Held*, that the sons could not be impleaded as legal representatives and the appeal proceeded with. (9 L. 306, Ref.) 13 L. 396. *See also* 44 Bom. L.R. 132. Where a debtor died before adjudication and the Court passed an order that the estate should thereby be adjudged as insolvent and O. R. was appointed to administer it and in subsequent proceedings the O.R. applied under Ss. 53 and 54 to set aside certain alienations and the objection was taken that the estate and not the transferor had been adjudged: *Held* that the judge had intended to pass the right order and that the application was maintainable even though the order adjudging the estate instead of the person was wrong in form. Provisions of this Act compared with Presy. T. Ins. Act and English Bankruptcy Act. 1933 M. 25 =63 M.L.J. 727. Property of a deceased insolvent vested in the receiver, although presumed to be ancestral, can be made exempt from sale after the death of the insolvent only if his heirs succeed in showing that the debts of the deceased were tainted with immorality or were otherwise illegal. 31 Punj. L.R. 842=1930 L. 1034.

Secs. 17 and 38.—Where a debtor dies and an adjudication order is passed subsequently, his legal representatives can enter into a composition with the creditors. Composition with creditors is one of the proceedings for the realisation and distribution of the property of the debtor and so would come under S. 17 of the Act. 1941 N.L.J. 218=1941 N. 238.

Secs. 17 and 75: SCOPE—Appeal by insolvent against order of adjudication—Death pending appeal does not cause abatement—Heirs can continue appeal. 1937 A.L.J. 491=1937 A. 435.

Sec. 18.—Form of petition must be in accordance with the Act. 11 Bom.L.R. 81; 18 I.C. 729. *See* 42 P.L.R. 29 (date of admission of insolvency petition).

Sec. 19.—Mere publication in the Official Gazette of the notice to be issued under S. 19 of the Act is not enough. R. 5 requires that a copy of the notice should also be forwarded to each creditor by registered post. Where a creditor has not received any notice of the application or of the date of hearing, his application to set aside an *ex parte* order passed on the debtor's application must be allowed, because S. 19 is mandatory. The question of prejudice is irrelevant. 187 I.C. 794=1940 P. 623.

Sec. 19 (2).—S. 19 (2) is not confined to the case of debtor's petition. 1926 L. 360. Private notice to all creditors is not sufficient. Adjudication without a general notice as required by this sub-section should be set aside. 34 I.C. 696 =3 L.W. 495. Notice is essential. 1 M. 136. Where a creditor is the petitioner, notice must go to the other creditors as well. 1 L.W. 1012 =26 I.C. 282. Where the absence of the requisite notice under S. 19 has not led to any prejudice, the order of adjudication cannot be interfered with on that ground. 1935 L. 412.

Sec. 19 (3).—The debtor is not liable under S. 22 for failure to comply with the processes of prohibition and injunction issued by an Ins. Court, on a creditor's petition, at least, until he has due notice of the same under S. 19 (3). 1936 N. 237.

Sec. 20.—SCOPE OF ENQUIRY.—Enquiry whether debts mentioned in the petition by the

Appointment of interim receiver.

where the debtor is the petitioner ordinarily shall, appoint an interim receiver of the property of the debtor or of any part thereof, and may direct him to take immediate possession thereof or of any part thereof, and the interim receiver shall thereupon have such of the powers conferrable on a receiver appointed under the Code of Civil Procedure, 1908, as the Court may direct. If an interim receiver is not so appointed, the Court may make such appointment at any subsequent time before adjudication, and the provisions of this [1][section] shall apply accordingly.

Interim proceedings against debtor.

21. At the time of making an order admitting the petition or at any subsequent time before adjudication the Court may either of its own motion or on the application of any creditor make one or more of the following orders, namely:—

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debtor are real debts is not proper in such a summary enquiry. 1929 L. 49. When the Court makes an order appointing an *interim* receiver of the property of the debtor, it ought to give direction as to which of the powers ordinarily conferable upon a receiver appointed under the Code of Civil Procedure should be exercisable by the receiver in the particular case. I.L.R. (1938) 1 C. 245=66 C.L.J. 61=1938 C. 182.

OBJECT.—Reading Ss. 20 and 56 the following principles are deducible: (*a*) An interim receiver may be appointed by any Ins. Court with directions to take immediate possession of the property of the alleged insolvents; (*b*) the powers to be exercised by an interim receiver shall be determined by the Court with reference to O. 40, C. P. Code; (*c*) to ensure compliance with its order, the Ins. Court can remove a person in whose possession such property is, but it cannot remove any person whom the insolvent has not a present right so to remove. 36 P.L.R. 205=1934 L. 1006. *See also* 1938 C. 182. Where the property is under a mortgage and the mortgagee is in possession through his tenant, in ordinary circumstances the Court is not competent to remove the mortgagee from the possession of the property as the insolvent himself cannot do so. Where the person through whom the mortgagee is in possession is the insolvent himself, the receiver takes the property subject to the burden, if any, and is entitled to elect whether to retain it or not if the burden is too onerous to be borne by him. If the interim receiver elects to remain in possession, he shall have to discharge the obligations attached to the property 1934 L. 1006 Ordinarily an *ad interim* Receiver is appointed to preserve property from destruction or disappearance. 32 I.C. 897=3 L.W. 250; 42 C. 289. As to *powers of interim receiver*, see 23 L.W. 300=50 M.L.J. 665. Effect of such appointment is that he will have such of the powers conferrable on a receiver appointed under C. P. Code. 1927 M. 693=53 M.L.J. 142. Appointment of a receiver in respect of undivided share of joint family property is not valid. 48 I. C. 526. *See also* 49 L.W. 422=1939 M. 438. Power of interim receiver to apply under O. 21, R. 89, to have sale of insolvent's properties set aside. [*see* 1926 M. 357=50 M.L.J. 239.] A receiver appointed under S. 20 does not have all the powers of a receiver appointed after adjudication but it is necessary for the Court to make an order under that section in which the Court may in its discretion direct him to take immediate possession of the property or any part thereof. On the other hand, in the case of a receiver appointed under S. 56, the property immediately vests in him from the moment of his appointment. 9 P. 945. *See also* 1938 Nag. 230=I.L.R. (1940) Nag. 161=1938 N.L.J. 40. Order appointing interim receiver—Discretion—Second appeal. 34 Bom.L.R. 382=1932 B. 228.

Secs. 20 and 21.—Where a creditor filed an application, unsupported by an affidavit, nominally under the provisions of S. 20 (but really to get an order under S. 21) praying for the appointment of an *interim* receiver of not only the properties of the debtor but also the properties which were supposed to be his and for directing him to take immediate possession thereof, the Court ordered accordingly, and the Official Receiver went and took possession of a shop which stood in the name of and which was ostensibly carried on by somebody quite different from the debtor, in a high-handed manner, though he protested and set up a claim to be the owner of the shop and contended that the property had nothing to do with the insolvent. *Held*, that the conditions required by S. 21 and the proviso to it had never been fulfilled and no materials had been placed before the lower Court. The receiver should have stayed his hand until the question of whether or not the shop was the property of the debtor had been determined by the Court, after an investigation. He should have gone away and brought the matter before the Court in order that the claim put forward by the stranger might be properly adjudicated upon. The order of the Court in so far as it purported or was assumed to authorise the receiver to take possession of the shop of a third party is an illegal order and one made without jurisdiction. I.L.R. (1938) 1 Cal. 245=66 C.L.J. 61=1938 C. 182.

Sec. 21.—Under S. 21 Court can make an order for security at any time at or after admitting petition. 93 I. C. 903=1926 L. 360. When the Court has only ordered the debtor

(1) order the debtor to give reasonable security for his appearance until final orders are made upon the petition, and direct that, in default of giving such security, he shall be detained in the civil prison;

(2) order the attachment by actual seizure of the whole or any part of the property in the possession or under the control of the debtor, other than such particulars (not being his books of account) as are exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree;

(3) order a warrant to issue with or without bail for the arrest of the debtor, and direct either that he be detained in the civil prison until the disposal of the petition, or that he be released on such terms as to security as may be reasonable and necessary:

Provided that an order under clause (2), or clause (3), shall not be made unless the Court is satisfied that the debtor, with intent to defeat or delay his creditors or to avoid any process of the Court,—

(*i*) has absconded or has departed from the local limits of the jurisdiction of the Court, or is about to abscond or to depart from such limits, or is remaining outside them, or

(*ii*) has failed to disclose or has concealed, destroyed, transferred or removed from such limits, or is about to conceal, destroy, transfer or remove from such limits, any documents likely to be of use to his creditors in the course of the hearing, or any part of his property other than such particulars as aforesaid.

Duties of debtors.

22. The debtor shall on the making an order admitting the petition produce all books of account, and shall at any time thereafter give such inventories of his property, and such lists of his creditors and debtors and of the debts due to and from them, respectively, submit to such examination in respect of his property or his creditors, attend at such times before the Court or receiver, execute such instruments, and generally do all such acts and things in relation to his property as may be required by the Court or receiver, or as may be prescribed.

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to appear in Court to answer the allegations made against him, the penalty for his not appearing being an adjudication order in the absence of the insolvent, the Court is not justified in issuing a warrant for the arrest of the debtor. Such order cannot be deemed to be under cl. (1). It can be only passed under cl. (3), S. 21. 1929 L. 808.

Sub-sec. (1).—The seeurity cannot be summarily enforced. Proper course is to obtain an assignment and sue. 7 M. 273; 19 B. 694. *See also* 31 C. 162.

Sub-sec. (2).—Scope and object of, *see* 59 C. 1338=36 C.W.N. 741. S. 21 (2) contemplates an order of attachment which is analogous to an attachment before judgment and the provisions of the Code of Civil Procedure apply to such attachments by virtue of the provisions of S. 5 of the Provincial Insolvency Act. I.L.R. (1938) 1 C. 245=66 C.L.J. 61=1938 C. 182. Vesting properties with an *ad interim* receiver while sale proceedings were going on in execution is illegal. 32 I.C. 897=3 L.W. 250. Attachment under this section is analogous to an attachment before judgment. Objection by an alleged owner must be enquired into. The alleged owner can wait and appeal or object to the attachment itself. 24 I.C. 752=36 A. 65. As to *Stamp for Security bond* under S. 21 (2), *see* 47 L.W. 154=(1938) 1 M.L.J. 159.

Secs. 21, 28 and 56: COMPARISON OF POWERS CONFERRED BY.—As the debtor continues to be in possession of property prior to adjudication, the Insolvency Court is empowered by S. 21 (2) to get at the property in the possession of the debtor. But after adjudication all property of the insolvent vests by virtue of S. 28 (2), in the Court or receiver. S. 56 (3) empowers the Court or receiver to remove persons in possession and obtain actual physical possession. But if the third person in possession sets up a title, a Court has no power under S. 56 to summarily direct him to deliver up possession. In such a case the Court has to try under S. 4 the issue whether the insolvent is entitled to the property or not. The more convenient course is to authorise a creditor to conduct the proceedings on its behalf under S. 28 (2) and present the necessary petition for that purpose. 1938 N.L.J. 384=1939 N. 10.

Sec. 22.—The provision in first part of S. 22 that the debtor shall on the making of an order admitting the petitions produce all account books is not applicable to a case when an order has been made on a creditor's petition. But the second part of the section applies to both classes of cases, *viz.*, debtor's and creditor's petition and to all stages of the proceedings that follow the order admitting the petition, leaving it to the Court or the receiver to make the requisition at the appropriate stage. [In re *Moir*, (1882) 21 Ch.D. 61, Ref.] 61 C.

23. (1) At the time of making an order admitting the petition or at any subsequent time before adjudication, the Court may, if the debtor is under arrest or imprisonment in execution of the decree of any Court for the payment of money, order his release on such terms as to security as may be reasonable and necessary.

Release of debtor.

(2) The Court may at any time order any person who has been released under this section to be re-arrested and re-committed to the custody from which he was released.

(3) At the time of making any order under this section, the Court shall record in writing its reasons therefor.

24. (1) On the day fixed for the hearing of the petition, or on any subsequent day to which the hearing may be adjourned, the Court shall require proof of the following matters, namely,—

Procedure at hearing.

(*a*) that the creditor or the debtor, as the case may be, is entitled to present the petition:

Provided that, where the debtor is the petitioner, he shall, for the purpose of proving his inability to pay his debts, be required to furnish only such proof as to satisfy the Court that there are *prima facie* grounds for believing the same and the Court, if and when so satisfied, shall not be bound to hear any further evidence thereon;

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537=149 I. C. 352=38 C.W.N. 642=1934 C. 409. After admitting petition, Court may demand inventory of the debtor's property and lists of debts due to and from his creditors and debtors. 93 I.C. 903=1926 L. 360. *See also* 1936 N. 237. [Absence of due notice under S. 19 (3), effect of].

Sec. 23.—There is no inherent jurisdiction for the Ins. Court under S. 5 to pass a protection order or an order protecting the alleged insolvent from arrest and imprisonment in execution of a money decree otherwise than under the provisions of S. 23 and 31. 148 I.C. 975=1934 L. 113. As to protection order by Ins. Court and arrest of judgment-debtor, *see* 83 I.C. 877=1924 P. 559. Court is not bound to release though security is furnished. 3 P. 543. Where a Court accepts the security furnished by a petitioner in insolvency but on objections by the other side finds that it is not sufficient, it has inherent jurisdiction to demand fresh security. 1935 L. 148. Whether person not arrested can ask for protection order, *see* 47 M.L.J. 530=20 L.W. 870; 47 M.L.J. 783=20 L.W. 879. Mere issue of warrant of arrests is not sufficient, but actual arrest should have been made to obtain protection under this section. 148 I.C. 975=1934 L. 113; 1931 L. 121. An Ins. Court has no power to pass an order of interim protection in favour of a person arrested by a person empowered to arrest under S. 10, Sind Encumbered Estates Act: 1927 S. 123=22 S.L.R. 24; nor arrested under S. 45 of the Lower Burma Land and Revenue Act. 5 R. 806=109 I.C. 145=1928 R. 81. Imprisonment under S. 488 (3), Cr. P. Code—If imprisonment in execution of decree or order for payment of money—Protection order—Effect of. 1940 M.W.N. 237.

Sec. 24:—SCOPE.—*see* 36 M. 402; *also* 108 I.C. 433 (1)=1928 N. 226. No elaborate enquiry into validity of debts need be held. 97 I.C. 463=24 L.W. 219; 1927 C. 69; 8 Pat.L.T. 184=1927 P. 188. In administering the Act, it is the duty of the Court hearing petition by a debtor, to be satisfied *prima facie* and after following the necessary procedure and making the necessary investigation, to come to a conclusion that the statements of the debtor are true and that the insolvency application is honest and *bona fide*. 1937 P. 62. *See also* 1942 N.L.J. 409. S. 24 does not contemplate a searching enquiry. Under that section only *prima facie* proof of his right to present an application has to be taken. 1930 L. 644. *See also* 1942 N.L.J. 409. It is unfair on the part of the Court to order the debtor in every case to file inventories of his property and list of debts due from them to others, without petitioning creditors having first established their right to present the petition. In the absence of circumstances to justify such an order it is necessary for the Court to proceed under S. 24 by calling upon the petitioning creditors to establish their right as defined in S. 9 to present a petition before taking any other action against the debtor. 119 I.C. 753=1929 L. 636. Where an insolvency petition has been presented by a person claiming to be a creditor of the debtor, it is open to another creditor of the debtor to contest the petition on the ground that the petitioner is not a creditor at all. 38 P.L.R. 729=1936 L. 499. Enquiry under S. 24—Finding that debt is fictitious—If *res judicata*. *See* 40 P. L. R. 316. Where in a creditor's petition, the insolvent denies the existence of the debt, the Court *is not bound* to decide every question connected with it or which may incidentally arise from it. It can refer the parties to a regular suit, if it thinks that a complicated question of law or fact arises in the case. 59 B. 161=36 Bom.L.R. 1236. Evidence of benami, if and when can be taken. 1928 P. 477. Omission and mis-statement of debts need not be enquired into. 36 M. 402=22 M.L.J. 52. *See also* 26 I.C. 24; 1930 L. 738 (1). The Court is bound to enquire as to the existence

(*b*) that the debtor, if he does not appear on a petition presented by a creditor, has been served with notice of the order admitting the petition; and

(*c*) that the debtor has committed the act of insolvency alleged against him.

(2) The Court shall also examine the debtor, if he is present, as to his conduct, dealings and property in the presence of such creditors as appear at the hearing, and creditors shall have the right to question the debtor thereon.

(3) The Court shall, if sufficient cause is shown, grant time, to the debtor or to any creditor to produce any evidence which appears to it to be necessary for the proper disposal of the petition.

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of the debt if the debtor denies the debt. 99 I.C. 666=1927 L. 111; 109 I.C. 552. Proof required from debtor *see* 29 L.W. 750=113 I.C. 290. Mere inability to pay debts is not enough. Court has to record finding as to act of insolvency under cl.(*c*). 115 I.C. 419=1929 L. 239. Debtor swearing to correctness of his debts and want of other property—Petition should not be dismissed. 1930 L. 75. In the case of a petition presented by a creditor, although the act of insolvency may have been proved, it is not open to the Court merely on that fact being proved to adjudge the debtor an insolvent. The Court must examine the debtor as to his property, conduct and dealings and his ability to pay his debts. 1930 L. 855 (1). The Court is not bound to accept the statement of the petitioner but should investigate the facts for itself. 12 P. 866. When a *prima facie* case is made out the Court should not reject the debtor's application simply because it is shown that he had in part entered into certain colorable transactions. 37 C.W.N. 841. The fact that the debtor acts *mala fide* and dishonestly in presenting insolvency application inasmuch as he includes some fictitious items both on the side of liabilities and assets is no ground for refusing application, if it is found that he is unable to pay his debt. 1930 L. 644. But the creditor should not be prevented from letting in evidence to show that several of the debts are fictitious, as he is entitled to show that the debtor is in a position to discharge his liabilities and that he has no right to present the petition. 144 I.C. 102=1933 L. 629. Where the insolvent having admitted the debt of the petitioner, the Court did not consider it necessary to frame an issue and call for further proof, it is open to the District Judge in appeal to frame an issue on the point and remand the case for evidence thereon, if he thought it fit to do, but he is not justified in dismissing the petition without giving the petitioner an opportunity to produce proof of his debt. 148 I.C. 910=1934 L. 128 (1).

Sec. 24, proviso.—Where it was shown that the debtors had suffered an attachment on a previous occasion, they had been trying to wind up their business ever since, their trade had been very much reduced and the Court had no *prima facie* difficulty in inferring that they were unable to pay their debts, the debtors are entitled to be adjudicated as insolvents, and the Court is not justified in refusing to adjudicate them on the ground that they failed to produce their account books for three certain years. 59 C. 1279=1932 C. 817.

Sec. 24 (2).—The object of S. 24 (2) is to obtain information at as early a stage as possible of the property and the whole conduct of the debtor in relation to the insolvency proceedings; therefore the failure to examine the debtor when the petition is presented by a creditor does not invalidate the subsequent proceedings, unless it can be shown that the debtor has been prejudiced by the omission. Where the debtor files a written statement and gives evidence on his behalf and is in no way prejudiced by the omission to examine him under S. 24 (2) the order of adjudication cannot be set aside on the ground of such omission. 174 I.C. 61=1937 N. 226. Under S. 24 the Court is not bound to accept the debtor's mere statement as *prima facie* proof of his allegation that he is unable to pay off his debts. 41 C.W.N. 804. Where an insolvency petition has been presented by a person claiming to be a creditor of the debtor, it is open to another creditor of the debtor to contest the petition on ground that the petitioner is not a creditor at all. 38 P.L.R. 729=1936 L. 499. The procedure indicated in sub-S. (2) is to be adopted as a preliminary to the decision as to whether the petition should be granted or not. The hearing of the petition is no mere formal matter. When the petitioning debtor says he has no books of account, it is the duty of the Court to be satisfied *prima facie* and after following the necessary procedure and making the necessary investigation to come to a conclusion that the statements by the debtor are true, before the petition can be granted. 13 Pat.L.T. 714. The fact that the debtor has concealed his account books is no ground for dismissing the application. 34 Punj.L.R. 69=1933 L. 330. The examination of the debtor is absolutely necessary when he applies to be adjudicated. 14 I.C. 416=9 A.L.J. 233; 87 I.C. 751. The provisions of S. 24 (2) are mandatory and the Court must examine the insolvent with reference to the facts stated in the petition before dismissing his application for being adjudicated an insolvent. 1930 L. 746. The provisions of cl. (2), S. 24, are mandatory and the failure to observe them vitiates the order of the trial Court. The section does not distinguish between debtors' and creditors' petitions. (1930 L. 746, Rel. on; 1932 R. 67, Diss. from.) 1935 Pesh. 139; 1927 C. 32; 1926 L. 508.

Sub-Sec. (3).—For "*extension of time*" and "*sufficient cause*", see 36 M. 402=22 M.L.J. 52; 9 I.C. 461. The question of granting further time can be considered only after examining the debtor. 14 I.C. 416=9 A.L.J. 233; *also* 1927 R. 329 (2). Witnesses not absolutely necessary—Dismissal of a debtor's petition for want of

(4) A memorandum of the substance of the examination of the debtor and of any other oral evidence given shall be made by the Judge, and shall form part of the record of the case.

Dismissal of petition.

25. (1) In the case of a petition presented by a creditor, where the Court is not satisfied with the proof of his right to present the petition or of the service on the debtor of notice of the order admitting the petition, or of the alleged act of insolvency, or is satisfied by the debtor that he is able to pay his debts, or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition.

(2) In the case of a petition presented by a debtor, the Court shall dismiss the petition if it is not satisfied of his right to present the petition.

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witnesses other than the debtor himself, without recording whether he was disbelieved is wrong. 100 I.C. 1004 (1)=1927 R. 329.

CONSTRUCTION OF SECTION.—The provisions of S. 24 ought not to be interpreted in such a way as to reduce the requirements of the most salutary new provision that the debtor must prove his inability to pay his debts to a mere assertion or nominal proof. He must prove *prima facie* grounds for believing the plea as to inability to pay debts. 9 Pat.L.T. 444=1928 P. 477.

Sec. 25 (1).—"Ability to pay debts" is a ground for dismissal only when the petition is by a creditor. 39 I.C. 590. *See contra* 37 I.C. 109. The words "any other sufficient cause" must be read along with "is satisfied by the debtor" and refers to petitions filed by creditors. 83 I.C. 967=1924 A. 686; 11 I.C. 743. *See contra* 9 I.C. 461. Where an insolvency petition is dismissed by the Court upon the statement by the creditor that his debt had been paid and that the petition should be dismissed, such dismissal is one under S. 25 (1) of the Act as it comes within the words " for any other sufficient cause" of that section. 1938 M. 267=(1938) 2 M.L.J. 179. The words "for any other sufficient cause" in S. 25 cannot be taken to override an express provision of law especially on a question of procedure. Hence where the Court has no jurisdiction to proceed under O. 11, R. 21, C. P. Code, it cannot do so under the general provisions of S. 25, Insolvency Act. I.L.R. 1936 N. 142=1936 N. 130. Statements by debtor in answer to an application by a creditor may amount to sufficient proof of act of insolvency. 18 I.C. 729.

Sec. 25 (2).—The right to be adjudicated is a statutory right and not a matter of discretion of Court, when the debtor satisfies the necessary conditions. His misconduct is not a ground for refusing adjudication. 44 C. 535=32 M.L.J. 1 (P.C.); 9 I.C. 682; 27 P.L.R. 734. *See also* 37 I.C. 391; 11 I.C. 745; 36 A. 250 =23 I.C. 4. As to scope of enquiry on a petition by debtor, *see* 162 I.C. 278. =1936 Pesh. 102. For rejection of a petition on the ground of its being intended as an abuse of the process of Court, a distinct finding on evidence is essential. 14 M.L.T. 587=22 I.C. 276. If the petition amounts to an abuse of the process of Court petition may be dismissed. 37 I.C. 391; 36 A. 250=23 I.C. 4.

WHAT ARE NOT GOOD GROUNDS FOR DISMISSAL.—In order to escape adjudication on a well-founded petition and act of insolvency, a debtor must satisfy the Court that he has a present ability to pay creditors, and it is not sufficient for him to show that he will be able to pay in the more or less distant future. 43 L.W. 516=1936 M. 275. Mere presence of unliquidated assets does not necessarily prove that they are capable of being liquidated. Unliquidated assets cannot be sufficient to discharge debts until they are liquidated and until those steps are taken, willingly or unwillingly by the debtor, it cannot be said that, at the time when the petition is put in, praying for his insolvency, he is able to discharge his debts in the ordinary sense of the term. The fact that he might pay them off if a purchaser was available and if he had time given to convert his assets into cash does not affect the question whether at the time of the presentation of the petition and up to the time when this point arises for decision he is or is not able to pay his debts. Therefore although he has assets which, if liquidated, would provide sufficient money to discharge his debts, yet if he has no liquidated assets with which to pay his debts at present he must be held not be to able to pay his debts and therefore liable to adjudication as an insolvent. The mere fact that the " value " of the immovable property owned by the debtor is in excess of his liabilities, is not sufficient to prove his ability to pay his debts, regardless of all other considerations. What he has to show in each particular case is whether he possesses such realizable assets, as can within a reasonable time be made available to meet all his liabilities. Where the assets realizable at the instance of the creditors are much less than the debts due to them, and there is no reasonable prospect of the debtor paying them by voluntary alienation of his land and the debts have been due for a considerable time but no effort whatever has been made by the debtor to pay off the creditors nor has he any present intention of paying them anything by liquidating any of his assets it must be held that the debtor is " unable to pay his debts" within the meaning of S. 25. I.L.R.(1939) L. 408=1939 L. 349. Where under S. 25 an application is made by a creditor for adjudicating his debtor as insolvent, the burden of proof lies upon the debtor to show that he is able to pay his debts. Although a debtor may have assets which, if liquidated, would provide sufficient money to discharge his debts, if he has no liquid assets wherewith to pay his debts, he should be deemed to be unable to pay his debts. 1937 N. 127. A petitioning creditor need not, under S. 25 (1) do anything more

Award of compensation.

26. (1) Where a petition presented by a creditor is dismissed under sub-section (1) of section 25, and the Court is satisfied that the petition was frivolous or vexatious, the Court may, on the application of the debtor, award against such creditor such amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the debtor for the expense or injury occasioned to him by the petition and the proceedings thereon, and such amount may be realised as if it were a fine.

(2) An award under this section shall bar any suit for compensation in respect of such petition and the proceedings thereon.

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than prove his right to present the petition and the alleged act of insolvency; or that the adjudication has to follow unless the Court is satisfied by the debtor that he is able to prove his debts. It is not for the creditor-petitioner to prove the debtor's inability to prove his debts. 47 L.W. 772=1938 M. 489. The provisions of S. 25 relate to the defence that the debtor may put up even though the petitioning creditor satisfies the conditions required by the Insolvency Act. Therefore in a creditor's petition although he may have proved that the debtor has committed an act of insolvency, if the debtor makes an allegation that he is able to pay his debts and attempts to prove it, the Court is bound to enter into the matter and if satisfied as to his ability to do so, dismiss the creditor's petition. I.L.R. (1939) Lah. 408=41 P.L.R. 785=1939 L. 349. Irregular accounts not relevant to the question of adjudication 9 I.C. 682. Insufficient evidence of inability to pay debts. 14 I.C. 570=9 A.L.J. 699. Suspicion that the debtor is guilty of criminal misappropriation. 50 I.C. 192=41 A. 486. An endeavour on the part of the debtor applicant to keep back the property. 17 I.C. 92=10 A.L.J. 188. Change of residence or false account of income and debts. 60 I.C. 848=2 Pat.L.T. 166. That evidence on the other side shows him to be a man of sufficient means. 14 I.C. 224. Omission to disclose dismissal of a previous application. 40 I.C. 445=15 A.L.J. 572. Failure to examine the debtor is not one of the facts on the proof of which the Court is bound to dismiss the petition and unless the debtor is thereby prejudiced failure to examine the debtor as provided in S. 24 (2) does not *ipso facto* vitiate the adjudication. 10 R. 187=1932 R. 67. But *see contra* 1930 L. 746; 1935 Pesh. 139; 1927 C. 32; 1926 L. 508. Grounds for dismissal must be set forth. 15 I.C. 870=15 C.L.J. 631. Full enquiry as to truth of particulars of property is not pertinent. They become relevant only after adjudication. 46 B. 751=1922 B. 80. Dismissal for default is not a bar to a fresh application. 49 I.C. 229. Nor is subsequent petition, where fresh and changed circumstances are alleged, barred by reason of dismissal of prior petition. 154 I.C. 874=1935 Pesh. 25. Adjudication does not bar question whether petitioner can be discharged. 12 I.C. 403 (M.).

APPELLATE COURT will not in general exercise its discretion under S. 25 to set aside order of adjudication. 50 M. 396=1927 M. 153 =51 M.L.J. 680. Where the lower Court has not actually exercised the discretion under S. 25, it is not open to the appellate Court to base its decision on the ground that the lower Court has exercised such discretion. There can be no unconscious exercise of discretion. But it would be open to the appellate Court to exercise that power itself. I.L.R. 1936 N. 142=1936 N. 130. Where the Court refused permission to verify the petition and order the same "to be struck off from the register," *held*, that the order should be deemed to be one of dismissal passed under S. 25 and that the same was appealable. 133 I.C. 626=1932 L. 28.

Secs. 25 and 27: PETITION BY DEBTOR—SCOPE OF ENQUIRY.—No elaborate enquiry is required at the initial stage of the bankruptcy proceedings when the petitioner is a debtor. It has to be seen whether the petitioner has made out a *prima facie* case for adjudication by proving that his debts exceed Rs 500 and that he is unable to pay those debts. The fact that petitioner is acting *mala fide* by keeping back his account books does not arise at this stage at all and where the Court dismisses the petition merely on the ground that the petitioner has kept back his account books, it commits a material irregularity and its order is open to revision. 162 I.C. 278=1936 Pesh. 102.

Sec. 26.—The word "debtor" in S. 26 means any one against whom an insolvency application has been presented by a creditor. The person applying for compensation under that section need not in truth be a debtor at all. 1938 M. 267=(1938) 2 M.L.J. 179. For the application of the provisions of S. 26 it is not necessary that at the time of dismissal under S. 25 (1) itself the Court should be satisfied that the petition was frivolous or vexatious. The Court can consider the matter on a separate application even though it did not do so at the time of dismissal of the petition under S. 25 (1). 1938 M. 267=(1938) 2 M.L.J. 179. A creditor in whose favour a Hindu father had executed a promissory note found to be binding on the family presented a petition in insolvency against the father and his two sons to have them declared insolvents. About 4 months later, on the creditor's statement that his claim was satisfied, the insolvency petition was dismissed under S. 25 (1). The sons claimed compensation under S. 26 of the Act. It was found on evidence that the debt was one binding on the family for which the sons' share could be made liable. *Held*, that under the circumstances the creditor had sufficient grounds to reasonably suppose that fraud was being attempted by the sons also and therefore it could not be held that the petition of the creditor against the sons was frivolous or vexatious and that therefore no compensation was recoverable. 1938 M. 267=(1938) 2 M.L.J. 179.

Order of Adjudication.

27. If the Court does not dismiss the petition, it shall make an order of adjudication, and shall specify in such order the period within which the debtor shall apply for his discharge.

Order of adjudication.

(2) The Court may, if sufficient cause is shown, extend the period within which the debtor shall apply for his discharge, and in that case shall publish notice of the order in such manner as it thinks fit.

28. (1) On the making of an order of adjudication, the insolvent shall aid to the utmost of his power in the realisation of his property and the distribution of the proceeds among his creditors.

Effect of an order of adjudication.

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Sec. 27.—Where a person brings his case within the four corners of the Act, he is entitled to an adjudication as a matter of right and there is no question of an abuse of the process of the Court. Distinction between cases of adjudication and annulling the same pointed out. 51 C.L.J. 545=1930 C. 576. Whether a lunatic can be adjudged an insolvent is still an open question. 1930 M.W.N. 651. Duty of Court to specify time for discharge is imperative. 7 P. 375=1928 P. 338. At the time of adjudication of a firm a Court need not make an order as to the course of administration of joint estate of firm and separate estate of partners. 55 I.C. 186. *See also* 27 P.L.R. 734. Court cannot order cancellation of alienation. 1921 M.W.N. 810. Property vests in O.R. only on an order to that effect. As to whether the principle of ratification will apply when the order is passed subsequent to O. R.'s dealings with the property, *see* 85 I.C. 439=47 M.L.J. 749 and 51 M.L.J. 529 (F.B.). No appeal lies against an order refusing to extend time. 89 I.C. 959. *See also* 1926 O. 186. Insolvent cannot apply for second order of adjudication. 1929 O. 149. Conditional order of adjudication bad. 9 P. 304=1930 P. 326. A co-parcener cannot be adjudged insolvent simply on the ground that he cannot enforce partition of the joint property during the lifetime of his father. 122 I.C. 237 (2)=1930 L. 227 (2). A person can be declared insolvent in spite of the fact that he died before the creditor's application for his being declared insolvent was decided. 33 P.L.R. 151 =1932 L. 264.

Sec. 27 (2).—Adjudication does not *ipso facto* become annulled on the expiry of the time fixed for discharge. 29 Punj.L.R. 122= 107 I.C. 394=1928 L. 82. Power to extend time. 1927 L. 763(1). *See also* 27 N.L.R. 374; 1938 N. 312. A Court has jurisdiction to extend the time originally fixed under S. 27 for an application by the debtor of discharge, after the expiry of that time but before an order of annulment is passed under S. 43. All that is intended by S. 43 (1) is that, if no one applies for an extension of time or no extension of time is given, the Court must then annul the adjudication. A judge was absent on the day fixed for applying for discharge and the insolvent did not apply on that ground. The case was posted to another date when the insolvent applied. The judge dismissed the application as being belated on the ground that he had no power to extend time. *Held*, that the judge had power to extend time and that he had power to consider application. 144 I.C. 869=1933 R. 133. *See also* 1937 A.L.J. 773. Where an order of the Insolvency Court fixing a year for the insolvent to apply for discharge, is challenged by way of appeal and revision, the original order of the Insolvency Court is not the final order in matter and time for applying for discharge should be calculated from the date of the order in revision. 1941 O.W.N. 587=1941 O. 308. S. 27 (2) gives the Court power to extend the time within which the debtor shall apply for his discharge, and it applies as much to cases beyond the extended period as to those within it, so long as the application is made before any order of annulment is made by the Court. Further, S. 148 of C. P. Code allows the Court to enlarge the time even in cases in which the application for extension of time is after the expiry of the time originally fixed. 53 M. 288=58 M.L.J. 369 (F.B.). *See also* 117 I.C. 87=1929 L. 399; 113 I.C. 357=1929 N. 11; 10 L.W. 357; 1941 O.W.N. 857=1941 O. 308. An application of the insolvent for discharge can also be an application for extension of time, although it does not specifically ask for such extension. 117 I.C. 87=1929 L. 399. The Court can extend time of its own motion. 8 R. 506. *See also* 14 Luck. 40=1938 O.W.N. 377=1938 O. 122 (F.B.).

Secs. 27 and 43.—Ss. 27 and 43 should be read in a manner so as not to contradict each other and an Ins. Court can extend the time for applying for discharge even after the expiry of the period fixed on the date of adjudication. A power to grant further time carries with it a power to grant extension even after the expiry of the term originally fixed, since annulment of adjudication is not automatic. 55 A. 241=1933 A. 230. *See also* 1942 O. 97=1941 O.W.N. 1190 =17 Luck. 271; 1939 N. 103=1939 N.L.J. 96; 1937 A.L.J. 773=1937 A. 536.

Ss. 27 and 53.—The Court should not at the time of adjudication avoid the alienations by the insolvent unless and until it is moved by the O. R. under S. 53, or by an aggrieved party. Even if the Court purported to declare the mortgage by the insolvent void, it is not *res judicata* so as to preclude the mortgagee from suing for declaration of its validity. (45 M. 189, Ref.) 1932 M. 233=62 M.L.J. 177.

(2) On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose.

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Sec. 28.—Adjudication itself does not mean that the debtor could not be arrested, even though no protection order is passed. 49 A. 201=1927 A. 418; 160 I.C. 33=1936 G.W.N. 56=1936 O. 177. No immunity from arrest until protection order is obtained. 1929 L. 453. Effect of deleting in the New Act the words "on persons" in S. 28 considered. 54 A. 416=1932 A. L. J. 186. Where the appellant prayed that a declaratory decree should be set aside and the declaratory decree was to the effect that property was not attachable under the decree, *held*, that the appeal was not barred by S. 28. 54 A. 532 =1932 A. 382. An insolvent is under S. 28 (1) required to aid the Court 'in the realisation of his property.' Property here includes moneys received by way of income. Though Palampat land granted for the purpose of maintenance does not pass to the Court on insolvency, the same does not apply to income from it. 1942 N.L.J. 246=1942 N. 83=I.L.R. 1942 N. 714.

INSOLVENCY OF FIRM—ONLY ADULT PARTNERS WILL BE ADJUDICATED.—When a firm consists of adult and minor partners and an adjudication order is sought against the firm itself, it will not be made against the firm, but the adult partners alone will be adjudicated. 1935 R. 327.

Sec. 28 (2): GENERAL.—As to difference between positions of Official Assignee and Official Receiver, *see* 40 I.C. 170=32 M.L.J. 520. A purchaser of the insolvent's property at a sale in execution of a decree held after the adjudication of the judgment-debtor as an insolvent, who purchases the property in good faith, acquires a good and valid title as against the receiver, though the purchaser is the decree-holder himself. 39 C.W.N. 424. The provisions of sub-S. (2) of S. 28 do not create any right of suit which does not otherwise exist; they operate as a bar on the rights of creditors in respect of remedies, suits and proceedings otherwise existing. That bar is in itself subject to an exception, namely, that premission of the Court may remove it. But permission of the Court operating as an exception to the bar created by the sub-section certainly cannot give the creditor any right which he has not apart from this sub-section. 73 C.L.J. 225=1941 C. 298. *See also* 1937 M. 667=(1937) 2 M.L.J. 223; 1938 M. 906=(1939) 1 M.L.J. 705. *The provision contained in S.* 28 (2) *is controlled by S.* 51 (3). And when the decree-holder is wholly unaware of the insolvency proceedings, the sale in execution cannot be held to be a nullity merely because of the non-service of notice on the receiver under O. 21, R. 23, C. P. Code. 39 C.W.N. 424. *See also* 53 L.W. 357=1941 M. 575=(1941) 1 M. L.J. 405. Applicability of S. 28 to proceedingi under Companies Act, *see* 1936 Pesh. 57. In the case of a scheme, S. 28 has to be read with S. 39, and the protection in respect of the debts not included in the scheme is taken away. Where, therefore, a debt is left out of the scheme by consent of the parties, as being no obstacle to it, a suit instituted by the creditor to recover that debt is not barred. 57 M. 1012=1934 M. 529=67 M.L.J. 843. The provisions of this sub-section do not apply to creditors having no notice of the proceedings. 60 I.C. 588. But *see* 17 L.W. 319=1923 M. 487 (1). When an O.R. has been appointed, he represents the whole body of creditors and it is he who should move the Court on behalf of a creditor to attach the insolvent's property, though it is open to a creditor to bring any matter to the notice of the O. R. or of the Court. 1933 A. 153. Suit against the insolvent without leave of insolvency Court is not maintainable. 110 I.C. 386. Permission to sue does not cover permission to execute decree. 24 A.L.J. 755=1926 A. 640. As to the proper course to be adopted in respect of a suit by the insolvent after adjudication, *see* 1935 A.L.J. 709=1935 A. 675 (F.B.). Property devolving on an insolvent after adjudication can be transferred by him before O.R. intervenes, if the transaction is *bona fide*: *see* 97 I.C. 980=1927 N. 16. On sub-cl. (2) *see also* 92 I.C. 142=1926 R. 2. A person is not entitled to claim exclusion of the period spent by him in the Ins. Court under either of Ss. 28 (2) and 78 (2), inasmuch as an order of adjudication is a pre-requisite for the applicability of either of the said sections. 121 I.C. 55. On the wording of S. 28 it is clear that the *Crown is included among creditors*. Where the Crown has to recover arrears of *income-tax* due from the insolvent, it being a creditor, can only recover it by applying to the Court or receiver in whom all the property of the insolvent is vested. It cannot by virtue of the certificate issued under S. 46 (2) of the Income-tax Act recover it by sale under the Land Revenue Act. 1938 N.L.J. 128.

MEANING OF TERMS.—"*Salary*" is property of the insolvent. 19 C.L.J. 83=21 I.C. 950; 38 I.C. 410. "As hereinafter provided' qualifies "Receiver" and not "vest," 45 M. 167=42 M. L.J. 53. Receiver represents creditors. Where the judge is himself the Receiver, he must in case of dispute appoint a creditor as the representative of the general body of creditors. 39 A. 152 =37 I.C. 76. "Legal proceeding"—Meaning of—Application to Debt Conciliation Board pending insolvency is a "Legal proceeding". 48 L.W. 246=1938 M. 808=(1938) 2 M.L.J.93

VESTING IN RECEIVER.—The scheme of the Ins. Act is to vest the property of the insolvent in the receiver. If the insolvent is under a

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liability, whether it arises out of an equity or as a matter of law, the Receiver cannot have any greater right than the insolvent himself. 133 I.C. 541. *See also* I.L.R. (1937) 1 C. 127=1936 C. 434; 1938 N. 247 (Order as to vesting—Rule to be observed); I.L.R. (1940) L. 40=41 P.L.R. 816 =1939 L. 346. (Vesting order on adjudication takes effect from date of insolvency petition); 1940 Pesh. 36. S. 28 (2) read with S. 2 (*d*) makes it clear that all the property of an insolvent whether within or without British India vests in the Official Receiver. 1939 A.M.L.J. 73. On the insolvency of a person, what vests in the Official Receiver is, not the property which the insolvent knows he possesses, but the property which in law he possesses. 31 S.L.R. 506=1937 S. 306. Where, prior to his insolvency, the insolvent executes a deed of trust vesting his property in trustees for payment of secured and unsecured creditors, and in proceedings under S. 53 the deed is upheld as valid and effective, the property comprised therein does not form part of his estate or vest in the O.R. The latter is not, therefore, competent to deal with such property in any way or to administer it either on behalf of the creditors or in accordance with the terms of the deed of trust. The proper course is for the O.R. to institute a suit for the administration of the trust. 1935 P. C. 104=61 C.L.J. 274=68 M.L.J. 744 (P.C.). Where the insolvent had at the time of purchase of certain property agreed with the vendor to remove certain *chatta* in a common lane whenever the vendor required and the receiver having sold the property of the insolvent, *held*, that the purchaser was bound by the undertaking given by the insolvent. 133 I.C. 541 (A.). Absence of a vesting order is immaterial. Attachment after adjudication is void. 41 M. 923=35 M. L.J. 581. *See contra* 43 M. 869=39 M.L.J. 438. Since the properties vest in O.R. on adjudication, O.R. can simply sue for declaration without asking for possession. 44 A. 617=1922 A. 448. Charges created on the property even by a decree after the date of insolvency petition are not binding on the receiver. 109 I.C. 373= 1926 L. 738. Where a person who had obtained a decree against another for a monthly family allowance was adjudicated an insolvent, the decree became vested in the receiver as from the date of adjudication, and all payments alleged to be made by the judgment-debtor to the insolvent after the said date, which were not certified to the Court under O. 21, R. 2 (3), C. P. Code, could not be recognised as against the receiver by the executing Court. 137 I.C. 394 =35 L.W. 161=1932 M. 250. Money due to a Government servant from the General Provident Fund is a compulsory deposit and on the insolvency of the servant, the O.A. is not entitled to demand from him the money comprised in such deposit. 11 R. 93=143 I.C. 771=1933 R. 148. *Semble.*—It may be that if the moneys came into the hands of the insolvent and the O. A. then took steps before his disposal of the moneys to realise the same, the insolvent might be ordered to pay the sums for the general benefit of his creditors. 1933 R. 148. Even *property obtained by sons on partition* can be taken possession of by Receiver. 47 A. 263=1925 A. 225. Only the share of an insolvent member in a joint family vests in the receiver. The rights of the other members are unaffected. 35 I.C. 610=32 M.L.J. 84; 6 O.W.N. 977. Where one of the coparceners of Hindu joint family becomes insolvent, the O.R. can sell the right, title and interest of such coparcener in the joint family property and the purchaser's remedy is to compel partition as against the other co-sharers. The actual shares of the coparceners of other members in the family need not be determined at the time of sale by the O.R., but can be determined at time of partition. 1933 L. 651= 146 I.C. 840=34 P.L.R. 1032. The undivided interests of the co parceners in the joint family property do not vest in the Receiver upon the adjudication of the manager as an insolvent, though the manager's power to dispose of such shares to satisfy the just and proper debts incurred by him on behalf of the joint family may so vest. But as the manager has no right to exclude them from possession, the receiver also cannot attach their property. 1933 N. 150=29 N.L.R. 159. *See also* 63 C. 194=40 C.W.N. 808. Hindu insolvent—Claim by mother and unmarried sisters for arrears of maintenance, marriage expenses, residence and clothing—Suit without leave of Court not maintainable. 52 L.W. 307=1940 M. 951=(1940) 2 M.L.J. 239; 1938 L. 20; 1938 C. 279; I.L.R. (1937) 2 C. 675=1937 C. 517. Where manager has been adjudged insolvent, suit in respect of a promissory note executed by him is maintainable, without the leave of the Court, and a decree may be passed thereon. 1934 M. 223=66 M.L.J. 277. *See also* 144 I. C. 117=1933 N. 324. On the insolvency of the father of a joint Hindu family, it is only his own share of the family property that vests in the O. R. The shares of his sons do not vest in the O. R. With respect to those shares, what vests in the O.R. is only the father's power of disposal. 1931 M. 118; 31 Punj.L.R. 245=123 I.C. 286; 1935 M. 255=68 M.L.J. 357; 1931 A.L.J. 122= 1931 A. 162 (F.B.); 15 Pat.L.T. 502; 147 I.C. 642=9 Luck. 304=1934 O. 1 (F.B.); 1937 N. 31; 6 L. 1; 16 P. 60=18 Pat.L.T. 1=1937 P. 185 (F.B.); (15 P. 363 is no longer good law); 32 Bom L.R. 1362=1931 B. 50; 1933 N. 373; 13 L. 464; 20 N.L.J. 229; 44 P.L.R. 96; 63 C. 194=40 C.W.N. 808; 50 L.W. 839=1940 M. 222=(1939) 2 M.L.J. 708; 1937 P. 665; 71 M. L.J. 294; 1938 M. 299; I.L.R. (1939) M. 585= (1939) 1 M.L.J. 889; 51 L.W. 357; 1938 M. 752=(1938) 1 M.L.J. 824; 1939 M.W.N. 270; 1937 R. 165. The effect of the insolvency of a member of a joint Hindu Mitakshara family is to vest his interest in the joint family property in the receiver who, so to say steps into the shoes of the former. If the insolvent happens to be the father of the other coparceners of the joint family consisting of himself and his descendants, the receiver in insolvency would have all the powers which the insolvent had. The receiver would thus be able to bind by his sale the share of the other coparceners, if the insolvent himself could have sold for those debts of his the joint property including the share of his descendants, that is to say, the receiver will have the powers to bind the non-insolvent coparceners by his sale of the entire joint property, provided the family at the time

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of his sale was still undivided, and provided the sale is for the liquidation of the personal debts of the father (insolvent) which were not of immoral nature. The position, therefore is that he steps into the shoes of the father who has become insolvent. In accordance with this principle he will not be entitled to take possession of the entire joint undivided properties, but would only be entitled to joint possession with the other non-insolvent coparceners of the family. 45 C.W.N. 329. On the insolvency of the managing member of a joint Dayabhaga family who is not and cannot be the father, his power to sell or mortgage the interest of other coparceners for satisfaction of joint debts does not vest in the receiver under S. 28 (2). The receiver therefore has no power, by virtue of adjudication alone, of alienating the share of other coparceners 46 C.W.N. 808=A. I. R. 1942 C. 533. By virtue of such power the receiver has also the right to ask for annulment of the sale of the sons' shares. The remedy of the receiver lies in the Ins. Court and not in ordinary Civil Court. 152 I.C. 1026=1934 N. 271; 19 Pat.L.T. 488=1938 Pat. 234. Such a power does not terminate on the death of the insolvent. *Distinction between powers conferred by a deed under the English law and the right of a Hindu father to sell the son's interest in joint family property* pointed out. 13 L. 464=135 I.C. 217=1932 L. 151. When the father of a Hindu joint family becomes insolvent, the Official Receiver has the right to collect the rent due from the minor's shares in the joint family properties in order to pay off the insolvent's creditors. 139 I. C. 833=1933 M. 73=36 L.W. 581. Sale by O.R. of father's right after a decree for partition—Son's share not conveyed. 1933 M. 475 (distinguishing 1916 P.C. 220). Where the entire property belonging to the judgment-debtor and his sons had been attached before the judgment-debtor was adjudicated as an insolvent and the petition for adjudication was presented after the date of the attachment, the father's power of disposal of the son's shares is destroyed by the existing attachment of those shares; and the O.R. has no power to deal with the sons share by reason of the order of adjudication or to appropriate the sale proceeds accruing from the sale of the son's shares. 1931 M. 118; 148 I.C. 787=39 L.W. 338=1934 M. 217=66 M.L.J. 412. *See also* 156 I.C. 205=1935 M. 427; 1936 M. 698=71 M.L.J. 294; 44 L.W. 615=1936 M. 948=71 M.L.J. 541. There is nothing in the scheme of the Ins. Act authorising the Receiver to eject the sons of the insolvent from the property in their possession. The property of the sons is not the property of the insolvent. 1932 A.L.J. 285=1932 A. 353. Receiver has power to deal with assets of the joint family where only one member is adjudicated insolvent. 69 I.C. 485=14 L. W. 361. On the adjudication of the father, Official Receiver cannot sell the son's share where they have been attached by their creditors. 51 M. 342=1928 M. 479 (1)=54 M.L.J. 674. *See also* 71 M.L.J. 294 (noted *supra*.) Though ordinarily an attachment of the son's shares in execution of a decree would put an end to the right of the O.R. to sell the shares of the son of the insolvent, when the attachment is effected by a creditor who was granted leave to institute the suit under S. 28 (2) of the Act on condition of his handing over to the O.R. all the moneys realised by him, and when such creditor consents to a sale by the O.R. of the entire property of the joint family, the creditor is not, by reason of the attachment, entitled to any preferential right in respect of the proceeds of the sale of the shares of the sons to the exclusion of other creditors. 1935 M. 255=61 M.L.J. 357. But even the son's share vests in the receiver. 102 I.C. 266=1927 M. 701. Manager's power to dispose of family property to pay debts whether vests in O.R.: *see* 52 M. 246=1929 M. 166. The suit or other legal proceedings contemplated by S. 28 (2) must be one against the insolvent himself or against persons whom it is sought to make liable through him. Where the liability of the defendants depends, not upon their being the sons or representatives of the insolvent, but on their being grandsons of the father of the insolvent in respect of debts contracted by the father of the insolvent as *karta* of a joint Hindu family, S. 28 (2) has no application, and the suit will be maintainable without the leave of the Court. To such a suit neither the insolvent nor the receiver in insolvency is a necessary party. 63 C. 194=40 C.W.N. 808. The *share of an insolvent in partnership business vests in receiver* 45 M.L.J. 827=1924 M. 223; 26 I.C. 836=42 C. 225. A minor cannot be adjudicated an insolvent. and as a *partner* in a trading firm, he is under no personal liability and no property of his which is not the property of the firm can be touched by the receiver. But where a joint family consisting of fathers and minor sons is a partner in a trading firm which is adjudicated insolvent, the liability of the minors as *sons* extends to all debts of their fathers as are not shown to be immoral. 11 P. 399=139 I.C. 13=1932 P. 231. Where the vendor left certain monies with the purchaser of goods with a direction to pay his creditors and obtain receipts and subsequently became insolvent, *held*, that the monies with the purchaser which had not in fact been paid to the creditors vested in the O.R. and that there was no trust for creditors. 134 I.C. 100=32 P.L.R. 876. Occupancy land of a tenant does not vest, on his being adjudicated an insolvent. 151 I.C. 889=17 N.L.J. 163=1934 N. 231; *See also* I.L.R. (1937) Nag. 484=1937 Nag. 242; nor occupancy rights under S. 6, Punjab Tenancy Act. 160 I.C. 921 (2)=38 P.L.R. 233=1936 L. 502; *See also* 1938 R.D. 787; nor land belonging to an agricultural tribe. 1936 Pesh. 109; 1937 Pesh. 57=167 I.C. 14. The receiver or the creditors of an insolvent cannot lay hands for any purpose on a colony land governed by the Punjab Act V of 1912, as under S. 18 of that Act none of the rights or interests vested in a tenant from Government can be attached or sold in execution of a decree or order of a Court or in any insolvency proceedings. 42 P.L.R. 144. The Municipal licences, which are personal and not transferable, cannot form assets in the insolvency of the licensee. 39 L.W. 82=1934 P.C. 1 (P.C.). Where a certain sum of money payable to the creditor under an award was directed to be brought into Court and was permitted to be in deposit with a third person till the plaintiff's claim was finally decided and the plain-

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tiff having succeeded applied for the same but it appeared that during the interval the debtor had been adjudged insolvent at the instance of another creditor, *held*, that the creditor could recover the amount in spite of the insolvency, because the Court had already allotted for his debt. 1933 C. 625=37 C.W.N. 475. The property in the articles bailed did not belong to the insolvent and therefore did not vest in the O.A. and the suit by the insolvent having been filed as a mere bailee was maintainable. 59 M.L.J. 629=1930 M. 913 (2) (F.B.). The right to claim damages is a mere right to sue therefore does not vest in the O.R. 28, N.L. R. 340. But a right of suit in respect of a tort *resulting in injuries to insolvent's estate* vests in the receiver. 145 I.C. 835=1933 R. 268. An alienation by an undischarged insolvent of property belonging to him is not void but only voidable at the option of the receiver or the Court and is not wholly void. S. 28 only vests his property in the receiver but does not take away his capacity to contract. (43 A. 555, Ref.) 55 A. 508=1933 A.459=1933 A.L. J. 475. *See also* 1935 M. 907: 1937 O.W.N. 94 (Effect of transfer by insolvent after adjudication where order of adjudication has been annulled). A vesting under S. 28 (2) or 56 (1) is a "transfer" under S. 34 (5) of the U. P. Land Revenue Act and the receiver must make a report as required by that section. In the absence of such a report, he cannot maintain a suit in the Revenue Courts for arrears of rent due to the insolvent. 11 O.W.N. 1037=15 L.R. 546 (Rev.)=18 R.D. 430 (2). Where the time for applying for discharge has expired, the Court is not bound to vest the property in the insolvent; but it may vest it in the receiver for the benefit of the creditors; and even if the receiver sells the property or distributes it among creditors, the insolvent has no right to object to it, though the creditors may do so. 1933 L. 1008. The salary earned by an insolvent after the presentation of the insolvency petition and before his adjudication vests in the receiver under sub-s. (2) read with sub-s. (7) of S. 28. Under sub-s. (4) of S. 28, salary earned by the insolvent after the date of adjudication and before his discharge vests *forthwith* in the receiver, and not only when the receiver intervenes. The rule in *Cohen* v. *Mitchell* does not apply to cases arising under the Pro. Ins. Act. 60 B. 141=38 Bom.L.R. 211=1936 B. 164; 1938 Nag. 408; 20 Pat. 866. *See also* 1937 Sind 306=31 S.L.R. 506. The test for determining whether or not the salary which has been ordered to vest in the receiver is excluded by the terms of sub-S. (5) of S. 28. will be whether or not on the date the order of adjudication was made, the salary was liable to attachment and sale in execution of a decree assumed to subsist on that date. Where therefore an order of adjudication was made on 3rd April, 1937, the extent of the salary to be excluded from vesting in the receiver will be determined according to the Civil Procedure Code, S. 60, as existing on that date and not according to S. 2 of the Civil Procedure Code Amendment Act (IX of 1937). 177 I.C. 352=1938 Cal. 325; 20 Pat. 866. The insertion of the word 'forthwith' in S. 28 (1) has been to sweep away the Court's attempt to postpone the vesting. As soon as the amount of a provident fund reaches the hands of an undischarged insolvent depositor, it ceases to be a compulsory deposit that is not liable to attachment and it becomes the absolute property of the depositor insolvent and therefore vests in the Insolvency Court. I.L.R. (1939) Nag. 530=1938 Nag. 408. "Property"—Insolvency of employee company—Provident Fund rules providing for absolute disposal by employee of amount subscribed by him—Such amount, if vests in receiver. 16 Pat.LT. 167. Pensioner—Insolvency of—Pension for past services—If property available for distribution among creditors—Order for payment of part of pension to receiver in insolvency—Legality. 40 C.W.N. 142. *See also* 43 C.W.N. 1004; 1937 Sind 306; (Life interest in a fund under a will rests in O.R.)

OFFICIAL RECEIVER, A NECESSARY PARTY TO SUITS—LEAVE OF COURT; *see* 1929 L. 28; (1937) 2 M.L.J. 29=1937 Mad. 725. Where a suit is instituted against an insolvent after his adjudication without the leave of the Ins. Court. any order passed therein is *ultra vires* and of no effect. 1936 R.D. 164=1936 A.W. R. 485. A suit without obtaining such leave is liable to be dismissed. 1936 M. 984=71 M.L. J. 738. The language of S. 28 (2) is perfectly plain. The prohibition enacted imposes a condition precedent to the commencement of a suit, and if the leave of the Court is not obtained, the suit must necessarily be dismissed. I.L.R. (1939) Bom. 493=41 Bom.L.R. 583=1939 Bom. 344. It is not imperative on a creditor to obtain leave to commence a suit when his debtor has merely applied to be adjudicated insolvent. Subsequent adjudication would not affect the maintainability of a suit without such leave. The intention of sub-S. (7) is only that the title of the Court or the receiver appointed by it to the insolvent's property shall relate back to the date when the petition for adjudication was filed. When an adjudication is annulled, it is annulled for all purposes and the position with reference to a suit filed without leave of Court is as though there had never been any necessity for obtaining leave of the Court. 42 C.W.N. 34. *See also* 1940 Rang.L.R. 396=1940 Rang. 234. Suit by creditor impeaching transfer by debtor as fraudulent—Debtor adjudged insolvent—Leave of Insolvency Court is necessary. 1938 Lah. 856. *See also* 1941 Mad. 503=(1941) 2 M.L.J. 684 (F.B.). A suit against a firm which has been adjudicated insolvent to recover money deposited with it prior to its adjudication is not maintainable, where the leave of the Court has not been obtained. 160 I.C. 229=1936 O.W.N. 52=1936 O. 236. Insolvency proceedings against debtor—Execution petition by creditor without leave of Court—If legal. 1936 M. 284=59 M. 759=44 L.W. 403=71 M.L.J. 180. A judgment-creditor can. no doubt, proceed against the person of the insolvent judgment-debtor, but the leave of Court is essential as an application for execution of a decree by arrest of the judgment-debtor is a "legal proceeding". 1936 O.W.N. 56=1936 O. 177. S. 28 (2) lays down that only after making an

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order of adjudication shall a creditor have no remedy against the property of the insolvent or commence any suit or other legal proceeding except with the leave of the Court. The mere application for insolvency therefore is not a bar to the commencement of a suit or legal proceedings. 1936 A.W.R. 485. Leave whether can be obtained after suit. 1928 M.W.N. 122. Refusal of dicharge does not dispense with necessity to obtain leave of Court. 6 R. 27=1928 R. 109. The right to recover assets of insolvent vests in the Receiver; any suit by a creditor against a person in possession of assets of insolvent without impleading the Receiver as a party is unsustainable. 43 M. L.J. 41=49 C. 560 (P.C.). In a suit for specific performance against insolvent, O. R. is a necessary party and has to execute the necessary deed in pursuance of the decree. 1913 M. W.N. 897=21 I.C. 576. An appeal against an order affecting the property of the insolvent is maintainable only by the Receiver and not by insolvent. 47 I.C. 152; 51 I.C. 971; 1922 M. 439; 45 I.C. 239=7 L.W. 516. Leave of Court is necessary for a creditor to sue to set aside a transfer under S. 53 of the T. P. Act after adjudication. 42 M. 684=36 M.L.J. 453. *See also* 23 Pat.L.T. 35. A suit by a creditor under S. 53 of the Transfer of Property Act to set aside an alienation made by the debtor before he is adjudged an insolvent is maintainable without the leave of the Insolvency Court under S. 17 of the Presidency Towns Insolvency Act or S. 28 of the Provincial Insolvency Act as the case may be. The property transferred by the debtor before insolvency does not form part of his estate which will not at once vest in the Official Assignee or Official Receiver. It will vest only when the Official Assignee or Official Receiver or a creditor obtains a declaration that the transaction offends against S. 53, T. P. Act. If the creditor desires to make the Official Assignee or Official Receiver a party to the suit, the leave of the Insolvency Court is necessary. 54 L.W. 495=1941 M.W.N. 942=1941 Mad. 903=(1941) 2 M.L.J. 684 (F.B.). A suit by landlord for arrears of rent against insolvent requires leave of Court, though the power to distrain is not affected by insolvency. 34 A. 121=12 I.C. 927. *See also* 1937 A.L. J. 405=1937 All. 399; 1938 A.L.J. 134=1938 All. 198. A suit with leave of Court against insolvent for declaration of priority of mortgage is maintainable. 36 I.C. 1004 Permission to proceed against concealed properties of insolvent can be granted to a decree-holder creditor, on condition of his handing over to the O. R. all sums realised. 37 I.C. 903. Insolvency of judgment-debtor pending execution sale—O. R. not brought on record—Other legal representatives as parties—Sale whether invalid. 1929 M.W.N. 168. Mahomedan co-heirs—Vesting of estate—Debt of ancestor not a charge—Decree against estate of deceased—Subsequent insolvency of one co-heir—Need for impleading O.R. as party. 1929 M.W.N. 168. *See also* (1942) 1 M.L.J. 173 (Hindu father and son) A secured creditor for the purpose of enforcing his security can proceed as if the title of the mortgaged property remained with the insolvent and that the Receiver, is not therefore a necessary party to a mortgage suit instituted by the creditor of an insolvent to enforce the mortgage. 31 P.L.R. 506=1930 L. 791; 13 R. 37=1935 R. 92. 1939 Nag. 207=I.L.R. (1939) Nag. 540. But *see contra* 1935 L. 316. A judgment-debtor cannot have the sale set aside on the ground that the O.R. who was a necessary party was not impleaded in the mortgage suit. O.R. may not be bound by the sale but the judgment-debtor is bound. 130 I.C. 485=1931 A. 159. *See also* 60 C.L.J. 581=32 C.W.N. 366. *See also* 1939 N.L.J. 202=1939 Nag. 128; 1937 Lah. 402. When an auction sale has taken place, the property itself no longer vests in the Court or the receiver, but under S. 51 the sale proceeds are at the receiver's disposal. The sale cannot be set aside on an application by the receiver or the insolvent. 1934 A.L.J. 857=1934 A. 252. *See also* 1937 Lah. 402. When a mortgaged property vests in a Receiver the mortgagee cannot bring or continue a suit for foreclosure without making the receiver the defendant and a decree obtained in his absence is not *res judicata* against him. *See* 39 P.L.R. 627=1937 Lah. 402.

WHERE LEAVE OF COURT IS NOT NECESSARY.—Objection as to want of leave should be taken in the first Court. And where it has not been so raised, it is not open to the O.R. on appeal to contend that the suit should have been dismiss-d by the lower Court for want of leave. 38 L.W. 891=1933 M. 917. The wording of S. 28 does not require that a suit by a creditor against an insolvent without leave of Court to be dismissed, but by implication gives power either to stay the suit or allow it to be proceeded with on terms; these powers may be exercised at a stage later than the commencement of the suit, should the suit have already been commenced without leave. 34 Bom.L.R. 683=1932 B. 344. *See*, however, the ruling under S. 17 of the Presidency Towns Insolvency Act holding that is the duty of Court to dismiss such a suit. 34 Bom.L.R. 649. No permission is needed for suits against Receiver. 46 A. 16=1924 A. 40; 53 I.C. 973=30 C.L.J. 515; 1930 L. 708 (suit by stranger). Where in the order of adjudication itself, the Court specifically stated that the creditor might, if so advised, file a separate suit for having the transfer declared void, that itself constitutes the necessary leave. 35 P.L.R. 402=1934 L. 460. Also where the Insolvency Court entertains an application made by the creditor under S. 4, hears it and proceeds to give a decision upon it, the Court must be deemed to have impliedly granted leave. 40 L.W. 693=67 M.L.J. 616. S. 78 will not apply if the permission to execute given under this sub-section cannot be acted upon. 3 R. 492. Leave of Court is necessary to a suit by a creditor for declaration of insolvent's rights. 1930 R. 317. Failure to obtain leave before the institution of the suit cannot be cured by obtaining leave subsequently. 1933 N. 217=145 I.C. 697 (2). Leave of the Insolvency Court is a mandatory condition precedent to the entertainment of the plaint under S. 28, and the initial absence of leave cannot be condoned or does not become unnecessary because the insolvency proceedings are annulled subsequently 113 I.C. 550=1929 M. 480. Limitation to sue

(3) For the purposes of sub-section (2), all goods being at the date of the presentation of the petition on which the order is made, in the possession, order or disposition of the insolvent in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof, shall be deemed to be the property of the insolvent.

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insolvent is not extended by the fact of adjudication. 42 M. 319=36 M.L.J. 104. Limitation to recover debts due to insolvent ceases to run on presentation of petition. 66 I.C. 758=34 C.L.J. 167. *See also* 1936 M. 290. Receiver's claim to property of insolvent is a statutory claim. When the vesting is after attachment, Arts. 11 and 13 of the Lim. Act have no application. 41 M.L.J. 334 =45 M. 70. Suit against two persons for maintenance—One of them adjudicated insolvent—Suit continued as such without impleading O. R.—Execution of decree obtained in suit and property sought to be brought to sale—Validity of sale. *Held*, that under S. 28 (2), as execution was sought without leave of Court in respect of property which had already vested in the O. R., the proceedings were invalid as against the O. R., in so far as he represented the estate of the insolvent, but that otherwise they were valid. 1933 M. 858=65 M.L.J. 833.

EFFECT OF ADJUDICATION.—All decrees and proceedings against insolvent are ordinarily stayed on adjudication, and any subsequent proceeding is a nullity. 15 I.C. 950=14 Bom. L.R. 511; 42 M.L.J. 426; 44 M. 524=40 M.L.J. 219; 43 I.C. 672=40 A. 197; 32 I.C. 489. A vesting order passed by a competent foreign Court (Secunderabad) is a transfer by operation of law, which does not give way to an earlier attachment and the rights of the O. R., under such a vesting order override those under an earlier attachment in British India. 33 L.W. 562=61 M.L.J. 774. Any private arrangement between creditors and insolvent after adjudication will not be recognised. 61 I.C. 904=25 C.W.N. 137. Leave of Insolvency Court necessary before proceeding against person of debter after insolvency. 107 I.C. 608=1928 L. 258; 1935 M. 239=68 M.L.J. 148; 160 I.C. 33=1936 O. 177. In the case of execution petitions *pending* at the time of the adjudication, there is nothing in the Act to prevent the creditor from proceeding to arrest his debtor unless the latter applies to the Court for protection under S. 31. 1928 Lah. 258. Before the protection given to an insolvent after adjudication is taken away, he should be given notice to show cause why he should not be arrested. 31 I.C. 15=5 L.W. 220. Insolvency proceedings end on refusal of discharge under S. 42. 3 R. 492. When an O. R. has been appointed, he represents the whole body of creditors and it is he who should move the Court on behalf of a creditor to attach the insolvent's property, though it is open to a creditor to bring any matter to the notice of the O. R. or of the Court. 146 I.C. 494=1933 All. 153. The concluding portion of S. 28 (2) imposes a disability which debars a creditor from commencing any suit or other legal proceeding, except with the leave of Court and an application for execution is the commencement of a legal proceeding within the meaning of the section. The disability is not affected by the fact that there has been no protection order under S. 31, if the creditor could not have applied at all for leave. Until such leave is obtained, the decree-holder is under disability from taking any step in execution of decree and where the application for execution of a decree passed after an adjudication is made within the period of limitation from the order granting leave, the application is not barred by limitation, even though it may be more than three years from the date of decree. 10 P. 422= 1931 P. 357. *See also* 69 M.L.J. 137. A person obtaining a decree on the understanding that he is getting a decree against certain insolvents and that his exclusive remedy would be to go to the Insolvency Court and get rateable shares in the assets, has no right to execute that decree independently of the Insolvency Court and attach the property contrary to the provisions of S. 28 (2). 1935 A.L.J. 673=1935 A. 643. Execution sale by creditors—Subsequent adjudication on application presented before sale—Assets realised—Right of execution creditors to—Receiver subsequently appointed—Right of. 160 I C. 146= 1936 P. 112. Where prior to his adjudication the insolvent had executed a deed of trust conveying his properties to the trustees named therein to be held and administered by them on the trusts mentioned in the deed, which trusts included the payment of certain specified creditors, the properties comprised in the trust deed are not the insolvent's properties but are vested in the trustees and consequently it is not competent for the receiver in insolvency to deal with them in any way. After the execution of the said trust deed, the insolvent has no interest in the properties covered by the deed and they do not vest in the receiver and are not subject to be administered by him on behalf of the general body of creditors. Nor has the receiver any right to administer the assets in accordance with the terms of the trust. 68 M.L.J. 744=40 C.W.N. 33=1935 P.C. 104 (P. C.). Suit and decree against insolvent after petition and before adjudication—Validity as against O. R. 42 L.W. 220=69 M.L.J. 241. The expression "whole property" in S. 28 (2) means the entire joint family property which the father himself can transfer or against which the execution may be had to enforce payment of the debt. 53 A. 239=1931 A.L.J. 122 (F.B.). A Hindu father's right to dispose of the joint family property in order to satisfy his own debts is property within the meaning of S. 28 of the Act and vests in the receiver who is entitled to seize the entire family property and transfer it in order to satisfy the debts of the father. It is not incumbent on such a receiver to obtain an order of the Court, execute it and attach the family property. He can straight away seize the property and sell it under a private deed, it not being incumbent upon him to take out an attachment. 1935 A.L.J. 673= 1935 A. 643.

Sec. 28 (3).—Reputed ownership—Applicability of doctrine—Unregistered mortgage of immo-

(4) All property which is acquired by or devolves on the insolvent after the date of an order of adjudication and before his discharge shall forthwith vest in the Court or receiver, and the provisions of sub-section (2) shall apply in respect thereof.

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vables and movables—Order upholding latter—Insolvent in possession of some movables—Right of O. R. as against mortgagee—Construction of order. 60 C.L.J. 515. Court cannot delegate to receiver power to determine title to certain promissory notes alleged to be held benami for the insolvent. 46 I.C. 335=22 C.W.N. 700. An insolvent can sue to recover "after acquired property". Only the O. R. can step in at any time. 45 M.L.J. 827=48 I.C. 236. There is a conflict among the High Courts as to whether the insolvent can sue at all. 1923 P. 287; 22 I.C. 687. An order setting aside *ex parte* decree where plaintiff pending the application is adjudicated insolvent is valid and is not prohibited. 61 I.C. 534.

Sec. 28 (4).—S. 28 (4) refers to property which the insolvent acquires by his own efforts, such as his wages or salary, or to property which devolves on him by rule of law, such as inheritance. It is not intended to apply to a case where property which does not come under the section is sold by some one who has a right to sell it. Where the Zamindary property of the insolvent which is exempted under the Bundelkhand Land Alienation Act from liability to attachment and sale in execution of a decree and which is, therefore, by virtue of S. 28 (5), not the property of the insolvent, for the purposes of that section, is sold by a Co operative Bank under the Co-operative Societies Act for a debt owing to them from the insolvent, the sale price of the property will go to the Bank and cannot be considered as being acquired by or devolving on the insolvent under S. 28 (4). 1935 A.L.J. 170=1935 A. 279. *See also* 23 Pat.L.T. 35. A decree for costs obtained by an insolvent after the order of adjudication vests in the Official Receiver under S. 28 (4) and the insolvent is not competent to transfer or assign it. I.L.R. (1941) Mad. 824=54 L.W. 758=1941 Mad. 713=(1941) 2 M.L.J. 834. Where, on a mortgagor's death, the mortgaged property devolves on the insolvent, the receiver alone has a right to deal with the equity of redemption. If in a suit for foreclosure the receiver is not a party, the decree is not *res judicata* against him. 54 C. 595=52 M.L.J. 734=54 I.A. 190 (P.C.). But *see* 1927 N. 16. When a person has been, along with his father, adjudicated and it was not appealed against, an application under S. 28 (4) in respect of a property bequeathed to him by a will could not be resisted on the ground that it is the personal property of the insolvent. As long as the adjudication stands it could not be done. 19 Pat.L.T. 860=1939 Pat. 18; 1937 Sind 306. Where sons acquired property after adjudication of father, but they were enjoyed in common whether receiver can proceed against father's share in them. *See* 29 Bom. L.R. 473. As to *after-acquired proprety* of insolvent, *see* 4 R. 125=1926 R. 179; 137 I.C. 394=1932 M. 250; 9 O.W.N. 523. Mortgage of property inherited by undischarged insolvent is invalid. But if O. R. does not claim the property in the insolvency proceedings, it revests in the mortgagor on his discharge, and then mortgagee can enforce the same. 36 P.L.R. 185=1934 L. 809. *See also* 1940 M.W.N. 19. So also in the case of partition, 1934L. 809. The after-acquired property of an insolvent before discharge can be transferred by him provided the transaction is *bona fide* and for value and is completed before the intervention of the Official Assignee. *Difference in the language of the section under old and new Acts* pointed out. 8 P. 478=1929 P. 97. *See also* 97 I.C. 980=1927 N. 16. S. 28 (4) disables the insolvent from conveying a valid title to property which devolves on him as a reversioner after adjudication and before discharge. 42 L.W. 33=1935 M. 694. Where subsequent to adjudication, the insolvent, a Government servant, incurs debts and creditor obtains a decree, and subsequently the adjudication is annulled, but the O. R. has not availed himself of S. 28 (4), the decree-holder can proceed against salary obtained by him after the order of annulment. 1936 L. 761. If the Official Assignee or creditors have permitted the insolvent to trade, they cannot claim upon the person, who may be allowed to supply him with stock in trade, materials or cash for the purpose of carrying on his business, to have those assets taken and applied for their own benefit in the insolvency. Their object in allowing him to trade must be taken to be with a view to obtain some advantage out of the surplus profits which have been acquired when the trading is over and all necessary outgoings incident to the trading have been paid. The claim of a person who has supplied money for business constitutes a prior charge over any claim by the receiver. 1940 Rang. L.R. 352=1939 Rang. 186. Under S. 28 (2) all the property of the insolvent vests in the Court. If no receiver is appointed, all future property of the insolvent including future salary vests in the Court. If any creditor takes any proceedings against the insolvent by way of suit or appeal, the District Judge (the Insolvency Court) must be made a party to such proceedings. 23 Pat.L.T. 35. Provident fund—Deposit in—Insolvency of subscriber—If vests in O. R. *See* 37 Bom.L.R. 494. Application for adjudication—Subsequent payments to insolvent—Binding nature on O. R. 138 I.C. 628=1932 S. 62.

Secs. 28 (4) and 44 (2).—So far as the debts due from the insolvent at the time of the order of adjudication are concerned, he is released from them on an order of discharge. But the power of the O. R. to deal with the property which vests in him at the time of order of discharge does not cease with the passing of the order of discharge. Where, under misapprehension, the O. R. made a report to the District Judge that the insolvent's assets were completely disposed of and the order of discharge was passed, but in fact certain property

(5) The property of the insolvent for the purposes of this section shall not include any property (not being books of account) which is exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree.

(6) Nothing in this section shall affect the power of any secured creditor to realise or otherwise deal with his security, in the same manner as he would have been entitled to realise or deal with it if this section had not been passed.

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had devolved on the insolvent some months before order of discharge. *Held*, that the report of the O. R. did not affect the question as the assets inherited by the insolvent before order of discharge vested in the O. R. and S. 44 (2) did not take away his power to deal with the property inherited by the insolvent, and which vested in him at the time of order of discharge, even after the order of discharge. (1929 R. 168, Rel. on.) 1937 L. 87.

Sec. 28 (5).—Property exempted from attachment and sale does not vest in the receiver. 42 A. 142=58 I.C. 551; 1928 L. 734. As exproprietary holdings are not saleable because of S. 23 (1) of the Agra Tenancy Act, they cannot vest in the O. R. under S. 28 (5) of the Provincial Insolvency Act. 133 I.C. 479=1931 A.L.J. 680. When salary not sufficient for maintenance. 40 A. 213=43 I.C. 984. Regarding *non-transferable occupancy holding*, *see* 39 A. 120=38 I.C. 171. *See also* 40 P.L.R. 8=1937 Lah. 782. A transfer by insolvent of property exempted from being sold in execution cannot be set aside. 23 A.L.J. 648=89 I.C. 488. Whether the amount of compulsory deposit under the Provident Funds Act can be attached, *see* 1 Luck. 313=1927 O. 22. Compulsory deposit under Provident Funds Act *after* payment to insolvent can be attached—Not before. 29 O.C. 278=99 I.C. 673. If an employee of the Imperial Bank of India who is entitled to a pension under the Pension Fund Rules and Regulations framed under S. 31 (2) (1) of the Imperial Bank of India Act is adjudicated insolvent after his retirement, his pension, as soon as it becomes payable at the end of each month, vests in the Court or the receiver under S. 28 (4) and is divisible amongst the creditors subject to the right of the insolvent and his family to be maintained out of the moneys so coming to hand. 43 C. W.N. 1004. *See also* 40 C.W.N. 142. As to property exempted from execution under S. 16, Bundlekand Alienation of Land Act, *see* 47 A. 952=1925 A. 467. As to exemption of house, buildings, cattle-shed belonging to an agriculturist, *see* 49 M. 227=50 M.L.J. 90. Large landed proprietor whose sole income is from land is an agriculturist. 49 Mad. 227. Exemption applies even though house is *not owned but only occupied* by the agriculturist. 1933 L. 1010. A receiver in insolvency, in whom the property of the member of a notified agriculturist tribe has become vested, does not possess power to sell his land to another agriculturist. (1928 L. 734 and 119 I.C. 730, Diss. from). 31 P.L.R. 842=1930 L. 1034. The words "*attachment and sale*" in S. 28 (5) must be given their plain grammatical meaning and cannot be taken to be equivalent to "*attachment or sale*". 1930 L. 1034. Land belonging to a member of a notified agricultural tribe is liable to attachment in execution of a money decree passed against him and in the event of his being adjudicated insolvent such land vests in the receiver who has the power to effect a temporary alienation or create a self-redeeming mortgage and not to sell to another agriculturist. 1930 L. 1034; 1933 L. 250=34 P.L.R. 486. *See also* 1937 A.L.J. 801=1937 A. W.R. 686. Books belonging to a lawyer are not exempt from liability to attachment and sale either under S. 60, C. P Code or under any other law and that they should be deemed to come under S. 28 (1) of the Act. 1937 O. W.N. 33=1937 O. 177=13 Luck. 64. Where a creditor claims a charge on the assets of the insolvent, in respect of a deposit made with the insolvent on trust, he must prove not only the deposit, but also that the deposit was made for a definite purpose. 38 L.W. 891=1933 M. 917.

SUIT BY INSOLVENT FOR MONEY LENT AFTER ADJUDICATION—DEFENDANT, IF CAN DENY THAT MONEY WAS PLAINTIFF'S.—Where an insolvent filed a suit for money lent after adjudication, the defendant who took the money from the plaintiff should not be allowed to deny that the money belonged to the plaintiff. *Prima facie* there is no presumption that the money does not belong to the plaintiff and if the receiver has not intervened and seized this amount, there is a presumption in favour of the plaintiff that the money is his own and the suit cannot be thrown out on the mere ground that the plaintiff is an insolvent. 1935 A.L.J. 709=1935 A. 675 (F.B.).

Sec. 28 (6).—Mortgagee can sue on and realise his security. 63 I.C. 91. *See also* 39 A. 204=38 I.C. 613; 48 M. 750=49 M.L.J. 203; 1937 Lah. 402; I.L.R. (1939) Nag. 540=1939 Nag. 207; I.L.R. (1939) All. 492=1939 A.L.J. 238=1939 All. 401 and leave of Court is not necessary. 31 Bom.L.R. 1199. If the receiver realises the debt out of the secured property, the creditor has a charge on the amount realised. 21 A.L.J. 32=15 I.C. 860. A mortgage by insolvent after adjudication is not invalid if consideration went to discharge a prior mortgage. 43 A. 555=63 I.C. 366; 90 I.C. 349. Where in a suit filed by a mortgagee, prior to adjudication of the mortgagor, the receiver was impleaded only in the final decree proceedings, and he did not object to the claim, final decree cannot be refused. 101 I.C. 78=1927 M. 609. A judgment-debtor cannot have the sale set aside on the ground that the O. R. was not impleaded in the mortgage suit. O. R. may not be bound by the sale but the judgment-debtor is bound. 130 I.C. 485=1931 A. 159. Mortgage after insolvency for payment of mortgage debt contracted prior to insolvency, validity of. *See* 1926 N. 29. Where by the terms of the decree

(7) An order of adjudication shall relate back to, and take effect from, the date of the presentation of the petition on which it is made.

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a party to a money suit is a secured creditor, it is not necessary for him to prove in insolvency. 120 I.C. 218=1930 N. 17. The existence of an attachment in favour of a creditor does not constitute that creditor a secured creditor. I.L.R. (1937) 2 Cal. 675=41 C.W.N. 1079=66 C.L.J. 315=1937 Cal. 517. A receiver appointed in a mortgage suit and in possession of the mortgaged property, is not superseded by the insolvency of the mortgagor and the appointment of a receiver-in insolvency. The latter has no preferential right to possession and the receiver appointed in the suit cannot be removed from possession and made to surrender possession to the Receiver-in insolvency. The right of a secured creditor to realise or otherwise deal with his security is unaffected by an order of adjudication. 39 C.W.N. 384.

Sec. 28 (7) SCOPE.—S. 28 (7) governs Sec. 34. 42 C.W.N. 34. The doctrine of relation back enunciated by S. 28 (7) cannot be invoked to entitle a creditor to deduct the period from the date of the presentation of the insolvency petition as well, because the two sections deal with quite different subjects; S. 28 (7) dealing with all dealings by or with the insolvent, and S. 78 (2) with the maintainability of actions on a debt due by him in a Court of law. The doctrine of relation back can never be applied to a suit instituted before an order of adjudication. I.L.R. (1938) Mad. 439=46 L.W. 559=1938 Mad. 19=(1937) 2 M.L.J. 703. *See also* 42 C.W.N. 34; 1938 M. 806. An order of adjudication under Cl. (7), S. 28, relates back to the date when the petition for insolvency is admitted by the Court. The effect of Cls. (2) and (7), S. 28, is that the properties of the insolvent, wherever they may have been and whoever may have been in their possession, automatically vest in the Court. It is immaterial whether there was at that time any receiver appointed by the Court or not. The vesting of the property of the insolvent in the Court is not dependent upon there being a receiver. 17 Pat.L.T. 313=1936 P. 112. *See also* (1939) 1 M.L.J. 705=1938 Mad. 906. This sub-section is controlled by S. 51. The decree holder has greater rights than receiver in respect of assets realised before date of adjudication. 2 Pat.L.J. 235=39 I.C. 463; 42 A. 336=59 I.C. 67. The title of the auction-purchaser who purchases in good faith is protected by S. 51 (3) of the Act; though there may be an adjudication order subsequent to the sale, the title of the purchaser to the property would remain unaffected. The doctrine of relation back of the Official Receiver under S. 28 (7) is subject to the exception enacted in S. 51 (3). The fact that the decree-holder himself is the purchaser would make no difference, provided he acts in pursuance of a valid order of Court and purchases with leave of the Court. 48 L. W. 279=1938 Mad. 906=(1939) 1 M.L.J. 705. The sub-section does not mean that the date of adjudication is identical with date of presentation for all purposes. Reading with S. 53, a transfer more than two years prior to adjudication but less than two years from presentation cannot be annulled. 1924 L. 374. Transfer between date of presentation and adjudication is void. 18 A.L. J. 449=55 I.C. 941. *See also* 1935 L. 368; 1938 Mad. 906=(1939) 1 M.L.J. 705. Whether a debtor of insolvent is liable to the receiver after payment to creditor of insolvent, *see* 1925 M. 328. A creditor who has attached a sum of money due to insolvent, before vesting in O. R. is entitled to it exclusively in satisfaction of his debt. 30 I.C. 82=42 C. 289. The fiction that once the order of adjudication is made, it relates back to the presentation of the petition has no place outside the Ins. Act. 1927 M. 693=53 M.L.J. 142. *See also* 167 I.C. 493=1937 R. 50 (debt contracted between date of application and date of adjudication is provable in insolvency. By the operation of S. 28 (7), the title of the auction-purchaser who purchases the property of the debtor after the admission of the insolvency petition but before the order of adjudication is not absolute, but contingent on the insolvency application being dismissed. If the insolvency application is dismissed, he gets an indefeasible title. But if the order of adjudication is made, he cannot claim any title as against the receiver unless he is purchaser in good faith. 39 C.W. N. 1289=1935 C. 612.

Secs. 28 and 29.—The operation of S. 28 affects all creditors [other than secured creditors, —28 (6)] whether they are judgment-creditors or not, or have proved their debt or otherwise. The section clearly enacts that during the pendency of the insolvency proceedings no creditor shall commence any proceedings in pursuit of a remedy against the property of the insolvent in respect of his debt without leave of the Court and such leave is a condition precedent to the commencement of proceeding. S. 29 which must be read with S. 28 can only refer to proceedings which are pending at the time of adjudication or else simultaneously with it. It cannot be invoked where the suit is filed after adjudication. 1940 Rang.L.R. 544=1940 Rang. 289. After a person is adjudged an insolvent, a suit filed by a creditor for the recovery of a debt provable in insolvency without the leave of the Insolvency Court is not maintainable; nor can the Court in which the suit is filed give leave to continue it. The point of time to which both Ss. 28 (2) and 28 refer is the date of the order of adjudication. S. 21 deals with proceedings not pending on the date of the order of adjudication, while S. 29 deals with proceedings then pending. S. 29 only refers to a suit already begun but not finished when the order of adjudication is made since leave of the Insolvency Court is a condition precedent to the right of action under S. 28, the want of it is a defect fatal to the suit and subsequent leave cannot validate it. The fact that the creditor files the suit in ignorance of the order of adjudication makes no difference. If a suit is filed after the order of adjudication without the leave of the insolvency previously obtained, the suit is not maintainable; the Court in which the suit is instituted has no power under S. 29 to grant leave to continue the suit. I.L.R. (1937) Mad.

29. Any Court in which a suit or other proceeding is pending against a debtor shall, on proof that an order of adjudication has been made against him under this Act, either stay the proceeding, or allow it to continue on such terms as such Court may impose.

Stay of pending proceeding.

30. Notice of an order of adjudication stating the name, address and description of the insolvent, the date of the adjudication, the period within which the debtor shall apply for his discharge, and the Court by which the adjudication is made, shall be published in the Official Gazette and in such other manner as may be prescribed.

Publication of order of adjudication.

Proceedings consequent on order of adjudication.

31. (1) Any insolvent in respect of whom an order of adjudication has been made may apply to the Court for protection, and the Court may on such application make an order for the protection of the insolvent from arrest or detention.

Protection order.

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841=45 L.W. 709=1937 Mad. 667=(1937) 2 M.L.J. 223.

Secs. 28 (7) and 53 : TRANSFER BY INSOLVENT DECLARED VOID—PROPERTY, IF VESTS IN RECEIVER.—Where subsequent to the transfer made by the insolvent, a petition for adjudication is filed and the transfer is found to be fictitious and fraudulent, and consequently void as against the O.R., the property vests in the O.R. under S. 28 (7) from date of petition for insolvency, and as such the transferee has no saleable interest subsequent to this. Hence a transfer by him is void. 1935 L. 368 ; 18 A.L.J. 449=55 I.C. 942.

Secs. 28 and 59: SCOPE AND EFFECT—SUIT BY INSOLVENT AFTER ADJUDICATION AND PENDING INSOLVENCY—MAINTAINABILITY. It is fundamen ally opposed to all principles of insolvency to hold that an insolvent after an adjudication order is competent to file a suit in his own name. That is clear from Ss. 28 and 59 of the Provincial Insolvency Act. A suit by an adjudicated insolvent during the pendency of the insolvency is therefore not maintainable. 40 Bom.L.R. 956.

Sec. 29 : SCOPE AND APPLICATION.—*See* 3 Pat. L.J. 456=46 I.C. 224 ; (1939) 2 M.L.J. 786. Stay of pending proceedings. 6 I.C. 96 ; 40 B. 461=18 Bom.L.R. 198 ; 97 I.C. 765=1926 M. 1145; 1929 N. 356. Court is bound to stay proceedings against debtor only after adjudication. 1926 M. 432=50 M.L.J. 665. "*Other proceedings*—" Meaning of. *See* 56 C. 712. The presumption from the word "*stay*" is that the suit stayed is not at an end, but may be continued until a further order is passed and as all orders in suit must be made after hearing parties, a Court cannot make a final order until it has heard objections; even where the creditor, whose suit is stayed, has not made an application, the Court would have to consider his request to continue the suit. 1929 S. 204. Where a suit for arrears of rent was pending against the insolvents at the time the order of adjudication was made and the insolvents brought it to the notice of the Court and there is no specific order on the record, but the Court continued the proceedings, it must be deemed to have allowed the suit to be continued without specifying any terms and there can be no bar to the passing of a decree for arrears of rent. 1936 R.D. 164=1936 A.W.R. 485. *See also* 45 L.W. 709.

Secs. 29 and 52 : RELATIVE SCOPE AND DISTINCTION—*Venkatasubba Rao, J.*—S. 29 deals with the effect of an order of adjudication, while S. 52 deals with the effect of an order admitting the petition for adjudication. Under S. 52, the material point of time is not the date of the order of adjudication but the date of the admission of the insolvency petition. The point of difference is that, whereas under S. 29, on mere proof of an order of adjudication having been made the executing Court's power is checked under S. 52, no such result automatically follows from the mere fact that notice of the admission of the insolvency petition has been given to the Court ; there must also be an application to the Court for delivery of the property. 59 M. 928 =1936 M. 819=71 M.L.J. 170.

Sec. 30.—Want of notice is a mere irregularity. 5 C.W.N. 91. The publication is intended only to provide conclusive evidence in all legal proceedings of an order of adjudication having been duly made and its date. Want of notice is only an irregularity and cannot vitiate the proceedings. I.L.R. (1939) Nag. 478=1939 N. L.J. 96=1939 Nag. 103. Though in a suit for damages for defamation of an insolvent a part of the claim refers to the injury to the insolvent's estate, the insolvent may still carry on the suit as the right of action for the injury to his character and reputation remains vested in him. 26 S.L.R. 21. Adjudication pending attachment and execution—Execution if can be continued. 28 N.L.R. 317. Whether application for protection before arrest is maintainable, *see* 47 M.L.J. 530=20 L.W. 870. Protection not to be granted when insolvency was due to gross extravagance. 41 B. 312=33 I.C. 694. Absence of protection order does not stop running of time. 47 I.C. 798. On this section, *see also* 1926 C. 160.

Sec. 31.—*See* 49 A. 201=1927 A. 418. There is no inherent jurisdiction for the Ins. Court under S. 5 to pass a protection order or an order protecting the alleged insolvent from arrest and imprisonment in execution of a money decree otherwise than the provisions of Ss. 23

(2) A protection order may apply either to all the debts of the debtor, or to any of them as the Court may think proper, and may commence and take effect at and for such time as the Court may direct, and may be revoked or renewed as the Court may think fit.

(3) A protection order shall protect the insolvent from being arrested or detained in prison for any debt to which such order applies, and any insolvent arrested or detained contrary to the terms of such an order shall be entitled to his release:

Provided that no such order shall operate to prejudice the rights of any creditor in the event of such order being revoked or the adjudication annulled.

(4) Any creditor shall be entitled to appear and oppose the grant of a protection order.

Power to arrest after adjudication.

32. At any time after an order of adjudication has been made, the Court may, if it has reason to believe on the application of any creditor or the receiver that the debtor has absconded or departed from the local limits of its jurisdiction with intent to avoid any obligation which has been, or might be, imposed on him by or under this Act, order a warrant to issue for his arrest, and on his appearing or being brought before it, may, if satisfied that he was absconding or had departed with such intent, order his release on such terms as to security as may be reasonable or necessary, or, if such security is not furnished, direct that he shall be detained in the civil prison for a period which may extend to three months.

Schedule of creditors.

33. (1) When an order of adjudication has been made under this Act, all persons alleging themselves to be creditors of the insolvent in respect of debts provable under this Act shall tender proof of their respective debts by producing evidence of the amount and particulars thereof, and the Court shall, by order, determine the persons who have proved themselves to be creditors of the insolvent in respect of such debts, and the amount of such debts, respectively, and shall frame a schedule of such persons and debts:

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and 31. 148 I.C. 975=1934 L. 113 (2). The wording of S. 31 is very wide and protection order can be obtained by the debtor, even when a debt is incurred after adjudication. 1933 L. 261. No pretection order can be passed against Crown debts. 5 R. 806=109 I.C. 145=1928 R. 81. *See also* 1938 A. 253. The Act makes no provision for an *ad interim* protection pending the hearing of an application for adjudication of a debtor. *A fortiori*, the pendency of an appeal from an order dismissing an application for adjudication is no reason to stop the decree-holder from proceeding with execution of his decree by arrest of the judgment-debtor. 36 C.W.N. 345. *See also* 30 C.W.N. 834 ; 1925 M. 170 ; 10 R. 71=1932 R. 51. S. 28 (2) no longer protects an insolvent from arrest. In the absence of a protection order obtained by the insolvent, he is liable to be arrested. The protection order is a privilege to be granted or withheld as the Court, in its discretion, may, determine and in exercising that discretion it is relevant and proper for the Court to have regard to the character and circumstances of the insolvent. 118 I. C. 791=1929 B. 135. *See also* 54 A. 416=1932 A. 188. As to effect of protection order passed by Court of appeal, *see* 1932 A.L.J. 407=1932 A. 385. Grounds for refusing or granting protection order. 1933 A. 591=1933 A.L.J. 1051. Previous refusal of protection order does not bar such order at subsequent stage. (*Ibid.*) Adjudication—Application by creditor for arrest of insolvent in execution of decree—Leave of Court—Necessity. 68 M.L.J. 148. S. 31—Construction of arrest or detention—Meaning, if includes order for imprisonment by Criminal Courts. *See* 1938 A. 253=I.L.R. 1938 A. 486.

Sec. 33: SCOPE—RIGHTS OF CREDITOR.—The policy of the Act is that when a person is indebted, all his debts should be dealt with in the insolvency. A creditor who has got a debt provable in insolvency should not stand aside when all the other creditors or most of them have their debts dealt with by the Ins. Court and refuse to come in or take notice of a composition scheme and then as soon as the adjudication is annulled, proceed once more to harass the insolvent. Of the two Acts, the Presy. T. Ins. Act seems to carry out the policy more correctly, because the plain meaning of the word in S. 30 of the Act is that if any composition creditor has a debt which he could prove in insolvency and does not do so, he is nevertheless bound by the composition. But in the Pro. Ins. Act, S. 33, if strictly followed, means that a creditor whose debt is not entered in the schedule is not bound by the

Provided that, if, in the opinion of the Court, the value of any debt is incapable of being fairly estimated, the Court may make an order to that effect, and thereupon the debt shall not be included in the schedule.

(2) A copy of every such schedule shall be posted in the Court-house.

(3) Any creditor of the insolvent may, at any time before the discharge

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composition and can have a remedy elsewhere against the insolvent. Where the creditors of an insolvent agree to a composition and one of the creditors, who had a decree against the insolvent did not prove his debt in insolvency and was not a party to the composition proceedings, and after annulment of the order of adjudication he sought to execute the decree by arresting the judgment-debtor. *Held*, that, under S. 33, the creditor was entitled to pursue the remedy he liked. But in the circumstances of this case, arrest of the jndgment-debtor was refused by the revision Court also. (1934 M. 529, Rel. on.) Amendment of this Act and bringing it in conformity with S. 30, Presy. T. Ins. Act, suggested. 1935 M.W.N. 380=1935 M. 602. *See also* 1937 O.W.N. 1143 (proof of debts, if obligatory). A *time-barred debt* is not provable in insolvency. 66 I.C. 758=34 C.L.J. 167. Enforcement of claim as a scheduled creditor against property acquired after discharge is not possible unless the schedule of creditors had been prepared before discharge. 35 A. 402 =20 I.C. 316. A judgment in insolvency, declaring that the creditor's debt (*i.e.*, a judgment debt) is a provable debt does not declare that an alleged debt which merged in that judgment-debt is proved. 54 M. 601=1931 M. 441=61 M.L.J. 229 (S.B.). Even the creditor on whose application the debtor was adjudged insolvent is found to prove his debt before the O. R. and the latter may reject it if he is not safisfied with the proof. 146 I.C. 221=1933 S. 313.

POWER OF COURT.—It is for the Ins. Court alone to decide whether the debt can be fairly estimated or not and to make an order accordingly. High Court has no jurisdiction to decide whether the debt can be fairly estimated or not. I.L.R. (1940) Lah. 458=1940 Lah. 304. Ins. Courts have inherent power to correct clerical errors. 51 I.C. 52. Other creditors have right to be heard against the application to be added to the scheduled creditors. 34 A. 442= 14 I.C. 589. Disputes between creditors—Amendments of schedule—O.R. not a necessary party. 150 I.C. 960=1934 R. 112.

Sec. 33 (3).—Proof of debt can be given at any time during the administration of the estate, even after order of discharge. Limitation ceases to run on adjudication. 45 M.L.J. 166=1924 M. 163. But *see* 14 R. 529=1936 R. 393. *See also* 2 Luck. 261. The Act provides a formal method of proving a debt and this is the only method which can be applied in so proving a debt. A debt cannot be said to have been legally proved unless the method laid down in the Act is adopted. I.L.R. (1940) Lah. 345=42 P.L.R. 751. Where a notice issued to a creditor to produce details of what is owing to him together with the evidence thereof, threatens him that if they are not supplied his name will be struck off the schedule, the latter part is *ultra vires* since it is not in accordance with the provisions of S. 33. The debt can be proved at any time before discharge and an official receiver is legally incapable of directing the striking off of a creditor from the schedule for failure to produce the necessary evidence. 1940 A.M. L.J. 84. S. 33 (3) prevents a creditor from proving his debt after the insolvent has been given a final discharge. 14 R. 529=1936 R. 393. *See also* 1941 Lah. 6 (mode of proof of debt) Before a creditor's name is added to or removed from the list, the validity of the claim should be judicially determined after notice to parties. 90 I.C. 802. "Any creditor"—Meaning of. 44 C.L.J. 108=1926 C. 1210. The presumption under S. 118 of the Negotiable Instruments Act is only as against the debtor. Any creditor or O.R. can question the consideration for a decree debt. 108 I.C. 147=1928 A. 380. Hindu insolvent governed by Mitakshara Law—Sons not bound by his admission of debts —Court must inquire as to the genuineness of debts. 95 I.C. 463=1926 C. 982.

LIMITATION.—Debt not barred at time of insolvency does not become barred by lapse of time. 1926 O. 621. An order rejecting the application of a creditor for inclusion of his name as a creditor on the ground of delay is not proper, when his name is not included in the list of creditors and when no opportunity is given to him to explain the delay in making the application. S. 33 (3) entitles a creditor at any time before final discharge to tender proof of his debt and apply to the Court for an order directing his name to be entered in the schedule. The discharge mentioned in S. 33 (3) means the final discharge and not a conditional discharge. 1936 C. 807=41 C.W.N. 221. There is no express period of limitation for a creditor, whose debt is provable in insolvency proceedings to prove his debt. A debt is to be proved ordinarily before any dividend is declared. That is necessary in order that the officer of the Court administering the insolvent's estate may have in his possession materials which will enable him to make a *pro rata* and equitable distribution of the assets. The provisions of S. 33 (3) are directory and a creditor can come on the schedule of creditors as long as there are any assets available for distribution amongst the creditors and till the final dividends are distributed and till the administration is complete. The same principle finds support in S. 64, for, that section requires a receiver, before declaring a final dividend, to serve notice in the manner prescribed to persons whose claims to be creditors have been notified but not proved; and if such persons come and prove their claims within the time limited by the notice, they will be entitled to a share in the final distribution. The time of the discharge of an insolvent has no relation to and can have no relation, in any case, to the time for declaring the final dividend. 1936 C. 434.

Secs. 33 (3) and 53.—When transfer by way of sale by the insolvent is annulled as fraudulent under S. 53, but it is found that the alience paid a sum of money towards the satisfaction of a prior decretal debt, the alience may be allowed to prove in the insolvency as an un-

of the insolvent, tender proof of his debt and apply to the Court for an order directing his name to be entered in the schedule as a creditor in respect of any debt provable under this Act, and not entered in the schedule, and the Court, after causing notice to be served on the [1][receiver] and the other creditors who have proved their debts, and hearing their objections (if any), shall comply with or reject the application.

Debts provable under the Act.

34. (1) Debts which have been excluded from the schedule on the ground that their value is incapable of being fairly estimated and demands in the nature of unliquidated damages arising otherwise than by reason of a contract or a breach of trust shall not be provable under this Act.

LEG. REF.

[1]The word "receiver" was substituted for "insolvent" by Act XXXIX of 1926, S. 2.

secured creditor to the extent of the prior debt discharged by him. 34 P.L.R. 127=1933 L. 211.

Secs. 33 (3) and 64.—The provisions of S. 33 (3) and S. 64 are not necessarily irreconcilable. It is not laid down in S. 33 (3) that the debt of a creditor must be proved before discharge. The rule is that the application to be included in the schedule must be made before that time and that it must be accompanied by proof of the debt. It may be that the proof is not considered sufficient by the receiver and, if that is so, there is no reason why further proof should not be provided after the discharge of the insolvent. The provisions of S. 64 are subject to the rule laid down in S. 33 (3). They are provisions of the final distribution of assets of the insolvent and this distribution may or may not take place before an order of discharge is passed. If the distribution is to take place after the order of discharge, there would be no question of proof by any person who had not already made application supported by such proof as he himself thought sufficient under S. 33 (3) of the Act. Where there is an adjudication and a discharge before there is any proof, any debt and there has been no application by any creditor, it would be too late for a creditor thereafter to apply to the Insolvency Court to include his debt in the schedule and ask for its discharge by the disposal of any property which might be found to belong to the insolvent. 1942 A.L.J. 399.

Secs. 33 and 34.—Scope—Partnership between persons for limited period—Subsequent dissolution — Withdrawal of one—Promissory note by partner to withdrawing member—Subsequent insolvency of sole partner— Retired partner—Right to be included in schedule of creditors—Extent of debt provable. I.L.R. (1940) Nag. 242=20 N.L.J. 196=1937 Nag. 410.

Secs. 33, 34 and 44.—Purchaser of shares of company adjudged insolvent and unconditionally discharged—Subsequent liquidation of company—Balance of money due upon shares is not recoverable in liquidation. I.L.R. (1940) Lah. 458=42 P.L.R. 754=(1940) Lah. 304.

Sec. 34 : SCOPE.—Proceeds of execution sale prior to adjudication are excepted from the operation of this section. 1925 M. 224. S. 34 is governed by sub-S. (7) of S. 28. Hence if the right to recover a debt has become barred by time on the date when the order of adjudication is made, but the right subsists on the date of the presentaiion of the application or on the date when the application is admitted, the creditor is entitled to prove his debt as the statute of limitation does not affect debts which are within time on the date of the petition. 34 P.L.R. 464 =1933 L. 688. But *see* 1937 R. 50 *infra*. Where the Official Receiver realizes rent of the property of the insolvent from the period subsequent to his adjudication, such arrears of rent do not amount to "provable debt" under S. 34 of the Act. The Official Receiver cannot claim such amount for the purpose of distribution amongst the creditors of the insolvent. 40 P.L.R. 669= 1937 Lah. 790. It is an ordinary rule of construction that a statement in a statute or a section should be interpreted according to its natural meaning. As S. 34 stands, there is nothing to show that it is to be read with S. 28 (7) and the doctrine of relation back is not to be imported into S. 34. Accordingly, a debt contracted by an insolvent between the date of the presentation of an application for his adjudication and the date of the order of his adjudication is provable in insolvency. 167 I.C. 493= 1937 Rang. 50. *See also* 42 P.L.R. 367=1939 Lah. 384.

APPLICATION.—An obligation incurred after adjudication is not provable under the Act. A suit lies. 48 I.C. 913. *Maintenance to a wife* provided in a decree is not a debt provable. 35 I.C. 541, *contra*. A claim for maintenance or residence is capable of valuation as much as an annuity which is admittedly provable in insolvency. 1933 Lah. 901. Maintenance due to a wife under a decree of Court against her husband is a debt provable in insolvency, and does not fall under debts excluded by S. 34 (1). A decree for maintenance is clearly distinct from an order for alimony. No execution of the maintenance decree against the insolvent husband can be taken out without leave of the Insolvency Court. 49 L.W. 167=1939 Mad. 183=(1938) 2 M.L.J. 1042. Claim to future maintenance by mother and unmarried sisters against Hindu insolvent—If debt provable in insolvency. *See* (1940) 2 M.L.J. 239. In order that a particular debt contracted after the order of adjudication may be a debt provable in insolvency proceedings, the debt should have existed at the date of order of discharge, or if contracted

(2) Save as provided by sub-section (1) all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent, or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable under this Act.

Annulment of adjudication.

Power to annul adjudication of insolvency.

35. Where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full, the Court shall, on the application of the debtor, or of any other person interested, by order in writing, annul the adjudication [1][and the Court may, of its own motion or on application made by the receiver or any creditor, annul any adjudication made on the petition of a debtor who was, by reason of the provisions of sub-section (2) of section 10 not entitled to present such petition.]

LEG. REF.

[1] Inserted by Act XI of 1927.

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subsequent thereto, it should have been based on a liability existing at the time of adjudication. 1930 A.L.J. 350=1930 All. 104. *See also* 1930 Cal. 459. In respect of rent due by the insolvent firm till the date of the passing of the order of adjudication, the lessor should rank as an ordinary creditor having the same rights as the creditors who proved their debts had; in respect of rent which accrued subsequent to the order of adjudication, the lessor could recover the same in full as "*expenses of administration or otherwise.*" 34 C.W.N. 751=1930 Cal. 459.

Sec. 34 (2).—To the ordinary rule that a matter decided by a decree cannot be reopened, there is an exception in solvency. The Insolvency Court has the power to go behind a judgment and inquire into the consideration even for a judgment-debt, and this although the judgment may have gone by default or by consent or been affirmed on appeal. But the Court will not, as a matter of course, inquire into the validity of a judgment debt, but only when there is evidence that the judgment has been obtained by fraud or collusion or that there has been some miscarriage of justice. 34 Bom.L.R. 411=1932 Bom. 253. *See also* 145 I.C. 835=1933 Rang. 268. The criterion or material date for purposes of S. 34 (2), is the date of the filing of the insolvency petition, as the adjudication relates back to the date of the petition under S. 28 (7). Consequently, a debt which could be enforced in a Court of law on the date of the presentation of the insolvency petition but in respect of which the remedy by suit becomes barred by limitation before the date of the order of adjudication, is a debt provable under the Act and can be admitted by the O. R., in the schedule. 45 L.W. 565=(1937) 1 M.L.J. 637.

Secs. 34 (2) and 28 (2).—The obligation on the part of an insolvent under the Hindu Law to pay maintenance allowance to his brother's widow is a debt provable in insolvency as laid down in S. 34 (2) of the Provincial Insolvency Act. His liability is not a personal liability, but a liabiiity which has got to be met from the property which he inherited from his father and this property is now vested in the receiver for the benefit of the creditors. If the brother's widow has a charge declared upon the property in respect of her maintenance allowance by a competent Court, the receiver may be compelled to pay the money out of the estate in his hands. But in the absence of a charge, she can only rank as an ordinary creditor and can prove the liability in insolvency proceedings. A suit by her for arrears of maintenance allowance is not, therefore, maintainable against the receiver. 45 C.W.N. 808.

Secs. 34 (2) and 44.—The liability of a member of a Co-operative Society to contribute to the assets of the society in the event of its being dissolved before or during insolvency is a contingent liability and as such a debt provable in insolvency under S. 34 (2) of the Provincial Insolvency Act. The liquidator should either prove it or have it excluded from the schedule under S. 33 if it comes within the provisions of that section. If he does not do so, the member's liability for such debt ceases on his being granted a complete discharge by the Insolvency Court as expressly provided in S. 44 (2) of the Act. An order of the liquidator assessing the contribution of a member under S. 42 (2) (*b*) of the Co-operative Societies Act after he is granted a complete discharge will be in excess of the limit of his jurisdiction and therefore a nullity, and the Civil Court can decline to execute the order under S. 42 (5) of that Act. 44 P.L.R. 376. Having regard to the express language of S. 34 (2) and the absence in the Act of a clause similar to S. 46 (2) of the Pres. T. Ins. Act, a debt contracted after the presentation of the petition in insolvency, but before an order of adjudication is provable in insolvency. A suit on the debt after the discharge of the insolvent is barred by S. 44. 34 Bom.L.R. 980=1932 Bom. 511.

Sec. 35.—Action under S. 35 can ordinarily be taken on an application made by the O. R., or by the creditors and on proof of circumstances specified in that section, and the attention of the insolvent must be drawn to the facts alleged against him by notice or otherwise so that he may be able to meet them. I.R. 1932 Lah. 659. An order of adjudication cannot be annulled on an application by a creditor under S. 35, on the ground that the petitioning creditor's debt was a bogus debt, unless it is shown that the debtor did not owe any other debts

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that the debtor was not really insolvent at the time the order of adjudication was made. It is not enough for an applicant to merely prove that there was no binding debt due to the petitioning creditor in order to make it obligatory on the Court to set aside the order of adjudication under S. 35 on the ground that the order ought not to have been made. 50 L.W. 821=1940 Mad. 151=(1939) 2 M.L.J. 753. *See also* (1940) 1 M.L.J. 228 (F.B.). Under S. 35 the appellate Court is competent to consider the propriety of an *ex parte* order of adjudication. An *ex parte* order of adjudication made on the last Saturday, which is a clearance day, is not a proper day and is therefore liable to be set aside in appeal. Judicial work is presumed not to be done on a clearance day. 20 Pat.L.T. 768= 1940 Pat. 58. Where it is shown that no act of insolvency has in fact been committed the Court can set aside the adjudication on the ground that the debtor ought not to have been adjudged insolvent. The fact that the debtor does not object to an order of adjudication being passed against him is no bar to the granting of an application, for an order setting aside the adjudication under the provisions of S. 35. Where an adjudication has taken place under the Act and it has been shown that no act of insolvency has been committed, the Court has no discretion in the matter, but it must annul the adjudication. I.L.R. (1940) Mad. 441=51 L.W. 231=1940 Mad. 375=(1940) 1 M.L.J. 228 (F.B.); (1938) 2 M.L.J. 385; (1939) 2 M.L. J. 753. Where an order of adjudication is clearly without jurisdiction, S. 35 empowers the Insolvency Court to annul the adjudication on the ground of want of jurisdiction. *The Judge sitting in insolvency is competent to revise his own order or an order of his predecessor* adjudicating a person an insolvent on the ground of want of jurisdiction. Where the act of insolvency, a fraudulents tranfer, relied on as the basis of the petition by the creditor on which the adjudication order is made, was committed more than three months prior to the date of the petition, the adjudication order is without jurisdiction because there is no act of insolvency on which an adjudication order can be made. Such an adjudication can be annulled under S. 35. I.L.R. (1939) Mad. 24=48 L.W. 239=1938 Mad. 898= (1938) 2 M.L.J. 385. Debtor adjudicated on his petition—Transfer deeds executed by debtor subsequently found to be fictitious is good ground for annulment of adjudication. 1938 P.W.N. 453=1938 Pat. 368. It is doubtful whether Court can refuse annulment when the circumstances mentioned in this section were proved to exist. 23 C.L.J. 220=34 I.C. 792. Annulment order on grounds untenable under S. 25 cannot be made. This section is subject to S. 25: 38 I.C. 822. The debtor realized certain debts due to him before presenting the insolvency petition and nevertheless showed the debts as still due to him. The Court further found him to have been dishonest in his dealings and entering recklessly into transactions and incurring debts which he never hoped to pay. Upon these grounds the judge annulled the adjudication. *Held*, that the facts found might furnish grounds for refusing an absolute discharge, but they furnished no grounds for dismissing an insolvency petition and that consequently no legal grounds for annullicg an adjudication. 53 A. 476=1931 A.L.J. 175. "*Ought to have been adjudged insolvent*," meaning of. *See* 1928 M.W.N. 175=1928 M. 609. Mere transfer of a money decree to another by the insolvent prior to adjudication, is no ground for annulment, if no fraud is proved. 3 Luck. 323=1928 D. 404. Annulment of adjudication when to be ordered. 24 L. W. 486=1926 M. 1159. As to payment of interest if there are sufficient funds in the insolvent's estate, *see* 48 A. 272= 1926 A. 289. A suit by O. R. against a debtor does not cease if an annulment order was passed *pendente lite*. 41 A 200=48 I.C. 443. Court cannot annul an adjudication order on non-fulfilment of a condition imposed at the time of adjudication if the condition itself was illegal. 21 I.C. 950=18 C.W.N. 1052. The fact that criminal proceedings under S. 43 are contemplated is not enough to annul adjudication. 31 I.C. 15=5 L.W. 220. Payment to creditors need not be made through the O.R. 52 I.C. 689=1919 M.W.N. 622. Annulment of adjudication if can be ordered only after the debts due to all creditors have been paid. 99 I.C. 277=3 O.W.N. 296 (Supp.). An insolvent whose debts have not been paid in full is not entitled to apply for annulment. The fact that all the creditors give him a complete and full discharge will not entitle him to do so. 30 L.W. 948=57 M.L.J. 816. An order of adjudication once made can only be annulled under the provisions of S. 35 or S. 43. Neither section provides for annulment from failure to deposit the cost of publication. As to power given to Court under R. 277 (30) of the Oudh Chief Court, *see* 1930 O. 53=5 Luck. 479. Where an application of a creditor is dismissed under S. 25 (1) there can be no order of annulment under S. 35: 121 I.C. 55. It is only when an appeal against an order of adjudication has been made under S. 75 (1) or when an application is made by a person interested under S. 35 that the Court has authority to annul or set aside an order of adjudication. 1930 M.W.N. 651. The insolvent got himself fraudulently and collusively adjudicated by setting up a bogus creditor. Later on the original creditor who had sued to enforce his claim dropped out and another bogus creditor who stepped in to continue the proceedings put in proof of his claim before the O. R. The same having been rejected, he appealed to the District Judge who however dismissed his appeal and at the same time annulled the adjudication. Thereupon another creditor applied under O. 47, R. 1 to review the said order but it was also rejected. *Held*, that the District Judge acted wrongly in annulling the adjudication in the absence of a prayer to that effect by either party and that the same constituted an error apparent on the face of the record so as to sustain an application for review. The question whether the District Judge had power to review his order on the ground of error of law that is to say non-compliance with S. 35 was held not to arise. 1932 M.W.N. 153 (F.B.).

PAYMENT OF DEBTS IN FULL—WHAT AMOUNTS TO.—Under S. 35 the debts of the insolvent must be paid in full before the adjudication can be annulled. It may be that the debts

Power to cancel one of concurrent orders of adjudication.

36. If, in any case in which an order of adjudication has been made, it shall be proved to the Court by which such order was made that insolvency proceedings are pending in another Court against the same debtor, and that the property of the debtor can be more conveniently distributed by such other Court, the Court may annul the adjudication or stay all proceedings thereon.

Proceedings on annulment.

37. (1) Where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done, by the Court or receiver, shall be valid; but, subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the Court may, by order in writing, declare.

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referred to in the section mean debts proved in the Ins. Court; but once a debt is proved, it does not cease to be a proved debt simply because the creditor states that he does not wish to be recorded as a scheduled creditor. The consent of, or even an unconditional discharge by, the creditor will not entitle the Court to annul the adjudication, unless the debts have been paid in full in cash. If a debt is not paid off, it still subsists in spite of the annulment. 18 N.L.J. 145.

APPLICATION BY JUDGMENT-DEBTOR FOR ANNULMENT ON GROUND OF FRAUD—POWER OF COURT TO ENQUIRE.—On application of a creditor who had obtained a decree on a promissory note, the debtor was adjudicated insolvent. The debtor filed an application under S. 35 for annulment of the adjudication or on the ground that there was no consideration for the promissory note and that judgment was obtained by fraud or collusion. *Held*, that the Ins. Court had power to enquire into the consideration for a judgment-debt. It would do so when there would be evidence that the judgment had been obtained by fraud or collusion or that there had been some miscarriage of justice. 1935 R. 276.

Secs. 35 and 27 (2).—It is a matter for consideration whether in all ordinary cases, annulment proceedings shall not be kept pending so long as proceedings under Ss. 53 and 54 are outstanding. The better view seems to be that it can be under S. 27 (2). I.L.R. (1940) Nag. 204=1938 Nag. 312.

Secs. 35 and 37.—ORDER OF ANNULMENT—CAUTION TO BE OBSERVED.—Orders of annulment should be very carefully worded because where the Court annuls insolvency proceedings, to avoid very considerable hardship to the creditors, it is necessary to make provision for what is to happen to the assets. Further a Court should be very chary about annulling insolvency proceedings where there are proceedings pending under Ss. 53 and 54 of the Insolvency Act. 1939 N.L.J. 465=1940 Nag. 4=I.L.R. (1941) Nag. 500; 1940 M. 375.

Secs. 35 and 38.—REJECTION OF APPLICATION UNDER S. 35.—IF A BAR TO LATER APPLICATION UNDER S. 38.—Proceedings under S. 38 are not allied to proceedings under S. 35. In the latter case the insolvent has to show that the debts have been paid in full, which implies that the debts have been paid along with interest at the contractual rate, while S. 38 contemplates a proposal for a composition in satistaction of debts and implies a reduction in the claim of the creditors. Hence rejection of an application, by the insolvent, under S. 35 does not bar, on the principle of *res judicata*, a later application by him under S. 38. 1936 A.L.J. 44=1936 A. 102.

Sec. 36.—The Chief Court of Oudh could not pass an order of stay of a case pending before the Court of the Insolvency Judge at Cawnpore, unless it is confirmed by the High Court. Where such an order is communicated to the Insolvency Judge at Cawnpore by the Registrar of the High Court. with a remark, that it was for the Judge to decide to stay or not, it does not amount to a direction by the High Court to stay proceedings under S. 36 of the Act. But if he does stay it, he being the Court that had jurisdiction to pass the order of stay, is undoubtedly authorised to reopen the proceedings stayed by himself. I.L.R. (1938) All. 800=1938 A.L.J. 878=1938 All. 555. Two applications in two different Courts for adjudication of the same person as insolvent—Procedure. *See* 109 I.C. 648. Discretion of Court, *see* 31 C. 761=8 C.W.N. 553.

Sec. 37.—OBJECT OF SECTION.—The sole object of the legislature in enacting S. 37 is to put a brake upon the ex-insolvent's activities by giving the Court a discretion, if it thinks fit to do so, not to hand back to the debtor his property unconditionally or at once but either to do so after imposing a condition upon him in a proper case, which would give the creditors an opportunity to make good their claims in the ordinary course of law against the debtor, or to vest the debtor's estate in some person appointed by it, presumably for a reasonable period, so that if the creditors hereafter act with reasonable diligence they would be able, by attachment or otherwise, to liquidate any decrees that they might obtain against the debtor out of the assets in the hands of the appointee. 14 Rang 254=1936 Rang. 284 (F.B.) Where the property of an insolvent is vested in the Official Receiver or any other appointee under S. 37, it is the Insolvency Court which retains control of it, and the Insolvency Court must direct its disposal in the interests of

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the general body of creditors. The property comes completely under the Insolvency Court and can only be disposed of under its direction. The property can only be distributed equally among all the creditors and no one creditor has got a right to appropriate the money of the insolvent to the exclusion of other creditors. Where the property is, by the order under S. 37, vested in the Official Receiver or other appointee in the interests of the general body of creditors, there is a statutory trust created by virtue of the order in favour of the creditors. 1941 M. W.N. 489=1941 Mad. 753. A vesting order under S. 37, to be valid, need not be passed simultaneously with the order annulling the adjudication. A vesting order passed subsequently is perfectly valid and cannot be attacked as being without jurisdiction. 47 L. W. 587=1938 Mad. 752=(1938) 1 M.L.J. 824. S. 37 gives the Court a wide discretion. The annulment of the adjudication does not mean that the debtor who is adjudicated is necessarily to be placed in possession of the property which is in the hands of the Official Receiver at the time the adjudication is set aside. The Insolvency Court retains full power to give directions as to the realization and disposal of the debtor's assets. Where it is found that after the adjudication and before the annulment the insolvent has paid moneys to a person fraudulently and that the insolvent and the person to whom he has paid were parties to a gross fraud, the Court on the application of the Official Receiver to direct the moneys to be refunded to the Official Receiver and to direct the latter, not as the Official Receiver but as a person appointed by the Court under S. 37, to direct the amount rateably among the creditors who have proved in the insolvency proceedings. I.L.R. (1940) Mad. 441=51 L.W. 231=1940 Mad. 375=(1940) 1 M.L.J. 228 (F.B.). *See also* 1940 Nag. 4.

"PROPERTY" — RIGHT TO COLLECT MONEY DUE TO INSOLVENT.—The word "property" is used in its widest sense, that is to say, it is used in the sense not only of the thing which is the subject-matter of ownership, but includes also the dominion or the right of ownership or of partial ownership. In this sense the right to collect the money which is found to be due to the insolvent is property within the meaning of S. 37 and it vests in the appointee. 1935 Rang. 328. The words "*all acts theretofore done*" mean all acts done with a view to making sales and dispositions of property, including the setting aside of transfers made by the insolvent with a view ultimately of making sale of the property so recovered for the benefit of the estate in his hands and therefore ultimately for the benefit of the creditors, even though the actual final disposal of the property has not been made on the date of the annulment of the adjudication and therefore the date on which the receiver in insolvency *qua* receiver caases to exist. Hence on annulment of adjudication, orders passed in proceedings instituted by receiver in insolvency under Ss. 53 and 54 do not become vacated. [Difference between the positions of the debtor and of the appointee made out.] 1935 Rang. 328. After the making of an order of adjudication, the insolvent has no right or title left to him in his property in view of the provisions of S. 28 (2), and a transfer by an undischarged insolvent is, therefore, void. Such a transfer cannot be made valid by the annulment of adjudication. When a transaction is void *ab initio*, nothing that can happen afterwards can validate or revive it. 1937 O.W.N. 94. *See also* 1938 Nag. 312 (extent and limit of validation of proceedings). Decree against debtor before adjudication—Annulment of adjudication for failure to apply for discharge—Execution of decree and realization by creditor—Subsequent order of vesting under S. 37—Effect of on fruits of execution. 1941 Mad. 588=(1941) 1 M.L.J. 537.

Sec. 37 (1).—Court's duty to pass order under the section on annulment of adjudication. 1927 L. 914. Application for annulment of adjudication during pendency of application under S. 54. *Held*, that the judge ought to have made use of the provisions of S. 37 and ordered the debtor's property to vest in the O.R. and that the effect of an order vesting the property in the O. R, would be to entitle him to continue the proceeding instituted by him under S. 54. Per *curiam*—The word "*acts*" in S. 37 is wide enough to include O.R.'s act of avoidance under S. 54. 52 M. 648=57 M.L.J. 116. *See also* 1930 O. 474; 44 L.W. 719 (absence of vesting order, effect of). The word 'property' as used in S. 37 does not include the right to sue for cancellation of a transfer which had accrued to the O.R. This right to sue is a personal right and cannot be subject of transfer. Being a personal right specially granted by law, it cannot be an interest that devolves under O. 22, R. 10, C. P. Code. Therefore where an O.R. has become *functus officio* on account of the property of the insolvent having been vested in the trustees in consequence of which he withdraws from a suit for the cancellation of a transfer pending in a certain Court and the Court dismisses it under O. 9, R. 8, the trustees cannot apply to be made the legal representatives of the O.R. and ask for the restoration of the suit. 152 I.C. 380=1934 Pesh. 89.

ANNULMENT OF ADJUDICATION—EFFECT OF.—Except where there is an express provision in that behalf, the effect of an order annuling an order of adjudication is that there is no longer an insolvent before the Court and the Court subject to S. 37 is no longer entitled to pass orders in respect of the debtor's estate in its Ins. jurisdiction. 14 Rang. 254 1936 R. 284 (F.B.). *See also* 42 C.W.N. 34. Annulment of adjudication — Effect—Insolvent member of joint Hindu family—Share vesting in Receiver and reverting on annulment—If joint family property or separate property—Decree against debtor's assets in respect of personal debt—Executability against reverting share. 71 M.L.J. 707. S. 37 contemplates that, unless the Court has passed an order vesting the property of the insolvent, after the adjudication has been annulled, in a person appointed by the Court, it shall revert to the debtor. The mere fact that the property on passing of the adjudication order vested in the O.R. does not authorise the receiver to deal

(2) Notice of every order annulling an adjudication shall be published in the Official Gazette and in such other manner as may be prescribed.

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with it after the adjudication has been annulled, in the absence of an express order to that effect by the insolvency Judge. The effect of annulment of adjudication is that the condition with regard to the property which existed immediately before the passing of the adjudication order is restored unless, of course, an order under S. 37 vesting the property in a person appointed by the insolvency judge has been passed. 163 I.C. 1007=38 P.L.R. 273=1936 Lah. 568. Where the Court passes an order under S. 37 vesting the property of the insolvent in the Official Receiver or some one other than the debtor, there is no reversion of the debtor's property to the debtor. The only person entitled to represent the estate of the debtor after such an order is the appointee under S. 37. An execution sale of the debtor's property held thereafter without notice to and without impleading the appointee under S. 37, is therefore null and void, and the purchaser gets no title under the sale. 1942 M.W.N. 114=(1942) 1 M.L.J. 311. Where an order annulling an adjudication stated that 'adjudication is annulled subject to the property in the hands of the receiver which will be sold and assets will be distributed amongst the scheduled creditors' and there was neither a vesting order nor the appointment of an appointee, the order only means that the Court is annulling an insolvency, but is providing that there shall be no reverter of the property vested in the receiver under the receiving order to the debtors, but that the property is to be sold and the proceeds distributed amongst the creditors. If there was balance it would go to the insolvents. 1939 N.L.J. 186=1939 N. 203=I.L.R. (1941) Nag. 410. The order of discharge is not equivalent to annulment of adjudication so as to bring in the provisions of S. 37. The revesting of the property in the discharged debtor cannot take place through the operation of S. 37. I.L.R. (1940) Lah. 458=42 P.L.R. 754 1940 Lah. 304.

ANNULMENT—POSITION OF RECEIVER AND OF APPOINTEE.—From the moment of the annulment of an order of adjudication and onwards the receiver ceases to be receiver in insolvency, but if he is appointed to receive the property of the insolvent, he becomes a mere appointee with reference to such property and thus a mere custodian of the property which comes into his hands. (1933 Rang. 223, Applied). 1935 Rang. 152. The persons in whom property vests under S. 37 have full power to deal with the property vested in them and can proceed to distribute the estate. 43 P.L.R. 369=1941 Lah. 316. An appointee under S. 37 has no power to distribute debtor's assets; and unlike a Receiver is not a necessary party to a suit in respect of debts proved in insolvency before annulment. He is not even a proper party. His only duty is to be custodian of the property, so that it may be attached in his hands when decrees are obtained against the debtor (1933 Rang. 223, F. B. Rel. on.) Rang. 254=1936 Rang. 284 (F.B.). The unconditional annulment of the adjudication pending a creditor's application to set aside a sale of the insolvent's property by the O.R. does not deprive the Ins. Court of its jurisdiction to hear and determine the application. The effect of S. 37 is that the order of annulment will not invalidate the acts of the Court or of the O. R. theretofore done; but they do not acquire a degree of sacrosanctity or immunity from attack by way of appeal which they would not have possessed had there been no order of annulment. 156 I.C. 284=41 L.W. 461=1935 M. 433. As to scope and meaning of section, *see* 13 Pat.L.T. 775. It is not correct to say that after the order of annulment the insolvency proceeding comes to an end *ipso facto*. Though the effect of passing an order of annulment without any condition is to vest the property in the debtor, there is nothing in the Act to prevent the Court subsequently from giving suitable directions or vesting the property in the receiver for the protection of the creditors. Such an order is not a review of the order of annulment but is supplementary to it, and can be passed under the inherent powers of the Court under S. 151, C. P. Code, attracted by S. 5 (1) of this Act. No doubt, if subsequent to annulment and before the vesting order, the insolvent has transferred the property to a *bona fide* purchaser, such a purchaser perhaps may not be affected. But the parties to the insolvency proceeding will be bound by the order. 13 Pat.L.T. 775. *See also* 15 L. 698=1934 L. 468. On annulling an adjudication under S. 43 on the ground that the insolvent did not apply for discharge within time, Ins. Court has, under S. 37 ample jurisdiction to make an order vesting the property of the insolvent in the hands of the O. R. or any other person for distributing the assets among the creditors of the insolvent. Though the annulment of insolvency puts an end to the insolvency proceedings against the insolvent, the Ins. Court still has jurisdiction over the insolvent's assets to pass the necessary orders in favour of the creditors. 1930 M. 520=58 M.L.J. 658. *Also* 139 I.C. 574 (2)=63 M.L.J. 414. Effect of annulment without any further order is to vest property in insolvent unconditionally. 3 R. 201=56 I.C. 324. *See also* 1928 M. 265=54 M.L.J. 344; 1931 S.31. Annulment of adjudication order —Notice to interested creditor necessary. 1927 R. 273. When the insolvent fails to apply for order of discharge, the Court is bound to pass an order under S. 37 vesting the property in a person appointed by it. 100 I.C. 137. *See also* 19 S.L.R. 286; 112 I.C. 768. On annulment of adjudication, the O. R. can only take such amount as he has spent and his costs and commission, and the rest of the amount should be held for the insolvent's benefit. 1926 M.W.N. 950; 1928 L. 453. S. 37 does not allow an Ins. Court on annulling an insolvency to proceed to distribute the assets of the insolvent among any of the creditors. But the words "to vest in such person" do not mean distributing the property among the creditors. Such vesting is only

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for the purpose apparently of making the property available to creditors to proceed through the Civil Court. 1931 A.L.J. 18=1931 A. 71; 1932 A.L.J. 1095=1933 A. 117. As soon as an order of annulment coupled with a vesting order under S. 37 is made, all acts done by the receiver shall be valid and the property of the insolvent shall vest in such person as the Court may appoint. The consequences of the annulment are that the insolvent does not get back any property which has already been distributed amongst his creditors, and as to such property, as still remains in hand, the Court will, to protect the creditors, make an order vesting it in such person as the Court may appoint with a view to distribute the same. That person may proceed to sell and distribute the property among the creditors then existing and not call for any future claims. He should proceed to divide property in his hand amongst the creditors, whose claims have been admitted and entered in the schedule. 1931 S. 31. S. 37 is intended to vest the insolvent debtor's admitted properties in some third person for the purpose of making them available to the creditors while in the meanwhile avoiding the debtor being called an insolvent. Where, until the alienation is found bad, the property belongs to the alienee there cannot be an order vesting the property in the creditor. 1930 M.W,N. 670. The *consequences of annulment of adjudication are different from those of a discharge.* On the annulment of adjudication, there is nothing to prevent a creditor from pursuing his remedy in a Court of law if his debt has not been scheduled in the insolvency proceedings. So, where, after a composition scheme had been sanctioned the adjudication was annulled, a creditor in whose favour a cheque had been given by the insolvent and who could not cash it owing to the adjudication, is entitled to bring a suit against the debtor for recovery of the amount due under the cheque. 34 P.L.R. 135=1933 L. 187 (1). The provisions of S. 37 are applicable to composition schemes by virtue of S. 39. 35 P.L.R. 522=1934 L. 394. When an annulment is made, the debtor reverts to the position as he was before the insolvency. 9 P. 945. Where the debt due to the insolvent had been sold, it is only the proceeds of the sale and not the debt itself that vest in the receiver. 9 Pat. 945. There is no basis for the view that when the Court has passed a particular vesting order under S. 37 at the time of annulling an order of adjudication under S. 43, restricted in a particular way, it retains the power on some future date to pass a fresh order removing those restrictions and providing for an entirely new scheme for the distribution of the assets. That cannot be done under the Insolvency Act. There is no inherent power to rectify errors so as to justify the divesting of property which under the Act has already vested in the insolvent. The error may, however, be corrected, under O. 47, C. P. Code, if the matter can be brought within the purview of O. 47. 51 L.W. 612=1940 Mad. 724=(1940) 1 M.L.J. 932. The question whether one creditor is entitled to appropriate the money which is intended for the distribution among all creditors of the insolvent, in priority to other creditors, can only be adjudicated in the presence of the creditors by the Court which has jurisdiction in insolvency; the Official Receiver by himself cannot be said to represent the creditors in regard to the decision on the question of priority. An order of an executing Court that a decree obtained by an individual creditor against the Official Receiver and the insolvent after a vesting order under S. 37 is executable does not in any way affect the power of the Insolvency Court over the fund at its disposal. The fact that the Officiai Receiver is compelled by order of an executing Court to pay moneys in his hands cannot affect the power of the Insolvency Court to make orders regarding the money in the hands of the Receiver; and it is competent to the Insolvency Court to direct a refund of any sum of money taken away by a creditor, who is amenable to its jurisdiction, in excess of what he is justly entitled to. 1941 M. W.N. 489=1941 Mad. 753.

Secs. 37 and 43.—Where the Court passes an order annulling an adjudication for failure on the part of the insolvent to apply for his discharge it is not necessary that a vesting order under S. 37 should be made then and there. There is nothing in S. 37 or S. 43 of the Act which requires that the order vesting the property under S. 37 must be made at the time of the order of annulment. Such a vesting order may be made subsequently to the order of annulment and an order so made subsequently is neither illegal nor without jurisdiction. In any case, the Court omitting to pass a vesting order at the time of the annulment of the adjudication has power to supply the omission later on for the ends of justice or to prevent abuse of process of the Court and pass a vesting order under its inherent powers under S. 151, C. P. Code. The powers defined in S. 151, C. P. Code, have been conferred on the Insolvency Court by S. 5 (1) of this Act. 40 C.W.N. 1229=1936 C. 573. *See also* 43 P.L.R. 369=1941 Lah. 316; 1939 Lah. 275; 14 Luck. 404=1939 Oudh 55. Where the Insolvency Court annuls an adjudication under S. 43 and passes an order under S. 37 vesting the properties of the quondam insolvent in an appointee (Official Receiver or other person) the administration in insolvency can be continued for the realisation and distribution of the assets of the insolvent notwithstanding the annulment. The Insolvency Court will in such a case have full power to give directions to the appointee as to the realisation and disposal of the debtor's assets. That power, however, should not be used arbitrarily, and should be used not in the interests of this or that creditor, but in the interests of the whole body of creditors; in other words, the only proper order for the Court to pass is that the appointee should continue to realise and distribute the debtor's property in accordance with the provisions of the Act. Though a person appointed under S. 37 is competent to continue applications under Ss. 53 and 54, which are pending at the time the order of annulment is made under S. 43, he cannot initiate similar proceedings after the annulment. 69 M.L.J. 364 (F.B.).

Secs. 37, 28 and 51.—Where some of the creditors of the insolvent bring to sale an un liquidated debt due to the insolvent before th

Compositions and schemes of arrangement.

Compositions and schemes of arrangement.

38. (1) Where a debtor, after the making of an order of adjudication, submits a proposal for a composition in satisfaction of his debts, or a proposal for a scheme of arrangement, of his affairs, the Court shall fix a date for the consideration of the proposal, and shall issue a notice to all creditors in such manner as may be prescribed.

(2) If, on the consideration of the proposal, a majority in number and three-fourths in value of all the creditors whose debts are proved and who are present in person or by pleader, resolve to accept the proposal, the same shall be deemed to be duly accepted by the creditors.

(3) The debtor may at the meeting amend the terms of his proposal if the amendment is, in the opinion of the Court, calculated to benefit the general body of creditors.

(4) Where the Court is of opinion, after hearing the report of the receiver, if a receiver has been appointed, and after considering any objections which may be made by or on behalf of any creditor, that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the Court shall refuse to approve the proposal.

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order of adjudication and the debt is sold by the Court not knowing the pendency of the insolvency proceedings, the sale. although it would protect a *bona fide* purchaser, will have absolutely no effect upon the rights of the creditors *inter se*, which would be governed by S. 51 and the creditor realizing money from the sale of the property must share it along with other creditiors, and under S. 28 read with S. 51, he must make over the benefit he has derived from the execution to the receiver when the receiver calls upon him to do so. S. 37 does not apply to such a case as it refers to the vesting of the property of the insolvent after an order of annulment has been made. 17 Pat. L.T, 313=1936 P. 112.

Secs. 32 and 75.—Any complaint as to absence of notice of order of annulment under S. 37 (2) can only be agitated by way of an appeal under S. 75 against the order of annulment and cannot be challenged in other proceedings. (1937) A.M.L.J. 101.

Sec. 38: SCOPE—*See* 18 A.L.J. 449=55 I.C. 941. Provisions of the section should be strictly fulfilled—Effect of notice not being issued to all the creditors. 1926 L. 87. Any private arrangement between creditors and insolvent will not be recognised. The creditors can prove their claims notwithstanding the arrangement. 61 I.C. 904=25 C.W.N. 137. A composition in its essence is an agreement. Unless therefore a proposal is accepted by a majority in number and three-fourths in value of all the creditors, it cannot be deemed to be duly accepted; the proposal cannot be said to have reached the stage of agreement or a composition and there cannot therefore be a proposal for composition before the Court for its consideration or acceptance. 160 I.C. 994=1936 A.L.J. 44=1936 A.W.R. 41 =1936 A. 102. Validity of composition by legal representatives. 1941 N.L.J. 218. Procedure provided must be strictly followed. No acceptance of a composition is valid without notice to creditors, 89 I.C. 740. A composition scheme can be filed in Court only after an order of adjudication is made and not before. 145 I.C. 185=1933 C. 495 (2): 37 C.W.N. 189. Secured creditor is not affected by any composition unless approved by Court and consented to by him. 63 I.C. 895. Mere consent of all creditors is not necessarily sufficient to order annulment. 34 I.C. 792=21 C.W.N. 936. An arrangement consented to by three-fourths of creditors need not be necessarily accepted. 30 I.C. 694. On this section *see also* 1927 S. 78. Application by insolvent to pay to his creditors amounts which after inquiry may be found to be due to them—Appointment of Commissioner by Court—Order of Court as per Commissioner's report expunging claim of the creditor—Subsequent order of annulment—Legality of proceedings. 24 A.L.J. 441=97 I.C. 556=1926 A. 361. Composition scheme—Approved by Court—Circumstances to be considered—Consent of majority of creditors—Duty of Court. 54 M. 823=61 M.L.J. 173. Per *Reilly, J.*—The duty of the Insolvency Court is to see that the assets are administered through the proper and ordinary machinery of the Court and not to require nor even invite any creditor or other person to take over the estate on certain terms and carry out the functions of the Court for it. 54 M. 823 =61 M.L.J. 173. *Bona fide* assignment of whole property for the benefit of creditors divests debtor of all interest in the property and so cannot be the subject of subsequent attachment in execution. 97 I.C. 257 following 1924 L. 709; 1 B. H.C.R. 22 ; 8 B.H.C.R. 245.

Secs. 38 (2) and 7.—Where a proposal for composition has not been duly accepted by the creditors under S. 38 (2). it is open to the Court to approve the proposal under S. 38 (7). The Provincial Insolvency Act seems to contemplate a possibility that public morality and the interests of the general body of creditors may both require that such a proposal be accepted. The Legislature has armed the Court with power to accept the proposal even though the creditors have not accepted it. An Insolvency Court

(5) If any facts are proved on proof of which the Court would be required either to refuse, suspend or attach conditions to the debtor's discharge, the Court shall refuse to approve the proposal unless it provides reasonable security for payment of not less than six annas in the rupee on all the unsecured debts provable against the debtor's estate.

(6) No composition or scheme shall be approved by the Court which does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of an insolvent.

(7) In any other case the Court may either approve or refuse to approve the proposal.

Order on approval.

39. If the Court approves the proposal, the terms shall be embodied in an order of the Court, and [1][* * *] the order of adjudication shall be annulled and the provisions of section 37 shall apply, and the composition or scheme shall be binding on all the creditors [1][so far as relates to any debt due to them from the debtor and provable under this Act.]

Power to re-adjudge debtor insolvent.

40. If default is made in the payment of any instalment due in pursuance of the composition or scheme, or if it appears to the Court that the composition or scheme cannot proceed without injustice or undue delay, or that the approval of the Court was obtained by fraud, the Court may, if it thinks fit, re-adjudge the debtor insolvent and annul the composition or scheme but without prejudice to the validity of any transfer or payment duly made or of anything duly done under or in pursuance of the composition or scheme. When a debtor is readjudged insolvent under this section, all debts provable in other respects which have been contracted before the date of such re-adjudication shall be provable in the insolvency.

LEG. REF.

[1]In S. 39 the words "the Court shall * * * * S. 33" have been omitted and the words "so far as relates to any debts entered therein substituted by Act X of 1935.

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could only reasonably approve a proposal that had been refused by the creditors in very extraordinary circumstances involving very unusual behaviour on the part of the creditors refusing. Some sort of exceptional circumstances would be neeessary before a Court could properly approve a proposal that the creditors had refused. I.L.R. (1941) Nag. 764=1941 N.L.J. 523=A.I.R. 1941 Nag. 355; *See also* (1942) 1 M.L.J. 316.

Sec. 39.—S. 39 as amended in 1935 is retrospective and applies to pending proceedings (1942) 1 M. L. J. 511=A.I.R. 1942 M. 474. Schedules are to be settled before composition is accepted. 39 I. C. 953. Where there is a joint decree against father and on and the father was declared insolvent and compounded with the decree-holder, the son is yet liable for the rest of the claim. 102 I.C. 193. Under the Provincial Insolvency Act of 1907, if a creditor did not prove his debt and was not included in the schedule, he could even after the discharge enforce his claim. The new Act of 1920 is the same except that an order of discharge under it does release the insolvent from all provable debts. But there is nothing in the Act to show that the order of annulment can prevent a creditor who has not proved his debt from proceeding to enforce it in a Civil Court. 1929 S. 204. The Court by approving of a scheme cannot impose an obligation upon one creditor to give up his claim against another creditor; S. 39 cannot cover the case of debts due to one creditor of the insolvent by another. Where in a scheme put forward by the insolvent there is a proposal that in consideration of the receipt of enhanced dividends certain creditors should give up their claims against the surety (another creditor) and this is not consented to by the creditors concerned, it cannot be binding upon them under S. 39, although the scheme has been assented to by the requisite number and value of the creditors. 1942 M.W.N. 140=(1942) 1 M.L.J. 316. *See also* 1941 Nag. 355. Parties absent—Order passed in default is no order of annulment. 1930 N. 34. An annulment under S. 39 does not put an end to the jurisdiction of the Insolvency Court over all the parties, and that Court does not, by reason of the annulment, become wholly *functus officio* so as to be incompetent to enforce a surety bond executed to it in the composition scheme. The Insolvency Court to which a surety bond is given must *prima facie* have power to enforce it, and that Court has therefore jurisdiction to grant relief to a creditor against the surety by summary orders notwithstanding the annulment of the adjudication under S. 39. The creditor is not bound to take an assignment of the bond and sue thereon. 1936 M. 424=71 M.L.J. 733.

Discharge.

41. (1) A debtor may, at any time after the order of adjudication and shall, within the period specified by the Court, apply to the Court for an order of discharge, and the Court shall fix a day, notice whereof shall be given in such manner as may be prescribed, for hearing such application, and any objections which may be made thereto.

Discharge.

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Secs. 39 and 37.—Where a composition scheme sanctioned and embodied in the order provided for the deposit by the debtor of a certain sum in instalments and the latter defaults in complying with the order it is open to the Insolvency Court, on an application by the creditor, to proceed as in execution and enforce its own orders. There is no need in such a case to set aside the annulment. 1942 N.L.J. 313.

Sec. 41.—The wording of S. 41 shows that it is open to the insolvent to apply for his discharge at any time though it is obligatory for him to make an application in the first instance within such time as may have been fixed by the Court at the outest. 32 P.L.R. 476=1931 L. 672. Under S. 41 it is discretionary with the Court to pass one of three orders mentioned therein. The question whether the Courts would have exercised better discretion if they had acted in one manner rather than another is not one which can be properly raised in revision. 1931 L. 672. An order of discharge as contemplated by S. 41 could only be made in the interest of the general body of creditors of the insolvent, and the fact that one of them only raises objection to the discharge is not material for the purpose of the Courts making an order which is to affect the entire body of creditors. 39 C.W.N. 1292=1935 C. 644. In an application for discharge under S. 41, the Court has no power to annul the adjudication in insolvency, though it may be of opinion that the insolvent is dishonest. 68 M.L.J. 699. Ordinarily speaking insolvency proceedings would not terminate until there has been a discharge of the insolvent, but the matter is otherwise where the insolvent is dead. In such a case there is an automatic discharge of the insolvent and where the property has been distributed prior to his death, the proceedings must be held automatically terminated. 1933 L. 997. If a Court, on application by the insolvent for discharge, refuses an absolute discharge under S. 41(2) (*a*), it should then consider the possible application of Cl. (*b*) or (*c*) or both and pass an order accordingly. It is not proper for the Court to merely refuse to grant an absolute discharge without specifying any further conditions and without settling the future position of the insolvent. 193 I.C. 546 =1941 Pat. 285. A discharge under laws of a foreign country in respect of debts contracted therein is valid in British India, though the debt was intended to be paid in British India. 51 I.C. 38=9 L.W. 535. Where time for applying for discharge was contained in an addendum at the foot o fthe order of adjudication, it is not a part of the order. 1926 L. 24 The time limit—Meaning of "*shall*". 12 Luck. 75. Court has no power to extend the time stipulated for the insolvent applying for discharge. The remedy is to apply for fresh adjudication if there are justifiable circumstances. 5 O.W.N. 686=1928 O. 376. *See* 108 I.C. 803, *contra*. *See also* the cases cited on this point under S. 27; 1933 M.W.N. 1309. Discharge of firm—Liability of partner for separate debt incurred prior to adjudication. 25 S.L.R. 422. Per *Mukerji, J.*—The principle of Ins. law is that the debtor on giving up the whole of his property shall be a free man again, able to earn his livelihood and having the ordinary inducements to industry. It would be only in extreme cases that an insolvent will be refused a discharge either absolute or conditional or of any kind whatever. 1930 A.L.J. 316=1930 A. 471 (2). Per *Mukerji, J.*—Ordinarily no second application by the insolvent is contemplated by the law, the first application being sufficient. Per *King, J.*—The language of S. 41 (1) seems to be sufficiently wide to cover a fresh application made after the refusal of an application made within the period specified. 1930 All. 471. Where an insolvent who has applied for an order of discharge within the time specified by the Court has failed to file *talbana*, his failure to do so cannot be considered as a failure to apply for the discharge. 128 I.C. 273=7 O.W.N. 941=1930 O. 474. The order of discharge should state that the Judge was satisfied that the assets were not of the requisite value from circumstances for which the insolvent could not be held to be justly responsible. 1928 C. 843; 115 I. C. 584. Where the insolvent's assets were not found to be equal to eight annas in the rupee and the insolvent had failed to prove that his liabilities arose out of circumstances for which he could not justly be held responsible, *held*, that he could not legally be granted an order of discharge under S. 41. 8 O.W.N. 843=1931 O. 356 (1). Before passing an order of final discharge under S. 41 it is necessary for a Court to examine the insolvent and to be satisfied of certain facts which are to be found in S. 42. 1929 C. 576. An order under S. 41 does not put an end to the proceedings in insolvency. The discharge of the insolvent does not put an end to its power to give directions as to the distribution of the assets. 7 R. 126; 1929 M. 157; 1931 L. 725. Under S. 41 all that the Court can do is to suspend the operation of the order for a specified time or grant an order of discharge subject to any condition with respect to any earnings or income which may afterwards become due to the insolvent, or with respect to his after-acquired property; but an order stating that he shall remain a bankrupt until he pays a particular proportion in the rupee is a bad order. 1929 L. 461 (1); 55 C.L.J. 94=1932 C. 623. Where under S. 44 of the former Act III of 1907 and S. 41 of the pre-

(2) Subject to the provisions of this section, the Court may, after considering the objections of any creditor and, where a receiver has been appointed, the report of the receiver—

(*a*) grant or refuse an absolute order of discharge; or

(*b*) suspend the operation of the order for a specified time; or

(*c*) grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the insolvent, or with respect to his after-acquired property.

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sent Act V of 1920, the Court passes an order of absolute discharge which is suspended for a specific time, that is, until the property of the insolvent has been sold and subsequently the property is sold, the insolvency proceeding is terminated, although, owing to a clercial error of the office, a formal order of discharge is not drawn up after the sale of the property and the insolvency proceeding cannot be revived at any later date at the instance of any creditor. 1935 A.L.J. 274=1935 A. 272.

Sec. 41 (2) (a).—The mere fact of a suit pending against the O. R. should not prevent an Ins. Court from granting an application for discharge. 1931 L. 725. Unconditional order of refusal to discharge—Subsequent applications for discharge maintainable. 1928 M.W.N. 175 =1928 M. 609. *See also* 5 O.W.N. 686=1928 O. 376; 1926 C. 529. S. 41 (2) (*a*) contemplates only an order either granting or refusing an absolute order of discharge as distinguished from an order of discharge subject to a condition. The section does not contemplate that there may be an order absolutely refusing to discharge an insolvent. Where the Judge passed an order in the following terms:—"It seems to me that nothing is to be gained from suspending the discharge or making a conditional order. The man is not fit to be given credit and that will be the result of his remaining an undischarged insolvent. I therefore refuse discharge absolutely." *Held*, that the order must be regarded as merely an order refusing to make an absolute order for discharge. *Held, further*, that if the order meant to preclude the insolvent from again applying for discharge, it was erroneous. 1931 C. 392=53 C.L.J. 44. *See also* 148 I.C. 971=1934 L. 109. An absolute refusal to grant an order of discharge is not justified by S. 41. 14Luck. 442=1939 Oudh 129. An order directing the insolvent to pay Rs. 15 a month and to apply for discharge after one year, imposes conditions but does not grant any discharge subject to those conditions, and hence does not come within any of the clauses of S. 41. 144 I.C. 247=1933 S. 151 (1). Creditors who have not proved their debts are not necessary parties to an application for discharge. Therefore, the failure to give *talbona* for such a creditor or to bring the representatives of such a deceased creditor on the record does not affect the proeedings. 39 P.L.R. 344=1937 Lah. 752. An order of discharge in the insolvency proceedings does not put an end to the proceedings and therefore a receiver can be appointed, without vacating the order of discharge, at any time when it is discovered that there is property of the insolvent which comes within the definition of property in S. 2 (1) (*d*), and to which S. 28 of the said Act is applicable. 1940 Rang. L.R. 392=1940 Rang. 156. An order of discharge is not invalidated in consequence of the omission to give notice of the application for discharge as required by S. 41 (1) in a case where none of the creditors had proved his debt for there is no irregularity at all. The notice is only required to be given to those creditors who prove their debts. I.L.R. (1939) Nag. 478=1939 Nag. 103.

Sec. 41, (2) (b) and (c).—S. 41 (2) (*c*) does not justify the Insolvency Court in passing an order discharging the insolvent but at the same time leaving him liable to debts incurred before insolvency. That would defeat the object of the adjudication in insolvency which is to free the debtor from the claims o his existing creditors, which are to be satisfied out of the property of the debtor which the Court takes possession of and distributes among the creditors. A condition imposed on the discharge to the effect that the creditors may recover their dues, if within time, until they become irrecoverable, is invalid in law. The order can only be taken to be a refusal to discharge. I.L.R. (1939) Bom. 493=41 Bom.L.R. 583=1939 Bom. 341. In the absence of evidence to show that since his insolvency the insolvent has, or is likely to have, any income or has acquired or is likely to acquire, any property a conditional discharge asking an insolvent to deposit all his subsequent earnings or his after-acquired property in Court is not good. Further an order vesting the whole of a man's earnings subsequent to insolvency and after-acquired property in the Court, is an order which ought not to be made because it destroys the very motive which moves a man to attempt to obtain income or to acquire property ; it has the effect that he has no incentive either to work or to acquire property. 1939 Rang. 58. *See also* 1937 Lah. 304=174 I.C. 878. Under S. 41 (*a*), (*b*) and (*c*) the discharge may be either absolute or suspended or conditional. If the discharge is absolute, it must obviously come into operation at once. If the discharge is suspended, then obviously it does not come into operation at once but it does automatically come into operation at the end of the specified time. A conditional discharge operates immediately but the insolvency proceedings are not terminated until the conditions imposed have been fulfilled. The Insolvency Court has power to vary the conditions which it has imposed, although it can not revoke the order of discharge. 42 P.L.R. 324. The Court has absolute discretion in the matter or suspension of discharge and in imposing conditions with respect to after earnings. 39 I.C. 916; 10 I.C. 698; 1928 O. 263. *See* 1930 C. 576 for the points to be considered by the Court in an

Cases in which Court must refuse an absolute discharge.

42. (1) The Court shall refuse to grant an absolute order of discharge under section 41 on proof of any of the following facts, namely:—

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application for discharge, conduct of the insolvent, etc. The intention of the legislature is that the debtor on giving up the whole of his property shall be a free man able to earn his livelihood. But sometimes it is necessary that he should pass through a period of probation. The civil rights of creditor must not be forgotten in such a case and a conditional order of discharge should be, as far as is reasonable, for the benefit of the creditors. What is exactly just to both parties is a matter dificult to determine. Insolvent directed to contribute Rs. 50 out of his monthly salary of Rs. 100 for a period of five years. The rate of Rs. 25 fixed by the lower Court held to be too low and the period of 25 years fixed described as amounting to a 'life sentence' which should not be directed. 32 P.L.R. 298 There is no provision for the adding of any other order to an order refusing a discharge under S. 41 (2) (*a*). S. 41 (2) (*b*) permits suspension of a discharge for a specified time only. Therefore, where the Court refuses an insolvent his discharge and at the same time directs him to pay certain amount to the receiver until he had paid all his debts, his order is illegal. 1930 R. 236. The Court is competent to grant an order of discharge to an insolvent subject to the condition that he shall hand over to the O.R. all the assets which he might inherit from his father. The possibility of the insolvent's father not dying for a long time or not leaving any property for his son, is no ground for making the discharge unconditional. 35 P.L.R. 786=1934 L. 659 (1). A conditional discharge under the provisions of S. 41 (2) (*c*) is just as much a discharge as an absolute order of discharge, and concludes the insolvency proceedings. The fact that a condition in regard to after-acquired property is imposed merely gives the creditors right to proceed against such property when it is acquired by the discharged insolvent. (1932 C. 623, Rel. on.) 161 I.C. 242=1936 R. 2. When an insolvent applies for discharge within the period specified in the order of adjudication and his application is refused, he is not precluded from making a further application for discharge and so remain undischarged for life. 1939 Lah. 432. Order granting absolute discharge to enable insolvent to take advantage of U.P. Encumbered Estates Act cannot be passed. 1937 O.W.N. 923=1937 Oudh 450.

Secs. 41 and 42: RIGHT TO DISCHARGE.—An order suspending an insolvent's discharge until such time as his scheduled debts are fully paid, is illegal. The Court must grant an absolute order of discharge, if the insolvent pays 8 annas in the rupee and is not guilty of the misconduct specified in S. 42 of the Provincial Insolvency Act. I.L.R. (1939) Lah. 429=41 P.L.R. 78=1939 Lah. 183. The only conditions that can be imposed under S. 41 (2) (*c*) of the Provincial Insolvency Act are conditions with respect to any earnings or income which may afterwards become due to the insolvent or with respect to his after-acquired property. It is not possible to impose a condition that the insolvent shall pay any specified proportion of his debts. Where an insolvent's debts exceeded Rs. 18,000 and his total assets realised were a little above Rs. 50 the Court was obliged under S. 42 (1) to refuse an absolute order of discharge, unless the insolvent satisfied the Court that the fact that the assets were not of a value equal to 8 annas in the rupee on the amount of his unsecured liabilities had arisen from circumstances for which he could not justly be held responsible. The operation of an order of discharge can only be suspended after the order has come into existence. 50 L.W. 632=1939 Mad. 890=(1939) 2 M.L.J. 555. Where through no fault of their own the assets of the insolvents have not been properly administered and the non-realisation of 8 as. in the rupee was not due to anything for which the insolvents can be held responsible and the insolvency proceedings have been dragging on for well-nigh 14 years and there was no reasonable prospect whatsoever of the insolvents coming into any property which can be taken over by the receiver for liquidating the debts due by the insolvents, an order granting discharge is right and proper. 38 P.L.R. 218=1936 L. 840. Where it is found that the debts shown by the insolvent are trade debts incurred in the course of a business carried on by the insolvent and his father, and that the insolvent is not guilty of any of the acts mentioned in Cls. (*c*) to (*f*) of S. 42, there being nothing to suggest that the insolvent continued to trade, knowing himself to be insolvent, or contracted any debt recklessly or brought on his insolvency by any sort of rash and hazardous speculation, the Court can properly grant him an absolute order of discharge, although his assets are not of a value equal to eight annas in the rupee, especially when the receiver reports recommending a discharge. 44 L.W. 284=1936 M. 800=71 M L.J. 371.

Secs. 41 and 44 : DISCHARGE—EFFECT OF.—An order of discharge does not revest property in the insolvent. 31 S.L.R. 506=1937 Sind 306.

Sec. 42.—As to grounds for refusing discharge *see* 146 I.C. 532=34 P.L.R. 991=1933 L. 812. The facts that at the time of the transactions the insolvent was a young man of about 20 years of age and was carrying on business with his father under his direction and control, is no ground for granting him an absolute discharge. 38 P.L.R. 1164. As to whether refusal of discharge terminates proceedings, *see* 3 R. 492. An insolvent is responsible for incurring debts when he had no assets at all and the purpose of keeping him an insolvent is to make plain to the world that his credit is gone so that he cannot cause loss to creditors in the future. His credit will return to him to some extent when he is discharged. That time will be postponed unless he pays 8 as. in the rupee or satisfies the Court that the absence of the requisite asset was due to circumstances for which he was not responsible. 1942 N.L.J. 246. Refusal of discharge though eight annas in the rupee was paid, *see* 1928 O. 263=5 O.W.N. 347. The *onus* is on the insolvent and when, he gives no evidence of

(*a*) that the insolvent's assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities, unless he satisfies the Court that the fact that the assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible;

(*b*) that the insolvent has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his insolvency;

(*c*) that the insolvent has continued to trade after knowing himself to be insolvent;

(*d*) that the insolvent has contracted any debt provable under this Act without having at the time of contracting it any reasonable or probable ground of expectation (the burden of proving which shall lie on him) that he would be able to pay it;

(*e*) that the insolvent has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities;

(*f*) that the insolvent has brought on, or contributed to, his insolvency by rash and hazardous speculations, or by unjustifiable extravagance in living, or by gambling, or by culpable neglect of his business affairs;

(*g*) that the insolvent has, within three months preceding the date of the presentation of the petition, when unable to pay his debts as they became due, given an undue preference to any of his creditors;

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discharge, no order of discharge can be passed. 1930 A. 858; 148 I.C. 971=1934 L. 109. But where an insolvent applies for discharge and the report of the O.R. is in favour of granting a discharge to the insolvents, the onus of proving the contrary lies on the opposing creditors. 146 I.C. 532=34 P.L.R. 991=1933 L. 812. Insolvent spending excessively for death and marriage—Very small assets—Still Court can grant order of discharge subject to conditions. 1929 A. 843. Assets found insufficient—Court bound to refuse discharge—Permission to file second application. 32 P.L.R. 476=1931 L. 672. Suspension of discuarg—Application for final discharge. Whether notice to creditors is necessary. 131 I.C. 721 (1)=1931 R. 188. The expression "assets" in S. 42 (1) (*a*) is generally understood to mean the amount actually in existence available for division among the creditors and it does not include future assets. I.L.R. (1939) Lah. 429=41 P.L.R. 78=1939 Lah. 183. Where the assets of the insolvent do not realise eight annas in the rupee. S. 42 (1) (*a*) lays on the debtor the burden of satisfying the Court that that fact has arisen from circumstances for which he cannot justly he held responsible. It is for the debtor to discharge that burden. There is no burden on the creditors or on the Official Receiver to show that the debtor can justly be held responsible for the deficiency of assets. 47 L.W. 653=1938 Mad. 590=(1938) 1 M.L.J. 760. Delay on the part of the insolvent to apply for discharge is not a ground for refusing him absolute discharge, although it is a ground for annulling the order of adjudication. 193 I.C. 546=1941 Pat. 285.

Sec. 42 (1) (a): SCOPE—IF IMPERATIVE—BURDEN OF PROOF.—The provisions of S. 42 (1) (*a*) are imperative and the burden of proof lies on the insolvent; and in the event of failure on his part to satisfy the Court in this respect, the Ins. Court has no jurisdiction to pass an order of discharge. 166 I.C. 956 (2)=1937 N. 37; 160 I.C. 35=1936 N. 17. According to the Rules of the Lahore High Court, the licence of an insolvent legal practitioner is suspended only till his discharge, whether absolute or conditional. As Insolvency Court has no jurisdiction to impose a penalty on the insolvent in the shape of suspension from practice. The suspension is the result of the Rules framed by the High Court and the scope of the Rules cannot be extended either by the agreement of the parties or by the order of the Insolvency Court. 42 P.L.R. 92=1939 Lah. 495. The facts that at the time of the transactions the insolvent was a young man of about 20 years of age and was carrying on business with his father under his direction and control, is no ground for granting him an absolute discharge. 38 P.L.R. 1164=1936 Lah. 381. It is quite clear that, in view of the wide powers conferred upon the Court by S. 42 the Court has power generally to review any questionable transactions covered by that section which are in any way relevant to the insolvency even if such transactions could not be expressly avoided under Ss. 53 and 54 of the Act. 42 C.W.N. 1156=69 C.L.J. 229=1939 Cal. 490.

Sec. 42 (1) (f): SPECULATIVE TRANSACTIONS BY INSOLVENT—RIGHT TO DISCHARGE.—Mere speculation would not disentitle an insolvent from asking the Court for a discharge. Many people indulge in all kinds of speculations, but the thing which debars an insolvent from claiming his discharge is rash and hazardous speculation. 38 P.L.R. 218=1936 L. 840.

(*h*) that the insolvent has on any previous occasion been adjudged an insolvent or made a composition or arrangement with his creditors;

(*i*) that the insolvent has concealed or removed his property or any part thereof, or has been guilty of any other fraud or fraudulent breach of trust.

(2) For the purposes of this section, the report of the receiver shall be deemed to be evidence; and the Court may presume the correctness of any statement contained therein;

(3) The powers of suspending, and of attaching conditions, to an insolvent's discharge may be exercised concurrently.

Adjudication to be annulled on failure to apply for discharge.

43. (1) If the debtor does not appear on the day fixed for hearing his application for discharge or on such subsequent day as the Court may direct, or if the debtor does not apply for an order of discharge within the period specified by the Court, the order of adjudication shall be annulled, and the provisions of section 37 shall apply accordingly.

NOTES.

Sec. 42 (1) (b).—The words "previous occasion" in Cl. (*h*) of S. 42, sub-S. (1) cannot be read as applying only to the words "adjudicated an insolvent." The words govern also the "composition" following the words "adjudicated an insolvent or made" and they mean a composition previous to the adjudication in question. The clause means only that there should be no discharge of an insolvent who has done one of two things, both previous to the adjudication in insolvency, *viz.* a previous adjudication as insolvent, and a previous composition or arrangement with the creditors. Where a composition is entered into after the adjudication in question, but the insolvent fails to carry out the terms thereof by making the stipulated payments. S. 42 (1) (*h*) cannot come into operation so as to preclude discharge of the insolvent. 1937 A.L.J. 387=1937 A.L.R. 308=1937 All. 526.

Sec. 42 (1) (i). : FRAUDULENT TRANSFER—ONUS.—In an application by debtor for discharge, if the creditors allege that the debtor's case comes under S. 42 (1) (*i*) by reason of some fraudulent transfers effected by him, the onus of proving fraud in respect of those transactions is on the creditors. 42 C.W.N. 1153=69 C.L.J. 229 =1939 Cal. 490. S. 42 gives wide powers to Courts to examine the insolvent's conduct whether before or after insolvency and hence fraudulent transfers by the insolvent prior to invency come within the purview of S. 42 (1) (*i*). But there must be some time limit regarding the alleged fraudulent transfers upon which the order of discharge can be refused, and the Judge should not take into consideration conduct which could not have had anything to do with the bankruptcy either in producing it or affecting it in any way after its commencement. Where however the transfers effected by the insolvent have considerable effect upon the insolvency, then an order refusing discharge can be based on such transfers although they might have been effected long before the application for insolvency. 49 C.W.N. 1153=69 C.L.J. 229=1939 Cal. 490. In view of the wide powers conferred upon the Court by S. 42, the Court has power generally to review any questionable transactions covered by that section which are in any way relevant to the insolvency even if such transactions could not be expressly avoided under Ss. 53 and 54 of the Act. 42 C.W.N. 1153=69 C.L.J. 229=1939 Cal. 490.

Sec. 43.—There is no discretion in the Court to enlarge time after the expiry of the period fixed for an application for discharge. The provision of this rule is mandatory. 4 P. 51=88 I. C. 70. *See also* 1928 M. 265=54 M.L.J. 344. But *see* 132 I.C. 223 (L.); 11 R. 287=1933 R. 223=145 I.C. 320 (F.B.) and the cases cited on the point under S. 27 and S. 41. Though the provisions of this section are mandatory, still the annulment of adjudication does not occur as a matter of course, but has to be the subject of a specific order of the Court. 1933 R. 133=144 I.C. 869: 15 L. 698=1934 L. 468; 37 P.L.R. 144. Discretion to extend time—Proper exercise of. 1928 M.W.N. 441; 108 I.C. 803. But *see contra* 1928 O. 376. The Insolvency Court is not bound to pass an order annulling the adjudication under S. 43 when the insolvent fails to appear on the date fixed for hearing his application for discharge or at any of the times mentioned in that section. That section can be interpreted as allowing an Insolvency Court to postpone annulment after default either by extending the time in which the debtor is to apply for his discharge or by merely postponing the actual pronouncement after the default has occurred. On this view, there will be two courses open to the Court when an insolvent fails to appear on the date fixed. If there is still any considerable estate to be administered, and more particularly if there are any outstanding claims with regard to property transferred before adjudication, then it would be much simpler and also work for more efficient control if the Court postpones the order of adjudication instead of assuming control under S. 37. On the other hand, if there are no such outstanding disputes, the Court may find it more convenient to annul the adjudication at once, even though there is still some estate to be administered and in that case it would still have jurisdiction to exercise some control over the subsequent administration of the estate and any connected proceedings. 43 P.L.R. 369=1941 Lah. 316. The High Court will not interfere with such discretion in revision.

(2) Where a debtor has been released from custody under the provisions of this Act and the order of adjudication is annulled under sub-section (1), the Court may, if it thinks fit, re-commit the debtor to his former custody, and the officer in charge of the prison to whose custody such debtor is so re-committed shall receive such debtor into his custody according to such re-commitment, and thereupon all processes which were in force against the person of such debtor at the time of such release as aforesaid shall be deemed to be still in force against him as if no order of adjudication had been made.

NOTES.

1930 M.W.N. 673. Extension of time granted when the insolvent failed to apply for extension to prevent any enquiry into his fraudulent conduct. 1930 M.W.N. 673. Also when petition under S. 53 has to be enquired into. 1930 M. W.N. 673. "*Shall be annulled*," meaning of—*Section mandatory*. 91 I.C. 467=1926 S. 94; 1926 M. 942=51 M.L.J. 29. But *see* 52 M. 648. *See also* cases under S. 39. *Annulment*—Object of—Omission to impose conditions—Subsequent order vesting property in receiver—Validity. 13 Pat.L.T. 775. Where the time for applying for discharge has expired, the Court is not bound to vest the property in the insolvent; but it may vest in the receiver for the benefit of the creditors; and even if the receiver sells the property or distributes it among creditors, the insolvent has no right to object to it, though the creditors may do so. 1933 L. 1008. *See also* 165 I.C. 207 =44 L.W. 719=1936 M. 915. Where the insolvent did not apply for discharge within the time fixed and pending an application under S. 54, a creditor applied for the annulment of adjudication, *held*, that the Court could order annulment and that the insolvency proceedings do not always stop at the moment of annulment. The view of *Wallace, J.*, in 29 L.W. 23 that the annulment of adjudication under S. 43 puts an end to the insolvency proceedings as a whole dissented from: *contra*. 52 M. 648=57 M. L.J. 116=1929 M.W.N. 489. *See also* 53 M. 288 =1930 M. 389 (F.B.) and other cases cited under S. 27. *See also* 63 M.L.J. 414 (decision of *Wallace, J.*) following his view in 29 L.W. 23, cited above. The annulment of an adjudication under S. 43 does not operate so as to cause the abatement of proceedings already instituted under Ss. 53 and 54 of the Act. 43 P.L. R. 369=1941 Lah. 316. The insolvency proceedings do not automatically terminate with an order of annulment under S. 43 (1); nor does the Ins. Court lose seisin of the matter so as to preclude it from passing any order in those proceedings thereafter. A person appointed by the Court subsequently, in whom it vests the properties of the insolvent is in the position of a trustee for the creditors and in such a character has the power and is under the duty of administering the assets vested in him fairly and equally amongst all the creditors of the debtor according to the rules of administration contained in the Ins. Act. No creditor has the right, even after the annulment of the adjudication, to pursue his remedy for realising his money under the ordinary civil law. All the creditors are bound in law to reciover their dues through the dividends to be paid by the appointee in whom the Court has vested the properties of the debtor in the course of his administration. 40 C.W.N. 1229=1936 C. 573. *See also* 1939 N.L.J. 96; 1939 O.W.N. 32; 1939 All. 114. When an insolvency has been annulled under the provisions of S. 43 and the receiver has, before the order of annulment, applied to the Court to have a transfer of property set aside under the provisions of S. 53 or S. 54 of the Act, the Court has no jurisdiction after the order of annulment of the insolvency proceedings to continue the proceeding under S. 53 or S. 54 of the Act. 11 R. 287=1933 R. 223 (F.B.). Annulment of adjudication and vesting of properties in particular person—Rights and powers of latter—Power to continue administration and to set aside fraudulent transfers. 69 M.L.J. 364; 40 C.W.N. 1229=1936 C. 573. The effect of an annulment of adjudication under S. 43, is that the provisions of S. 37 apply immediately an order of adjudication is annulled; and if on such annulment, no order is made vesting the properties in the O.R., the latter ceases to have any right or authority to deal with the properties of the insolvent after the date of the annulment. 44 L.W. 719=1936 M. 915. Application for enlargement of time can be made by any person interested in such an application by creditor—Notice to alienees is desirable but omission to issue notice does not invalidate the order granting extension. 1929 M.W. N. 809 (2). The Court can extend the time of its own motion. 8 R. 506. The provisions of S. 43 (1) are mandatory, there being no discretion to the Court to enlarge the time after the expiry of the period fixed by the Court for an application for an order of discharge. Unless the debtor applies for his discharge within the time fixed, the adjudication must be annulled. 8 R. 187=1930 R. 166. *See also* 166 I.C. 956= 1937 N. 37; 193 I.C. 546=1941 Pat. 288. Extension of time under S. 148, C. P. Code, cannot be granted in cases where the insolvent fails to apply for discharge within the time fixed by Court, since the provision of S. 43 (1) are mandatory and the powers given by S. 5 are to that extent limited. 1937 Nag. 37. In an application for discharge by an insolvent the Court directed him to pay certain amount every month and further to renew his application for discharge "six months hence," its order is under S. 32 (1) (*a*) and hence, if the insolvent neither pays any monthly amount nor renews application, his adjudication cannot be annulled under S. 43. 118 I.C. 332=1929 P. 184. The penalty of annulment under S. 43 it hardly appropriate in the case of an insolvent who comes before the Court in time and applies for extension of the time fixed for his application for discharge. 60 M.L. J. 339. *See also* 128 I.C. 273=7 O.W.N. 941= 1930 O. 474. A joint debt cannot be set-off against a separate debt. They do not come within the meaning of "*mutual dealings*." 63 I.

Effect of order of discharge.

44. (1) An order of discharge shall not release the insolvent from—

(*a*) any debt due to the Crown;

(*b*) any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party;

(*c*) any debt or liability in respect of which he has obtained forbearance by any fraud to which he was a party; or

(*d*) any liability under an order for maintenance made under section 488 of the Code of Criminal Procedure, 1898.

(2) Save as otherwise provided by sub-section (1), an order of discharge shall release the insolvent from all debts provable under this Act.

NOTES.

C. 906=45 B. 1219. An aggrieved person may appeal and the order of appellate Court is final. 45 M.L.J. 166=1924 M. 163. *Leave of Court* is necessary to file an appeal. 7 P. 375=107 I.C. 830=1928 P. 338. But leave may be implied on admission of appeal. 1928 P. 338. Revision, *see* 1928 M.W.N. 441.

Secs. 43 and 27.—Though the provisions of S. 43 are mandatory, still the annulment of adjudication does not occur as a matter of course, but has to be the subject of a specific order of the Court; in other words it does not operate as an automatic annulment on the failure of the debtor to apply for a discharge. 14 Luck. 22=1938 Oudh 122 (F.B.). Ss. 43 and 27 should be read in a manner so as not to contradict each other, and an Insolvency Court can extend the time for applying for discharge even after the expiry of the period fixed on the date of adjudication. A power to grant further time carries with it a power to grant extension even after the expiry of the term originally fixed, since annulment of adjudication is not automatic. 55 A. 241=1933 A.L.J. 117=1933 A. 233. *See also* 1937 A.L.J. 773=1937 All. 636.

Secs. 43 and 37: ORDER OF ANNULMENT—VESTING OF PROPERTY IN COURT AMIN—EFFECT.—An order of annulment is not same thing as an order of discharge and where in addition to that, the property was by order made to vest in the Court Amin, there is hardly any justification for the contention that annulment restores the *asttus quo*. 1938 A.L.J. (Supp.) 17=1938 O.W.N. 641. After the annulment of adjudication under S. 43 no further proceedings could be taken by the Official Receiver for the sale of the property of the insolvent. All that the Court could do on the annulment of the adjudication is to direct that the property of the insolvent should vest in a certain person. If it passes such a vesting order, the receiver could only hold the property for the benefit of the creditors, and the creditors would have to enforce their claim by a proper suit. The property cannot be sold in any case by the Insolvency Court. I.L.R. (1939) Lah. 275=41 P.L.R. 741=1939 Lah. 536.

Secs. 43 and 78.—The subsequent annulment of an adjudication cannot give validity to a suit filed by an insolvent or his legal representative during the pendency of the insolvency when the property is vested in the Official Receiver. Such a suit is not maintainable and must be dismissed. 52 L.W. 522=(1940) 2 M.L.J. 606=1941 Mad. 84.

Sec. **44.**—There is nothing in S. 44 which would justify the view that an application for discharge when refused is refused for ever and that no later application can be made. (22 L.W. 202, Foll.) 33 P.L.R. 620=1932 L. 478. The fact that a person conceals an important circumstance but for which concealment another person would not have acted as he did and does so with the intention of causing him so to act is a fraud. It constitutes the offence of cheating as much as an actual untrue representation would. 1937 Mad. 677=1937 M.W.N. 404. Where an insolvent plays a fraud upon a creditor and deliberately conceals the existence of a debt due to that creditor in order that the insolvency proceedings may be decided to his advantage. preventing by his fraud the creditor from appearing in the Insolvency Court and obtaining his share of the assets, he cannot afterwards be permitted to plead the bar of those very insolvency proceedings in defence to a suit by the creditor to recover his debt. S. 44 (1) (*c*) of the Provincial Insolvency Act would apply to such a case; and an absolute discharge granted to the insolvent in face of the prohibition contained in S. 42 (1) (*a*) is no bar to a suit by the creditor. 52 L.W. 380=(1940) 2 M.L.J. 379=1941 Mad. 100.

Sec. 44 (2).—S. 44 (2) protects the Insolvent and not assets in the hands of the Official Receiver. 42 P.L.R. 243=1939 Lah 300. By reason of the provisions of S. 47 the debt of a secured creditor is not provable until he has realised his security or has abandoned it or valued it until one of these events has happened there is no debt provable in the insolvency proceedings during the pendency of those proceedings, and S. 44 (2) of the Act has therefore no application. If a secured creditor has not during the insolvency proceedings realized his security or surrendered or valued it, S. 44 (2) cannot affect him, as it applies only to debts provable in insolvency and he is entitled to get a personal decree against the insolvent after he has got an order of absolute discharge, in respect of the balance due to him after sale of the mortgaged property. If he has realized his security before the discharge of the insolvent, and there is a deficiency the balance of the debt constitutes a debt provable in the insolvency, and S. 44 (2) will operate to cancel it, and the creditor cannot afterwards obtain a personal decree in respect of such balance. (1942) 1 M.L.J. 11. *See also* 1940 Nag. 252. Surety's right of proof in respect of a contingent liability 26 A.L.J. 425=1928 A.

(3) An order of discharge shall not release any person who, at the date of the presentation of the petition, was a partner or co-trustee with the insolvent, or was jointly bound or had made any joint contract with him or any person who was surety for him.

PART III.

ADMINISTRATION OF PROPERTY.

Method of proof of debts.

Debt payable at a future time.

45. A creditor may prove for a debt not payable when the debtor is adjudged an insolvent as if it were payable presently, and may receive dividends equally with the other creditors, deducting therefrom only a rebate of interest at the rate of six per centum per annum computed from the declaration of a dividend to the time when the debt would have become payable, according to the terms on which it was contracted.

NOTES.

306. The effect of S. 44 (2) is that the order of discharge releases the insolvent from all debts provable under the Act. It is immaterial that a creditor deliberately chooses not to have his debts proved. 110 I.C. 893. *See also* 1936 C. 434. There is no provision that property, which is vested in the Ins. Court, should re-vest in the insolvent on the passing of the absolute discharge, and it was never contemplated that an insolvent should get an order of absolute discharge and yet retain part of his property. S. 44 (2) means that the order of discharge frees the insolvent from liability for all debts provable under the Act, but does not free his property from such liability. So, where after an absolute discharge of the insolvent, his property has vested in the Ins. Court, but remains unsold and if a creditor applies to Court for sale of the property, the Court is bound to allow the application. 1937 N. 171. Property inherited by insolvent some months before order of discharge —Report by O.R. under misapprehension that all assets of insolvent were disposed of—Order of discharge passed thereon—Right of O. R. to deal with the property inherited by insolvent. *See* 1937 L. 87. The rule of law, *viz.*, an order of discharge, shall release the insolvent from all debts provable under this Act, is not qualified by any rule that the creditor should have notice of the proceedings. The rule is based on a policy of law and not any rule of constructive notice. Notice or no notice, S. 44 comes into play and releases the insolvent from the debt which could undoubtedly have been proved under the Act, even if the omission of the name of creditor be deliberate on the part of the insolvent, provided no question of fraud is involved. 55 A. 636=1932 A.L.J. 1340=1933 A. 600. An order of discharge under S. 44 releases an insolvent from his liability under a decree passed by a liquidator of a Co-operative Society against him either as a debtor to the Society or as a member liable to contribute to its assets, and the decree cannot, therefore, be executed against him thereafter. 43 P.L.R. 422=1941 Lah. 314. Where a creditor holding a mortgage decree against the insolvent, realises his security before the order of discharge is passed, but does not value his security and prove the balance personally due from the insolvent, the order of discharge releases the insolvent from personal liability under the mortgage as it is a debt provable under the Act and the creditor cannot subsequently claim a personal decree for the balance against the insolvent. 40 P.L.R. 514= 1938 Lah. 217; 54 L.W. 741; 1940 Nag. 252. Though an order of discharge releases the bankrupt from certain debts provable in the bankruptcy, its effect is not to destroy the debt as though it had never been. If a creditor can otherwise realize his debt, there is nothing in the Insolvency law which precludes him from doing so as the debt is not extinguished. 1937 Mad. 727. A mortgagor's personal liability under the mortgage deed is a debt provable in insolvency within the meaning of S. 44 (2) and such liability would be discharged by an order of absolute discharge. A mortgagee is not therefore entitled to apply under O. 34, R. 6, C. P. Code, for a personal decree against the mortgagor after an order of absolute discharge has been made in the mortgagor's insolvency. 54 L. W. 523=1941 M.W.N. 937=(1941) 2 M.L.J. 690. *See also* (1942) 1 M.L.J. 11=I.L.R. 1942 Mad. 448. Order of discharge—Debt incurred prior to insolvency—Promissory note executed subsequent to discharge—Enforceability. 137 I.C. 320=35 L.W. 449=932 1M. 416.

Sec. 44 (3).—The discharge of an insolvent does not release his surety from liability to be proceeded against in execution of a decree passed jointly against him and the insolvent. 18 N.L. J. 145. Under S. 44 (2) the order of discharge has the effect of releasing the bankrupt from all debts provable in bankruptcy. But until the insolvency proceedings are terminated by a formal order or the order of adjudication is annulled, the property which vested in the Insolvency Court under S. 28 (1) of the Act could not revert to the insolvent. As an order of discharge does not terminate the proceedings, the creditors are precluded by S. 28 (2) from enforcing their remedy in any other Court or in any other manner except in the Insolvency Court and in the manner provided by that Act. I.L. R. (1939) Nag. 478=1939 N.L.J. 96=1939 Nag. 103; 1941 M. 620. Decree against debtor —Subsequent adjudication of debtor—Attachment of house in execution—Claim by wife—

Mutual dealings and set off.

46. Where there have been mutual dealings between an insolvent and a creditor proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively.

Secured creditor.

47. (1) Where a secured creditor realises his security he may prove for the balance due to him, after deducting the net amount realised.

(2) Where a secured creditor relinquishes his security for the general benefit of the creditors, he may prove for his whole debt.

NOTES.

Dismissal—Suit to set aside—Dismissed—Subsequent order of discharge—Effect on decree—Debt—House cannot be seized and sold. 1941 Mad. 620=(1941) 1 M.L.J. 565.

Secs. 44 and 34 (2).—Having regard to the express language of S. 34 (2) and the absence in the Act of a clause similar to S. 46 (2) of the Presy. T. Ins. Act, a debt contracted after the presentation of the petition in insolvency but before an order of adjudication is provable in insolvency. A suit on the debt after the discharge of the insolvent is barred by S. 44. 34 Bom.L.R. 980=1932 B. 511. Discharge of insolvent—Subsequent execution of decree obtained prior to discharge—Decree-holder ignorant of discharge—Ignorance of decree-holder, no proof of fraud. 1933 A. 340=144 I.C. 888.

Sec. 46.—The O.R. has no right to set off against the creditor's claim a time-barred claim against the creditor. Per *Reilly, J.*—The word "*due*" in S. 46 means "legally recoverable" and not "justly due." 1930 M.W.N. 837. The term "mutual dealings" includes not only the case of a person who owes a debt to the insolvent but also the case of a claim for unliquidated damages. 60 C.L.J. 281=39 C.W.N. 106. The privileges and rights. which are given in S. 46 (which is made applicable to companies in liquidation by S. 229, Companies Act) are based upon equity and fair dealing. It would be very harsh if the Official Receiver or the Official Liquidator of a company could demand in full moneys due by a debtor and at the same time that person being a creditor, for an equal or a larger sum of the company must be content with a dividend dependent on the distribution which can be made from the assets. O. 8, R. 6, C. P. Code, is in no way referable to matters arising in insolvency or liquidation. 1939 M.W.N. 1231 =1940 Mad. 266.

Sec. 47.—A mortgagee without possession is secured creditor. 1928 A. 306. A secured creditor can realise from the security his principal and interest at contract rate up to date of payment. 41 A. 481=51 I.C. 192. S. 47 provides for various steps which could be taken by a mortgagee. If instead of taking one or the other of these courses he simply ignores the insolvency then he is limited to his security, the reason being that a mortgagee with a mortgage containing a personal covenant is a secured creditor so far as the mortgage transaction is concerned and an ordinary creditor so far as the personal covenant is concerned. If however a secured creditor does not assess under S. 47 and does not even ask the Court to say that the debt is of such a nature that its valuation is incapable of being fairly estimated and allows the insolvent to be discharged without any proof having been put in for the balance, he must be content with his security only. I.L.R. (1940) Nag. 512=1940 N.L.J. 221=1940 Nag. 252. *See also* (1941) 2 M.L.J. 690=54 L.W. 741. Where a secured creditor gives proof for the whole of his debt, he must be taken to have relinquished his security. (1929 B. 258, Rel. on.) 38 P.L.R. 414=1936 L. 690. A creditor who was appointed as agent to sell books of the debtor and pay himself for his debt out of the sale amount is a secured creditor. 37 A. 383=29 I.C. 263. An attaching creditor is not a secured creditor. 1933 N. 229=29 N.L.R. 303. The term "relinquish" is sufficient to cover an abandonment by conduct. Proof of debt in insolvency by a secured creditor amounts to relinquishment. 1929 B. 258=31 Bom.L.R. 463. A secured creditor has a right to prove for the balance of the decretal amount when the amount realised by him is less than it. 1930 O. 20. A secured creditor can if he so wishes obtain a decree under O. 34, R. 6 and utilise the same as proof of the balance. But it is not necessary for him to take such a course. Even if his application for a decree under O. 34, R. 6 is refused, it is still open to him under the special remedy provided by S. 47 of the Act to prove for the balance due. Under this special provision, no question of limitation arises under S. 47 ; he will be placed on the footing of an unsecured creditor. 1930 O. 20. An order under S. 41 does not put an end to the proceedings in insolvency. The discharge of the insolvent does not put an end to the court's power to give directions as to the distribution of the assets and as to the enforcing the right of the secured creditor. 7 R. 126 =1929 R. 168. Where a mortgagee does not consent to the sale of property free from his mortgage, an order that the property should be so sold would be in derogation of his rights and he can claim that it should be set aside. But if the mortgagee consents to such a course, such an order can be passed. 122 I.C. 374=1930 N. 196. Where a mortgagee decree-holder does not comply with the provisions of S. 47, he cannot apply to have his debt included in the schedule. 133 I.C. 876 (2)=32 P.L.R. 698. S. 47 does not empower the mortgagee to authorize the O. R. to sell property not vested in him. 1933 L. 1010.

(3) Where a secured creditor does not either realise or relinquish his security, he shall, before being entitled to have his debt entered in the schedule, state in his proof the particulars of his security, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.

(4) Where a security is so valued, the Court may at any time before realisation redeem it on payment to the creditor of the assessed value.

(5) Where a creditor, after having valued his security, subsequently realises it, the net amount realised shall be substituted for the amount of any valuation previously made by the creditor, and shall be treated in all respects as an amended valuation made by the creditor.

(6) Where a secured creditor does not comply with the provisions of this section, he shall be excluded from all share in any dividend.

Interest.

48. (1) On any debt or sum certain whereon interest is not reserved or agreed for, and which is overdue when the debtor is adjudged an insolvent, and which is provable under this Act, the creditor may prove for interest at a rate not exceeding six per centum per annum,—

(*a*) if the debt or sum is payable by virtue of a written instrument at a certain time, from the time when such debt or sum was payable to the date of such adjudication; or,

(*b*) if the debt or sum is payable otherwise, from the time when a demand in writing has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment to the date of such adjudication.

(2) Where a debt which has been proved under this Act includes interest or any pecuniary consideration in lieu of interest, the interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding six per centum per annum, without prejudice to the right of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled after all the debts proved have been paid in full.

Mode of proof.

49. (1) A debt may be proved under this Act by delivering, or sending by post in a registered letter, to the Court an affidavit verifying the debt.

(2) The affidavit shall contain or refer to a statement of account showing the particulars of the debt, and shall specify the vouchers (if any) by which the same can be substantiated. The Court may at any time call for the production of the vouchers.

50. (1) Where the receiver thinks that a debt has been improperly

NOTES.

Sec. 48.—It is not open to an Ins. Court to allow interest at more than 6 per cent. after date of adjudication. 24 A.L.J. 441=67 I.C. 556 (2) =1926 A. 361. Interest at contract rate from date of adjudication to date of payment—Payment of debts in full—Surplus—Right of creditor. 34 L.W. 143=1931 M.W.N. 937.

Sec. 49.—Section only specifies a simple mode of proof of debt; it does not exclude any other mode of proof. 48 C.L.J. 574=1929 C. 159 (2). S. 49 does not lay down a mandatory method of proving a debt. It merely lays down one of the modes in which a debt may be proved. 19 Pat.L.T. 364=1938 Pat. 65. The modes of proof mentioned in S. 49 are not exhaustive. 1937 O.W.N. 1143=1938 Oudh 8. A decree was passed in favour of the plaintiff after which the judgment-debtor was adjudicated an insolvent on his application filed pending the suit. The decree contained a direction that the plaintiffs should prove their debt in insolvency. The decree was assigned and the assignee applied to the Ins. Court to be recognized as the insolvent's creditor and referred to the direction as to proving the debt, in the decree. *Held*, that in the above circumstances the debt must be held to have been proved, although the formal mode prescribed by S. 49 was not followed. 1933 Mad. 168=145 I.C. 764.

Sec. 50.—Judge cannot delegate power to record evidence to a Receiver other than the O. R. 13 L.W. 145=61 I.C. 767. For procedure and duty of Court in removing a name

Disallowance and reduction of entries in schedule.

entered in the schedule, the Court may, on the application of the receiver and after notice to the creditor, and such inquiry (if any) as the Court thinks necessary, expunge such entry or reduce the amount of the debt.

(2) The Court may also, after like inquiry, expunge an entry or reduce the amount of a debt upon the application of a creditor where no receiver has been appointed, or where the receiver declines to interfere in the matter or, in the case of a composition or scheme, upon the application of the debtor.

Effect of insolvency on antecedent transactions.

51. (1) Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of the admission of the petition.

Restriction of rights of creditor under execution.

NOTE.

from the list of creditors, *see* 90 I.C. 802. There is nothing in S. 50 which says that any question of title raised between two scheduled creditors, will be decided by the Insolvency Court. 24 A.L.J. 334=92 I.C. 14=1926 All. 244. S. 50 governs the procedure of the Court during the insolvency, *i.e.*, during the course of the administration of the debtor's assets in an insolvency. But, S. 50 can no longer apply after the insolvency has come to an end by annulment of adjudication. After the adjudication has been annulled it is not open to the Court to take action under S. 50 and to expunge or reduce the debt of a creditor. 16 Pat. 754=1938 Pat. 225. A creditor to whom a dividend has been paid cannot be directed to bring back the amount merely by reason of the fact that subsequently the name of the creditor is expunged from the list of creditors. Where after the payment of a dividend an application is made under S. 50 for expunging the name of the creditor from the list of creditors, if there are no other assets to be realized by the Official Receiver and no prospect of any further dividend, an inquiry into the merits of the application is wholly unnecessary. 55 L.W. 504=(1942) 2 M.L.J. 202. If any creditor wishes to have any amendment made of the schedule as framed by the Court under S. 33, he must cause notice to issue to all the other creditors who would thereby be affected, and their objections be heard before any alteration or amendment of the schedule can be ordered by the Court and in an application of appeal in connexion with this, the receiver is not a necessary party. 150 I.C. 690=1934 Rang. 112.

Secs. 50 and 53.—Name of mortgagee entered in the schedule of creditors—Application by another creditor to treat mortgagee as nominal—O. R., powers of. *See* 97 I.C. 407=1926 Mad. 1019=54 M.L.J. 287.

Sec. 51.—As to whether this section controls S. 28 (2), *see* 39 C.W.N. 424. What S. 51 means is that if a creditor has proceeded to execute a decree, he will not be entitled as against the receiver to the benefit of the execution, except in so far as he may have been able to realize the assets before the admission of the petition for insolvency. If he has derived any benefit from that execution when the application for insolvency was pending, he cannot keep that benefit to himself as agains the receiver 17 P.L.T. 313=1936 Pat. 112. *See also* 18 Pat L.T. 553. There is no scope under S. 51 for the passing of an order directing a decree-holder to restore to an Official Receiver property which he has purchased at an execution sale. Where a decree holder has purchased the judgment-debtor's property with leave to be bid and set off in execution of his decree against the judgment-debtor the intervention of insolvency can never bring about a cancellation o the execution proceedings including the sale. The benefit of the execution represents the bids made at a sale or assets realized otherwise in the execution. The decree-holder cannot therefore claim the right to hand back the property to the official Receiver instead of paying the bid amount into the hands of the Official Receiver. 1942 M.W.N. 176=55 L.W. 134=(1942) 1 M.L.J. 306. The effect of sub-S. (1) and (2) of S. 51 is that the Receiver in Insolvency is in any event entitled to the assets realised after the date of the admission of the petition and that he is entitled even to the property of the insolvent if he can successfully challenge the good faith of auction purchaser in a sale held subsequent to the presentation of the petition in insolvency. The only adverse effects whic i S. 51 has on the rights of the receiver are firstly, that if any assets have been realized in execution of a decree before the date or admission of the petition, the receiver will have no right to prevent the decree holder from getting the benefit of those assets even if they are in the hands of the Court and have not paid over to the decree-holder before the date of the admission of the petition by the Insolvency Court; and secondly that an auction purchaser who can establish good faith can acquire a good title against the receiver. I.L.R. 1942 A. 421=A.I.R. 1942 A. 263. In execution of a money decree obtained by the appellant against his judgment-debtors, he attached in December, 1926, in the Madras High Court, a preliminary decree for partition which had been passed by the High Court in favour of his judgment-debtors. In September, 1928, an order was made by the District Court at Secunderabad adjudicating as insolvents the said judgment-debtors. The question having been raised as to what effect was to be given by the Madras Courts to the adjudication order

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of the Secunderabad Court in competition with the prior attachment of the decree in the Madras Court. *Held* that the British Cantonment in Secunderabad being part of the Hyderabad State and the property of the Nizam, the District Court at Secunderabad was a 'foreign Court' in relation to the Courts of British India. *Held. further*, that the appellant's prior attachment was not avoided by the subsequent adjudication of the foreign Court. *Quaere*, as to the effect a British Indian adjudication order would have had on the appellant's prior attachment and whether under the Code an attachment creates a lien or charge or confers title. 60 I.A. 167=56 M. 405=64 M.L.J. 562 (P.C.). S. 51 refers to the date of admission and not that of presentation of petition. Therefore it does not deprive the creditors of the fruits of their decrees in respect of moneys which are brought into Court between the date of the presentation of a petition for insolvency and the date of its admission. 130 I.C. 559= 1931 S. 65. *See also* 1938 M.W.N. 841; 55 L W. 436=(1942) 2 M.L.J. 178; 14 L. 724=1933 L. 477; 35 P.L.R. 408=1934 L. 535 ; 1937 M.W.N. 366. "Assets realized in the course of the execution"—Meaning. *See* 1931 S. 164. Where pending an insolvency petition the Court directed that the money realised in a Court sale should be kept in deposit but the insolvency application was later on dismissed for a technical defect and a fresh application was preferred and the money was sought to be withheld from payment, *held*, that the money kept in deposit did not come under assets realised after the application and the Ins. Court had no jurisdiction regarding the same. 146 I.C. 597=1933 C. 651=37 C.W.N. 135. Where during the pendency of a suit the defendant agreed and paid a certain amount into the hands of the plaintiff's pleader in part satisfaction of the money to which the plaintiff may become entitled and the plaintiff subsequently obtained a decree, but meanwhile another creditor applied filed an application in insolvency and the defendant was adjudged insolvent after the decree in the earlier suit had been made, *held*, that the money deposit with the plaintiff's pleader in the earlier suit did not form part of the assets of the insolvent and the original plaintiff was entitled to appropriate the same towards his decree. 37 C.W.N. 475=145 I.C. 826=1933 C. 625. *See also* 1937 Lah. 634; 18 Pat.L.T. 553; 1938 M. 903=(1938) 2 M.L.J. 488. Pending disposal of a petition, the Ins. Court cannot issue an injunction to stop sale. 39 A. 547=39 I. C. 783. *See also* 40 C. W. N. 336. Property attached but not sold until adjudication is available for the general body of creditors. 37 A. 452=29 I.C. 990. *See also* 40 C.W.N. 336. Where petition of insolvency is filed after deposit of 25 per cent of purchase money but, before deposit of the balance, the decree-holder has no prior right to the amount. 48 M. 656=47 M.L.J. 759. Where sale was held prior to filing of petition but actual payment to the decree-holder was not made till adjudication, the receiver could not claim the money. 28 I.C. 816=13 A.L.J. 359; 11 I.C. 433=146 I.C. 961=1933 Sind 305. But the O. R. is entitled to the assets realis d after petition and before adjudication. 1933 L. 477; 144 I.C. 580. When an auction sale has taken place, the property itself no longer vests in the Court or the receiver but under S. 51 the sale proceeds are at the receiver's disposal. The sale cannot be set aside on an application by the receiver or the insolvent. 148 I.C. 891=1934 A.L.J. 857=1934 A. 252. "Benefit of the execution"—Meaning of—"Date of admission of the petition"—What is—Amount directed to be refunded to Official Receiver—Right to interest on. (1941) 2 M.L.J. 918= 1941 M.W.N. 852.

DATE OF ADMISSION OF PETITION—WHAT IS.—The Act nowhere states as to which is the date of the admission of the insolvency petition. But there are certain sections in the Act, that afford guidance in determining the date of admission. From a consideration of Ss. 18, 21 and 51, the date on which an applicant is asked to furnish security for his regular attendance in Court can be regarded as a date of admission of the insolvency petition. 1936 L. 885. In admitting an insolvency petition all that the Court is concerned with is to see wnether the petition itself complies with the requirements of the law. If it does, then it admits it. It cannot be said that such a petition must be deemed to have been admitted only on the date when the costs of publishing the notice of the petition are paid. Where properties are sold in execution in separate lots, the sale of each lot is complete when the whole of the balance of the purchase money of each lot is deposited in Court. There is no justification for holding that the assets cannot be deemed to be received by the Court until the purchase consideration for all the lots have actually been deposited into Court. The decree-holder is bound to return to the Official Receiver under S. 51 the purchase price for that lot in respect of which the balance has been paid only after the admission of the insolvency petition. He can, in so refunding, deduct from the amount merely the costs of the execution proceedings and not the costs of the suit out of which the proceedings arose. The Court can, in a case of this kind, direct the refund to be made with interest under its inherent powers. 55 L.W. 436= (1942) 2 M.L.J.178. *See also* (1941) 2 M.L.J. 918.

Secs. 51 and 52 : SCOPE AND EFFECT OF.—S. 51 qualifies S. 52 which must consequently be read in conjunction with S. 51. If no notice is received by the executing Court and that Court in ignorance of the insolvency proceedings holds an execution sale, the sale though held after the admission of the insolvency petition will not be void unless the purchaser in execution purchases the property with knowledge of the insolvency proceedings. But the benefit accruing from the sale, namely, the sale proceeds, will be entirely at the disposal of the Insolvency Court for distribution among the creditors, if they are real sed after the date of the admission of the insolvency petition. The Insolvency Court can call upon the decree-holder to deposit the sale-proceeds if he has drawn the same out of Court towards the decree-debt. I.L.R. (1937) Nag. 249=1937 Nag. 193. *See also* 1939 Mad. 433=(1939) 1 M.L.J. 429 ; (1938) 1 M.L.

(2) Nothing in this section shall affect the rights of a secured creditor in respect of the property against which the decree is executed.

(3) A person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquired a good title to it against the receiver.

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J. 471 ; I.L.R. 1938 M. 1063; (1940) 2 M.L.J. 388=1940 Mad. 932.

S. 52 does not apply to a case, which dealt with property which has not been brought to sale; under S. 51, however, the words "benefit of the execution" referred to the net realisations after paying costs and charges and the decree-holder was entitled to the charge claimed by him. 38 L.W. 389=1933 M. 703=65 M.L.J. 402. Before adjudication, money realised by the Court cannot be retained but must be disposed of according to law. 33 I.C. 723=14 A.L.J. 246. *See also* 49 I.C. 480=23 C. W.N. 461; 42 M.L.J. 361 ; 1928 S. 165. The section applies to a case where the decree is against a person against whom insolvency proceedings are pending and who has subsequently been adjudicated an insolvent. So where no insolvency proceedings are pending against the judgment-debtor, and it is the decree-holder who is subsequently adjudicated an insolvent and there is a dispute not between the decree-holder and the judgment-debtor but between the original decree-holder and his assignee, the section is inapplicable. 1929 L. 805. Where an application by a creditor for adjudication as insolvent of his debtor, relying on sale in execution of his decree is dismissed, act of insolvency, namely, sale in execution of decree, having taken place subsequent to the filing of petition, and where after confirmation of sale second application is made and is granted, second insolvency proceeding can not be regarded as continuation of the first, but is an entirely fresh proceeding based on a different act of insolvency. 1930 R. 265 (1). Stay of sale in execution cannot be ordered on an application by an *ad interim* receiver who has been ordered to take possession of insolvent's property. 31 P.L. R. 944=1930 L. 970;1937 Nag. 193=I.L.R. (1937) Nag. 249. An application by the receiver for the sale proceeds is necessary. 9 P. 945. Assets in the custody of the Court—Application for payment out—Adjudication—Rights of Receiver. 1931 S. 164. Attachment by creditor—Effect of—Subsequent insolvency of debtor—Rights of creditor. 1933 N. 229=29 N.L.R. 303.

Sec. 51 (2).—Where money was deposited to avert an attachment before judgment but the debtor was adjudicated prior to decree, the creditor has no charge over the deposited money. 31 I.C. 573=19 C.W.N. 1200.

Sec. 51 (3)—EFFECT ON EXECUTION SALE OF INSOLVENCY PETITION DECISIONS NOT UNIFORM. —The words "the property of a debtor" in S. 51 (3) read with the heading of the section, must mean only the property of a person which has been sold previous to adjudication, the "transaction" being the sale. All sales both before and after the presentation of a petition but before adjudication by the Court are protected so far as passing a good title to a purchaser is concerned. I.L.R. (1938) Mad. 1060=1938 Mad. 449=(1938) 1 M.L.J. 471. *See also* 55 L.W. 119=(1942) 1 M.L.J. 283 ; 1938 Mad. 718=(1938) 1 M.L.J. 781. S. 51 (3) applies even to cases in which there have been auction sales and purchases of debtor's properties after their adjudication. The words 'in all cases' occurring in sub-S. (3) of S. 51 are wide and includes sales both before and after adjudication. 1940 N.L.J. 505=1940 Nag. 414, *See also* (1942) 1 M.L.J. 283. S. 51 (3) does not apply to a purchase in execution after adjudication which vests the property in the Official Receiver. Where subsequent to the final decree and order for sale in a mortgage suit the mortgagor is adjudicated insolvent but owing to ignorance of the insolvency the Official Receiver is not brought on the record in execution, and the property is purchased at the execution sale by a *bona fide* purchaser, the purchaser does not get a good title to the property as against the Official Receiver or a purchaser from the latter subsequent to the sale in execution. It makes no difference that the decree is a mortgage decree and not a money decree. The fact that the execution purchaser buys the property in good faith and without knowledge of the insolvency cannot protect his purchase under S. 51 (3), as this provision has reference to a stage prior to the adjudication. 49 L.W. 383=1939 Mad. 433=(1939) 1 M.L.J. 429. *See also* (1938) 1 M.L.J. 471. S. 51 (1) and (3) should not be restricted to sales in execution of decrees passed in "suits" in the technical sense, but should be held to apply to sales in execution in general including a sale in execution of an award by the Registrar or the Arbitrator under the Madras Co-operative Societies Act. A sale in execution of an award under the Co-operative Societies Act therefore gives a good title to the purchaser who in good faith purchases the property. 52 L.W. 454=1940 Mad. 932=(1940) 2 M.L.J. 388. *See also* 1938 Mad. 449. A purchaser at an execution sale of the debtor's property with knowledge that an insolvency petition for adjudication of the debtor has been admitted cannot be said to be acting otherwise than in good faith, when the sale was sanctioned by the Court. Where the executing Court with knowledge of the insolvency petition refuses to stay the sale and orders the sale to take place, the purchaser cannot be expected to doubt the correctness of the Court's order. A purchase made on the faith of a Court's order negatives any inference of bad faith, which knowledge of the debtor's insolvency standing alone might possibly justify. 59 M. 928=1936 M. 819=71 M.L.J. 170. *See also* 48 L.W. 279 =1938 Mad. 906=(1939) 1 M.L.J. 705. Purchaser of insolvent's property from *bona fide* Court auction purchaser, always gets a good title, even though he himself may have knowledge of

Duties of Court executing decree as to property taken in execution.

52. Where execution of a decree is issued against any property of a debtor which is saleable in execution and before the sale thereof notice is given to the Court executing the decree that an insolvency petition by or against the debtor has been admitted, the Court shall, on application, direct the property, if in the possession of the Court, to be delivered to the receiver, but the costs of the suit in which the decree was made and of the execution shall be a first charge on the property so delivered, and the receiver may sell the property or an adequate part thereof for the purpose of satisfying the charge.

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the insolvency of the debtor. 35 I.C. 643. Where, pending an execution petition, the judgment-debtor was adjudicated an insolvent, but the executing Court in ignorance of the same ordered sale of the properties which were purchased by the decree-holder himself, the execution proceedings are a nullity and the question of good faith of the purchaser is not relevant. 28 Nag. L.R. 317. Court has power to annul sale and order re-delivery, even when it had previously confirmed the sale and given delivery of possession to purchaser. 146 I.C. 252=1933 P. 619. A sale after notice to executing Court of the fact of insolvency confers no title on a purchaser. 34 I.C. 829=33 M.L.J. 611. Where judgment-debtor applied for adjudication before sale in execution. Court should stop sale and the property has to be handed over to the receiver. 30 Bom.L.R. 455=1928 B. 177 (1).

Secs. 51 and 18: INSOLVENCY PETITION—DATE OF ADMISSION.—Where a petition for insolvency was presented on the 8th March, 1934 and was ordered to be entered in the Court register on the 13th March, 1934, when the Court also passed an order directing the insolvent to furnish security for his appearance. *Held*, that the petition was admitted on the 13th March, 1934, if not earlier. 42 P.L.R. 29=1940 Lah. 166.

Sec. 52.—Scope of, *see* 34 L.W. 908; 59 M. 928=71 M.L.J. 170. S. 52 applies to a state of affairs antecedent to what is contemplated by S. 51 (1). 14 L. 724=34 P.L.R. 1076. S. 52 will have no application when a receiver is not appointed of the insolvent's property and so an executing Court while executing a decree passed against the insolvent need not stay its hands. 1938 Cal. 503. In an application under S. 52, where the conditions laid down by the section are fulfilled, the executing Court has no other duty to perform than to direct the delivery of the property concerned to the O. R. It is not competent for the Court to investigate or decide questions of title as between the insolvent judgment-debtor and any other co-judgment-debtor (though he be his son) or stranger. 41 L.W. 698=68 M.L.J. 681. An application under S. 52 has got to be made to *the Court which is executing the decree* and it is that Court alone which can direct the property to be delivered to the receiver in order that a sale may be held. The Insolvency Court has no jurisdiction to make an order for sale under the section. 38 C.W.N. 1122. *See also* 1935 R. 317. Applicability of section to money decree-holder —Security obtained—Insolvency, effect of. *See* 92 I.C. 497=1926 M. 194. Under S. 52 the Court executing the decree is to deliver possession to the receiver and no one else; and where there is no receiver in existence till after the sale in execution of a decree, the Court executing the decree cannot be said to have acted under S. 52. 1933 A. 559=1933 A.L.J. 1342. Where the property has been sold before the order of adjudication and before the executing Court had knowledge of the insolvency proceedings, and there is no application to have the property delivered to the receiver, the executing Court has jurisdiction to continue the execution proceedings. I.L.R. 1936 N. 41=1936 N. 117. *See also* 40 C.W.N. 336. Suit against Hindu father and sons—Attachment before judgment of family property—Decree against father and subsequent insolvency of father—Right of Official Receiver to claim delivery of sons' shares: *see* 156 I.C. 205=1935 M. 427. The executing Court is not bound to stay its hand if no receiver to whom the attached property can be made over is in existence at the time of the sale. 39 C.W.N. 1289=1935 C. 612. The mere admission of an insolvency petition does not debar a creditor from executing his decree against the debtor. But where execution of a decree has issued against any property of a debtor and before a sale thereof notice is given to the executing Court that an insolvency petition has been admitted, the executing Court is bound under S. 52, on application, to direct the property attached to be delivered to the receiver. 39 C.W.N. 1289=1935 C. 612. *See also* 40 C.W.N. 336. Where a judgment-debtor is adjudged insolvent after the sale of his property in execution of the decree and before its confirmation, and the executing Court confirms the sale before receipt of the order staying its confirmation, the decree-holder is entitled to get the sale proceeds. 41 P.L.R. 706=1940 Lah. 37. *See also* (1939) 1 M.L.J. 705. The only order which the Court can pass under S. 52 is that the property be delivered to the receiver, so that it follows that the order can only be made if the receiver has already been appointed and clothed by the Insolvency Court with power to take possession of the insolvent's property. (1933 C. 150 and 1933 C. 561, Dist.) 39 C.W.N. 1289=1935 C. 612. Mortgage in favour of decree-holder—Execution during pendency of appeal—Later adjudication of judgment-debtor as insolvent—Validity of mortgage. 32 P.L.R. 180=1931 L. 298. Section refers to "property" which would include both movable and immovable property. 95 I.C. 705; 19 S.L. R. 35=1926 Sind 199. Immovable property

53. Any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged insolvent [1][on a petition presented] within two years after the date

Advance of voluntary transfer.

LEG. REF.

[1] Inserted by Act X of 1930, S. 6.

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attached by prohibitory order of Court under O. 21, R. 54, C. P. Code, does not fall within the purview of S. 52. "Receiver" in the section does not include *interim* receiver. *See* 1930 L. 851. But *see* 33 P.L.R. 790 and 34 P.L.R. 41 =1933 L. 192; 148 I.C. 417=1934 A. 444. 1932 Mad. 95=62 M.L.J. 68; 50 M.L.J. 665; 1932 Lah. 471=14 Lah. 63. S. 52 clearly contemplates the presentation of an application under that section before the adjudication of insolvency, and, therefore, it appears clear that the word 'Receiver' must in such a case include an *interim* receiver, who would be the only receiver in existence before adjudication. The *interim* receiver is, therefore, entitled to ask to be placed in possession of the property attached in execution of the decree-holder's decree and he is entitled to sell that property. 31 N.L.R. (Supp.) 212= 161 I.C. 661=1936 Nag. 120. S. 52 enables even an *interim* receiver to get possession of the property of the debtor which is subject to attachment, and when he applies to the executing Court, the latter is bound to direct the property of the debtor in the custody of the Court to be delivered over to him. And as necessary implication, the Court is likewise bound to stay the sale of the attached property in execution in view of the peremptory provisions of S. 52. But a sale in execution in defiance of S. 52 cannot be held to be null and void. The sale confers a good title on a purchaser in good faith, although the sale proceeds would have to go to the receiver for the benefit of creditors genecally and not merely for the benefit of executing creditor. There is nothing in S. 52 which qualifies the very emphatic language of S. 51 (3). 59 M. 928=1936 M. 819=71 M.L.J. 170. *See also* 1936 Nag. 120. S. 52 places on the executing Court the duty to deliver the property to the receiver if an application is made in that behalf. But if no such application is made, the executing Court is bound to proceed with the sale of the property, and its power to sell remains unaltered and unaffected. An application made by the judgment debtor insolvent for stay of sale is not in conformity with the requirements of S. 52 of the Act. 48 L.W. 279 =1938 Mad. 906=(1939) 1 M.L.J. 705. *See also* 1940 Lah. 37. "*Cost of the execution*" should have a liberal interpretation so as to include the costs of the suit brought under O. 21, R. 63 of the Code, in which the creditor succeeded in having the order under R. 60 releasing the property from attachment, set aside. 1929 C. 524. The true construction is that S. 52 refers to the case of attachment of all kinds of property and is not confined to movable property alone. 1929 C. 524. Before an executing Court can stay sale of judgment-debtor's property, under this section, two conditions must be satisfied. They are, firstly, that notice should have been given to the executing Court of the admission of the insolvency petition and secondly that the application should haue been made to that Court for delivery of the property to the receiver. 1930 L. 851; *see also* 1935 R. 317. Where a sale is held notwithstanding the apprisement of insolvency proceeding the sale is void. 60 C. 696= 37 C.W.N. 392=1933 C. 561. The object of this section is not to give an advantage to the insolvent but to prevent individual creditors deriving unfair advantage over other creditors and to place the property in the hands of a Receiver for equal distribution to the general body of creditors. Property attached in execution of decree is property in possession of the Court and the only order which the Court can make on an application under S. 52 is that such property be delivered to the receiver if such receiver has been already appointed; if no such receiver has been appointed, the Court should proceed with the execution but hold the sale proceeds subject to such orders as the Insolvency Court may pass in the matter. 1930 P. 406 (2). The receiver referred to in the section is not only the receiver appointed after adjudication; the term includes interim receivers. The section, as now amended, contemplates the presentation of an application, not, as it used to do, after adjudication, but at an earlier stage, *i.e.*, after an insolvency petition has been admitted. At that stage, the only receiver that can be in existence for the purpose of applying is an *interim* receiver. (50 M.L.J. 665, Diss.) 34 L.W. 908=1934 M.W.N. 1251. *See also* 138 I.C. 821=1932 L. 471. Immovable property, which has not been attached and which is sought to be sold on the ground that the decree created a charge upon it, cannot be said to be property "in the possession of the Court" within the meaning of S. 52, and an *interim* receiver cannot apply to have the sale stopped. (62 M.L.J. 68, Cons.) 56 Mad. 453 =64 M.L.J. 119. Immovable property attached by an executing Court is in *custodia legis* and must, therefore, be deemed to be in possession of the Court within the meaning of S. 52. 31 N.L.R. (Supp.) 212=1936 Nag. 120. *See also* 39 P.L.R. 204. Under S. 52, a creditor is entitled to the *costs of the suit as also the costs of the execution, and he has a first charge* for the said amount on the property released by the executing Court to the receiver. If the receiver sells only a portion of such property or only some of the many items of such property, the whole of the sale proceeds or such portion as will be sufficient to discharge the charge will have to be paid to the creditor, and not merely a proportionate amount. 43 C.W.N. 421.

S. 53: SCOPE.—S. 53 does not deal with the jurisdiction of the Insolvency Court but only lays down certain rules of law affecting those transactions which fall within its scope; it does not control or restrict the jurisdiction conferred upon the Court by S. 4 to decide all questions of title. The insolvency Court has jurisdiction to decide a question of title raised on the basis

of the transfer, be voidable as against the receiver and may be annulled by the Court.

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of a transfer which took place more than two years prior to his adjudication. 15 Lah. 294= 1934 Lah. 365. *See also* 1937 Mad. 32; 1939 A. 431=182 I. C. 497. The words "any transfer" n S. 53 would include a transfer made by a decree, and such a transfer can, therefore, be annulled on the ground that it was fraudulent. 162 I.C. 659=38 Bom.L.R. 255=1936 Bom. 176. S. 53 applies not only to voluntary alienations, but also to transfers *in invitum*. 1940 M. W.N. 259=1940 Mad. 749. S. 53 makes it incumbent on the Court to annul every transfer of property by an insolvent if he is adjudged an insolvent within two years of the transfer, provided it finds that such transfer was not made in good faith or for valuable consideration. Where therefore the transfers by the insolvent are upheld as against some creditors in objection under O. 21, R. 58 or in a suit under O. 21, R. 63,the other creditors are not deprived of their right to move the Insolvency Court to proceed under S. 53. 1933 Nag. 365. It is doubtful whether an objection to a transfer based upon S. 64, C. P. Code, is properly within the scope of an application under either S. 53 or S. 4 of the Provincial Insolvency Act. 69 C.L.J. 329= 43 C.W.N. 575=1939 Col. 503. By virtue of the important words being exactly the same in S. 55, Presidency Towns Insolvency Act, as in S. 53, of this Act, if an hypothecation bond comes within the meaning of S. 55, Presidency Towns Insolvency Act, it would certainly be void under this section. 1933 R. 424. Section not controlled by S. 28 (7); 1928 L. 361 (F.B.). Section is wider than S. 53 of the T. P. Act. The latter requires proof of intent to defeat or delay creditors, which is not required by this section. 39 A. 95=37 I.C. 684. *See also* 1933 M.W.N. 1019. The Insolvency Court, under the terms of this Act, is the only appropriate tribunal which can determine the question raised under S. 53. 58 C. 1352. Section covers cases of transfers to persons other than creditors. 62 I.C. 924. But *see* 1933 M. 185 =64 M.L.J. 382; 1933 L. 43=33 P.L.R. 1058. S. 53 contemplates only such property as is available to the creditors or the Official Receiver for the purposes of insolvency, and as a colony land governed by the Punjab Act V of 1912 is excluded from that category, its transfer by the Government tenant could not be challenged by the O. R. 42 P.L.R. 144. Regarding *conveyance to trustees*, *see* 50 M. 815=53 M.L.J. 742. "*Creditor*," meaning of. 1928 R. 166. A British Court cannot annul transfer of property situate in a foreign country. 18 N.L.R. 93=1922 N. 221. The word "*voluntary*" in the marginal note to the section means gratuitous or without consideration. 30 Bom.L.R. 893=1928 B. 341. Section does not operate as a bar in the case of a fictitious transfer. 1933 L. 197 (1)=143 I. C. 630. Where a suit for specific performance of a contract entered previous to his insolvency is brought against an insolvent in a Court other than the Insolvency Court, such a Court has no jurisdiction to determine the question of fraudulent preference. 1928 M.W.N. 617= 1928 M. 860. *See also* 5 O.W.N. 776. As to *what is voluntary transfer*, see also 101 I.C. 742 =1928 L. 750. S. 53 does not impliedly deprive the debtor or the creditor of his right to have transfers set aside by instituting a suit before an ordinary tribunal within the longer period of limitation. 115 I.C. 330=1929 S. 94. Where the vendees are not shown to be connected in any way with the insolvent and *prima facie* from the evidence the transaction does not seem to be a colourable one, nor does any question of "*fraudulent preference*" arise, the sale not having taken place within three months before adjudication, the case comes under S. 53 and the sale should not be annulled. 1930 L. 135. S. 53 applies where the existence of transfer is admitted; on the other hand S. 4 applies if the transfer or the existence of right claimed by the objector is denied by receiver. 123 I.C. 539=1930 L. 180. A right of pre-emption is merely one of substitution and not of re-purchase and when the original transfer has been found to be fictitious and has been set aside, the title of pre-emptors cannot be sustained; 15 L. 319=148 I.C. 1013=1934 L. 101 (2). A partition among the members of a joint Hindu family is a transfer of property within the purview of S. 53: 31 P.L.R. 245= 123 I.C. 286. So also a transfer by a Court-sale in execution. 1931 M. 597 (1)=135 I.C. 544; 38 Bom.L.R. 255=162 I.C. 659=1936 B. 176. A deed of release accompanied by mutation and transfer of possession is a transfer. Where such transfer has been entered into by the insolvent more than two years before the adjudication, the Ins. Court has no power to annul the same. 123 I.C. 217=1930 O. 314. If a person tricks the would-be insolvent into giving him a mortgage by a representation that he would settle with his other creditors, the transfer can be annulled under S. 53: 1930 R. 315. If a creditor takes the whole, or substantially the whole, of the property of his debtor in payment of a past debt and knowing that there are other creditors, he cannot be said to be acting in good faith. 1933 L. 43=33 P.L.R. 1058. Where in a case of joint insolvency, one of the joint insolvents alone receives his discharge and not the other, the insolvency proceeding cannot be said to have come to an end, and an application for annulment of a transfer made by the discharged insolvent prior to his insolvency is, therefore, maintainable under S. 53. 14 Rang. 704=1937 Rang. 276. When there is want of good faith in respect of a transfer, the fact that valuable consideration has passed will not save the transaction. Such a transaction by an insolvent within two years of the presentation of the petition for adjudication is voidable as against the Official Receiver and may be annulled by the Court. 54 L.W. 173=(1941) 2 M.L.J. 212. *See also* 1941 A.L.J. 387=1941 All. 316. The fact that an insolvent and his fellow conspirators may not have had in mind that a transaction would operate to defeat his creditors and acted merely with the object of putting the property

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beyond the reach of the insolvent's son for the benefit of the insolvent's mistress does not make the transaction any the less a fraud on the creditors. In transferring the property the insolvent must be held to be really defeating his creditors. 1941 M.W.N. 818=54 L.W. 173=(1941) 2 M.L.J. 212.

TRANSFER TO CREDITOR— TRANSFEREE NOT AWARE OF OTHER CREDITORS—VALUE OF PROPERTY NOT GREATER THAN AMOUNT OF DEBTS—IF FOR VALUABLE CONSIDERATION AND BONA FIDE. —12 R. 625. Where a mortgage is effected by a debtor not only to secure debt already due to the mortgagee but also to secure a fresh loan, and the mortgagee is fully aware of the embarrassed condition of the debtor and does not act in good faith, the mortgage can be annulled even in respect of the fresh loan. To such a case though S. 54 may not be applicable, action can be taken under S. 53. 155 I.C. 611=1935 M. 246. In cases not falling under S. 54 a preferential transfer of property to one creditor in satisfaction of an existing debt due to him is not fraudulent as to other creditors, although the debtor in making the transfer intended to defeat the claims, and the transferee had knowledge of such intention, if the only purpose of the latter is to secure his own debt and the property not worth materially more than the amount of his debt. 183 I.C. 635=43 C.W.N. 575=1939 Cal. 503.

ENQUIRY.—The O.R. is not even a Court but a mere executive officer. He is not entitled to take evidence in an enquiry under S. 53 though ordered by the District Judge: So limited is his power and so subject to interference that any person can ask the Court to modify or reverse his decision. 1933 M. 471=38 L.W. 896. In an action to set aside a sale under S. 53, it is not enough to pick out a few circumstances and to find explanations for them and then deduce therefrom that the creditor has discharged his burden of proof. But it is essentially necessary that the Court should consider all the facts in relation to each other and weigh them as a whole and then come to a conclusion. 1938 Mad. 370. The Court ought to decide a challenged transfer and not derive the parties to a separate suit. 37 A. 252=28 I.C. 573. The District Judge cannot delegate an enquiry to a Subordinate Judge. 36 A. 549=26 I.C. 32 ; 33 I.C. 188. *See also* (1937) 1 M.L.J. 654; nor to the receiver, who in fact is a party to the proceedings. 35 I.C. 875. It is only the receiver who can set the Court in motion. If he refuses, the creditor can move in the matter. 42 M. 322=52 I.C. 519=1924 M. 345. Report of receiver —Question of annulment—Need for enquiry. 58 C. 1352. The enquiry must not commence on a mere report of the receiver, but must be preceded by a properly stamped petition. 52 I.C. 761. An enquiry under S. 53 begun prior to the annulment stops short where it is on the date of the annulment, but the Court has the power, at the time of annulling the adjudication, to give a direction to continue the enquiry. 1932 Mad. 731=63 M.L.J. 414. The fraudulent nature of the transaction in insolvency cases can scarcely ever be proved by direct evidence. The petitioning creditor or the receiver has to rely on circumstantial evidence in most cases, and usually that is to be found only in the conduct of the parties. It is therefore more than ever the duty of the Court carefully to examine all the surrounding circumstances, and in any case if a Judge considers that the burden of proof lies on a particular party it is incumbent on him at least to examine the facts on which that party's case is based. 175 I.C. 430=1938 Nag. 216. A transferee whose transfer is challenged by the receiver under S. 53 is entitled to raise defences pertinent to the enquiry. It could not be said that the plea that the sole creditor of the insolvent is a bogus one and that the insolvency proceedings are a nullity is not a pertinent defence by a transferee when his transfer is challenged under S. 53. The pleas have a direct bearing on the proceedings under S. 53 and the Court is bound to investigate the question. I.L.R. (1940) Nag. 564=1940 N.L.J. 420 =1940 Nag. 393.

A fresh order at the time of annulment vesting the property in the O. R. may imply a direction to him to continue an enquiry (under S. 53 or S. 54) on which he had already embarked, but it would certainly be more satisfactory from the legal point of view if such a freshdirection is given in express terms. *Obiter.*— 1932 M. 731=63 M.L.J. 414. Motive of insolvent not material. 42 M. 520. The proceedings are to be conducted in the name of the receiver and after his appointment only. Notice of the grounds of attack of the transfer must be given to the transferee. 42 I.C. 845 ; 44 I.C. 168 ; 42 M. 322. The enquiry should be conducted as in a regular suit and not be summarily disposed of. 39 A. 391=42 I.C. 841 ; 41 I.C. 411.

BURDEN OF PROOF.—The *onus* of proving the fraudulent nature of the transaction lies on the petitioner and not on the transferee. 58 I.A. 115=9 R. 170=60 M.L.J. 652=1931 P.C. 75 ; 12 R. 625 ; 1934 Pesh. 126; 14 Pat.L.T. 739=1933 P. 564 (1); 11 O.W.N. 601=1934 O. 368; 33 P.L.R. 1058=1933 L. 43; 1935 C. 650. To enjoy the protection under S. 53 the purchaser or an incumbrancer must not only show that the transfer was for valuable consideration but it must also be proved that it was made in good faith. Good faith is necessary only on the part of the transferee. It is not required that the transferor should act in good faith also. I.L.R. (1938) 2 Cal. 275=42 C.W.N. 554=1938 Cal. 417; 1941 All. 316; 1938 B. 449. *See also* 1941 All. 603; (1941) 2 M.L.J. 212. The presumption under the English law as to the intent when the whole of property of the insolvent is transferred is not applicable under this Act, which specifically sets forth that a certain intent is necessary to bring the act within the meaning of the statute. 1933 R. 216; 1934 R. 208. Where the receiver seeks to set aside a transfer under S. 53, the onus is upon him to prove that it was not made in good faith and for valuable consideration. 37 C.W.N. 675=1933 C. 689 ; 159 I.C. 975; 1938 All. 555=1938 A.L.J. 878; 1937 Nag. 117; 39 P.L.R. 1025=1937 Lah. 801 ; 17 Pat. L.T. 626=164 I.C. 808; 38 P.L.R. 965. A transaction cannot be annulled on mere suspicion (60 I.A. 362, Expl.). 38 P.L.R. 212; 41 C.W.N. 368. But if the *prima facie* case made out by him remains unanswered or if the answer given

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is such as to fall short of creating any serious doubt in the mind of the Court, then the burden of proof laid upon the O.R. is discharged. 14 R. 704. Where the burden of proving good faith and valuable consideration is wrongly placed on the mortgagee, though it is an erroneous and unjustifiable course, the appellate Court will not merely on that ground reverse the decision, when it is not satisfied that any case of prejudice has been made out as a result of the reversal of procedure in taking evidence. 40 C.W.N. 731. On an application in an insolvency proceeding to set aside a transfer made by the insolvent, the burden of proving want of consideration is on the person alleging it. 38 P.L.R. 965. Under S. 53 the burden of proving want of good faith on the part of the transferee is on the receiver seeking to set aside the transfer. 69 C.L.J. 329=43 C. W. N. 575=1939 Cal. 503. *See also* 1937 Rang. 276=14 Rang. 704; 39 P.L.R. 1025=1937 Lah. 801. The burden of proof in an application to set aside a fraudulent transfer under S. 53 is not on the transferee, but upon the Official Receiver to establish that the transfer was not *bona fide* and for value and was in consequence voidable as against him. It is clear that the receiver has to prove not that the insolvent was acting fraudulently or in bad faith, but he has to prove that the transfer gave no value or consideration for the transfer, and if there was consideration for the transfer, the receiver has then to prove absence of good faith on the part of the transferee. It is not necessary for the validity of the transfer that both parties to the transaction should act in good faith. Mere fraud on the part of the insolvent is not enough. What the section requires is fraud or want of good faith on the part of the transferee before the receiver can get the same annulled. In the case of a transfer in favour of a minor, the fraud if any, on the part of the guardian of the minor cannot be deemed to be the fraud of the minor under S. 53. A transferee cannot be fraudulent by deputy. The rule as to the onus is the same in the case of S. 55 of the Presidency Towns Insolvency Act, which is exactly similar in terms to S. 53 of this Act. I.L.R. (1939) Bom. 1=40 Bom.L.R. 884=1938 Bom. 449. *See also* 1937 Lah. 801. Where a Court holds that a creditor has no *locus standi* to present a petition for annulling a transaction under S. 53 because it violates the provisions of S. 54-A, the Court has no jurisdiction to give a decision on the application on merits and the decision given is *ultra vires*. 1930 Rang. 332 (1). Where no fraud is proved, the transaction must be taken to be one of a real mortgage. 9 Rang. 170=58 I.A. 115=60 M.L.J. 652 (P.C.). Where a husband transferred property to his wife for a grossly inadequate consideration and the circumstances showed that there was an intention to defeat creditors. *Held*, that the plea of fraudulent preference must be upheld. 150 I.C. 240=35 P.L.R. 74=1934 Lah. 271 (1). *See also* I.L.R. (1938) Lah. 502=40 P. L. R. 1048=1937 Lah. 859 (transfer in lieu of deferred dower). 38 P.L.R. 67 (gift by registered deed by husband to wife). For a man practically in a state of insolvency to alienate his last remaining property, and that only an expectancy to a relative for a sum only part of which was paid would indicate that there was bad, faith and the transaction must be set aside under S. 53. 41 P.L.R. 190=1939 Lah. 322. Where the sale by the insolvent sought to be set aside takes place only 11 months before the application for insolvency and the circumstances give rise to presumption as to want of good faith on the part of the vendee, it is for the vendee and the insolvent to rebut the presumption and prove that the insolvent's financial position was sound at the time of the sale and both of them acted in good faith. 173 I.C. 531=1937 Lah. 441. A deed is void against creditors when the debtor is in a state of insolvency or when the effect of the deed is to leave the debtor without the means of paying his present debts. 1933 Rang. 424. The fact that the creditor was not ignorant of the embarrassed circumstances of his debtor and that there may not be enough left after a transfer in his favour to meet the claims of the other creditors in the event of an adjudication is not sufficient to prove *mala fides*. The considerations that apply for determining *mala fides* under S. 54 are different from those that determine the question under S. 53.[50 Mad. 948, Dist.] 1933 M.W.N. 1049; 68 M.L.J. 57. 1935 M. 250. In the absence of a receiverappointed in the case, the scheduled creditor could apply for setting aside a transfer under Ss. 53 and 54 and when the Insolvency Court entertains such an application, it must be deemed that it had granted him the necessary leave. I. L. R. (1940) Nag. 564=1940 Nag. 393. Registered gift by insolvent to wife—Debt's mostly incurred subsequently—Gift, not fraudulent. 163 I.C. 956=1936 Lah. 593=38 P.L.R. 67. In the vicissitudes of business, firms do sometimes part with their property to get cash or satisfy old creditors and thus keep their credit in the market. But this does not necessarily imply that they are acting *mala fide*, nor does it lead to the conclusion that the transferees had become aware of their difficulties. 1934 Pesh. 126. Where a transfer is shown to have taken place directly after the insolvent had been served with a summons and is one of two transfers by which he got rid of all his immovable properties, and the other has been admitted by the transferee to be a fraudulent one, and the transfer was to a mere child, the circumstances certainly require a very full explanation to a void the inference of fraudulent transfer. 1936 Rang. 506. An insolvent owed to *B* certain sum of money. *C* who was agent of *B* and was in a dominating position obtained title-deeds from an employee of the insolvent by way of equitable mortgage regardless of the solvency of the debtor or the claims of other creditors whom *C* put off by a false assurance that their money was safe. *Held*, that the onus was in the first instance on *B* to prove his title to the properties transferred. *Held*, *further*, that the transaction was entirely devoid of the element of good faith which is a necessary ingredient of the provisions of S. 53. 190 I.C. 643=52 L.W. 757=1940 P. C. 211 (P.C.). Where the debtor executes a mortgage in favour of a creditor as a result of pressure which the mortgagee who is a *bona fide* creditor of the insolvent brings to bear upon

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him, there is no case of fraudulent preference. So long as there is a threat of legal proceedings to avoid which the debtor makes the alienation and so long as his dominant motive is not to fraudulently prefer a particular creditor the validity of the alienation cannot be challenged under Ss. 53 and 54 especially when the existence of the debt is not disputed. 50 L.W. 771=1940 Mad. 228=(1940) 1 M.L.J. 786.

RES JUDICATA.—A decision of an Insolvency Court setting aside insolvent's transfers for want of valuable consideration under S. 53 operates as *res judicata* and hence such transferees are not entitled to prove their debts before the Official Receiver as unsecured creditors as regards the unproved consideration. 41 P.L.R. 575=1939 Lah. 145. No doubt according to S. 5, Provincial Insolvency Act, the provisions of the C. P. Code, are applicable subject to the provisions of Provincial Insolvency Act. But the Insolvency Act provides for setting aside alienations under Ss. 53 and 54 on different grounds. Hence the dismissal of an application under S. 53 does not bar the subsequent application under S. 54 under C. P. Code, S. 11, Expl. 4, particularly when the Official Receiver is not proved to be aware of the grounds of his second application at the time when his first application was presented. 39 P.L.R. 914=1937 Lah. 668. *See also* 1937 Rang. 27.

TRANSFER BY A TRANSFEREE OF THE INSOLVENT cannot be attacked by O. R. under this section. 1927 Mad. 59=51 M.L.J. 228; 1930 Nag. 34. *See also* 1932 M.W.N. 821; 1935 All. 671; 52 I.C. 761; 1932 M.W.N. 821. Where a transfer by an insolvent is not *bona fide*, the sebsequent transfers by the transferees also fall. 1938 Mad. 370. A *bona fide* transferee who took a transfer for value from one whose transfer offends S. 53 may invoke the protection of the equitable rule in favour of transferee for value without notice, only if he parted with consideration subsequent to the date of the transfer by the insolvent to the intermediate transferor. 46 L.W. 39=1937 Mad. 872=(1937) 2 M.L.J. 378. *See also* 1937 O.W.N. 234=1937 Oudh 129. It cannot be said that a transferee from an insolvent can avoid the operation or S. 53 by merely passing on the property to some other person. The original transfer made by the insolvent is voidable under S. 53 and if once it is declared void as against the O. R., the subsequent transfer by the transferee cannot stand and can be annulled under S. 4 if not technically under S. 53. 1935 Lah. 368; 1935 All. 671; 38 Bom.L.R. 255=162 I.C. 659=1936 Bom. 176. *B* executed a sale-deed of his house in favour of his own brother. *R*, who in turn sold it to one *S*. *B* was subsequently adjudicated insolvent, and the receiver made an application to the Court under S. 53 of the Provincial Insolvency Act for avoidance of the transfers. The Court found that the sale by *B* in favour of *R* was fraudulent, but that the transfer by *R* in favour of *S* was not fraudulent, *S* not having been proved to have acted in collusion with *R*. *Held*, that as the fraud which was intended by the insolvent and his brother had been completely successful in respect of the house conveyed to *S*, the insolvent could not recover the property, nor could the receiver, who could not claim any better rights than the insolvent, recover the price of the house sold from the insolvent's brother. 166 I. C. 210=1937 O. 129.

"TWO YEARS."—A transfer within two years from presentation to a wrong Court but more than two years from presentation of insolvency petition to a proper Court does not come within the operation of the section. 5 L.W. 123=36 I. C. 828; 1930 M. 782; 37 Bom.L.R. 478=1935 B. 316. *See also* 51 L.W. 429=(1940) 1 M.L.J. 647. In the case of a mortgage executed by a debtor requiring registration, the date of transfer for purposes of Ss. 53 and 54 is the date of its registration, because without registration the transfer is inoperative. But in the case of document whose registration is refused in the first instance but ordered on appeal, the date of registration is not the date of the appellate order directing registration but the date on which it was first presented for registration, in view of S. 75 (3) of the Registration Act. 48 L.W. 522 =1938 Mad. 801=(1938) 2 M.L.J. 362. *Quaere.*—Whether, when the period of two years prescribed in S. 53 expires on a holiday, the petition can be presented on the next working day of the Court. 1933 M.W.N. 1049. S. 53 applies only to actual transfers. Where the transfer by way of wakf is found to be fictitious, the Court can decide the question of title under S. 4 and two years rule does not apply. 8 O. W.N. 147. The two years is to be reckoned back not from the date of adjudication, but from presentation of petition. 46 C. 991=52 I. C. 747; 49 I.C. 283=35 M.L.J. 296; 5 L.W. 123=36 I.C. 828. But *see* 49 B. 730=88 I.C. 941. *Also* 1928 L. 361 (F.B.); 6 R. 193=1928 R. 148; 97 I.C. 321; 1929 S. 94. But now the Amending Act X of 1930 has made it clear that transfers could be annulled if they are within two years prior to the date of the presentation of the *petition*. It has not introduced a new period of limitation but only clarified the meaning of the old section. So it has retrospective operation. 1930 M. 834=59 M.L.J. 686 (F.B.). *See also* 1932 O. 267; 1932 O. 77. Fraudulent transfer more than two years prior to insolvency can be challenged only in a separate suit under S. 53 of the T. P. Act. 1922 A. 443; 1930 O. 314. *See also* 4 Lah.L.J. 444; 45 M.L. J. 105=1925 M. 641; 45 I.C. 180. But *see* 51 A. 550 (F.B.), which held that, under S. 53 of the Act, the insolvency Court can try a question of title raised on the basis of a transfer which took place more than two years prior to the adjudication. Ss. 51 to 55 do not restrict or purport to restrict the wide jurisdiction conferred by S. 4 (1). They merely enact rules which define the effect of insolvency upon antecedent transactions and which must be followed by Ins. Courts whenever the rules are applicable. *See also* 1933 M. 527=64 M.L.J. 397. A transfer to a few of the creditors for the distribution to creditors *pro rata* is transfer for good consideration. 34 I.C. 602=30 M.L.J. 415. Transfer to wife for dower debt is not fraudulent transfer. 39 A. 95=37 I.C. 684. *See also* 20 I.C. 641=11 A.L.J. 614; 40 P.L.R. 1048=1937 Lah. 859. A transfer effected by decree of Court can also be attacked under this section. 1926 S. 133.

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The O.R. is not bound by the admission of the validity of a mortgage executed by the insolvent by some of his creditors ; nor is he precluded on that account from applying under S. 54 to have it annulled as a fraudulent preference. 1933 L. 354=34 P.L.R. 436. Insolvent owning property under contract to create wakf thereof—Invalid wakf created by him is liable to be annulled—Rights of receiver. 44 C.W.N. 718=1940 Cal. 417. On annulment, the receiver is entitled to take immediate possession of the property and appropriate the income therefrom for distribution among the creditors, although he is not entitled to sell the property. I.L.R. (1940) 2 Cal. 189=44 C.W.N. 718=1940 Cal. 417.

PROCEDURE.—Where a transaction is *ab initio* a nullity, it cannot be formally '*annulled*'. It can only be declared invalid. Annulment applied to voidable transactions such as those lying under S. 53 which are good until avoided and annulled. 161 I.C. 687=1936 R. 54. Application by receiver for annulment of transfer not found entertainable under the section as the transfer was more than two years old—Application may be treated as a suit under S. 53, T. P. Act, and orders passed. 24 A.L.J. 495=1926 A. 470. The proper course in a case where a suit on a mortgage is pending and where the O.R. applies to have the mortgage declared bad under the section is to have the proceedings in the suit stayed. 48 M. 750=49 M.L.J. 203. Where four separate applications under S. 53 are tried together with the consent of parties, it does not follow either that evidence otherwise irrelevant becomes relevant because the applications were heard together, or that because some alienations are found to be fraudulent as being not in good faith the other alienations must necessarily on that account partake of the same character. Therefore in spite of the joint trial of all the applications, the case as regards each alienation must be dealt with separately and the evidence relating to each considered separately. 181 I.C. 225=1938 Mad. 285. S. 53 has clearly no application where the allegation is not that the insolvent has transferred property but that he acquired certain property before his insolvency in the name of somebody else. But the Court can go into the facts and ascertain the true ownership of this property under the powers conferred by S. 4 and declare that the property, though standing in the name of another, is property which has vested in the O.R. and which can be distributed among the creditors. 1935 A. L.J. 1158=1935 A. 952. Where, in a case of joint insolvency, one of the joint insolvents alone receives his discharge and not the other, the insolvency proceeding cannot be said to have come to an end, and an application for annulment of a transfer made by the discharged insolvent prior to his insolvency is, therefore, maintainable under S. 53. 14 R. 704. Cash items of consideration in transfers set aside by the Insolvency Court advanced at the time of execution of a fraudulent transfer cannot be allowed to be proved as a debt as the same is advanced for the purpose of carrying out the fraud. 41 P.L.R. 575=1939 Lah. 145.

SECOND APPEAL.—No second appeal lies from a decision under S. 53. (51 M. 567 ; 52 M. 337 Rel. on.) 54 M. 989=1931 M. 745=61 M.L.J. 820 and 27 N.L.R. 179=1931 N. 153 (F.B.). *See also* 67 I.C. 887=1933 M. 653=65 M.L.J. 298 ; 41 Bom.L.R. 1258. Application by O.R. to set aside fictitious mortgage—Second appeal. 1933 L. 934=1935 M. 592.

LIMITATION.—Art. 181 of the Lim. Act does not apply to an application under this section to set aside an alienation. 60 I.C. 123=12 L. W. 535. In the N. W. F. Province, the law prior to the amendment by Act X of 1930 was that the period of limitation was to be considered from the date of adjudication. The amendment can therefore only affect transactions which came into existence after it and the transaction before the date of amendment and over two years old at the adjudication order is not within time. 150 I.C. 308=1934 P. 30.

Secs. 53 and 4.—Benami transfer by insolvent—Ins. Court can decide the real nature of transaction. S. 4 is controlled by S. 53 only in respect of real transfers made by insolvent. 136 I.C. 299=11 P. 9=1932 P. 129. Under S. 4 an Ins. Court can declare a transfer to be void, even though it was more than two years old on the date of adjudication. 142 I.C. 97=1933 Pesh. 46.

Secs. 53 and 33 (3).—When a transfer by way of sale by the insolvent is annulled as fraudulent under S. 53, but it is found that the alience paid a sum of money towards the satisfaction of a prior decretal debt, the alienee may be allowed to prove in the insolvency as an unsecured creditor to the extent of the prior debt discharged by him. 1933 L. 211=34 P.L. R. 127.

Secs. 53 and 54.—An order by the District Judge transferring an application under Ss. 53 and 54 of the Act for disposal to a Subordinate Judge is *ultra vires* when the insolvency matter originates outside the local limits of the jurisdiction of his Court. The Subordinate Judge in such a case has no jurisdiction to deal with the application. 40 L.W. 313=(1937) 1 M.L.J. 654. Suit by wife for maintenance against husband claiming charge—Subsequent application by husband in insolvency—Decree in suit creating charge—Subsequent order of adjudication—Application by Official Receiver to avoid charge—Decree not to be annulled—Principles. 1940 Mad. 749=1940 M.W.N. 259. Proceedings under—Annulment of adjudication —Person appointed and properties vested in him—If can start or continue proceedings, *see* 69 M.L.J. 364 (F. B.). Where an order of adjudication is based on fraudulent perference, the O.R. is at liberty to show that the transfer was without consideration, without affecting the order of adjudication and the transaction can be avoided under S. 53 instead of under S. 54. 14 R. 748=1937 R. 27. But where in challenging a transfer by the debtor, the receiver does not press his case under S. 53 and does not allow the transferee to adduce evidence as to the fairness of the price but confines his case to one of fraudulent preference under S. 54, he should not be allowed in appeal to adduce fresh evidence as to inadequacy of price. 1935 C. 650.

54. (1) Every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the receiver, and shall be annulled by the Court.

Avoidance of preference in certain cases.

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Secs. 53, 54 and 55.—Once an adjudication is annulled, the receiver or a creditor or the Insolvency Court cannot either institute or continue proceedings under S. 53 or S. 54 of the Act. Where therefore the creditors of an insolvent apply for an annulment of a transfer made by the insolvent during his insolvency and the adjudication of the insolvent is annulled without any opposition from the creditors during the pendency of the application, the creditors are not entitled to pursue the application and obtain an annulment of the transfer after the annulment of the adjudication. No question of validating the proceeding under S. 37, arises and the property transferred, having ceased to be the property of the debtor, the Court has no power to deal with it under S. 37. I.L.R. (1940) Nag. 204=1938 Nag. 312. In an appeal before the District Judge against an order dismissing an application by the Official Receiver in insolvency to annul transfers made by the insolvent debtor under Ss. 53 and 54, it is not open to the District Judge to annul the order of adjudication on the ground that the debtor had not applied for his discharge within the time allowed by the order of adjudication. The appeal being concerned merely with the validity of the order by the lower Court refusing to annul the transfers, the District Judge can only deal with it on the merits and cannot usurp the function of the Court having seisin of the insolvency proceedings unless that matter specifically comes before him in appeal. 55 L.W. 301=(1942) 1 M.L.J. 588. If a transfer in favour of a creditor cannot be annulled under S. 54, the prescribed period of three months having elapsed, that provision cannot be circumvented by recourse being had to S. 53, which allows the longer period of two years. But it does not follow from this that the fact that the transfer is in favour of a creditor necessarily takes it out of the reach o S. 53. S. 53. in addition to valuable consideration, insists upon good faith; if the creditor-transferee is shown not to have acted *bona fide*, the transfer can be annulled. But in considering the question of good faith under S. 53, that element, which relates to fraudulent preference, must be eliminated, that is to say, the knowledge, for instance on the part of the transferee-creditor that the other creditors are being defrauded does not by itself constitute bad faith. But if, for instance, it is found that the property transferred is worth more than the debt and that the creditor intends to get a larger benefit than to what he is entitled, or where, though the sale is ostensibly in favour of a creditor there is some benefit reserved to the debtor, or again, where a third party, a *i.e.*, person other than the transferee is really intended to take the benefit, the sale will be annulled. Such cases of bad faith tainting the transfer, while being unconnected with the fraudulent preference which comes within the mischief of S. 54, are nevertheless within the ambit of S. 53. 41 L.W. 723=1935 M. 250=68 M. L.J. 57. *See also* 1933 M.W.N. 1049. Power of Ins. Courts to consider validity of transfers by transferees from insolvents—Onus. 140 I.C. 674 =36 L.W. 219=1932 M. 513. *See also* (1942) 1 M.L.J. 588. As to difference between Ss. 53 and 54, *see* 93 I.C. 331=1926 S. 133; 92 I.C. 5=1926 S. 140; 95 I.C. 1055.

Sec. 54.—A creditor can make an application under S. 54 for annulment when the receiver refuses to act. 155 I.C. 611=1935 M. 246. In the case of a series of alienations, if the original alienation is challenged and the subsequent alienees are also made parties, the subsequent transfers also should be set aside if not under S. 53, at least, under S. 4. When the original transfer falls through, the subsequent transfers cannot have any greater validity than the original transfer. 15 L. 349=148 I.C. 1013 =1934 L. 101 (2). *See also* 1937 Mad. 32. The section applies even to a transaction by a company. 59 I.C. 977=2 L. 102. O. R. cannot object to execution of a decree by a transferee unless he has obtained an order of Court under this section. 38 I.C. 231. Where it is established by the O. R. that the object of the insolvent in making the transfer is to give preference to one of the creditors, the fraudulent character thereof is to be presumed, although the mere fact that preference incidentally resulted from the transfer is not enough to attract the application of S. 54. 1933 A.L.J. 504=1933 A. 431. Before S. 54 can be made to apply to any particular case, the following conditions are to be fulfilled: (*i*) the debtor must, at the date of the transaction, be unable pay his debts; (*ii*) the transaction must be in favour of a creditor; (*iii*) the debtor must have acted with a view to giving such creditor a preference over other creditors; and (*iv*) the debtor must be adjudicated insolvent on a petition presented within three months of the date of the transaction attacked. 1928 R. 166. A decree against judgment-debtor is not binding on the receiver in insolvency, since it might have been collusive. 1923 A. 33 (1). "*Creditor*" includes a person, a transfer in whose favour is impeached under this section. 43 A. 427. It includes a surety for the payment of a debt due by the insolvent. 40 M. 783=32 M.L.J. 253 (F.B.); 1923 R. 149=113 I.C. 813. *See contra* 32 I.C. 795. Where a Hindu father executes a mortgage of joint family property for himself and as guardian of his minor sons, and the transaction is found to be a fraudulent preference,

it can be annulled under S. 54 not only as regards the insolvent father's share in the family property, but as a whole even in respect of the shares of the minor sons. 46 L.W. 391=1937 Mad. 791=(1937) 2 M.L.J. 427. A secured creditor does not come under "creditor." A sale in his favour is not fraudulent. 27 C.W.N. 816=1923 C. 689. *See contra* 1922 N. 235. The term "void" in the section means voidable. 38 I.C. 231. Where the period of three months prescribed by S. 54 expired during the vacation and the O. R. filed an application under S. 54 for the annulment of a mortgage on the re-opening day. *Held*, that the petition was in time and validly presented. S. 10 of the General Clauses Act did not apply but the same effect was achieved by virtue of S. 4 of the Lim. Act which, by S. 29 (2), was made applicable to proceedings under this Act. The period of three months in S. 9 (1) is a period of limitation and not a condition precedent and as such is capable of extension. The benefit of this rule is also available to a petition under S. 4. 1933 M.W.N. 1049. *See also* I.L.R. (1939) Nag. 377=1938 Nag. 454. There can be no valid mortgage without registration where the value is more than Rs. 100. So the period of three months should be calculated from the date of registration and not from the date of execution of a deed of mortgage. If it was registered within three months prior to the petition for adjudication, it can be attacked under S. 54, even though executed more than three months before the petition. 1933 M. 185 =64 M.L.J. 382 : 12 R. 263=1934 R. 216 ; 1934 M. 637 (2)=67 M.L.J. 380. Receiver objected to certain mortgages executed by the insolvent on the ground that the mortgages, although executed prior to presentation of petition, being registered subsequent to it by the insolvent, were invalid as the transferor had no transferable interest. *Held*, that the insolvency of executant who had executed a document requiring registration did not render registration impossible as he was deprived of transferable interest in the property involved subsequent to the execution of the deed but before its registration. 1935 R. 133.

FRAUDULENT PREFERENCE.—For *test of fraudulent preference*, and for an enumeration of the conditions for its operation, *see* 41 I.C. 399 ; 19 C.W.N. 157=29 I.C. 128; 92 I.C. 296= 1926 L. 231; 91 I.C. 522=1925 M. 1089; 1929 L. 159; 33 P.L.R. 464; 140 I.C. 463=1932 M. 459. Whether a transfer is fraudulent depends on the intention of transferor, real and not legal. 43 C. 640=33 I.C. 548; 19 C.W.N. 157=29 I. C. 128; 44 M. 810=40 M.L.J. 570; 10 L.W. 354=37 M.L.J. 246; 83 I.C. 440=1924 R. 308. *See also* 30 Bom.L.R. 893. When a conveyance is impeached as a fraudulent preference under S. 54, the test to be applied is, what is the dominant or operative motive of the debtor in making the transfer. The question is not whether several motives have not operated on the mind of the creditor (debtor); but what among them was the dominant or effectual motive. 46 L.W. 895=1938 Mad. 177=(1937) 2 M.L.J. 868. In deciding whether a conveyance by the insolvent is a fraudulent preference liable to be set aside under S. 54 the test is what is the dominant or operative motive of the debtor in making the transfer. It has to be considered whether the dominant motive of the debtor was to prefer a particular creditor, or whether it is more reasonable to hold that he acted with a view to protect himself from exposure or from any sort of proceedings. The fact that the debtor has present in his mind as one view among several, the giving of a preference to a particular creditor can hardly be decisive of the matter. The true test is: (1) had the debtor a view of giving a preference to the creditor? and (2) was that the operative effectual view ? 46 L.W. 895=1938 M. 177=(1938) 2 M.L.J. 868. Before an alienation by an insolvent can be set aside under S. 54 the dominant intention in the mind of the insolvent must be found to have been actually to prefer a creditor. The fact that a preference in favour of the alienee-creditor inevitably follows from the act of the insolvent does not warrant the inference that the insolvent's intention was to prefer, since under S. 54, the burden of proof is upon the Official Receiver. 52 L.W. 768=1940 M.W.N 1200=(1940) 2 M.L.J. 846=1941 Mad. 274; 1938 Cal. 417. *See also* as to burden of proof, 52 L.W. 768= (1940) 2 M.L.J. 846. In determining the question of good faith, it is necessary that the facts should be considered in relation to each other and weighed as a whole; it is a mistake to take each fact, which militates against the *bona fides* of the transfer, separated from the rest of the facts and to proceed to demonstrate that it was quite consistent with good faith. [36 N.L.J. 483 (P.C.), Ref.] 34 P.L.R. 647=1933 L. 931. The predominating motive of the insolvent is the guiding factor in cases under S. 54. Such intention must be clearly proved. 12 Lah.L.J. 316. *See also* 1932 M. 459; 142 I.C. 247= 1936 R. 170. It is not sufficient for the O.R. seeking to annul a transfer by the debtor that the result of the transfer was the preference of some creditors over others. I.L.R. (1937) N. 78=1937 N. 117. Court can infer fraudulent intention from circumstantial evidence. 8 O.W.N. 1126. *See also* 43 I.C. 286 (L.). Per *Mukherjea, J.*—The question whether the transfer in favour of a creditor was made by the debtor with a view to give him an undue preference over his other creditors, must be decided with reference to the dominant intention of the debtor. If a debtor transfers a valuable property on the eve of insolvency to a creditor of his, the consideration being the past debt due to the creditor, an inference of undue preference can legitimately be drawn. But if the debtor approaches a creditor for a loan and substantial advance is made by the latter who insists, as a part of the same bargain, on the payment of the existing debt, the debtor consenting to it cannot be said to have voluntarily given preference to the creditor. I.L.R. (1938) 2 Cal. 275=42 C.W.N. 554=1938 Cal. 417. Evidence of other acts of preference in favour of other creditors, committed by the debtor shortly before or after the transaction impugned, is admissible to show the debtor's intent. I.L.R. (1937) N. 78=1937 N. 117. "*Preference*" implies freedom of choice and free will. There is no preference in paying money under a

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prior arrangement. 20 I.C. 395=11 A.L.J. 545. *See also* 110 I.C. 824=1928 L. 744; or in transferring property under a prior agreement. 43 C. 640=33 I.C. 548 ; 1933 M.W.N. 1049. But this does not apply to a case where the earlier agreement only contains a vague promise by the debtors to execute a mortgage and does not state what the debtors would offer as security, and the simple mortgage executed by them of practically the whole of their properties amounts to an act of bankruptcy. 1933 M. 653 =65 M.L.J. 298. A mere threat to sue which, if at all, is the only pressure, will not be such as to change the nature of the debtor's act from a voluntary to an involuntary one, especially when he was in expectation of such suits being filed by almost all the creditors. 155 I.C. 611= 1935 M. 246. Transfer effected under pressure of a suit does not come under S. 54. 1935 L. 167. Where a transfer came into existence not because of pressure by a creditor but at the suggestion of the debtor and the creditor was only too pleased to advance a little more money in order to secure the debts which may or may not be proved to have been incurred. *Held* that the transfer should be annulled. (1924 R. 308, Dist.; 1930 R. 315, Expl.) 1935 R. 316. *See also* 1935 C. 650. If the object of the insolvents in executing a mortgage in favour of one of their creditors is to give undue preference to him in consideration of a fresh advance, the fact that the mortgagee had refused to make a fresh advance without security for the previous loan as well as for the fresh advance does not affect the matter, and S. 54 applies to the case. 1936 A.L.J. 698=1936 A. 489. *See also* 46 L.W. 439=1937 Mad. 872=(1937) 2 M.L.J. 378. Transferring property under threat of criminal prosecution for sums misappropriated to a *bona fide* transferee for value is no fraudulent preference. 30 Bom.L.R. 893=1928 B. 341; nor a transfer made on the eve of insolvency; 140 I.C. 463=1932 M. 459. A threat of legal proceedings to a person in hopelessly insolvent condition is no genuine pressure at all, so as to make a transfer, which otherwise appears fraudulent, a *bona fide* transfer. 1940 Lah. 6. Where a mortgage was effected not with the intention of giving preference to a creditor but with a view to avoid a crisis in the business, *held*, that the transfer was not hit at by S. 54. 33 P.L.R. 464=1932 L. 381. In order that the payment may be voluntary there should be neither outside pressure nor even inward mental apprehension of such pressure. 32 Bom.L.R. 293=1930 B. 217. Where the motive behind the transfer by an insolvent in favour of a friend of his is to give him a preference over the other creditors, it is void under S. 54 and must be annulled. Where the transfer is effected after a creditor has filed suits and attached some of the properties of the insolvents, and when there are many other creditors whom the insolvent has no hope of paying, it is only reasonable to infer that the insolvent has the idea of preferring one creditor to the others as his motive. 48 L.W. 522=1938 Mad. 801 =(1938) 2 M.L.J. 362. A mortgage executed for *fictitious consideration* amounts to fraudulent preference. 1930 A. 282. *See also* 33 P.L.R. 905. Where the insolvent's dominant motive in making the transfer was to prefer one particular creditor over others, then the transaction amounts to a fraudulent preference. 1929 M. 821. *See also* 113 I.C. 129; 1936 A.W. R. 1149=1937 A. 4. Where a consent decree was passed against the insolvent more than three months prior to the date of the petition, an order for rateable distribution passed in execution cannot be annulled under S. 54 as a fraudulent preference, though the execution proceedings might have been taken within three months before petition. 25 S.L.R. 371. *See also* 97 I.C. 257. Voluntary payment to near relation without demand three days before application for adjudication was held to constitute fraudulent preference. 1933 L. 620. *See also* 1929 M. 471. Preferences, which are direct result of real pressure brought to bear on insolvent, are not voluntary. 1929 M. 471; 1929 M. 821; 1933 L. 354. Preference given in return for money payment for personal benefit as opposed to benefit of business and transfer of entire property to a single creditor are fraudulent preferences. 1930 R. 315. Where the creditor, although he knows that the debtor is insolvent, presses and insists upon having a security for his debt, and the debtor yields to that pressure and gives the security, although it may be well known to both, at the same time, that the effect will be to give to that particular creditor an advantage over the other creditors of the insolvent, the transaction is perfectly good and valid. [*Johnson* v. *Fesenmeyr*, 25 Beav. 88; *Smith* v. *Pilgrim*, (1876) 2 Ch. D. 127, Foll.] 1934 R. 208. The pressure of creditor excludes the idea of preference. 59 I.C. 578=3 L.L.J. 44; 41 I.C. 399=1933 R. 216; 34 P.L.R. 436=1933 L. 354. But *see also* 43 C. 640=33 I.C. 548. A threat of legal proceedings to a man who is hopelessly insolvent clearly cannot be described as pressure. 39 P.L.R. 181=1937 L. 53. Where an insolvent, being heavily indebted and being pressed by the other creditors for payments, lest they should file suits against him, transfers substantially all his property in favour of his relative, also a creditor, and also falsely declares his inability to pay "owing to depression in paddy price", the transfer is fraudulent and must be set aside. 14 R. 748=1937 R. 27. Transfer for consideration to all creditors except one is not bad as intended to defraud creditors generally. 31 I.C. 695. Where the motive of the debtor is to benefit himself and not any of his creditors, there is no fraudulent preference. 43 A. 427=62 I.C. 732. Fraudulent preference —Essentials—Debtor executing mortgage to creditor in order to get a benefit for himself, by getting further loan—Nor "preference." 41 L. W. 358=1935 M. 300. The *onus* of proving that the transfer by the debtor was made with the intention of preferring one creditor to others lies on O. R. 1931 A.L.J. 26=1931 A. 142 (2); 1925 M. 325. *See also* 107 I.C. 210; 30 Bom.L.R. 290=54 M.L.J. 337 (P.C.); 1926 S. 123; 1929 M. 821; 1929 L. 159; 9 R. 71=134 I.C. 744= 1931 R. 136; 1933 L. 354=144 I.C. 762=34 P.L.R. 436. But the *onus* is shifted on to the creditor or transferee to prove the contrary where the insolvent has made the payment or transfer of property, as the case may be, in dis-

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charge of an old debt and on the eve of bankruptcy. And where the reason of such payment or transfer remains unexplained, it is competent for the Court to hold that a *prima facie* case of fraudulent preference has been established. 137 I.C. 55=1932 L. 321. *See also* 63 C.L.J. 253; 1941 Mad. 796=54 L.W. 259=(1941) 2 M.L.J. 810. The question of onus becomes only important if the circumstances are so ambiguous that a satisfactory conclusion is impossible without resort to it. 1937 A. 4. Facts to be proved by O. R. 23 L.W. 10=1926 M. 338; 1928 R. 166; 1934 L. 994. Evidence given at the insolvency proceedings can be used against a purchaser, under this section. 23 I.C. 597. Where a transaction between a debtor and his creditor is attacked as a fraudulent preference evidence of other or similar contemporaneous acts of preference in favour of other creditors, is admissible to show the debtor's intent. 195 I.C. 527=1941 Nag. 188. Where the application is by a creditor, it could be heard only after notice to the O. R. 40 M. 783=32 M.L.J. 253 (F.B.). So far as movable property is concerned, mere preference of one creditor at the expense of another, if he is not injuriously affected, will not make the transaction void or voidable under any law except insolvency law. 118 I.C. 401 (2)=1929 R. 110. Fraudulent preference— Shifting of onus of proof— Principles—Circumstances sufficient to shift onus. 1941 Nag. 188. A debtor who was unable to pay his debts, voluntarily gave over to a near relation of his, who was one of the creditors, practically the only movable assets he had, *viz.*, a promissory note duly assigned and some piece-goods. There was no allegation or proof that the latter had made any demand on the debtor or that any pressure had been applied by him on the date of the transaction. *Held*, that the transaction was not entered into in good faith, that the dominant intention of the debtor was to give to his relation fraudulent preference over other creditors and that the transaction should be annulled under S. 54. 145 I. C. 874=1933 L. 620. The execution of a mortgage, for a sum more than double of what is really due, to a near relative points both to the dishonest intention of the alienor to give undue preference to his creditor and to the *mala fides* of the alience and the transaction falls within S. 54. 1933 L. 856. Whether the object of the transfer is to give preference to one of the creditors is a matter of inference from the circumstances of each case and is essentially a question of fact. 1933 A.L. J. 504=1933 A. 431. *See also* 155 I.C. 611=1935 M. 246; 152 I.C. 655=15 Pat.L.T. 461=1934 P. 526. Where a mortgage is executed by a father and his two minor sons who are represented by him as their guardian and the mortgage is effected to the extent of the major portion of the consideration for the purpose of discharging the antecedent debts of the father and the cash consideration received is stated to be for discharging some other debts by him, the purpose for which this mortgage is effected being such as would justify the guardian of the minors to alienate their shares in the family property, the execution of the deed by the father as guardian of the minor sons would not be invalid. Therefore in so far as it is an alienation by the two sons of the debtor (insolvent), it cannot be viewed as a transfer by the insolvent for the purposes of Ss. 53 and 54. Hence the mortgage cannot be annulled so far as the two-thirds share of the insolvent's sons in the mortgaged property is concerned. 155 I. C. 611=1935 M. 246. A surrender of tenancy right is a transfer of an interest in property and S. 54 could operate on such a transaction. 1941 N. L. J. 187=1941 Nag. 118. Transfer of outstandings to creditors—Undue preference — Outstandings not realised — Liability to refund. 1933 S. 85=143 I.C. 628. Before the Insolvency Court, all persons, men and women, normally are alike. Among the Chettyar community a sum of money, merely because it happens to be a woman's stridhanam or dowry, has no special sanctity, so as to make the non-payment of it to be regarded as a peculiar disgrace to the man or firm from whom it has got to be recovered, and such debt when owned by a firm does not rank above ordinary debts. Fraudulent preference shown even to such a debt is voidable under this section. 164 I.C. 893=1936 R. 413. The effect of an order setting aside a transfer by an insolvent is to restore the *status quo ante* between all the parties concerned. Tho mere fact that some of the creditors managed to get certain debts of the insolvent assigned in their favour, which assignments have been annulled subsequently, cannot make the assignees liable to pay the entire amounts of the debts to the receiver from their own pocket. They are, however, liable to refund to the receiver the amounts realised from the debtors after deducting any legitimate expenses incurred by them. 171 I.C. 82=1937 Lah. 913. It is clear from sub-S. (2) of S. 54 that a transfer that may be deemed void under this section is not necessarily void *ab initio*, and it is void only as against the receiver while remaining valid as as between the parties to the transaction. From this it follows that such a transfer is not void *ab initio* but is merely voidable, *i.e.*, valid until set aside. The transferee, therefore, is in lawful posiession and is not liable for mesne profits on annulment of the transfer. 31 N.L.R. (Supp.) 178=1936 N. 139.

APPEAL.—A creditor has a right of appea from an order passed on an application by the Official Receiver under S. 54 (4). (47 A. 849, Foll.) 1933 L. 856. Annulment of a transfer or refusal to annul a transfer is not a decision of a question falling under S. 4, and as the distinction between decisions under S. 4 and orders under Ss. 53 and 54 is clearly recognised in Sch. I, no second appeal lies against an order passed under S. 54. 1930 N. 272.

LIMITATION.—The three months period contemplated in S. 54 runs from the date of registration of the transfer deed because it is by registration that the transfer becomes effective and the title passes from the transferor to the transferee. I.L.R. (1939) Nag. 377=1938 Nag. of 454. The date of commencement of the period of three months under S. 54 is the date of the execution of the deed of transfer sought to be avoided, and not the date of its registration. I. L.R. (1938) 2 Cal. 275=42 C.W.N. 551=1938 Cal. 417. The requirement of registration of a

(2) This section shall not affect the rights of any person who in good faith and for valuablee consideration has acquired a title through or under a creditor of the insolvent.

[1][54-A. A petition for the annulment of any transfer under section 53, or of any transfer, payment, obligation or judicial proceeding under section 54, may be made by the receiver or, with the leave of the Court, by any creditor who has proved his debt and who satisfies the Court that the receiver has been requested and has refused to make such petition.]

By whom petitions for annulment may be made.

55. Subject to the foregoing provisions of this Act with respect to the effect of insolvency on an execution, and with respect to the avoidance of certain transfers and preferences, nothing in this Act shall invalidate in the case of an insolvency—

Protection of *bona fide* transactions.

LEG. REF.

[1]Inserted by Act XXXIX of 1926, S. 3.

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document is an evidentiary requirement; an unregistered transfer is inchoate and is ineffective until registered. But it nevertheless exists and when registered, operates from the date of its execution. The requirement of registration is a requirement of form only; the Registration Act looks not to the reality of the agreement between the parties but to the form in which that agreement is expressed; once the form has been supplied, the reality of the transaction receives acknowledgment. Hence the period of three months referred to in S. 54, begins to run from the date of execution of the transfer provided it has been properly registered within the specified time. (12 Rang. 263, overruled.) 1937 Rang.L.R. 375=1937 Rang. 446 (F.B.). There is no period of limitation for an application under this section. It can be filed at any time during the pendency of insolvency. 1924 L. 331. *See* 109 I.C. 370. No separate suit lies to cancel an order under this section; but appeal lies. 1922 L. 214.

EXECUTION OF A COMPOSITION DEED, by a debtor amounts to an act of insolvency. 97 I.C. 257 following 26 B. 476; 25 S.L.R. 371.

PROCEDURE.—Application by Official Receiver to set aside mortgage by insolvent—Transfer by District Judge to Sub-Court not having local jurisdiction in the insolvency matter—If *ultra vires*—Notification under S. 3—Effect of. *See* (1937) 1 M.L.J. 654.

Sec. 54-A.—S. 54-A does not abrogate S. 58 and must be read subject to the provisions of that section. The words "voidable, against the receiver" in S. 53 must, therefore, in view of S. 58, be read as "voidable against the receiver or the Court as the case may be", and a creditor is entitled to move the Court to take action under S. 53 where a receiver has not been appointed. 1933 N. 365. The restrictions placed by S. 54-A on the powers of a creditor to move the Court to take action under S. 53, apply only where a receiver has been appointed. Where the Court is summarily administering the estate, any creditor may move the Court to take action under S. 33 of the Act. 9 P. 839=1931 P. 14. Where a Court holds that a creditor has no *locus standi* to present a petition for annulling a transaction under S. 53, because it violates the provisions of S. 54-A, the Court has no jurisdiction to give a decision on the application on merits and the decision if given is *ultra vires*. 1930 R. 332 (1). Sale of insolvent to wife—Application by creditor to annul—Prior adverse claim order against creditor in execution proceedings—If a bar. 69 M.L.J. 120. When the Court, on the recommendation of the Official Receiver, that a payment made by the insolvent to a creditor was not really due to him, passes an order directing the creditor to furnish security for the amount held by him pending decision as to the exact amount to be refunded by him and that in default the same will be realised by distress, the fact that the receiver did not file an application under S. 54-A does not make it an invalid order. When the point has not been taken by the aggrieved party at a prior stage of the proceedings, when he could have done so, and when all the parties have had notice, and evidence has been fully gone into, the absence of a formal application does not make it necessary to quash the proceedings and to start a fresh enquiry by a proper application. 60 C.L.J. 253.

Sec. 55.—This section does not apply and will not invalidate a mortgage which was exccuted when the old Act III of 1907 was in force, and which would be valid under the old Act. 1934 L. 819. The section is intended to protect *bona fide* transactions. 43 A. 427 =62 I.C. 732. The true interpretation of S. 55 (*c*) is that insolvency itself will not invalidate a transfer for value except in cases provided for by the Act itself, but the avoidance of transfers under the general law or under S. 53, T. P. Act, is not affected by that section. 59 C. 1135= 1932 C. 642. Persons claiming the benefit of the proviso must show that they had no notice of the presentation of the insolvency petition. 1933 S. 85=143 I.C. 628. *See also* 1934 L. 819, as to conditions necessary for applicability of proviso.

Sec. 55, proviso.—"TRANSACTION"—MEANING OF.—Where a person files a suit against the insolvent pending an insolvency petition against the latter and obtains a decree against him before the adjudication—the insolvent filing a written statement but subsequently withdrawing his defence—the decree is not a "transaction" covered by S. 55 of the Act. The word "transaction" means one in which the insolvent does something and not a proceeding

(*a*) any payment by the insolvent to any of his creditors;

(*b*) any payment or delivery to the insolvent;

(*c*) any transfer by the insolvent for valuable consideration; or

(*d*) any contract or dealing by or with the insolvent for valuable consideration:

Provided that any such transaction takes place before the date of the order of adjudication, and that the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor.

Realisation of Property.

Appointment of receiver.

56. (1) The Court may, at the time of the order of adjudication, or at any time afterwards, appoint a receiver for the property of the insolvent, and such property shall thereupon vest in such receiver.

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in which he is merely passive. The act of the insolvent in withdrawing his defence and submitting to a decree, being a purely passive act, is not a "transaction" contemplated or protected by S. 55. 42 L.W. 220=69 M.L.J. 241.

MORTGAGE AS SECURITY FOR RENT DUE TO GOVERNMENT—RENT NOT PAID—PROPER COURSE FOR CROWN TO PURSUE.—A person, who had executed a mortgage of his immovable property as security for due payment of rent due to Government, committed default in payment thereof. He was adjudged an insolvent and subsequent to adjudication, the Government sold the property without notice to the receiver who applied to have it set aside. *Held*, that if the Government wished to rely upon the protection given by S. 55, to *bona fide* transactions prior to the date of the order of adjudeication, it was the duty of the Crown to have pleaded the protection of that section, and further the burden was upon the Crown to show that at the time of the transaction in question it had no notice of the presentation of an insolvency petition. *Held*, *further*, that the sale should be set aside, but that as the debt due to the Crown was contracted before date of adjudication, the debt due to the Crown was provable in the insolvency under the provisions of S. 34 (2). and on proof of the debt the Crown should have priority in the distribution of the property of the insolvent under S. 61 (1) (*a*). Consequently, the proper course for the Crown to pursue was to prove in the insolvency the amount due on account of the rent as a debt, and then to claim priority under S. 61 (1) (*a*). 1935 R. 273.

Secs. 55 (a) and 56 (3): RECEIPT OF PAYMENT BY CREDITOR IN VIOLATION OF S. 55 (*a*)—POWER OF COURT TO ORDER REFUND.—Where during the pendency of an application for insolvency and before the order of adjudication, the debtor pays to a creditor a certain sum in satisfaction of a debt, the receipt of payment by the creditor who has notice of the filing of the insolvency petition is in violation of the provisions of S. 55 (*a*) and the money received by him continues to belong to the estate of the insolvent which is vested in the receiver and the provisions of S. 56 (3) read with S. 4 give jurisdiction to the Ins. Court to pass an order against the creditor to refund the amount which appertains in the eye of the law to the estate of the insolvent. The Court cannot award interest to the receiver by way of damages under S. 74, Contract Act, his claim for refund not being based upon any contract but being essentially a claim under tort. But the Court can, under S. 34, C. P. Code, award interest from the date of the presentation of the application for refund by the receiver till realisation. 31 N.L.R. (Supp.) 121 =1936 N. 28.

Sec. 56 (1): GENERAL.—Receiver is not a judicial officer and cannot make a judicial enquiry. 46 I.C. 337. It is objectionable to appoint as Receiver a pleader who represents a party in the proceedings by allowing him to throw up his brief in the middle of the case except in special circumstances appearing on the record justifying such a procedure. I.L.R. (1940) Nag. 161=1938 N.L.J. 40=1938 Nag. 230. Receiver cannot be appointed for a portion only of the insolvent's property. 89 I.C. 61= 1925 R. 224. Appointment of receiver; *see* 1924 C. 849=83 I.C. 360. As to effect of appointment of *ad interim* receiver, *see* 94 I.C. 506=1926 P. 291. Whether the receiver in Ins. Act is a representative of the judgment-debtor for purposes of S. 47, C. P. Code, depends on the purpose and nature of the application made by him. 35 C.W.N. 971.

INTERIM RECEIVER—HIS POWERS—If the interim receiver elects to remain in possession, he shall have to discharge the obligations attached to the property; but if he does not, the insolvent tenant who has been dispossessed shall have to be let in possession. Under no circumstances, therefore, the property can be restored to the mortgagee. 39 P.L.R. 205=1934 L. 1006. A creditor cannot be appointed as a receiver. L.R. 3 A. 85. Where petition was transferred to O.R. for disposal and he passed an order of adjudication, no separate vesting order is necessary. 44 M. 547=40 M.L.J. 209. Where the Court passes an adjudeication order, it should also formally pass an order appointing O. R. as receiver. 34 I.C. 602=30 M.L.J. 415. The receiver and Court should preserve the estate of the insolvent while administering his estate. 38 A. 37=31

(2) Subject to such conditions as may be presribed, the Court may—

(*a*) require the receiver to give such security as it thinks fit duly to account for what he shall receive in respect of the property; and

(*b*) by general or special order, fix the amount to be paid as remuneration for the services of the receiver out of the assets of the insolvent.

(3) Where the Court appoints a receiver, it may remove the person in whose possession or custody any such property as aforesaid is from the possession or custody thereof:

Provided that nothing in this section shall be deemed to authorize the Court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove.

(4) Where a receiver appointed under this section—

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I.C. 716. An attaching creditor cannot execute the decree attached after adjudication of the debtor. 40 A. 86=43 I.C. 129. If a transfer has been made *benami*, the proper course is for the O.R. to sue the alienee for the property. A summary procedure is wrong in law. 44 I.C. 143=22 C.W.N. 702. Sale by receivers is in fact sale by owner. It may be private or public. It need not be in the manner prescribed for sales in execution of decrees. 60 I.C. 745=24 C.W.N. 1072. A vesting under S. 56 (1) or 28 (2) of a proprietary right in a mahal is a "transfer" and the receiver is bound to make a report. When no such report is made, a suit in the Revenue Courts by the receiver for arrears of rent due to the insolvent is not maintainable. 11 O.W.N. 1037=15 L.R. 546 (Rev.).

Sec. 56 (2) (b).—Receiver's remuneration should be proportioned to the amount of dividend distributed. 27 Bom.L.R. 1116=90 I.C. 656. A receiver is not entitled to commission on the amount of the mortgage-money realised by the sale of the mortgaged property. He can recover commission only for the net assets after satisfying the mortgage debt. 7 R. 126=1929 R. 16=106 I.C. 200=1928 R. 23; 150 I.C. 960=1934 R. 112. Where an order is passed under S. 56 (2) (*b*) fixing as his remuneration Rs. 150 per month or 5 per cent. of the assets realised up to a maximum of Rs. 200 a month, without any direction as to the source from which the money is to be paid, the order must naturally be construed in the light of the section, Cl. (2) (*b*) of which pravides for payment out of the assets of the insolvent read with R. 13 of the Nagpur Insolvency Rules framed under S. 79 (2) (*a*). 1938 N.L.J. 40=1938 Nag. 230. Receiver appointed on adjudication—Adjudication order set aside on appeal—Effect on status and rights of receiver—If makes receiver *interim* receiver—Right to remuneration—If lost. *See* 1938 N.L.J. 40=A.I.R. 1938 N. 230.

Sec. 56 (3).—The section empowers Court to dispossess third persons from property belonging to insolvent. 37 A. 65=26 I.C. 926. Sub-cl. (3) does not cover the case of a person in possession claiming adversely to the insolvent. 46 I.C. 377; 49 M. 762=50 M.L.J. 180. Where a third party sets up a title in himself in respect of a property which the receiver attempts to take possession, the receiver has to make an application to the Insolvency Court which under S. 4 has power to try and determine all questions raised by the ob,ector including those of title. The result of the enquiry is either that the insolvent has a present right to dispossess the obstructor or that he has not. If he has, then action can be taken under S. 56 (3). The expression 'has not a present right so to remove' in S. 56 (3) does not mean 'has not a present right to remove except under a decree of a Civil Court.' Though the Insolvency Court has the power to enquire into title, it should ordinarily lean against enquiry into disputed titles unless the matter is simple. If the Insolvency Court takes upon itself the powers of a Civil Court, it should proceed like a Civil Court with reference to pleadings, issues and evidence. 1940 N.L.J. 283=1940 Nag. 233. *See also* 1941 Nag. 696; 1941 Mad. 75. Ins. Court cannot order delivery under Rr. 97 and 98 of O. 21, C. P. Code. 8 L.W. 136=47 I.C. 308. Court can remove obstruction and deliver property to purchaser from O. R. 45 M. 434=42 M.L.J. 185. Sale of property by receiver after third person's objection setting up his title, is dismissed for default—Application by purchaser for delivery of possession—Objection by third person reiterating his title—Power of Court. 1935 A.L.J. 484=1935 A. 546. Receiver cannot eject a purchaser of property from the insolvent, without first taking proceedings under S. 54. 89 I.C. 61=1925 R. 224. Where an alienation is impeached, the impeaching creditor should be directed to put funds in the hands of receiver to conduct the enquiry. 46 I.C. 377. Receipt of payment by criedtor in violation of S. 55 (*a*)—Power of court to order refund—Award of interest. *See* 31 N.L.R. (Suppl.) 121=1936 Nag. 28.

Sec. 56 (4).—Where in the circumstances of a case there is nothing to justify a positive conclusion of fraud and nothing but a doubtful enquiry on the hands of the Court, it would not be proper to pursue the proceedings against the receiver after several abortive attempts. This is a matter of discretion and should be exercised afresh in every case. Even in criminal matters the Crown does not always prosecute a second or third time when a previous prosecution has proved abortive, if it feels that they would savour of undue harassment or persecution. It is necessary to afford those who undertake the onerous responsibilities and heavy duties of officers of the Court the same general protection. 1942 N.L.J. 82. A receiver in bankruptcy is a trustee for the creditors and consequently, if he has withheld sums which properly belong to the

(*a*) fails to submit his accounts at such periods and in such form as the Court directs, or

(*b*) fails to pay the balance due from him thereon as the Court directs, or

(*c*) occasions loss to the property by his wilful default or gross negligence,

the Court may direct his property to be attached and sold, and may apply the proceeds to make good any balance found to be due from him or any loss so occasioned by him.

(5) The provisions of this section shall apply, so far as may be, to interim receivers appointed under section 20.

Power to appoint Official Receivers.

57. (1) The Provincial Government may appoint such persons as it thinks fit (to be called "Official Receivers") to be receivers under this Act within such local limits as it may prescribe.

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creditors, then his conduct can be and should be inquired into by the Court at any time. and there is no question of limitation. 150 I.C. 960 =1934 R. 112. *See also* 1942 N.L.J. 82. What is necessary for the Court to determine under S. 56 (4) is whether there has been "loss to the property" and not to the insolvent. 1942 N.L.J. 82.

Sec. 56 (4) (c).—Scope—Gross neglect of receiver resulting in *ex parte* decree for partition in favour of insolvent's after-born sons—Suit by creditors to declare decree is not binding—Maintainability—Dismissal of receiver's application under O. 9, R. 13, C. P. Code—Effect of. 59 M. 770=43 L.W. 483=1936 M. 161=70 M. L.J. 90.

Sec. 56 (5).—As to *differences in powers of receiver* and ad interim *receiver*, see 58 I.C. 783.

Secs. 56 and 4.—The Court has no power under S. 56, summarily to direct a third person to deliver up possession of property of which he is in possession if he sets up a title, however flimsy, to it. The only power the Court has in such circumstances is to try the issue whether the insolvent is entitled to the property or not under S. 4. But before that can be done a proper application has to be presented by the receiver, when there is one, or by such one of the creditors or other person interested in preserving the insolvent's estate as the Court authorises to act, when there is not. Where the Court or receiver enters into possession of such property without any obstruction from the claimant for some reason, then the latter's remedy to recover possession, whatever the nature of the proceedings, would have to be under S. 4 and should be against the person or authority in whom the proprty has vested. These could certainly not be a creditor or the body of creditors. Hence they are not necessary parties to such proceedings. I.L.R. (1941) Nag. 696. *See also* 1941 M. 75; 1940 Nag. 233.

Secs. 56 and 57.—Ss. 56 and 57 do not operate to prohibit the Court appointing an *additional Receiver* for a special purpose, and the Court has power to appoint an additional Receiver when the case demands it. I.L.R. (1939) Mad. 194=1939 Mad. 374=(1939) 1 M.L.J. 88. Where property sold as the property of the in olvent has been delivered to the purchaser, the Insolvency Court has no power to entertain an application for delivery by a person alleging himself to have been dispossessed when holding adversely to the insolvent. There is no jurisdiction in the Insolvency Court to order re-delivery of possession from the Official Receiver when once possession has been taken under the powers in S. 56 except on an adjudication as to title under S. 4 of the Act. 52 L.W. 377=1941 Mad. 75.

Sec. 57.—The status of O. R. is that of an officer of the Court. 1924 L. 331. A receiver is an officer of the Court appointed under statutory provisions, and the fact that an O.R. is provided for a particular district and the Ins. Court appoints him to act as a receiver in a certain case cannot make the receiver a servant of the Secretary of State for India, nor is the latter responsible for the receiver's wrongful acts in the discharge of his duties. (1932 A. 575, Foll.) 1936 A.L.J. 79=1936 A. 89. O.R. has the same powers as District Court, as regards dismissal and adjudication. But an appeal lies against his order to the District Court itself. 38 M. 15=16 I.C. 820. For exceptional reasons connected with the personality of the O.R., the Court may appoint a special receiver and remove the O. R. 46 M. 405=44 M.L.J. 251. Whether an express vesting order is necesssary even in the case of the O.R. 62 I.C. 396=41 M.L.J. 78. O.R. should conduct the proceedings on behalf of creditors. 36 I.C. 906. There is no liability imposed on the Secretary of State in Council by O.R. making a contract. 1932 A.L.J. 842=1932 A. 575. The expression "*gross assets*" in the Notification of the Government, dated May, 20, 1925, means the entire amount realised by the O.R. irrespective of whether the whole was distributable or not among the creditors. 1930 A.L.J. 1497. The receiver is entitled to charge by reason of the above Government Notification, 5 per cent. commission on the gross amount, that is to say, the entire sale proceeds of the property sold free from the prior mortgage and not only on the value of the equity of redemption. 1931 A.L.J. 670. *Also* 1932 A.L.J. 152; but *see* 150 I.C. 960 =1934 R. 11.

Secs. 57 and 80.—It cannot be said that the Official Receiver as such represents the whole body of creditors in every action he takes. No doubt he is given authority under the Provincial

(2) Where any Official Receiver has been so appointed for the local limits of the jurisdiction of any Court having jurisdiction under this Act, he shall be the receiver for the purpose of every order appointing a receiver or an interim receiver issued by any such Court, unless the Court for special reasons otherwise directs.

(3) Any sum payable under clause (*b*) of sub-section (2) of section 56 in respect of the services of an Official Receiver shall be credited to such fund as the Provincial Government may direct.

(4) Every Official Receiver shall receive such remuneration out of the said fund or otherwise as the Provincial Government may fix in this behalf, and no remuneration whatever beyond that so fixed shall be received by the Official Receiver as such.

Power of Court if no receiver appointed.

58. Where no receiver is appointed, the Court shall have all the rights of, and may exercise all the powers conferred on, a receiver under this Act.

Duties and powers of receivers.

59. Subject to the provisions of this Act, the reeiver shall, with all convenient speed, realise the property of the debtor and distribute dividends among the creditors entitled thereto, and for that purpose may—

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Insolvency Act to bind the creditors under certain circumstances, but that can only be in proceedings under and resulting from the insolvency. A proceeding by a creditor to obtain a personal decree against the insolvent for a debt due under a mortgage is wholly outside the insolvency, and a decree passed against the Official Receiver in such a proceeding will only bind in his capacity as representative of the insolvent and not the creditors. The creditors other than the decree-holder are not bound by that decree. The Official Receiver is, therefore, entitled upon the evidence led by the other creditors to go behind that decree and order the decree-holder to prove his debt in the insolvency proceedings. I.L.R. (1940) Lah. 345=42 P.L.R. 751=1941 Lah. 6.

Sec. 58.—Where the Court acts under S. 58, it functions as a Court and not as a receiver. 62 I.C. 307. *See contra* 43 I.C. 672=16 A.L.J. 32=40 A. 197. The powers of an Insolvency Court being identical with those of a receiver under the Act it cannot have recourse to the provisions of O. 21, C. P. Code, and the machinery to which it refers, since a sale of the insolvent interest in immovable property is not a proceeding under the Code, and therefore it must be executed by the Court by a registered instrument in accordance with the provisions of S. 54, T. P. Act. 1940 Rang.L.R. 263=1940 Rang. 186. *See also* 1940 Rang. 263. Sale of insolvent's mortgagee interest by Court—Registered instrument—Necessity. 1940 Rang.L.R. 263. *See also* 1942 All. 39.

Secs. 58 and 59.—Where an order for costs is made against creditors and in favour of the insolvent, and at the time there is a receiver appointed of the insolvent's property, on the death of the receiver, if no other receiver is appointed, insolvent's estate vests in the Ins. Court, and the order for costs cannot be executed by the insolvent or, on his death pending insolvency, by his heirs as agent under S. 59 (*e*) without the leave of the Court on an application in that behalf. Mere leave to execute the order is not sufficient to entitle the heirs of deceased insolvent to clothe them with title to execute the decree. 1936 C. 521.

Sec. 59 : GENERAL.—S. 59 does not control the powers of the Court under S. 4 of the Act. 18 N.L.J. 14. A receiver acting under this section is not a Court. 41 M. 440=6 L.W. 694. An Ins. Court cannot enquire into and judicially decide the existence or amount of debt. 26 I.C. 69=9 N.L.R. 182. It cannot be said that because a particular amount has been passed by the Ins. Court, the matter cannot be reopened at a later stage. If, on an examination of the accounts by an auditor, certain mistakes and overcharges are pointed out, it is open to the Court to reopen the accounts and make the receiver refund what he has taken without justification. 133 I.C. 607=1931 A.L.J. 670=1931 A. 723. If the members of a joint Hindu family governed by the Mitakshara law choose to divide the family property and to separate without making any arrangement for the payment of the family debts, a creditor of the father is entitled to proceed against the separated shares given to the sons and grandsons of the father, to enforce the payment of the debt, the debt being one which it is the pious duty of the sons and grandsons to pay. The receiver in insolvency of the father can proceed in the insolvency proceedings, without recourse to a suit against the shares received by the sons and grandsons in the partition. (50 A.137,Overruled.) 53 A.868=1931 A.L.J. 917=1931 A. 512 (F.B.). The receiver is not entitled to claim expenses which he has incurred without the previous sanction of the Court. If, however, he satisfies the Court that any part of the expenses was reasonably incurred and in good faith, he will be entitled to claim credit for the same. 1931 A.L.J. 670=1931 A. 723. When an Official Receiver is appointed all the property of the insolvent vests in him under the Provincial Insolvency Act and he has power under S. 59 of the Act to sell all or any part of that property. It cannot be said that, when he

'(*a*) sell all or any part of the property of the insolvent;

(*b*) give receipts for any money received by him;

and may, by leave of the Court, do all or any of the following things namely:—

(*c*) carry on the business of the insolvent so far as may be necessary for the beneficial winding up of the same;

(*d*) institute, defend or continue any suit or other legal proceeding relating to the property of the insolvent;

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sells property that it is transferred by operation of law or by, or in execution of a decree or order of a Court of competent jurisdiction within the meaning of S. 2 (*d*) of the T. P. Act. Even if the insolvency Court ordered the sale and acceptance of the bid which it had no jurisdiction to do, it could not make any difference in the nature of the sale. It therefore cannot be said that S. 54, T. P. Act does not apply by virtue of S. 2 (*d*) of that act and that no sale deed is necessary. As the sale is not in the course of execution proceedings a sale certificate under O. 21, R. 94 could not be issued. 1942 O.W.N. 396.

Sec. 59 (a).—The powers conferred upon the receiver by S. 59 are exercisable only for the purpose of realising the property of the debtor for distribution among the creditors. Money realised by him by sale of the insolvent's property is divisible among the general body of creditors. The receiver has no power to execute a conveyance which would result in a valuable part of the insolvent's estate being lost to the general body of creditors without the purchase-money being utilised to satisfy the claims. The receiver cannot effect a sale which would result only in the extinction of the debt of one of the creditors. 15 Pat.L.T. 502=152 I.C. 277=1934 P. 514. Under S. 59 the receiver is entitled to sell any part of the property of the insolvent and to give receipts for any money received by him without the permission of the Court. If, however, he wishes to mortgage or pledge any part of the property of the insolvent for the purposes of raising money for payment of the debts of the insolvent, he must first obtain the leave of the Court. 35 P.L.R. 717=1934 L. 867. S. 54 of the T. P. Act applies as well to conveyances by receivers. 53 I.C. 121=46 C. 887. The Provincial Insolvent Act does not provide for sales by the Court such as are provided for in the C. P. Code. A sale in insolvency proceedings, whether it be a sale at auction or a direct one by the Official Receiver to a particular person, is nothing more than a transfer by act of parties. Since the Official Receiver is an agent of the Court, it may be said that a sale effected by him is a sale under the Court, but it is certainly not a sale by the Court. Hence for title to pass to the vendee at such a sale a registered instrument is necessary as required by the Transfer of Property Act. 1942 A. 39. *See also* 1940 Rang.L.R. 263. Where prior to the execution of a formal conveyance in respect of a sale by the Official Receiver for which the entire consideration had been deposited by the purchaser, a third party establishes his title in a Civil Court to the property sold and obtains possession, then the purchaser from the receiver is entitled to a refund of price paid by him. 1942 All. 39. The Court cannot order sale on the face of contention that the property is not liable to attachment or sale. 20 I.C. 273=18 C.L.J. 564. Where the mortgaged property of the insolvent is sold by the O. R. without reference to the rights of the mortgagee, the mortgagee may or may not have a right to protest against the sale; but this does not give the insolvent a right to protest against the sale. 1933 L. 1008. The carrying on of the business is for winding it up conveniently and not to make a profit. 21 I.C. 969=40 C. 678. *Held*, by the *Full Bench*.—When the managing member of a joint Hindu family is adjudicated an insolvent on debts contracted as managing member, and other members of the joint Hindu family bring a suit for partition, subsequent to the application in insolvency, the decree for partition does not prevent the receiver from selling property allotted to members of the family other than the insolvent. 53 A.868. 1931 A.512 (F.B.). *See also* 16 P.60=18 P.L.T. 1 =1937 P. 185 (F. B.). "Property of debtor", what is—Insolvency of Hindu father—Power to sell son's shares also.) *See also* on this point, 17 P.L.T. 34=1936 P. 115. Per *Mukerji, J.*—Under the circumstances the receiver is not entitled to sell the property allotted to members of the family other than the insolvent. But the receiver may bring a suit in the Court of proper jurisdiction (not being the Ins. Court) against the divided members of the family and establish their liability and having done so may proceed to execute the same. 53 A. 868 =1931 A. 512 (F.B.). *See also* 41 P.L.R. 192.

Sec. 59 (c).—O. R. continuing to take on lease the premises in which the printing press of the insolvent is worked, acts under S. 59 (*c*) and must enter into the arrangement with the leave of the Court. 139 I.C. 701=1932 A.L. J. 842=1932 A. 575.

Sec. 59 (d).—A defendant in a suit by receiver cannot object to suit on the ground of want of sanction of Court. 42 M.L.J. 53= 45 M. 167. A suit commenced *in forma pauperis* can be carried on by receiver in the same way. 47 I.C. 577=16 A.L.J. 440. Insolvent himself can sue, defend or continue a suit to set aside a decree against him. 27 I.C. 876=12 A.L.J. 925. *See also* 168 I.C. 377=1937 Pesh. 42. Order for costs against receiver—Personal liability. 54 A. 444=1932 A.L.J. 226. Right of O. R. to prosecute appeal—Claim for damages against and claim for return of deposit by insolvent, whether can be the subject of appeal. 1926 M. 1133=51 M.L.J. 613. Suit by receiver —If to be in writing—Want of leave, if can be raised as a plea in defence : *see* 1926 N. 156. "Relating to the property of the insolvent"—Meaning of—Suit for maintenance by Hindu widow against father-in-law—Insolvency of

(*e*) employ a pleader or other agent to take any proceedings or do any business which may be sanctioned by the Court;

(*f*) accept as the consideration for the sale of any property of the insolvent a sum of money payable at a future time subject to such stipulations as to security and otherwise as the Court thinks fit;

(*g*) mortgage or pledge any part of the property of the insolvent for the purpose of raising money for the payment of his debts;

(*h*) refer any dispute to arbitration, and compromise all debts, claims and liabilities, on such terms as may be agreed upon; and

(*i*) divide in its existing form amongst the creditors, according to its estimated value, any property which, from its peculiar nature or other special circumstances, cannot readily or advantageously be sold.

[1][59-A. (1) The Court is specially empowered in this behalf by an order of the Provincial Government, or any officer of the Court so empowered by a like order, may, on the application of the receiver or any creditor who has proved his debt, at any time after an order of adjudication has been made, summon before it in the prescribed manner any person

Power to require information regarding insolvent's property.

LEG. REF.

[1]Section 59-A was inserted by Act XXXIX of 1926, S. 4.

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defendant—Official Receiver added as party—Decree against insolvent and declaring charge on property—Appeal by insolvent impleading Official Receiver as party respondent—Competency—C. P. Code, O. 22, Rr. 8 and 10. 46 L.W. 550=1937 Mad. 915.

SUIT BY INSOLVENT AFTER ADJUDICATION—COMPETENCY—PROPER COURSE.—S. 28, sub-s. (3) prohibits suits being brought by creditors against the property of the insolvent and also prohibits the commencement of any suit or other legal proceeding by a creditor. But there is no specific provision in the Act, under which a suit by an insolvent after his adjudication is, in express terms, prohibited. S. 59 (*d*) implies that the receiver is the proper person to institute, defend or continue suits and proceedings relating to the insolvent's property. Where the property in dispute in a suit is admitted to be or is of such a nature that it must vest in the receiver, a receiver alone is the proper person to institute suits and proceedings. The suit brought by an insolvent behind the back of the receiver would be defective. But where a loan is advanced by the insolvent after his adjudication to the defendant, it does not necessarily follow that the sum of money given by the insolvent was property which had vested in the receiver. The insolvent might be a mere benamidar on behalf of an undisclosed principal, in which case he would be entitled to sue even though an insolvent, and the suit would, of course, be for the benefit of the real owner. Again, under S. 28 (5), properties exempted by the C.P. Code or other enactments from liability to attachment and sale in execution of a decree do not vest in the receiver. Such moneys as are exempted remain the property of the insolvent and if he has lent the money out of such accumulated savings, there would be no bar either to his lending the money to the defendant or to his bringing a suit to recover the amount. At the same time as a receiver is an officer of the Court acting under the control and direction of the Court and in the interest of the insolvent's creditors, it is the duty of the Court to see that no fraud is perpetrated before its eyes, and that the insolvent does not walk away with moneys which ought to go to the officer of the Court. An appropriate course would seem to be to implead the O. R. in the suit or at least give him notice of the action, so that when a decree is passed in favour of the plaintiff, the receiver may be at liberty to take the benefit of the decree and recover the amount due under it, if it can be shown that the property was such as had vested in the receiver. Such inquiry can easily be made either in the execution department or by a separate suit between the receiver and the insolvent. 1935 A. L.J. 709=1935 A. 675 (F.B.). *See also* 40 Bom.L.R. 966.

Sec. 59 (g).—Where a receiver not duly appointed effects, under a written order of the Ins. Court, a mortgage of a part of the property belonging to the insolvent, which is subsequently ratified by the Court, the mortgage is analogous to a judicial sale and is valid. As soon as the order of adjudication is passed, the estate of the insolvent vests in Court and the person effecting the mortgage is merely acting as its agent. 35 P.L.R. 717=1934 L. 867. 152 I. C. 638 (2); Where the Insolvency Court vests the estate of an insolvent in the Official Receiver and later on appoints two other persons as additional receivers to administer the estate, without vacating the order vesting the estate in the Official Receiver and making another order vesting the estate in a body of three receivers, the Official Receiver can by himself maintain suits to recover the estate of the insolvent. 1938 Lah. 264.

Sec. 59 (h).—The fact that sanction was not obtained by the Official Receiver to a compro-

known or suspected to have in his possession any property belonging to the insolvent or supposed to be indebted to the insolvent, or any person whom the Court or such officer, as the case may be, may deem capable of giving information respecting the insolvent or his dealings or property, and the Court or such officer may require any such person to produce any documents in his custody or power relating to the insolvent or to his dealings or property.

(2) If any person so summoned, after having been tendered a reasonable sum, refuses to come before the Court or such officer at the time appointed, or refuses to produce any such document, having no lawful impediment made known to and allowed by the Court or such officer, the Court or such officer may, by warrant, cause him to be apprehended and brought up for examination.

(3) The Court or such officer may examine any persons so brought before it or him concerning the insolvent, his dealings or property, and such person may be represented by a legal practitioner.]

Special provisions in regard to immovable property.

60. (1) In any local area in which a declaration has been made under section 68 of the Code of Civil Procedure, 1908, and is in force, no sale of immovable property paying revenue to the Government or held or let for agricultural purposes shall be made by the receiver; but, after the other property of the insolvent has been realised, the Court shall ascertain—

(*a*) the amount required to satisfy the debts proved under this Act after deducting the moneys already received;

(*b*) the immovable property of the insolvent remaining unsold; and

(*c*) the incumbrances (if any) existing thereon;

and shall forward a statement to the Collector containing the particulars aforesaid; and thereupon the Collector shall proceed to raise the amount so required by exercise of such of the powers conferred on him by paragraphs 2 to 10 of the Third Schedule to the said Code as he thinks fit, and subject to the provisions of those paragraphs so far as they are applicable, and shall hold at the disposal of the Court all sums that may come to his hands by the exercise of such powers.

(2) Nothing in this Act shall be deemed to affect any provisions of any enactment for the time being in force prohibiting or restricting the execution of decrees or orders against immovable property; and any such provisions shall be deemed to apply to the enforcement of an order of adjudication made under this Act as if it were such a decree or order.

NOTES.

mise under S. 59 (*h*) does not make the compromise invalid. The said provision is only an administrative provision. 112 I.C. 452 (2)= 1929 S. 41.

Sec. 60.—Applicability of section when the parties are all secured creditors; *see* 48 A. 475= 24 A.L.J. 480=1926 A. 501.

Sec. 60 (1).—S. 60 (1) is not applicable to Punjab. 61 I.C. 664=2 L. 78. The section does not mean that the receiver or Court should proceed through the Collector. 61 I.C. 664=2 L. 71. S. 16, Punjab Alienation of Land Act overrides the provisions of this Act in respect of all matters which are done in 'enforcement of the order of adjudication.' An act done by the Receiver in pursuance of the authority which he derives from the order of adjudication is nothing but an enforcement of the order of adjudication and sale of land belonging to member of agricultural tribe is subject to provisions of S. 16, Punjab Alienation of Land Act. 31 Punj. L.R. 842=1930 L. 1034.

Sec. 60 (2) is intended to supplement S. 28 and to protect the interest of the insolvent by saving the operation of enactments prohibiting the execution of decrees or orders against the immovable property of the insolvent even after the property has vested in the receiver and must therefore be held to apply to sale of insolvent's property by the receiver. Such a sale being made in enforcement of an order of adjudication, S. 16, Punjab Alienation of Land Act, which applies to execution of decrees

Distribution of Property.

Priority of debts.

61. (1) In the distribution of the property of the insolvent, there shall be paid in priority to all other debts—

(*a*) all debts due to the Crown or to any local authority; and

(*b*) all salary or wages, not exceeding twenty rupees in all, of any clerk, servant or labourer in respect of services rendered to the insolvent during four months before the date of the presentation of the petition.

(2) The debts specified in sub-section (1) shall rank equally between themselves, and shall be paid in full, unless the property of the insolvent is insufficient to meet them, in which case they shall abate in equal proportions between themselves.

(3) Subject to the retention of such sums as may be necessary for the expenses of administration or otherwise, the debts specified in sub-section (1) shall be discharged forthwith in so far as the property of the insolvent is sufficient to meet them.

(4) In the case of partners, the partnership property shall be applicable in the first instance in payment of the partnership debts, and the separate property of each partner shall be applicable in the first instance in payment of his separate debts. Where there is a surplus of the separate property of the partners, it shall be dealt with as part of the partnership property; and where there is a surplus of the partnership property, it shall be dealt with as part of the respective separate property in proportion to the rights and interests of each partner in the partnership property.

(5) Subject to the provisions of this Act, all debts entered in the schedule shall be paid rateably according to the amounts of such debts respectively and without any preference.

(6) Where there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date on which the debtor is

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or orders of Court against land belonging to a member of a notified agricultural tribe, applies to a sale by the receiver of land belonging to an insolvent who is a member of such tribe It is open to the receiver to arrange for temporary alienation of the land of the insolvent according to law. I.L.R. (1940) Lah. 40=41 P.L.R. 816=1939 Lah. 346.

Sec. 61.—A proved debt cannot be excluded in the distribution of the assets. 19 I.C. 355 =6 S.L.R. 163. Since in a Hindu joint family the sons are liable to pay their father's suretyship debt, upon the insolvency of the father and the sons, the interests of the sons also in the joint family are answerable in the discharge of such debt to a public body in priority over all the debts, whether of the sons of the joint family. The priority is not restricted to the interest of the father alone. 1930 S. 244. Section 230 of the Companies Act was enacted to deal especially with the same question as to priority as were dealt with by S. 61 and confining the decision on all such matters to the provisions of S. 230 32 P.L.R. 367=1931 L. 351.

Sec. 61 (1) (a).—Mortgage executed as security for payment of rent due to Government—Rent not paid—Adjudication—Sale of properties by Government without notice to receiver —Validity—Proper course for Crown to pursue *See* 1935 R. 273. Where the insolvent firm is only one firm with different branches, there is no provision in the Act that creditors who had dealings with the foreign branch must realize their debts as far as possible from the foreign property before being entitled to share rateably with creditors in British India. 149 I.C. 935 (1)=1934 L. 33.

Sec. 61 (3).—No doubt the rent for premises in which the insolvent's goods are stored after adjudication, comes under expenses of administration within the meaning of S. 61 (3) and takes priority even over the debts of a secured creditor; yet where the premises are vacated before the order of adjudication is passed, the owner of the premises is not entitled to claim priority under S. 61 (3) for the amount due to him as rent. (1930 C. 459, Dist.) 39 P.L.R. 314=1937 L. 96.

Sec. 61 (4).—"*Partnership debt*" means a debt which is due from a partnership. The mere fact that a partner is personally liable for the partnership debt as a partner would not deprive it of its character as a "partnership" debt for the purposes of S. 61 (4); 143 I.C. 755 (2)= 1933 L. 639. The English Bankrupcy Act gives a preference to the petitioning creditor, and it is not applicable to India. 1934 A.L.J. 676=1934 A. 521.

adjudged an insolvent at the rate of six per centum per annum on all debts entered in the schedule.

Calculation of dividends.

62. (1) In the calculation of dividends, the receiver shall retain in his hands sufficient assets to meet—

(*a*) debts provable under this Act and appearing, from the insolvent's statements or otherwise, to be due to persons resident in places so distant that in the ordinary course of communication they have not had sufficient time to tender their proofs;

(*b*) debts provable under this Act, the subject of claims not yet determined;

(*c*) disputed proofs or claims; and

(*d*) the expenses necessary for the administration of the estate or otherwise.

(2) Subject to the provisions of sub-section (1), all money in hand shall be distributed as dividends.

Right of creditor who has not proved debt before declaration of a dividend.

63. Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid, out of any money for the time being in the hands of receiver, any dividend or dividends which he may have failed to receive before that money is applied to the payment of any future dividend or dividends; but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein.

NOTES.

Sec. 62.—S. 47 must be read as corollary to and subject to S. 62. Before the Official Receiver is required to make any reserve, the claim must be submitted in the required form and further the Official Receiver cannot reasonably be expected to retain any assets when he is not in a position to know the extent of the debt he is to provide for. Hence where there is no compliance by a secured creditor with S. 47, there is no debt provable in respect of which the Official Receiver can retain moneys in his hands. 1935 S. 57.

Sec. 63.—Under S. 63 no creditor who comes in after declaration of a dividend shall be entitled to disturb the distribution of any dividend declared before his debt was proved by reason of his non-participation therein; the section does not, however, say how the money shall be distributed between subsequent and competing creditors *inter se*. It is silent on the question of what is to be done when competing creditors come in under the section. The general principle of rateable distribution should apply to all claims pending for admission before the Official Receiver when he proceeds to adjudicate upon the claims of late-comers; and a creditor whose claim has been admitted earlier is not entitled to any preference to other creditors whose claims were pending before the Official Receiver at the same time. It is inequitable that claims filed earlier should necessarily be postponed to others filed later which the Official Receiver may have, possibly on grounds of administrative convenience, heard and admitted first. It is open to the Official Receiver to admit late claims subject to conditions; and he should admit all claims, if proved, pending before him before the first of the claims is proved, to a share *pro rata*. 30 S.L.R. 161=1936 S. 186.

Secs. 63 and 64.—*See* 1933 S. 330; 1935 S. 57. At the time of the declaration of the first dividend, it is not possible for the receiver to be sure whether it will or will not be the final dividend. Unless it is quite clear that it is the final dividend it is not incumbent on him to give individual notices under S. 64. The unexpected event that the first dividend happened to be the final dividened would not entitle the negligent creditors guilty of delay in proving their debts to disturb the distribution of any dividend already declared. 33 Bom.L.R. 148.

Secs. 63, 64 and 74.—In the case of a summary administration under S. 74, a creditor is entitled to come before the Court at any time before the single dividend is distributed and proving his claim to a share in the amounts realised. Where a creditor makes an application to have his claim included before the distribution of the dividend, the Court is bound to entertain it and deal with it on the merits. The Court has under S. 74 (3) to inquire into the debts and assets at the hearing of the petition and cannot transfer the petition itself to the official for disposal, as the Act does not provide for any such delegation to the official of the power of disposing of insolvency petitions summarily under S. 74. If such a petition is transferred to the receiver and he frames a schedule, which is not required under S. 74, that cannot make the ordinary procedure applicable to the case, and when the dividend for which the Official Receiver prepares a schedule is the one and only dividend that can be possibly declared in

Final dividend.

64. Where the receiver has realised all the property of the insolvent or so much thereof as can, in the opinion of the Court, be realised without needlessly protracting the receivership, he shall declare a final dividend; but before so doing, he shall give notice in manner prescribed to the persons whose claims to be creditors have been notified but not proved, that if they do not prove their claims within the time limited by the notice, he will proceed to make a final dividend without regard to their claims. After the expiration of the time so limited, or if the Court, on application by any such claimant, grants him further time for establishing his claim, then on the expiration of such further time, the property of the insolvent shall be divided among the creditors entered in the schedule without regard to the claims of any other persons.

No suit for devidend.

65. No suit for a dividend shall lie against the receiver; but where the receiver refuses to pay any dividend, the Court may, on the application of any creditor who is entered in the schedule, order him to pay it, and also to pay out of his own money interest thereon for the time that it is withheld, and the costs of the application.

Management by and allowance to insolvent.

66. (1) The Court may appoint the insolvent himself to superintend the management of the property of the insolvent or of any part thereof, or to carry on the trade (if any) of the insolvent for the benefit of the creditors, and in any other respect to aid in administering the property in such manner and on such terms as the Court may direct.

(2) The Court may, from time to time, make such allowance as it may think just to the insolvent out of his property for the support of himself and his family, or in consideration of his services if he is engaged in winding up his estate; but any such allowance may, at any tme, be varied or determined by the Court.

Right of insolvent to surplus.

67. The insolvent shall be entitled to any surplus remaining after payment in full of his creditors with interest as provided by this Act, and of the expenses of the proceedings taken thereunder.

NOTES.

the insolvency, it is still a dividend under S. 64 of the Act, and not an *interim* dividend under S. 63, so as to bar the right of a creditor to prove her claim before the distribution of such dividend, when that creditor has not had any notice under S. 64. 1937 M.W.N. 1160.

Sec. 64.—*See* 1936 C. 434. S. 64 does not control the proviso to S. 63 of the Act. 33 Bom.L.R. 148. Notice of final dividend should go to all creditors whose claims have been notified to the Official Receiver irrespective of the fact whether they have proved their claims or not. 107 I.C. 439; 1928 S. 105. Succession certificate is not necessary for payment of dividend to scheduled creditors. 1926 M. 899=51 M.L.J. 349.

Sec. 66 (2).—Courts cannot attach the half salary of the debtor, under S. 60 of the C. P. Code and the section goes further and enables the Courts to make a further reasonable allowance out of the other half as well. 45 A. 364=1923 A. 466. But *see* 38 I.C. 410. S. 66 (2) contemplates only a money allowance being given for the maintenance of the insolvent or his family. It does not empower the Court to reserve a portion of the immovable property of the insolvent for his maintenance. 40 P.L.R. 151. S. 66 (2) does not empower the Court to reserve a portion of the immovable property of the insolvent for the maintenance of the insolvent's wife and children. That section is meant only for the purpose of reserving a money allowance for them. 40 P.L.R. 1057=1939 Lah. 39. S. 66 (2) was not meant for the purpose of reserving a house for the residence or maintenance of the wife or family. 31 P.L.R. 661. S. 66 only gives discretion to the Court to make an allowance to the insolvent for the maintenance of himself and his family, and does not give any independent right to the members of the family of the insolvent to ask for any separate maintenance. 37 P.L.R. 517. There is no authority for holding that a Hindu insolvent has a right to claim out of his estate the expenses that he contemplates incurring for celebrating the marriage of his daughter. Such a claim cannot be made as a matter of right. The proper course for the insolvent is to ask for an increase in his allowance for the period during which he contemplates celebrating the marriage of his daughter. 51 L.W. 363=1940 Mad. 675 =(1940) 1 M.L.J. 334.

Sec. 67.—The words "*payment in full*" in S. 67

[1][67-A. (1) The Court may, if it thinks fit, authorize the creditors who have proved their debts to appoint a committee of inspection for the purpose of superintending the administration of the insolvent's property by the receiver.

Committee of inspection.

(2) The persons appointed to a committee of inspection shall be creditors who have proved their debts or persons holding general powers of attorney from such creditors.

The committee of inspection shall have such powers of control over the proceedings of the receiver as may be prescribed.]

Appeal to Court against Receiver.

68. If the insolvent or any of the creditors or any other person is aggrieved by any act or decision of the receiver, he may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just:

Appeal to Court against receiver.

LEG. REF.

[1] Inserted by Act XXXIX of 1926 S. 5.

NOTES.

refer not merely to the payment of the creditors at the contract rate up to the date of adjudication and of interest at the statutory rate of 6 per cent. from the date of adjudication under S. 61 (6), but also to the payment of the higher rate, if any, stipulated for in the contract with the creditor from the date of adjudication to the date of payment as indicated in S. 48 (2). So if, after payment in full of all the debts, there is a surplus left, the creditor of the insolvent to whom money is due under a promissory note providing for a rate of interest higher than the statutory 6 per cent. is entitled to be paid interest at the contract rate from the date of adjudication to the date of payment, before the insolvent can be entitled to the surplus. 134 I. C. 169=1931 M. 729. Where, in the exercise of the father's power of disposal, the O.R. sold the family properties including the shares of the sons to discharge the debts of the father, the surplus, if any, remaining after the satisfaction of the father's creditors should be returned to the sons. 32 Bom.L.R. 1362=1931 B. 50.

Sec. 68.—The sale of the property of the insolvent by the receeiver is an act of receiver within S. 68. 9 R. 231=1931 R. 122 (S.B.). Once an insolvent's property has vested in an O. R., he has no further interest therein and is not aggrieved by the disposal of the property for the benefit of the creditors by the O. R. The insolvent has no *locus standi* as an aggrieved person to appeal against the sale. 163 I.C. 621=1936 Pesh. 151. *See also* 43 Bom.L.R. 805 =1941 Bom. 415. An appeal lies against all acts of the receiver even against an order dismissing an insolvency petition. 38 M. 15=24 M.L. J. 73. The conduct of the O.R. can be brought to notice of Court by any person. 20 I.C. 683 =18 C.W.N. 366; 1 L. 307=58 I.C. 6. Court can interfere not only in cases of *mala fides* on the part of receiver, but also where his action has been irregular and has prejudiced creditors generally. 44 M.L.J. 284=1923 M. 350. A contract of sale by the receiver can be questioned under this section; O. 21, R. 90, C. P. Code, has no application. 7 L.W. 406=44 I.C. 885. Under this section sales by O. R. can be set aside. 41 M.L.J. 211=64 I.C. 524 (1); 39 M. 479=29 M.L.J. 755. *Grounds for setting aside sale.* 5 R. 768=1928 R. 60. *See also* 9 R. 231 =1931 R. 122 (S.B.). *An insolvent* whose estate has vested in the O.R. is not entitled to appeal against an order of the judge rejecting his objection to a sale of his estate by the O.R. 40 L.W. 864=67 M.L.J. 942. Where the two creditors of the insolvent are the only two prospective bidders, it is neither fair nor reasonable that the receiver should hold the sale in the absence of the other creditor at an earlier hour than that at which sales normally are held and long before the other creditor could reasonably be expected to be present and without making enquiries to ascertain whether the other creditor was at that place or giving him any opportunity to be present when the sale took place. 9 R. 231=1931 R. 122 (S.B.). *"Person aggrieved,"* meaning of. 33 M.L.J. 612=42 I.C. 789. *See also* 37 I.C. 773=5 L.W. 255. Mere omission or refusal is not an "act", *e.g.*, where he refuses to act under S. 53 or 54. 18 L.W. 857= 1924 M. 345. "May" does not mean "must." A mortgage executed by an insolvent in favour of the petitioner was annulled by the Court under S. 54 (1), but the Court, in the same proceeding, considered the question whether the mortgage should be annulled under S. 53 and decided that the mortgage debt was true. Relying on this finding in his favour, the petitioner filed proof of this debt before the O.R who refused to admit it without further enquiry. Petitioner then applied to the Court under S. 68 of the Act against this refusal of the O. R. *Held* that, though it would have been better for the receiver to have admitted the debt and put the onus of getting expunged from the schedule of the other creditors, the O.R. could not be said to have acted *ultra vires* in posting the petitioner's application for further enquiry; that the O. R. was not bound to accept as final the decision in the annulment petition, and that he should be given an opportunity of considering the case and coming to a decision; and that until the O.R. had given a decision, the petitioner was not "aggrieved" and was not entitled to apply under S. 68, and the application was therefore premature. *Held, further*, that the O. R. should not in any way be fettered in the course of making inquiries into the validity of debts of which proofs are entered and that the

Provided that no application under this section shall be entertained after the expiration of twenty-one days from the date of the act or decision complained of.

NOTES.

act or decision referred to in S. 68, cannot be held to apply to some step taken in the course of such an enquiry. 71 M.L.J. 809=1937 Mad. 151. The making of a statement by a Receiver, in certain insolvency proceedings, is unquestionably an act and as the Provincial Insolvency Act, does not restrict the word 'act' to any particular kind of act it must be understood in its ordinary meaning. Any person aggrieved by reason of such a statement can appeal. 1940 N.L.J. 90=1940 Nag. 142. A third person may treat the receiver as a trespasser and maintain a claim in a Civil Court. 46 A. 16=1924 A. 40; *see also* 44 A. 620=1922 A. 407. *See contra* 47 I.C. 62. But if once an application is made under this section and a decision is arrived at, it is final. 51 I.C. 113; 41 A. 378 =49 I.C. 590; 43 I.C. 573=39 A. 626; 33 I. C. 798=15 A.L.J. 661. The section only applies to acts done in the course of insolvency. 39 A. 204=38 I.C. 613. A creditor, wishing. to attach a certain property as the insolvent's, has first to move the receiver. If he refuses, then this section comes into play. 39 A. 152= 37 I.C. 76.

PROCEDURE.—Where the O.R. sells a house belonging to the insolvent at a public auction to a certain person who deposits one-fourth of the price but subsequently, under the direction of the Court, executes a sale deed in favour of another who makes a higher offer, the Ins. Court cannot summarily cancel the sale-deed. In such a case the Court should leave the controversy to be settled in more appropriate proceedings, granting leave, if necessary for a suit against the receiver and the third person claiming rights under the sale-deed. 155 I.C. 563= 1935 A. 687.

PROVISO.—An application by a person not aggrieved can be enquired into even after the period of limitation provided in the proviso. 18 C.L.J. 359=20 I.C. 683. The proviso does not apply to the Court taking action under S. 50 (2). 42 M. 13=35 M.L.J. 531. An order rejecting proof of claim is appealable before notice is issued. When an order has been duly issued and a party is apprised of that order, time will run, even though it is directed that a notice of an order shall be sent. 57 M. 1030= 40 L.W. 145=68 M.L.J. 65. Where the land of an agriculturist was sold by the receiver contrary to the provisions of the Punjab Alienation of Land Act and the validity of the same was contested by the insolvent by means of an application filed more than 21 days after the sale, but all the time the O. R.'s report was before the judge for confirmation: *Held*, that the judge could refuse to confirm the action of the O. R. in having sold the property and that the question whether he acted rightly in entertaining the insolvent's application after 21 days did not therefore arise for decision. 1931 L. 133 (1). S. 68 empowers the insolvent, when aggrieved by any act of the receiver, to move the Court. The insolvent however must take action within the period provided by the proviso to S. 68: 33 P.L.R. 332=1932 L. 320. But *see* 67 M.L. J. 942. Where a house was attached under an order of the Court and the objector was not challenging the act of the receiver but the order of attachment passed *ex parte*: *Held*, that the attachment was not an act or decision of the receiver within the meaning of S. 68 but was a claim put forward by a stranger to the insolvency proceedings setting up his own independent title and it fell within the scope of S. 4. It was therefore open to the Court to enquire into the question of title and adjudicate upon the rights of the objector, even though the claim was made 21 days after the attachment. 136 I.C. 791=1932 A.L.J. 391=1932 A 408. Applicability of section—Application under S. 4—Limitation of 21 days—If applicable. 1935 L. 60.

LIMITATION.—S. 5 of the Limitation Act does not apply to an application under this section. 35 A. 410=20 I.C. 673. An application made to the Court by the insolvent under S. 68 within 21 days of the sale itself complaining that the O. R. had sold the property which he had no right to sell, is not barred by limitation, even though the application was preferred more than 21 days from the date of the attachment of the property by the O.R. There is no provision in the Act which requires or empowers the O. R. to attach the property as a necessary preliminary to sale, and the sale is not, in any sense, in continuation of the attachment. 1937 A.L. J. 129=1937 A. 226. By reason of the express terms of S. 29 (2) (*a*) of the Lim. Act, S. 4 of that Act applies to an application under S. 68 of the Prov. Ins. Act, so that if the last day of limitation for that application happens to be a Sunday, it may be presented on the next day. 5 R. 150=134 I.C. 223=1931 R. 209. The proceedings under S. 68 are more akin to an appeal than to a suit and the provisions of S. 22 of the Limitation Act have no application to such proceedings. There is no law which requires that certain parties should be formally mentioned as respondents in an application under S. 68. The phraseology of that section negatives such a necessity. The application is directed against an action of the Official Receiver and normally he is the only necessary party to be heard against the application. But the Court may hear other parties who are interested, as for instance a purchaser. But it is not necessary that the purchaser should be formally named as a party at the heading of the application. Accordingly an application under S. 68 directed against a sale held by the Official Receiver is not liable to be dismissed as barred by time on the ground that the auction-purchaser was made a party to it more than twenty-one days after the sale. 168 I.C. 389=1937 Lah. 611.

APPEAL.—Orders passed under this section cannot be appealed against except with leave of Court. 33 I.C. 773. *See* 40 M. 752=32 M.L. J. 449. On the wording of S. 68 the insolvent has the right to apply under S. 68 to the Insol-

PART IV.

PENALTIES.

Offences by debtors.

69. If a debtor, whether before or after the making of an order of adjudication,—

NOTES.

vency Judge to set aside the sale of his property conducted by the Official Receiver. 186 I.C. 241=1939 Lah. 499. A time-barred appeal can be converted into a revision by the High Court. 39 M. 593=30 I.C. 703. Where no application for leave to appeal has been made, it cannot be inferred that leave was granted because the appeal was admitted. Leave was granted at hearing and time was extended under S. 5, Lim. Act. 149 I.C. 935 (1)=1934 L. 33. *See also* 1940 Nag. 142.

Secs. 68 and 4. *See* 149 I.C. 43=1934 R. 97, as to remedies open to parties aggrieved. Where the O. R. passes an order on a claim petition which he has no jurisdiction to pass, even though no appeal is filed under S. 68, an application under S. 4 is not barred because the remedy under S. 4 is much larger than what could be got under S. 68. In fact the correct procedure is under S. 4 and not by appeal under S. 68. 1933 M. 471=38 L.W. 896. S. 68 is intended to apply to provide an appeal to the Court against an act of the receiver and not an appeal to the Court against acts of the Court done through receiver. Where a receiver considers that certain property of which the insolvent is the trustee should be sold, and merely invites bids under the instructions of the Court, and refers the bids received to the Court which accepts the highest bid, the sale, if a sale be held to have taken place, is not the act of the receiver and S. 68 does not apply to such a case. An application to set aside such sale does not therefore fall under S. 68. It falls under S. 4 and is not barred by time although filed after 21 days after the date of the sale. 178 I.C. 110=1938 Nag. 320. *See also* 1937 Lah. 297.

Secs. 68 and 75.—A right of appeal is not a mere matter of procedure. It is a substantive right and is primarily a creature of statute. As such, it can be exercised only by those in whom the power rests either expressly or by necessary implication. Where the Official Receiver in insolvency who fails in a suit to set aside a sale of the insolvent's property for arrears of income-tax, and on appeal, refuses to prefer a second appeal to the High Court, it is not open to a creditor of the insolvent to prefer an appeal himself. The Official Receiver is not a representative of the creditors and the creditors cannot ignore him or act independently of him and prefer an appeal. The fact that leave had been granted to a creditor to appeal makes no difference when such leave is granted without notice to the opposite party, the grant of leave can only be regarded as having been made without prejudice to the interests of those against whom leave was granted. The proper remedy of the creditor would be to go to the Insolvency Court under S. 68 and to apply for a reversal of the refusal by the Official Receiver to prefer a second appeal or in the alternative for permission to appeal himself in the name of the Official Receiver. 1941 Mad. 577=(1941) 1 M.L.J. 531.

Secs. 68 and 80 (b)—Order of receiver that alleged debt was genuine but unsecured—Appealability. In order to prepare the schedule (under the powers delegated to him under S. 80 (*b*), Provincial Insolvency Act) the receiver has to decide whether the alleged debt was actually due and, if so, whether the whole or a part of it was unsecured. When after an inquiry into these matters he has come to the conclusion that the debt was genuine, but that no part of it was secured, the proceedings before the receiver cannot be said to have been misconceived, or the order passed by him *ultra vires*. An appeal against the receiver's order lies to the Districr Judge under S. 68 at the instance of the creditot who is an aggrieved person. 41 P.L.R. 884=1939 Lah. 480.

Sec. 69 : NATURE OF OFFENCES.—The offences are in the nature of disciplinary offences and not offences against criminal law. 39 A. 171=37 I.C. 996. Penal action against insolvent is not to be taken on mere suspicion. 97 I.C. 590=1926 M. 1159 ; 1936 Nag. 207.

PROCEDURE.—Difference between this and the next section, *see* 106 I.C. 486 (2)=1928 S. 85. Proceedings under S. 69 cannot be taken after a petition for adjudication has been dismissed and it is known that the alleged debtor is not going to be made insolvent at all. An order to prosecute passed under those circumstances is entirely *ultra vires*. 134 I.C. 534=1931 C. 508. The proceedings should be carried on in analogy with the Cr. P. Code. 38 I.C. 969. *See contra* 45 I.C. 675. A conviction based on report of the receiver and not on evidence is unsustainable. 18 C.W.N. 692=27 I.C. 199 ; 37 A. 429=29 I.C. 998. But District Court can grant permission to O. R. to prosecute insolvent under Ss. 421 and 424, I. P. Code on the strength of the receiver's report. 42 I.C. 608=16 L.W. 283. Opportunity should be given for answering a charge framed. 19 I.C. 920=19 C.L.J. 430. O.R. is merely an ordinary litigant who may be entitled to move the Court in the usual manner, that is, by presentation of a proper application which is to be heard in the presence of the parties and proceedings taken in his absence by the Court must be set aside on the proper application before the Court. 1929 L. 805.

CONCEALMENT.—As to necessity to prove criminal intent, *see* 1937 C. 234. Where the insolvent was in jail and had only omitted to mention the equity of redemption of certain property which he had mortgaged many years ago, but admitted the mortgage at once when the fact was brought to his notice, the prosecution of the insolvent is hardly warranted. 39 P.L.R. 213=1937 Lah. 432. If the insolvent having the means to find out where his properties are, though not a party to his active concealment, keeps quiet, his conduct amounts to concealment. 43 A. 406=64 I.C. 37. Where the insolvent was proved to have received certain sums of money within seventeen days after his adjudication, the Court may, under S. 114 of the Evidence Act, presume that the source of the

(*a*) wilfully fails to perform the duties imposed on him by section 22 or to deliver up possession of any part of his property which is divisible among his creditors under this Act, and which is for the time being in his possession or under his control to the Court or to any person authorized by the Court to take possession of it, or

(*b*) fraudulently with intent to conceal the state of his affairs or to defeat the objects of this Act,—

(i) has destroyed or otherwise wilfully prevented or purposely withheld the production of any document relating to such of his affairs as are subject to investigation under this Act, or

(ii) has kept or caused to be kept false books, or

(iii) has made false entries in or withheld entries from or wilfully altered or falsified any document relating to such of his affairs as are subject to investigation under this Act, or

(*c*) fraudulently with intent to diminish the sum to be divided among his creditors or to give an undue preference to any of his creditors,—

(i) has discharged or concealed any debt due to or from him, or

(*ii*) has made away with, charged, mortgaged or concealed any part of his property of any kind whatsoever,

he shall be punishable on conviction [1][* * * *] with imprisonment which may extend to one year.

[2][70. Where the Court is satisfied, after such preliminary inquiry, if any,

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LEG. REF.

[1]The words " by the Court" were repealed by Act XII of 1927 as consequential on the amendment of S. 70 by Act IX of 1926.

[2]Substituted by Act IX of 1926, S. 11 as amended by Act X of 1927, Second Schedule.

NOTES.

trade which brought those ms into the insolvent's hands consisted of undisclosed assets in his possession at the time of the adjudication and a conviction based on such presumption is not bad in law. 1931 M.W.N. 1312. Disposal of Provident Fund by insolvent is not fraudulent. 44 B. 673=56 I.C. 450. A creditor whose allegations against the insolvent are disbelieved, has no right of appeal. 39 A. 171=37 I.C. 996 ; 1 L. 213. *See also* 56 I.C. 744. *See contra* 45 M. L.J. 804=1924 M. 185. No appeal lies from an order declining to take action against insolvent. 48 I.C. 333=22 C.W.N. 958 ; 11 L.W. 145=38 M.L.J. 338 ; 1931 A.L.J. 999. Punishment can be suspended till disposal of appeal. 44 B. 673=56 I.C. 449.

Sec. 69 (a).—To fulfil the requirements of the word "wilfully", it will have to be proved that the account books required to be produced were in the possession or power of the debtor. 61 C. 537=38 C.W.N. 642=1934 C. 409. Non-compliance with prohibitory notice—Notice defective and not in proper form—Conviction not proper. *See* 1936 N. 232.

Sec. 69 (b)—On a charge framed under S. 69 (*a*), the Court cannot convict an accused under S. 69 (*b*) as the elements of the offences contemplated by the two clauses are not the same, and so there may be prejudice to the accused if such a procedure is adopted. 61 C. 537 (noted *supra*).

Sec. 69 (c) (i)—S. 69 (*c*) (*i*) refers to debts incurred before the order of adjudication and not to debts incurred after that order, for the simple reason that the insolvent is supposed to be incapable of incurring debts before his insolvency and is expressly forbidden from doing so by S. 72; 27 N.L.R. 304.

Sec. 69 (c) (ii).—Where an adjudicated insolvent removes away certain vital parts of his flour mill which he was not entitled to, as it has been sold away by the Insolvency Court to a third party, his conduct is such that the only possible inference is that he intended to cause wrongful loss to the creditors. His conviction under S. 69 (*c*) (*ii*) is proper and will not be interfered with in revision. 1938 A.L.J. 1217=1939 All. 166. A case of gift fraudulently made by an insolvent with intent to diminish the sum to be divided among his creditors is as much liable to punishment under S. 69 (*c*) (ii) as a case of charge or mortgage. The words "made away with" are sufficiently wide to cover cases of gift of immovable property. 8 O.W.N. 1318. Where the debts of the insolvent are very large, and the value of the assets concealed is very trifling, it is not a proper exercise of discretion to order a prosecution. 16 Pat.L.T. 140=1935 P. 126.

Secs. 69 and 75—Appeal or revision—Order of Small Cause Court refusing to take proceedings under S. 69. *See* 1937 O. 247.

Sec. 70.—Fraudulent mortgage executed at Bombay—Assets held and creditors prejudiced at Yeotmal—Jurisdiction of Court at Yeotmal. 1933 N. 33=145 I.C. 550. Under S. 70, as amended by Act IX of 1926, it is not obligatory on the insolvency judge to give notice to the insolvent before holding that there are *prima facie* grounds for enquiry into an offence under S. 69 against the insolvent. Indeed the amended section leaves it to the discretion of

Procedure on charge under section 69.

as it thinks necessary, that there is ground for inquiring into any offence referred to in section 69, and appearing to have been committed by the insolvent, the Court may record a finding to that effect and make a complaint of the offence in writing to a Magistrate of the first class having jurisdiction, and such Magistrate shall deal with such complaint in the manner laid down in the Code of Criminal Procedure, 1898.]

Criminal liability after discharge or composition.

71. Where an insolvent has been guilty of any of the offences specified in section 69, he shall not be exempt from being proceeded against therefor by reason that he has obtained his discharge or that a composition or scheme of arrangement has been accepted or approved.

Undischarged insolvent obtaining credit.

72. (1) An undischarged insolvent obtaining credit to the extent of fifty rupees or upwards from any person without informing such person that he is an undischarged insolvent shall, on conviction by a Magistrate, be punishable with imprisonment for a term which may extend to six months or with fine or with both.

(2) Where the Court has reason to believe that an undischarged insolvent has committed the offence referred to in sub-section (1), the Court, after making any preliminary inquiry that may be necessary, may send the case for trial to the nearest Magistrate of the first class, and may send the accused in custody or take sufficient security for his appearance before such Magistrate; and may bind over any person to appear and give evidence on such trial.

Disqualifications of insolvent.

73. (1) Where a debtor is adjudged or readjudged insolvent under this Act, he shall, subject to the provisions of this section, be disqualified from—

(*a*) being appointed or acting as a Magistrate;

(*b*) being elected to any office of any local authority where the appointment to such office is by election or holding or exercising any such office to which no salary is attached; and

(*c*) being elected or sitting or voting as member of any local authority.

(2) The disqualifications which an insolvent is subject to under this section shall be removed, and shall cease if—

NOTES.

the judge even to hold a preliminary enquiry into the matter. 38 P.L.R. 1160=1936 L. 871. Nature of notice. *See* 106 I.C. 486 (2)=1928 S. 85. Option to hold enquiry under the new section is given. 1936 L. 871. *Also* 47 C.L.J. 250=1928 C. 211.

Secs. 71 and 72.—S. 71 does not apply to the offence of obtaining credit within the meaning of S. 72. After an insolvent has been discharged, the Ins. Court cannot proceed against him under S. 72, even though an offence was committed within the meaning of that section before the order of discharge, because in such a case the person from whom the insolvent has obtained credit during the insolvency can proceed against the insolvent in the ordinary course of law. 27 N.L.R. 304. *See also* 61 C. 505=1934 C. 764.

Sec. 72.—Application by a firm to be adjudicated as insolvents— Adjudication— Subsequent adjudication of one of the partners in another insolvency—Effect. 23 S.L.R. 63. The only person who can appeal under S. 72 is the debtor himself in the case where his prosecution has been ordered. 28 N.L.R. 286.

Secs. 72 and 75.—An insolvent has a right of appeal against an order of the Court directing his prosecution for an offence under S. 72. 52 L.W. 604=(1940) 2 M.L.J. 672=1941 Mad. 285.

Sec. 73 (2).—Execution of decree—Subsequent adjudication and annulment—Fresh application to execute—Deduction of period. 131 I.C. 252 (A). The words "annulled under this Act" in S. 73 (2) are not limited to annulment under the chapter "Annulment of adjudication" beginning from S. 35; they include the case where the order of adjudication was discharged by the Court of appeal. Hence the period between the adjudication and the final dismissal of application should be omitted in computing the period of limitation for the suit by a creditor. 14 L. 426=1933 L. 769.

Sec. 73—Scope of—If controls of S. 55 (2) (*b*). Madras Local Boards Act. *See* (1940) 2 M.L.J. 590.

(*a*) the order of adjudication is annulled under section 35, or

(*b*) he obtains from the Court an order of discharge, whether absolute or conditional, with a certificate that his insolvency was caused by misfortune without any misconduct on his part.

(3) The Court may grant or refuse such certificate as it thinks fit, but any order of refusal shall be subject to appeal.

PART V.

SUMMARY ADMINISTRATION.

Summary administration.

74. When a petition is presented by or against a debtor, if the Court is satisfied by affidavit or otherwise that the property of the debtor is not likely to exceed in value five hundred rupees, the Court may make an order that the debtor's estate be administered in a summary manner, and thereupon the provisions of this Act shall be subject to the following modifications, namely:—

(*i*) unless the Court otherwise directs, no notice required under this Act shall be published in the Official Gazette;

(*ii*) on the admission of a petition by a debtor, the property of the debtor shall vest in the Court as a receiver;

(*iii*) at the hearing of the petition, the Court shall inquire into the debts and assets of the debtor and determine the same, by order in writing, and it shall not be necessary to frame a schedule under the provisions of section 33;

(*iv*) the property of the debtor shall be realised with all reasonable despatch and thereafter, when practicable, distributed in a single dividend;

(*v*) the debtor shall apply for his discharge within six months from the date of adjudication; and

(*vi*) such other modifications as may be prescribed with the view of saving expense and simplifying procedure:

Provided that the Court may at any time direct that the ordinary procedure provided for in this Act shall be followed in regard to the debtor's estate, and thereafter the Act shall have effect accordingly.

PART VI.

APPEALS.

Appeal.

75. (1) The debtor, any creditor, the receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court may appeal to the District Court, and the order of the District Court upon such appeal shall be final:

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Sec. 74.—An Ins. Court which makes an order for summary administration under S. 74 is not entitled to make an order requesting another Court, which, in execution of a decree against the debtor, has, prior to the presentation of the petition by the debtor, attached his salary, to withdraw such attachment or to make no further attachment. Such an order is without jurisdiction. S. 74 (ii) does not give the Court power to pass such an order either under S. 51 or 52. 63 C. 535=40 C.W.N. 336. Duty of Court under S. 74—Insolvency petition—Power of Judge to transfer to Official Receiver for disposal—Enquiry into debts and assets—Duty of Court to hold and determine. *See* 1937 M.W.N. 1160.

Sec. 75.—An appeal from an order under S. 69 is a civil appeal. 36 A. 576=25 I.C. 986; 73 I.C. 129. The language of S. 75 of Act V of 1920 is materially different from S. 46 of Act III of 1907. *Held*, that the insolvent was a "person aggrieved" within the meaning of S. 75 and that he can prefer an appeal. 119 I.C. 427=1929 L. 622. *See also* 1941 Lah. 243. S. 75 is very general and clearly covers an order passed by the insolvency Judge under S. 70 regarding the finding that there are *prima facie* grounds for an enquiry into the offence referred to under S. 69 and appearing to have been committed by the insolvent, and making a complaint of the offence in writing to a Magistrate of competent jurisdiction. Such order made under S. 70 is appealable. 38 P.L.R. 1160=1936 L. 871. S. 75 is confined to cases falling under S. 4 only and a case decided under S. 53 does not properly fall under S. 4. 1930 L. 122. *Guha, J.*—An appeal under

Provided that the High Court, for the purpose of satisfying itself that an order made in any appeal decided by the District Court was according to law. may call for the case and pass such order with respect thereto as it thinks fit:

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S. 75, Prov. Ins. Act, can lie only on grounds similar to those under S. 100 (1), C. P. Code. The decision of the lower Courts based on findings of fact cannot be assailed under S. 75. 59 C. 1135=36 C.W.N. 492. Under S. 75 which gives a right of appeal to any person aggrieved by the decision come to by the Ins. Court, the person aggrieved must have an independent right to the relief sought for. 37 P.L.R. 517. In the absence of any substantial reason, the decision of the District Judge on the question of fact should not be disturbed. 148 I.C. 501=1934 P. 144.

AGGRIEVED PARTY.—The word "aggrieved" in S. 75 qualifies all the classes of persons previously mentioned in the sentence, and neither a creditor nor the receiver has any right of appeal under the section unless aggrieved. A person can only be aggrieved under the section if he has been wrongfully refused something which he has a right to demand, and inasmuch as neither the creditor nor the receiver has any right to demand the prosecution of the insolvent, they cannot be said to be aggrieved at an order refusing to prosecute the insolvent under S. 69 of the Act and as such have no right of appeal against that order. 43 P.L.R. 217=1941 Lah. 243. The words "aggrieved by a decision, etc." in S. 75 (1) cannot be read as qualifying only the words "any other person" preceding them. They must be read as qualifying all the persons who are entitled to appeal, *viz.*, "the debtor, any creditor receiver or any other person." There is no doubt that S. 75 (1) confers the right of appeal only on persons aggrieved by the order of a Subordinate Court. Hence a creditor who has been refused leave to prosecute the insolvent for fraudulent suppression of assets by an order under S. 70 of the Act made by a Subordinate Court is not aggrieved by the order within the meaning of S. 75 (1) of the Act, and hence not entitled to appeal to the District Court. 1942 Bom. 27 =43 Bom. L.R. 964. An insolvent is an aggrieved party, when a debt not provable in insolvency, is admitted. 45 M.L.J. 166=1924 M. 163; 1929 L. 622. An insolvent whose estate has vested in the O.R. is not entitled to appeal as a person aggrieved against the order of the District Judge passed in insolvency. [1919 A. 284 and 1926 M. 559 (F.B.), Rel. on.] 154 I.C. 96=1935 M. 107 (1). Sale by receiver—Objection by insolvent—Rejection by judge—Appeal by insolvent not maintainable. 67 M.L.J. 942=40 L.W. 864. Order directing money to be paid to O.A.—Claim by stranger—Appeal lies against order of dismissal. 107 I.C. 400=1927 L. 423. Alienee of insolvent. 112 I.C. 623 (1); 71 M.L.J. 333=44 L.W. 97=1936 Mad. 660. A person aggrieved is a man against whom a decision has been pronounced, which has wrongfully refused him something which he had a right to demand, in other words, a party to the dispute before the Court who has endeavoured to maintain the contrary of that which has taken place. 118 I.C. 198=1930 S. 2. *See also* 32 P.L.R. 438. Where the judge of the Ins. Court granted a lease of a hotel to the highest bidder at an auction and the prior lessee of a hotel appealed against the order granting the lease, *held*, that the appellant was not an "aggrieved person" and that the appeal was incompetent. 133 I.C. 436=1931 L. 586 (1). On the adjudication of a Hindu father, receiver obtained an *ex parte* order that his debts were binding on the minor sons. The family property was sold and the purchaser obtained an *ex parte* order for delivery. Then the minors applied to set aside that order but the application was styled as one for review of the previous order. The application was dismissed and an appeal therefrom was also dismissed by the District Judge that it was not competent under O. 47, R. 7. *Held*, that the application, though purporting to be under O. 47, R. 1 must be deemed to be under S. 151 of the C. P. Code, that the order for delivery passed without notice to the sons was void; the order dismissing the application by the minor sons was the first valid order which was appealable under S. 75. (61 M.L.J. 894, Ref.) 37 L.W. 720=1933 M.W.N. 75=1933 M. 345=143 I.C. 613. S. 75 must be taken to override the provisions of O. 47, R. 7, C. P. Code, in so far as it bars a right of appeal from an order rejecting an application for review. 53 L.W. 466=1941 Mad. 588=(1941) 1 M.L.J. 537. *See also* 1937 Lah. 568. A piece of land in which the insolvent had occupancy rights under S. 6 of Punjab Tenancy Act was sold in insolvency. The sale was subsequently set aside as invalid in a suit by the landlord. Thereupon the vendee applied to the Insolvency Court for the refund of the purchase-money. The application was dismissed. *Held*, that no question of title was involved and that an appeal was not competent from the order dismissing the application. 34 P.L.R. 183=1933 L. 628 Refusal by Court to consider fictitious nature of alienation at instance of receiver—Sale of insolvent's interest—Application by purchaser to consider question of title—Issues framed—Revision. 1933 L. 611 (2)=146 I.C. 545 (1). An insolvent has no *locus standi* in the administration of his estate. He is not an aggrieved person to entitle him to appeal against an order confirming sale of his property. 41 A. 243=49 I.C. 816. A creditor not being a proper party to an application, has no right of appeal from an order on that application. 39 A. 152=37 I.C. 76. Creditor, at whose instance, adjudication order was made, whether has a right of appeal from an order annulling adjudication. *See* 92 I.C. 235=1926 L. 24. A creditor is an aggrieved person when he is a party to an application under S. 53 or 54 and the same is dismissed. 18 L.W. 857=1924 M. 345; 52 I.C. 761. *See also* 56 C.L.J. 440; I.L.R. (1941) Lah. 779. S. 75 is sufficiently wide to enable a creditor, who is aggrieved by an order passed by the insolvency Judge to lodge an appeal. 39 P.L.R. 214=1937 L. 2. A creditor has a right of appeal from an order passed on an application by O. R. under S. 54 (4) [47 A

Provided, further, that any such person aggrieved by a decision of the District Court on appeal from a decision of a subordinate Court under section 4 may appeal to the High Court on any of the grounds mentioned in sub-section (1) of section 100 of the Code of Civil Procedure, 1908.

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849, Foll.]. 1933 L. 856. *See also* 1934 L. 968 (1). In an application under S. 69, if the order is that there is no *prima facie* case, a creditor cannot be said to be aggrieved. 55 I.C. 717. *See also* 118 I.C. 198; 39 P.L.R. 213. An O. R. suspended and superseded by a special receiver is aggrieved by that order. 46 M. 405=44 M.L.J. 251. An additional Judge is not subordinate to a District Judge. An appeal lies from his order only to the High Court. 36 A. 576=25 I.C. 986. From an order of the Deputy Commissioner, an appeal lies to the District Judge only. 13 I.C. 605=15 C.L.J. 239. An appeal from an order passed by the senior Sub-Judge in the exercise of insolvency jurisdiction lies to the District Judge. 34 P.L.R. 176=1933 L. 307 (1). A first appeal from an order of an Assistant District Court passed in its insolvency jurisdiction, lies to the District Court and not to the High Court. 12 Rang 352=151 I.C. 798=1934 Rang. 155. Against an order by receiver dismissing an insolvency petition, an appeal lies only to the District Court. 38 M. 15=16 I.C. 820. An order in appeal directing lower Court to take and submit additional evidence is not final but is subject to revision. 61 I.C. 589. The appellate Court has power to annul adjudication. 1930 M.W.N. 651. Where a Judge holds that the claim is not maintainable under S. 4, the order can be appealed against under S. 75 read with Schedule I. 58 C.L.J. 118=1934 C. 122 (2). No appeal lies from an order refusing to frame specific issues as required by the insolvent. 35 P.L.R. 155 =1934 L. 194 (1); nor against an order refusing to review an order. 1935 P. 177. Where a Court which has appointed a receiver in a mortgage suit rejects an application made to it by the O. R. for removal of the receiver in suit and for possession of the mortgaged properties, there is no provision either in the C. P. Code or in this Act, which confers a right of appeal against that order. An appeal by the O. R. against such rejection is therefore incompetent. 39 C.W.N. 384.

DECISION.—The word 'decision' has an element of finality so far as a particular Court is concerned. Hence an interlocutory order of a Court cannot be said to be a decision of the Court. 58 A. 639=1936 A.L.J. 9=1936 A. 80. Where, in an appeal, District Court passes an order impleading the legal representatives of the deceased debtor, it does not arrive at a decision but has only passed an interlocutory order and therefore no second appeal lies. High Court cannot also interfere in revision with the order for the same reason. (1936) All. 80. A decision upon jurisdiction has only the effect of regulating procedure and where it is not sufficient to dispose of the application hardly stands on a different footing from a ruling as to the admissibility of a document tendered or the relevancy of a question put and objected to in the course of the trial. Such decisions as to details of procedure and admissibility of evidence may, no doubt, be regarded as orders in a sense but it could not have been intended that such decisions should by themselves be open to appeal apart from the final drcision disposing of the application or matter. Accordingly, an order merely holding that the Court has jurisdiction to entertain applications for scaling down debts under Madras Act IV of 1938, in respect of debts due by the insolvent and posting the applications for trial on merits, is not appealable under S. 75 of the Act. (1942) 1 M.L.J. 113.

Sec. 75 (1) and 2.—*See* 49 M. 794=96 I.C. 944=1926 M. 801=50 M.L.J. 602. A creditor is entitled to appeal to the High Court against an order of the District Judge under S. 41 of the Act granting an absolute discharge to the insolvent. 1937 O.W.N. 923=1937 Oudh 450. The powers of the High Court under S. 75 are wider than those given under S. 115, C. P. Code, and the High Court can interfere in revision if the order is not according to law. 28 N.L.R. 295. An order passed by a District Court on appeal from a Subordinate Court under S. 75 (1) is not open to appeal but can be the subject of revision. 8 O.W.N. 1318. A Subordinate Court whether of the first or second Class is a Subordinate Court to a District Court within the meaning of S. 3 in relation to the investment of the powers by the Local Government; and such Court though exercises concurrent jurisdiction with the District Court does not cease to be subordinate for the purposes of appeal under S. 75 which the High Court has no jurisdiction to entertain. I.L.R. (1939) Kar. 527=1939 Sind 221. An order under S. 25 dismissing a creditor's application for the adjudication of the debtor is appealable. 40 P.L.R. 433. A creditor who is aggrieved by the decision of the Insolvency Court on the point of jurisdiction, has a right of appeal under S. 75 (1). 1940 Cal. 244=44 C. W.N. 333=71 C.L.J. 316. S. 75 gives a right of appeal against orders made in the exercise of insolvency jurisdiction by Courts subordinate to a District Court not only to a person aggrieved by the decision but also to any creditor. 1932 O. 61. "Person aggrieved"—Creditor not a party to a proceeding by another creditor to retard a sale by O.R. which was withdrawn. 34 L.W. 684=61 M.L.J. 714. *See also* 1939 Sind 45; 1937 Lah. 2; 1938 Mad. 370. A creditor is entitled to appeal against an order by the Insolvency Court which affects him along with other creditors and it is not necessary under S. 75 that he alone should be affected by the order appealed against and not jointly with other creditors. 40 P.L.R. 465= 1937 Lah. 757. A creditor has no right of appeal to the District Court under S. 75 from an order of the Insolvency Court refusing to sanction a prosecution of the insolvent under S. 69 of the Act. The creditor to have a right

(2) Any such person aggrieved by any such decision or order of a District Court as is specified in Schedule I, come to or made otherwise than in appeal from an order made by a subordinate Court, may appeal to the High Court.

(3) Any such person aggrieved by any other order made by a District Court otherwise than in appeal from an order made by a subordinate Court may appeal to the High Court by leave of the District Court or of the High Court.

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of appeal under S. 75 must be aggrieved by the order and he is not aggrieved within the meaning of that section when the Court in the exercise of its discretion refuses to prosecute the insolvent. 1937 Rang.L.R. 264=1937 R. 472. [*See contra* in 1937 O.W.N. 762=170 I. C. 542.]

Sec. 75 (2).—The words "*any such person*" in S. 75 (2) include the debtor also. An appeal to the High Court by the debtor against an order of the District Court declining to expunge certain debts from the schedule and declaring that they have been proved by the creditors is competent. 17 Pat. 201=19 P.L.T. 821=1938 Pat. 471. Where a person makes an application under S. 68, objecting to the conduct of the Official Receiver in taking possession of property belonging to him and not to the insolvent, and the Insolvency Court frames an issue on the point and decides that the property belongs to the person claiming it, an appeal lies against the order releasing the property. 1937 Lah. 757=40 P.L.R. 465. S. 75 if regulates appeals to Privy Council—Decision in appeal by District Judge from Subordinate Judge—Certificate of leave to appeal to Privy Council by District Judge—Appeal to High Court against certificate—If lies. *See* 46 L.W. 416=1937 Mad. 930. An order requiring to show cause why the insolvent should not be proceeded against under S. 69 is not appealable. 34 I.C. 777=23 C.L.J. 553. An appeal lies against the decision of a District Judge on a question of title. 122 I.C. 762=1930 A. 498. Where in respect of a creditor's application to set aside a transfer by the insolvent, a plea of *res judicata* is disallowed, an appeal is competent to the High Court under S. 75 (2) from such decision. 1940 Rang.L.R. 643. An objection to a sale by receiver was raised by an application under S. 68. The objection was that the objector was the owner of the property sold. The District Judge upheld the objection. Question was whether there could be an appeal from the order of the District Judge without obtaining leave of the Court. *Held*, that though the District Judge was moved under S. 68, which was not one of the sections mentioned in Sch. I mentioned in S. 75 (2), the investigation which he is expected to make in a case like the present should be under S. 4 and any order passed by him under S. 4 was appealable as of right to the High Court. (1928 L. 556 Rel. on.) 39 P.L.R. 214=1937 L. 2. No appeal, without leave, is competent to the High Court from an order of the District Judge under S. 70 making a complaint of an offence punishable under S. 69. I.L.R. (1938) 2 Cal. 478=42 C.W.N. 787= 1939 Cal. 264; 1937 Lah. 432. The consideration for a mortgage consisted of two main items, the second item being of Rs. 3,000, kept in deposit for payment to a previous mortgagee. The previous mortgage-deed was in possession of the second mortgagee; and the discharge of the previous mortgage was admitted by the first mortgagee. The lower appellate Court upheld the annulment of the mortgage under S. 53 remarking that there was an initial presumption of collusion and hence the proof was insufficient overlooking the mortgagee's own evidence. *Held*, that the finding was vitiated by an error of law. 1930 L. 122. A creditor cannot be considered to be an aggrieved person and as such entitled to appeal under S. 75 against an order of the Insolvency Judge refusing to order prosecution of the insolvent under S. 69. 39 P.L.R. 213=1937 Lah. 432. *See also* 1939 Cal. 264; 1937 Rang. 472=1937 Rang.L.R. 264; 1937 O.W.N. 762=170 I.C. 542. Where a District Judge refused to modify the terms of an annulment order of his predecessor, the order of refusal is appealable with the leave of the District Court or the High Court. 1938 M.W.N. 18 (1)=1938 Mad. 461. After a notice under S. 19 has been issued to the other parties concerned and they have appeared under S. 24, the only final orders that the Court can pass are either to adjudicate the debtor an insolvent or to dismiss the petition. Where the Court refused permission to verify the petition and ordered the same "to be struck off from the register," *held*, that the order should be deemed to be one of dismissal passed under S. 25 and that the same was appealable. 133 I.C. 626.

Sec. 75 (3).—The provisions of the C. P. Code ought to guide the Courts in appeals under this sub-section. 44 A. 605=1922 A. 206. *See also* 1937 Lah. 568. The High Court and District Court have concurrent jurisdiction to grant leave to appeal. High Court can grant leave though District Court has refused. 29 I. C. 406=19 C.W.N. 760. *See also* 1935 M. 432. But where there is no prayer in the grounds of appeal that the High Court may grant leave for the filing of the appeal and there is nothing to show that the failure of the Official Receiver to obtain leave of the District Court for the filing of the appeal was due to a *bona fide* mistake, that is, a mistake which occurred in spite of the exercise of due care and caution, the High Court will decline to grant leave to appeal at the hearing. 164 I.C. 664. *See also* 50 L.W. 202. An order refusing to annul a transfer is covered by this clause and is appealable only with the leave of the Court. 33 P. L.R. 971. Leave may be granted after period of limitation. 151 I.C. 625=1934 R. 117. Leave of Court to appeal can be granted after hearing the appeal. 7 P. 375=1928 P. 338; and even an oral application in the course of hearing. 164 I.C. 893=1936 R. 413. The

(4) The periods of limitation for appeals to the District Court and to the High Court under this section shall be thirty days and ninety days, respectively.

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mere fact that an appeal has been admitted by a Motion Bench does not necessarily imply that leave for the purpose of the appeal was granted. It is however open to the Court hearing the appeal to grant such leave. 132 I. C. 223 (L.). But *see* 1937 L. 87, where it was held, that the admission of the appeal by Motion Bench amounted to grant of leave to appeal. *See also* 18 L. 775=1937 Lah. 87; 1937 Lah. 895; 13 Luck. 757=1938 O. 101; 39 P. L .R. 510=1937 Lah. 249. Where the law allows an appeal to be taken only by leave to do so; the appeal cannot be regarded as having been duly instituted until such leave is obtained. Where leave is obtained long after the expiry of the period of limitation from the date of the order which is to be appealed against, sufficient cause within the meaning of S. 5, Limitation Act must be shown for not duly instituting the appeal within the period of limitation. 172 I.C. 253=1937 Rang. 283. Where the Insolvency Court refuses to set aside a transfer under Ss. 53 and 54, leave to appeal should not be given to a creditor unless either the District Judge or the High Court is satisfied that the receiver has been requested and has refused to appeal. 132 I.C. 539=1931 L. 651. No appeal lies against an order refusing leave to appeal. 5 L.W. 168=38 I.C. 818. Leave of Court can be granted by implication by admitting it. 1929 L. 622=119 I.C. 427. *See also* 1929 L. 636; 1933 L. 642 (2)=145 I.C. 474=34 P.L.R. 827; 1937 Pat. 665=16 Pat. 724. Appeal—Competency of—Order of District Judge refusing to add more persons as debtors in the insolvency—Leave of Court may be implied. 1933 C. 151=56 C.L.J. 440. An order passed by the District Court, refusing to set aside an order of adjudication passed by that Court *ex parte* in an appeal against an order by the Subordinate Judge dismissing an application for adjudication, is appealable to the High Court under S. 75 (3). Such an order is not a proceeding in the appeal, the appeal itself having terminated. 59 M. 1049=44 L.W. 97=1936 Mad. 660=71 M.L.J. 333. Appeal by debtor—Death pending—Right of heirs to prosecute and continue—Abatement. *See* 1937 All. 435. *See also* 44 P.L.R. 347 (F.B.).

Sec. 75 (4).—S. 12 of the Limitation Act is not applicable to proceedings under this Act. 41 M. 169=33 M.L.J. 566: 33 A. 738=11 I.C. 197. *See also* 39 M. 593=30 I.C. 703. *See contra* 46 I.C. 588; 20 I.C. 258=9 N.L.R. 91. Ss. 9 and 10 of the General Clauses Act apply to appeals under this section. If the last day for appeal is excluded under S. 10, the day on which the order appealed against was passed must be excluded under S. 9. 42 M. 13=35 M. L.J. 531. A Court has to record a finding and make a complaint under S. 70 of the Provincial Insolvency Act. It is only against the combined effect of the order that the person aggrieved, has a right to appeal; hence the right to appeal arises only when the finding is completed by the forwarding of the complaint to the Magistrate. 1939 N.L.J. 495.

SECOND APPEAL.—The jurisdiction conferred by S. 75 is one and indivisible. The tribunal in both cases is the "High Court". Its powers are different in the two cases (*i.e.*, revisional or appellate) but its jurisdiction is one. The manner in which the jurisdiction is invoked is a matter of procedure, and the fact that the application is labelled an appeal instead of a revision would at the most be an irregularity, which if it does not affect the merits, or result in prejudice or injustice, is curable. Where, therefore, the High Court entertained a second appeal when only a revision lay and interfered on grounds on which it could interfere in revision, it is a mere irregularity in procedure which is curable. 1935 N. 33. *See also* 1935 M. 432; 1941 O.W.N. 1218. When S. 28 authorises the determination of the question raised, the matter cannot fall under S. 4, and so no second appeal can be entertained. 1935 Nag. 33. No second appeal lies from the decision of an Insolvency Court under S. 54 but the appeal can be treated as revision under S. 75. 1940 Lah. 6. A decision under S. 51 that a creditor had realised the assets by an execution sale after the admission of the insolvency petition, falls under S. 4 of that Act. A second appeal from that decision is, therefore, competent. 42 P.L.R. 29=1940 Lah. 166. Orders passed by a District Judge on appeal from orders passed from a Subordinate Judge under Ss. 53 and 54 are final and are not subject to a second appeal to the High Court. The second proviso to S. 75 of the Act, which deals with decisions of the District Court on appeal from decisions of Subordinate Courts under S. 4 of the Act and allows second appeals to the High Court in such cases cannot be construed so as to cover orders made under Ss. 53 and 54. S. 4 was not intended to cover orders under Ss. 53 and 54. I.L.R. (1940) Bom. 1=41 Bom. L.R. 1258=1940 Bom. 51. *See also* 44 Bom.L. R. 132. An order avoiding a voluntary transfer is authorised by S. 53; it is not necessary to invoke the power under S. 4 and it is not therefore a decision under S. 4. So, a second appeal does not lie from such a decision to the High Court. 27 N.L.R. 179=1931 N. 153 (F.B.). *See also* 146 I.C. 490=34 P.L.R. 960=1933 L. 634; 1933 M. 53=65 M.L.J. 298; 37 P.L.R. 224; 1937 O.W.N. 807; 74 C.L.J. 528. The words "subject to the provisions of this Act" in S. 4 mean "excluding questions otherwise provided for by the provisions of this Act". So, an order annulling a sale by the insolvent is one provided for by S. 53 to which S. 4 has no application. Consequently, the second proviso to S. 75 does not apply and no second appeal is competent from the order of annulment. 54 M. 989=1931 M. 745=61 M.L.J. 820. A second appeal lies, only when the Court decides any of the matters referred to in S. 4; but in a case in which no question of title or priority arises, there is no second appeal. 36 P.L.R. 5=1934 L. 807 (1). *See also* I.L.R. (1940) Lah. 40=41 P.L.R. 816=1939 L. 346; 1937 L.

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441 (Question whether sale by insolvent is benami). If a District Judge entertains an appeal which does not lie to his Court, a second appeal lies against his decision. The appealability from such decision does not depend on the view taken by the lower appellate Court with regard to the competency of appeal before it. 1933 M. 475. An order of the District Court dismissing an appeal against an order of the Court of first instance exercising insolvency jurisdiction and adjudging a person as insolvent is final and no second appeal lies. I.R. 1932 L. 645 (1). *See also* 1939 Lah. 300=42 P.L.R. 243; 39 P.L.R. 744 ; 1938 All. 28=1937 A.L.J. 1071. An insolvent who had been granted a conditional discharge appealed to the District Judge but he impleaded only the creditors and not the O.R. An objection on the ground of non-joinder was taken, but the Court, while modifying the order, held that the non-joinder was a mere irregularity. Against the appellate order both the creditor and insolvent preferred appeals. *Held*, that the order under appeal was not covered by S. 4 and that no second appeal lay. *Held*, further, though the O.R. was a necessary party to the appeal, the High Court was not bound to interfere in revision when the O.R. himself had not moved in the matter. 132 I.C. 526=1931 L. 647. It is clear from the second proviso to S. 75 (1) that no second appeal to the High Court from an order made by the District Judge setting aside in appeal an order of adjudication passed by a Subordinate Court. Such an order cannot be said to be order passed under S. 4 of the Act. 44 Bom.L.R. 132 ; 1940 Bom. 51. On this point, *see also* 1933 L. 634. An order of the District Judge refusing to grant an absolute discharge to an insolvent cannot form the subject of second appeal. It can however be the subject of revision. 35 P.L.R. 114=1934 L. 198. No second appeal lies from an order, made on an application under S. 61 by a creditor, claiming priority for certain debts due to him on account of rent for the premises in which the insolvent's goods are stored by the O.R. 39 P.L.R. 314=1937 L. 96. A question as to the right of the petitioning creditor to file his petition and the existence of his debts is not one falling under S. 4 of the Act and the decision on such a question is therefore not open to second appeal. 36 Bom.L.R. 1236=1935 B. 80.

REVISION.—The question whether a particular transaction is genuine or *bona fide*, or whether it is fictitious or not made in good faith is a mere question of fact and not of law. The decision on such a question is not open to revision. 37 P.L.R. 224. It cannot be held that the High Court has no power to interfere in revision with a decision of the District Judge in appeal. But the High Court should be very reluctant to interfere in revision unless the order is perverse or palpably wrong. 154 I.C. 908=1935 O.W.N. 374. In exercising the revisional jurisdiction under the Insolvency Act, the High Court has got wider powers than those vested in it by S. 115 of the C. P. Code. All that the Court has to decide is whether or not the order sought to be revised is in accordance with law. I.L.R. (1938) All. 84 1937 A.L.J. 1221=1938 All. 59. *See also* 40 Bom.L.R. 1025; 42 C.W.N. 1153=69 C.L.J. 229=1939 Cal. 490. Whether under S. 75 a single creditor is or is not entitled to appeal in cases where a receiver has been appointed, in a revision. High Court is entitled under S. 75 to act *suo motu* on the facts being brought to its notice even by any creditor. 1937 Nag. 31. An application by an insolvent to the insolvency Judge to set aside a mortgage of his occupancy rights made by the O. R. falls within the scope of S. 68. In such circumstances, S. 4 which is subject to the other provisions of the Act could not be held to be applicable, and a second appeal is, therefore, not competent from the order of the District Judge on appeal. The High Court has, however, ample power to interfere in revision under S. 75. 160 I.C. 921 (2)=38 P.L.R. 233=1936 Lah. 502. *See also* 58 All. 639=1936 A.L.J. 9; 1939 All. 80; 41 P.L.R. 655. Where the order was passed in the first instance by the receiver and not by a Court subordinate to the District Judge, revision under S. 75 does not lie. The revision however may be treated as having been made under S. 115, C. P. Code, read with S. 5, Insolvency Act. 41 P.L.R. 884=1939 Lah. 460. An appeal lies to the District Court under S. 75 (1) from an order of a Small Cause Court Judge, exercising insolvency jurisdiction, refusing to take proceedings against the insolvent under S. 69. As the remedy by way of appeal is open to the aggrieved party, a revision application is incompetent. 1937 O.W.N. 236=1937 Oudh 247; 1937 O.W.N. 762; 1937 Rang. 472.

NOTICE OF APPEAL.—In an appeal against dismissal of an application for adjudication, notice of appeal should be sent to substantial number of creditors. 37 I.C. 391. Only parties directly affected by order appealed against are entitled to notice. 27 I.C. 144=20 M.L.J. 451. Non-service of notice on legal representatives of one creditor would not vitiate the appeal. But the heirs may have the proceedings reopened on the ground of non-service of notice. *See* 44 C. L.J. 108=1926 Cal. 1210; 42 C.W.N. 1143. Procedure regarding issue of notices to creditors in discharge proceedings is prescribed primarily in order to afford them a reasonable opportunity to appear at the time of the hearing of the application for discharge. Where during the course of discharge proceedings started by the insolvent, a creditor who is party to such proceedings dies, the criterion which should be adopted for deciding whether the heirs of such creditor should be substituted to ascertain whether or not the interest of such heirs would be adversely affected by their non-substitution. 42 C.W.N. 1153=1939 Cal. 490=69 C.L.J. 229.

PARTIES.—In an appeal by a secured creditor whose rights were negatived, the other creditors are not necessary parties, if the receiver is impleaded. 58 I.C. 10=24 C.W.N. 401. Where a person is adjudged insolvent on the application of two creditors, and, on failure of the O. R. to apply for annulling a mortgage executed by the insolvent, the above creditors apply for the same and get the

PART VII.

MISCELLANEOUS.

Costs.

76. The costs of any proceeding under this Act, including the costs of maintaining a debtor in the civil prison, shall, subject to any rules made under this Act, be in the discretion of the Court in which the proceeding is had.

Courts to be auxiliary to each other.

77. All Courts having jurisdiction in insolvency and the officers of such Courts, respectively, shall severally act in aid of and be auxiliary to each other in all matters of insolvency, and an order of a Court seeking aid with a request to another of the said Courts shall be deemed sufficient to enable the latter Court to exercise, in regard to the matters directed by the order, such jurisdiction as either of such Courts could exercise in regard to similar matters within their respective jurisdictions.

Limitation.

78. (1) The provisions of sections 5 and 12 of the Indian Limitation Act, 1908, shall apply to appeals and applications under this Act, and for the purpose of the said section 12, a decision under section 4 shall be deemed to be a decree.

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mortgage annulled, both creditors and the O. R. are also necessary parties to the appeal filed by the mortgagee, and, if all of them are not impleaded, the appeal is incompetent. 148 I.C. 329 (1)=1934 Lah. 36 (1). *See also* 41 C.W.N. 1079=66 C.L.J. 315=1937 Cal. 517.

Sec. 76.—The provisions of S. 76 are not mandatory. There is no prohibition to a Court exercising its discretion in the matter of costs and in the exercise of that discretion applying the provisions of S. 35-A, C. P. Code, to such cases as it deems fit for such application. (1930 Rang. 166, Dist.). 158 I.C. 394=1935 Nag. 207.

Sec. 77.—Where the Court which has adjudicated the insolvent has recognised the Court of the place where part of the property of the insolvent is situate as a Court having full jurisdiction to decide claims to that property, having previously requested that Court to aid it in the sale of that property, and the aiding Court has accepted jurisdiction, the proper Court to deal with claims to the property which is sold by the aiding Court is the latter Court. The fact that there is no special request by the Court which has adjudicated to the aiding Court in the matter of a particular claim makes no difference, because there is no necessity for it, when the adjudicating Court has previously requested that Court to aid it and has acknowledged that it had left the aiding Court to decide all matters relating to the property situate within the jurisdiction of the aiding or auxiliary Court. 53 L.W. 370=1941 Mad. 580=(1941) 1 M.L.J. 423. An auxiliary Court acting on a latter of request under S. 77 of the Act which has authorised the Official Receiver to take possession and sell property, has no power to conduct enquiries subsequent to the sale and to the delivery into claims by third parties who allege that possession was wrongly delivered. In such cases the matter has got beyond the stage at which the Court is entitled under S. 56 to consider who is in possession. 1940 M.W.N. 905=52 L.W. 377=1941 Mad. 75.

Sec. 78.—The section has no application to a case in which the decree-holder and not the judgment-debtor is the insolvent. Where all that happened was that a petition was filed by a creditor and the O. R. was appointed as interim receiver, but before the stage of adjudication was reacted the insolvency petition was withdrawn, it cannot have any effect in extending the time within which the execution petition should be filed. (1929 M.W.N. 369, Appr.) 1931 M.W.N. 1014=1931 Mad. 784. The provisions of S. 5, Limitation Act, cannot be applied to the amendment of an insolvency petition by the addition of a creditor-partner after the expiration of three months from the act of insolvency, because an insolvency petition is not an "application" within the meaning of S. 78 of the Act. 34 L.W. 799=61 M.L.J. 544. *See also* 1937 A.M.L.J. 101. This section does not create or take away any substantive right. The Court can excuse delay under S. 5, Limitation Act. 45 M.L.J. 844=1924 Mad. 400; 18 L.W. 857=1924 Mad. 345. There is no question of enlarging the period of limitation in favour of insolvents who happen to be either decree-holders or creditors in so far as proceedings to be taken against their debtors are concerned. *Held, further*, that S. 78 really enacts a further exception to S. 9, Limitation Act, and any person claiming to take advantage of an exception should clearly prove that he comes within it. 30 L.W. 327=1929 Mad. 715. Applicability—Suit brought during pendency of insolvency proceedings—Saving of limitation. 114 I. C. 227. *Quaere.*—The question whether the term "application" as used in S. 78 includes a petition for insolvency is not free from difficulty, there being opposite views on the point. 1930 Lah. 417 (2). No doubt the period from the date of the adjudication to the date of annulment cannot be excluded under S. 78 in case of an execution of a decree, unless the debt to which the decree related was proved in insolvency. Where, however, the application for execution is directed against the person of the judgment-debtor and not against the

(2) Where an order of adjudication has been annulled under this Act, in computing the period of limitation prescribed for any suit or application for the execution of a decree (other than a suit or application in respect of which the leave of the Court was obtained under sub-section (2) of section 28) which might have been brought or made but for the making of an order of adjudication under this Act, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded:

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property movable or immovable, the decree-holder will, if he applies promptly after the cessation of the protection order, be entitled to the exclusion of the period during which the protection order was in force. 1930 All. 580 (2).

Sec. 78 (2).—S. 78 (2) applies only to a suit or application for the execution of a decree [other than a suit or application in respect of which the leave of the Court was obtained under sub-S. (2), S. 28], which might have been brought or made but for the making of an order of adjudication. S. 78 (2) is not intended to extend the period of limitation for a suit or application brought by the insolvent himself, and it is inserted purely for the benefit of creditors who were prevented from proceeding against him by the order of adjudication. I.L. R. (1936) N. 41=1936 N. 117. *See also* (1937) 2 M.L.J. 703 ; 51 L.W. 697=1940 Mad. 716= (1940) 2 M.L.J. 17 ; 1936 Mad. 290. The applicability of S. 78 (2) is not confined to the period of limitation fixed by the Limitation Act, but extends to other statutes including the C. P. Code. The language of S. 78 (2) is quite general, clear and definite, and comprehensive enough to affect and control the computation of the period of time limited, whether by S. 48, C. P. Code, the Limitation Act or any other statute. The period of 12 years fixed by S. 48, C.P. Code, is a "period of limitation" within S. 78 (2) of the Provincial Insolvency Act and therefore in computing the period of 12 years limited by S. 48, C. P. Code ; the time during which the insolvency of the judgment-debtor was pending must be excluded. I.L.R. (1939) Mad. 611= 48 L.W. 881=1939 Mad. 270. The words "*annulled under this Act*" in the section are not limited to annulment under the Chapter "Annulment of adjudication" beginning from S. 35 of the Act. They include also the case where the owner of adjudication was discharged by the Court of appeal. Hence the period between the adjudication and the final disposal of the application should be omitted in computing the period of limitation for the suit. 14 L. 426= 1933 L. 769. *See also* 1937 C. 158 ; 1936 Mad. 290. Where an appeal is filed without obtaining leave, but subsequently leave is obtained after the period of limitation, limitation may be reckoned up to the date on which memo of appeal is presented, or in any case the delay in filing the appeal, may be excused under this section 151 I.C. 625=1934 R. 117. S. 48. C. P. Code, is governed by S. 78 (2) of this Act. The words "*the period of limitation prescribed for any suit or application for the execution of decree*" are general and comprehensive and refer to the period of limitation prescribed in any law for the time being in force. They can control or modify the period of time allowed not only in the statute of limitation but also in S. 48, C. P. Code. 134 I.C. 878=8 O.W.N. 1186. In order to claim for purposes of limitation an exemption of the period between the order of adjudication and the order of annulment, the creditor must show that the Ins. Judge either passed a formal order under S. 33 or that there were proceedings which by necessary implication were tantamount to such an order. 32 P.L.R. 905=1932 L. 173; 1937 O.W.N. 1143=1938 Oudh 8. Where a creditor had done all that was necessary to prove his debt, it must be assumed in the absence of a decision by the receiver refusing to admit the debt, that the debt was proved, though the O.R. by inadvertence omitted to mention the debt in the schedule. So, the decree-holder is for the purposes of execution against the judgment-debtor entitled to deduct the time between the date of the adjudication order passed against the judgment-debtor and the annulment thereof. 142 I.C. 644=1933 L. 101. Limitation for proving debts ceases to run during insolvency proceedings. Where therefore a creditor sues after ordinary period of limitation is over, but before annulment of adjudication order, the proper course is not to dismiss the suit but to permit him to withdraw suit with liberty to sue again after annulment of adjudication. 1933 R. 75.

PROVISO.—Before a party can claim the benefit of the exclusion enacted in S. 78 (2) two conditions must be satisfied: Firstly, the suit or application in which limitation is pleaded must be in respect of a debt provable under the Act, and secondly, it must also have been proved under the Act. "Proved" under S. 78 (2), proviso, means proved under S. 49 of the Act, and not any kind of proof at any stage of a proceeding without reference to the purpose for and the manner in which it is given. The proof of a debt in insolvency means that kind of proof only which entitles a creditor to have his name entered in the schedule and none other. Therefore evidence given to make out that a petitioning creditor is qualified to apply to have the debtor adjudicated insolvent is not proof of insolvency, and cannot entitle a creditor to claim exclusion of time under S. 78 (2), if he has not proved his debt under S. 49 of the Act. 51 L. W. 697=1940 Mad. 716=(1940) 2 M.L.J. 17 =I.L.R. (1941) Mad. 136. *See also* 43 L.W. 520=1936 Mad. 290. The word 'proved' occurring in the proviso to S. 78 is used not in its ordinary sense under the said Act, but in its technical insolvency sense and that for the purpose of this proviso, a debt is 'proved' when those steps in respect of it which are prescribed by S. 49 (1) have been taken. The word 'proved' is in relation to a provable debt, satisfied, when a proper 'affidavit verifying' it has been delivered or sent by registered post to the Court. 1940 A.W.R. (H.C.) 454=1940 All.

Provided that nothing in this section shall apply to a suit or application in respect of a debt provable but not proved under this Act.

Power to make rules.

79. [(1) The High Court may, with the previous sanction [1]of the Provincial Government, make rules for carrying into effect the provisions of this Act.]

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide—

(*a*) for the appointment and remuneration of receivers (other than Official Receivers), the audit of the accounts of all receivers and the cost of such audit,

(*b*) for meetings of creditors,

(*c*) for the procedure to be followed where the debtor is a firm, [2][*]

(*d*) for the procedure to be followed in the case of estates to be administered in a summary manner, [2][and

(*e*) for any matter which is to be or may be prescribed.]

(3) All rules made under this section shall be published, [3][* *] in the Official Gazette, [3][* * *] and shall, on such publication, have effect as if enacted in this Act.

Delegation of powers to Official Receivers.

80. (1) The High Court, with the like sanction, may from time to time direct that, in any matters in respect of which jurisdiction is given to the Court by this Act, the Official Receiver shall, subject to the directions of the Court, have all or any of the following powers, namely:—

LEG. REF.

[1]Substituted by A. O., 1937.

[2]The word "and" at the end of cl. (*c*) was omitted and the word "and" at the end of cl. (d) and cl. (*e*) were added by Act XXXIX of 1926, S. 6.

[3]Words "in the Gazette of India or' and 'as the case may be' omitted by A.O., 1934.

NOTES.

494. Where subsequent to the adjudication of a person as insolvent, a decree is obtained not only against the insolvent but also against the O.R. who was impleaded as a party to the suit, the debt must be taken to have been "proved," within the meaning of the proviso to S. 78, although the formal method of proving the debt as provided by the Act was not adopted, and consequently the proviso does not apply to such a case. 53 M. 243=122 I.C. 341 (1); 1930 M. 356 (1)=58 M.L.J. 170. A person who has lodged a proof and fulfilled all the requirements of S. 49 has *proved* his debt within the meaning of the *proviso*. 57 M. 767=1934 M. 465=67 M.L.J. 45. *See also* 1938 Mad. 142=(1938) 2 M.L.J. 883. But *see* 1934 N. 282.

Sec. 79.—Service of notice of insolvency proceedings on agent of debtor is as good as service on debtor. 39 M. 613=29 M.L.J. 788. It is clear from S. 79 (2) (*c*) that the Legislature contemplated orders of adjudication being passed against firms. Moreover, a firm is not a separate legal entity; nor is it a distinct person. It is merely a shorthand form for collectively designating all the partners in a firm and an order of adjudication passed against the firm is an order against individual partners who constitute it. 119 I.C. 735=1929 L. 447. Amendment of R. 34 regarding advertisement suggested. 55 A. 636=1933 A.L.J. 1340=1933 A. 600. Creditors upon whom notices of the date of hearing of the application for discharge are served in accordance with the provisions of R. 9, framed under S. 79 do not thereby become parties to the proceedings in the same sense that plaintiffs and defendants are parties in a civil suit. If some of such creditors die during the pendency of an appeal filed by the insolvent against the order disallowing his application for discharge, the failure to make their heirs parties to the appeal does not necessarily render the appeal incompetent. The criterion which should be adopted for the purpose of deciding whether such heirs should be substituted, is to ascertain whether or not the interests of such persons are likely to be adversely affected by their non-substitution. Heirs of creditors who have taken no interest in the proceedings beyond proving their debts and heirs of creditors who have even failed to prove their debts, cannot be affected in any way by their non-substitution, and the fact that they have not been impleaded in the case, can not therefore in any way affect the competency of the appeal. 69 C.L.J. 229=42 C.W.N. 1153 =1939 Cal. 490. The effect of the adjudication of a firm carried on by a joint Hindu family as an insolvent, is to make all the members of the family insolvents. 1935 A.L.J. 673=1935 A. 643.

Sec. 79 (2) (a).—Nagpur Insolvency Rules, R. 13—Scope—If controls S. 56 (2) (*b*). *See* 1938 N.L.J. 40.

Sec. 80.—The O.R.'s Court is not a Court subordinate to that of the District Court. 40

(*a*) [1](*Omitted*);
(*b*) to frame schedules and to admit or reject proofs of creditors;
(*c*) [1](*Omitted*);
(*d*) [1](*Omitted*);
(*e*) to make interim orders in any case of urgency; and
(*f*) to hear and determine any unopposed or *ex parte* application.

(2) Subject to the appeal to the Court provided for by section 68, any order made or act done by the Official Receiver in the exercise of the said powers shall be deemed the order or act of the Court.

Power of Provincial Government to bar application of certain provisions to certain Courts.

81. Any Provincial Government [2][* * *] may, by notification in the Official Gazette, declare that any of the provisions of this Act specified in Schedule II, shall not apply to insolvency proceedings in any Court or Courts having jurisdiction under this Act in any part of the territories administered by such Provincial Government.

Savings.

82. Nothing in this Act shall—

(*a*) affect the Presidency-towns Insolvency Act, 1909, [3][* * *].

(*b*) apply to cases to which Chapter IV of the Dekkhan Agriculturists Relief Act, 1879, is applicable.

83. [4][(1) * * *].

(2) Where in any enactment or instrument in force at the date of the commencement of this Act, reference is made to Chapter XX (of Insolvent Judgment-debtors) of the Code of Civil Procedure, 1877, or of the Code of Civil Procedure, 1882, or to any section of either of those Chapters, such reference shall, so far as may be practicable, be construed as applying to this Act or to the corresponding section thereof.

SCHEDULE I.

[*See* Section 75 (2).]

Decisions and Orders from which an appeal lies to the High Court under section 75 (2).

Section.	Nature of decision or order.
4	Decision of questions of title, priority, etc., arising in insolvency.
25	Order dismissing a petition.
26	Order awarding compensation.
27	Order of adjudication.
33	Orders regarding entries in the schedule.
35	Order annulling adjudication.
37	Order declaring the conditions on which the debtor's property shall revert to him on annulment of adjudication.
41	Order on application for discharge.
50	Order disallowing or reducing entries in the schedule.
53	Order annulling a voluntary transfer.
54	Decision that a transfer of property is a preference in favour of a creditor
[4][69	* * *]

LEG. REF.

[1]Clauses (*a*),(*c*) and (d) were omitted by Act XXXIX of 1926.

[2]The words "with the previous sanction of the Governor-General in Council" were repealed by Act XXXVIII of 1920.

[3]Word and figures "or S 8 of the Lower Burma Courts Act, 1902" omitted by Act VIII of 1930.

[4]Repealed by Act XII of 1927.

NOTES.

M. 752=32 M.L.J. 449. Official Receiver—Power to bind creditors—Proceeding by creditor to obtain personal decree against insolvent for debt due under mortgage—Official Receiver made party—Decree, if binds all creditors—Power of Official Receiver to order decree-holder to prove debt in insolvency. *See* I.L.R. (1940) Lah. 345. Where an Official Receiver passes orders acting under powers conferred by S. 80, he acts as a Court and orders passed by District Judge on appeal from such orders are revisable by the High Court. 1941 A.M.L.J. 108.

Sec. 80 (1) (b).—Framing a schedule of creditors by receiver after an *ex parte* enquiry is not a final or judicial decision of claims. 45 I. C. 67=41 M. 30.

SCHEDULE II.

(*See* Section 81.)

Provisions of the Act, application of which may be barred by Provincial Governments.

Provisions of the Act.	Subject.
Section.	
26	Award of compensation.
28, sub-section (3)	Reputed property of an insolvent.
34	Debts provable under the Act.
38, 39, 40	Compositions and schemes of arrangement.
42 sub-sections (1) and (2)	Obligation to refuse absolute discharge.
45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55	Method of proof of debts. Effect of insolvency on antecedent transactions.
61. [except clause (*a*) of sub section (1) and sub section (4)].	Priority of debts.
62, 63, 64, 65	Dividends.
66	Management by and allowance to insolvent.
72	Penalty for obtaining of credit by undischarged insolvent.

SCHEDULE III.

(*Repealed by Act XII of* 1927.)

THE PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887).[1]

Year.	No.	Short title.	Amendment.
1887	IX	Provincial Small Cause Courts Act, 1887.	Repealed in part, X of 1888; XII of 1891; IX of 1908, S. 32; I of 1938 Repealed in part and amended, X of 1914. Amended, IV and VI of 1914; XI of 1915; IX of 1922; I of 1926; I of 1935; Government of India (Adaptation of Indian Laws) Order, 1937.

LEG. REF.

[1]For Statement of Objects and Reasons, see *Gazette of India*, 1886, Pt. V, p. 8; for Report of the Select Committee, see *ibid.*, 1887, Pt. IV, p. 33; and for proceedings in Council, see *ibid.*, 1886, Supplement, pp. 8 and 9 and *ibid.*, 1887, Pt. VI, p. 25.

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THE FIRST SCHEDULE.—[*Repealed.*]
THE SECOND SCHEDULE.—SUITS EXCEPTED FROM THE COGNIZANCE OF A COURT OF SMALL CAUSES.

[*24th February*, 1887.

An Act to consolidate and amend the law relating to Courts of Small Causes established beyond the Presidency-towns.

WHEREAS it is expedient to consolidate and amend the law relating to Courts of Small Causes established beyond the local limits for the time being of the ordinary original civil jurisdiction of the High Courts of Judicature at Fort William in Bengal and at Madras and Bombay; It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Title, extent and commencement.

1. (1) This Act may be called THE PROVINCIAL SMALL CAUSE COURTS ACT, 1887.[1]

(2) It extends to the whole of British India;[2] and

LEG. REF.

[1]Ss. 15, 32, 37, 38. 39 and 40 of the Bengal, North-Western Provinces and Assam Civil Courts Act, 1887 (XII of 1887) apply to Courts of Small Causes constituted under this Act, *see* Act XII of 1887, S. 40, E. B. & A. Code, Vol. I.

[2]As to definition of "British India," *see* Interpretation Act (52 and 53 Vict., c, 63), S. 18, cl. 4; *Gazette of India*, 1889, Pt. I, p., 545 and the General Clauses Act (X of 1897), S. 3 (7).

NOTES.

Sec. 1.—The object of the Small Cause Courts Act is to provide a speedy and cheap means of settling disputes. Short judgments are generally written as the understanding is that the case is heard and disposed of at one sitting, or if working hours are over, it is to be taken up and determined on the next working day. Where the whole evidence is heard by one Judge and judgment written by his successor, though there is no objection in law to such a

(3) It shall come into force on the first day of July, 1887.

2. (1) [*Repealed of enactments,*] *Repealed by the Repealing and Amending Act,* 1891 (*XII of* 1891).

(2) [Construction.] [*Repealed by Act I of* 1938.]

Savings.

3. Nothing in this Act shall be construed to affect—

(*a*) any proceedings before or after decree in any suit instituted before the commencement of this Act; or

(*b*) the jurisdiction of a Magistrate under any law for the time being in force with respect to debts or other claims of a civil nature, or of village-munsiffs or village-panchayats, under the provisions of the Madras Code, or of village-munsiffs under the Dekkhan Agriculturists' Relief Act, 1879; or

(*c*) any local law or any special law other than the Code of Civil Procedure.

Definition.

4. In this Act, unless there is something repugnant in the subject or context, "Court of Small Causes" means a Court of Small Causes constituted under this Act, and includes any person exercising jurisdiction under this Act in any such Court.

CHAPTER II.

CONSTITUTION OF COURTS OF SMALL CAUSES.

Establishment of Courts of Small Causes.

5. (1) The Provincial Government, [1][* * * *] may, by order in writing, establish a Court of Small Causes at any place within the territories under its administration beyond the local limits for the time being of the ordinary original civil jurisdiction of a High Court of Judicature established in a Presidency-town.

(2) The local limits of the jurisdiction of the Court of Small Causes shall be such as the Provincial Government may define, and the Court may be held

[1]The words "with the previous sanction of the Governor General in Council" were repealed by Act IV of 1914.

NOTES.

procedure, it is opposed to the whole spirit of the Small Cause Courts Act. 1940 A.M.L.J. 131.

Sec. 2 (3).—The powers of a S. C. Court under this Act have been conferred upon the Courts of the Sub-Divisional Officers of Angul and of the Khondmals by S. 15 of the Angul Dsstrict Regulation (I of 1894). as substituted by S. 8 of the Angul District (Amendment) Regulation (IV of 1904), Ben. Code, Vol. I.

GENERAL.—While the old Act gave to the Small Cause Court jurisdiction only in certain specified matters, the present Act proceeds upon another basis, excluding from the jurisdiction of the Courts of Small Causes certain matters and leaving to these Courts a residuary jurisdiction. I.L.R. (1939) Kar. 134=1939 Sind 35.

S. C. Court can pass an order under S. 95, C. P. Code, and that order is not appealable. 26 I.C. 359. A decision of a S. C. suit tried as a regular suit is not appealable. 39 A. 101=37 I. C. 92. *See* 33 M. 323 (F.B.). But *see* 45 I.C. 645. Though there is no appeal, it can be set a ide on the ground of fraud. 63 I.C. 712=48 C. 298. A S. C. Court acting as such cannot attach immovable property in execution of a decree. This is so even though the S. C. Court is also an ordinary Court unless the decree has been formally transferred to the ordinary side. 114 I.C. 329=1929 L. 398. A S. C. Court Judge is not bound to record the evidence *in extenso* but it is incumbent upon him to record such statements of witnesses, or to make a summary of those statements in the deposition, as recorded, on which he relies in his judgment. 41 C.W.N. 412=1937 Cal. 308=64 C.L.J. 456.

Sec. 3.—Village Munsif's Court and S. C. Court have concurrent jurisdiction for sums within the former's jurisdiction. 13 M. 145; 5 M.H.C.R. 45.

at such place or places within those limits as the Provincial Government may appoint.

Judge.

6. [1][When a Court of Small Causes has been established there shall be appointed, by order in writing, a Judge of the Court:

Provided that if the Provincial Government so direct, the same person shall be the Judge of more than one such Court.]

Appointment of times of sitting in certain circumstances.

7. (1) A Judge who is the Judge of two or more such Courts may, with the sanction of the District Court, fix the times at which he will sit in each of the Courts of which he is Judge.

(2) Notice of the times shall be published in such manner as the High Court from time to time directs.

Additional Judges.

8. (1) [2][If the Provincial Government so directs, there may be appointed, by order in writing, additional Judges of a Court of Small Causes or of two or more such Courts.]

(2) [3][An] Additional Judge shall discharge such of the functions of the Judge of the Court or Courts as the Judge may assign to him, and in the discharge of those functions shall exercise the same powers as the Judge.

(3) The Judge may withdraw from [3][an] Additional Judge any business pending before him.

(4) When the Judge is absent the [4][senior] Additional Judge may discharge all or any of the functions of the Judge.

9. [5][* * * * *]

Power to require two Judges to set as a bench.

10. The Provincial Government, after consultation with the High Court, may, by order in writing, direct that two Judges of Courts of Small Causes or a Judge and an Additional Judge of a Court of Small Causes shall sit together for the trial of such class or classes of suits or applications cognizable by a Court of Small Causes as may be described in the order.

Decision in case heard by a bench.

11. (1) If two Judges, or a Judge and an Additional Judge, sitting together under the last foregoing section, differ as to a question of law or usage having the force of law, or in construing a document the construction of which may affect the merits, they shall draw up and refer, for the decision of the High Court, a statement of the facts of the case and of the point on which they differ in opinion, and the provisions of Chapter XLVI[1] of the Code of Civil Procedure shall apply to the reference.

(2) If they differ on any matter other than a matter specified in sub-section (1), the opinion of the Judge who is senior in respect of date of appoint-

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LEG. REF.

[1]S. 6 substituted for old S. 6 by A.O., 1937.

[2]Sub-s. (1) substituted for old sub-s. (1) by A.O., 1937.

[3]The word 'An' was substituted for the word 'the' by Act XI of 1915.

[4]The word "Senior" before the words "Additional Judge" were added by Act XI of 1915.

[5]S. 9 omitted by A.O., 1937.

NOTES.

Sec 8.—Additional Judge has power to file a complaint regarding obstruction to warrant of Court. 132 I.C. 842=1931 L. 530.

Sec. 11.—S. 11 extends rather than restricts the power of a Provincial Court of Small Causes to make a reference under S. 113 and O. 46, R. 1, C. P. Code. A single Judge

ment as Judge of a Court of Small Causes, or, if one of them is an Additional Judge, then the opinion of the Judge sitting with him, shall prevail.

(3) For the purposes of sub-section (2), a Judge permanently appointed shall be deemed to be senior to an officiating Judge.

Registrar.

12. (1) [2][There may be appointed to a Court of Small Causes an officer to be called the Registrar of the Court.]

(2) Where a Registrar is appointed, he shall be the chief ministerial officer of the Court;

(3) The Provincial Government may, by order in writing, confer upon a Registrar within the local limits of the jurisdiction of the Court, the judisdiction of a Judge of a Court of Small Causes for the trial of suits of which the value does not exceed twenty rupees;

(4) The Registrar shall try such suits cognizable by him as the Judge may, by general or special order, direct;

(5) [3][* * * *]

13. [4][* ..* * *]

Duties of ministerial officers.

14. (1) The ministerial officers of a Court of Small Causes shall, in addition to any duties mentioned in this Act or in any other enactment for the time being in force, as duties which are or may be imposed on any of them, discharge such duties of a ministerial nature as the Judge directs.

(2) The High Court may make rules consistent with this Act, and with any other enactment for the time being in force, conferring and imposing on the ministerial officers[5] of a Court of Small Causes such powers and duties as it thinks fit, and regulating the mode in which powers and duties so conferred and imposed are to be exercised and performed.

CHAPTER III.

JURISDICTION OF COURTS OF SMALL CAUSES.

Cognizance of suits by Courts of Small Causes.

15. (1) A Court of Small Causes shall not take cognizance of the suits specified in the second schedule as suits excepted from the cognizance of a Court of Small Causes.

(2) Subject to the exceptions specified in that schedule and to the provisions of any enactment for the time being in force, all suits of a civil nature

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LEG. REF.

[1]*See* now Ss. 113 and 115 and the first Schedule, O. 46, C. P. Code (1908).
[2]Sub-s. (1) to S. 12 substituted by A.O., 1937.
[3]Sub-s. (5) to S. 12 omitted by A.O., 1937.
[4]S. 13 Omitted by A.O., 1937.
[5]For instance of a notification issued under this power, *see* Bom.R. & O., Vol. I.

NOTES.

of such Court can make a reference to the High Court. 172 I.C. 805=1937 Sind 318.

Sec. 12 (1)—The Registrar has no jurisdiction under R. 30 to enquire into the liability of the garnishee, when the identical claim is already the subject-matter of another suit in the Court. His jurisdiction extends to those cases only where suit is not actually instituted. 30 L.W. 217=1929 M. 274. [A case under the Pres. S. C. Courts Act, S. 9].

Sec. 15.—S. 15 does not apply to the Karachi Small Cause Court constituted under the Karachi Small Cause Courts Act of 1929. I.L. R. (1941) Kar. 238=1941 Sind 138. The test of jurisdiction is in the shape in which the suit is originally brought. 20 B. 675; 10 A. 524; 32 B. 356. The nature of the suit is to be determined according to the claim made by the plaintiff and not by the contest of the defendant. The latter procedure would give rise to the greatest confusion and eliminate from the jurisdictian of the Small Cause Court many cases which would fall within that jurisdiction. 29 N.L.R. 115=1933 N. 82. The principle that a plaintiff could not by his own act give or take away jurisdiction must be confined to cases where the amount claimed is such that he could not recover. 24 C. 661=1 C.W.N.

of which the value does not exceed five hundred rupees shall be cognizable by a Court of Small Causes.

(3) Subject as aforesaid, the Provincial Government may, by order in writing, direct that all suits of a civil nature of which the value does not exceed one thousand rupees shall be cognizable by a Court of Small Causes mentioned in the order.[1]

Exclusive jurisdiction of Courts of Small Causes.

16. Save as expressly provided by this Act or by any other enactment for the time being in force, a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable.

LEG. REF.

[1]For notifications issued under this power in—

(1) Bombay, *see* Bom.R. & O., Vol. I.

(2) Burma, *see* Bur. R. M.; this notification issued originally under Act XI of 1865 and was kept in force by S. 2 (2) of this Act; and *Burma Gazette*, 1900, Pt. I, p. 322.

NOTES.

556. But a plaintiff can always relinquish a part of his claim so as to bring the case within the limit of a Small Cause Court. 23 B. 266. By S. 15 read with Sch. II, Art. 8, a Court of Small Cause cannot take cognizance of a suit for the recovery of rent other than house rent. A suit for rent in respect of a Cinema Hall is not cognizable by the Small Cause Court. The test to be applied to determine whether it is a 'house' is to look at the character of the building and the purpose to which it is or can be adapted; not the name by which it is called. 'House' has a much more restricted meaning than building. It is a structure of a permanent character, structurally severed from other tenements, that is used, or may be used for the habitation of man. It need not actually be used as a dwelling. 1940 Rang.L.R. 820=1941 Rang. 36. *Suit for recovery of money* recovered as rent on expiry of lease is cognizable by Small Cause Court. 96 I.C. 822=1926 A. 340; as also a *suit for damages for use and occupation*. 134 I.C. 289=1931 L. 501; 1933 N. 382 and a *suit to recover the price* of the plaintiff's share of certain ornaments. 11 P. 690. Suit for ground rent of site not not revenue paying or agricultural land—Small Cause Court has jurisdiction. 1933 N. 382. Where a suit is for a payment of money, it is entertainable by Small Cause Court, though the principal question to be decided is as regards right to immovable property. 37 B. 675=20 I.C. 974; and though incidentally accounts may have to be examined the suit does not become one for accounts. 21 C.W.N. 784=41 I.C. 929. But jurisdiction is conferred by the exercise of discretion under S. 23. 29 M 329.

Sec. 15 (1).—*See* 30 Bom.L.R. 741=1928 B. 265.

Sec. 15 (2).—The mere addition of an idle prayer for declaration of the invalidity of the assessment as auxilliary to a *suit for refund of profession tax* does not make the suit any the less a suit of a Small Cause nature, if the claim for money can proceed without the prayer for declaration. 1931 M.W.N. 1107; 35 L.W. 70=1932 M. 226.

Sec. 15 and Art. 31.—Suit for damages for use and occupation after termination of tenancy—Is cognizable by Small Cause Court—Contract—Breach—Damages—Right to in the absence of stipulation in contract. 23 P.L.T. 11.

Sec. 16.—[*See* 1928 All. 38.] The effect of the provisions of S. 16 is not to deprive the regular Court altogether of jurisdiction in suits cognizable by a Court of Small Causes, but merely to prevent the exercise of that jurisdiction by the regular Court so long as there is a Court of small causes having jurisdiction within the same local limits. If, therefore, a Township Court having small cause jurisdiction tries a case of a small cause nature and within that jurisdiction as a regular suit, the proceedings of that Court are not entirely without jurisdiction and, therefore, are not a nullity. 1937 Rang.L.R. 234=1938 Rang. 35. Where a suit which is of a small cause nature is filed and tried on the original side of a District Munsif's Court because the Munsif has no jurisdiction to try it as a small cause suit, the suit cannot be considered to be a small cause suit so as to bar an appeal. All that can be said is that the suit is of a small cause nature. There is nothing in the Provincial Small Cause Courts Act or the C. P. Code, which prohibits a first appeal in such a case. The former Act applies only to small cause suits; and though S. 102, C. P. Code, would bar a second appeal in a suit of a small cause nature, there is nothing in the Act which prohibits a second appeal. A first appeal is competent, but no second appeal lies by virtue of S. 102, C. P. Code. 53 L.W. 690=1941 Mad. 665=(1941) 1 M.L.J. 635. S. 16 does not apply to a suit already instituted in another Court at a time when the latter Court had jurisdiction to entertain it. A suit, though of the kind cognizable by a Small Cause Court, is not itself so cognizable after another Court had lawfully taken cognizance of it. 15 Pat.L.T. 619=1934 Pat. 504. S. 16 is no bar to the exercise of the powers of the transfer of the District Judge under S. 24, C. P. Code. Under this section the District Judge is entitled to transfer any suit for trial to any Court subordinate to him competent to try or dispose of the same. 151 I.C. 385 (2)=1934 All. 530; 1934 Lah. 901. S. 16 does not deprive the regular Courts of their jurisdiction but merely directs them not to try

CHAPTER IV.

PRACTICE AND PROCEDURE.

Application of the Code of Civil Procedure.

17. (1) [The procedure prescribed in the Code of Civil Procedure, 1908, shall, save in so far as is otherwise provided by that Code or by this Act,] be the procedure followed in a Court of Small Causes in all suits cognizable by it, and in all proceedings arising out of such suits:

LEG. REF.

[1] Substituted by Act I of 1926, S. 2 (1).

NOTES.

suits of a small cause nature. This bar is removed by S. 24 (4) of the C. P. Code, which empowers the High Court to transfer a suit from a Small Cause Court to a regular Court irrespective of the small cause powers of the Court to which the suit is transferred, provided the value of the suit is within the ordinary pecuniary jurisdiction of Bench Court. 56 Bom. 387=1932 Bom. 486. The expression 'suit' in S. 16 is wide enough to include an application under para. 20, Sch. II, C. P. Code, which is not a suit but is required to be registered as a suit. So, an application to file an award under para. 20, Sch. II is a suit within the meaning of S. 16. (10 W.R. 85 and 10 B.H.C.R. 54, Foll.) 1935 Sind 208. *See also* 30 S.L.R. 12. The expression "*competent to try*" in S. 24 of the Code means "of jurisdiction competent to try." S. 16 is made elastic by S. 24. *Held*, that a small cause suit pending before a sub-Court can be transferred to a District Munsiff for purposes of convenience and joint trial even though the value of the suit transferred may be beyond the small cause jurisdiction of the Munsiff. 55 Mad. 960=63 M.L.J. 689. *See also* 1936 Pat. 406. Where a suit filed in the Small Cause Court at Gorakhpur was transferred by the District Judge to the Court of the Subordinate Judge under S. 24, C. P. Code, it was contended by the applicant in revision that, under S. 16, the trial by the Subordinate Judge was illegal, because there was a Court of Small Cause at Gorakhpur at the time, by which the suit was triable. *Held*, that though it was a fact that Gorakhpur was one of the places where a Small Cause Court Judge was usually posted, it did not follow that there was an officer with these powers posted on the date of transfer and it was necessary for the applicant to show this from a a reference to not only civil lists but also Gazettes. 1935 A. 690=1935 A.L.J. 511. Where the same Judge presides over a Small Cause Court and a District Court and tries by mistake as Judge of the District Court a case of a small cause nature, the mistake does not alter the character of the suit and no appeal lies from the District Court. 7 Rang. 809=1930 Rang. 139. Small cause suit filed as such—Presiding officer having jurisdiction transferred—Successor not having necessary small cause powers—Suit transferred to original side—Return of former Judge and trial of suit as original suit *Held*, that the suit did not lose its character of a small cause suit by reason of its having been mistakenly tried as a regular suit, and that the decree in the suit was therefore final under S. 27 and not appealable. 1937 Mad. 227=(1937) 1 M.L.J. 14. Where a suit cognizable by a Small Cause Court has been tried against the provisions of S. 16 as an ordinary suit by a Judge who is not invested with Small Cause Court powers, the parties to the suit having raised no objection to the trial, it should not be considered as a small cause suit, and appeal would lie from the decision. (1924 Nag. 17, Rel. on.) 30 N.L.R. 252=1934 N. 121. S. 7, Cl. (4) of the Honorary Munsiffs Act provides that nothing in S. 16 of this Act shall be deemed to affect the jurisdiction of Honorary Munsiffs or Benches under the Honorary Munsiffs Act. Accordingly, where a suit of a nature cognizable by a S. C. Court is instituted in the Court of the Honorary Munsiff, there is nothing to prevent that Court from proceeding to dispose of the suit, even though there is a S. C. Court having territorial jurisdiction over that suit. 155 I.C. 95=1935 A. L.J. 426.

Sec. 17—The provisions of this section are mandatory and a non-compliance with them amounts to an illegality. The furnishing of security for the appearance for the judgment-debtor before the Court cannot be deemed to be a compliance with this section and the fact that cash is subsequently paid into Court is immaterial. 1930 A.L.J. 1494. If no deposit is made or security given, the Court has no power to set aside an *ex parte* decree. 106 I.C. 830; 50 A. 254=1928 A 111; 1929 L. 347; 6 O.W.N. 1014. *See also* 1938 A.L.J. 1078=1939 All. 46; 1939 All. 77=1938 A.L.J. 1058. Under S. 17 the purpose for which security has to be furnished is to ensure the performance of the *ex parte* decree in case that decree is not set aside. It is not the intention of the Legislature that the security to be furnished is for the performance of the ultimate decree that might be passed in the event of the *ex parte* decree being set aside. 70 C.L.J. 4=1939 Cal. 748. *See also* 40 Bom.L.R. 898=1938 Bom. 448. S. C. Court cannot order attachment before judgment of immovable property. 28 C.W.N. 16=1924 C 193. [*N.B.*—Conflict of law in this respect has been set at rest by the amending Act of 1926.] To say that the provisions of S. 17, as amended in 1935, are mandatory and that it is incumbent upon an applicant for setting aside an *ex parte* decree to have prior to the presentation of that application filed an application praying security be accepted for the performance of the decree or compliance with the judgment, is to put upon the section a too narrow interpretation. Provided the application is made and the security is furnished within 30 days, there is substantial compliance with the provisions of S. 17 of the Act. I.L.R. (1939) All. 554=1939 A.L.J. 293 =1939 All. 503. When a party applies to set

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aside an *ex parte* decree under S. 17, it may be regarded as consisting of two parts: first a preliminary application to get a direction of the Court with a view to get the *ex parte* decree set aside and secondly after obeying the direction of the Court the actual application to set aside the *ex parte* decree. The second part follows only after obeying the directions of the Court. 1935 M.W.N. 57=1935 M. 380=68 M.L.J. 466 (F.B.). The requirements of S. 17 of the Small Cause Courts Act that the amount due or security for it is to be furnished " at the time of presenting the application" can only be relaxed to this extent that if the application is presented without the money or the security bond and the security bond or money is put in thereafter, the application will be considered to have been duly filed on the date on which the money was put in or the security furnished as the case may be. Accordingly, the security bond or money cannot be deposited after the expiry of the period of limitation prescribed for the application. 1938 Pat. 106. *See also* 1940 O.W.N. 1190. Where two applications are filed simultaneously, one for permission to give security and the other to set aside the *ex parte* decree and the Court entertained the former first and allowed it and thereafter proceeded with the setting aside application and directed notice, it was held that there was sufficient compliance with S. 17 of the Provincial Small Cause Courts Act. I.L.R. (1941) All. 589=1941 A.L.J. 340=1941 All. 284.

Sec. 17 (1): PROVISO.—Rules regarding interpretation of the proviso. 1931 A.L.J 1049 =1931 A. 727 (F.B.). No security is necessary in setting aside an order of dismissal for default. 45 A. 569=1923 A. 605 (2); 44 C. 950=53 I.C. 613; 35 I.C. 45=23 C.L.J. 147. A surety under S. 17 (1) is discharged as soon as the *ex parte* decree is set aside. I.L.R. (1939) Nag. 371=20 N.L.J. 266=1938 Nag. 75; 1938 Bom. 448=40 Bom.L.R. 898. An application for review is valid and can be entertained by the Court, even though not then accompanied by the deposit, provided the deposit is made subsequently before the expiry of period of limitation prescribed for the application. 29 N.L.R. 104=1933 N. 102. The applicant applying under S. 17 (1) for a review of judgment or for an order to set aside a decree passed *ex parte* shall and must, at the time of presenting his application, do one of two things, namely either deposit in Court the amount due from him under the decree or give such security for the performance of the decree as the Court may have directed on a previous application made by him in this behalf. If he does not make the previous application, he must put in the decretal amount in full. If he has made it and been successful in getting an order for security instead of depositing the money in full, he can furnish the security which the Court may have previously directed. It is no longer open to the Court to extend the time within which the deposit is to be made or security furnished. 18 Lah. 728=40 P.L.R. 164=1938 Lah. 18. Where an applicant to set aside an *ex parte* decree, not only failed to furnish the security within the time prescribed but furnished a security different from that ordered to be furnished, a Court if it sets aside the *ex parte* decree under such circumstances, its order is both illegal and *without* jurisdiction and can be set aside in revision. 1938 A.L.J. 742=1938 A. W.R. (H.C.) 434. There is no exception made on behalf of the Secretary of State to the rule as to deposit of decretal amount and furnishing security at the time of application for review. 1932 A.L.J. 842=1932 A. 575. "*Amount due under the decree*" does not include cost of execution. 55 I.C. 618; and does not mean the amount due on the date of application. 87 I.C. 370 (2)=47 A. 623; 54 A. 409=1932 A.L.J. 260. Tender is sufficient compliance. 2 Luck. 594. *See also* 26 L.W. 569. The proviso is mandatory and must be strictly complied with and the applicant has got no option of making the necessary deposit or giving security at any subsequent stage of the proceedings. 116 I.C. 641; 1930 A.L.J. 1494=1931 A. 103; 1935 Pesh. 159; 1938 Pesh. 91; 1940 Sind 105. *See also* 142 I.C. 599=1933 P. 134. Applicant not depositing amount due but desirous of giving security—Proper procedure. 27 A.L.J. 1273=1929 A. 840. The deposit need not have been made at the time of presenting the application. It may be made at any time within 30 days. 38 M.L.J. 539=55 I.C. 977; 144 I.C. 813=29 N. L.R. 104=1933 N. 102. *See also* 55 B. 779=33 Bom.L.R. 1433. 166 I.C. 671. But *see* 35 I.C. 625; 54 I.C. 971. S. 17 of the Provincial Small Cause Courts Act as it stands now contains a mandatory provision. An applicant has got to do one of two things, that is either deposit the decree amount in Court or give security as per directions previously given. When this mandatory provision is not complied with, and a suit is restored the power of the High Court to interfere under S. 25 of the Act is purely discretionary. The mere fact that an order passed by the Small Cause Courts is either illegal or without jurisdiction, does not necessarily justify interference. The real test is whether any substantial injustice has been done by the order complained against. 1938 A.L.J. 1058=1939 All. 77. The proviso to S. 17 means that the applicant for setting aside the *ex parte* decree must at the time of making his application either deposit the decretal amount or give security for the same as directed by the Court upon a previous application made by him in that behalf. The proviso clearly predicates the existence of an application to be made by an applicant, who is not prepared to deposit the decretal amount in cash, to ask for the filing of a security as a substitute therefor. The mandatory nature of the proviso shows that the Court has no jurisdiction to grant any extension of time either for making the deposit or for the filing of the security. 1941 O.W.N. 195=195 I.C. 103. Security bond filed in time but re-filed late is valid. 1933 A.L.J 992=1933 A. 933. An application to set aside an *ex parte* decree not accompanied by either security bond or cash cannot be treated as an application to set aside an *ex parte* decree. But where, after the presentation of such an application, the Court directs security to be furnished and the security is furnished within the time allowed, the application can

Provided that an applicant for an order to set aside a decree passed *ex parte* or for a review of judgment shall, at the time of presenting his application, either deposit in the Court the amount due from him under the decree or in pursuance of the judgment, or give [1][such security for the performance of the decree or compliance with the judgment as the Court may, on a previous application made by him in this behalf, have directed].

LEG. REF.

[1] Substituted for the words "security to the satisfaction of the Court for the performance of the decree or compliance with the judgment, as the Court may direct" by Act IX of 1935, S. 2.

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only be considered to be a proper application as and from the date after the proper deposit was made and the Court can consider such application. 1930 A. 830. Where the applicant tendered the deposit amount to the Court on a Saturday but was unable to make his deposit in the treasury which had closed earlier in the day, and he actually deposited it only on the following Monday, he should be deemed to have substantially complied with the requirements of the proviso to S. 17. 123 I.C. 825. The S.C. Court has disrcetion either to ask for a deposit of the decretal amount or a security for that amount and where the time for testing a security is not sufficient, the Court exercises its discretion properly in ordering deposit instead of security and in dismissing the application for failure to make the deposit as ordered. 1930 M. 658. *Also* 33 P.L.R. 931. An application to set aside an *ex parte* decree was made accompanied by necessary security and the Court was satisfied with the security at the time it was filed. Subsequently the plaintiff objected to the security but not on the ground that it was insufficient. *Held*, that the objection was not good. 8 O.W. N. 225. Where a security bond hypothecating immovable property is duly executed by the applicant and filed in Court within the period of limitation but the same is not registered, the S. C. Court Judge cannot treat the security as sufficient and proceed to hear the application. In such a case the S. C. Court Judge has no jurisdiction to order a retrial. 15 Pat.L.T. 13=1934 P. 74. But *see* 1933 P. 279, *infra*. An unregistered security bond is sufficient compliance with law, provided the delay in getting it registered is not due to any fault of the applicant himself. The test is whether the security which the party placed in the hands of the Court and which the Court ultimately accepted was sufficient to enforce the obligation upon him. 1933 P. 279=12 P. 745=14 P.L.T. 326. Application to set aside *ex parte* decree—Security bond filed within limitation—Error in description of property offered as security—Fresh bond in respect of same property filed after limitation—Application is maintainable. 12 Luck. 287=1937 Oudh 407. Per *Agarwala, J.*—The word '*security*' signified anything that makes the money more assured in its payment or readily recoverable. 14 Pat.L. T. 326=1933 P. 279; 1936 Pesh. 193. The Court has no power to extend the limitation period of 30 days for an application. 45 A. 332=1923 A. 319 (2). *See also* 161 I.C. 518=1936 L. 140; 1936 Pesh. 91; 144 I.C. 394; 50 A. 254=25 A.L.J. 1032=1928 A. 111. A valid deposit or security must be furnished within 30 days. The Court cannot extend time for furnishing security. 56 I.C. 810=1920 P. 203; 24 C.W.N. 380=56 I.C. 551. But the Court has power to extend time under S. 5 of the Limitation Act for deposit in special circumstances. 44 M.L.J. 247=1923 M. 354 (2); 161 I.C. 518=1936 L. 140; 1936 M. 524; 42 M.L.J. 484=1922 M. 186. But *see* 1933 N. 43=144 I.C. 394 *contra*. *Also* 1933 P. 134; 12 L. 359=1931 L. 332 (F.B.). Where on an application to set aside an *ex parte* decree, the decretal amount had been handed over to the vakil's clerk by the party in time, but the deposit could not be made in time owing to the *bona fide* mistake of the clerk in mislaying the *chalans*, *held*, there was sufficient cause for excusing the delay under S. 5 of the Lim. Act. 61 M.L.J. 710. Where the delay in furnishing full security within time of limitation is due to the action of the Court, the judgment-debtor should not be held responsible for it. 163 I.C. 732=1936 M. 524. Mere filing of a draft bond is not sufficient. The security must be given within 30 days. 15 L.W. 186=1922 M. 330. Tender in time but deposit a day late is sufficient compliance with the section. 48 A. 342=1926 A. 602. *See also* 62 I.C. 108; 90 I.C. 194. There is a valid deposit, if the money deposited was that named in the decree, even though the decree was incorrectly drawn. 43 A. 438=62 I.C. 689. The decree cannot be set aside till the deposit is made. 38 I.C. 139. *See also* 35 I.C. 625; 1926 A. 602. An application for setting aside an *ex parte* decree of a S. C. Court is undoubtedly a proceeding arising out of a S. C. Court suit and where such application is made, after the abolition of the S. C. Court, the procedure in the application is to be regulated by S. 17, and there is nothing in 35 which in terms modifies the provisions of that section. 1934 A.L.J. 917=1934 A. 943. An objection taken by a judgment-debtor in certain execution proceedings before the S. C. Court was struck off for default. The judgment-debtor made an application praying that his objection dismissed for default be restored. The Court dismissed it on the preliminary ground that no security was furnished as required by the proviso to S. 17. On revision, *held*, that the order striking off the objection for default cannot be treated as an order under S. 47, C. P. Code, and cannot therefore amount to a decree, as no question of the nature specified in that section was determined and that the order can, in no sense, be considered to be an *ex parte* decree so as to attract the application of the proviso to S. 17. *Held, further*, that no question of *res judicata* can arise as the objection had not

(2) Where a person has become liable as surety under the proviso to sub-section (1), the security may be realized in manner provided by section [1][145] of the Code of Civil Procedure, [2][1908].

Trial of suits by Registrar.

18. (1) Suits cognizable by the Registrar under section 12, sub-sections (3) and (4), shall be tried by him, and decrees passed therein shall be executed by him, in like manner in all respects as the Judge might try the suits, and execute the decrees, respectively.

(2) The Judge may transfer to his own file, or to that of the Additional Judge, if an Additional Judge has been appointed, any suit or other proceeding pending on the file of the Registrar.

Admission, return and rejection of plaints by Registrar.

19. (1) When the Judge of a Court of Small Causes is absent, and an Additional Judge has not been appointed or, having been appointed, is also absent, the Registrar may admit a plaint, or return or reject a plaint for any reason for which the Judge might return or reject it.

(2) The Judge may, of his own motion or on the application of a party, return or reject a plaint which has been admitted by the Registrar, or admit a plaint which has been returned or rejected by him:

Provided that, where a party applies for the return or rejection or the admission of a plaint under this sub-section, and his application is not made at the first sitting of the Judge after the day on which the Registrar admitted, or returned or rejected, the plaint, the Judge shall dismiss the application unless the applicant satisfies him that there was sufficient cause for not making the application at that sitting.

Passing of decrees by Registrar on confession.

20. (1) If, before the date appointed for the hearing of a suit, the defendant or his agent duly authorized in that behalf appears before the Registrar and admits the plaintiff's claim, the Registrar may, if the Judge is absent, and an Additional Judge has not been appointed or, having been appointed, is also absent, pass against the defendant, upon the admission, a decree which shall have the same effect as a decree passed by the Judge.

(2) Where a decree has been passed by the Registrar under sub-section (1), the Judge may grant an application for review of judgment, and rehear the suit, on the same conditions, on the same grounds, and in the same manner as if the decree had been passed by himself.

LEG. REF.

[1] Substituted by S. 2 of Act I of 1926 for "253".

[2] Inserted by S. 2, *ibid.*

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been dismissed on the merits and it is, therefore, open to the judgment-debtor to take the same objection by another application instead of applying for the order of dismissal being set aside. 1935 A.L.J. 403=1935 A. 502.

LIABILITY OF SURETY.—*See* 164 I.C. 570=1936 A.L.J. 933=1936 A. 593. A surety for the performance of the decree in the application to set aside the *ex parte* decree is discharged on *ex parte* decree being set aside. 178 I.C. 181=40 Bom.L.R. 898=1938 Bom. 448; I.L.R. (1939) Nag. 371=20 N.L.J. 266=1938 Nag. 75.

PROCEDURE.—*See* 41 L.W. 482=68 M.L.J. 466 (F.B.).

Secs. 17 and 16.—The petitioner brought a suit to recover Rs. 100 by way of damages for the loss of a cow before a Munsiff with powers of a S. C. Court Judge. The suit was tried in the regular form and the petitioner was successful, but he lost on appeal before the Subordinate Judge. *Held*, (1) that the suit should be taken to have been tried as a S. C. suit and that no appeal lay to the Subordinate Judge. 109 I.C. 46 (2)=1928 P. 451 (1). Application to set aside *ex parte* decree—Applicant offering security for less than decree amount—Court refusing to accept the same—Legality—Revision. 114 I.C. 502.

Sec. 17 (2).—Sufficient security — What amounts to. *See* 1928 A. 607 (2)=51 A. 402=27 A.L.J. 96. Deficiency in security may be made good even after 30 days. 166 I.C. 137=1937 O.W.N. 53=1937 O. 206. So also where on account of an error in description of property offered for security a fresh bond has been filed after limitation—Application good. 164 I.C. 470=1936 O.W.N. 688=1936 O. 407.

Execution of decrees by Registrar.

21. (1) If the Judge is absent, and an Additional Judge has not been appointed or, having been appointed, is also absent, the Registrar may, subject to any instructions which he may have received from the Judge or, with respect to decrees or orders made by an Additional Judge, from the Additional Judge, make any orders in respect of applications for the execution of decrees and orders made by the Court of which he is Registrar, or sent to that Court for execution, which the Judge might make under this Act.

(2) The Judge, in the case of any decree or order with respect to the execution of which the Registrar has made an order under sub-section (1), or the Additional Judge, in the case of any such decree or order which has been made by himself, and with respect to which proceedings have not been taken by the Judge under this sub-section, may, of his own motion, or on application made by a party within fifteen days from the date of the order of the Registrar or of the execution of any process issued in pursuance of that order, reverse or modify the order.

(3) The period of fifteen days mentioned in sub-section (2) shall be computed in accordance with the provisions of the Indian Limitation Act, 1877,[1] as though the application of the party were an application for review of judgment.

Adjournment of cases by chief ministerial officer.

22. When the Judge of a Court of Small Causes is absent and an Additional Judge has not been appointed or, having been appointed, is also absent, the Registrar or other chief ministerial officer of the Court may exercise from time to time the power which the Court possesses of adjourning the hearing of any suit or other proceeding, and fix a day for the further hearing thereof.

Return of plaints in suits involving questions of title.

23. (1) Notwithstanding anything in the foregoing portion of this Act, when the right of a plaintiff and the relief claimed by him in a Court of Small Causes depend upon the proof or disproof of a title to immovable property or other title which such a Court cannot finally determine, the Court may at any stage of the proceedings return the plaint to be presented to a Court having jurisdiction to determine the title.

LEG. REF.

[1] *See* now the Indian Limitation Act (IX of 1908.)

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Sec. 23.—The terms of the section cannot be availed of, if only the right claimed depends upon the proof of title but the relief claimed could be granted without any reference to the question of title. 1928 M.W.N. 193. *See also* 1939 Pesh. 14. It is for the S. C. Court to decide whether a question of title is involved in a case. If the S. C. Court to desires, it may return the plaint. 119 I.C. 285 (2)=1929 A. 816. Under S. 23, S. C. Court Judge has got a discretion and no revision is competent from his order simply on the ground that a question of title is raised in the suit. 150 I.C. 980 (1)=1934 L. 355 (1). *See also* 150 I.C. 144=1934 A. 695. Where a question of title to immovable property arises on the pleadings in a small cause suit, the Small Cause Court has no option under S. 23, to return the plaint for presentation to a Court having jurisdiction to take cognizance of the question of title. S. 23 does not say that the Small Cause Court has no jurisdiction to determine the question of title; it only gives that Court an option. It is most inconvenient for the time of that Court to be taken up with case which involves evidence on a point of title. Where, in a suit for rent of a house the defendant pleads that the plaintiff is not the owner of the property in question, the Court will be acting properly in returning the plaint under S. 23, as a question of title does arise on the pleadings. 1937 A.L.J. 727=1937 All. 676. Simply because a suit of a S. C. nature involves the determination of title which may be a complicated question of law, but not of title to immovable property, that would not empower a S. C. Court Judge to remove the plaint from his file and return it for presentation to a Court of original jurisdiction. The question involved must be one relating to the proof or disproof of title to an immovable property. 62 C.L.J. 530. *See also* 1940 Pesh. 34. S. C. Courts have jurisdiction to decide questions of title that arise incidentally. 23 S.L.R. 411=1929 S. 43; 1930 P. 389. A. S. C. Court Judge is competent to decide a question of title but he should finally determine the same and not in a cursory manner. It is not always convenient for him to decide an intricate question of title, and the object of S. 33 is to meet cases in which the Judge is satisfied that the question of title is so intricate that it

(2) When a Court returns a plaint under sub-section (1), it shall comply with the provisions of the second paragraph of section 57[1] of the Code of Civil Procedure and make such order with respect to costs as it deems just, and the Court shall, for the purposes of the Indian Limitation Act, 1877, be deemed to have been unable to entertain the suit by reason of a cause of a nature like to that of defect of jurisdiction.

Appeal from certain orders of Courts of Small Causes.

24. Where an order specified in [2][clause (*ff*) or clause (*h*) of sub-section (1) of section 104 of the Code of Civil Procedure, 1908,] is made by a Court of Small Causes, an appeal therefrom shall lie to the District Court [2][on any ground on which an appeal from such order would lie under that section].

LEG. REF.

[1] See now the Code of Civil Procedure (V of 1908), Sch. I, O. 7, R. 10.

[2] Substituted for the words "section 588, cl. (29) of the Code of Civil Procedure" and the words "on any ground. . . . . that section" were added by Act IX of 1922.

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should not be decided summarily and then it should return the plaint for presentation to a proper Court. There are no words in the section which would justify the inference that the plaintiff and the defendant should be rival claimants to the immovable property before the question of returning the plaint for presentation to proper Court arises. Where therefore in a suit for arrears of rent in respect of certain shops, the defence is that the shops are in the ownership of of a third person who had purchased them at an auction sale and the rent had been paid to this third person, and the question of title depends upon a consideration of a number of documents, it is a case in which the question of title ought to be decided by a competent Court other than the S.C. Court. 1935 A.L.J. 301 = 1935 A. 148. When the suit is transferred under S. 23, it is triable as an ordinary suit and the decision is open to appeal, although it does not thereby cease to be one cognizable by Small Cause Court within the meaning of S. 102, C. P. Code. Therefore although no second appeal would lie, a first appeal would lie to the District Judge. 189 I.C. 688 = 1940 Cal. 399.

OBJECT OF SECTION is to meet cases in which a S.C. Court Judge is satisfied that the question of title raised is so intricate that it should not be decided summarily but in a Court in which evidence is recorded in full and the decision is open to appeal. The matter is one of discretion. 20 C.W.N. 1080; 1 P.L.J. 465 = 37 I.C. 129.

SCOPE.—When a plaint is returned, the nature of the suit is not altered. 85 I.C. 1002; 87 I.C. 659 = 1925 A. 821. *See also* 1926 C. 86. When a S. C. Judge decides to try a question of title himself, he cannot try it in a summary manner. 14 I.C. 2. When a Judge has small cause and regular jurisdiction a plaint can be transferred from one to the other without a return. 38 B. 190 = 21 I.C. 832. An appeal lies when the trial is on the regular side even though the suit may be a S. C. suit. 64 I.C. 436; 45 I.C. 645; 1931 A.L.J. 967. But *see* 39 A. 101 = 37 I.C. 92. A second appeal is, however, barred under S. 102, C. P. Code. 134 I.C. 251 = 1931 A.L.J. 967. A small cause suit is none the less a S. C. suit though tried on the regular side. 4 L.W. 245 = 36 I.C. 202 : 65 I. C. 93. *See also* 23 L.W. 518 = 1926 M. 622. The regular side has no jurisdiction to refuse to entertain a suit returned to it. 18 I.C. 325 = 18 C.W.N. 380. Where a plaint was returned to the regular side but was tried as a S. C. suit ignoring the order in the return, the trial is illegal. 27 I.C. 751. S. C. Court cannot try a suit by executors when defendant questions the power of testator to dispose of certain lands. 38 I.C. 608 = 4 L.W. 349.

Secs. 23 and 25.—Where the relief for damages depended on the proof or disproof of the title or the plaintiff to certain trees, *held*, that the suit was maintainable in the Court of small causes. 1934 A.L.J. 115 = 1934 A. 290. An order by the Small Cause Court returning the plaint for presentation to the proper Court purporting to have been passed under S. 23 is not appealable but it is a 'case decided' within the meaning of S. 115 of the C. P. Code, and if the Court has in doing so acted with material irregularity, the High Court can interfere with the order in revision. (1 I.C. 288, Diss.) 54 A. 1048 = 1933 A.L.J. 1068 = 1933 A. 106. Under S. 23, a Court of small causes is given a considerable discretion. Thus, if a *bona fide* question of title arises incidentally in a Small Cause Court suit, the Court may determine it. But where the Court does not consider whether such question was a *bona fide* one, or that it was necessary for the purposes of the suit to decide it, but decrees the suit, it cannot be said that it acted illegally. Therefore, no revision lies on such a decree. *See also* 150 I.C. 980 = 1934 L. 355; 150 I.C. 144 = 1934 A. 695.

Sec. 24: SMALL CAUSE SUIT—TRIAL BY SMALL CAUSE JUDGE AS ORDINARY SUIT—APPEAL.—When a suit cognizable by a Court of small causes is tried by a Munsiff invested with S. C. powers as an ordinary suit, the judgment is not appealable. 37 C.W.N. 917 = 1934 C. 784. No appeal is allowed against an order of a S. C. Court directing compensation to be paid under S. 95, C. P. Code. 123 I.C. 225 (1) = 1930 S. 173; 1937 N. 126.

25. The High Court, for the purpose of satisfying itself that a decree or order made in any case decided by a Court of Small Causes was according to law, may call for the case and pass such order with respect thereto as it thinks fit.

Revision of decrees and orders of Courts of Small Causes.

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Sec. 25: SCOPE.—*See* 8 O.W.N. 800; 1932 O. 60. Power of revision under this section is wider than under C. P. Code. A revision is open when the grounds of a decision are not clear. 41 I.C. 873=15 A.L.J. 680. *See also* 157 I.C. 471=1935 P. 452; 94 I.C. 790=1926 A. 554. The revisional powers of the High Court even in a case decided under Provincial Small Cause Courts Act are very limited. 170 I.C. 797=1937 Pat. 524. *See also* 1936 Lah. 140. S. 25 ought not to be construed as giving parties a right of appeal on points of law. The object of S. 25 is to enable the High Court to see that there has been no miscarriage of justice, that the decision was given according to law. 40 Bom.L.R. 125=1938 Bom. 223. In an application under S. 25 no High Court can be intended to be or can possibly undertake the duties of a Court of first appeal from decision of a Judge of a Court of Small Causes. While the High Court has the power to interfere even upon a point of fact, it behaves it to exercise the power simply and solely for the purpose of preventing miscarriage of justice or gross illegalities. The powers conferred by the section are purely discretionary. The section is not intended to give in effect a right of appeal in all Small Cause Court cases either on law or on fact. 14 Luck. 588=1939 O.W.N. 203=1939 Oudh 141. A A Court can only act under S. 25, where a decree or order has been passed. So when after deciding the issue as to limitation, the case is adjourned to a future date, for trial of other issues, there is neither a decree nor order which could be revised by the High Court. 46 L.W. 924=1938 Mad. 252=(1938) 1 M.L.J. 61. *See also* 1941 O.W.N. 1112. Revision lies from an order wrongly dismissing a suit as time barred. 1928 L. 274. But *see also* 108 I.C. 378. Powers of revision under this section are wider than those under S. 115, C. P. Code. 1928 L. 274. *See also* 115 I.C. 257; 1936 A.M. L.J. 68; 1930 A.L.J. 1090=128 I.C. 766=1930 A. 832 (1). *See also* 42 Bom.L.R. 1098; 1938 A.L.J. 1058. Under S. 25 the High Court has the power and the duty in proper cases of taking revisional action, even though not moved to do so by any party, when the matter comes to its notice. Rule as to contents of judgment in S. C. suit stated. 55 M. 671=62 M.L.J. 439. Under S. 35, the High Court may call for a case for the purpose of satisfying itself that a decree or order made in any case has been decided by a Court according to law, and is not in any way bound by questions of waiver as between the parties, regarding the right of revision. 1934 A. 107. The powers of revision conferred by S. 25 are discretionary and the High Court should not interfere unless it appears that some substantial injury is done to the aggrieved party. 7 O.W.N. 760=1930 O. 420; 10 O.W.N. 581=1933 O. 346. *See also* 9 O.W.N. 436; 32 P.L.R. 163. The High Court should not ordinarily exercise its discretionary powers in revision under S. 25 no injustice has been done. The question whether interference should be made or not depends upon the facts and circumstances of each case. Where the question of limitation raised is even one of law, interference is not justified if the Court is satisfied that far from furthering any ends of justice, it would prepetuate an injustice in interfering with the decree of the lower Court. *See also* 1941 Nag. 273. 1941 O.W.N. 1112=1941 O.A. 827. *See also* 1937 M.W.N. 398 (no interference in revision on purely technical grounds). *See also* 1941 O.A. 1061; 1942 N.L.J. 311. The revisional powers given by S. 25 are only exercisable, where it appears that some substantial injustice to a party to a litigation has directly resulted from a material misapplication or misapprehension of law or from a material error in procedure. Where it appears to the High Court that substantial justice is done to the parties by an order of the Court below setting aside an *ex parte* decree, it will not interfere with such order even though the Court has not complied with the provisions of S. 17. 1935 A.L.J. 414=1935 A. 379. *See also* 1935 L. 190; 1938 A.L.J. 742=1938 A.W.R. (H.C.) 434. The existence of a remedy by way of suit does not preclude the Court from hearing a revision under S. 25. 1041 A.M.L.J. 19. High Court's jurisdiction under S. 25 is discretionary and cannot be exercised except to remedy injustice. 114 I.C. 288=1929 N. 70; 54 A. 409=1932 A. L.J. 260; 9 O.W.N. 962. *See also* 1933 A. 145 =144 I.C. 172; 1935 L. 190; 1935 A. 379. Where it appears that the Judge really applied his mind to the case and gave a decision on the issue based on the evidence before him, it is not a proper case for interference in revision. 7 O.W.N. 1202. Order based on conjecture would be set aside in revision. 157 I.C. 199=1935 A.W.R. 1093=1935 A.L.J. 1140; 1935 P. 952. An application for revision under S. 25 has a much larger scope than one under S. 115 of the C. P. Code, but it cannot be said that a clear finding of the S. C. Court can be reversed or modified by the High Court upon the sole ground that the balance of evidence was in favour of the applicant. It is not within the province of the High Court to make an appraisement of the value or weight of the finding of the Court below. 130 I.C. 289 (1)=1931 A. 210. *See also* 1941 Bom. 67=I.L.R. (1941) Bom. 153. The revisional powers given by S. 25 are only exercisable where it appears that some substantial injustice to a party to a litigation has directly resulted from a material misapplication or misapprehension of law or from a material error in procedure. If the judge has applied himself to the decision of the case carefully, his finding must be accepted in revision. 105 I.C. 845 (1); 1927 O. 627 (1). *See also* 108 I.C. 378; 1928 O.

26. [*Amendment of the second schedule to the Code of Civil Procedure.*] *Repealed by the Presidency Small Cause Courts Law Amendment Act (X of 1888), section 4.*

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144; 1932 A.L.J. 842. No revision lies unless the decision is perverse or impossible. 84 I.C. 794=1925 A. 172; 47 A. 136=85 I.C. 474; 3 R. 471=1925 R. 310. The revisional Court would not upset the judgment of a S. C. Court on a bare technicality if substantial justice has been done. 160 I.C. 462=1936 Pesh. 1. *See also* 1936 Lah. 140; 1937 M.W.N. 398. The revisional powers are discretionary. 55 I.C. 209. In the case of an *instalment decree* the amount of the instalments and the period for their payment is a matter of the discretion of the Court; but it is a discretion to be exercised within bounds. Where it is so exercised as to constitute a virtual denial of the plaintiff's rights such as by fixing the amount at an unduly low figure, the High Court may interfere in revision and substitute a higher amount as instalment payable. 54 A. 539. Delay in filing revision, effect of. 92 I.C. 993=1926 A. 228. Dismissal of suit under O. 9, R. 2, C. P. Code—Interference. 8 O.W.N. 1179.

ILLUSTRATIVE CASES.—A Judge of the Court of Small Cause is not required to write an elaborate judgment but he must indicate that he has applied a judicial mind to the case. Where the parties were examined by the Judge who disposed of the case without even stating whether he believed the evidence, *held*, that the case was not properly tried and that the judgment be set aside. 1930 A.L.J. 1090=128 I.C. 766=1930 All. 832 (1). An order *rejecting amendment* is of an interlocutory character and cannot be revised even under S. 25. S. 25 is applicable only when a case is decided by the Court and not to an interlocutory order. 1934 Lah. 165. Where the *decree is passed without jurisdiction* by the lower Court, the High Court ought to interfere in revision. 1935 M.W.N. 519=1935 Mad. 554. Where a *decree is opposed to public policy* it is not improper to interfere with it. 1930 Cal. 596. Where it appeared that substantial injustice had resulted from the *misapprehension of law* by the trial Court, *held*, that the High Court could interfere in revision and decide the question of law and send the case for proper disposal to the trial Court. 27 A.L.J. 1285=1930 All. 87. *See also* 1935 A.L.J. 651=1935 All. 410. *See also* 64 C.L.J. 456 (judgment not supported by evidence on record). The High Court will not interfere in revision with the decision of the lower Court on a pure question of fact unless the judgment of the lower Court is perverse. It cannot interfere on the ground that the decision is not in accordance with law. 1933 All. 373=144 I.C. 270. *See also* 1935 Lah. 190; 1939 N.L.J. 118=1939 Nag. 19; 1940 Sind 228. It is not the practice of the Patna High Court to exercise revisional powers when it has arrived at the conclusion that the decision which is before it is sound on the merits. 163 I.C. 133=1936 Pat. 562. In a suit on a pronote, a finding by the Court that it had been duly executed by the defendant is clearly one of fact, and is not open to challenge in revision when it is based on due consideration of the evidence both direct and circumstantial. 1936 O.W.N. 245=1936 Oudh 176.

REFERENCE.—The District Court can make a reference to the High Court under O. 46, R. 7, C. P. Code, regarding a decision of a Small Cause Court subordinate to it. 34 I.C. 527.

MEANING OF TERMS.—The word '*case*' includes a branch of a whole case having an independent remedy and an interlocutory order. '*Decided*' means disposed of. 1937 Nag. 136; 1937 Nag. 68. *See also* 41 All. 42=47 I.C. 610; 59 I.C. 906=12 L.W. 285; 25 I.C. 643=27 M.L.J. 494; 43 I.C. 455=2 P.L.J. 682; 40 C.W.N. 698; 62 C.L.J. 530. When a Court arrives at finding that the suit is not cognizable by the Small Cause Court and *directs the plaint to be returned for presentation to the proper Court*, the case must be deemed to have been decided so far as the Small Cause Court is concerned, even though the Court does not decide it on its merits. Therefore, there is nothing in the provisions of S. 25 to prevent the High Court from exercising its revisional powers in respect of orders passed by the Judge in the course of proceedings in the Small Cause Court suit before him. 11 O.W.N. 1135=1934 Oudh 429 (2); 19 N.L.J. 306. *See also* 1940 O.W.N. 347=1940 Oudh 245; 1937 O.W.N. 677=1937 Oudh 364 (revision against order restoring suit dismissed for non-payment of additional court-fee). A Sub-Judge in whose Court a suit was filed as a small cause suit took leave and was succeeded by another Judge who had no power to try the suit as a small cause one. The suit was sent to another Judge to be tried as an original one. It was heard on merits and was posted for arguments. The Sub-Judge who had gone on leave returned, and on an application being made to him, he transferred the suit to his own file to be tried as a small cause suit. *Held*, that the order of the Sub-Judge was not an interlocutory order, as no suit was pending before him and as such revision was competent. *Held further*, that the Sub-Judge had no jurisdiction to pass such order and that his action amounted to a transfer of a suit under S. 24, C. P. Code, which can be ordered only by District Court or High Court. *Held also*, that even if the order was an interlocutory order, the High Court could interfere under S. 25 as the order in question amounted to a "case decided." 30 S.L.R. 226=1936 Sind 160. Where a suit of a small cause nature is tried by a Judge having small cause powers as a money suit, the decree passed in the suit has to be regarded as a decree passed by a Small Cause Court Judge, and is not appealable. The remedy of the aggrieved party is not by way of appeal, but by way of an application to the High Court under S. 25. 40 C.W.N. 698; 62 C.L.J. 530. Where an application for execution of a Small Cause Court decree is made to a Small Cause Court, and it is transferred to the Original Side Court for purposes of execution against immovable property, any order that may be

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passed thereon is not subject to revision as an appeal lies against it. 1940 A.M.L.J. 133. Where an award in a Small Cause suit is set aside, the order is not capable of revision, as no case has been decided at that stage. 86 I.C. 788=1925 All. 395.

QUESTION OF TITLE.—Under S. 23, Small Cause Court is given a considerable discretion. Thus if a *bona fide* question of title arises incidentally in a Small Cause Court suit, the Court may determine it. But where the Court does not consider whether such question was a *bona fide* one, or that it was necessary for the purposes of the suit to decide it, but decrees the suit. it cannot be said that it acted illegally. Therefore, no revision lies on such a decree. 150 I.C. 144=1934 All. 695.

ERROR OF LAW.—The High Court can interfere if by the reason of omission to consider material evidence or by evident mistake in the appreciation of evidence substantial injustice has been done to the party. 37 C.W.N. 275=144 I.C. 740=1933 Cal. 501. For a revision, there should be complete wrong done, not a a mere mistaken application of law. 66 I.C. 435=19 A.L.J. 555; 29 I.C. 1008=13 A.L.J. 563; 40 I.C. 890; 17 I.C. 748=1912 M.W.N. 1227; 1 Rang. 372=85 I.C. 362=1924 Rang. 54: 114 I.C. 111=1929 Sind 117. *See also* 52 C.L.J. 528=1931 Cal. 163; 1936 O.W.N. 533=1936 Oudh 297. It is the practice of the Nagpur High Court to interfere in revision against an incorrect view of the law only when the law is well known. 1938 N.L.J. 457=1939 Nag. 64. There cannot be any antithesis between law and justice; t e object of law being to secure justice, no decision which is contrary to statutory law can be described as substantially just. 1936 A.M.L.J. 68. The inference drawn from proved documents is a pure question of law. It is open to the Chief Court in revision to consider whether the inference drawn by the lower Court from certain documents has been correctly drawn or not. 8 O.W.N. 800. *See also* 162 I.C. 793=1936 Pat. 257. *Failure to determine a material issue* is an error of law. When such question was beyond the scope of the Small Cause Court's jurisdiction, the plaint ought to have been returned for presentation to proper Court. 5 P.L.J. 248=57 I.C. 653. Where the Judge misdirected himself and wrongly threw the burden of proof on the plaintiff in a promissory note case ignoring the presumption under S. 118, Negotiable Instruments Act, *held*, that the High Court could interfere in revision. 54 All. 375=135 I.C. 241=1932 All. 164. *See also* 154 I.C. 517=1935 All. 410; 159 I.C. 1075=1936 pat. 132. A dismissal for default, on taking up a case after 5 P.M. without notice is revisable. 44 All. 325=1922 All. 72. So also an *order setting aside an* ex parte *decree* without taking a registered security bond. 42 I.C. 751=26 C.L.J. 315. *See also* 154 I.C. 516; also an *order of return of plaint* when the Small Cause Court has jurisdiction over the suit. 15 C.W.N. 666=10 I.C. 8; *also* 54 All. 1048=1932 A.L.J. 1068=1933 All. 106; also a dismissal when one of two reliefs is not cognizable. The proper order would be to direct the plaintiff to strike out that relief and the plaint 37 I.C. 665=20 C.W.N. 1020. Decree of Small Cause Court executed on regular side of another Court—Orders in—Appeal—Revision—If open. *See* 7 Cut.L.T. 33. *See also* 1939 Nag. 64. It is a matter of discretion as to whether a Small Cause Court should or should not allow restoration of suit which was decreed *ex parte*. Where it refuses to allow restoration holding that the grounds alleged were not sufficient, the High Court will not interfere in revision. 154 I.C. 516=1935 All. 437. *See also* 155 I.C. 575=41 L.W. 117=1935 Mad. 196. Where the decision in two rent suits was unimpeachable when taken separately but the two results taken together were anamolous. *Held*, that the High Court need not interfere in revision. 10 O.W.N. 48=1933 Oudh 129. The *grant* of *compensation under S. 95, C. P. Code*, is no doubt a matter of discretion but the discretion has to be exercised in a judicial manner. Where the Court has given no reasons for refusing the application for compensation; the order clearly ignores the terms of S. 95 and is not one according to law. 11 O.W.N. 1135=1934 O. 429 (2); *see also* 1937 Oudh 358 (order of S. C. Court rejecting application under S. 5 (1) of U. P. Agriculturists' Relief Act).

FINDING OF FACT.—The High Court will uphold the decree mad by the S. C. Court, when there is sufficient evidence to support t:at decree, although the lower Court's finding on the facts may be vague. 19 N.L.J. 251=167 I.C. 448. *See also* 31 S.L.R. 1. High Court can interfere also with a finding of fact, though ordinarily it is averse to doing so. 59 I.C. 267=45 B. 292; 1 Pat.L.T. 199. *See also* 27 L. W. 735=54 M.L.J. 157; 1933 S. 363; 153 I.C. 625=1935 L. 206 (Finding as to misconduct in risk-note form . *See also* 1935 A. L.J. 396=1935 A. 372. Where on a consideration of the materials before it, the trial Court was of opinion that an *ex parte* decree should be set aside, its discretion should not be interfered with in revision under S. 25. 1937 O. W.N. 53=1937 O. 206; also a finding without reference to material evidence. 38 M.L.J. 360=55 I.C. 754; 1923 N. 292; 6 L.L.J. 593=1925 L. 278. But *see* 15 I.C. 186=1912 M. W.N. 181. In an application under S. 25, the High Court will not generally interfere with findings of facts, but where it is shown that the findings are such as could not have been arrived at upon the state of the evidence on the record it is open to the Court to interfere. 142 I.C. 463=14 Pat.L.T. 61=1933 P. 145. Judgment —Contents of—No issues framed—Plaintiff's evidence alone recorded—Judgment contrary to evidence—Validity of. 1933 A.L.J. 316. A finding of fact cannot be interfered with on the ground of *misdirection as to burden of proof*. 35 I.C. 204=4 L.W. 611. Finding of fact—Interference by High Court when justified—Evidence equally balanced—Trial Court's decision to be accepted. *See* 118 I.C. 241; 30 Bom.L.R. 1104.

NEW PLEA.—The applicant cannot be allowed to take any plea before the High Court in revision which was not taken in the Court below. 1932 O. 230=9 O.W.N. 436; 54 A. 1048=1933 A. 106; *see also* 1936 Pat. 428; 1941 Oudh 111; 23 P.L.T. 407. It is not

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open to an unsuccessful litigant to raise in revision a new plea that the suit is not cognizable by Court of S. C. even as regards his own pleading, much less with regard to the pleading of his successful adversary. 161 I.C. 937=1936 P. 428. The language in S. 25 states that the High Court may satisfy that the decree or order by the S. C. Court was according to law. This expression "according to law" is paralled to language in S. 100 (1) (*a*), C. P. Code, and limits the High Court in revision to ground of law that might be raised in a second appeal, and it does not cover a revision on questions of fact. 1935 A.W.R. 190=1935 A.L.J. 396=1935 A. 372. Plea of limitation can be raised for the first time in revision. 56 I.C. 513; *See also* 1940 O.W.N. 988=1940 O.A. 971. *Plea of want of jurisdiction* cannot be raised for first time in revision. 29 I.C. 566; 9 O.W.N. 962. But *see* 3 L.L.J. 380; 1935 M.W.N. 519=1935 M. 554; unless necessary in considering on merits. 1925 O. 88. *See also* 1940 Lah. 13=41 P.L.R. 543; 1938 P.W.N. 900=1931 Pat. 378. High Court in revision should set aside a decision in a suit not cognizable by S. C. Court. 41 I.C. 203=27 C.L.J. 590. Where the judgment was based on facts which the judge ought not to have taken into consideration in coming to his conclusion and it also appeared that the judge had misdirected himself as to certain pieces of evidence, *held*, that the High Court had jurisdiction to revise the finding of the lower Court. 54 B. 105=31 Bom.L.R. 1426=1930 B. 129. *See also* 1933 A.L.J. 897=1933 A. 577; 1933; A.L.J. 316=1933 A. 339; 52 C.L.J. 528=1931 C. 163. It is not within the power of the High Court to examine the facts on which an order under C. P. Code, O. 5, R. 20 is made. 1933 L. 288.

QUESTION OF LIMITATION.—A decree without reference to provisions of the Limitation Act would be set aside in revision. 20 A.L.J. 89=65 I.C. 107 (1); 28 I.C. 969=14 A.L.J. 394. The decision on a question of limitation is reversible. 20 I.C. 175; 19 I.C. 782=11 A.L.J. 295; 46 I.C. 804=21 O.C. 139; 1928 L. 51. The High Court will not, in the exercise of its discretionary powers of revision under S. 25, interfere with an erroneous decision on a point of limitation, where the judgment of the lower Court does substantial justice between the parties. 1935 L. 137; 1936 O.W.N. 533=162 I.C. 717=1936 O. 297; 1936 O.W.N. 332=161 I.C. 423; 161 I.C. 389=1936 O. 247. 1936 A.M.L.J. 68; 1941 Oudh 111. Under S. 25, the High Court can interfere on a point of limitation if the facts are not in dispute. 154 I.C. 713=1935 A.L.J. 379. Plea of jurisdiction and limitation raised but not decided—Revision lies. 95 I.C. 4. A plausible view that the claim might he barred by a few days is no ground for revision. 90 I.C. 321 (1). *See also* 1926 O. 319.

JERISDICTION.—The High Court is not bound to interfere in revision in every case in which the trial Court has no jurisdiction to try the suit, *i.e.*, where the lower Court has wrongly tried an original suit on the small cause side or conversely has tried a small cause suit on the original side. The High Court will not, and is not bound to, interfere in revision if it is satisfied that the lower Court's decree is neither incorrect nor unjust. The mere fact that the decree has been passed on the wrong side of the Court does not justify interference in revision. 45 L.W. 691=1937 Mad. 644=(1937) 2 M.L.J. 299. Wherever the High Court comes to the conclusion that the unsuccessful party has not had a proper trial according to law, *e.g.*, where the lower had no jurisdiction to make the order, or where it has based its decision on evidence which should not have been admitted, or where the unsuccessful party has not been given a proper opportunity of being heard, or where the burden of proof has been placed on the wrong shoulders, the High Court can interfere. But the High Court ought not to interfere merely because it thinks that possibly the lower Court may have arrived at a conclusion which the High Court would not have arrived at. The conclusion arrived at by the lower Court as to the construction of an agreement and the rights of the parties thereunder in a trial regularly conducted is not open to discussion in revision, though it would be open to discussion in an appeal. 40 Bom.L.R. 125=1938 Bom. 223.

RES JUDICATA.—Where the former decision was not correct but the later one is correct, the High Court does not in revision interfere on the technical ground that the matter is *res judicata*. 40 L.W. 656=1934 M. 563.

REVIEW CASES.—High Court can interfere with an order of a S. C. Court granting review. 53 I.C. 44. But *see* 12 I.C. 903=4 Bur. L.T. 147. In case of difference of opinion the senior judge's opinion prevails. 85 I.C. 1016=47 M.L.J. 876.

PRACTICE.—In a matter of discretion, unless there are very special circumstances, the High Court is reluctant to interfere with the orders of the Court below. 161 I.C. 518 (1)=1936 L. 140. High Court will not generally interfere if other remedy by way of regular appeal is open to the aggrieved party. 1933 O. 454; 1933 O. 477=146 I.C. 993=10 O.W.N. 1085. A second petition for revision is competent when the first one was dismissed for default. 39 P.L.R. 481=1937 Lah. 685. The revisional Court would not upset the judgment of a Small Cause Court on a bare technicality if substantial justice has been done. 160 I.C. 462=1936 Pesh. 1. *See also* 1937 M.W.N. 398. Transfer of S C. suit to Munsif not having S. C. powers—Revision against order of Munsif—Maintainability. 26 A.L.J. 839. On this section, *see also* 1926 P. 575. Judgment glaringly defective in its contents. 93 I.C. 632. Perverse finding of fact is ground for revision. 91 I.C. 679=1925 R. 310. If a judge of a S. C. Court chooses to depart from the procedure laid down for the conduct of cases in such a Court, he should not fall back on the provisions of that procedure in order to suit his own convenience. 1933 L. 452=145 I.C. 704. Adjournment of suit for long periods at instance of third party without intimation to plaintiff, if ground for revision. 15 P. 561=17 Pat.L.T. 329=162 I.C. 568=1936 P. 472. (F.B.)

Finality of decrees and orders.

27. Save as provided by this Act, a decree or order made under the foregoing provisions of this Act by a Court of Small Causes shall be final.

CHAPTER V.

SUPPLEMENTAL PROVISIONS.

Subordination of Courts of Small Causes.

28. (1) A Court of Small Causes shall be subject to the administrative control of the District Court and to the superintendence of the High Court, and shall—

(*a*) keep such registers, books and accounts as the High Court from time to time prescribes, and

(*b*) comply with such requisitions as may be made by the District Court, the High Court or the Provincial Government for records, returns and statements in such form and manner as the authority making the requisition directs.

(2) The relation of the District Court to a Court of Small Causes, with respect to administrative control, shall be the same as that of the District Court to a Civil Court of the lowest grade competent to try an original suit of the value of five thousand rupees in that portion of the territories administered by the Provincial Government in which the Court of Small Causes is established.

Seal.

29. A Court of Small Causes shall use a seal of such form and dimensions as are prescribed by the Provincial Government.

Abolition of Courts of Small Causes.

30. The Provincial Government may, by order in writing, abolish[1] a Court of Small Causes.

Saving of power to appoint Judge of Court of Small Causes to other office.

31. (1) Nothing in this Act shall be construed to prevent the [2][appointment of] a person who is a Judge or Additional Judge of a Court of Small Causes to be also a Judge of any other[3] Civil Court or to be a Magistrate of any class or to hold any other public office.

(2) When a Judge or Additional Judge is so appointed, the ministerial officers of his Court shall, subject to any rules which the Provincial Government may make in this behalf, be deemed to be ministerial officers appointed to aid him in the discharge of the duties of the other office.

Application of Act to Courts invested with jurisdiction of Court of Small Causes.

32. (1) So much of Chapters III and IV as relates to—

LEG. REF.

[1]For instance of a notification abolishing a Court of Small Causes (Broach), see *Bombay Government Gazette*, 1907, Pt. I, p. 339.

[2]Substituted A.O., 1937.

[3]For instances of notifications issued under this power, *see* U. P. List of Local R. & O., Vol. I.

NOTES.

Sec. 27.—The decree in a S. C. suit is not appealable even though it be tried as a regular suit. 55 I.C. 642 ; 39 A. 101=14 A.L.J. 984; 152 I.C. 144=1934 R. 312. *See also* 44 L.W. 874=(1937) 1 M.L.J. 14; 1939 Pesh. 141. But *see* 45 I.C. 645. An order in execution of the S. C. decree is not appealble but revisable. 32 I.C. 484=3 L.W. 34; 42 I.C. 467. S. 27 does not apply when a case is decided by a successor of a judge of a S. C. Court under S. 35. 1931 A.L.J. 953=1931 O.A. 574 (F.B.).

Secs. 27 and 16.—Where a suit of a small cause nature instituted in the Court of a Munsif whose presiding officer at the time had no Small Cause Court powers, is tried by his successor having such powers up to the amount covered in suit, the decree is not appealable although the suit is actually tried in the ordinary procedure. 43 C.W.N. 947.

Sec. 32.—The character of a S. C. suit though tried as a regular suit is not altered and the decree is not appeable. 21 I.C. 120=40 C. 537. *See also* 65 C.L.J. 303=1937 Cal. 631. A suit which according to the frame of it was S. C. suit was filed in the Court and was registered as regular money suit, as the Court was not then invested with the S. C. Court powers to the extent of the value of the suit.

(*a*) the nature of the suits cognizable by Courts of Small Causes,

(*b*) the exclusion of the jurisdiction of other Courts in those suits,

(*c*) the practice and procedure of Courts of Small Causes,

(*d*) appeal from certain orders of those Courts and revision of cases decided by them, and

(*e*) the finality of their decrees and orders subject to such appeal and revision as are provided by this Act,

applies to Courts invested by or under any enactment for the time being in force with the jurisdiction of a Court of Small Causes so far as regards the exercise of that jurisdiction by those Courts.

(2) Nothing in sub-section (1) with respect to Courts invested with the jurisdiction of a Court of Small Causes applies to suits instituted or proceedings commenced in those Courts before the date on which they were invested with that jurisdiction.

Application of Act and Code to Court so invested as to two Courts.

33. A Court invested with the jurisdiction of a Court of Small Causes with respect to the exercise of that jurisdiction, and the same Court with respect to the exercise of its jurisdiction in suits of a civil nature which are not cognizable by a Court of Small Causes, shall, for the purposes of this Act and the Code of Civil Procedure, be deemed to be different Courts.

Modification of Code as so applied.

34. Notwithstanding anything in the last two foregoing sections,—

(*a*) when in exercise of the jurisdiction of a Court of Small Causes, a Court invested with that jurisdiction sends a decree for execution to itself as a Court having jurisdiction in suits of a civil nature which are not cognizable by a Court of Small Causes, or

(*b*) when a Court, in the exercise of its jurisdiction in suits of a civil nature which are not cognizable by a Court of Small Causes, sends a decree for

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Before the suit came for hearing, a Munsif's Court was established at the place with S. C. Court powers to the extent of the suit and the case transferred to him. The Munsif tried the suit as an ordinary suit and not as a S. C. suit. *Held*, that an appeal lay from the decision of the Munsif. 1930 P. 270. *See also* I.L.R. (1937) Nag. 399=1937 Nag. 200.

Sec. 32 (2).—When a suit was admitted on the regular side because the Munsif had no S, C. powers, he cannot try it summarily even though he got S.C. powers later, and an appeal lies. 9 I.C. 264. *See also* 25 Bom.L.R. 516= 1923 B. 454: 49 I.C. 208=4 Pat.L.J. 13; 19 A.L.J. 89=54 I.C. 428. A Court not having jurisdiction cannot try a suit filed in it though the Court subsequently is invested with jurisdiction. 20 A.L.J. 257=1922 A. 112.

Secs. 32 and 35.—Sub-S. (2) of S. 32 is in the nature of a proviso to sub-s. (1), and its operation must therefore be limited to cases mentioned therein. If a suit is instituted in the ordinary Civil Court or proceedings are commenced in such a Court, the subsequent investment of such a Court with S. C. powers would not make S. 32 (1) applicable. Sub-s. (2) would apply, if at the time of the institution of the suit, there is no S.C. Court in the locality and the suit is filed in a Civil Court, even if the presiding judge of the civil Court be later on invested with S.C. Court powers. If, therefore, a suit is instituted in a S. C. Court and that Court is abolished, the case will have to be sent to the ordinary Civil Court under S. 35. If the Court to which the case is so sent under S. 35 acquires before the date of trial the powers of a S. SC. Court, S. 32 (1) would become applicable. In such a case the decision would be that of a S. C. Court, and no appeal would lie. 61 C.L.J. 137=1935 C. 556.

Sec. 33.—It is clear from S. 7 of the C. P. Code that a S. C. Court, acting as such cannot attach immovable property in execution of its decree. This is so even though the S. C. Court is also an ordinary Court unless the decree has been formally transferred to the ordinary side. 132 I.C. 208. *See also* 1940 A.M.L.J. 133. Where a suit of S. C. nature is tried on the regular side and confirmed on appeal, it will not be interfered with as there is no prejudice to the defendant. 66 I.C. 207=14 L. W. 349. *See also* 44 L.W. 874=(1937) 1 M. L.J. 14. A counter-claim in a S. C. suit by way of set-off beyond the pecuniary limits of the S. C. Court's jurisdiction cannot be entertained. 14 B. 371.

Sec. 34.—*See* 1941 A.M.L.J. 133.

execution to itself as a Court invested with the jurisdiction of a Court of Small Causes,—

the documents mentioned in section 224[1] of the Code of Civil Procedure shall not be sent with the decree unless in any case the Court, by order in writing, requires them to be sent.

Continuance of proceedings of abolished Courts.

35. (1) Where a Court of Small Causes, or a Court invested with the jurisdiction of a Court of Small Causes, has from any cause ceased to have jurisdiction with respect to any case, any proceeding in relation to the case, whether before or after decree, which, if the Court had not ceased to have jurisdiction, might have been had therein, may be had in the Court which, if the suit out of which the proceeding has arisen were about to be instituted, would have jurisdiction to try the suit.

(2) Nothing in this section applies to cases for which special provision is made in the Code of Civil Procedure as extended to Courts of Small Causes or in any other enactment for the time being in force.

36. [*Amendment of Indian Limitation Act.*] *Rep., Act IX of* 1908.

Publication of certain orders.

37. All orders required by this Act to be made in writing by the Provincial Government shall be published in the Official Gazette.

THE FIRST SCHEDULE.

[ENACTMENTS REPEALED.]

Rep., by the Repealing and Amending Act (*XII of* 1891).

THE SECOND SCHEDULE.

SUITS EXCEPTED FROM THE COGNIZANCE OF A COURT OF SMALL CAUSES.

(*See* Section 15.)

(1) [1][*A* suit concerning any act done or purporting to be done by or by order of the Central Government, the Crown Representative or the Provincial Government.]

LEG. REF.

[1]*See* now the First Schedule, O. 21, R. 6 of the Code of Civil Procedure (Act V of 1908).

[2]Art. 1 substituted by A.O, 1937.

NOTES.

Sec. 35.—[*See also* notes under S. 32, *supra*.] Under S. 35 when the Court ceases to have jurisdiction in relation to the case, all proceedings in relation to it even after the decree have to be taken in the Court which, if the suit out of which the proceeding had arisen was about to be instituted, would have jurisdiction to try the suit. *Held, further,* that S. 35 should be read subject to the provisions of the C. P. Code, such as S. 21. 52 A. 944=1930 A. 873. *See also* 1941 Mad. 103=(1941) 2 M.L.J. 700=52 L.W. 598. Where a S. C. suit is transferred under S. 24 (4), C. P. Code, its character is not changed and no appeal lies. 40 A. 525=46 I.C. 893; 36 I.C. 317=14 A.L.J. 705. Where a subsequent Munsif having no S. C. jurisdiction tries a pending S. C. suit, as a regular suit, the procedure is regular and an appeal lies from the decision. 64 I.C. 573=19 A.L.J. 838; 37 A. 450=29 I.C. 997; 47 A. 925 =1925 A. 165; 43 P.L.R. 488=1941 Lah. 356; 13 Luck. 369=1937 O.W.N. 801=1937 Oudh 398; 1939 A.L.J. 335. But *see* 36 I.C. 317 =14 A.L.J. 705. An order in execution of a S. C. decree passed on the regular side, because the S. C. ceased to exist, is appealable. 39 A. 357=38 I.C. 105. *See also* 1941 Pesh. 18. Where a suit valued at less than rupees one hundred was filed before a Munsif invested with S. C. powers, but the same was tried by him under his ordinary jurisdiction: *Held* that no appeal lay from his decision to the Sub-Judge. 106 I.C. 859=1928 C. 153. Where a S. C. suit was instituted in the Court of a Subordinate Judge invested with S. C. powers, but before that suit came on for trial, the Subordinate Judge was transferred and was succeeded by another Subordinate Judge who did not possess such powers: *Held* that the decision passed by the succeeding Subordinate Judge must be taken to have been passed by him in his capacity as a Subordinate Judge trying an original suit and therefore the decision was appealable. 117 I.C. 370; *also* 1931 A.L.J. 953=1931 A. 574 (F.B.). S. 35 does not in any way operate to change a small cause suit into an original suit. What it does is to invest a Court which otherwise would be incompetent to hear any, or certain, small cause suits with power to hear certain of such suits, namely, those pending in that Court at the time its jurisdiction is changed. The section does not purport to turn a S. C. suit into an original suit with all kinds of changes in procedure in the rights of appeal. 42 L.W. 619=1935 M. 919 =69 M.L.J. 443.

Art. 1—The Collector of a district is not a "Local Government." 1 B. H.C.R. 398. Because taxation by a municipality requiries the

(2) a suit concerning an act purporting to be done by any person in pursuance of a judgment or order of a Court or of a judicial officer acting in the execution of his office;

(3) a suit concerning an act or order purporting to be done or made by any other officer of the Government in his official capacity, or by a Court of Wards, or by an officer of a Court of Wards in the execution of his office;

(4) a suit for the possession of immovable property or for the recovery of an interest in such property;

(5) a suit for the partition of immovable property;

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sanction of the Government, *a suit for refund of tax* paid is not covered by this article. 13 M. 78. *See also* 141 I.C. 378=34 P.L.R. 219=1933 L. 124 (Suit against District Board for refund of tax not cognizable by S. C. Court). 141 I. C. 378=1933 L. 124. A *suit by a toll-gate contractor against the Distrtci Board for damagcs* for unauthorized exemption of carts from payment of tolls is not covered by this article. 45 M.L.J. 125=46 M. 808. There is nothing in Sch. It which excludes from the jurisdiction of the Court of Small Causes a suit by a Municipality to recover municipal taxes due to them. I.L.R. (1939) Kar. 134=1939 Sind. 35. *Suit against trespasser for use and occupation* is cognizable by S. C. Court: 1928 N. 118=106 I.C. 495.

Art. 2.—For this article to apply the judicial officer must show (1) that the act was done in his judicial capacity and (2) that he at least believed to have jurisdiction to do the acts complained of. 30 B. 241=7 Bom.L.R. 951. A *suit for refund of money paid under an order of Court* is not cognizable by a S. C. Court. 5 C. 494. But a suit to recover money alleged to have been wrongfully made over by a Magistrate under S. 517, Cr. P. Code, is not covered by this article. 9 C.W.N. 495=1 C.L.J. 355. *See also* 1928 L. 515. Where the suit was for damages for money paid by the plaintiffs for which the defendant was liable, *held*, that Art. 2 had no application. 10 O.W. N. 52=1933 O. 146.

Art. 3.—Art. 3 of the Second Schedule takes out of the purview of the Small Cause Court claims arising out of an act or order purporting to be done by an officer of Government in his official capacity. The fact that such an order, which is actually made by the officer of the Government, might have been made by a private person in his private capacity could not affect the question. Where the Inspector-General of Prisons cancelled the acceptance of the tender for the supply of certain articles aad directed the forfeiture of the deposit made by the tenderer, a suit by such a tenderer for damages and for the return of the deposit forfeited is not cognizable by the Court of Small causes. 1940 O.W.N. 347=1940 Oudh 245. A karnam in a Zamindari is not an officer of the Government. 18 M. 395. A mere failure to carry out a contract cannot be regarded as an act contemplated by this article. It must relate to a distinct act. 12 M.L.T. 299=23 M.L.J. 732. A *suit for damages against the Secretary of State* for injury to an article carried by a State Railway does not come under this article. 17 C. 290.

Art. 4.—The definition of immovable property given in the Burma General Clauses Act applies to this and as growing palm tree is immovable property for the purposes of the former Act, it is also immovable property for the purposes of this Act. 7 R. 706=1929 R. 200. A *suit for recovery of documents* relating to land is not one for an interest in land. 6 L. 33=88 I.C. 574. A suit for damages on the allegation that the defendant had cut down and misappropriated a mango tree does not fall within the purview of Art. 4 of Sch. II. The mango tree which has been cut down and misappropriated was not immovable property at the time of the institution of the suit. 173 I.C. 598=65 C.L.J. 303=1937 Cal. 631. In a *suit to recover rent* the defendant raised the plea that he had executed the lease because of the fraud of the plaintiff and consequently denied the liability. The lower Court held that the issue raised by the defendant involved questions of title and that as the suit was tried as a S. C. one, the same could not be gone into and a decree was passed, the plea as to fraud having been negatived. *Held*, in revision, that the lower Court's refusal to consider the question of title even incidentally had prejudiced the defendant and that a remand should be ordered. 117 I.C. 447 (2)=1929 B. 228. Neither Art. 4 nor Art. 35 (*ii*) applies to a suit for the price of fruit removed by the defendants from certain trees in the assertion of a contested claim or right. Such a suit is cognisable by a Court of small causes. I.L.R. (1939) Lah. 100=40 P.L.R. 720=1938 Lah. 759.

Sch. II, Art. 4 (as amended by Bombay Act VI of 1930)—QUESTION OF TITLE—TEST OF—REFERENCE TO DEFENCE.—In cases under Art. 4 for purposes of deciding as to whether the Court has got jurisdiction to entertain the suit both the plaint and the allegations in the written statement can be considered. Plaintiff sued for recovery of the rent and ejectment of defendants. The rent deed was executed by only one of the defendants and the others were impleaded on the ground that they were in possession as members of a joint family along with the executant of the rent note. These defendants denied the title of the plaintiff. *Held*, the substantial issue as between these defendants and plaintiff being one of title, the Small Cause Court had no jurisdiction to try that issue. I.L.R. (1939) Kar. 60=1938 Sind 122. A "substantial issue" within the meaning of Sch. II, Art. 4 of the Provincial Small Cause Courts Act, as amended by S. 3 of the Bombay Amendment Act of 1930, is an issue which goes to the root of the case, other issues being merely incidental or concerned with matters of detail. "Substantial issue" means an issue arising not only upon the allegations in the plaint but upon those allegations combined with the allegations made in the written statement. 186 I.C. 841=41 Bom.L.R. 755=1939 Bom. 353.

(6) a suit by a mortgagee of immovable property for the foreclosure of the mortgage or for the sale of the property, or by a mortgagor of immovable property for the redemption of the mortgage;

(7) a suit for the assessment, enhancement, abatement or apportionment of the rent of immovable property;

(8) a suit for the recovery of rent, other than house rent, unless the Judge of the Court of Small Causes has been expressly invested by the Provincial Government with authority to exercise jurisdiction with respect thereto[1];

(9) a suit concerning the liability of land to be assessed to land-revenue;

LEG. REF.

[1]For notifications issued under this clause for—

(1) the Madras Presidency, *see* M. R. & O., Vol. I.

(2) Burma, *see* Bur. R.M., Vol. I.

NOTES.

Art. 6.—*See* 94 I.C. 1046=1926 M.W.N. 291=51 M.L.J. 159. Where the tenants in consideration of arrears of rent and some cash consideration execute a *rehun bond*, the relationship of landlord and tenant gives place to that of creditor and debtor and the creditor's suit on the personal covenant contained in the bond is of a S. C. nature. 147 I.C- 341=1934 P. 43.

Art. 7.—Where in a *rent suit* a rateable amount is claimed by reason of the lessee not getting possession of a portion of the properties, the suit is not a S. C. suit. 41 M. 370=33 M.L.J. 618. A *suit for enhanced kattoobadi* on the ground of the defendant's default in the payment of the money rate is barred by this article. 31 I.C. 871.

Art. 8.—A *suit for rent* is not cognizable by a S. C. Court. 13 I.C. 29=16 C.W.N. 89; 47 C.L.J. 595; 37 I.C. 980=1917 P.H.C.C. 287. *Suit to recover share* of paddy grown by defendant on plaintiff's land with express stipulation for delivery of the share is cognizable by S. C. Court. 1928 R. 260=114 I.C. 543 (2). A charge for the use of water meter is a part of the water-tax, and the person taking water is liable to pay that charge under the rules for the assessment of water rate under S. 66 (1) (*k*), C. P. Municipalities Act. Such a charge is not a rent within the meaning of Art. 8, and therefore the jurisdiction of the Small Cause Court is not barred. 170 I.C. 241=1937 Nag. 209. A suit by an assignee of a landlord for arrears of rent after they had fallen due, for the recovery of the amount due, is one for rent and is excepted from the jurisdiction of the Court of Small Causes. 196 I.C. 393=43 P.L.R. 432=1941 Lah. 313. A suit for rent of a site is different from a suit for house rent and is not cognizable by a Small Cause Court unless that Court has been expressly invested with jurisdiction in that behalf. 197 I.C. 158=1942 Oudh 145=1941 O.W.N. 1179. Rent suit—Whether includes suit to recover payment from licensee—Forum. *See* 1930 A.L.J. 550. *See also* 22 Pat.L.T. 348.

SCOPE.—The authorisation under this article is entirely personal to the presiding Judge. 19 C.W.N. 1236=31 I.C. 177. Whether damages for use and occupation are rent, *see* 1925 L. 196 (1). A suit for rent other than house rent is not cognizable by a S. C. Court. 42 C. 638=27 I.C. 258. *Khattis*, whether situate within the limits of a residential house or otherwise, are meant for storage of grain, and when let apart from the houses in which they are situate, they cannot be considered to be places meant for human habitation. Hence a suit for rent in respect of such *khattis* used for storing grain is not one for recovery of rent of house and is not cognizable by a S. C. Court. 146 I.C. 594=1933 A. 918. Decree passed in suit excepted under—Transfer for execution to Small Cause Court—Jurisdiction of latter Court to execute. *See* I.L.R. (1939) 1 Cal. 233.

"JUDGE OF THE COURT OF SMALL CAUSES" in cl. (8) must be taken to apply either to Court of S.C. constituted under the Act or to a Court invested with the jurisdiction of a Court of Small Cases. It is not necessary to invest the powers by reference to the name of the particular judge. 30 Bom.L.R. 741=1928 B. 265. It is not, therefore, necessary to confer powers by reference to the name of a particular judge of Court of S. C. in order to enable him to try suits for the recovery of rent of homestead land under the S. C. Court procedure. 40 C.W.N. 942=1936 C. 497 (F.B.).

WHAT IS NOT A RENT SUIT.—A *suit for jodi* by Zamindar against inamdar is cognizable by S. C. Court. 40 M. 93=30 M.L.J. 387. A *suit on a demand note for balance of rent* is not one for rent. 1923 N. 285. *Suit for interest due* on mortgage-money is cognizable by S. C. Court. 66 I.C. 285. A *suit for recovery of rent* attached due by defendant to his landlord is not a suit for rent. 10 I.C. 569. *Suit for recovery of fees* for privilege of receiving goods. 106 I.C. 391=1928 O. 99. As to suit for money due on settlement of date and palm trees, *see* 15 P. 626.

WHAT IS RENT SUIT.—A suit for rent of homestead land is excluded by the article. 1925 C. 423. An open site on which fuel is stacked containing a chapper used for shelter and carrying on business can hardly be regarded as a house or a shop, and hence a suit for rent is not cognisable by a S. C. Court. 34 P.L.R. 100=1933 L. 306. Money payable in respect of forest right is rent. 26 I.C. 380=19 C.W.N. 1030. A *suit for rent* of shops leased by a usufructuary mortgagee is a suit on a lease of immovable property and is barred. 15 I.C. 32=9 A.L.J. 776. *See also* 1936 Pesh. 55. A shop is a house within the meaning of Art. 8. Hence a suit for rent of a shop is triable as a small cause. 181 I.C. 241=1939 Pesh. 14. A suit claiming rent for use and occupation against an alleged trespasser is not a suit for recovery of rent within Sch. II, Art. 8 and as such is cognizable by the S. C. Court. 150 I.C. 980 (1)=1934 L. 355 (1). The assignment of arrears of rent by the landlord to

(10) a suit to restrain waste;

(11) a suit for the determination or enforcement of any other right to or interest in immovable property;

(12) a suit for the possession of an hereditary office or of an interest in such an office, including a suit to establish an exclusive periodically recurring right to discharge the functions of an office;

(13) a suit to enforce payment of the allowance or fees respectively called *malikana* and *hakk*, or of cesses of other dues when the cesses or dues are payable to a person by reason of his interest in immovable property or in an hereditary office or in a shrine or other religious institution;

LEG. REF.

[1] t*See* now Act I of 1894.

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a third party has not the effect of altering its character. The fact that the landlord has assigned his rights, and his representative, whether a vendee or an heir, is suing, would not alter the character of the tenant's liability. The suit is not thereby altered into one for a mere debt, but is still a suit for recovery of rent, other than house rent, and the S. C. court has no jurisdiction to entertain it. 1934 A.L.J. 848=1934 A. 893. Some of the co-proprietor's of land transferred their right to recover their share of rent from the tenants to the plaintiff. The plaintiff brought a suit against the non-transferor co-proprietor to recover the share of rent transferred to him. *Held* that exception in Art. 8 did not apply because the defendant was not a tenant of transferor and the suit was not for arrears of rent. The suit was not excepted by art. 31 because the action was not a claim for immovable property. The expression "belonging to the plaintiff" as used in art. 31, applies to immovable property and not to profits. So, the suit in the Small Cause Court was maintainable. 162 I.C. 389 (1)=1936 L. 377. *See also* 1936 P. W.N. 169=1936 Pat. 406.

Sch. II, Arts. 8 and 0 : APPLICABILITY—FARMER OF MUNICIPAL MARKET DUES—SUIT BY FOR DUES FROM PERSON HOLDING SITE UNDER HIM. —A person who occupies a site in a municipal market has no right or interest in land so as to give rise to an action for rent in respect of the site occupied by him. He is only liable for market toll and the money payable by him is not rent so as to come within Art. 8 of the Act. Nor would the dues come under "other dues" under art. 13, because they are not payable by reason of any interest in immovable property. Plaintiff, a farmer of a market, sued the defendant who held a site under him in the market for dues in respect of that site. *Held*, that the suit was not barred either by art. 8 or art. 13. 16 P.L.T. 175=1935 P. 184.

"HOUSE RENT" includes shop rent. 107 I.C. 273=1928 L. 289; 161 I.C. 207=1936 Pesh. 55.

Art. 11.—*Suit for recovery of balance of consideration* for a mortgage is covered by this article. 1923 C. 567. But *suits for unpaid purchase-money* are not excepted by this article. 55 I.C. 541=11 L.W. 211 ; 10 I.C. 267=9 M.L.T. 372 ; 89 I.C. 933. A *suit by lessee* of lac produce to recover value of quantity illegally removed is cognizable by S. C. Court. 50 I.C. 629. By Sch. II, Art. 11 the Small Cause Court is precluded from trying a suit to enforce a charge and it has no power having regard to S. 7, C. P. Code, to attach immovable property, to issue injunctions or to appoint receiver of immovable property. So it could not have been contemplated to confer power on that Court to pass a decree charging immovable property. Where a decree directs that a defendant shall not alienate certain property till the satisfaction of the particular decree, it has to be understood as creating a charge on immovable property. As that Court has no power to create the charge the decree so far as it seeks to create a charge must be regarded as void and inoperative. 182 I.C. 102=1939 N.L.J. 121=1939 Nag. 118=I.L.R. (1941) Nag. 356. Where the plaintiff conveyed certain pcoperty bo sale and took a mortgage for the unpaid portion of the purchase-money from the vendee, but the pattas having continued to stand in her name, the Government took steps against her for recovering arrears of revenue, and having paid the same, she sued the vendee and other persons who had taken a conveyance from him for recovering the sums paid by her towards the land revenue, *held*, that her right was merely to proceed against the property sold for the amount of the kist due and consequently being a suit to enforce the charge on the land, it was not cognizable by S. C. Court. 1929 M.W.N. 381 (2). On this article, *see also* 1926 N. 65 ; 1926 A. 753.

Art. 13 : SCOPE.—This article applies only to suits against persons who are directly liable for the dues and not to suits against persons who have improperly collected them. 27 Bom.L.R. 627=88 I.C. 668 ; 21 A.L.J. 312=1923 A. 420 (1) ; 19 I.C. 628. *See also* 47 C.L.J. 595. Art. 13 relates to suit or claims made against a person primarily liable to pay the cessesor dues ; and a *suit for recovery of plaintiff's share of offerings made at a temple* is S .C. and is not barred by art. 13 from the cognizance of S. C. Courts. 113 I.C. 750 (1). *See also* 1933 L. 606=144 I.C. 669 ; 162 I. C. 992=1936 L. 100. A *suit for recovery of a ferry toll* is not of a S. C. nature. 85 A. 156=18 I. C. 282. A *suit for recovery of arrears of municipal taxes* does not fall within art. 13 or any other articles of Sch. II. It is cognizable by a S. C. Court. 13 P.L.T. 277=1932 P. 220. *See also* 154 I.C. 877 (Market dues) ; 1935 M. 554 (Customary dues) ; *Suit for cess* : *see* 92 I.C. 779 =1928 L. 276. *Suit for temple emoluments and naivadyam* is not a S. C. suit. 13 I.C. 183= (1911) 2 M.W.N. 589. But a *suit by archaka to recover dues* of his hereditary office is barred. 31 I.C. 206=1915 M.W.N. 846. *Suit by purveyor of ghee* to a temple for arrears of hereditary allowance falls within the scope of this article. 30 I.C. 351=18 M.L.T. 163. A *suit by landlord for the recovery of cess* from the holder of an inam

(14) a suit to recover from a person to whom compensation has been paid under the Land Acquisition Act, 1870[1] the whole or any part of the compensation;

(15) a suit for the specific performance or rescission of a contract;

(16) a suit for the rectification or cancellation of an instrument;

(17) a suit to obtain an injunction;

(18) a suit relating to a trust, including a suit to make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust, and a suit by a co-trustee to enforce against the estate of a deceased trustee a claim for contribution;

(19) a suit for a declaratory decree, not being a suit instituted under section 283[2] or section 332 of the Code of Civil Procedure;

LEG. REF.

[1] *See* now the Land Acquisition Act (I of 1894).

[2] *See* now the First Schedule, O. 21, Rr. 63 and 100 respectively of the Code of Civil Procedure (Act V of 1908).

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in his estate does not come within the purview of Art. 13, where the payment is purely a voluntary one and not one which the landlord is entitled to, as representing his interest in immovable property. 117 I.C. 295=1929 M. 694. A *suit for poruppu and cesses* by a zamindar against tenant does not come within Art. 13 and is cognizable by S. C. Court. 137 I.C. 564 (1) =1932 M. 224. The dues contemplated by Art. 13 must be "dues" arising directly from the interest in the immovable property and cannot include "dues" which are indirectly connected with something arising out of an interest in the immovable property. Interest on arrears of rent is really damages for default in payment of rent in time and it is not a sum payable to a person directly by reason of his interest in immovable property. Accordingly a claim for arrears of interest only, such interest being due because of non-payment of rent in due time, is recoverable in a Small Cause Court suit. I.L. R. (1938) 2 Cal. 60=42 C.W.N. 284=1938 Cal. 320.

WHERE ARTICLE DOES NOT APPLY.—This article does not apply to *suits for local or village cess.* 36 M. 126=12 I.C. 171; nor to *suits for land cess.* 35 M. 18=21 M.L.J. 819; nor to jodi and road cess. 1925 M. 1196=49 M.L.J. 185; nor to *suit for price of plaintiff's water used for irrigiation* by defendant. 22 I.C. 144. Right to claim a *share of the income of inam land* by inamdar is a right to payment by reason of some interest in immovable property, to which Art. 13 applies. 153 I.C. 619=41 L.W. 641=1935 M. 41=68 M.L.J. 172; *also* suit for share of *income of religious shrine.* 144 I.C. 669=1933 L. 606. *Market dues*—Suit by farmer against person holding site not excluded. 154 I.C. 877=16 P.L.T. 175. A suit to recover jodi or meras which are of the nature of *customary dues* and are not rent paid to the Rajas by agraharamdars is excepted from the cognizance of the S. C. Court. 1935 M.W.N. 519=1935 M. 554. A suit on a promissory note which recites that it is executed 'on account of *rusum* of Deshpandeship for two years,' is not barred by Art. 13 of Sch. II from cognizance by the Court of Small Causes, for the suit is not to recover the dues but to recover money on a negotiable instrument. 1941 N.L.J. 388=1941 Nag. 271.

Art. 15.—A *suit to recover a sum of money due on an award* passed under the Indian Arbitration Act is not a suit for specific performance of a contract and is therefore cognizable by the S.C. Court. 23 S.L.R. 411=1923 S. 43. A *suit for refund of money* under the terms of a contract is a suit for specific performance of a contract and is therefore not cognizable by the S. C. Court. 113 I.C. 747=1929 A. 62. *See also* 162 I.C. 553=17 P.L.T. 591=1936 P. 429. *Suit by landlord for unpaid premium* is not one for specific performance to lend money and is cognizable by S. C. Court. 1933 A. 147. A *suit for balance of mortgage money* is one for specific performance of part of agreement. 43 C. 59=29 I.C. 621; but not a *suit by vendor for balance of purchase money.* 1924 L. 314. But where a conveyance has not yet been executed, a *suit for purchase money unpaid* is one for specific performance. 35 M.L.J. 89=49 I.C. 385. *Suit for recovery of sewing machine* given on hire-purchase system is not one for specific performance and so is cognizable by S. C. Court. 110 I.C. 316=1928 L. 535. As to *suit to recover goods pledged,* 3 Luck. 118. *Suit for recovery of gold and silver* entrusted to make ornaments is cognizable by S. C. Court. 91 I.C. 108=1926 O. 272; *See also* 83 I.C. 122=1924 M. 903. A suit *to enforce award* is one for specific performance. 22 C.W.N. 66 =42 I.C. 590. But *see contra* 49 I.C. 62. On this section, *see also* 1926 N. 65; 4 R. 227=1926 R. 198. *Suit for recovery of account papers of* darpatni mehal—Suit, if of S. C. nature—Second appeal. 59 C. 352=1932 C. 481.

Art. 18.—This article applies to a suit by a schoolmaster for pension. 25 I.C. 41. Provision in partition deed for marriage of daughter is trust provision. 24 I.C. 943=38 M. 788. This article does not apply to a *suit by trustee* for a specific sum agreed to be paid for being used as a trust. 15 I.C. 273. *Suit for recovery of offerings made to a shrine* which were misappropriated is not cognizable by S. C. Court. 1926 L. 228. Where a composition is effected between a debtor and his creditors, and a trustee is appointed to collect the outstandings and the trustee fails to carry out the terms of the deed, the only remedy of the creditors against the trustee is to file a suit against him for enforcing the trust. But such a suit is barred by Art. 18 from the cognizance of S. C. Court. A suit by the creditors on the original cause of action is incompetent against the trustee. 114 I.C. 109 =1929 S. 49. Suit for recovery of amount deposited with an arbitrator to be forfeited in the event of refusal to abide by the award is cognizable by S. C. Court. 145 I.C. 970=1933 A. 902.

Art. 19.—*Suits of declaratory nature* are not S. C. suits. 1924 A. 40. So is a *suit for a declaration of right to insurance policy* by virtue of an assignment. 38 I.C. 248=4 L.W. 339; also a suit to declare Municipal assessment illegal and for refund of excess tax paid. 166 I.C. 743=

(20) a suit instituted under section 283,[1] or section 332 of the Code of Civil Procedure;

(21) a suit to set aside an attachment by a Court or a revenue authority, or a sale, mortgage, lease or other transfer by a Court or a revenue-authority or by a guardian;

(22) a suit for property which the plaintiff has conveyed while insane;

(23) a suit to alter or set aside a decision, decree or order of a Court or of a person acting in a judicial capacity;

(24) a suit to contest an award;

(25) a suit upon a foreign judgment as defined in the Code of Civil Procedure or upon a judgment obtained in British India;

(26) a suit to compel a refund of assets improperly distributed under section 295[2] of the Code of Civil Procedure;

(27) a suit under the [3]Indian Succession Act, 1865, section 320 or section 321, or under the [3]Probate and Administration Act, 1881, section 139 or section 140, to compel a refund by a person to whom an executor or administrator has paid a legacy or distributed assets;

(28) a suit for a legacy or for the whole or a share of a residue bequeathed by a testator, or for the whole or a share of the property of an intestate;

(29) a suit—

(*a*) for a dissolution of partnership or for the winding up of the business of a partnership after its dissolution;

LEG. REF.

[1] *See* now the First Schedule, O. 21, Rr. 63 and 100 tespectively of the Code of Civil Procedure, (V of 1908).

[2] *See* now S. 73 of Act V of 1908.

[3] *See* now the Indian Succession Act (XXXIX of 1925), Ss. 360 and 361.

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1937 P. 25. *See also* 1938 Nag. 398. A money decree does not become a "declaratory decree" because the judgment is prefaced by some sort of declaration. So a *suit for the refund of profession tax* amounting to Rs. 125 is of a S. C. nature from which no second appeal is competent, even though the plaintiff may have prayed as well for a declaration of the invalidity of the levy. 139 I.C. 620=1932 M. 226.

Art. 20.—Regarding a *suit for compensation* where an objection to an attachment of crops was struck off without investigation, *see* 9 I.C. 537=8 A.L.J. 187.

Art. 21.—The S. C. Court is debarred from entertaining a *suit to set aside a sale.* 28 C. 235. The article does not apply to a *suii to enforce an award.* 25 I.C. 826; 49 B. 693=1925 B. 519. To a *suit for money due under an award* made out of Court, *see* 42 A. 169=58 I.C. 546.

Art. 23.—A suit to recover back the price paid for the purchase of stolen goods, when the stolen goods were taken back from the possession of the purchaser by order of Court does not fall either under Art. 2 or under Art. 23 and is therefore cognizable by S. C. Court. 108 I.C. 609; 1928 L. 515. If there is a dispute as regards the paying out of assets realised by a Court which is not as between judgment-debtor and creditor and therefore falling under S. 47, C. P. Code, and one of the creditors is dissatisfied with the order passed by the Court and the money is in consequence paid out to a rival creditor, he is at liberty to file a suit for its recovery on the basis that it is money had and received without necessarily getting the order refusing payment of the money to himself set aside as the orders of the executing Court are merely summary decisions passed without a final adjudication on the merits of the claims of rival parties. 8 R. 485=128 I.C. 834=1931 R. 56.

Art. 24.—*See* 4 R. 227. Suit to recover what was given by an award, *see* 91 I.C. 1032=1925 B. 519. A suit to recover a sum of money due on an award passed under the Indian Arbitration Act is not a suit to contest an award and is therefore cognizable by the S. C. Court. 23 S.L.R. 411=1929 S. 43.

Art. 28.—The article applies only to suits for share of the estate and not to particular items. 1925 A. 40. A denial of the plaintiff's title in a suit by the plaintiff for recovery of movables does not bring the suit within the operation of this article. 27 I.C. 773=19 C.W. N. 614; 22 L.W. 462=49 M.L.J. 554; 87 I.C. 354=1925 M. 1110. Art. 28 contemplates a suit between rival claimants to the property of an intestate. There must be a claim made by an heir as such, which claim is resisted by another person advancing a similar claim; otherwise the article does not apply. A suit by a husband for recovery of jewels as the heir of his deceased wife, the defendant not disputing that the plaintiff has succeeded to his wife's property, is not excluded by Art. 28 from the cognizance of the Small Cause Court. I.L.R. (1939) Mad. 78=48 L.W. 290=1938 Mad. 864=(1938) 2 M.L.J. 402. The question of jurisdiction depends entirely on the allegations made in the plaint and it is immaterial whether defendant is a rival claimant to the estate or merely a person in wrongful possession. 178 I.C. 31=1938 Pesh. 79. This article does not cover a suit after the death of bride and bridegroom, for recovery of jewels presented in marriage. 37 M. 538=23 M.L.J. 282. Suit for price of jewels left by deceased. *See* 91 I.C. 561=1926 M. 37; 22 L.W. 462=49 M.L.J. 554. A suit by a father for recovery of property as heir of his deceased daughter is not cognizable by S. C. Court. 142 I.C. 613 (1)=1933 M. 346. A suit for a share in a property of a Mahomedan, who died intestate is not cognizable by the S. C. Court. 149 I.C. 393=1934 A. 423.

Art. 29.—*See* 27 I.C. 629=13 A.L.J. 58. As to what constitutes a partnership, *see* 1937 N. 68. Where not only the balance is struck but there is a definite agreement by the defendant to pay the sum found due, the agreement affords a fresh cause of action to the plaintiff and a suit based for recovery of money agreed to be paid is not a suit within the meaning of Cl. (*a*), (*b*) or (*c*) of Art. 29. 27 S.L.R. 308=1933 S. 324.

(*b*) for an account of partnership transaction; or

(*c*) for a balance of partnership account, unless the balance has been struck by the parties or their agents;

(30) a suit for an account of property and for its due administration under decree;

(31) any other suit for an account, including a suit by a mortgagor, after the mortgage has been satisfied, to recover surplus collections received by the mortgagee, and a suit for the profits on immovable property belonging to the plaintiff which have been wrongfully received by the defendant;

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Art, 29, sub-Cl. (c).—The proviso to Art. 29 (*c*) contemplates that whcre a balance has been struck by the parties or their agents, a suit can lie on such balance in the Court of S. C. 24 S.L.R. 308=1933 S. 324. This article does not apply to a *suit for recovery of money advanced as loan* to a partnership business. 51 I.C. 435. Where a *suit for money* was brought in a S. C. Court on the allegation that it presented the commission due to the plaintiff who was a commission agent of the defendant, but the defendant raised the plea that the plaintiff was not the agent of the defendant but a partner with him, and the Court upheld the defendant's plea and dismissed the suit, *held*, (on revision) that the suit having failed on the merits, the decision of the S. C. Court was not without jurisdiction. 118 I.C. 667 (1)=1929 A. 907.

Arts. 29 and 30 : SUIT FOR ACCOUNTS EXPLAINED.—A suit for accounts is a suit for an indeterminate amount which could only be arrived at by taking the regular accounts between the parties. Where therefore the plaintiff sues for a definite sum and shows clearly how that sum is to be ascertained, the suit is not one for accounts. 29 N.L.R. 115=1933 N. 82.

Art. 30.—For the reason and object of this article, *see* 28 M. 394 and 23 C. 884 (890). Suit for accounts explained. 29 N.L.R. 115=1933 N. 82.

Art. 31.—This article applies to cases where the relationship is such that one of the parties is bound to render accounts to the other. 11 M.L.T. 13=13 I.C. 159; 85 I.C. 704=1925 A. 682. A suit for an account contemplated by Art. 31 is a special form of suit and does not embrace every case in which accounts have to be looked into to ascertain the amount due to the plaintiff. I.L.R. (1940) Mad. 296=51 L. W. 171=1940 Mad. 504=(1940) 1 M.L.J. 173. A suit for accounts is a special form of suit. It does not mean that whenever accounts have to be looked into in order to ascertain the amount due by one party to the other that the suit should be technically called a suit for accounts. A suit for a specific sum of money alleged to be due to the plaintiff by the defendant in regard to certain dealings, the plaintiff being merely an agent of the defendant on the allegations in the plaint, is not a suit for accounts within the meaning of Art. 31 of Sch. II especially when the plaintiff nowhere in his plaint asks for any accounts to be rendered to him. The allegations in the plaint would ordinarily determine the nature of the suit. 47 L.W. 654=1938 Mad. 707=(1938) 2 M.L.J. 112. Whether a suit is a suit for account falling under Art. 31 depends upon the relation in which the parties stand to each other and the nature of the investigation required to afford relief to the plaintiff. Where the essence of the action is that no relie can be granted without accounts being taken, the suit must be deemed to be one "for an account". 47 L.W. 793=1938 Mad. 799=(1938) 2 M.L.J. 76. A suit is not necessarily a suit for an account merely because accounts have to be examined. A suit is not a suit for an account unless the plaint asks for the taking of accounts. In a case where it is not disputed that the defendant, as agent or otherwise, is liable to render accounts to the plaintiff of all his dealings in the various transactions carried on by him on behalf of the plaintiff, the latter cannot be permitted to select capriciously a single transaction and claim the fruits thereof without an adjustment of the rights and liabilities of the parties in relation to other transactions. I.L.R. (1937) N. 85=1937 N. 172. A suit in which accounts have to be taken incidentally to arrive at the finding whether the amount claimed by the plaintiff is really due to him is not a suit for accounts. Suit between *principal and agent*. 1931 A.L.J. 5. Where the plaintiff alleged that there was a settlement between the parties in 1924 under which the defendant acknowledged a certain amount in paddy, cash and hay but subsequently the dealings continued between the parties, and the plaintiff claimed only a fixed sum, different from that shown in the settlement and did not call on the defendant to render an account, the suit cannot be deemed to be one for an account. 1931 M.W.N. 975=1931 M. 789. The fact that accounts have to be taken for the disposal of the suit and the sum claimed is not ascertained does not prevent a suit from being a S.C. one. 57 I.C. 951; 22 I.C. 424=12 A.L.J. 230; 64 I.C. 327; 10 I.C. 883=24 C.L.J. 187; 52 I.C. 631=26 M.L.J. 245; 48 I.C. 94; 24 M. L.J. 693; 20 I.C. 518; 3 P.L.J. 423. *Cf.* 3 L. W. 143=33 I.C. 16. The mere fact that the plaintiffs had given the defendants a notice to go into accounts cannot convert a suit for recovery of the balance due out of the consideration of a completed sale into one for account. 160 I.C. 1038=1936 L. 557. A suit for the price of goods purchased by the defendant plus interest and expenses, is not a suit for an account. 1936 A.L.J. 1174=1937 All. 23. Art. 31 does not apply to *suit by co-sharers* for recovery of value of their share of produce realized by other co-sharer—Such suit being of S. C. nature, no second appeal is competent. 1930 L. 613. Where one of several co-sharers in an occupancy holding is in actual cultivating possession thereof, his possession cannot be considered to be wrongful, nor can he be said to be in wrougful receipt of the profits accruing from the holding belonging to them in common. Possession of one of the co-sharers on receipt of income derived by him from the joint holding is on behalf of all the co-sharers, and there is no

(32) a suit for a general average loss or for salvage;

(33) a suit for compensation in respect of collision between ships;

(34) a suit on a policy of insurance or for the recovery of any premium paid under any such policy;

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wrongful receiving of the profits. 132 I.C. 201 (1)=1931 A. 551. *See also* 1940 N.L.J. 22. A suit by one joint owner to recover his proportionate share of the rent from another who had collected the entire rent, to which the tenants are also made parties is not barred under Art. 31. 152 I.C. 570=1935 L. 50. A suit by one of the joint landlords for recovery of sums which may have been collected by his co-sharers from the tenants in excess of their legitimate share is not cognizable by the S. C. Court. Such a suit is essentially a suit for accounts. 1934 P. 2; 1936 Lah. 377 (suit by transferee from a co-sharer of his right to recover rent). Suit to recover out of the advance a fixed amount in excess of the value of the goods supplied by the defendant is S. C. 116 I.C. 85; 1928 A. 332. *Suit against an agent* for value of goods not accounted for is not "*suit for acconnt*". 24 I.C. 764=1 L.W. 180; 32 P.L.R. 103. As to what are *suits for accounts* under this article, *see* I.L.R. 1937 N. 85=168 I.C. 190=1937 N. 172; 105 I.C. 848=1928 S. 66; 32 C.W.N. 400=1928 C. 424. *Suit for damages for breach of covenant for title* is S. C. suit. 15 L.W. 35=1922 M. 300. A suit after redemption for value of trees cut down by the mortgagee falls under this article. 54 I.C. 117; 31 M.L.J. 839=38 I.C. 1. *Suit for mesne profits* of wrongfully dispossessed property is not a S. C. suit. 40 A. 142=44 I.C. 689; 6 R. 60=1928 R. 101 (F.B.); or for mesne profits of property wrongfully kept out of possession. 19 I.C. 427=11 A.L.J. 238; 66 I.C. 368; 87 I.C. 695=48 M.L.J. 685. *See also* I.L.R. (1938) Lah. 341=40 P.L.R. 196=1938 Lah. 219. A *suit for mesne profits* is not cognizable by a S. C. Court, if the plaintiff by alleging that the defendant has actually received profits asks for an account of the profits received. But a suit for mesne profits, in which there is no allegation that the defendant received any profits may be triable by S. C. Court, as Art. 31 does not state that they should be considered suits for an account. 141 I.C. 825 (2)=29 N.L.R. 61=1933 N. 87; 146 I.C. 845=34 P.L.R. 262=1933 L. 509; 156 I.C. 68=31 N.L.R. 180. The trees standing on land being immovable property, the usufruct of growing trees is profit on immovable property, and a suit to recover the mesne profits from such usufruct is not a suit of S. C. nature. 140 I.C. 92=1932 M. 554. A suit for Rs. 187 being the profits of immovable property wrongfully received by the defendants is excluded from the cognisance of S. C. Court The mere fact that the suit was originally instituted in the S. C. Court, and was transferred therefrom under S. 24 of the Code cannot alter its nature and justify an application for revision to the High Court, when in fact an appeal to the District Court is competent. 34 P.L.R. 262. *Suit damages for use and occupation.* 23 L.W. 518=1926 M. 622. *See also* 23 Pat.L.T. 11 (suit for damages for use and occupation after termination of tenancy); 1940 Rang. 100 (suit for leaves cut from plaintiff's land); 1938 Pat. 96; 1936 Nag. 276 (suit for damages for wrongfully cutting trees from plaintiff's land. *See also* 1940 Lah. 66=42 P.L.R. 9); 40 P.L.R. 720; 1936 Pat. 428. A *tenant continuing in possession after the expiry of his lease* without the landlord's consent is a tenant "by sufferance," being no better than a mere trespasser and liable to be turned out at any moment without any notice to quit. The liability of such a tenant is *ex delicto* as for a tort. A suit by the landlord against such a tenant for damages for use and occupation, the measure of such damages being the amount of the mesne profits is not a suit for "the profits of immovable property" and is not excepted from the cognisance of a S. C. Court. 1935 M. 307=68 M.L.J. 196. *Suits for the recovery of specific quantities of paddy or their value* from the defendant on the ground that this amount of paddy belonging to the plaintiff firm had been wrongfully seized by the defendant are suits in tort for conversion and are cognizable by a S.C. Court, and as such no second appeal lies. And such suits were held not similar to a suit for account. [1928 R. 102 (F.B.), Expl.] 151 I.C. 405=1934 R. 218. *See also* 1936 Lah. 798 (Suit for money in respect of which offence under S. 379, Penal Code is committed.) This article does not apply to a *suit for share of rent* by one co-sharer against another. 40 A. 666=46 I. C. 647. On declaration of joint tenancy by the Revenue Court, a suit for a share of the profits of an occupancy holding would lie in a S. C. Court. 148 I.C. 640=3 A.W.R. 350=1934 A. 404; 37 I.C. 671. Suit for money due on acknowledgment. 67 I.C. 851. *Suit for damages for trespass* resulting in carrying away of crops may be instituted in a S.C. Court. 35 M. 726=21 M.L.J. 442. *See also* 1938 Pat. 96 =18 Pat.L.T. 758. The effect of annulment of a sale under S. 53, Provincial Insolvency Act, is to hold that no transaction had taken place at all, and any sum that the vendee receives by virtue of that transaction is received by him wrongfully within the meaning of Art. 31. I.L.R. (1938) Lah. 341=40 P.L.R. 196=A.I.R. 1938 Lah. 219.

Art. 34.—*See* 20 I.C. 155. A suit on a policy of insurance means a suit arising out of contract of insurance. According to the Articles of Association of a Mutual Life Insurance Company the monthly subscriptions obtained from members of certain class were divided among the members who had a ceremony after deducting 20 per cent. for the reserve. The Articles of Association however permitted twice as much to be paid in advance to any member on the occasion of the ceremony. The company, alleging that in accordance with a clause in the Articles of Association a certain member was paid a sum larger than he was actually entitled to receive when the accounts for the year were made out, brought a suit for refund of an amount overpaid. *Held*, that the suit was on a policy of insurance and therefore was not cognizable by a Court of Small Causes. 41 P.L.R. 551=1939 Lah. 220. *Suit to recover damages from bailee*—Bailee's con-

(35) a suit for compensation—

(*a*) for loss occasioned by the death of a person caused by actionable wrong;
(*b*) for wrongful arrest, restraint or confinement;
(*c*) for malicious prosecution;
(*d*) for libel;
(*e*) for slander;
(*f*) for adultery or seduction;
(*g*) for breach of contract of betrothal or promise of marriage;
(*h*) for inducing a person to break a contract made with the plaintiff;
(*i*) for obstruction of an easement or diversion of a water course;

[1][(*ii*) for an act which is, or, save for the provisions of Chapter IV of the Indian Penal Code, would be, an offence punishable under Chapter XVII of the said Code];

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[1] Inserted by Act VI of 1914.

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duct to be proved to be dishonest—Specific performance whether can be decreed, *see* 5 O. W.N. 1133.

Art. 35.—Criminal intention is necessary for this article to apply. 3 L. 369=1922 L. 451. *See also* 49 A. 85; 88 I.C. 511; 1925 A. 130 (2). The article covers a *suit for misappropriation*. 21 A.L.J. 357=1923 A. 543; 1926 A. 153. But *see* 21 A.L.J. 213=1923 A. 428; 27 C.W.N. 469=1923 C. 568. A *suit for damages for obstructing irrigation* is not S.C. suit. 5 L.L.J. 92=1923 L. 39; also a *suit for damages for wrongful arrest*. I.R. 1932 L. 637. Suit based on a *bona fide* claim for land and a tree which stood thereon which had been cut is of a S.C. nature. 146 I.C. 333=1933 R. 261. *See also* 145 I.C. 888=1933 M. 636; a *suit for damages for infringement monopoly* is small cause. 1923 L. 244. *Suit for damages for breach of contract* to allow plaintiff to drain water from his field is S.C. suit. 24 I.C. 44=1914 M.W.N. 497; but not *for breach of contract of betrothal* and recovery of jewels. 38 M. 274=19 I.C. 700; 1925 A. 51. S.C. Court can try *suit for return of ornaments* by prospective bridegroom. 1923 B. 393. This article does not apply to *suits for the recovery of jewels pledged* or their value. 18 A.L.J. 354=58 I.C. 663; or for *recovery of share of offerings* at temple. 69 I.C. 275; or for *share of value of* trees sold. 7 Lah. L.J. 285=90 I.C. 603; 28 Bom.L.R. 540=1926 B. 362; or for *recovery of bribe wrongfully extorted*. 9 I.C. 623=15 C.L.J. 219. S.C.Court has no jurisdiction to try a *suit for value of crops wrongfully and forcibly taken away*. 45 I.C. 5; 44 C.L.J. 190=1926 C. 1230. *See also* 41 I.C. 936; 1924 L. 71; 3 L.L.J. 380; 21 C.W.N. 1109=41 I.C. 276; 1925 L. 174 (2). *See also* 1925 C. 164. After a criminal case was over, the defendant was directed by the Court to take away certain logs of timber which had been kept in the custody of Court. Thereupon plaintiff sued for the logs themselves or for their value and the cause of action was based on the defendants having wrongfully taken them away from Court as ordered by Court. The value was less than Rs. 500. *Held*, that taking the timber from Court by order of Court was not an offence, that the suit was triable as a S.C. suit and that no second appeal lay. 145 I.C. 888=1933 M. 636.

Sub-Cl. (g).—A *suit for refund of money* advanced as consideration for marriage contract on the ground that there has been a breach of the contract falls within Art. 35 (*g*). 24 N.L.R. 66=106 I.C. 803=1928 N. 89 (2). Art. 35 (*g*) confines bar to suits for compensation for breach of contract of betrothal or promise of marriage and has very little to do with return, on failure of marriage, of articles or sums of money advanced by one party to the other for use in connection with marriage celebrations, and hence so far as a suit is for return of such articles or money, suit is not excepted from the cognizance of the S.C. Court. 1929 P. 744.

Sub-Cl. (h).—Whether the cutting of trees under a mistake of fact does or does not fall under Art. 35 (b) (ii), *see* 1933 M. 636=145 I.C. 888. A suit to recover gold and silver handed by the plaintiff to the defendant, a sonar, for making ornaments, it being alleged in the plaint that the defendant in bad faith did not return the same, does not fall under Art. 35 (ii) and is not barred from the jurisdiction of the S. C. Court. 4 A.W.R. 1267=1935 A. 141 (2). A suit for recovery of Rs. 150, compensation for loss suffered by the plaintiff on account of negligent construction of drain by the defendant and consequent percolation of water under the foundation of the plaintiff's shop, is a suit of the nature of a S.C. and hence second appeal is incompetent. Art. 35 (*h*) (ii) does not help the plaintiff. 143 I.C. 494=34 P.L.R. 583=1933 L. 363.

TEST OF COGNIZABILITY.—In determining whether a suit is cognizable by a S. C. Court, the Court is only concerned with the allegations in the plaint. And if the plaint does not contain any clear allegation of criminal misappropriation or breach of trust, Art. 35 will not bar a suit for recovery of the amount. 145 I.C. 970 (2)= 1933 A. 902. Where the plaint sets out that the defendant "without right and without consent by deceit unlawfully reaped the crop" of the plaintiff, the allegation amounts to an offence of theft which comes under Chap. XVII of the Penal Code, and therefore the suit is excluded from S. C. Court jurisdiction by Art. 35 (ii). 153 I.C. 763=1935 A.W.R. 36=1935 A.L.J. 248= 1935 A. 264. But no Criminal Court would convict the defendants if the evidence carries the case no further than what is alleged in the plaint. Art. 35 (ii), Sch. II will not bar the Jurisdiction of the S.C. Court. 1935 A, 33. A suit regarding a right to enter on another's land and to cut grass is one falling under Art. 35 and is excluded from the cognizance of S.C. Court. 145 I.C. 755=1933 L. 172.

Art. 35, sub-Cl. (h) (ii).—*See* 107 I.C. 721 =1928 C. 405; 106 I.C. 859=46 C.L.J. 552= 1928 C. 153; 10 L.L.J. 226; 24 N.L.R. 23.

ILLUSTRATIVE CASES.—Where the plaintiff sued

[1][(*j*) for illegal, improper or excessive distress, attachment or search, or for trespass committed in, or damage caused by, the illegal or improper execution of any distress, search or legal process];

LEG. REF.

[1] Substituted by S. 2 (2) of Act VI of 1914.

NOTES.

to recover a cow which had been stolen, but did not set out anything in his plaint tending to incriminate the defendant and there was no allegation of dishonesty, *held*, that the jurisdiction of the S. C. Court was not ousted. 127 I. C. 707. A suit for compensation for trees wrongfully cut and appropriated by the tenant is cognizable by S. C. Court. A disputed right to the trees on the land under tenancy depends in some cases on statutory provisions and in others on custom and as such no criminal case is maintainable thereon. Art. 35 (*ii*) is, therefore, inapplicable. (Conflict of decisions referred to.) 9 P. 569=1930 P. 575. Suit for damages for offence under Chap. XIV, I. P. Code—Whether of S. C. nature—Test. 132 I. C. 564 (1)=1931 A. 595. *See also* 165 I.C. 267 =1936 L. 798. A suit regarding a right to enter on another's land and to cut grass is one falling under Art. 35 (ii), Sch. II and is excluded from the cognizance of S. C. Court. 1933 L. 172. Where a branch of a joint tree is alleged to have been cut and the plaintiffs sue for their share of the price, the case is not one of mischief or theft and therefore not barred from the jurisdiction of the S. C. Court under Art. 35 (ii). 119 I.C. 285 (2)=1929 A. 816. Where the cause of action was an action in conversion or detinue, the plaintiff claiming the value of the timber cut by the defendant tenant and the plaint mentioned the appropriation by the defendant and also went on to allege that the right of cutting the timber still remained in the plaintiff (1930 P. 335) and where the plaintiff alleged that the defendant had wrongfully cut his trees but there was no allegation of any criminal intention or act on the part of the defendant. (1930 B. 361.) *Held*, that the facts did not fall within Art. 35, Cl. (*ii*) and the objection to the jurisdiction of the S. C. Court to try the suit was unsustainable. *See also* 1036 N. 276. *Also* 1930 A.L.J. 1247 : 1932 A.L.J. 306=1932 A. 472. *See also* 161 I.C. 937=1936 P. 428 (*bona fide* claim of defendant to trees on crops cut apparent on the plaint). *See also* 1936 N. 276. But where the plaint alleged that the defendants had forcibly and criminally cut certain branches of a tree, and it appeared that the said allegations were designedly made with a view to show that by reason of Art. 35 (*ii*) the suit was not cognizable by the S. C. Court and it further appeared that no objection was raised to the trial of the suit by the Munsiff on the Regular Side. *Held*, that S. 102, C. P. Code, did not under the circumstances apply to the case and that a second appeal was not barred. 8 O.W.N. 1019=1931 O. 411. A suit for recovery of Rs. 150, compensation for loss suffered by the plaintiff on account of negligent construction of drain by the defendant and consequent percolation of water under the foundation of the plaintiff's shop, is a suit of the nature of a S. C. and hence second appeal is incompetent. 1933 L. 363 (1). Where the suit for damages in respect of a portion of a tree which had been cut and removed by the defendant and the parties fought it out as a civil matter, *held*, that the suit was cognizable by the S. C. Court. The fact that the plaintiff alleged that the defendant acted illegally would not mean that the act alleged was criminal. 5 Luck. 739=1930 O. 317. A suit by the judgment-debtor to recover damages for an article retained and lost by the decree-holder after re-delivery order by the Court is a suit based on the allegation of misappropriation and as such excepted from the cognizance of S. C. Court. 1929 L. 386. A suit was brought for money claim. There was an allegation in the plaint that the defendant had got a wrong figure inserted in the acknowledgment, but that was only made a ground for bringing the suit on the previous account and not on the subsequent acknowledgment. *Held*, that the case did not fall under Art. 35 (ii). 118 I.C. 818=1929 N. 144. *Suit for recovery of excess amount* paid to decree-holder under fraud and cheating—If S. C. nature. 115 I.C. 581. *A suit to recover damages for trespass and mischief* is exempt from the jurisdiction of the S. C. Court. The nature of a suit does not depend on the defence but has to be judged from the allegations in the plaint. 33 C.W.N. 839.

Art. 35, Sub-Cl. (j).—*Suit for damages for illegal attachment*, see 18 I.C. 695=11 A.L.J. 91; 89 I.C. 982; 1926 L. 150; 1936 N. 257 (suit for damages carried by wrongful attachment and negligence). Art. 35 (b) and (j) have clearly no application to a wrongful seizure of cattle proceeding on the highway and hence a suit for damages in respect of such seizure is not barred by Art. 35 (b) and (j). 1941 N.L.J. 328. The demand of interest in a *claim for refund of tax* illegally levied makes the claim one for damages bringing it within the operation of this article. 27 Bom.L.R. 447=89 I.C. 580. *See also* 93 I.C. 290=1926 A. 326; 1931 M.W.N. 1107. Where a machine attached in execution of a decree and entrusted to a *Supurdar* is released from attachment on a claim by a third party and it is found that the machine had become useless owing to the acts of the decree-holder and the *Supurdar*, a suit by the owner of the machine for the price of the machine is really a suit for compensation for illegal and improper attachment and as such excluded from the cognizance of the Court of Small Causes by Art. 35 (j) of Sch. II to the Provincial Small Cause Courts Act. 1941 O.W.N. 555=1941 Oudh 412. Where the plaintiff sued to recover the excess amount of rent recovered from him together with interest and the suit was filed in the Court of the Subordinate Judge who was invested with S. C. powers, but he decided to hear the suit as an ordinary suit and transferred it to the joint Subordinate Judge who had no S. C. powers and the latter tried and decreed the suit. *Held*, that the cause of action was not one under the second schedule, Cl. 35 (j), merely because there was a claim for interest inasmuch as the interest was claimed by way of damages for detention of money and not a compensation under Cl. (*j*). *Held also*, that the trial of the suit as an ordinary suit prejudiced the parties inasmuch as it

(*k*) for improper arrest under Chapter [1]XXXIV of the Code of Civil Procedure or in respect of the issue of an injunction wrongfully obtained under Chapter [1]XXXV of that Code; or

(*l*) for injury to the person in any case not specified in the foregoing sub-clauses of this clause;

(36) a suit by a Muhammadan for exigible (*mu'ajjal*) or deferred (*mu'wajjal*) dower;

(37) a suit for the restitution of conjugal rights, [2][* * * *] for the custody of a minor, or for a divorce;

(38) a suit relating to maintenance;

(39) a suit for arrears of land-revenue, village-expenses or other sums payable to the representative of a village-community or to his heir or other successor in title;

(40) a suit for profits payable by the representative of a village-community or by his heir or other successor in title after payment of land-revenue, village-expenses and other sums;

(41) a suit for contribution by a sharer in joint property in respect of a payment made by him of money due from a co-sharer, or by a manager of joint property, or a member of an undivided family in respect of a payment made by him on account of the property or family;

LEG. REF.

[1] *See* now the Code of Civil Procedure (V of 1908), First Schedule, Orders XXXVIII and XXXIX respectively and S. 95.

[2] The words " for the recovery of a wife" rep. by Act X of 1914, S. 3 and Sch. II.

NOTES.

conferred a right of appeal which did not exist if it had been tried as S. C. suit and that the suit should be filed afresh before the proper Court. 31 Bom.L.R. 1307. *See also* 1938 Pat. 378.

Art. 35, Sub-Cl. (k)—*See* 1926 C. 200.

Sub-Cl. (l).—This clause debars S. C. Court from entertaining a suit for damages for assault with a shoe. 36 B. 413=15 I.C. 505. Or for losing a wife. 1 L. 574=58 I.C. 167.

Art. 37.—The words "for the recovery of a wife" were repealed by Act X of 1914, Sch. II.

Art. 38: MEANING OF MAINTENANCE.—Art. 38 applies "to all suits relating to maintenance, whether based on contract, bond, award, decree or personal law." Where therefore the wife sues for arrears of maintenance alleged to be due under the agreement entered in the course of proceedings by her under S. 488, Cr. P. Code, the suit is one "relating to maintenance" and is excluded from the jurisdiction of the S. C. Court by Art. 38. 1935 L. 101. Suit must be in form and substance one for maintenance. 1928 O. 47. *Suit against guardian of* property for money ordered to be paid by Court is not for maintenance. 32 I.C. 457. *Suit by one brother against another for contribution* towards maintenance paid to mother is not a suit for maintenance. 27 I.C. 824=2 L.W. 103. Where the basis of the suit is an agreement between the plaintiff and defendant, by which the plaintiff has to look after certain ladies and the defendant is to pay certain amount to plaintiff to compensate him, the suit is to recover what cannot be described as maintenance in the hands of the plaintiff but is really payment for having provided maintenance for the ladies. The jurisdiction of the Small Cause Court is not barred by Art. 38 of Sch. II. I.L.R. (1937) Nag. 517=1937 Nag. 236. Suit for money agreed to be paid for maintenance to a child whether a suit for maintenance, *see* 38 M. 553 =22 I.C. 39. *Suits for arrears of maintenance* are not cognizable by S. C. Court. 40 A. 52=42 I.C. 905 : 16 I.C. 13=10 A.L.J. 185 ; 53 I.C. 66=37 M.L.J. 402. *See also* 33 Bom.L.R. 510; 51 M.L.J. 215. Consequently even though the claim be below Rs. 500, a second appeal is competent. 33 Bom.L.R. 510. *See also* 1926 M. 932 =51 M.L.J. 215.

Art. 41.—Art. 41 applies only to a suit by a person who at the time of bringing the suit is a co-sharer in a joint property. A suit by a person who was once a sharer in such property does not fall under the article. 154 I.C. 447=40 L.W. 856 =1935 M. 83=68 M.L.J. 24. *See* 162 I.C. 553= 17 Pat L.T. 591=1936 P. 429. *See also* 43 C.W.N. 441. Common liability is the essence of the right to contribution where income-tax in respect of joint family property is wrongly recovered from the father alone who had separated from his son already, and in spite of his protest, the payment of the tax was not a common liability when it was made, and so a suit to recover from the son his proportionate share is not strictly a suit for contribution as contemplated by Art. 41 of Provincial Small Cause Courts Act and hence is cognizable by the SmallCauseCourt. 1938 N.L.J.125. A suit by a co-sharer against the other co-sharers to recover the rent paid by him to the superior proprietor in respect of the latter's shares is a suit for contribution and not reimbursement inasmuch as the liability is a joint liability and the paying co-sharer remains liable for the balance even after payment of his own share. Hence its cognizance by Court of Small Causes is barred by Art. 41 of Sch. II of the Provincial Small CauseCourts Act. 1941 O.W.N. 963=1941 Oudh 578. The question whether a suit falls under Art. 41 or not should be determined according to the averments in the plaint. Where a decree-holder sued another person interested in the decree for expenses incurred in execution and objection proceedings and the declaratory suit under O. 21, R. 63, C. P. Code and for costs paid to the other party in respect of the same. *Held*, that the suit was governed by Art. 41. 32 P.L.R. 710=1931 L. 748. The plaintiffs (co-sharers) had paid their shares of the revenue, but the defendants defaulted ; and the plaintiff, also paid the defendants' share of

(42) a suit by one of several joint mortgagors of immovable property for contribution in respect of money paid by him for the redemption of the mortgaged property;

(43) a suit against the Government to recover money paid under protest in satisfaction of a claim made by a revenue authority on account of an arrear of land-revenue or of a demand recoverable as an arrear of land-revenue;

[1][(43-A) a suit to recover property obtained by an act which is or, save for the provisions of Chapter IV of the Indian Penal Code, would be an offence punishable under Chapter XVII of the said Code];

LEG. REF.

[1] Inserted by Act IV of 1914.

NOTES.

the revenue to avert a revenue sale and sued the defendants for contribution. *Held*, that the suit was not cognizable by the Court of Small Causes in view of Art. 41. 1941 Pat. 49=1940 P.W.N. 709. *See also* (1940) 1 M.L.J. 175; 43 C.W.N. 99. For meaning of "*money due from a co-sharer*," see 86 I.C. 587 (1)=1925 M. 970. *See also* 5 O.W.N. 11=1928 O. 237 *Joint property*"—Meaning of—Whether includes joint family property. 1927 N. 365. As to the mjaning of the words "*sharer*" and "*joint property*" see also 109 I.C. 247=1928 C. 593. A suit *by vendee against a vendor* for value of undisclosed encumbrance paid off is one for compensation and not contribution. 26 I.C. 909=12 A.L.J. 1279. *See also* 18 Pat.L.T. 637=1937 Pat. 382; 1936 Pat. 429 (suit for recovery of money advanced). So also a suit for money paid by plaintiff for benefit of defendant. 18 C. W.N. 1308=24 I.C. 259. Claim under Ss. 69 and 70 of the Contract Act is of S. C. nature. 85 I.C. 549=1925 O. 625; 1922 P. 337. A *suit by one of the heirs his a deceased Muhammadan against another* for share of the debt of the deceased lies in the S. C. Court. 41 A. 51=47 I.C. 842; *also a suit for contribution for maintenance decree debt* paid by one of three brothers against all of whom the decree was passed. 40 A. 135=45 I.C. 560. *See* 1938 N.L.J. 457=1939 Nag. 64. *See also* 1926 A. 456. A *suit for compensation against joint tort-feasors* does not fall under this article. 62 I.C. 504. Where the partnership is not subsisting, a suit by one of the partners against the legal representatives of another partner for contribution in respect of the amount paid by him in respect of a joint decree against both the partners ismaintainable on the small cause side. However,it will beopen tothe defendants to prove that on a settlement of accounts theamount payable by them is wiped out or reduced. 1934 M. 699 (2). A *suit for contribution for debt due by a partnership concern, after the partnership is dissolved*, will lie on the S. C. side. 15 I.C. 218=1912 M.W.N. 384. So also a *suit for recovering loss* sustained in respect of a bond jointly executed, but subsequently renewed by plaintiff is not one for contribution and so is cognizable by S. C. Court. 5 O.W.N. 48=1918 O. 239. The S.C. Court cannot entertain a *suit by one mortgagor against his co-mortgagor for contribution* in respect of payment made for redemption. 29 I.C. 247 =13 A.L.J. 694; also a *suit for contribution* in respect or decree debt passed against joint tenant. 28 I.C. 587=13 A.L.J. 452. As to *suit by purchaser of one item of mortgaged property for contribution* against the purchaser of another item, *see* 109 I.C. 247=1928 C. 593. *See also* 26 C.L.J. 202=27 I.C. 56; 16 C.W.N. 975=17 I.C. 90; 2 L.L.J. 387; 57 I.C. 595. But *see contra* 62 I.C. 651; 14 I.C. 735. Certain putnidars filed a rent suit and got a decree against the plaintiff and his brothers and others. The plaintiff said he had no possession of or interest in any of the lands of the jote in question, having long before separated from his brothers, and as the putnidars had, however, executed the rent decree against the plaintiff, he had been obliged to satisfy that decree and so brought the present suit for reimbursement. *Held*, that the suit was not one for contribution but one for reimbursement, since his contention was that the defendants were wholly liable and that he was not liable at all and so was cognizable by the S.C. Court. (18 C.W.N. 1308, Foll.) 38 C.W.N. 532=1934 C. 626.

Art. 42.—Article should be strictly construed. 26 A.L.J. 164=1928 A. 298. *See also* 114 I.C. 47. "*Joint mortgagor*," includes an executant who had no interest in the property. 1923 A. 408. Suit by plaintiff for money paid by him to recover property free of the encumbrance created by defendants who had no title for the same is one for compensation and not contribution. 29 I.C. 245=13 A.L.J. 632. *See also* 109 I.C. 247=1928 C. 593. Suit by a company for recovery of arrears of allotment money and call money due on shares allotted is cognizable by a S. C. Court. 143 I.C. 732=34 P.L.R. 592=1933 L. 657.

Art. 43-A.—Scope of article. *See* 24 N.L.R. 23. For this article to apply, the defendants must have done some criminal act. 18 A.L.J. 354=58 I.C. 663. *See also* 55 I.C. 328. Wrongful withholding is not criminal misappropriation. 86 I.C. 328=1925 M. 942. *Suit for property forcibly* taken by defendants or their value is not cognizable by S. C. Court. 91 I. C. 659=1926 M. 320. Where the suit was on a chit executed by defendant, it does not matter that it was executed for value of coal misappropriated. The S. C. Court's jurisdiction is not taken away. 27 C.W.N. 549=1923 C. 650. A suit was brought in the S. C. Court for the recovery of certain ornaments or their value from the defendants who were the sons of a person who kept the ornaments promising to return them. There was no allegation of a criminal charge. The suit was dismissed as barred by Art. 48, Lim. Act, *held*, that criminal charge could not be presumed from the application of Art. 48, Lim. Act, and the suit was not barred under Arts. 35 and 43-A, from cognizance of S. C. Court. 116 I.C. 785=1929 A. 208. Where the plaintiff alleged that he deposited certain money and certain papers with the defendant as a bailee and that the defendant refused to return them and the S. C. Court Judge gave him a decree partle for money compensation and partly for return of papers, *held* that the Court went wrong in awarding relief for specific performance. *Held*, also that

(44) a suit the cognizance whereof by a Court of Small Causes is barred by any enactment for the time being in force.

THE PROVISIONAL COLLECTION OF TAXES ACT (XVI OF 1931).

EFFECT OF LEGISLATION.—Amended by the Government of India (Adaptation of Indian Laws) Order, 1937.

PREFATORY NOTE.—The following is the Statement of Objects and Reasons:—

The experience of the last three Delhi sessions has illustrated certain disadvantages in the present procedure as regards the Budget and the Finance Bill and, in particular, has brought out the fact that the period of thirty days prescribed under section 2 of the Provisional Collection of Taxes Act, 1918 (XVI of 1918), is not sufficiently long. It is, therefore, proposed to extend this period to sixty days and also to rectify certain minor imperfections in the existing Act. Opportunity has also been taken to insert a provision in the Bill whch will confine refunds of duty to the difference between the rates in force when the Bill was introduced and the rate proposed in that Bill, any further reduction imposed by the new Act taking effect only when that Act comes into operation.

[28*th September*, 1931.

An Act to amend the law providing for the immediate effect for a limited period of provisions in Bills relating to the imposition or increase of duties of customs or excise.

WHEREAS it is expedient to amend the law providing for the immediate effect for a limited period of provisions in Bills relating to the imposition or increase of duties of customs or excise; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE PROVISIONAL COLLECTION OF TAXES ACT, 1931.

Definition.

2. In this Act, a "declared provision" means a provision in a Bill in respect of which a declaration has been made under section 3.

Power to make declarations under this Act.

3. Where a bill to be introduced in the [1][Central] Legislature on behalf of Government provides for the imposition or increase of a duty of customs or excise, the Central Government may cause to be inserted in the bill a declaration that it is expedient in the public interest that any provision of the Bill relating to such imposition or increase shall have immediate effect under this Act.

Effect of declarations under this Act, and duration thereof.

4. (1) A declared provision shall have the force of law immediately on the expiry of the day on which the Bill containing it is introduced.

(2) A declared provision shall cease to have the force of law under the provisions of this Act—

(*a*) when it comes into operation as an enactment, with or without amendment, or

(*b*) when the Central Government, in pursuance of a motion passed by either Chamber of the [1][Central] Legislature, directs, by notification in the Official Gazette, that it shall cease to have the force of law, or

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LEG. REF.

[1] Substituted for word 'Indian' by A.O., 1937.

NOTES.

neither Art. 43 (*a*) nor 35 (ii) was applicable because the suit was one for damages and no dishonesty was imputed to the defendant. 4 Luck. 235=113 I.C. 736=1929 O. 90.

(*c*) if it has not already ceased to have the force of law under clause (*a*) or clause (*b*), then on the expiry of the sixtieth day after the day on which the Bill containing it was introduced.

Certain refunds to be made when declarations cease to have effect.

5. (1) Where a declared provision comes into operation as an enactment in an amended form before the expiry of the sixtieth day after the day on which the Bill containing it was introduced, refunds shall be made of all duties collected which would not have been collected if the provision adopted in the enactment had been the declared provision:

Provided that the rate at which refunds of any duty may be made under this sub-section shall not exceed the difference between the rate of such duty proposed in the declared provision and the rate of such duty in force when the Bill was introduced.

(2) Where a declared provision ceases to have the force of law under clause (*b*) or clause (*c*) of sub-section (2) of section 4, refunds shall be made of all duties collected which would not have been collected if the declaration in respect of it had not been made.

[*Repeal.*] *Repealed by Act I of* 1938.

THE PUBLIC SERVANTS (INQUIRIES) ACT (XXXVII OF 1850).

Year.	No.	Short title.	Amendment.
1850	XXXVII	The Public Servants (Inquiries) Act, 1850.	Repealed in part, XIV of 1870; XIV of 1874; XII of 1876. Amended, I of 1897; X of 1914; Government of India (Adaptation of Indian Laws) Order, 1937.

Short title given, Act I of 1897.

Rep. in Pt., Act XIV of 1870; Act XVI of 1874; Act XII of 1876; (locally Act XVI of 1868.

Am. Act I of 1897.

S. 8, Am., Act X of 1914.

Declared in force—

throughout B.I. except as regards the Schedule Districts, Act XV of 1874, S. 3; in the Sonthal Parganas, Reg. III of 1872, S. 3, as amended by Reg. III of 1899, S. 3; in Upper Burma (except the Shan States), Act XIII of 1898, S. 4.

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24. Saving of enactments as to dismissal of certain officers.
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[1*st November*, 1850.

For regulating Inquiries into the behaviour of Public Servants.

WHEREAS it is expedient to amend the law for regulating inquiries into the behaviour of public servants not removable [1][from their appointments] without the sanction of Government, and to make the same uniform throughout the territories under the Government of [2][India]; It is enacted as follows:—

1. [*Repeal of Acts.*] *Rep. by the Repealing Act,* 1870 (*XIV of* 1870).

Articles of charge to be drawn out for public inquiry into conduct of certain public servants.

2. Whenever the Government[3] shall be of opinion that there are good grounds for making a formal and public inquiry into the truth of any imputation of misbehaviour by any person in the service of [4][the Government not removable from his appointment without the sanction of the Government], it [5][may] cause the substance of the imputations to be drawn into distinct articles of charge, and [4][may] order a formal and public inquiry to be made into the truth thereof.

Authorities to whom inquiry may be committed.
Notice to accused.

3. The inquiry may be committed either to the Court, Board or other authority to which the person accused is subordinate, or to any other person or persons, to be specially appointed by the Government, commissioners for the purpose: notice of which commission shall be given to the person accused ten days at least before the begining of the inquiry.

Conduct of Government prosecution.

4. When the Government shall think fit to conduct the prosecution, it shall nominate some person to conduct the same on its behalf.

LEG. REF.

[1] These words were inserted by Act I of 1897, S. 2.

[1] The word "India" was substituted for the words "the East India Company" by Act I of 1897, S. 1.

[2] For definition of the word "Government", *see* S. 23, *infra*.

[3] These words were substituted for the words "the East India Company not removed from his office without the sanction of the same Government" by Act I of 1897.

[4] Substituted for "shall" by A.O., 1937.

NOTES.

Sec. 1: PUBLIC SERVANTS — DUTY OF.— Police and Military ought not to give way to feelings of vengence and should observe higher standard of conduct than the rabble among whom the former are expected to keep order. 85 I.C. 900=1925 M. 950.

5. When the charge shall be brought by an accuser, the Government shall require the accusation to be reduced to writing, and verified by the oath or solemn affirmation of the accuser; and every person who shall wilfully and maliciously make any false accusation under this Act, upon such oath or affirmation, shall be liable to the penalties of perjury, but this enactment shall not be construed to prevent the Government from instituting any inquiry which it shall think fit, without such accusation on oath or solemn affirmation as aforesaid.

Charge by accuser to be written and verified.
Penalty for false accusation.
Institution of inquiry by Government.

6. Where the imputations shall have been made by an accuser, and the Government shall think fit to leave to him the conduct of the prosecution, the Government before appointing the commission shall require him to furnish reasonable security that he will attend and prosecute the charge thoroughly and effectually, and also will be forthcoming to answer any counter-charge or action which may be afterwards brought against him for malicious prosecution or perjury or subornation of perjury as the case may be.

Security from accuser left by Government to prosecute.

7. At any subsequent stage of the proceedings, the Government may, if it thinks fit, abandon the prosecution, and in such case may, if it thinks fit, on the application of the accuser, allow him to continue the prosecution, if he is desirous of so doing, on his furnishing such security as is hereinbefore mentioned.

Power of Government to abandon prosecution and to allow accuser to continue it.

8. The commissioners shall have the same power of punishing contempts and obstructions to their proceedings, as is given to Civil and Criminal Courts by [1][the Code of Criminal Procedure, 1898,] and shall have the same powers for the summons of witnesses, and for compelling the production of documents, and for the discharge of their duty under the commission, and shall be entitled to the same protection as the Zilla and City Judges, except that all process to cause the attendance of witnesses or other compulsory process, shall be served through and executed by the Zillah or City Judge in whose jurisdiction the witness or other person resides, on whom the process is to be served, and if he resides within Calcutta, Madras or Bomay, then through the Supreme Court of Judicature[2] there. When the commission has been issued to a Court, or other person or persons having power to issue such process in the exercise of of their ordinary authority, they may also use all such power for the purposes of the commission.

Powers of commissioners.
Their protection.
Service of their process.
Powers of Court, etc., acting under commission.

9. All persons disobeying any lawful process issued as aforesaid for the purposes of the commission shall be liable to the same penalties as if the same had issued originally from the Court or other authority through whom it is executed.

Penalty for disobedience to process.

10. A copy of the articles of charge, and list of the documents and witnesses by which each charge is to be sustained, shall be delivered to the person accused, at least three days before the beginning of the inquiry, exclusive of the day of delivery and the first day of the inquiry.

Copy of charge and list to be furnished to accused.

LEG. REF.

[1] The words "the Code of Criminal Procedure, 1898" were substituted for the words "Act XXX, 1841" by Act X of 1914.

[2] *See* the Indian High Courts Act, 1861 (24 and 25 Vict., c. 104), S. 11.

11. At the begining of the inquiry the prosecutor shall exhibit the articles of charge to the commissioners, which shall be openly read, and the person accused shall thereupon be required to plead "guilty" or "not guilty" to each of them, which pleas shall be forthwith recorded with the articles of charge. If the person acccused refuses, or without reasonable cause neglects, to appear to answer the charge either personally or by his counsel or agent, he shall be taken to admit the truth of the articles of charge.

Procedure at beginning of inquiry.
Non-appearance of accused and admission of charge.

12. The prosecutor shall then be entitled to address the commissioners in explanation of the articles of charge, and of the evidence by which they are to be proved: his address shall not be recorded.

Prosecutor"s right of address.

13. The oral and documentary evidence for the prosecution shall then be exhibited; the witnesses shall be examined by or on behalf of the prosecutor and may be cross-examined by or on behalf of the person accused, The prosecutor shall be entitled to re-examine the witnessees on any points on which they have been cross-examined, but not on any new matter, without leave of the commissioners, who also may put such questions as they think fit.

Evidence for prosecution and examination of witnesses.
Re-examination by prosecutor.

14. If it shall appear necessary before the close of the case for the prosecution, the commissioners may, in their discretion, allow the prosecutor to exhibit evidence not included in the list given to the person accused, or may themselves call for new evidence; and in such case the person accused shall be entitled to have, if he demand it, an adjournment of the proceedings for three clear days, before the exhibition of such new evidence exclusive of the day of adjournment and of the day to which the proceedings are adjourned.

Power to audit or call for new evidence for prosecution.
Accused"s right to adjournment.

15. When the case for the prosecution in closed, the person accused shall be required to make his defence, orally or in writing, as he shall prefer. If made orally, it shall not be recorded; if made in writing, it shall be recorded, after being openly read, and in that case a copy shall be given at the same time to the prosecutor.

Defence of accused.
To be recorded only when written.

16. The evidence for the defence shall then be exhibited and the witnesses examined, who shall be liable to cross-examination and re-examination and to examination by the commissioners according to the like rules as the witnesses for the prosecution.

Evidence for defence, and examination of witnesses.

17. [*Examination of witnesses and evidence by prosecutor*]. *Repealed by the Repealing Act*, 1876 (*XII of* 1876).

18. The commissioners or some person appointed by them shall take notes in English of all the oral evidence, which shall be read aloud to each witness by whom the same was given, and, if necessary, explained to him in the language in which it was given, and shall be recorded with the proceedings.

Notes of oral evidence.

19. If the person accused makes only an oral defence, and exhibits no evidence, the inquiry shall end with his defence; if he records a written defence, or exhibits evidence, the prosecutor shall be entitled to a general oral reply on the whole case, and may also exhibit evidence, to contradict any evidence exhibited for the defence, in which case the person accused shall not be entitled to any adjournment of the proceedings, although such new evidence were not included in the list furnished to him.

Inquiry when closed with defence.
Prosecutor when entitled to reply and give evidence.
Accused not entitled to adjournment.

20. When the commissioners shall be of opinion that the articles of charge or any of them, are not drawn with sufficient clearness and precision, the commissioners may, in their discretion, require the same to be amended, and may thereupon, on the application of the person accused, adjourn the inquiry for a reasonable time. The commissioners may, also if they think fit, adjourn the inquiry from time to time, on the application of either the prosecutor or the person accused, on the ground of sickness or unavoidable absence of any witness or other reasonable cause. When such application is made and refused, the commissioners shall record the application, and their reasons for refusing to comply with it.

Power to require amendment of charge and to adjourn.
Reasons for refusing adjournment to be recorded.

21. After the close of the inquiry the commissioners shall forthwith report to Government their proceedings under the commission, and shall send with the record thereof their opinion upon each of the articles of charge separately, with such observations as they think fit on the whole case.

Report of Commissioners' proceedings.

22. The Government, on consideration of the report of the commissioners, may order them to take further evidence, or give further explanation of their opinions. It may also order additional articles of charge to be framed, in which case the inquiry into the truth of such additional articles shall be made in the same manner as is herein directed with respect to the original charges. When special commissioners have been appointed, the Government may also, if it thinks fit, refer the report of the commissioners to the Court or other authority to which the person accused is subordinate, for their opinion on the case; and will finally pass scch orders thereon as appear just and consistent with its powers in such cases.

Power to call for further evidence or explanation.
Inquiry into additional articles of charge.
Reference of report of special commissioners.
Final orders.

[1]23. [In this Act, "the Government" means the Central Government in the case of persons employed under that Government and the Provincial Government in the case of persons employed under that Government.]

"Definition of Government".

[2]24. Nothing in this Act shall be construed to repeal any Act or Regulation in force for the suspension or dismissal of Principal and other Sadar Amins or of Deputy Magistrates or Deputy Collectors, but a commission may be issued for the trial of any charge against any of the said officers, under this Act, in any case in which the Government shall think it expedient.

Saving of enactments as to dismissal of certain officers.
Commission under Act for their trial.

LEG. REF.

[1] S. 23 substituted by A.O., 1937.

[2] S. 24 has been repealed, as to the Lower Provinces and North-Western Provinces of of Bengal, by Act XVI of 1868.

Saving of power of removal without inquiry under Act.

25. Nothing in this Act shall be construed to affect the authority of Government, for suspending or removing any public servant for any cause without an inquiry undder this Act.

THE PUBLIC SUITS VALIDATION ACT (XI OF 1932).

[*8th April*, 1932.

As Act to validate certain suits relating to public matters.

WHEREAS it is expedient to validate certain suits relating to public matters which may be or have been held to be invalid by reason of the previous sanction of the Provincial Government in respect thereof not having been obtained as required by section 93 of the Code of Civil Procedure, 1908; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE PUBLIC SUITS VALIDATION ACT, 1932.

(2) It extends to all parts of British India to which section 91, 92 and 93 of the Code of Civill Procedure, 1908, extend.

Validation of certain pending public suits.

2. Where a suit relating to any of the public matters specified in sections 91 and 92 of the Code of Civil Procedure, 1908, is pending at the commencement of this Act, the institution of such suit shall not be deemed to be invalid on the ground that the previous sanction of the Provincial Government in respect of such suit has not been obtained as required by section 93 of that Code.

Explanation.—For the purposes of this section a suit pending at the commencement of this Act includes a suit in respect of which an appeal lies or is pending at the commencement of this Act.

Restoration of certain dismissed public suits.

3. Where any suit relating to any such public matter has, after the 30th day of November, 1931, and before the commencement of this Act, been dismissed by a Court of first instance solely on the ground that the sanction of the Provincial Government in respect of such suits has not been obtained as required by section 93 of the Code of Civil Procedure, 1908, the Court shall, on application made within six months from the commencement of this Act, make an order setting aside its decree and shall proceed with the suit.

AOTES.

Sec. 25: OFFICER DISMISSED WITHOUT ENQUIRY — RIGHT OF SUIT — GOVERNMENT OF INDIA ACT, S. 96-B (1) AND R. 14.—A Reader in the Government Press was dismissed from service without any enquiry. He sued the Secretary of State for damages for wrongful dismissal. *Held*, he had no right of action, as R. 14 framed under the Government of India Act, imposing formalities like enquiry before dismissal of a civil servant was specifically without prejudice to the provision of the Public Servants Inquiries Act, S. 14. When that was the case it was not possible to say that the Government or the authority to whom it delegated its powers in the matter could not, with reference to R. 14, dismiss its civil servant without an enquiry. That one was doing work, as a reader in a press, which could have been done by a private person did not make him any the less a public servant or limit the right of Government to dismiss him at its pleasure. The statutory rules gave him no right of suit and the general rule was that no remedy could be taken but the particular remedy prescribed by the statute. 57 M. 857 =1934 M. 516=67 M.L.J. 123. Appointed an appeal to P.C. in 64 I.A. 40=I.L.R. (1937) Mad. 517=1937 P.C. 27=(1937) 1 M.L.J. 515 (P.C.).

Sec. 3.—Scope and effect of—Defect in sanction for suit under S. 93, C.P. Code—Dismissal—Restoration—Subsequent dimissal for want of freeh consent—Legality. *See* **63 C.L.J. 70.**

Retrial of certain appeals relating to public suits.

4. Where, in any appeal arising from a suit relating to any such public matter, a decree has been passed after the 30th day of November, 1931, and before commencement of this Act, dismissing the appeal or dismissing the suit from which the appeal arose, solely on the ground that the previous sanction of the Provincial Government in respect of the suit had not been obtained as required by section 93 of the Code of Civil Procedure, 1908, the Appellate Court shall, on application made within six months from the commencement of this Act, make an order setting aside its decree and shall proceed with the appeal.

THE INDIAN RAILWAY BOARD ACT (IV OF 1905).

[Declared in force in British Baluchistan, Reg. 2 of 1913, S. 3[.

[22*nd March*, 1905.

An Act to provide for investing the Railway Board with certain powers or functions under the Indian Railways Act, 1890.

WHEREAS a Railway Board has been constituted for controlling the administration of railways in India, and it is expedient to provide for investing such Board with certain powers or functions under the Indian Railways Act, 1890; It is hereby enacted as follows:—

Short title and construction.

1. (1) This Act may be called THE INDIAN RAILWAY BOARD ACT, 1905; and

(2) It shall be read with, and taken as part of, the Indian Railways Act, 1890.

Investment of Railway Board with powers under Indian Railways Act, 1890.

2. The Central Government may, by notification in the Official Gazette, invest the Railway Board, either absolutely or subject to conditions,

(*a*) with all or any of the powers or functions of the Central Government under the Indian Railways Act, 1890, with respect to all or any railways, and

(*b*) with the power of the officer referred to in section 47 of the said Act to make general rules for railways administered by the Government.

Mode of signifying communications from the Railway Board.

3. Any notice, determination, direction, requisition, appointment; expression of opinion, approval or sanction, to be given or signified on the part of the Railway Board, for any of the purposes of, or in relation to, any powers or functions with which it may be invested by notification under section 2, shall be sufficient and binding if in writing signed by the Secretary to the Railway Board, or by any other person authorized by the said Railway Board to act in its behalf in respect of the matters to which such authorisation may relate; and the said Railway Board shall not in any case be bound in respect of any of the matters aforesaid unless by some writing signed in manner aforesaid.

Cessation of Railway Board on establishment of Federal Railway Authority.

[1][4. On the establishment of the Federal Railway Authority, the Railway Board shall cease to exist and any notification issued under section 2 of this Act shall cease to have effect, without prejudice, however, to the validity of anything previously done in pursuance thereof].

LEG. REF.

[1] S. 4 inserted by A.O., 1937.

THE INDIAN RAILWAY COMPANIES ACT (X OF 1895).

Year.	No.	Short title.	Amendments.
1895	X	The Indian Railway Companies Act.	Repealed in part, X of 1914. *See* IV of 1902

[*7th March*, 1895.

An Act to provide for the payment by Railway Companies registered under the Indian Companies Act, 1882, of interest out of capital during construction.

WHEREAS it is expedient to provide for the payment by Railway Companies registered under the Indian Companies Act, 1882, of interest out of capital during construction; It is hereby enacted as follows:—

Title and extent.

1. (1) This Act may be called THE INDIAN RAILWAY COMPANIES ACT, 1895.

(2) It extends to the whole of British India; [1][*]

[1][* * * *]

Definitions.

2. In this Act, unless there is something repugnant in the subject or context,—

(1) "Railway" means a railway as defined in section 3, clause (4) of the Indian Railways Act, 1890:

(2) "the railway" means the railway in relation to the construction of which interest out of capital is permitted to be paid as hereinafter provided: and

(3) "Railway Company" means a Company registered under the Indian Companies Act, 1882, and formed for the purpose of making and working, or making or working, a railway in India, whether alone or in conjunction with other purposes.

Payment of interest out of capital.

3. A Railway Company may pay interest on its paid-up share capital out of capital, for the period, and subject to the conditions and restrictions in this section mentioned, and may charge the same to capital as part of the cost of construction of the railway:—

(1) Such interest shall be paid only for such period as shall be determined by the Central Government; and such period shall in no case extend beyond the close of the half-year next after the half-year during which the railway shall be actually completed and opened for traffic.

(2) No such payment shall be made unless the same is authorised by the company's memorandum of association or by a special resolution of the Company.

(3) No such payment, whether authorised by the Company's memorandum of association or by special resolution as aforesaid, shall be made without the previous sanction of the Central Government.

(4) The amount so paid out of capital by way of interest, in respect of any period, shall in no case exceed a sum which shall, together with the net earnings of the railway during such period, make up the rate of 4 per cent. per annum.

(5) No such payment of interest shall be made until such Railway Company has satisfied the Central Government that two-thirds at least of its share capital, in respect whereof interest is to be so paid, has been actually issued and accepted, and is held by shareholders who, or whose representatives, are legally liable for the same.

LEG. REF.

[1] The word "and" at the end of sub-S. (2), and sub-S. (3) were repealed by Act X of 1914, S. 3 and Sch. II.

(6) No such interest shall accrue in favour of any shareholder for any time during which any call on any of his shares is in arrear.

(7) The payment of such interest shall not operate as a reduction of the amount paid up on the shares in respect of which it is paid.

Provisions of section 3 applicable to additional share capital for extensions.

4. A railway in course of construction and intended to be made or worked by a Railway Company in addition to or by way of extension of any railway owned or worked by such Company, shall be deemed to be the railway of such Company for the purposes of this Act, and all the provisions of the last preceding section shall apply to such railway and to the share capital issued for the purpose of its construction.

Notice in prospectus and other documents.

5. When a Railway Company has power to pay interest under this Act, notice to that effect shall be given in every prospectus, advertisement or other document inviting subscriptions for shares therein, and in every certificate of such shares.

Accounts.

6. When any interest has been paid by a Railway Company under this Act, the annual or other accounts of such Company shall show the amount on which, and the rate at which, interest has been so paid.

Construction of borrowing powers.

7. If by any memorandum of association, articles of association or other document any power of borrowing money is conferred on a Railway Company, or on its Directors, with or without the sanction of any meeting, and if such power of borrowing is limited to an amount bearing any proportion to the capital of such Company, the amount of capital applied or to be applied in payment of interest under this Act shall, for the purpose of ascertaining the extent of such power of borrowing, be deducted from the capital of such Company.

THE INDIAN RAILWAYS ACT (IX OF 1890).

Year.	No.	Short title.	Amendments.
1890	IX	The Indian Railways Act, 1890.	Repealed in part, XIII of 1898, S. 18 and Act I of 1938. Repealed in part and amended, IX of 1896; XI of 1923. *See* S. 1 Act I of 1905; Amended, Acts XVIII of 1919; X of 1927; XIV of 1930; XIX of 1933; XXXV of 1934; XXXIII of 1939; XXXIV of 1939; VI of 1941; A O 1937

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THE INDIAN RAILWAYS ACT (IX OF 1890).

[21*st March*, 1890.

An Act to consolidate, amend and add to the law relating to Railways in India.

WHEREAS it is expedient to consolidate, amend and add to the law relating to Railways in India; It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Title, extent and commencement.

1. (1) This Act may be called THE INDIAN RAILWAYS ACT, 1890.

NOTES.

Sec. 1.—Resolution of the Government of India at pp. 18, 19 (Supp.), *Gazette of India*, 1884, is not a "Rule". 36 P.R. 1911=9 I.C. 1011. Rail. Co. can exclude from railway permises all persons having no business with them and may impose on the rest of the public any terms they think proper. (*Ibid*.) Ordinarily freight is payable only by the contracting party. The person who is liable is the consignor and in the absence of an independent contract express or implied, the consignee is not liable. 57 C. 1168=1931 C. 33. A consignment of planks was despatched from station *S* on the *R* line at owner's risk and the risk-note Form B was given to the consignor. The weight charged was equal to the carrying capacity of the whole wagon. The consignment was not weighed at *S* but was weighed at *R* where the Rail. authorities demanded freight at a higher rate on the ground that there was an undercharge. The consignor having paid the money under protest sued the Rail. Co. for refund, and the Rail. Co. pleaded mistake of its clerk at *S*. *Held*, that such mistake could not alter the basis of the original contract, that the company was bound by their agent's contract and the plaintiff was consequently entitled to recover the excess paid. 54 A. 557=1932 A.L.J 526=1932 A. 540. But *see also* 32 Bom.L.R. 285=1930 B. 262; 1933 N. 135. A person bringing cattle to the Rail. station is bound to enquire, as to the times of running of cattle trains and cannot, by omitting to enquire, put upon the Rail. Co. the obligation to forward cattle out of the ordinary course of their arrangement. 117 I.C. 769=1929 S. 238. R. 6 of the N.W. Railway Goods Tariff applies to goods carried by goods trains and not to livestock carried by passenger trains. 117. I.C. 769=1929 S. 238. Payment of surcharge by consignee—Error of law—Suit to recover money paid—Maintainability—Limitation. 1929 M. 177=56 M.L.J. 269. The weight of goods consigned and inserted in the railway receipt when the bags are accepted by the Company does not amount to an admission of the weight by the Company. The weighment is only for the purpose of ascertaining what they will charge and for no other purpose. Where the Company's Goods Tariff, Part I, R. 15, which governs the consignment, says no admission is conveyed by a railway receipt that the weight as shown therein has been received or that the description of the goods as furnished by the consignor is correct and cl. (6) of the railway receipt reserves to the Company the right to re-measure and collect any undercharges at the place of destination, *held*, that the railway receipt was not conclusive. 32 Bom.L.R. 285=1930 B. 262. *See also* 1932 A. 540=34 A. 557. Railway line not fenced—Public whether can walk and take cattle across line. 7 O.W.N. 461. A Rail. Co. is not liable to a trespasser for a mere

(2) It extends to the whole of British India, inclusive [1][* * * *] (in so far is it has been or may be extended under the provisions of the Sind-Pishin Railways Act, 1887), of British Baluchistan, and applies also to all subjects of Her Majesty within the dominions of Princes and States in India in alliance with Her Majesty, and to all Native subjects of Her Majesty, without and beyond British India and those dominions; and

(3) It shall come into force on the first day of May, 1890.

2. [*Repeal*]. *Rep. by the Repealing Act* (*I of* 1938), *S. 2 and Sch.*

Definitions.

3. In this Act, unless there is something repugnant in the subject or context,—

(1) "tramway" means a tramway constructed under the Indian Tramways Act, 1886, or any special Act relating to tramways:

(2) "ferry" includes a bridge of boats, pontoons or rafts, a swing-bridge, a flying bridge and a temporary bridge, and the approaches to, and landing-places of, a ferry:

(3) "inland water" means any canal, river, lake or navigable water in British India:

(4) "railway" means a railway, or any portion of a railway for the public carriage of passengers, animals or goods, and includes—

(*a*) all land within the fences or other boundary-marks indicating the limits of the land appurtenant to a railway:

(*b*) all lines of rails, sidings or branches worked over for the purposes of, or in connection with, a railway;

(*c*) all stations, offices, warehouses, wharves, worshops, manufactories, fixed plant and machinery and other works constructed for the purposes of, or in connection with, a railway; and

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LEG. REF.

[1] Repealed by Burma Laws Act (XIII of 1898).

NOTES.

error of judgment, even amounting to negligence, on the part of its servant which causes damage to the trespasser. [*G.T.Ry. of Canada* v. *Barnet*, (1911) A.C. 361, Appl.]. The plaintiff who had been to the goodsyard of the railway, attempted to cross the railway line to get to the Station Master's office, when he was knocked down in broad daylight by a construction engine moving very slowly at 3 miles an hour. There was no evidence of permission or licence from the Company to cross the lines except at the level crossing. The driver sounded the whistle, which, however, had no effect on the plaintiff who was then "thinking about his own affairs". The driver then applied the brakes, but a second too late. *Held*, that the Rail. Co. was not liable for the injury caused to the plaintiff. 34 Bom.L.R. 826=1932 B. 452. Travelling by alternative routes. 51 A. 399=27 A.L.J. 78. There would ordinarily be no difficulty in prosecuting a railway company in a suitable case in respect of a breach of a statutory provision for which a penalty had been provided, and a State Railway does not occupy a more favourable position with reference to such matters. The general manager of a state railway is a legal entity in the same degree as a railway company is such an entity and it would be legal to prosecute him in his representative capacity in suitable cases. To such a prosecution no sanction under S. 197, Cr.P. Code, and S. 270 of the Government of India Act is necessary, as it is not sought to enforce against him personally any criminal liability which he has incurred in his personal capacity but merely to prosecute the railway administration for breach of statutory provision. I.L.R. (1941) 1 Cal. 345=45 C. W.N. 347=1941 Cal. 359.

Sec. 3 (4).—"Railway" what it includes. 36 P.R. 1911=9 I.C. 1011. *See also* 111 P.R. 1912=15 I.C. 12. Staffquarters are not part of Railway within S. 3 (4). 23 I.C. 177=1914 M.W.N. 124. Residential building is not part of a railway. 8 L.R. 120 (C.R.). The term "*water-tight*" is used

(*d*) all ferries, ships, boats and rafts which are used on inland waters for the purposes of the traffic of a railway and belong to or are hired or worked by the authority administering the railway:

(5) "railway company" includes any persons, whether incorporated or not, who are owners or lessees of a railway or parties to an agreement for working a railway:

(6) "railway administration" or "administration", in the case of a railway administered by the Government or a Native State, means the manager of the railway and includes the Government or the Native State, and, in the case of a railway administered by a railway company, means the railway company:

(7) "railway servant" means any person employed by a railway administration in connection with the service of a railway:

(8) "Inspector" means an Inspector of Railways appointed under this Act:

(9) "goods" includes inanimate things of every kind:

(10) "rolling-stock" includes locomotive engines, tenders, carriages, wagons, trucks and trollies of all kinds:

(11) "traffic" includes rolling-stock of every description, as well as passengers, animals and goods:

(12) "through traffic" means traffic which is carried over the railways of two or more railway administrations:

(13) "rate" includes any fare, charge or other payment for the carriage of any passenger, animal or goods:

NOTES.

to be understood as a guarantee that it is actually water-tight, although it is supposed to be so. 1933 N. 1.

Sec. 3 (5).—*Cf.* the Regulation of Railways Act, 1871 (34 & 35 Vict., c. 78), S.2.

A plea that the defendant company is not a Rail. Co. within the meaning of the Act cannot be raised for the first time on appeal. 111 P.R. 1912=15 I.C. 12.

Cl. (6): "RAILWAY ADMINISTRATION".—In the case of a railway administered by the Government, the Government represented by the Secretary of State would be a necessary party in a suit against the Railway under S. 79, C.P. Code. 10 P. 466. Notice to the Secretary of State is indispensable in such a case. 10 P. 466. Notice served on the manager of the Railway administration is not sufficient. 10 P. 466. The cannotation of the words "Railway administration" in S. 3 is not in any way cut down by S. 140. 44 C. 16=34 I.C. 130. On this clause, *see also* 4 O.C. 133. Person claiming damages for loss of goods sent by a Railway must serve notice of the claim on the Agent 4 L. 46; 14 L.W. 685 (F.B.). In a suit instituted against the Secretary of State on account of any act committed by a Railway servant, it is open either to the Secretary of State or to the Railway Administration to authorize counsel to appear. 101 I.C. 158.

Sec. 3. (7).—*See* 26 Cr.L.J. 190. In a very large proportion of the cases in which a person contracts with the railway to perform a certain service on its behalf he can be said to be employed by the railway to do that service and so comes within the definition of S. 3 (7), Railways Act. The service of a railway is not limited to the running of trains, but has a much wider meaning. The provision of meals for travellers is part of the service of a railway. The test to determine whether a person is an employee or an independent contractor is whether or not the employer retains the power not only of directing what work is to be done, but also of controlling the manner of doing the work. If a person can be overlooked and directed in regard to the manner of doing his work such person is not a contractor. Moreover the method of remuneration makes no difference. 38 Cr.L.J. 793=1937 Lah. 547. A cabinman is a railway servant within the meaning of S. 3 (7). 42 Cr.L.J. 786=1941 Sind 117.

Cl. (9).—*Cf.* the Railways Clauses Act, 1845 (8 and 9 Vict., c. 20), S. 3. Meaning of "goods". *See* 2 M. 5; 4 C. 492; 9 B.H.C. R. 95. *See also* Sale of Goods Act, *infra*.

Cl. (10).—*Cf.* the Railway Rolling-Stock Protection Act, 1872 (35 and 36 Vict., c. 50), S. 2.

Cls. (11) and (13).—*Cf.* the Railway and Canal Traffic Act, 1854 (17 & 18 Vict., c. 31), S. 1. "Traffic" does not include person going to a railway station to see a friend off 116 P.L.R. 1911=36 P.R. 1911=9 I.C. 1011=102 P.W.R. 1911. "Animals" includes crabs. 24 C. 881.

(14) "terminals" includes charges in respect of stations, sidings, wharves, depots, warehouses, cranes and other similar matters, and of any services rendered thereat:

(15) "pass" means an authority given by a railway administration, or by an officer appointed by a railway administration in this behalf, and authorizing the person to whom it is given to travel as a passenger on a railway gratuitously:

(16) "ticket" includes a single ticket, a return ticket and a season ticket:

(17) "maund" means a weight of three thousand two hundred tolas, each tola being a weight of one hundred and eighty grains troy: and

(18) "Collector" means the chief officer in charge of the land-revenue administration of a district, and includes any officer specially appointed by the Provincial Government to discharge the functions of a Collector under this Act.

[1] [(19) "Federal railway", "Indian State railway", and "minor railway," have the meanings respectively assigned to them in the Government of India Act, 1935, except that they do not in any provision of this Act include any tramway, unless that provision has been extended under section 146 of this Act to that tramway:

(20) "Government" where the context so requires means the Federal Railway Authority:

(21) "the safety controlling authority" means the Federal Railway Authority, or, in relation to functions which the Central Government determines under section 181 (3) of the Government of India Act, 1935, shall be performed by persons independent of that Authority and of any railway administration, the Central Government:

(22) "the general controlling authority" means, in relation to a federal railway, the Federal Railway Authority, in relation to a minor railway, the Provincial Government and, in relation to an Indian State railway, the Governor-General acting in his discretion.]

CHAPTER II.

INSPECTION OF RAILWAYS.

Appointment and duties of Inspectors.

4. (1) The [2][safety controlling authority] may appoint [3]persons, by name or by virtue of their office, to be Inspectors of Railways.

(2) The duties of an Inspector of Railways shall be—

(*a*) to inspect railways with a view to determine whether they are fit to be opened for the public carriage of passengers, and to report thereon to the [2][safety controlling authority] as required by this Act;

LEG. REF.

[1] Cls. 19 to 22 inserted by A.O., 1937.

[2] Substituted for "Governor-General in Council" by A.O., 1937.

[3] For persons appointed to be Inspectors of Railways under this section, *see* Government of India (Railway) Circular No. XV, dated 4th December, 1888.

NOTES.

Sec. 3 (14).—*Cf.* the Railway and Canal Traffic Act, 1888, (51 & 52 Vict., c. 25), S. 55. *Transhipment charges* are terminals within the meaning of S. 3 (14) and not tolls for using a ferry under S. 51 (*f*). 137 I.C. 159=1932 N. 53.

Cl. (18).—*See also* the definition in S. 3 (10) of the General Clauses Act, 1897 (X of 1897).

Sec. 4.—*Cf.* the Regulation of Railways Act, 1871, (34 and 35 Vict., c. 78, S. 3.

Cl. (2).—Where there is a general contract between a Rail. Co. and a canal company by which the work of carrying boats on the backwater is done by the latter it cannot be said that the backwater is a railway with-

(*b*) to make such periodical or other inspections of any railway or of any rolling-stock used thereon as the [1][safety controlling authority] may direct;

(*c*) to make inquiry under this Act into the cause of any accident on a railway;

(*d*) to perform such other duties as are imposed on him by this Act, or any other enactment for the time being in force relating to railways.

Powers of Inspector.

5. An Inspector shall, for the purpose of any of the duties which he is required or authorized to perform under this Act, be deemed to be a public servant within the meaning of the Indian Penal Code, and, subject to the control of the [1][safety controlling authority], shall for that purpose have the following powers, namely:—

(*a*) to enter upon and inspect any railway or any rolling-stock used thereon;

(*b*) by an order in writing under his hand addressed to the railway administration, to require the attendance before him of any railway servant, and to require answers or returns to such inquiries as he thinks fit to make from such railway servant or from the railway administration;

(*c*) to require the production of any book or document belonging to or in the possession or control of any railway administration (except a communication between a Railway Company and its legal advisers) which it appears to him to be necessary to inspect.

Facilities to be afforded to Inspectors.

6. A Railway administration shall afford to the Inspector all reasonable facilities for performing the duties and exercising the powers imposed and conferred upon him by this Act.

CHAPTER III.

CONSTRUCTION AND MAINTENANCE OF WORKS.

Authority of railway administrations to execute all necessary works.

7. (1) Subject to the provisions of this Act and, in the case of immovable property not belonging to the railway administration, to the provisions of any enactment for the time being in force for the acquisition of land for public purposes and for companies, and subject also, in the case of a Railway company, to the provisions of any contract between the company and the Government, a railway administration may, for the purpose of constructing a railway or the accommodation or other works connected therewith, and notwithstanding anything in any other enactment for the time being in force,—

(*a*) make or construct in, upon, across, under or over any lands, or any streets, hills, valleys, roads, railways or tramways, or any rivers, canals, brooks, streams or other waters, or any drains, water-pipes, gas-pipes or

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LEG. REF.

[a] Substituted for "Governor-General in Council" by A.O., 1937.

NOTES.

in the meaning of S. 4 (*d*). 130 I.C. 658 =1931 M. 115.

Sec. 5.—*Cf.* the Regulation of Railways Act, 1871 (34 and 35 Vict., c. 78), S. 4.

Sec. 7.—*Cf.* the Railways Clauses Act, 1845, (8 and 9 Vict., c. 20), S. 16.

Level crossing — Public street — Street vested in Municipality—Sanction of Government. 41 B. 291=21 C.W.N. 447=43 I.A. 310 (P.C.) (on appeal from 23 I.C. 765 =38 B. 565.) *See also* 33 B. 565. Rail. Co. can close the level-crossing and open a new one at any point lower down the line. 22 Bom.L.R. 822=44 B. 705. *See also* 34 B. 252=11 Bom.L.R. 1181.

telegraph lines, such temporary or permanent inclined planes, arches, tunnels, culverts, embankments, aqueducts, bridges, roads [1][lines of railway], ways, passages, conduits, drains, piers, cuttings and fences as the railway administration thinks proper;

(*b*) alter the course of any rivers, brooks, streams, or water-courses; for the purpose of constructing and maintaining tunnels, bridges, passages or other works over or under them, and divert or alter, as well temporarily as permanently, the course of any rivers; brooks; streams or water-courses or any roads, streets or ways, or raise or sink the level thereof, in order the more conveniently to carry them over or under or by the side of the railway, as the railway administration thinks proper;

(*c*) make drains or conduits into, through or under any lands adjoining the railway for the purpose of conveying water from or to the railway;

(*d*) erect and construct such houses, warehouses, offices, and other buildings, and such yards, stations, wharves, engines, machinery, apparatus and other works and conveniences as the railway administration thinks proper;

(*e*) alter, repair or discontinue such buildings, works and conveniences as aforesaid or any of them and substitute others in their stead; and

(*f*) do all other acts necessary for making, maintaining, altering or repairing and using the railway.

(2) The exercise of the powers conferred on a railway administration by sub-section (1) shall be subject to the control of the [2][general controlling authority].

Alteration of pipes, wires and drains.

8. A railway administration may, for the purpose of exercising the powers conferred upon it by this Act, alter the position of any pipe for the supply of gas, water or compressed air or the position of any electric wire or of any drain not being a main drain:

Provided that—

(*a*) when the railway administration desires to alter the position of any such pipe, wire or drain, it shall give reasonable notice of its intention to do so, and of the time at which it will begin to do so, to the [3]local authority or company having control over the pipe, wire or drain, or, when the pipe, wire or drain is not under the control of a local authority or company, to the person under whose control the pipe, wire or drain is;

(*b*) a local authority, company or person receiving notice under proviso (*a*) may send a person to superintend the work, and the railway administrations shall execute the work to the reasonable satisfaction of the person so sent and shall make arrangements for continuing during the execution of the work the supply of gas, water, compressed air or electricity or the maintenance of the drainage, as the case may be.

Protection for Government property.

[4][8-A. Nothing in the two last preceding sections shall authorize the doing of anything on or to any works, lands, or buildings vested in, or in the possession of, His Majesty for the purpose of he Central Government without the consent of that Government, or the doing of anything on or to any works, lands or buildings vested in, or in the possession of, His Majesty for the purposes of a Province without the consent of the Provincial Government.]

LEG. REF.

[1] These words were added by the Indian Railways Act (1890) Amendment Act (IX of 1896), S. 1.

[2] Substituted for "Governor-General in Council" by A.O., 1937.

[3] For definition of "local authority", *see* S. 135 (5), *infra*, and the General Clauses Act, 1897 (X of 1897), S. 3 (28).

[4] Inserted by A.O., 1937.

Temporary entry upon land for repairing or preventing accident.

9. (1) The [1][safety controlling authority] may authorize any railway administration, in case of any slip or other accident happening or being apprehended to any cutting, embankment or other work under the control of the railway administration, to enter upon any lands adjoining its railway for the purpose of repairing or preventing the accident, and to do all such works as may be necessary for the purpose.

(2) In case of necessity the railway administration may enter upon the lands and do the works aforesaid without having obtained the previous sanction of the [1][safety controlling authority], but in such a case shall, within seventy-two hours after such entry, make a report to the [1][safety controlling authority], specifying the nature of the accident or apprehended accident, and of the works necessary to be done, and the power conferred on the railway administration by this sub-section shall cease and determine if the [1][safety controlling authority], after considering the report, considers that the exercise of the power, is not necessary for the public safety.

Payment of compensation for damage caused by lawful exercise of powers under the foregoing provisions of this Chapter.

10. (1) A railway administration shall do as little damage as possible in the exercise of the powers conferred by any of the [2][foregoing provisions of this Chapter] and compensation shall be paid for any damage caused by the exercise thereof.

(2) A suit shall not lie to recover such compensation, but in case of dispute the amount thereof shall, on application to the Collector, be determined and paid in accordance, so far as may be, [3][with the provisions of sections 11 to 15, both inclusive, sections 18 to 34, both inclusive, and sections 53 and 54 of the Land Acquisition Act, 1894, and the provisions of sections 51 and 52 of that Act shall apply to the award of compensation].

Accommodation works.

11. (1) A railway administration shall make and maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway, namely:—

(*a*) such and so many convenient crossings, bridges, arches, culverts and passages over, under or by the sides of, or leading to or from, the railway as may, in the opinion of the [1][Provincial Government]; be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway is made, and

(*b*) all necessary arches, tunnels, culverts, drains, watercourses or other passages, over or under or by the sides of the railway; of such dimensions as will, in the opinion of the [1][Provincial Government] be sufficient at all times to convey water as freely from or to the lands lying near or affected by the railway as before the making of the railway, or as nearly so as may be.

(1) Subject to the other provisions of this Act, the work specified in clauses (*a*) and (*b*) of sub-section (1) shall be made during or immediately after the laying out or formation of the railway over the lands traversed thereby and in such manner as to cause as little damage or inconvenience as possible to persons interested in the lands or affected by the works.

LEG. REF.

[1] Substituted for "Governor-General in Council" by A.O., 1937.

[2] Substituted for "the three last foregoing sections" *by ibid*.

[3] These words and figures "with the provisions of Ss. 11 to 15, both inclusive, and Ss. 18 to 42, both inclusive, of the Land Acquisition Act, 1870, and the provisions of Ss. 57 and 58 of that Act shall apply to the award of compensation" by the Indian Railways Act (1890) Amendment Act, 1896 (IX of 1896, S. 2.

NOTES.

Sec. 9.—*Cf.* the Railway Regulation Act, 1842 (5 & 6 Vict., c. 55), S. 14.

Sec. 10.—*See* 2 Bom.L.R. 537; 27 B. 344; 6 B.H.C.R. (A.C.) 116; 11 C.W.N. 356; 25 C. 632.

Sec. 11.—*Cf.* the Railways Clauses Act, 1845 (8 & 9 Vict., c. 20), S. 68.

(3) The foregoing provisions of this section are subject to the following provisos, namely:—

(*a*) a railway administration shall not be required to make any accommodation works in such a manner as would prevent or obstruct the working or using of the railway, or to make any accommodation works with respect to which the owners and occupiers of the lands have agreed to receive and have been paid compensation in consideration of their not requiring the works to be made;

(*b*) save as hereinafter in this Chapter provided, a railway administration shall not, except on the requisition of the [1][Provincial Government] be compelled to defray the cost of executing any further or additional occommodation works for the use of the owners or occupiers of the lands after the expiration of ten years from the date on which the railway passing through the lands was first opend for public traffic;

(*c*) where a railway aministration has provided suitable accommodation for the crossing of a road or stream, and the road or stream is afterwards diverted by the act or neglect of the person having the control thereof, the administration shall not be compelled to provide other accommodation for the crossing of the road or stream.

(4) The [1][Provincial Government] may appoint a time for the commencement of any work to be executed under sub-section (1), and if for fourteen days next after that time the railway administration fails to commence the work or, having commenced it, fails to proceed diligently to execute it in a sufficient manner, the [1][Provincial Government] may execute it and recover from the railway administration the cost incurred by [2][it] in the execution thereof.

Power for owner, occupier or local authority to cause additional accommodation works to be made.

12. If an owner or occupier of any land affected by a railway considers the works made under the last foregoing section to be insufficient for the commodious use of the land, or if the [1][Provincial Government] or a local authority desires to construct a public road or other work across, under or over a railway, he or it, as the case may be, may at any time require the railway administration to make at his or its expense such further accommodation works as he or it thinks necessary and are agreed to by the railway administration or as, in case of difference of opinion may be authorized by the [1][general controlling authority].

Fences, screens, gates and bars.

13. The [1][safety controlling authority] may require that, within a time to be specified in the requisition, or within such further time as [3][it] may appoint in this behalf,—

(*a*) boundary-marks or fences be provided or renewed by a railway administration for a railway or any part thereof and for roads constructed in connection therewith;

LEG. REF.

1-Substituted for "Governor-General in Council" by A.O., 1937.

2 Substituted for "him" by *ibid*.

3 Substituted for "he" by *ibid*.

NOTES.

Sec. 11 (3) (b).—*Cf.* the Railways Clauses Act, 1845, (8 & 9 Vict., c. 29), S. 78.

Cl. (4).—*Cf.* the Railways Clauses Act, 1845 (8 & 9 Vict., c. 20), S. 70.

Sec. 12.—Cf. *ibid*., S. 71. *See* 23 B. 358.

Sec. 13.—*Cf.* the Railway Regulation Act, 1842 (5 & 6 Vict., c. 55), S. 10. The Railway Company are bound not only to use due care as to the construction and use of their engines, but also to use due care in keeping the line of railway and the land belonging to them on each side of it in a proper state. The method of maintaining a fire line of 10 feet clear of grass as required by the standing orders is no doubt a reasonable precaution. But the company is bound to see that the order is carried out. If it has allowed the rules to become ineffective and allows dry fodder to be placed on the fire line the company is guilty of actionable negligence. 1938 A.M.L.J. 25.

(*b*) any works in the nature of a screen near to or adjoining the side of any public road constructed before the making of a railway be provided or renewed by a railway administration for the purpose of preventing danger to passengers on the road by reason of horses or other animals being frightened by the sight or noise of the rolling-stock moving on the railway;

(*c*) suitable gates, chains, bars, stiles or handrails be erected or renewed by a railway administration at places where a railway crosses a public road on the level;

(*d*) persons be employed by a railway administration to open and shut such gates, chains or bars.

Over and under bridges.

14. (1) Where a railway administration has constructed a railway across a public road on the level, the [1][safety controlling authority] may, at any time, if it appears to [2][it] necessary for the public safety, require the railway administration, within such time as [3][it] thinks fit, to carry the road either under or over the railway by means of a bridge or arch, with convenient ascents and descents and other convenient approaches, instead of crossing the road on the level, or to execute such other works as, in the circumstances of the case, may appear to the [1][safety controlling authority] to be best adapted for removing or diminishing the danger arising from the level-crossing.

(2) The [1][safety controlling authority] may require as a condition of making a requisition under sub-section (1), that the local authority, if any; which maintains the road, shall undertake to pay the whole of the cost to the railway administration of complying with the requisition or such portion of the cost as the [1][safety controlling authority] thinks just.

Removal of trees dangerous to or obstructing the working of a railway.

15. (1) In either of the following cases, namely:—

(*a*) where there is danger that a tree standing near a railway may fall on the railway so as to obstruct traffic.

(*b*) when a tree obstructs the view of any fixed signal,

the railway administration may, with the permission of any Magistrate, fell the tree or deal with it in such other manner as will in the opinion of the railway administration avert the danger or remove the obstruction, as the case may be.

(2) In case of emergency the power mentioned in sub-section (1) may be exercised by a railway administration without the permission of a Magistrate.

(3) Where a tree felled or otherwise dealt with under sub-section (1) or sub-section (2) was in existence before the railway was constructed or the signal was fixed, any Magistrate may, upon the application of the persons interested in the tree, award to those persons such compensation as he thinks reasonable.

(4) Such an award, subject, where made in a Presidency-town by any Magistrate other than the Chief Presidency Magistrate or where made elsewhere by any Magistrate other than the District Magistrate, to revision by the

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LEG. REF.

[1] Substituted for "Governor-General in Council" by A.O., 1937.

[2] Substituted for "him" by *ibid*.

[3] Substituted for "he" by *ibid*.

NOTES.

Sec. 13 (b).—*Cf.* the Railways Clauses Act 1845 (8 & 9 Vict., c. 20), S. 63.

Cl. (c).—*Cf.* the Railway Regulation Act, 1842 (5 & 6 Vict., c. 55), S. 9.

Cl. (d).—*Cf.* the Railway Clauses Act, 1845 (8 & 9 Vict., c. 20), S. 48.

Sec. 14 (1).—*Cf.* the Railways Clauses Act, 1863 (26 & 27 Vict., c. 92), S. 7.

Cl. (2).—*Cf.* the Railways Clauses Act, 1845 (8 & 9 Vict., c. 20), S. 46 and the Railway and Canal Traffic Act, 1888 (51 & 52 Vict., c. 25), S. 16.

Sec. 15 (1).—*Cf.* the Regulation of Railways Act, 1868 (31 & 32 Vict., c. 119), S. 24.

Chief Presidency Magistrate, or the District Magistrate, as the case may be, shall be final.

(5) A Civil Court shall not entertain a suit to recover compensation for any tree felled or otherwise dealt with under this section.

CHAPTER IV.

OPENING OF RAILWAYS.

Right to use locomotives.

[1]16. (1) A railway administration may, with the previous sanction of the [2][safety controlling authority], use upon a railway locomotive engines or other motive power, and rolling-stock to be drawn or propelled thereby.

(2) But rolling-stock shall not be moved upon a railway by steam or other motive power until such general rules for the railway as may be deemed to be necessary have been made, sanctioned and published under this Act.

Notice of intended opening of a railway.

17. (1) Subject to the provisions of sub-section (2), a railway administration shall, one month at least before it intends to open any railway for the public carriage of passengers, give to the [2][safety controlling authority] notice in writing of its intention.

(2) The [2][safety controlling authority] may, in any case, if [3][it] thinks fit, reduce the period of, or dispense with, the notice mentioned in sub-section (1).

Sanction of the Safety Controlling Authority a condition precedent to the opening of a railway.

18. A railway shall not be opened for the public carriage of passengers until the [2][safety controlling authority], or an Inspector empowered by the [2][safety controlling authority] in this behalf, has by order sanctioned the opening thereof for that purpose.

Procedure in sanctioning the opening of a railway.

19. (1) The sanction of the [2][safety controlling authority] under the last foregoing section shall not be given until an Inspector has, after inspection of the railway, reported in writing to the [2][safety controlling authority]—

(*a*) that he has made a careful inspection of the railway and rolling-stock;

(*b*) that the moving and fixed dimensions prescribed by the [2][safety controlling authority] have not been infringed;

(*c*) that the weight of rails, strength of bridges, general structural character of the works, and the size of and maximum gross load upon the axles of any rolling-stock, are such as have been prescribed by the [2][safety controlling authority];

(*d*) that the railway is sufficiently supplied with rolling-stock;

LEG. REF.

[1] For notifications sanctioning the use of motive power and rolling-stock on railways in—

(1) Assam, see *Gazette of India*, 1883, I, p. 21; *ibid*. 1885, Pt. I, p. 588; *ibid*., 1893, Pt. I, p. 178; (2) Bengal (including districts now under Eastern Bengal and Assam), see *Gazette of India*, 1879; Pt. I, p. 428; *ibid*., 1880, Pt. I, p. 30; *ibid*., 1883. Pt. I, p. 21; *ibid*., 1884, Pt. I, p. 322, *ibid*., 1885; Pt. I, p. 580; *ibid*., 1888, Pt. I, p. 148, and others too numerous to be included in this footnote; (3) Bombay, *see* Bom.R.& O., Vol. I; (4) Burma, *see* Bur. R.M. Vol. I; (5) Central Provinces, see *Gazette of India*, 1885, Pt. I, p. 683, etc.; (6) Madras, *see* Mad. R.& O., Vol. I; (7) United Provinces of Agra and Oudh, see *Gazette of India*, 1879, Pt. 1, p. 428. *ibid*., 1884, Pt. I, p. 322 and *ibid*., 1895, Pt. I, p. 396, etc.; (8) Punjab, *see* Punj. List of Local R. & O.; *Gazette of India*, 1879, Pt. I, p. 428; *ibid*., 1884, Pt. I, p. 322; *ibid*., 1885, Pt. I, p. 588, etc.

[2] Substituted for "Governor-General in Council" by A.O., 1937.

[3] Substituted for "he" by A.O., 1937.

NOTES.

Sec. 16.—*See* 14 B.L.R. 1.

Sec. 16 (1).—*Cf.* the Railways Clauses Act, 1845 (8 & 9 Vict., c. 20), S. 86.

Sec. 19 (1) (c).—*Cf.* the Railway Regulation Act, 1842 (5 & 6 Vict., c. 55), S. 16.

(*e*) that general rules for the working of the railway when opened for the public carriage of passengers have been made, sanctioned and published under this Act; and

(*f*) that, in his opinion, the railway can be opened for the public carriage of passengers without danger to the public using it.

(2) If, in the opinion of the Inspector, the railway cannot be so opened without danger to the public using it, he shall state that opinion, together with the grounds therefor, to the [1][safety controlling authority], and the [1][safety controlling authority] may thereupon order the railway administration to postpone the opening of the railway.

(3) An order under the last foregoing sub-section must set forth the requirements to be complied with as a condition precedent to the opening of the railway being sanctioned, and shall direct the postponement of the opening of the railway until those requirements have been complied with or the [1][safety controlling authority] is otherwise satisfied that the railway can be opened without danger to the public using it.

(4) The sanction given under this section may be either absolute or subject to such conditions as the [1][safety controlling authority] thinks necessary for the safety of the public.

(5) When sanction for the opening of a railway is given subject to conditions, and the railway administration fails to fulfil those conditions, the sanction shall be deemed to be void and the railway shall not be worked or used until the conditions are fulfilled to the satisfaction of the [1][safety controlling authority].

Application of the provisions of the three last foregoing sections to material alterations of a railway.

20. (1) The provisions of sections 17, 18 and 19 with respect to the opening of a railway shall extend to the opening of the works mentioned in sub-section (2) when those works form part of, or are directly connected with, a railway used for the public carriage of passengers and have been constructed after the inspection which preceded the first opening of the railway.

(2) The works referred to in sub-section (1) are additional lines of railway, deviation lines, stations, junctions and crossings on the level, and any alteration or reconstruction materially affecting the structural character of any work to which the provisions of sections 17, 18 and 19 apply or are extended by this section.

Exceptional provision.

21. When an accident has occurred resulting in a temporary suspension of traffic, and either the original line and works have been rapidly restored to their original standard, or a temporary diversion has been laid for the purpose of restoring communication, the original line and works so restored, or the temporary diversion, as the case may be, may, in the absence of the Inspector, be opened for the public carriage of passengers, subject to the following conditions, namely:—

(*a*) that the railway servant in charge of the works undertaken by reason of the accident has certified in writing that the opening of the restored line and works, or of the temporary diversion, will not in his opinion be attended with danger to the public using the line and works or the diversion; and

(*b*) that notice by telegraph of the opening of the line and works or the diversion shall be sent, as soon as may be, to the Inspector appointed for the railway.

LEG. REF.

[1] Substituted for "Governor-General in Council" by A.O., 1937.

NOTES.

Sec. 19 (2).—*Cf.* the Railway Regulation Act, 1842 (5 & 6 Vict., c. 55), S. 16.

Sec. 20 (1).—*Cf.* the Regulation of Railways Act, 1871 (34 & 35 Vict., c. 78), S. 5.

Power to make rules with respect to the opening of railways.

22. The [1][safety controlling authority] may make rules[2] defining the cases in which, and in those cases the extent to which, the procedure prescribed in sections 17 to 20 (both inclusive) may be dispensed with.

Power to close an opened railway.

23. (1) When, after inspecting any open railway used for the public carriage of passengers, or any rolling-stock used thereon, an Inspector is of opinion that the use of the railway or of any specified rolling-stock will be attended with danger to the public using it, he shall state that opinion, together with the grounds therefor, to the [1][safety controlling authority], and the [1][safety controlling authority] may thereupon order that the railway be closed for the public carriage of passengers, or that the use of the rolling-stock so specified be discontinued, or that the railway or the rolling-stock so specified be used for the public carriage of passengers on such conditions only as the [1][safety controlling authority] may consider necessary for the safety of the public.

(2) An order under sub-section (1) must set forth the grounds on which it is founded.

Re-opening of a closed railway.

24. (1) When a railway has been closed under the last foregoing section, it shall not be re-opened for the public carriage of passengers until it has been inspected and its re-opening sanctioned, in accordance with the provisions of this Act.

(2) When the [1][safety controlling authority] has ordered under the last foregoing section that the use of any specified rolling-stock be discontinued, that rolling-stock shall not be used until an Inspector has reported that it is fit for use and the [1][safety controlling authority] has sanctioned its use.

(3) When the [1][safety controlling authority] has imposed under the last foregoing section any conditions with respect to the use of any railway or rolling-stock, those conditions shall be observed until they are withdrawn by the [1][safety controlling authority].

Delegation of powers under this Chapter to Inspectors.

25. (1) The [1][safety controlling authority] may, by general or special order, authorize the discharge of any of [3][its] functions under this Chapter by an Inspector, and may cancel any sanction or order given by an Inspector discharging any such function or attach thereto any condition which the [1][safety controlling authority] might have imposed if the sanction or order had been given by [4][itself].

(2) A condition imposed under sub-section (1) shall for all the purposes of this Act have the same effect as if it were attached to a sanction or order given by the [1][safety controlling authority].

CHAPTER V.

[5][TRAFFIC FACILITIES.]

[6][* * * *]

26-40. [*Relating to Railway Commissions.*] *Rep. by A. O.*, 1937.

41. Except as provided in this Act, no suit shall be instituted or proceeding

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LEG. REF.

[1] Substituted for "Governor-General in Council" by A.O., 1937.

[2] For rules, see *Gazette of India*, 1898, Pt. I, p. 159 and Genl. Stat. R. & O., Vol. III.

[3] Substituted for "his" by A.O., 1937.

[4] Substituted for "himself" by *ibid*.

[5] Substituted by Act XXXIV of 1939.

[6] Omitted by *ibid*.

NOTES.

Sec. 23 (2).—*Cf.* the Railway Regulation Act, 1842 (5 & 6 Vict., c. 55), S. 16.

Sec. 41.—*Cf.* the Railway and Canal Traffic Act, 1854 (17 & 18 Vict., c. 31), S. 6.

Bar of jurisdiction of ordinary Courts in certain matters.

taken for anything done or any omission made by a railway administration in violation or contravention of any provision of this Chapter[1] [* * * *]. [* * * *].[2]

Duty of railway administrations to arrange for receiving and forwarding traffic without unreasonable delay and without partiality.

42. (1) Every railway administration shall, according to its powers, afford all reasonable facilities for the receiving, forwarding and delivering of traffic upon and from the several railways belonging to or worked by it and for the return of rolling-stock.

(2) [3][* * * * * * *].

(3) A railway administration having or working railways which form part of a continuous line of a railway communication, or having its terminus or station within one mile of the terminus or station of another[4] railway administration, shall afford all due and reasonable facilities for receiving and forwarding by one of such railways all the traffic arriving by the other at such terminus or station, without any unreasonable delay, and without any such preference or advantage or prejudice or disadvantage [5][as is referred to in section 42-A] and so that no obstruction may be offered to the public desirous of using such railways as a continuous line of communication, and so that all reasonable accommodation may by means of such railways be at all times afforded to the public in that behalf.

(4) The facilities to be afforded under this section shall include the due and reasonable receiving, forwarding and delivering by every railway administration, at the request of any other railway administration, of through traffic to and from the railway of any other railway administration at through rates:

Provided as follows:—

(*a*) the railway administration requiring the traffic to be forwarded shall give written notice of the proposed through rate to each forwarding railway administration, stating both its amount and its apportionment and the route by which the traffic is proposed to be forwarded. The proposed through rate for animals or goods may be per truck or per maund;

(*b*) each forwarding railway administration shall, within the prescribed period after the receipt of such notice, by written notice inform the railway

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LEG. REF.

[1] Words "or of any order made thereunder by the Commissioners or by a High Court" omitted by A.O., 1937.

[2] Heading "*Traffic Facilities*" omitted by Act XXXIV of 1939.

[3] Sub-S. (2) omitted by A.O., 1937.

[4] *Cf.* the Railway and Canal Traffic Act, 1854 (17 & 18 Vict., c. 31), S. 1.

[5] Substituted for 'as aforesaid' by A.O., 1937.

NOTES.

Secs. 41 and 42.—Ordinary Courts cannot, in view of the provisions of Ss. 26 to 41 of Chapter V of the Railways Act, consider whether there has been any undue or unreasonable preference within S. 42 of that Act. 21 I.C. 499=7 S.L.R. 42; 23 Bom.L.R. 809. *See also* 42 A. 327=18 A.L.J. 254; 15 B. 537; 36 P.R. 1911=9 I.C. 1011. S. 42 applies both to the goods traffic as well as passenger traffic. 62 I.C. 1004=23 Bom.L.R. 809. It is lawful for a Railway company to reserve a compartment in a train for the use of Europeans and Anglo-Indians only. 45 M. 215=42 M.L.J. 21. *See also* 47 B. 465=24 Bom.L.R. 26. The expression "traffic" in S. 42 (2) is not restricted to conveyance of animals and goods and the fixing of charges therefor. 45 M. 215=42 M.L.J. 21. A penal provision ought to be strictly construed, and it is for the prosecution to make out that the compartment could be legally reserved in the manner it was reserved on the occasion. A reservation of this kind is apt to involve a transgression of the limitation laid down in S. 42. 42 M.L.J. 21. Where there has been an omission by a Railway Company in violation of Chap. V. of Railways Act the remedy provided for in the Act is laid down in S. 28 and S. 41 excludes the jurisdiction of the Civil Court. If an aggrieved party asks for a reference to the Railway Rates Advisory Board and obtains an opinion in his favour and thereafter files a suit for damages his suit is not maintainable. 1939 N.L.J. 124=1939 Nag. 141.

Sec. 42 (1).—*Cf.* the Railways Clauses Act, 1845 (8 and 9 Vict., c. 20), S. 90; the

administration requiring the traffic to be forwarded whether it agrees to the rate, apportionment and route, and, if it has any objection, what the grounds of the objection are;

(*c*) if at the expiration of the prescribed period no such objection has been sent by any forwarding railway administration, the rate shall come into operation at the expiration of that period;

(*d*) if an objection to the rate, apportionment or route has been sent within the prescribed period, the [1][Federal Railway Authority shall], on the request of any of the railway administrations, [2][decide the matter];

(*e*) if the objection is to the granting of the rate or to the route, the [3][Federal Railway Authority] shall consider whether the granting of the rate is a due and reasonable facility in the interests of the public, and whether, regard being had to the circumstances, the route proposed is a reasonable route, and shall allow or refuse the rate accordingly or fix such other rate as may seem to the [3][Federal Railway Authority] to be just and reasonable;

(*f*) if the objection is only to the apportionment of the rate, [4][* * * * * * *], the rate shall come into operation at the expiration of the prescribed period, but the decision of the [3][Federal Railway Authority] as to its apportionment shall be retrospective: in the case of any other objection the operation of the rate shall be suspended until the [3][Federal Railway Authority] make their order in the case;

(*g*) the [3][Federal Railway Authority] in apportioning the through rate shall take into consideration all the circumstances of the case, including any special expense incurred in respect of the construction, maintenance or working of the route or any part of the route, as well as any special charges which any railway administration is entitled to make in respect thereof;

(*h*) the [3][Federal Railway Authority] shall not in any case compel any railway administration to accept lower mileage rates than the mileage rates which the administration may for the time being legally be charging for like traffic carried by a like mode of transit on any other line of communication between the same points, being the points of departure and arrival of the through route;

(*i*) subject to the foregoing provisions of this sub-section, the [3][Federal Railway Authority] shall have full power to decide that any proposed through rate is due and reasonable notwithstanding that a less amount may be allotted to any forwarding railway administration out of the through rate than the maximum rate which the railway administration is entitled to charge, and to allow and apportion the through rate accordingly;

(*j*) the prescribed period mentioned in this sub-section shall be one month, or such longer period as the [5][Federal Railway Authority] may by general or special order prescribe.

[6][(5) The powers conferred by this section on the Federal Railway Authority shall, in relation to any dispute between two or more minor railways, be powers of the Provincial Government.]

LEG. REF.

[1] Substituted for 'Governor-General in Council may if he thinks fit' by *ibid*.

[2] Substituted for 'refer the case to the Council may if he thinks fit' by A.O., 1937.

[3] Substituted for "Commissioners" by *ibid*.

[4] The words "and the case has been referred to the Commissioners" were omitted by *ibid*.

[5] Substituted by A.O., 1937 for "Governor-General in Council".

[6] Inserted by A.O., 1937.

NOTES.

Railway and Canal Traffic Act, 1854 (17 and 18 Vict., c. 31), S. 2; and the Railway and Canal Traffic Act, 1888 (51 and 52 Vict., c. 25), S. 25.

Sec. 42 (i).—*Cf.* the Regulation of Railways Act, 1873 (36 and 37 Vict., c. 48), S. 12.

[1][42-A. (1) A railway administration shall not make or give any undue or unreasonable preference or advantage to, or in favour of, any particular person or railway administration, or any particular description of traffic in any respect whatsoever, or subject any particular person or railway administration or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Prohibition of undue preference.

(2) Any complaint that a railway administration is contravening the provisions of this section shall be determined by the general controlling authority.]

[2][42-B. (1) The Federal Railway Authority may by general or special order fix maximum and minimum rates for the whole or any part of a railway, other than a minor railway, and prescribe the conditions in which such rates will apply.

Power of the Federal Railway Authority to fix maximum and minimum rates.

(2) Any complaint that a railway administration is contravening any order issued by the Federal Railway Authority in accordance with the provisions of this section shall be determined by that Authority.]

43. (1) Whenever it is shown that a railway administration charges one trader or class of traders or the traders in any local area lower rates for the same or similar animals or goods, or lower rates for the same or similar services, than it charges to other traders or classes of traders, or to the traders in another local area, the burden of proving that such lower charge does not amount to an undue preference shall lie on the railway administration.

Undue preference in case of unequal rates for like traffic for services.

(2) In deciding whether a lower charge does or does not amount to an undue preference, the [3][general controlling authority] may, so far as [3][it] thinks reasonable, in addition to any other considerations affecting the case, take into consideration whether such lower charge is necessary for the purpose of securing, in the interests of the public, the traffic in respect of which it is made.

44. Where a railway administration is a party to an agreement for procuring the traffic of the railway to be carried on any inland water by any ferry, ship, boat or raft which does not belong to or is not hired or worked by the railway administration, the provisions of the two last foregoing sections applicable to a railway shall extend to the ferry, ship, boat or raft in so far as it is used for the purposes of the traffic of the railway.

Provision for facilities and equal treatment where ships or boats are used which are not part of a railway.

45. A railway administration may charge reasonable terminals.

Terminals.

46. [4][(1) The appropriate authority shall decide any question or dispute which may arise with respect to the terminals charged by a railway administration.]

Power of appropriate authority to fix terminals.

(2) In deciding the question or dispute, the [5][appropriate authority] shall have regard only to the expenditure reasonably necessary to provide the accom-

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LEG. REF.

[1] S. 42-A inserted by A.O., 1937.
[2] S. 42-B inserted by Act XXXIII of 1939.
[3] Substituted by A.O., 1937.
[4] Substituted by A.O., for original sub-section.
[5] Substituted by *ibid* for "Commissioner".

NOTES.

Sec. 43.—*See* 55 I.C. 342=18 A.L.J. 254.

Sec. 43 (1).—*Cf.* the Railway and Canal Traffic Act, 1888 (51 and 52 Vict., c. 25), S. 27.

Sec. 44.—*Cf.* the Railway and Canal Traffic Act, 1888 (51 and 52, Vict., c. 25), S. 25.

Sec. 46.—*See* 15 B. 537; 16 B. 434.

Sec. 46 (1).—*Cf.* the Regulation of Railways Act, 1873 (36 and 37 Vict., c. 48), S. 15.

Sec. 46 (2).—*Cf.* the Railway and Canal

modation in respect of which the terminals are charged, irrespective of the outlay which may have been actually incurred by the railway administration in providing that accommodation.

[1][(3) In this section 'the appropriate authority' means, in relation to a Federal Railway or an Indian State Railway, the Federal Railway Authority, and in relation to a minor railway, the Provincial Government.]

Decisions in accordance with this Chapter shall be binding.

[1][46-A. Any decision given by the Federal Railway Authority, the general controlling authority, or the Provincial Government, in accordance with the provisions of this Chapter, shall be final and binding on all parties concerned.]

Saving for functions of Railway Rates Committee and Railway Tribunal.

[1][46-B. The provisions of this Chapter have effect subject to the provisions of Part VIII of the Government of India Act, 1935, relating to the Railway Rates Committee and the Railway Tribunal.]

CHAPTER VI.

WORKING OF RAILWAYS.

General.

General rules.

47. (1) Every railway company and, in the case of a railway administered by the Government, an officer to be appointed by the [2][general controlling authority] in this behalf, shall make general rules[3] consistent with this Act for the following purposes, namely:—

(*a*) for regulating the mode in which, and the speed at which, rolling-stock used on the railway is to be moved or propelled;

LEG. REF.

[1] Sub-S. (3) to S. 46, Ss. 46-A and 46-B inserted by A.O., 1937.

[2] Substituted by A.O., 1937 for "Governor-General in Council".

[3] For general rules for working railways under construction, *see* Genl. Stat. R. and O., Vol. III.

NOTES.

Traffic Act, 1888 (51 and 52 Vict., c. 25, S. 24 (1).

Sec. 47.—Object of making rules under S. 47 is to regulate the traffic. 45 M. 215 =42 M.L.J. 21. Rule controlling or limiting statutory liability of railway under S. 72 is illegal. 20 A.L.J. 31=44 A. 218. A rule that the railway will not be responsible until a railway receipt is given is *ultra vires* and inconsistent with the Act. 29 N.L.R. 333=1933 N. 261. As to *gratuity rules*, see 60 C. 909=37 C.W.N. 663=1933 C. 409. A rule by a Railway Co. that the interval between the time of issue of a return ticket and the midnight of the same day shall be counted as one day is neither unreasonable nor *ultra vires*. 25 I.C. 801=8 S.L.R. 4. Rules adopted by the company though not originally prepared but which had received the sanction of the Governor-General and published in the Gazette are completely covered by S. 47, and it is unnecessary that the identity of the rules made by the company and those published should appear in the Circular or Gazette. 16 C.W.N. 360=13 I.C. 529. The rules imposed on all railways by Government by a notification do not become the rules of a particular Railway Co., till they are published in the *India Gazette* in the manner provided by S. 47. 15 C.W.N. 195=9 I.C. 331=13 C.L.J. 150. In the restricted sense that delivery had not been taken, the goods may be said to have been unclaimed, but where ownership in the goods had been asserted and directions given as to their retention, it cannot be said that the goods have been unclaimed in the general sense of the word. The powers given to the Railways by the rules must be strictly construed. 1938 A.M.L.J. 6.

Per *Ferrers, J.C.*—It appears from S. 134 that any person committing any offence against the Act or any rule thereunder shall be liable for such offence in any place in which he may be. It is clear therefore that any person not being a railway servant can be tried and punished for a breach of R. 17 made under S. 67. Per *Rupchand, A.J.C.* —There is no magic in the use of the expression "offence". It means any act or omission made punishable by the law for the time being in force. Cl. (2) of S. 47 empowers the railway to provide punishment for breach of the rules and thereby impliedly makes a breach of such rules an offence. 1935 S. 91.

Sec. 47 (1).—*Cf.* the Railways Regulation Act, 1840 (3 and 4 Vict., c. 97), Ss. 7 to 9, and the Railways Clauses Act, 1845 (8 and 9 Vict., c. 20), S. 10.

(*b*) for providing for the accommodation and convenience of passengers and regulating the carriage of their luggage;

(*c*) for declaring what shall be deemed to be, for the purposes of this Act, dangerous or offensive goods, and for regulating the carriage of such goods;

(*d*) for regulating the conditions on which the railway administration will carry passengers suffering from infectious or contagious disorders, and providing for the disinfection of carriages which have been used by such passengers;

(*e*) for regulating the conduct of the railway servants;

(*f*) for regulating the terms and conditions on which the railway administration will warehouse or retain goods at any station on behalf of the consignee or owner; and

(*g*) generally, for regulating the travelling upon, and the use, working and management of, the Railway.

NOTES.

Sec. 47 (1) (e).—For rules for the guidance of railway officials employed on lines administered by the Government, *see* Genl. Stat. R. and O., Vol. III.

Sec. 47 (1) (f).—Tariff Rule No. 464 (*v*) of N.W.Ry. is a rule passed under S. 47 (1) (*f*) and has the force of law. The rule is wide enough to include the loss due to the negligence of Railway or its servants. 17 I.C. 37=6 S.L.R. 103. So the Railway is not liable for the damage caused by the negligence of its servants after the goods had arrived for delivery. 17 I.C. 37=6 S.L.R. 103. Though a station-master is an agent of the railway, and it is within his authority to agree to carry passengers at certain rates, if he agrees to a wrong rate, it is not binding on the company. R. 23 of the Coaching Tariff Rules is a clear notice to the passengers that the Railway Company will have a right to correct any charges that may have been incorrectly made and to recover under-charges, from whatever causes arising. So where a station-master gave a wrong rate and subsequently at the time of the issue of the tickets demanded the proper rate, and it was paid by the passenger, the latter could not recover the excess which he was forced to pay. Every passenger when he makes a contract with the company, it will be implied that he does so with full notice of the conditions of the Coaching Tariff and the contract is subject to these conditions. I. L. R. (1940) All. 212=1940 A. L. J. 122=1940 All. 235. There can be no doubt that where a condition which entitles the railway company to re-classify and re-calculate and recover the difference at the place of destination exists in railway receipt, the railway company is entitled to re-classify the goods and to realize the excess freight after recalculating the rates at destination. Re-classification does not mean changing the class of goods under the heading 'class rates' but goods classed under 'schedule rate' can be re-classified under 'class rates'. 1937 A.L.J. 834=1937 All. 642. On this section, *see also* 11 C.W.N. 583. Rules under Cl. (2) do not create criminal offence); 23 A. 367; 18 B. 231; 8 W.R. 43 (Cr.); 8 I.C. 134; 16 B. 434; 15 B. 537. For rules applicable to all railways in British India regulating the terms and conditions on which railway administrations will warehouse or retain goods at any station or depot on behalf of consignee or owner. *see* Genl. Stat. R. & O., Vol. III. Refusal by consignee to take delivery owing to goods being damaged—Railway selling within six months is not legal. 49 A. 300=99 I.C. 440=1927 A. 220.

Secs. 47 (1) (f) and 72.—A "delivery to be carried by Railway" means something more than a mere depositing of goods on the Railway premises. It means some sort of acceptance by Railway. 39 B. 485=29 I.C. 545=17 Bom.L.R. 496. The commencement of the company's liability for goods delivered to be carried under S. 72 does not depend upon a receipt being granted, and must be determined on the evidence in the case. 39 B. 485. Where at the place of despatch the railway has agreed to charge by weight, it cannot at the place of destination claim to charge by measurement. That is not a claim to re-weigh or to re-measure. It is a claim to measure for the first time and to calculate in accordance with such measurement. 1933 N. 135=144 I.C. 386. *See also* 29 N.L.R. 306; 1932 A. 540 =54 A. 557; 32 Bom.L.R. 285=1930 B. 262.

Sec. 47 (1) (g).—For general rules made by the Director-General of Railways for all open lines of railway in British India administered by the Government, *see* Genl. Stat. R. & O., Vol. III. Publication is not necessary in respect of charge of rates between the maximum and minimum rates. 49 A. 300=25 A.L.J. 159=1927 A. 220.

Sec. 47 (1) (g) and (2): RULES UNDER, FOR THE HAWKING AND EXPOSURE FOR SALE OF GOODS—IF *ultra vires*—Per *Ferrers, J.C.* —A railway station is private property and it is intended for certain purposes. The rule forbidding the hawking and exposure for sale of goods on any station or platform comes within S. 47 (1) (*g*), and anybody

(2) The rules may provide that any person committing a breach of any of them shall be punished with fine which may extend to any sum not exceeding fifty rupees, and that in the case of a rule made under clause (*e*) of sub-section (1), the railway servant shall forfeit a sum not exceeding one month's pay, which sum may be deducted by the railway administration from his pay.

(3) A rule made under this section shall not take effect until it has received the sanction of the [1][general controlling authority and the safety controlling authority] and been published in the Official Gazette:

Provided that,

[2][(*a*) where the safety controlling authority is not the same as the general controlling authority, the safety controlling authority shall not refuse its sanction unless it appears to it to be necessary so to do for the purpose of securing safety; and]

(*b*) where the rule is in the terms of a rule which has already been published at length in the Official Gazette, a notification in that Gazette, referring to the rule already published and announcing the adoption thereof, shall be deemed a publication of a rule in the Official Gazette within the meaning of this sub-section.

(4) [3][The safety controlling authority or, with the sanction of that authority, the general controlling authority, may cancel any rule made under this section, and the company or officer required by sub-section (1) to make rules thereunder may at any time, with the previous sanction of those authorities, rescind or vary any such rule:

Provided that where the safety controlling authority is not the same as the general controlling authority, the safety controlling authority shall not cancel any rule or refuse its sanction to the cancellation, rescinding or variation of any rule, unless it appears to it to be necessary so to do for the purpose of securing safety.]

LEG. REF.

[1] Substituted by A.O., 1937 for "Governor-General in Council".
[2] Inserted by A.O., 1937.
[3] Substituted by the A.O., 1937.

NOTES.

infringing the rules made thereunder is liable to be punished, for the words "any person" used in Cl. (2) cannot be taken to be used for the restricted class of railway servants but to the public in general also. Per *Rupchand, A.J.C.*—S. 47 authorizes the framing of rules in respect of different objects and these are enumerated in Cls. (*a*) to (*g*). A bare reading of the clauses makes it abundantly clear that except Cl. (*e*) the other clauses contemplate rules being made not only for the guidance of railway employees but also for the guidance of the public. And such rules are not *ultra vires* the section. The expression used in Cl. (2), "any person", means any person whether he be employed in the railway or not. 1935 S. 91.

Cf. the Railways Clauses Act, 1863 (26 and 27 Vict., c. 92), S. 32.

Sec. 47 (2).—*Cf.* the Canadian Railway Act, 1886 (49 Vict., c. 109), S. 86.

Secs. 47 and 54.—The Railway Co. cannot avoid or unduly restrict its liability under the Railways Act by framing its own rules for the purpose. If any such rules are framed and it is found that they are unreasonable and inconsistent with the Act, such rules will be declared to be *ultra vires* and not binding on those who have to deal with the Rail. Co. *Held*, that R. 27 (*a*) of the B. & N.W. Rail. Co., defining its liability as bailee was *ultra vires* and void. 8 P. 808=117 I.C. 311=1929 P. 296. In any case the question as to whether the goods have been actually delivered to the Railway Co. or not is a question of fact which is to be proved by evidence in each case. The general rule is that, if there is something to show that the consignor has done all that is possible for him to put the goods in the possession of the Railway Co., that there is nothing left for him to be done in that connection and there is clear evidence, direct or circumstantial that the Rail. Co. has accepted the custody of the goods, the liability of the Rail. Co., as a bailee will begin to operate. It may be that the acceptance of the consignment notes will in certain cases be considered to be some evidence of the acceptance of goods, but it cannot be held that it must necessarily in all cases be treated as equivalent to the acceptance of the goods. 1939 Pat. 296=8 P. 808.

(5) Every rule purporting to have been made for any railway under section 8 of the Indian Railways Act, 1879,[1] and appearing from the Official Gazette to be intended to apply to the railway at the commencement of this Act, shall notwithstanding any irregularity in the making or publication of the rule, be deemed to have been made and to have taken effect under this section.

(6) Every railway administration shall keep at each station on its railway a copy of the general rules for the time being in force under this section on the railway, and shall allow any person to inspect it free of charge at all reasonable times.

Disposal of differences between railways regarding conduct of joint traffic.

48. Where two or more railway administrations whose railways have a common terminus or a portion of the same line of rails in common, or form separate portions of one continued line of railway communication, are not able to agree upon arrangements for conducting at such common terminus, or at the point of junction between them, their joint traffic with safety to the public, the [2][safety cotrolling authority] upon the application of either or any of the administrations, may decide the matters in dispute between them, so far as those matters relate to the safety of the public, and may determine whether the whole or what proportion of the expenses attending on such arrangements shall be borne by either or any of the administrations respectively.

Agreements with [4][any general controling authority] for construction or release of rolling-stock.

49. Any railway company, not being a company for which the [3]Statute 42 and 43 Vict., Chap. 41 provides, may from time to time make and carry into effect agreements with [2][any general controlling authority] for the construction of rolling-stock, plant or machinery used on, or in connection with railways or for leasing or taking on lease any rolling-stock, plant, machinery or equipments required for use on a railway, or for the maintenance of rolling-stock.

Powers of railway companies to enter into working agreements.

50. Any railway company, not being a company for which the Statute 42 and 43 Vict., Chap. 41 provides, may from time to time make with the [2][Federal Railway Authority] and carry into effect, or, with the sanction of the [2][Federal Railway Authority] make with any other railway administration, and carry into effect, any agreement[4] with respect to any of the following purposes, namely,:—

(*a*) the working, use, management and maintenance of any railway;

(*b*) the supply of rolling-stock and machinery necessary for any of the purposes mentioned in clause (*a*) and of officers and servants for the conduct of the traffic of the railway;

(*c*) the payments to be made and the conditions to be performed with respect to such working, use, management and maintenance;

(*d*) the interchange, accommodation and conveyance of traffic being on, coming from or intended for, the respective railways of the contracting parties,

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LEG. REF.

[1] Repealed by this Act.

[2] Substituted for 'Governor-General in Council' by A.O., 1937.

[3] The Indian Guaranteed Railways Act, 1879, Coll. Stats. Ind., Vol. I.

[4] For instance of such agreement, *see* Mad. R. & O., Vol. I.

NOTES.

Secs. 48.—*Cf.* the Railways Regulation Act, 1842 (5 & 6 Vict., c. 55), S. 11, and the Railways Clauses Act, 1863 (26 & 27 Vict., c. 92), S. 9.

Sec. 49.—*Cf.* the Indian Guaranteed Railways Act, 1879 (42 & 43 Vict., c. 4), S. 4 (*d*).

Sec. 50.—*Cf.* the Indian Guaranteed Railways Act, 1879 (42 & 43 Vict., c. 41), S. 2; the Railways Clauses Act, 1845 (8 & 9 Vict., c. 20), S. 87; the Railways (Sales and Leases) Act, 1845 (8 & 9 Vict., c. 96); and the Railways Clauses Act, 1863 (26 & 27 Vict., c. 92), S. 22.

and the fixing, collecting, apportionment and appropriation of the revenues arising from that traffic;

(*e*) generally, the giving effect to any such provisions or stipulations with respect to any of the purposes hereinbefore in this section mentioned as the contracting parties may think fit and mutually agree on:

Provided that the agreement shall not affect any of the rates which the railway administrations, parties thereto, are, from time to time, respectively authorized to demand and receive from any person and that every person shall, notwithstanding the agreement, be entitled to the use and benefit of the railways of any railway administrations, parties to the agreement, on the same terms and conditions, and on payment of the same rates, as he would be if the agreement had not been entered into.

Establishment of ferries and roadways for accommodation of traffic.

51. Any railway company, not being a company for which the Statute 42 and 43 Vict., Chap. 41,[1] provides, may from time to time exercise with the sanction of the [2][general controlling authority] all or any of the following powers, namely:—

(*a*) it may establish, for the accommodation of the traffic of its railway, any ferry equipped with machinery and plant of good quality and adequate in quantity to work the ferry;

(*b*) it may work for purposes other than the accommodation of the traffic of the railway any ferry established by it under this section;

(*c*) it may provide and maintain on any of its bridges, roadways for foot-passengers, cattle, carriages, carts or other traffic;

(*d*) it may construct and maintain roads for the accommodation of traffic passing to or from its railway;

(*e*) it may provide and maintain any means of transport which may be required for the reasonable convenience of passengers, animals or goods carried or to be carried on its railway;

(*f*) it may charge tolls on the traffic using such ferries, roadways, roads or means of transport as it may provide under this section, according to tariffs to be arranged from time to time with the sanction of the [2][Provincial Government].

Additional power to provide and maintain transport services.

[3][51-A. (1) Any railway company, not being a company for which the Statute 42 and 43 Vic., Chap. 41, provides, may frame a scheme for the provision and maintenance of a motor transport or air-craft service for passengers, animals or goods with a terminus at or near a station on the railway owned or managed by such company.

[4][(2) The scheme shall be submitted to the General controlling authority, which may sanction it, subject to such modifications and conditions as it may prescribe.]

(3) The scheme shall be published in the Official Gazette and thereupon the railway company shall, subject to sub-section (4), have the power to provide and maintain a service in accordance therewith.

(4) In respect of any service provided and maintained by any railway company under this section,—

LEG. REF.

[1] The Indian Guaranteed Railways Act, 1879. Coll. Stats. Ind., Vol. I.

[2] Substituted for 'Governor-General in Council' A.O., 1937.

[3] Newly inserted by Act XIX of 1933.

[4] New sub-S. (2) substituted by A.O., 1937.

NOTES.

Sec. 51.—*Cf.* the Indian Guaranteed Railways Act, 1879 (42 & 43 Vict., c. 41), S. 4.

Sec. 51 (f).—Tranship charges are terminals within the meaning of S. 3 (14) and not tolls for using a ferry under S. 51 (*f*) and therefore a Civil Court has no jurisdiction to entertain a claim relating to such

(*a*) the company shall be deemed not to be a railway administration for the purposes of this Act or of any other enactment affecting railways, and no property used exclusively for purposes of the service shall be deemed to be included in the railway or its rolling-stock; and

(*b*) all enactments and rules for the time being in force relating to motor vehicles, air-craft and roads shall apply accordingly.

(5) The [1][general controlling authority] may, by notification in the Official Gazette, after giving to the railway company six months' notice of [2][its] intention so to do, withdraw [2][its] sanction to any scheme sanctioned under sub-section (2) or may modify the scheme or impose further conditions on it.]

Returns.

52. Every railway administration shall, in forms to be prescribed by the [3][general controlling authority], prepare, half-yearly or at such intervals as the [3][general controlling authority] may prescribe, such returns of its capital and revenue transactions and of its traffic as the [3][general controlling authority] may require, and shall forward a copy of such returns to the [3][general controlling authority] at such times as [4][it] may direct.

Carriage of Property.

Maximum load for wagons.

53. (1) Every railway administration shall determine the maximum load for every wagon or truck in its possession, and shall exhibit the words or figures representing the load so determined in a conspicuous manner on the outside of every such wagon or truck.

(2) Every person owning a wagon or truck which passes over a railway shall similarly determine and exhibit the maximum load for the wagon or truck.

(3) The gross weight of any such wagon or truck bearing on the axles when the wagon or truck is loaded to such maximum load shall not exceed such limit as may be fixed by the [3][safety controlling authority] for the class of axle under the wagon or truck.

54. (1) Subject to the control of the [3][Federal Railway Authority], a

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LEG. REF.

[1] Substituted for "Governor-General in Council after consultation with the Local Government or Local Governments concerned" by A.O., 1937.

[2] Substituted for "his" by *ibid*.

[3] Substituted for "Governor-General in Council" by *ibid*.

[4] Substituted for "he" by *ibid*.

NOTES.

charges. 28 N.L.R. 27=137 I.C. 159=1932 N. 53.

Sec. 52.—*Cf*. the Railway Regulation Act 1840 (3 & 4 Vict., c. 97), S. 3; the Regulation of Railways Act, 1868 (31 & 32 Vict., c. 119), Ss. 3 and 4; and the Regulation of Railways Act, 1871 (34 & 35 Vict., c. 78), Ss. 9 and 10.

Sec. 53 (1).—*Cf*. the Railway Regulation Act, 1842 (5 & 6 Vict., c. 55), S. 16. Where a railway entered into a contract at the place of despatch to charge freight on two chairs by weight, it is not justified in charging freight by measurement at the place of destination, notwithstanding R. 127 of the Guide and Coaching Tariff which provides that "parcels will be charged by weight or by measurement, whichever gives the greater charge", R. 23 which reserves the right to the railway to correct any charges provided that the "Railway have the right of re-measurement, re-weighment, re-classification and re-calculation of rates, etc." Once having entered into a contract to charge by weight, it cannot subsequently claim to charge by measurement. It is not a claim to re-weigh or re-measure. It is a claim to measure for the first time and to calculate in accordance with such measurement, and that cannot be permitted. 29 N.L.R. 306. Where in respect of a consignment of firewood, the railway receipt was given charging the goods at the despatching station at maund rates, the railway is not entitled to charge subsequently at wagon rates, even though larger wagons may have been used for the purpose. 1933 A.L.J. 1180.

Sec. 54.—*See* 31 C. 951=8 C.W.N. 725; 20 A.L.J. 31=44 A. 218; 76 P.R. 1908; 1 S.L.R. 77. The proper test for determining as to whether a particular rule made by a railway administration is or is not valid is to see whether the rule is a reasonable one and is not inconsistent with the Indian Railways Act. There is nothing in the Act that prohibits a railway administration from insisting upon a particular mode of having

Power for railway administrations to impose conditions for working traffic.

railway administration may impose conditions, not inconsistent with this Act or with any general rule thereunder, with respect to the receiving, forwarding or delivering of any animals or goods.

(2) The railway administration shall keep at each station on its railway a copy of the conditions for the time being in force under sub-section (1) at the station, and shall allow any person to inspect it free of charge at all reasonable times.

(3) A railway administration shall not be bound to carry any animal suffering from any infectious or contagious disorder.

Lien for rates, terminals and other charges.

55. (1) If a person fails to pay on demand made by or on behalf of a railway administration any rate, terminal or other charge due from him in respect of any animals or goods, the railway administration may detain the whole or any of the animals or goods or, if they have been removed from the railway, any other animals or goods of such person then being in or thereafter coming into its possession.

(2) When any animals or goods have been detained under sub-section (1), the railway administration may sell by public auction, in the case of perishable goods at once, and in the case of other goods or of animals on the expiration of at least fifteen days' notice of the intended auction, published[1] in one or more of the local newspapers, or where there are no such newspapers, in such manner as the [2][Federal Railway Authority] may prescribe, sufficient of such animals or goods to produce a sum equal to the charge, and all expenses of such detention, notice and sale, including, in the case of animals, the expenses of the feeding, watering and tending thereof.

(3) Out of the proceeds of the sale, the railway administration may retain a sum equal to the charge and the expenses aforesaid, rendering the surplus, if any, of the proceeds, and such of the animals or goods (if any) as remain unsold, to the person entitled thereto.

LEG. REF.

[1] For mode of publishing notices on auction sales in places where there are no local newspapers in Bombay, see *Bombay Government Gazette*, 1885, Pt. I, p. 1320.

[2] Substituted for 'Governor-General in Council' by A.O., 1937.

NOTES.

their consignments despatched at its own risk. 100 I.C. 571=26 A.L.J. 801=1927 A. 400. Where the right of "re-measurement, re-weighment, re-classification and re-calculation of the rates" is reserved by the Rail. Co., in the railway receipt, the railway has the right to re-classify and re-calculate rates and charge an additional sum of money. 1929 A. 848. But *see* 1933 N. 135. *See also* 29 N.L.R. 333=1933 N. 261.

Sec. 55.—*Cf.* the Railway Clauses Act 1845 (8 and 9, Vict., c. 20), S. 97. *See* 23 A. L. J. 398; 1924 P. 39; 11 A. L. J. 335. Claim not specified—Notice not invalid. 8 L. 24=28 Punj. L. R. 449. A refusal to allow re-weighment is not a refusal to give delivery. If under the contract of carriage, the Railway Co. were entitled to have the goods re-weighed and the finding is that they did re-weigh and demand (as they were entitled to do under S. 55) the freight due on the weight so calculated by them (which was in excess of that noted at the place of booking), the mere fact that the Rail. Co. refused to comply with the request of the plaintiffs to have the goods re-weighed in their presence does not amount to a refusal to deliver and does not render the Rail. Co. liable in damages for non-delivery. 139 I.C. 802=55 C.L.J. 603=1932 C. 877. Agreement for lower rate—Loading on consignor's liability—Subsequent unloading because of overloading—No right to demand higher rate on re-loading. 4 A.W.R. 588=1934 A. 952. Re-weighment of goods—Failure—Damages—Refund of overcharge. 100 I.C. 406=1927 N. 77.

"LOCAL"—MEANING OF.—The words "local" in S. 55 (2) means papers of place where the sale is to be held, and the provision is intended to give notice of the sale to persons of the locality who are likely to attend the purchase. 1935 A. 601. "Local newspaper" means a newspaper which is issued from the locality and not a newspaper which may be read at the place. 53 A. 595=1931 A.L.J. 335=1931 A. 337. Where the formalities prescribed by the Act for conducting sale of goods detained are not observed, the Rail. Co. would be liable in tort. 151 I.C. 995=1934 P. 507.

NOTICE OF AUCTION—CONTENTS.—The ob-

(4) If a person on whom a demand for any rate, terminal or other charge due from him has been made fails to remove from the railway within a reasonable time any animals or goods which have been detained under sub-section (1) or any animals or goods which have remained unsold after a sale under sub-section (2), the railway administration may sell the whole of them and dispose of the proceeds of the sale as nearly as may be under the provisions of sub-section (3).

(5) Notwithstanding anything in the foregoing sub-sections, the railway administration may recover by suit any such rate, terminal or other charge as aforesaid or balance thereof.

56. (1) When any animals or goods have come into the possession of a

NOTES.

ject of a public notice of auction under S. 55 and the provision that the notice is to be inserted in local newspapers is an indication that it was the intention of the legislature that the local public shall be informed of a particular auction in order that persons may be attracted to bid at the auction. In order to attract bidders to the auction, the notice should contain adequate materials so that possible bidders may be informed of the class of the goods and the time and place where the sale is to be held. A notice that does not state when the sales would take place or the nature of the goods or the places at which they would be sold or the condition of the goods or indeed any particulars which would be calculated to attract purchasers to the sale is not "notice of the intended sale" as prescribed by S. 55. 151 I.C. 995=1934 P. 507.

Sec. 55 (5).—The Railway Co. received several consignments and delivered the same to the consignee at certain rates. It appeared, however, that, owing to a mistake in calculation, a lower rate of freight had been levied and on discovery of the same by the Railway Auditor, the under-charge was sought to be recovered from the consignor and consignee. The suit was held to be time-barred as against the consignee. *Held*, that the consignors were justified in believing that the rate charged was correct and in acting on such a belief, and that under the particular circumstances, the Rail. Co. had by their conduct deprived themselves of any right to obtain redress as against the consignors. 131 I.C. 749=32 P.L.R. 397=1931 L. 511. The words *"for traffic to"* constitute a phrase which is current in railway parlance to indicate that the rates are for carriage to a junction whence the goods will be transferred to a foreign line. Where a Railway Co. quotes rates for carriage of goods from a certain station on the line of that company to another junction station on that line, for traffic to a station on the foreign line, the rate so quoted is for carriage of goods from the station of dispatch to the junction station and does not include the rate chargeable from the junction station to the station of destination on the foreign line. 1932 N. 180.

Secs. 55 and 56: NOTICE OF PROPOSED SALE BY PUBLIC AUCTION—SUFFICIENCY—ESSENTIALS.—A notice of an intention to sell at a public auction cannot be sufficient or effective, unless it specifies the time and place of the proposed public auction, the nature of the goods intended to be sold and all other particulars necessary to enable the members of the public to appreciate what it is which it is intended to put up for sale at the public auction. 65 I.A. 21=47 L. W. 78=40 Bom.L.R. 285=42 C.W.N. 225 =66 C.L.J. 476=1938 P.C. 12=(1938) 1 M.L.J. 83 (P.C.).

"PUBLIC AUCTION"—MEANING.—The words "public auction" in Ss. 55 and 56 must bear the meaning which is ordinarily given to them in the English language. The words mean a public sale at which each bidder offers an increase upon the price offered by the preceding bidder, the article put up being sold to the highest bidder. This involves the auction being held in public, all members of the public having a right to attend, and a valuable element being the competition between the persons who are openly bidding for the subject-matter of the sale. This is of importance not only to the Railway Company but also to the owner of the goods, the competition being calculated to produce the highest price. Where notice of the intended sale of coal was given by Railway Company by proclamation and notice on the board at the station and some offers were sent to the station master which were forwarded by him to the superior officer who directed him to accept the offer which was in fact the highest. *Held*, there was no public auction in the ordinary meaning of the words: there was no sale in public, there was no opportunity for competitive bidding: in fact, what was done bore no resemblance to a "public auction". The Railway Company did not sell the coal in the manner prescribed by the sections, and therefore could not rely on the protection given by the Railways Act. 65 I.A. 21=47 L.W. 78=66 C.L.J. 476= 40 Bom.L.R. 285=42 C.W.N. 225=1938 P.C. 12=(1938) 1 M.L.J. 83 (P.C.).

Sec. 56.—Art. 62 of the Limitation Act governs a suit to recover surplus proceeds of sale held by the Rail. Co., under S. 56, as the proceeds are received for plaintiff's use. 44 M. 823=41 M.L.J. 205. On this

Disposal of unclaimed things on a railway.

railway administration for carriage or otherwise and are not claimed by the owner or other person appearing to the railway administration to be entitled thereto, the railway administration shall, if such owner or person is known, cause a notice to be served upon him, requiring him to remove the animals or goods.

(2) If such owner or person is not known, or the notice cannot be served upon him, or he does not comply with the requisition in the notice, the railway administration may, within a reasonable time, subject to the provisions of any other enactment for the time being in force, sell the animals or goods as nearly as may be under the provisions of the last foregoing section, rendering the surplus, if any, of the proceeds of the sale to any person entitled thereto.

Power for railway administrations to require indemnity on delivery of goods in certain cases.

57. Where any animals, goods or sale-proceeds in the possession of a railway administration are claimed by two or more persons, or the ticket or receipt given for the animals or goods is not forthcoming, the railway administration may withhold delivery of the animals, goods or sale proceeds until the person entitled in its opinion to receive them has given an indemnity, to the satisfaction of the railway administration, against the claims of any other person with respect to the animals, goods or sale-proceeds.

Requisitions for written accounts of description of goods.

58. (1) The owner or person having charge of any goods which are brought upon a railway for the purpose of being carried thereon, and the consignee of any goods which have been carried on a railway, shall, on the request of any railway servant appointed in this behalf by the railway administration, deliver to such servant an account in writing signed by such owner or person, or by such consignee, as the case may be, and containing such a description of the goods as may be sufficient to determine the rate which the railway administration is entitled to charge in respect thereof.

NOTES.

section, *see also* 1 P. 15; 14 B. 57; 3 Bom. L.R. 260; 1921 M.W.N. 422.

Sec. 56 (2): SALE UNDER—14 DAYS' NOTICE —SUFFICIENCY.—The words 'as nearly as may be' in S. 56 imply that the terms of S. 55 are not to be rigidly applied in a sale under S. 56. *Held*, that the notice of fourteen days was a sufficient notice for a sale under S. 56. 1935 A. 601.

Secs. 56 and 72.—A Rail. Co. has power to detain goods consigned, for recovery of some other amount other than that due by the consignor on that consignment. This is not so with an ordinary bailee. 19 I.C. 370 =11 A.L.J. 335.

Secs. 56 and 80.—A consignee has no right to demand that the goods shall be opened and inspected on the railway premises before he can be called upon to take delivery. 20 A.L.J. 761=44 A. 76.

Sec. 57.—A station-master is not competent to deliver goods unless the railway receipt is produced. But demurrage cannot be charged for the period taken in enquiring as to the identity of the person entitled to delivery. 63 I.C. 256=2 Pat.L.T. 523. The rule that upon a consignor informing a carrier that he is an unpaid vendor and requesting him to stop the goods in transit, the latter is bound to do so, is modified by S. 57, which gives to the railway administration the right to ignore the notice and to make delivery to the consignee of goods. A railway administration may accept notice from the consignor of goods to stop the goods delivered in transit, or it may act under S. 57, in which case there is no stoppage in transit as defined in the Contract Act, S. 99. But if the railway administration fails to act under the provisions of the Contract Act in giving effect to the notice of stoppage in transit and likewise fail to act under the special provisions of S. 57, they will have to take the consequences upon themselves and are not entitled to claim any demurrage from the consignee. 118 I.C. 748=1929 S. 220.

Sec. 58.—*See* 36 P.R. 1885 (Cr.); 21 W.R. 380. 'Account' and 'description' referred to in this section, mean the same thing as 'declaration' made for purposes of S. 75. If 'account' or 'description' be false materially, S. 78 will become applicable. 15 P. 394=17 Pat.L.T. 268=163 I.C. 685= 1936 P. 393. Rail. Co. is entitled to re-classify the goods, and cancel concession rates and demand excess charge if the fixing of original rates was due to false declaration of the consignor. 45 L.W. 262=(1937) 1 M. L.J. 341; or if it is due to mistake of Railway clerk. 1937 A.L.J. 344=1937 A. 400.

(2) If such owner, person or consignee refuses or neglects to give such an account, and refuses to open the parcel or package containing the goods in order that their description may be ascertained, the railway administration may,

(*a*) in respect of goods which have been brought for the purpose of being carried on the railway, refuse to carry the goods unless in respect thereof a rate is paid not exceeding the highest rate which may be in force at the time on the railway for any class of goods or, (*b*) in respect of goods which have been carried on the railway, charge a rate not exceeding such highest rate.

(3) If an account delivered under sub-section (1) is materially false with respect to the description of any goods to which it purports to relate, and which have been carried on the railway, the railway administration may charge in respect of the carriage of the goods a rate not exceeding double the highest rate which may be in force at the time on the railway for any class of goods.

(4) If any difference arises between a railway servant and the owner or person having charge, or the consignee, of any goods which have been brought to be carried or have been carried on a railway, respecting the description of goods of which an account has been delivered under this section, the railway servant may detain and examine the goods.

(5) If it appears from the examination that the description of the goods is different from that stated in an account delivered under sub-section (1), the person who delivered the account, or, if that person is not the owner of the goods, then that person and the owner jointly and severally, shall be liable to pay to the railway administration the cost of the detention and examination of the goods, and the railway administration shall be exonerated from all responsibility for any loss which may have been caused by the detention or examination thereof.

(6) If it appears that the description of the goods is not different from that stated in an account delivered under sub-section (1), the railway administration shall pay the cost of the detention and examination, and be responsible to the owner of the goods for any such loss as aforesaid.

Dangerous or offensive goods.

59. (1) No person shall be entitled to take with him, or to require a railway administration to carry, any dangerous or offensive goods upon a railway.

(2) No person shall take any such goods with him upon a railway without giving notice of their nature to the station-master or other railway servant in charge of the place where he brings the goods upon the railway, or shall tender or deliver any such goods for carriage upon a railway without distinctly marking their nature on the outside of the package containing them or otherwise giving notice in writing of their nature to the railway servant to whom he tenders or delivers them.

(3) Any railway servant may refuse to receive such goods for carriage, and, when such goods have been so received without such notice as is mentioned in [1][sub-section (2)] having to his knowledge been given, may refuse to carry them or may stop their transit.

(4) If any railway servant has reason to believe any such goods to be contained in a package with respect to the contents whereof such notice as is mentioned in sub-section (2) has not to his knowledge been given, he may cause the package to be opened for the purpose of ascertaining its contents.

LEG. REF.

[1] Substituted for "sub-S. (1)" by the Indian Railway Act (1890) Amendment Act (IX of 1896), S. 3.

NOTES.

Sec. 58 (4).—*Cf.* the Railways Clauses Act, 1845 (8 & 9 Vict., c. 20), S. 101.

Secs. 58, 75 and 78.—*See* 1936 Pat. 393 =15 Pat. 394=17 Pat.L.T. 268.

Sec. 59.—*See* 1 A. 60 (F.B.).

(5) Nothing in this section shall be construed to derogate from the Indian Explosives Act, 1884, or any rule under that Act, and nothing in sub-sections (1), (3) and (4) shall be construed to apply to any goods tendered or delivered for carriage by order or on behalf of the Government or to any goods which an officer, soldier, sailor, [1][airman] or police-officer or [2][a member of the Indian Territorial Force, or of the Auxiliary Force, India] may take with him upon a railway in the course of his employment or duty as such.

Exhibition to the public of authority for quoted rates.

60. At every station at which a railway administration quotes a rate to any other station for the carriage of traffic other than passengers and their luggage, the railway servant appointed by the administration to quote the rate shall, at the request of any person, show to him at all reasonable times, and without payment of any fee, the rate books or other documents in which the rate is authorized by the administration or administrations concerned.

Requisitions on railway administrations for details of gross charges.

61. (1) Where any charge is made by and paid to a railway administration in respect of the carriage of goods over its railway, the administration shall, on the application of the person by whom or on whose behalf the charge has been paid, render to the applicant an account showing how much of the charge comes under each of the following heads, namely:—

(*a*) the carriage of the goods on the railway;
(*b*) terminals;
(*c*) demurrage; and
(*d*) collection, delivery and other expenses;

but without particularising the several items of which the charge under each head consists.

(2) The application under sub-section (1) must be in writing and be made to the railway administration within one month after the date of the payment of the charge by or on behalf of the applicant, and the account must be rendered by the administration within two months after the receipt of the application.

Carriage of Passengers.

Communication between passengers and railway servants in charge of trains.

62. The [3][safety controlling authority] may require any railway administration to provide and maintain in proper order, in any train worked by it which carries passengers, such efficient means of communication between the passengers and the railway servants in charge of the train as the [3][safety controlling authority] has approved.

Maximum number of passengers for each compartment.

63. Every railway administration shall fix, subject to the approval of the [3][general controlling authority] the maximum number of passengers which may be carried in each compartment of every description of carriage, and shall exhibit the number so fixed in a conspicuous manner

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LEG. REF.

[1] Inserted by Act X of 1927, S. 2 and Sch. I.

[2] Substituted for the words "a person enrolled as a volunteer under the Indian Volunteers Act, 1869" by Act XI of 1923, S. 2 and Sch. I.

[3] Substituted for 'Governor-General in Council' by A.O., 1937.

NOTES.

Sec. 60.—*Cf.* the Regulation of Railways Act, 1873 (36 & 37, Vict., c. 48), S. 14; and the Railway and Canal Traffic Act, 1888 (51 & 52 Vict., c. 25), S. 33.

Sec. 61.—*Cf.* the Regulation of Railways Act, 1868 (31 & 32 Vict., c. 119), S. 17.

Sec. 61 (1) (d).—*Cf.* the Regulation of Railways Act, 1873 (36 & 37 Vict., c. 48), S. 14.

Sec. 62.—*Cf.* the Regulation of Railways Act, 1868 (31 & 32 Vict., c. 119), S. 22.

Sec. 63.—Pulling the chain—Overcrowding—No reasonable and sufficient cause. 1 P. 264=3 Pat.L.T. 195. *See also* 24 B. 293.

inside or outside each compartment, in English or in one or more of the vernacular languages in common use in the territory traversed by the railway, or both in English and in one or more of such vernacular languages as the [1][general controlling authority] after consultation with the railway administration, may determine.

Reservation of compartments for females.

64. (1) On and after the first day of January, 1891, every railway administration shall, in every train carrying passengers, reserve for the exclusive use of females one compartment at least of the lowest class of carriage forming part of the train.

(2) One such compartment so reserved shall, if the train is to run for a distance exceeding fifty miles, be provided with a closet.

Exhibition of time-tables and tables of fares at stations.

65. Every railway administration shall cause to be posted in a conspicuous and accessible place at every station on its railway, in English and in a vernacular language in common use in the territory where the station is situate, a copy of the time-tables for the time being in force on the railway, and lists of the fares chargeable for travelling from the station where the lists are posted to every place for which card-tickets are ordinarily issued to passengers at that station.

Supply of tickets on payment of fares.

66. (1) Every person desirous of travelling on a railway shall, upon payment of his fare, be supplied with a ticket, specifying the class of carriage for which, and the place from, and the place to which, the fare has been paid, and the amount of the fare.

(2) The matters required by sub-section (1) to be specified on a ticket shall be set forth—

(*a*) if the class of carriage to be specified thereon is the lowest class, then in a vernacular language in common use in the territory traversed by the railway, and

(*b*) if the class of carriage to be so specified is any other than the lowest class, then in English.

Provision for case in which tickets have been issued for trains not having room available for additional passengers.

67. (1) Fares shall be deemed to be accepted, and tickets to be issued, subject to the condition of there being room available in the train for which the tickets are issued.

(2) A person to whom a ticket has been issued and for whom there is not room available in the train for which the ticket was issued shall on returning the ticket within three hours after the departure of the train be entitled to have his fare at once refunded.

(3) A person for whom there is not room available in the class of carriage for which he has purchased a ticket and who is obliged to travel in a carriage of a lower class shall be entitled on delivering up his ticket to a refund of the difference between the fare paid by him and the fare payable for the class of carriage in which he travelled.

LEG. REF.

[1] Substituted for "Governor-General in Council" by A.O., 1937.

NOTES.

Secs. 66 and 68.—Under R. 29, a Railway Administration has the right to exclude from platforms any person not having business on the Railway premises, such rignt is P.R. 1911=9 I.C. 1011. On this section, not repugnant to S. 66 or 68 of the Act. 36 *see also* 12 C. 192; 1 B. 52.

Sec. 67:—S. 67 not only operates in cases where there are second class compartments but there is no room in those compartments, but also in cases where there are no second class compartments at all. 8 Pat.L.T. 676 =103 I.C. 316=1927 P. 352.

Prohibition against travelling without pass or ticket.

[1][68. (1)] No person shall, without the permission of a railway servant, enter [1][or remain in] any carriage on a railway for the purpose of travelling therein as a passenger unless he has with him a proper pass or ticket.

[1][(2) A railway servant when granting the permission referred to in sub-section (1) shall ordinarily, if empowered in this behalf by the railway administration, grant to the passenger a certificate that the passenger has been permitted to travel in such carriage upon condition that he subsequently pays the fare payable for the distance to be travelled.]

Exhibition and surrender of passes and tickets.

69. Every passenger by railway shall, on the requisition of any railway servant appointed by the railway administration in this behalf, present his pass or ticket to the railway servant for examination, and at or near the end of the journey for which the pass or ticket was issued, or, in the case of a season pass or ticket, at the expiration of the period for which it is current, deliver up the pass or ticket to the railway servant.

Return and season tickets,

70. A return ticket or season ticket shall not be transferable and may be used only by the person for whose journey to and from the places specified thereon it was issued.

Power to refuse to carry persons suffering from infectious or contagious disorder.

71. (1) A railway administration may refuse to carry, except in accordance with the conditions prescribed under section 47, sub-section (1), clause (*d*), a person suffering from any infectious or contagious disorder.

(2) A person suffering from such a disorder shall not enter or travel upon a railway without the special permission of the station-master or other railway servant in charge of the place where he enters upon the railway.

(3) A railway servant giving such permission as is mentioned in sub-section (2) must arrange for the separation of the person suffering from the disorder from other persons being or travelling upon the railway.

[2][CHAPTER VI-A.]

LIMITATION OF EMPLOYMENT OF RAILWAY SERVANTS.

Definitions.

71-A. In this Chapter, unless there is anything repugnant in the subject or context,—

(*a*) the employment of a railway servant is said to be 'essentially intermittent' when it has been declared to be so by the authority empowered in this behalf on the ground that it involves long periods of inaction, during which the railway servant is on duty but is not called upon to display either physical activity or sustained attention; and

(*b*) except in section 71-B, a 'railway servant' means a railway servant to whom this Chapter applies.

Application of Chapter VI-A.

71-B. This Chapter applies only to such railway servants or classes of railway servants as the Central Government may, by rules made under section 71-E, prescribe.

LEG. REF.

[1] Substituted and added by Act VI of 1941.

[2] Chapter VI-A was inserted by Act XIV of 1930.

NOTES.

Secs. 68 and 69.—It is not a criminal offence to travel in a train without a pass or ticket, when there is no intent to defraud the Company but a person so travelling is liable under S. 113 to pay on demand an excess charge in the nature of a penalty. 25 C.L.J. 610=44 C. 279. *See also* 9 C.P.L.R. 1; 35 I.C. 665; 13 M. 34; 12 C. 142.

Limitation of hours of work.

71-C. (1) A railway servant, other than a railway servant whose employment is essentially intermittent, shall not be employed for more than sixty hours a week on the average in any month.

(2) A railway servant, whose employment is essentially intermittent, shall not be employed for more than eighty-four hours in any week.

(3) Subject to rules made under section 71-E, temporary exemptions of railway servants from the provisions of sub-section (1) and sub-section (2) may be made—

(*a*) when such temporary exemptions are necessary to avoid serious interference with the ordinary working of the railway, in cases of accident, actual or threatened, or when urgent work is required to be done to the railway or to the rolling-stock, or in any emergency which could not have been foreseen or prevented; and

(*b*) in cases of exceptional pressure of work not falling within the scope of clause (*a*):

Provided that a railway servant exempted under clause (*b*) shall be paid for overtime at not less than one and a quarter times his ordinary rate of pay.

Grant of periodical rest.

71-D. (1) A railway servant shall be granted, each week commencing on Sunday, a rest of not less than twenty-four consecutive hours:

Provided that this sub-section shall not apply to a railway servant whose employment is essentially intermittent, or to a railway servant to whom subsecion (2) applies.

(2) The Central Government may, by rules made under section 71-E, specify the railway servants or classes of railway servants to whom periods of rest may be granted on a scale less than that laid down in sub-section (1), and may prescribe the periods of rest to be granted to such railway servants.

(3) Subject to rules made under section 71-E, temporary exemptions from the grant of periods of rest may be made in the cases or circumstances specified in sub-section (3) of section 71-C:

Provided that a railway servant shall, as far as may be possible, be granted compensatory periods of rest for the periods he has foregone.

Power to make rules.

71-E. (1) The Central Government may make rules—

(*a*) prescribing the railway servants or classes of railway servants to whom this Chapter shall apply;

(*b*) prescribing the authorities who may declare that the employment of any railway servant or class of railway servants is essentially intermittent;

(*c*) specifying the railway servants or classes of railway servants to whom sub-section (2) of section 71-D shall apply;

(*d*) prescribing the authorities by whom exemptions under sub-section (3) of section 71-C or sub-section (3) of section 71-D may be made;

(*e*) providing for the delegation of their powers by the authorities prescribed under clause (*d*); and

(*f*) providing for any other matter which is to be provided for by rules or which the Central Government may deem to be requisite for carrying out the purposes of this Chapter.

(2) Such rules shall be subject to the provisions of section 143.

Railway servant to remain on duty.

71-F. Nothing in this Chapter or the rules made thereunder shall authorise a railway servant to leave his duty where due provision has been made for his relief, until he has been relieved.

Supervisors of Railway Labour.

71-G. (1) The Central Government may appoint persons to be Supervisors of Railway Labour.

(2) The duties of Supervisors of Railway Labour shall be—

(*a*) to inspect railways in order to determine if the provisions of this chapter and of the rules made thereunder are duly observed, and

(*b*) such other duties as the Central Government may prescribe.

(3) A Supervisor of Railway Labour shall be deemed to be an Inspector for the purposes of sections 5 and 6.

Penalty.

71-H. Any person under whose authority any railway servant is employed in contravention of any of the provisions of this Chapter or of the rules made thereunder shall be punishable with fine which may extend to five hundred rupees.

CHAPTER VII.

RESPONSIBILITY OF RAILWAY ADMINISTRATIONS AS CARRIERS.

Measure of the general responsibility of a railway administration as a carrier of animals and goods.

72. (1) The responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by railway shall, subject to the other provisions of this Act, be that of a bailee, under sections 152 and 161 of the Indian Contract Act, 1872.

NOTES.

Sec. 72: SCOPE AND OBJECT OF.—*See* 51 C. 615=28 C.W.N. 1001. The sub-section deals with the responsibility of the Rail. Co. for loss, detention or deterioration only. It does not exclude other sections of the Contract Act, in regard to bailment. 27 A.L.J. 1169=1929 A. 960. Risk note protects the company only if loss occurs between stations covered by the risk-note. 1928 L. 349. Although the liability of the Rail. Co. could by special contract be limited, it cannot be enhanced by agreement between the parties in respect of particular cases. 32 C.W.N. 805=48 C.L.J. 370.

CONSTRUCTION.—The word 'shawls' means costly woollen fabric and does not cover articles of cheap manufacture at home or abroad. 47 B. 18=24 Bom.L.R. 416; 39 C. 1020. The word "package" means both that which is packed and also its covering or receptance. 4 Pat.L.T. 392. *See also* 10 L. 537=114 I.C. 56.

LIABILITY OF COMPANY.—The liability of a Rail. Co. under S. 72 is that of a bailee under Ss. 151, 152 and 161 of the Contract Act. 3 Pat.L.T. 222=1922 P. 17; 1924 N. 358=78 I.C. 34. *See also* 1924 A. 605=80 I.C. 737; 85 I.C. 786=1925 C. 737; 20 A. L.J. 114=1922 A. 63; 93 I.C. 1021=43 C. L.J. 211; 82 I.C. 772; 43 A. 623=64 I.C. 868. *See also* 38 Bom.L.R. 514=1936 Bom. 274. Till the delivery of the consignment to the consignee the liability of the company continues to exist. 1924 A. 605=80 I.C. 737; 22 A.L.J. 1=1924 A. 254. In a suit for damages against a Rail. Co. for non-delivery of goods, it is not open to the Rail. Co. to plead that the risk-note was not executed or that the execution was without authority. 116 I.C. 616=1929 L. 698.

GENERAL LIABILITY.—When delivery of goods was made to company's servant without railway receipt, whether the company would be liable for the loss by railway, *see* 44 A. 218=1922 A. 9. *See also* 38 Bom. L.R. 574=1938 Bom. 274.

DELAY DAMAGES.—Tne consignee is entitled to damages for unreasonable delay in delivery of goods consigned under risk-note B. 45 A. 530; 1924 N. 425; 1924 A. 7; 80 I.C. 1; 45 A. 534=21 A.L.J. 448. *See also* 143 I.C. 219=1933 O. 339. It is the duty of the consignor to furnish the address of the consignee and write the same plainly and legibly. If the consignor does not perform his duty and the goods are thereby lost or delayed, the company cannot be held responsible for the same. 61 C. 293=38 C.W.N. 352=1934 C. 508; 1923 A. 426; 21 N.L.R. 78=1925 N. 350. Where under the risk-note Form A one of the conditions of the contract between the parties was that the Railway Administration would not be held responsible for the condition of the goods until the same were delivered at destination or for any loss arising from the same, and it appeared that the outer covering of the packages was not made secure against damp and rain with the result that some of the goods were damaged in transit. *Held*, that there being no wilful negligence on the part of the Rail. Co. the consignee was not entitled to recover damages from the company for the loss or damage. 131 I.C. 31=1931 C. 489. Where a person sues to recover damages for loss of goods, he must show that they are not excepted articles under S. 75. 58 C. 989=35 C.W.N. 452.

DEVIATION FROM ROUTE.—Owner's risk-note on Form B does not exempt Railway when the goods were taken off the route indicated by the terms of the note. 22 A. L.J. 1020=47 A. 234. *See* 46 B. 830=24 Bom.L.R. 316. *See also* 10 L. 537=114 I.C. 56; 1937 Cal. 410; 1938 A.L.J. 855= 1938 All. 561. The Company is bound to prove that the shortage, if any, did not occur during the deviation. 26 Bom.L.R. 285= 1924 B. 386. Where there is deviation from the specified route and the loss of consignments takes place after wagon left the station from which there was deviation, the Rail. Co., cannot rely upon the risk-note to exempt itself from liability for loss. The onus of proving that loss occurred before

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deviation in the specified route is on the Rail. Co. 10 Pat.L.T. 835=1929 P. 618. When the contract is to relieve the company from liability for loss, damage, misconveyance, misdelivery, delay or detention of or to such goods during transit, the exemption is only from liability during the transit and when once the goods are diverted from that route, the protection ends. Change from ordinary route, therefore, puts an end to the protection given by the risk-note. 1930 A. L.J. 297=121 I.C. 828=1930 A. 132. *See also* 1932 A.L.J. 788=1932 A. 584. Form H embodies the contract with regard to the journey as if made between the consignor and the Rail. Co., and unless it is shown that the journey was made on a railway, it cannot apply. It cannot apply to transport by canal on the ground of there being a general contract between the Canal Co. and the Rail. Co. 1930 M.W.N. 816 =130 I.C. 658=1931 M. 115.

Loss, MEANING OF.—The 'loss' referred to in the section is the loss suffered by the consignor or the true owner where such loss occurred by reason of misdelivery or non-delivery. 1924 P. 812. *See also* 51 C. 615 =28 C.W.N. 1001; 10 L. 261; 87 I.C. 1031 =1925 N. 333; 45 A. 380=21 A.L.J. 220; 5 L. 523. "Loss of whole consignment"—Meaning of. 1927 L. 854. Loss of part of package, if covered by risk-note Form H. 49 A. 889.

THE WORD "LOSS" IN RISK-NOTE EXPLAINED.—The word "loss" as used in a risk-note means loss of the goods by the Rail. Co. while in transit and occurs whenever the Rail. Co. involuntarily or through inadvertence loses possession of the goods and for the time being is unable to trace them. 1929 C. 510. Where a risk-note makes a Rail. Co., liable for loss of complete packages, if the whole contents of a package are lost and only outer covers of the packages or gunnies are delivered, there is no delivery of packages and the company is liable for the loss. 10 P.L.T. 835=1929 P. 618. For the meaning of the word "loss" in risk-note Form H, *see* 57 C. 73=33 C.W.N. 989. The word "loss" does not mean pecuniary loss to the consignee. (*Ibid.*) The company under the protection granted to it under risk-note A would not be responsible except upon proof that the loss was due to misconduct on the part of the Railway Administration or servants. 1931 A. 135.

ADMISSION OF LOSS.—Admission of loss by plaintiff relieves company from proving same. 80 I.C. 426=1925 C. 229 (1); 27 O. C. 331=85 I.C. 338. Where the loss is admitted by the company, the onus of how the consignment was dealt with and its condition throughout the transit, lies upon the Rail. Co., and their failure or inability to enlighten the Court on the point cannot prejudice the plaintiff's claim for damages. 1933 P. 630. If the sender agrees that the condition of the package is not satisfactory, he cannot afterwards turn round and say that the packages were in good condition. 131 I.C. 31=1931 C. 439.

"DETERIORATION"—MEANING.—The word "deterioration" in the risk-note is wide enough to include depreciation in value on account of a fall in the price of the goods. The meaning of the word "deterioration" in S. 161 which imposes liability on Rail. Co. is the same as in the risk-note Form B, which lays down special conditions under which the Rail. Co. is protected. 1930 A. L.J. 297=1930 A. 132. *See also* 16 L. 280; 5 L. 523=1925 L. 255. The plaintiff firm despatched certain consignments of apples to Bombay from their place of business at Rawalpindi and booked them under risk-note H. They sued the Rail. Co. for damages on the ground that the Railway Administration at Rawalpindi did not despatch the consignments by the Frontier Mail as was always done, and that, in despatching them by the passenger trains, they caused an unreasonable delay in the delivery of goods at Bombay and that, as the price of apples had fallen down, the consignments did not fetch the price they would have otherwise done. *Held*, per *Din Mohommad, J.*, that the word "deterioration" as used in the risk-note included depreciation in value on account of detention or delay in delivery, but that the Railway Administration was under no obligation to the plaintiff firm to carry its goods by the Frontier Mail in view of R. 19 of the coaching tariff, and, as no misconduct had been established against the Railway Administration's servants, the company was protected by the risk-note H. *Held*, per *Bhide, J.*, that the word "deterioration" could not he held to cover depreciation of value due to fall in the market price and therefore the company could not claim any exemption from liability on the basis of the risk-note, but that in the absence of any specific contract to convey the goods by a particular train or within a particular period, all that the plaintiff could insist on under the general law was that the goods should have been delivered within reasonable time and that as it was not alleged that there was any risk of deterioration within 4 or 5 days within which time the goods had arrived in Bombay, or that the fruit was in fact damaged in any way, there was no reason for holding that there was any unreasonable delay and that therefore the plaintiff had failed to make out any case for damages. 16 L. 280=1935 L. 492. The Rail. Co. is not protected by either the rik-note A or B and is liable for damages when there is overcarriage of goods. Where a consignment of mangoes was sent to Ahmedabad but it was overcarried to Virugaum with the result that there was a delay of three days which caused deterioration of the goods, *held*, that the Rail. Co. was liable in damages and that it was not protected by the risk-note in Form A or B. 31 Bom.

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L.R. 1087=1929 B. 421. The consignee of goods claiming damages for deterioration is not entitled to refuse to take delivery but should take delivery and sue for the loss, and where owing to his failure to take delivery, no evidence exists regarding the amount and extent of damage he cannot recover any compensation. It is only by showing special circumstances that he can be given an award of interest on damages. 148 I.C. 489. When goods consigned by Railways are only deteriorated and not absolutely lost, the consignee is bound to take delivery of the goods and then claim damages for the deterioration; when the consignee not only refuses to take delivery but also prevents the Rail. Co. from selling the goods, he is not entitled to claim damages on the basis of actual loss. 59 C.L.J. 467=1934 C. 834. Where certain potatoes consigned by a Railway arrived at the destination after a delay of eleven days and on account of their perisnable nature, were sold by auction by the Railway authorities. *Held,* that it was a case of deterioration or damage and not a case of non-delivery and so the condition of the risk-note imposing an obligation on the Rail. Co. to give evidence as to their dealing with the goods did not arise, that, though the goods were perishable, they were not perishable in the sense that under no circumstance can they stand a railway journey, they would not have perished if they were in good condition when they were first consigned and therefore there was no misconduct of the Rail. Co. 130 I.C. 837=1931 P. 201.

BURDEN OF PROOF.—Loss of goods—Suit for damages—Risk-note Form B. 46 A. 125=1924 A. 177; 1924 P. 315; 1924 M. 388; 79 I.C. 137=1925 M. 133; 1924 P. 812; 22 A.L.J. 1035=1925 A. 172; 90 I.C. 1054 (2); 26 Punj.L.R. 819; 106 I.C. 42; 55 C. 132=1928 C. 65. *Also* 1933 N. 1; 1933 N. 42. Burden of proving misconduct on the part of the company's servants lies on the consignor. 51 A. 480=27 A.L.J. 185=1929 A. 124; 58 C.L.J. 918=37 C.W.N. 1109; 144 I.C. 204=1933 N. 1; 1933 A.L.J. 995=1933 A. 460. *See also* 168 I.C. 76=1937 S. 85; 17 Pat. L. T. 521; 1936 Mad. 508=70 M. L. J. 608. In a suit by a consignor against a railway company for recovery of damages on account of the damage caused to his consignment during the transit, where a risk-note in form H is executed in respect of the goods consigned, the plaintiff should prove not only that the waggon in which the goods were loaded was found defective at the arrival station but also that it was on account of the misconduct of the servants of the railway company that it was or became defective. (1930 Cal. 815, Rel. on.) 189 I.C. 56=13 R.C. 55=1939 Cal. 377. In the case of risk-note H, the Railway has first to disclose how it has dealt with the consignment, if necessary, by giving evidence. If upon a fair construction of that evidence an inference of misconduct of Railway servants arises, then liability for the loss falls upon the Railway. Otherwise, the burden of proving the misconduct is thrown upon the consignor. 1934 Pesh. 119; 26 S.L.R. 327; 1933 N. 1. As to distinction between risk-note B in force before and after 1924, *see* 1937 P.W.N. 71=1937 P. 289. Where exemption from responsibility is claimed by a Rail. Co. on the basis of a risk-note, the intention to exempt should be expressed in clear and unambiguous language. 129 I.C. 769=35 C.W.N. 133=1920 C. 85. If it be found that the risk-note is out of the way, then the case will have to be tried on the footing of the liability of the Rail. Co. under the provisions of S. 72, and then it would be necessary to consider whether in point of fact the company have succeeded in showing that they took as much care of the consignment as a man of ordinary prudence would do in the circumstances of the case. 1929 C. 510. As to *proof of loss,* see 89 I.C. 497=1925 A. 675; 45 A. 223=1923 A. 126; 1924 A. 7=45 A. 530; 45 B. 1201; 23 A.L.J. 51=86 I.C. 162. *Also* 1932 A.L.J. 788=1932 A. 584. As to burden of proof, *see also* 1927 L. 854; 1927 A. 833; 107 I.C. 158=1928 P. 259; 50 A. 246=1928 A. 103; 24 N.L.R. 104; 148 I.C. 489; 9 P.L.T. 611=110 I.C. 778; 30 C.W.N. 209=1926 C. 612; 7 P.L.T. 90=1927 P. 190; 5 P. 118; 1941 All. 164; 70 M.L.J. 608; 17 Pat. L.T. 521. Refusal to account for loss is not proof of loss by wilful misconduct of company's servants. 7 L.L.J. 588=1926 L. 40. Risk-note B—Rail. Co. undertaking to disclose to consignor how consignment was dealt with while in its control—Theft of goods from moving train—Company withholding evidence of guard. *Held,* the failure of the Rail. Co. to submit the evidence of the guard was in breach of its contractual obligation to give the evidence necessary for disclosure of how the consignment was dealt with. Hence, the Court was entitled to presume, in terms of S. 114 (*g*), Evidence Act, that the guard's evidence, if, produced, would have been unfavourable to the Rail. Co., and that, in consequence, misconduct by complicity in the theft, of some servants of the company, might fairly be inferred from the company's evidence. 168 I.C. 1=1937 P.C. 152 (P. C.). All that the proviso (*a*) to the Risk-note form B means is that in certain cases the onus of proof which is laid on the plaintiff of proving misconduct, on the part of the Railway Company's servants need not be discharged in the first instance. There is no justification for the view, that in the case of a consignment destroyed by fire, the proviso exempts the Rail. Com. from all liability even though it is proved that the fire was due to or the result of some misconduct on the part of its servants. 1938 A.L.J. 1169=1939 All. 55. *See also* 46 L.W. 790 =1938 Mad. 206=(1937) 2 M.L.J. 798.

ULTRA VIRES.—The rule of a Rail. Co. that the administration is not accountable for

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any articles, unless they are booked and a receipt is given to the consignor is inconsistent with the Railways Act and is therefore *ultra vires*. 35 C.W.N. 1242. *See also* 29 N.L.R. 333=1933 N. 261.

EVIDENCE.—Evidence of railway servants is not to be disbelieved merely because they would not admit failure of duty. 106 I.C. 801=1928 L. 56.

ESTOPPEL.—A person who claims damages from the Rail. Co. for damages to his goods cannot retain to himself the advantage of the reduced rate and repudiate the consideration for it by saying that the risk-note executed by the person who delivered the goods to the railway was unauthorised. 129 I.C. 769=35 C.W.N. 133=1930 C. 815. Company cannot dispute the consignor's title to the goods consigned. 47 A. 549=23 A. L.J. 398=1925 A. 656. Where a person sues a Rail. Co. to recover damages for non-delivery of goods basing his claim upon a railway receipt which specifically mentions the existence of a risk-note, he is not entitled to allege that the risk-note was not executed or was executed without authority. 15 L. 596=150 I.C. 709=1934 L. 186. The Rail. Co. does not owe a consignor any duty, which the contract under S. 72 (2) is expressed on the face of it to exclude, and if he has approbated that contract by sending his goods under it, he cannot afterwards reprobate by claiming a right inconsistent with it. 15 L. 596=150 I.C. 709=1934 L. 186. Consignor asking goods to be rebooked but refusing to execute risk-note—Liability of company. 1935 A. 844.

PLEADINGS.—Under the new form of risk-note B, possibly it is initially the plaintiff's duty to call upon the railway administration to disclose its dealings with the consignment, and the railway should in its pleadings disclose how the consignment was dealt with. The plaintiff should call upon the railway to prove either its pleadings or its previous disclosure or the Court should decide if it is necessary for the railway to give evidence. 106 I.C. 801=1928 L. 56.

"THEFT" AND "ROBBERY".—The terms theft and robbery as used in the risk-notes are not synonymous. 11 L. 158=123 I.C. 845=1930 L. 37. Looting of trains by railway servants while on strike—Liability of the company. *See* 32 C.W.N. 805=48 C.L.J. 37; 152 I.C. 562=1934 P. 583.

FIRE.—Destruction by fire of goods sent at railway risk—Railway exempted from liability, if ordinary and reasonable care is shown by the company. 49 A. 884=1927 A. 774. *See also* 58 C.L.J. 98=37 C.W.N. 1109; 1938 Mad. 206=(1937) 2 M.L.J. 798; 1938 A.M.L.J. 25; 55 I.A. 67=52 B. 169=57 M.L.J. 167 (P.C.). Railway not liable even if fire is caused by negligence of its servants. 7 L. 319=1926 L. 341. Where the bags of biri leaves stocked in an open space were destroyed by fire during night apparently by some passer-by throwing a cigar on them, *held*, that the company was not negligent and were not liable in damages. 35 C.W.N. 1242. Where a man is well aware that a danger may result from the use of railway engines in a statutory manner and where that man grows a crop of an inflammable nature close to the railway line, it is a matter of ordinary precaution for him to place a fire line between his crop and the railway fencing, or to cut the grass adjacent to the railway line. If he does not adopt this simple precaution, he is guilty of contributory negligence and cannot recover damages from the railway company for loss occasioned to his property by sparks of fire escaping from the engine, even assuming that there is negligence on its part in not cutting the grass on the banks of its railway lines. 58 All. 771=1936 A.L.J. 262=1936 All. 771. Per *Sulaiman, C.J.*—There is obviously no statutory duty on a railway company to cut all grass from the railway track and to see that at no place any grass grows or that any dry grass is allowed to remain there. At the same time this may be a reasonable precaution which a railway company should take. Where damage is caused to dry grass growing on or near the railway track by sparks omitted from an engine, it is for the Court to decide whether the dry grass has been allowed to remain on the railway track so close to the rails and so high in stature as to amount to negligence on the part of the railway company. 58 All. 771=1936 A.L.J. 262=1936 All. 771. *See also* 1938 A.M.L.J. 25. Risk-note B—Goods destroyed by fire—Railway officials taking steps to extinguish fire—Steps prudent in their opinion—Conduct not unbusinesslike—No liability for damages. 1937 P.W.N. 71=1937 Pat. 289. Loss and non-delivery of goods—Proof of loss by fire not forthcoming—Company bound to disclose how tne goods were dealt with—Opportunity to adduce evidence not taken by Rail. Co.—Liability of Co. 1938 Mad. 206=(1937) 2 M.L.J. 798=46 L.W. 790.

DEFECTIVE PACKING.—Loss due to. *See* 10 L.L.J. 1=1928 L. 166.

LOSS BY THEFT.—Unless there is direct evidence adduced in a particular case the Court is not in a position to decide that thefts are of frequent occurrence in a particular railway nor is it entitled to take judicial notice of the thefts merely from reported cases. 124 I.C. 833=1930 P. 283. Even where the Rail. Co. succeeds in proving that there was "loss", the provisions of the risk-note will not absolve the Rail. Co. from liability if it is once proved that the loss was due to theft by the servants of the company. 1929 C. 510.

NEGLIGENCE.—An admission by the company that goods were lost by theft does not amount to proof of wilful neglect. 78 I.C. 479. The *incompetence* in steering a boat used for transport does not come under the heading of misconduct. 130 I.C. 658=1931 M. 115. A Rail. Co. does not insure

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against the negligence of the consignor. It is the latter's duty to have the goods properly packed, such as would be damaged unless properly packed; and when that is not done, he cannot recover any damages for loss occasioned thereby. 39 C.W.N. 114= 60 C.L.J. 590=1935 C. 271.

WILFUL NEGLECT, WHAT IS.—Per *Ashworth, J.*—"The expression *'wilful neglect'* means the failure to take such precautions as a prudent man would in respect of his own goods take to provide against such loss or theft as he would contemplate as not merely possible but as likely". 50 A. 246= 1928 A. 103. *See* 55 I.A. 67=52 B. 169= 54 M.L.J. 167 (P.C.); 1928 L. 299; 48 C.L.J. 32=1926 C. 498; 10 L. 261=1929 L. 551. *See also* 137 I.C. 884=62 M.L.J. 573. "Loss" and "wilful neglect," meaning of. 47 C.L.J. 611; 1926 L 40. *See also* 37 C.W.N. 1109=58 C.L.J. 98. Wilful neglect if question of law or fact. 1928 L. 774; 10 L. 360=112 I.C. 736; 128 I.C. 798 =1930 P. 559 (2). The question of wilful neglect is one to be determined in the light of the circumstances of each case. It cannot be laid down as a hard and fast rule that the mere fact that the wagon was sealed and not locked constitutes wilful neglect within the meaning of risk-note B. Per *Shadi Lal, C.J.*—It cannot be affirmed that the locking of a wagon is always an adequate safeguard against theft; especially when it is remembered that the Railway Administration owns thousands of wagons and it is impracticable to have a different lock for each wagon. If a standard lock is used it would not be difficult for thieves to make keys fitting it. 132 I.C. 664=1931 L. 627 (2). *See also* 15 L. 596=150 I. C. 709= 1934 L. 186. Wilful neglect—Sending goods in wagons sealed with paper, string and wax. *See* 105 I.C. 843=1928 N. 73; 11 L. 158= 123 I.C. 845=1930 L. 37; 23 A.L.J. 645 =88 I.C. 559; 92 I.C. 1007. Company not locking the van in which the goods were placed in spite of frequent thefts on the lines. *See* 22 A.L.J. 1035=84 I.C. 794. Guard not endeavouring to recover article known to have been removed, no wilful neglect by company. 47 A. 186=85 I.C. 474. Where a consignment is made under a risk-note Form 'B' the burden lies on the consignor to prove that the loss was due to the wilful neglect of the Rail. Co. or its servants. 85 I.C. 1003=1925 M. 949; 78 I.C. 449=1925 C. 306; 79 I.C. 571=4 Pat. L.T. 185; 86 I.C. 558=1925 C. 915; 18 L. W. 322=1924 M. 388; 1928 P. 242. Where goods consigned at the owner's risk under risk-note Form H are shown to have been properly directed but not delivered to the consignee, the onus of proof lies on the person suing the Rail. Co. for compensation for the loss to show wilful neglect on the part of the Railway Administration or its servants. 137 I.C. 884=1932 M. 545=62 M.L.J. 573. Where the risk-note is not forthcoming, the question of the plaintiff's liability to establish the defendant's wilful neglect does not arise and the plaintiff's case must succeed under the ordinary law. 134 I.C. 300. A person brought a suit against a Rail. Co. for damages. Some of the packages of sugar consigned to him under two risk-notes in Form B were lost. The wagon in which the bags were loaded had no lock on it at all but a tin shackle had been put on it which could be broken by any instrument. There had been many thefts on the line and it was found that theft did not take place on the running train. *Held,* that there was sufficient legal evidence to support finding of wilful neglect and it being a finding of fact was binding in second appeal and that the person was entitled to damages as complete packages were lost. 1929. A 749. Where certain perishable goods were sent at a special rate by a parcel train but the same were forwarded by a goods train with the result that the goods were received late at the place of destination and they were also damaged, *held,* that the Rail. Co. had broken the contract, that it was liable in damages and that the risk-note Form H was no defence to the same. 119 I.C. 665=1929 B. 355. Risk-note Form B—"Wilful neglect"—Question of—If one of law or fact. 10 L. 360=112 I.C. 736. *See also* 128 I.C. 798=1930 P. 559 (2). Risk-note Form H—"Wilful neglect" —Loss of heavy bale at station yard—Inference as to theft by or wilful neglect on part of railway servants. 62 M.L.J. 573.

MISCONDUCT.—Misconduct involves moral obliquity. The word "misconduct" is used in a sense which carries an imputation of some degree of moral obliquity. 120 I.C. 286=1930 L. 120. "Misconduct" implies something more than negligence; and a finding that there was no negligence on the part of the Railway necessarily excludes misconduct. 39 C.W.N. 114=1935 C. 271 (2). Misconduct is something opposed to accident or negligence; it is the intentional doing of something which the doer knows to be wrong and which he does recklessly not caring what the result may be. Where the fault was not in the doing of anything but in the failure to do it; where it was a fault of omission, not of commission it is negligence but not positive misconduct. 188 I. C. 536=1940 N.L.J. 171=1940 Nag. 238. "Improper conduct" would be perhaps the simplest and the most non-committal definition of tne word 'misconduct' in risk-note Form H. In such cases the Court has to consider all the facts and circumstances and then arrive at a conclusion as to whether the conduct of the Railway employees was such as to render the railway administration liable in damages upon a reasonable view of the matter. Where packets of yarn delivered to the company for transit are found soiled at the place of destination, if it is established that the railway employees in defiance of the ordinary practice, placed tins of molasses in a wagon which contained the plaintiff's packets or alternatively placed the plaintiff's

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packets in a wagon which contained tins of molasses, it must be held that they acted recklessly knowing that contamination and damage would be a likely and probable result, and that by their conduct they showed themselves indifferent to such results. It is for the plaintiff to prove all the above which would go to constitute misconduct, and where he fails to elicit from witnesses for the defence, what was the act or what were the acts of the railway employees which resulted in the damage, he cannot get any relief at the hands of the Court. I.L.R. (1941) All. 160=1941 O.W.N. 234=1941 A.L.J. 29=1941 All. 164. The word "misconduct" occurring in risk-note B is of wider import than the popular sense in which that word is used. Want of proper care and caution may amount to misconduct within the meaning of risk-note B. A mistake in the preparation of the railway receipt which throws doubt on the identity of the consignment to which it relates is misconduct in the above sense. 55 A. 625=1933 A.L.J. 966=1933 A. 477. *See also* 60 C. 996=57 C.L.J. 281 =1933 C. 742; 1934 Pesh. 119. "Misconduct" in risk-note Form 'B' under S. 72 means nothing short of wilful neglect. In the absence of proof of disregard of the Rules by the railway servants and there is no negligence, the Railway Administration cannot be held to be guilty of misconduct. 17 Pat.L.T. 521. *See also* 1936 Pat. 257. It means nothing short of wilful neglect. In the absence of proof of disregard of the Rules by the Railway servants, and there is no negligence, the Railway Administration cannot be held to be guilty of misconduct. 17 Pat.L.T. 521. *See also* 162 I.C. 793= 1936 P. 257. It includes a *fortiori* anything more culpable and is not such misconduct of railway servants as may amount to a failure of duty towards their employers but such misconduct on the part of railway servant or the Railway Administration itself as amounts to a failure of duty towards the consignor. 128 I.C. 798=1930 P. 559 (2). Risk-note H speaks of 'misconduct' and not "wilful misconduct." The word "misconduct" means the doing of a wrong thing. Culpable negligence or gross negligence as distinguished from ordinary negligence may amount to misconduct. Where it was alleged by the plaintiff that the roof of the wagon in which the consignment was carried was leaky and the damage was caused by rain water entering through the leaks, but it was proved that the railway servants did not find anything wrong with the wagon when the consignment was loaded, *held,* that negligence had not been established, that there was no misconduct and that the plaintiff was not entitled to recover damages. Meaning of "negligence" and "gross negligence" discussed. 33 C.W.N. 1048; 134 I.C. 1268=54 C.L.J. 314. *See also* 1935 A.M.L.J. 38. The word "misconduct" in risk-note Form "A" cannot obviously mean the same as "wilful conduct" as interpreted in English cases. It must be construed in relation to the consignor and the responsibility of the Railway Company judged accordingly. The term used in the present risk-note, which is wider and more comprehensive than the old form, in enlarging the liability of the railway, must be distinguished from the accident and is not far from negligence, not only gross and culpable negligence, and involves that a person misconducts himself when it is wrong conduct on his part in the existing circumstances to do or fail or omit, to do (as the case may be) a particular thing or to persist in the act, failure or omission, or acts, with carelessness. The immunity which the risk-note brings to the Railway Company is by shifting the burden of proof. 59 Mad. 789=43 L. W. 638=1936 Mad. 508=70 M. L.J. 608. Where it is found that the identity of the consignment sent under risk-notes A and H had not been proved and the consignee had refused to accept the consignment, it is a case of non-delivery and when it is further found that evidence justified the finding of misconduct on the part of the company's servants, the claim of the consignee for damages has to be decreed. 185 I.C. 435=1939 A.L.J. 905=1939 All. 748. Misconduct need not be wilful. It may be interpreted as being equal to wilful neglect or failure of duty towards the consignor. The plaintiff consigned a bale of dates weighing 9½ maunds for being sent to a certain destination. The bale never reached its destination and was found missing when the train arrived. It was proved in an action on risk-note Form H that the wagon in which the goods had been placed was secured on one side by an "Ellis Patent Lock" and on the other by an ordinary lock. The station was on the latter side and it was shown that one of the rings to which the lock was attached was broken and that the bale was missing. *Held,* that the bale was removed owing either to deliberate misconduct of the railway servants in the shape of standing by or helping in the theft or at any rate in so neglecting the wagon to make the theft possible and that the Rail. Co. was liable in damages for the misconduct of the administration. 54 A. 368=1932 A. 321. *See also* 1933 A. 854. The expression "wilful neglect" means that the act was done deliberately and intentionally and not by accident or inadvertence so that the mind of the person who does the act goes with it. The mere fact that the wagons are locked one side only and on the other side seals were used does not justify an inference that there was wilful neglect. Where the guard found the seals on the wagons broken at one station and had them re-sealed at the next station, *held,* that the omission to re-seal them earlier will not amount to wilful neglect if in fact goods had been lost before the discovery of the seals having been broken. 11 P. L. T. 161=124 I.C. 833=

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1930 P. 283. *See also* 51 A. 480=27 A. L.J. 185. The word "misconduct" in risk-note. Form "A" cannot obviously mean the same as "wilful conduct" as interpreted in English cases. It must be construed in relation to the consignor and the responsibility of the Rail. Co. judged accordingly. The term used in the present risk-note, which is wider and more comprehensive than the old form, in enlarging the liability of the railway, must be distinguished from accident and is not far from negligence, not only gross and culpable negligence, and involves that a person misconducts himself when it is wrong conduct on his part in the existing circumstances to do or fail or omit, to do (as the case may be) a particular thing or to persist in the act, failure or omission, or acts, with carelessness. The immunity which the risk-note brings to the Rail. Co. is by shifting the burden of proof. 59 M. 789=1936 M. 508=70 M.L.J. 608. The new risk-note Form B imposes a larger measure of responsibility on the Railway Administration than the old risk-note form. The word "misconduct" includes wrongful commission or omission intentional or unintentional. *Held,* that the deliberate omission of the company to padlock the wagons and the gross delay in transit constituted miscoduct and that the company was liable for the loss of entire packages during such transit. 35 C.W.N. 1250=1931 C. 734 (2). *See also* 143 I.C. 113=1933 A. 477; 1933 A.L.J. 901=1933 A. 854. When the only evidence is that when the wagons were opened, some bags which were huge and comparatively light fell out, it is not enough to prove that the goods had been loaded against the sides or flap-doors. 39 C.W.N. 114=60 C.L.J. 590=1935 C. 271. If rain water enters a wagon, which is in good condition, by the great force of winds, the omission of the Rail. Co. to provide absolutely water-tight doors will not amount to misconduct. 39 C.W.N. 114=60 C.L.J. 590=1935 C. 271. *See also* 144 I.C. 204=1933 N. 1; 1933 P. 630. Where goods booked under risk-note Form 'H' are lost by theft during transit, the loss cannot be said to be due to the misconduct of the Railway Administration, simply because the doors of the wagon were rivetted and sealed and were not locked. The rivetting of the wagon is at least as effective a safeguard against theft as the locking of it. 153 I.C. 625=1935 L. 206. Mere failure to inspect the wagon at every stage does not amount to misconduct. 173 I.C. 797=1937 Cal. 410. Risk-note—"Misconduct" — Consignment of goods in water-tight wagon—Rain-water blowing through crevices of the door —Liability for damages. 40 L.W. 702=1934 M. 715=67 M.L.J. 704. *See also* 173 I.C. 797=1937 Cal. 410.

PERISHABLES IN DAMAGED CONDITION UNFIT FOR FURTHER JOURNEY—DISPOSAL BY RAILWAY AFTER CONSULTATION WITH CONSIGNOR—FAILURE TO CONSULT CONSIGNEE, NOT MISCONDUCT.—It cannot be laid as a proposition of law that the consignor loses his title in the goods as soon as he makes them over to the Rail. Co. for delivery to the consignee at another station. It depends on the circumstances of each case. Where, therefore, a consignment of perishables, damaged by fire, was in such a condition that they could not stand further journey and the Rail. Co. after consultation with the consignor sold them at once. *Held,* that the Railway was not guilty of any misconduct either for not having consulted the consignee or for having disposed of the consignment, when further delay would have meant the total destruction of the consignment. 61 C. 293=38 C.W.N. 352=1934 C. 508.

ILLUSTRATIVE CASES.—A plaintiff claiming compensation on account of damage caused to his bags of biris by rain water leaking through holes of the wagon must establish by positive evidence that it was owing to the defective state of the wagon in which the goods were loaded that the injury was caused. By merely proving that, when the wagon reached its destination, it was found in a defective state, he does not discharge the onus which lies heavily upon him to prove misconduct by the servants of the Rail. Co. 35 C.W.N. 133=1930 C. 815. The plaintiff company delivered to the defendant company at Ahmedabad certain bales of goods for carriage to Cawnpore. The consignment was made in risk-note Form B. The wagon had to be re-sealed at two intermediate stations when it was discovered that the seal and rivets had disappeared. At another station nearer the place of destination, it was discovered that two bales were missing and the plaintiff company were given delivery of sixteen bales only. In a suit to recover the value of the missing bales, *held,* that the consignor had not proved misconduct on the part of the servants of the Rail. Co. and the company was consequently not liable. 54 B. 105=31 Bom.L.R. 1426=1930 B. 129; 49 C.L.J. 551=1929 C. 654. But *see* 35 C.W.N. 1250=1931 C. 734 (2). *See also* 1933 A.L.J. 1316.

NOTICE.—Where notice is addressed to the Secretary to the Government of India instead of the Agent, but the addressee acknowledged receipt and sent the same to the Agent, *held,* there was sufficient notice. 6 L.L.J. 237=79 I.C. 428. Because a certain postal receipt of acknowledgment has been filed by the plaintiff which purports to be with reference to some document transmitted to a railway authority it cannot be predicated with certainty that the document was a notice which fulfilled the requirements of S. 77. 1932 A.L.J. 1033. Where there is loss of consignment, notice of loss to the company is necessary. 1922 L. 72. S. 72—Risk-note Form B—Consignment of mangoes —Breach in the line—No notice sent to sending station—Delay and re-sale—No notice of re-sale—Liability of railway company. 55 C. L.J. 104=1932 C. 492.

(2) An agreement purporting to limit that responsibility shall, in so far as it purports to effect such limitation, be void, unless it—

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ESSENTIALS UNDER THE SECTION.—Section requires that an agreement limiting the responsibility of the railway shall be in writing. 22 A.L.J. 645=46 A. 649. *See also* 10 L.L.J. 202.

SIGNATURE.—Risk-note must have been signed by the consignor or some person on his behalf to exonerate the company from liability. 1924 P. 811. *See also* 80 I.C. 705 (2)=1925 C. 408. Risk-note—Signature by Agent—Consignor if bound. 1924 P. 315. *See also* 55 C. 142; 10 L. 537=30 Punj.L.R. 626. Where executant of risk-note is an illiterate person, whether Rail. Co. bound to explain the contract to him, *see* 55 C. 142=1927 C. 170. The person signing the consignment note at the time of the delivery of goods to the Rail. Co. is the person who delivers the goods. The company is not concerned with the ownership of the goods. A consignor is bound not only by the signature of himself or his agent on the contract but also by the signature of the person who delivers the goods to the Rail. Co. whether that person had authority to sign or not. The contract may be signed by the person delivering for carriage and such a person has not merely such authority to bind the sender as naturally arises from his position of an agent but an absolute statutory authority to bind him. He has authority to sign any form of contract. 129 I.C. 769=35 C.W.N. 133=1930 C. 815. The risk-notes forwarding order and the railway receipt need not bear the same date and if it is established that they refer to a particular consignment in question the Rail. Co. is protected. 35 C.W.N. 133; 56 C. 1060 =1929 C. 482. Where there was a difference in the dates of the goods consignment note and the risk-note on the one hand and the date of the railway receipt on the other, *held,* that the risk-note was not on that account rendered invalid. Practical difficulties of holding the contrary view indicated. 31 Bom.L.R. 1297.

DELIVERY OF GOODS TO OTHER THAN CONSIGNEE.—Under S. 72 there is no obligation thrown upon a Rail. Co. to deliver the goods to any particular person. A condition printed on the back of a railway receipt granted to the consignor of goods to the effect that the receipt must be given up at destination by the consignee before delivery is made, etc., cannot be said to impose any liability on the company to deliver the goods to the consignee or his endorsee only. The company has a wide discretion and can make delivery even to a person other than the endorsee of the consignee, provided it is satisfied that that person is entitled to receive them. 38 Bom.L.R. 514=1936 B. 274.

OPEN DELIVERY.—Refusal to give—Suit for damages does not lie. 1922 L. 448. "Refusal to deliver"—What amounts to. 1928 L. 804. Endorsee can sue for *short delivery*. 46 A. 691=22 A.L.J. 663. In cases of *short delivery* burden of proving loss is on the company. 79 I.C. 602=1924 N. 288.

LIABILITY OF COMPANY TO RE-WEIGH.—R. 73 shows that at the request of a consignee, a Station Master is bound to re-weigh a consignment, if from any cause whatever the consignee suspects that there may be underweight. The proposition holds true in case when there is no risk-note, and cannot be applied generally to cases of risk-notes. 27 A.L.J. 1169=1929 A. 960. *See also* 1933 A.L.J. 1316. Liability of company for damages for not giving *open delivery* when it was rightly demanded. *See* 55 A. 625=1933 A.L.J. 966=1933 A. 477. A refusal to allow re-weighment is not a refusal to give delivery. If, under the contract of carriage, the Rail. Co. were entitled to have the goods re-weighed and the finding is that they did re-weigh and demand (as they were entitled to do under S. 55) the freight due on the weight so calculated by them (which was in excess of that noted at the place of booking), the mere fact that the Rail. Co. refused to comply with the request of the plaintiffs to have the goods re-weighed in their presence does not amount to a refusal to deliver and does not render the Rail. Co. liable in damages for non-delivery. 139 I.C. 802= 1932 C. 877. Where a load of plantains was consigned from Muttra, under risk-note Form H, to be delivered to Lahore and no weigh bridge being available there, instructions to re-weigh the consignment were telegraphed to Delhi, Bhatinda and Lahore, and the consignment having been accordingly re-weighed at Delhi, the wagon was detained for about 30 hours at Bhatinda without either weighing or making enquiries in that direction, *held,* that this behaviour amounted to misconduct. 120 I.C. 286=1930 L. 120.

SHORT DELIVERY.—Where out of a consignment of 200 bundles, nine were missing, and the Rail. Co. offered to deliver the remaining 191 bundles and intimated that a claim may be sent in regarding the missing bales, the plaintiffs are not entitled to refuse that offer and claim damages in respect of the whole consignment. Their claim for damages is limited to the nine missing bundles. 1933 A.L.J. 1360=1933 A. 595.

REFUND.—Goods booked at owner's risk-note at station of despatch—Freight re-calculated at first class rate at station of destination—Excess charged by Rail. Co. liable to be refunded. 107 I.C. 206=1928 N. 52.

Sec. 72 (2): "THAT RESPONSIBILITY"—MEANING OF.—The words 'that responsibility' in S. 72 (2) can mean grammatically

(*a*) is in writing signed by or on behalf of the person sending or delivering to the railway administration the animals or goods, and

(*b*) is otherwise in a form[1] approved by the [2][Federal Railway Authority].

(3) Nothing in the common law of England or in the Carriers Act, 1865, regarding the responsibility of common carriers with respect to the carriage of animals or goods, shall affect the responsibility as in this section defined of a railway administration.

Further provision with respect to the liability of a railway administration as a carrier of animals.

73. (1) The responsibility of a railway administration under the last foregoing section for the loss, destruction or deterioration of animals delivered to the administration to be carried on a railway shall not in any case exceed, in the case of elephants or horses, five hundred rupees a head or, in the case of [3][mules], camels or horned cattle, fifty rupees a head or, in the case of [3][donkeys], sheep, goats, dogs or other animals, ten rupees a head, unless the person sending or delivering them to the administration caused them to be declared or declared them, at the time of their delivery for carriage by railway, to be respectively of higher value than five hundred, fifty or ten rupees a head, as the case may be.

(2) Where such higher value has been declared, the railway administration may charge, in respect of the increased risk, a percentage upon the excess of the value so declared over the respective sums aforesaid.

(3) In every proceeding against a railway administration for the recovery of compensation for the loss, destruction or deterioration of any animal, the burden of proving the value of the animal, and, where the animal has been injured, the extent of the injury, shall lie upon the person claiming the compensation.

LEG. REF.

[1] For risk-note forms prescribed under Cl. (*b*), sub-S. (2) of S. 72, *see* Genl. Stat. R. & O., Vol. III.

[2] Substituted for 'Governor-General in Council' by A.O., 1937.

[3] Inserted by the Indian Railways Act (1890) Amendment Act (IX of 1896), S. 4.

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"the responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by railway" as set forth in S. 72 (1). The word "that" was used in order not to repeat the same words over again which had already been used in S. 72 (1) and not in S. 75 (1). 15 L. 596=1934 L. 186.

GOODS FALLING UNDER S. 75—RISK-NOTE FORM X, IF ULTRA VIRES.—When articles declared to fall under S. 75 exceeding Rs. 100 in value are sent without the extra percentage, the railway can protect itself by an agreement under S. 72 (2) provided the conditions falling within that sub-section are satisfied and risk-note Form X is not *ultra vires*. 15 L. 596=1934 L. 186. *See* 49 A. 916.

Secs. 72 and 76: STANDARD OF CARE.—The standard of care required of a bailee cannot be formulated as an inflexible practical rule applicable to all cases. The general principle is that the bailee should take such care as a man of ordinary prudence would take of his own goods. The bailee is liable for the servant's acts done during the course of employment. The conduct of the Railway Administration with reference to such consignments in general and the suit consignment in particular should be considered. The Court has to see whether the company took the necessary steps to obviate the risk of loss and whether they took adequate measures for protecting the goods when such risk had already happened. *Held*, on the facts that the loss of jute consignment by fire in a railway shed was due to the negligence of the servants of the company and the latter was liable for the loss. 58 C.L.J. 98=37 C.W.N. 1109.

Sec. 73 (1).—*Cf.* the Railway and Canal Traffic Act, 1854 (17 & 18 Vict., c. 31), S. 7.

RISK-NOTE H.—Custody and care of goods of high order—Goods disappearing in spite of that—Inference of misconduct is stronger. 20 A.L.J. 446=1928 A. 230=113 I.C. 743.

Further provision with respect to the liability of a railway administration as a carrier of luggage.

74. A railway administration shall not be responsible for the loss, destruction or deterioration of any luggage belonging to or in charge of a passenger unless a railway servant has booked and given a receipt therefor.

Further provision with respect to the liability of a railway administration as a carrier of articles of special value.

75. (1) When any articles mentioned in the second schedule are contained in any parcel or package delivered to a railway administration for carriage by railway, and the value of such articles in the parcel or package exceeds one hundred rupees, the railway administration shall not be responsible for the loss, destruction or deterioration of the parcel or package unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared or declared them at the time of the delivery of the parcel or package for carriage by railway, and, if so required by the administration, paid or engaged to pay a percentage on the value so declared by way of compensation for increased risk.

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Sec. 75 (1).—*Cf.* the Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 69), S. 1.

APPLICABILITY.—As to applicability of this section and Ss. 58 and 78, *see* 15 P. 394 17 Pat.L.T. 268=163 I.C. 685=1936 P. 393. Section applies to all articles specified in Sch. II whether they are of any special or exceptional value or not. 41 M.L.J. 603= 14 L.W. 614. S. 75 does not apply when the value of a package does not exceed Rs. 100. 17 I.C. 419=23 M.L.J. 511. *See also* 15 L. 596=1934 L. 186. S. 75 (1) contemplates a declaration regarding the contents and their value, of each package, where the consignment consists of a number of packages. 15 P. 394=17 Pat.L.T. 208 =1936 P. 393. A bar of silver, not having been packed in the sense of being contained in a complete outer covering, comes within the purview of S. 75. 116 I.C. 616=1929 L. 698. Where the door of a wagon, in which the goods consigned were kept, was only sealed but not locked, the failure to lock the wagon does not constitute wilful neglect within the meaning of the risk-note Forms A and B. 118 I.C. 876=1929 N. 315. Mere signing of a risk-note does not bind tne Company. The section embraces the theft of goods in transit even though the actual way of the theft is not proved. 34 A. 656 =16 I.C. 369. *See also* 43 B. 386=21 Bom.L.R. 6. Loss of package—Company's liability—Necessity of declaration—Package, meaning of. 13 A.L.J. 658=30 I.C. 400 =37 A. 463. *See also* 43 B. 386=49 I.C. 396=21 Bom.L.R. 6 (on appeal from 20 Bom.L.R. 591=41 I. C. 401). Loss by theft or by means of fraud is clearly a "loss" within the meaning of this section. 61 C. 599=152 I.C. 37=1934 C. 783; 44 L.W. 333 =1936 M.W.N. 995=163 I.C. 840 (1)= 1936 M. 491. Where only part of the goods is lost the owner can only recover under S. 75 (2) such portion as represents the loss which he has sustained. The owner cannot recover the whole of the declared value in respect of a portion of the goods. 15 P. 394=17 Pat.L.T. 268=1936 P. 393. When a certain valuation has been placed upon certain goods carried by a Rail. Co. under S. 75 (1) and the Rail Co. has fixed the rate of carriage on that basis, the owner of the goods is estopped from going behind that declaration and from alleging that the declared value is not the true value of the goods. 15 Pat. 394=1936 Pat. 393. In the case of valuable goods, declaration of value is a matter of importance to the railway administration, as it would put the responsible officers of the Railway on their guard and they would take special care to guard the parcel. Where the plaintiff has omitted to make the requisite declaration, suit for loss of parcel must fail as he is hit by S. 75, and he cannot escape the effect of the section on the ground that the loss happened by the negligence or connivance of railway servants. 61 C. 599=152 I.C. 37 =1934 C. 783. To avoid liability under S. 75, a Rail. Co. must establish first that the articles composing the consignment were articles mentioned in the second schedule to the Act, and, secondly, that the total value of the consignment exceeded Rs. 100. 42 A. 76=17 A.L.J. 1031. 'Shawls' in Cl. (*m*) of Sch. II should not be interpreted in a restricted sense. *See* 65 I.C. 99=41 M.L.J. 603. Declaration of contents and weight is not a declaration of contents and value as contemplated by S. 75. *See* 96 I.C. 193=24 A.L.J. 728=1926 A. 552. Goods requiring insurance—Failure to insure —Consignment for carriage over two railway lines—Suit for compensation for non-delivery—Proof of loss. *See* 24 A.L.J. 305= 1926 A. 299.

RISK-NOTE FORMS A AND B—LOSS OF CONSIGNMENT—STANDARD OF PROOF—BURDEN OF PROOF.—The law does not lay down any particular standard of proof in the case of a loss of a consignment sent through a Rail. Co. under risk-note Forms A and B, and the direct evidence of those witnesses who actually dealt with the consignment in

(2) When any parcel or package of which the value has been declared under sub-section (1) has been lost or destroyed or has deteriorated, the compensation recoverable in respect of such loss, destruction or deterioration shall not exceed the value so declared, and the burden of proving the value so declared to have been the true value shall, notwithstanding anything in the declaration, lie on the person claiming the compensation.

(3) A railway administration may make it a condition of carrying a parcel declared to contain any article mentioned in the second schedule that a railway servant authorized in this behalf has been satisfied by examination or otherwise that the parcel actually contains the article declared to be therein.

Burden of proof in suits in respect of loss of animals or goods.

76. In any suit against a railway administration for compensation for loss, destruction or deterioration of animals or goods delivered to a railway administration for carriage by railway, it shall not be necessary for the plaintiff to prove how the loss, destruction or deterioration was caused.

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question is the best available evidence that the Rail. Co. can produce to prove the loss. The Rail. Co. in such a case is not bound to produce the reports made by its servants in connection with the loss of the goods unless the consignee has moved the Court to compel the company to produce such document. 118 I.C. 876=1929 N. 315. Where a Rail. Co. proved that the goods, for the non-delivery of which damages were claimed, were loaded in a certain wagon at a certain station, that they arrived in fact at another station, at which the locks were examined and found to be safe, and that at the next station the door of the wagon was found open and the goods had disappeared, *held*, that the Rail. Co. had made such disclosure as was contemplated by the risk-note Form B. 114 I.C. 51=1929 L. 887. It is not the duty of a Rail. Co. to give evidence regarding a portion of journey which was uneventful especially when such details are not specifically asked for by the plaintiff. 125 I.C. 327=1930 L. 557. Where a person seeks to recover damages as price of goods sent at the ordinary railway parcel rate and lost while in custody of the Railway Administration, he must prove first that he entrusted the parcel to the Railway Administration and that it did not contain any of the excepted articles mentioned in the second schedule, exceeding Rs. 100 in value. It is not for the Railway Administration to prove the contrary. 35 C.W.N. 452=58 C. 989. Risk-note is not *ultra vires*. 15 L. 596=150 I.C. 709=1934 L. 186.

Sec. 75 (2).—The words "shall not exceed the value so declared" in S. 75 (2) imply that a claim may be less than the value declared under sub-S. (1). 15 P. 394=17 Pat.L.T. 268=1936 P. 393. S. 75 (2) cannot be understood as merely limiting the total compensation recoverable for loss of the goods or any part of them; and if the section stood alone, there might be much to be said for the view that the compensation is not limited further than it is expressly limited by statute. 15 P. 394. But S. 75 (2) must be read in conjunction with Ss. 58 and 78 of the Act. The "declaration" made for the purposes of S. 75 is not a separate thing from the "account" and "description" referred to in S. 58. If the account or description or declaration is materially false, the provisions of S. 78 will become applicable. 15 P. 394.

Sec. 76: APPLICABILITY.—S. 76 does not apply to contract limiting Rail. Co.'s liability under S. 72 of the Act. 78 I.C. 449 =1925 C. 306; nor where there is a risk-note. 43 M. 671; 11 L.W. 358; 41 C. 576; 18 L.W. 322=1942 M. 388. The ordinary liability under S. 76 is limited by the special agreement entered into under a risk-note in Form B. 75 I.C. 26=1924 P. 812. "Deterioration," meaning of—Abstraction from parcel is also deterioration. 5 P. 465=96 I.C. 605=1926 P. 384.

BURDEN OF PROOF.—In suits for damages for non-delivery of goods entrusted to a Rail. Co. the primary question is whether the company has taken as much care of the goods as a man of ordinary prudence would under similar circumstances, take of his own goods of the same description. As regards burden of proof, S. 76 does no more than take away from the plaintiff a burden which in any case lies upon the defendant under S. 106, Evidence Act, *viz.*, to prove facts which are within his special knowledge. It is for the defendant to place all the materials before the Court and if there is a failure on the defendant's part in this respect, the Court may presume that if produced such materials would have gone against the defendant. Upon materials produced by the defendant the plaintiff must show that there was want of due diligence or that there was negligence on the part of the latter or his servants or agents. 58 C.L.J. 98=37 C. W.N. 1109. Where from the terms of the contract it appears that the plaintiff knew of the fact that the goods tendered to the railway were either in bad condition or defectively packed and understood to hold the railway "harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination and for any loss arising

77. A person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by railway or to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried, unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the railway administration within six months from the date of the delivery of the animals or goods for carriage by railway.

Notification of claims to refunds of overcharges and to compensation for losses.

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from the same except upon proof that such loss arose from misconduct on the part of the Railway Administration's servants," he is not relieved of the necessity of proving that the loss or damage had arisen from misconduct on the part of the railway servants by S. 76. This, however, only shows that if it is clear that the damage has been caused by the misconduct of the railway servants, it is not necessary for the plaintiff to prove how their misconduct has caused the loss. 155 I.C. 97=1935 A.L.J. 640=1935 A. 525. Consignment—Risk-note Form A—Shortage —Onus is upon consignor to prove that the shortage was due to pilferage of the Railway servants. 65 I.C. 583=1923 A. 234 (2). *See also* 86 I.C. 393 (1)=1925 B. 96; 43 C.L.J. 211=1926 C. 983. In case of risk-note Form B, burden of proving loss through wilful neglect of company is on plaintiff. 90 I.C. 1054=1926 L. 40.

Sec. 77.—The object of S. 77 is to prevent stale and possibly dishonest claims for loss, when owing to delay it might be impossible to trace the transaction or check the allegations made, and when the evidence necessary to rebut a dishonest claim might no longer be available. It is intended as a weapon of defence against fraud, not as a means to enable the railway authorities to deprive their customers of their just dues. 57 C. 1286=1930 C. 332. The object of the section is to see that the company gets notice. 42 M.L.J. 202=45 M. 135 (F.B.). Agent of a Railway is not viewed as an agent but as a principal. 7 L. 238=1926 L. 253 (F.B.). "Loss" includes non-delivery. 28 C.W.N. 438=72 I.C. 714; 6 P.L.T. 565= 90 I.C. 374. No notice under S. 77 is necessary in the case of a claim for non-delivery or misdelivery. Such a notice is required only when the claim is one for loss, destruction or deterioration of goods. 1937 A.L.J. 794=1937 All. 632. *See also* 31 N.L.R. (Sup.) 79=1936 Nag. 21.

APPLICABILITY.—Section 77 refers only to a suit against the carrier in his capacity as a carrier for the loss, destruction or deterioration of the goods. The section therefore refers to the special liability of the carrier as such; it has no application to the broad liability of the Rail. Co. in the case of tort-feasors quite apart from their position of railway carriers. And therefore no notice is necessary before bringing such a suit. 151 I.C. 995=1934 P. 507. Where goods had reached their destination and had never been lost from the possession of the Rail. Co. but were in the lost property office and were sold by public auction against the express direction of plaintiff. *Held*, that, in a suit for damages against the Rail. Co., S. 77 did not apply and that no notice under it was necessary. 1935 A. 601.

"Loss", "NON-DELIVERY", "DETERIORATION". —It is settled law that in the case of damage claimed for non-delivery of a consignment no notice is necessary under S. 77, because the word "loss" does not include non-delivery. 8 P. 545=1929 P. 109; 134 I.C. 93 =35 C.W.N. 338=1931 C. 585; 61 C. 559 =152 I.C. 37=1934 C. 783; 31 N.L.R. (Supp.) 79=161 I.C. 867=1936 N. 21. But *see* 97 I.C. 474=1926 A. 698. Notice essential. 47 A. 136=85 I.C. 474; 73 I.C. 642 (2)=1924 P. 315; 6 P.L.T. 565=90 I.C. 374. Notice of loss necessary. 1922 L. 72 (1); 5 P. 106=1925 P. 727. But *see* 3 P.L.T. 215=1922 P. 106 *contra*. Claim simply for compensation for non-delivery—Notice is necessary. 1924 P. 315; 41 M. 871; 1922 P. 106; 12 O.L.J. 162=1925 O. 419. A suit for damages in respect of certain bales of piece-goods which at the end of the transit were found tampered with is a claim for compensation for the loss of goods within the meaning of S. 77 for which notice is necessary. 34 C.W.N. 1079=1931 C. 306. The word "deterioration" does not cover the fall in the market value of the goods which is due to the delay in delivery. 27 A.L.J. 859=1929 A. 597 (2). S. 77 refers only to loss, destruction or deterioration of goods and has nothing to do with detention or conversion of goods. 57 C. 1286=128 I.C. 248=1930 C. 332. Where the railway officials delivered the goods in contravention of the express and definite instructions of sender, *held*, that the case fell within the exception of the risk-note B as the misdelivery was due to misconduct of the officials and that the railway was liable for damages. 144 I.C. 404=1933 L. 425.

COMPENSATION FOR PILFERRED GOODS.— Notice must be given within six months from delivery of goods to company. 22 A.L.J. 897.

NOTICE—WHEN UNNECESSARY.—Section 77 is mandatory and does not contemplate that a notice should be given in anticipation. The object of S. 77 is only to prevent stale and dishonest claims for loss and not to enable the railway authorities to deprive their customers of their just dues. But the railway authorities are entitled to have due notice of the total extent of the claim pre-

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ferred against them. 1939 N.L.J. 124=1939 Nag. 141. Where Rail. Co. alleges non-receipt of articles. 22 A.L.J. 897=80 I.C. 725. Damages for short delivery of goods. 79 I.C. 602=1924 N. 28. *See also* 1936 Nag. 21. But *see* 90 I.C. 572=1925 O. 615, *contra*. Suit for refund of over charge—No notice necessary. 97 I.C. 474 =1926 A. 698. S. 77 certainly assumes the possibility of claims for overcharge, but all it means is that where such a claim lies in law then it cannot succeed unless notice within six months has been given. It does not provide a remedy under the Act; it only cuts down the remedy in cases where claims would lie according to the general law. An overcharge is simply a charge of more than is permitted by law. The word should be interpreted in a wide sense. 1939 N.L.J. 124=1939 Nag. 141.

NOTICE TO WHOM TO BE GIVEN.—A notice under S. 77 would not dispense with a notice under S. 80 of the C.P. Code, when the Secretary of State is the defendant. 1932 A.L.J. 1033. Adequacy of notice is a question of fact. 47 C.L.J. 611. Notice given to subordinate official and not to the Agent is not sufficient. 45 A. 353=21 A.L.J. 223; 29 O.C. 80=1925 O. 419; 28 A. 552; 33 A. 544; 4 L. 46=1923 L. 84; 92 I.C. 548=50 B. 84. Notice to Traffic Manager does not in law amount to notice to the Agent. 44 A. 645=20 A.L.J. 664; 27 Bom.L.R. 1500; 33 A. 544; 1926 B. 138; 28 C.W.N. 438= 72 I.C. 714; 1926 O. 1. But *see also* 1926 L. 572 and 253. Notice required by Ss. 77 and 140 must be served on the Agent of the Company and not on the Traffic Manager of the Company. The mere fact that in practice claims such as the one put forward by a party are dealt with by Traffic Manager will not by itself be sufficient to make a notice to the Traffic Manager valid in law. Such notice is invalid unless it is shown that the Agent had authorised the Traffic Manager to receive such notice on his behalf. 32 P. L.R. 163=133 I.C. 283=1931 L. 606. "Cause of action" means every fact which it would be necessary for the plaintiff to prove in order to support his right to the judgment of the Court. Under S. 77, a person is not entitled to compensation for loss from the railway unless he has preferred his claim in writing to the agent of the Railway at its head office. Consequently this is a fact which it is necessary to prove in a suit against the railway for compensation and is part of the cause of auction for the suit. I.L.R. (1941) 2 Cal. 160. The mere fact that the power of dealing with claims for compensation has been delegated by the Agent to the Divisional Traffic Manager does not entail that notice of a claim to compensation given to the Divisional Traffic Manager and not to the Agent is a valid notice. 10 Pat.L.T. 24= 112 I.C. 616. According to S. 77 the notice must be addressed to the Railway Administration from which compensation is demanded. Notice under S. 77 to one Railway Administration cannot avail a party to claim against another Railway Administration. 35 C.W.N. 338=1931 C. 585. R. 6 of the N. W. Railway Goods, Tariff which provides that any application in connection with claims for compensation and refund of overcharges relating to Karachi division should be made to Divisional Commercial Officer, Karachi, does not at all refer to the statutory notice as required by Railways Act and, therefore, notice required by S. 7 should, to be valid, be addressed to the Agent. 117 I.C. 769=1929 S. 238. In the case of a railway administered by Government, there being no such official as the manager, a notice sent to the Chief Commercial Manager is sufficient and fulfils the requirements of S. 77. 57 C. 1286=52 C.L.J. 260=1930 C. 332. But *see* 12 Pat.L.T. 681=1931 P. 393. In the case of a Railway administered by the Government, notice to the Secretary of State is indispensible. Notice to the Manager of the Railway Administration is not sufficient. 12 P.L.T. 681=1931 P. 393. *See also* 10 P. 466=1931 P. 326. Amount of claim need not be stated in notice. 89 I.C. 490=1925 N. 405; 3 P. 76=1924 P. 98 Goods carried over different railways—Notice must be given to the Agent of each railway. 46 B. 176=23 Bom.L.R. 866. Notice to agent's nominee is notice to agent. 7 L. 238 (F.B.). The date of announcing the order to the party is the starting point. 116 I.C. 317=1929 L. 409.

Secs. 77 and 140.—There is nothing in S. 77 or S. 140, which makes it imperative on plaintiff to mention in the plaint that refund had been demanded from the Railway Administration in the manner required by law. If the fact is denied by the defendant but appears from the evidence, the plaintiff's suit is not liable to be dismissed. Where in a suit for refund of overcharge realised by the Rail. Co. the plaint recited that a notice under S. 80, C.P. Code, had been given to the manager of the Rail. Co. within six months of the delivery of the goods and more than two months before the institution of the suit, *held*, that there was substantial compliance with the requirements of Ss. 77 and 140 and that the suit could not be dismissed on that ground. 137 I.C. 205=1932 A. 381. S. 140 merely provides a safe and unanswerable method for serving a claim upon the Railway Administration and enacts in effect that service upon the Agent is service upon the company. But S. 77 enacts that the service must be upon the administration. If the company by its course of business holds up any particular official as competent to deal with claims, then service of notice upon such an official must be taken as against the company to be service upon the company. So where the company has all along persisted in a course of business by which they allowed the District Traffic Superintendent to

Exoneration from responsibility in case of goods falsely described.

78. Notwithstanding anything in the foregoing provisions of this Chapter, a railway administration shall not be responsible for the loss, destruction or deterioration of any goods with respect to the description of which an account materially false has been delivered under sub-section (1) of section 58 if the loss, destruction or deterioration is in any way brought about by the false account, nor in any case for an amount exceeding the value of the goods if such value were calculated in accordance with the description contained in the false account.

Settlement of compensation for injuries to officers, soldiers, airman and followers on duty.

79. Where an officer, soldier, [1][sailor], [2][airman] or follower, while being or travelling as such on duty upon a railway belonging to, and worked by, the Government, loses his life or receives any personal injury in such circumstances that, if he were not an officer, soldier, [1][sailor], [2][airman] or follower being or travelling as such on duty upon the railway, compensation would be payable under Act [3]No. XIII of 1855, or to him, as the case may be, the form and amount of the compensation to be made in respect of the loss of his life or his injury shall, where there is any provision in this behalf in the military [1][naval] [2][or air-force] regulations to which he was immediately before his death, or is, subject, be determined in accordance with those regulations, and not otherwise.

Suits for compensation for injury to through-booked traffic.

80. Notwithstanding anything in any agreement purporting to limit the liability of a railway administration with respect to traffic while on the railway of another administration, a suit for compensation for loss of the life of, or personal injury to, a passenger, or for loss, destruction or deterioration of animals or goods where the passenger was or the animals or goods were booked through over the railways of two or more railway administrations, may be brought either against the railway administration from which the passenger obtained his pass or purchased his ticket, or to which the animals or goods were delivered by the consignor thereof, as the case may be, or against the railway administration on whose railway the loss, injury, destruction or deterioration occurred.

LEG. REF.

[1] Inserted by Act XXXV of 1934.
[2] Inserted by Act X of 1927.
[3] The Indian Fatal Accidents Act, 1855.

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deal with claims for compensation and never in the course of their correspondence, till the filing of the written statement, did the company suggest that the notice to him was ineffective. *Held*, that the plea was not open to the Company that there had been no sufficient notice under S. 140. 13 P.L.T. 693 =1933 P. 45. *See also* 10 P.L.T. 24=112 I.C. 616.

Sec 78.—*See* 3 B. 120; 132 I.C. 336= 1931 A.L.J. 367. Applicability and scope—Consignment of goods—Account and description and declaration as to nature and value of goods materially false—Liability of company for loss—Extent of. 15 P. 394 =1936 P. 393.

Sec. 79.—*See* 28 C. 401 (P.C.); 2 C. W.N. 609; 4 M.L.T. 251; 34 I.A. 115=17 M.L.J. 347 (P.C.); 28 M. 479; 24 B 1.

Sec. 80: PRINCIPLE OF SECTION.—The principle underlying S. 80 is that the railway which takes delivery of goods with an undertaking to carry it safe, is an agent for the railways over which the goods have to pass in order to reach its destination and *vice versa*. The consignor is a third person. He contracts with the particular railway to deliver to him, at a particular station, the goods consigned and the arrangement of carrying the goods is between the railways over which the goods have to pass and has nothing to do with the consignor. He may sue the company to which the goods are delivered or the company on whose railway, the loss, injury, destruction or deterioration occurred or both. 1933 P. 630. Goods consigned to one railway for carriage to destination on another railway—Goods found to weigh less at destination—Request by consignee for memorandum as to weight and condition of goods—Refusal by railway—Refusal by consignee to take delivery—Liability of latter railway to damages. *Held*, it was not liable. *Held, further*, that the refusal by the latter railway to deliver the goods on the consignee's terms could not amount to "loss" within the meaning of S. 80, nor could the refusal be deemed to

81. [*Limitation of liability of railway administration in respect of traffic on inland waters by vessel not being part of railway.*] *Rep. by the Indian Railways Act* (1890), *Amendment Act* (*IX of* 1896), *section* 5.

Limitation of liability of railway administration in respect of accidents at sea.

82. (1) When a railway administration contracts to carry passengers, animals or goods partly by railway and partly by sea, a condition exempting the railway administration from responsibility for any loss of life, personal injury or loss of or damage to animals or goods which may happen during the carriage by sea from the act of God, the King's enemies, fire, accidents from machinery, boilers and steam and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, shall, without being expressed, be deemed to be part of the contract, and, subject to that condition, the railway administration shall, irrespective of the nationality or ownership of the ship used for the carriage by sea, be responsible for any loss of life, personal injury or loss of or damage to animals or goods which may happen during the carriage by sea, to the extent to which it would be responsible under the [1]Merchant Shipping Act, 1854, and the [1]Merchant Shipping (Amendment) Act, 1862, if the ship were registered under the former of those Acts and the railway administration were owner of the ship, and not to any greater extent.

(2) The burden of proving that any such loss, injury or damage as is mentioned in sub-section (1) happened during the carriage by sea shall lie on the railway administration.

CHAPTER VIII.

ACCIDENTS.

Report of railways accidents.

83. When any of the following accidents occur in the course of working a railway, namely:—

(*a*) any accident attended with loss of hufan life, or with grievous hurt as defined in the Indian Penal Code, or with serious injury to property;

(*b*) any collision between trains of which one is a train carrying passengers;

(*c*) the derailment of any train carrying passengers or of any part of such a train;

(*d*) any accident of a description usually attended with loss of human life or with such grievous hurt as aforesaid or with serious injury to property;

LEG. REF.

[1] *See* now the Merchant Shipping Act, 1894 (57 & 58 Vict., c. 60).

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be a tort. 1936 M. 878=71 M.L.J. 325. "Loss" includes loss by misdelivery. 2 L. 133 (F.B.). "Deterioration" in S. 80 includes decrease in market value consequent on detention. 111 P.R. 1912=15 I.C. 19. Where goods carried by different railways were lost in transit, to attach liability on any particular railway, one must prove that the loss occurred on the line of that railway. 23 I.C. 22=19 C.L.J. 434. *See also* 1939 Cal. 377. Suit for refund of overcharge does not lie against transferring railway. 25 A.L.J. 89=49 A. 236. Goods lost in transit—Suit against two railway companies having control over the route—Appeal only against one defendant company—Non-joinder of the other defendant fatal to appeal. 6 P. 105=1927 P. 344. *See also* 21 I.C. 428=11 A.L.J. 775 (Note); 34 A. 422; 25 I.C. 77=12 A.L.J. 339; 1926 L. 116; 1926 A. 698. Goods sent over several railways —Loss on particular line not proved—Liability. 1923 A. 145. *See also* 3 L.L.J. 297; 6 L. 499. Plaintiff can implead both companies in suit. Although S. 80 gives plaintiff the option to sue any of two companies through whom the goods have been carried, it by no means prohibits him from impleading both the companies in a suit. Indeed, in many cases it may be difficult for the plaintiff to know before the institution of the suit on which line the loss actually occurred. 121 I.C. 828=1930 A. 132. *See also* 34 C. W.N. 1079=1931 C. 306.

Sec. 82.—*Cf.* the Regulation of Railways Act, 1868 (31 & 32 Vict., c. 119), S. 14 and the Regulation of Railways Act, 1871 (34 & 35 Vict., c. 78), S. 12.

See 34 C. 419; 18 C. 427.

Sec. 83.—*Cf.* the Regulation of Railways Act, 1871, (34 & 35 Vict.; c. 78); S. 6.

See 1924 M.W.N. 899, 51 C. 861; 1925 C. 108.

(*e*) any accident of any other description which the [1][safety controlling authority] may notify in this behalf in the Official Gazette;

the railway administration working the railway and, if the accident happens to a train belonging to any other railway administration, the other railway administration also shall, without unnecessary delay, send notice[2] of the accident to the Provincial Government and to the Inspector appointed[3] for the railway; and the station master nearest to the place at which the accident occurred or, where there is no station master, the railway servant in charge of the section of the railway on which the accident occurred shall, without unnecessary delay, give notice of the accident to the Magistrate of the district in which the accident occurred, and to the officer in charge of the police station within the local limits of which it occurred, or to such other Magistrate and police officer as the [1][safety controlling authority] appoints in this behalf.

Power to make rules regarding notices of, and enquiries into, accidents.

84. The [1][safety controlling authority] may make rules[4] consistent with this Act and any other enactment for the time being in force for all or any of the following purposes, namely:—

(*a*) for prescribing the forms of the notices mentioned in the last foregoing section, and the particulars of the accident which those notices are to contain;

(*b*) for prescribing the class of accidents of which notice is to be sent by telegraph immediately after the accident has occurred;

(*c*) for prescribing the duties of railway servants, police officers, Inspectors and Magistrates on the occurrence of an acident.

Submission of return of accidents.

85. Every railway administration shall send to the [1][safety controlling authority] a return of accidents occurring upon its railway, whether attended with personal injury or not, in such form and manner and at such intervals of time as the [1][safety controlling acthority].

Provision for compulsory medical examination of person injured in railway accident.

86. Whenever any person injured by an accident on a railway claims compensation on account of the injury, any Court or person having by law or consent of parties authority to determine the claim may order that the person injured be examined by some duly qualified medical practitioner named in the order and not being a witness on either side, and may make such order with respect to the cost of the examination as it or he thinks fit.

CHAPTER IX.

PENALTIES AND OFFENCES.

Forfeitures by Railway Companies.

87. If a railway company fails to comply with any requisition made under

LEG. REF.

[1] Substituted for "Governor-General in Council" by A.O., 1937.

[2] For such notice, *see* Supplement to Assam R.M.; for report of accidents on E.I. and I.M. Railways in Central Provinces, *see* Centrl. Provs. Local R. & O.

[3] For notification appointing the Commissioner of Police, Madras, to receive reports of all railway accidents happening within the limits of the town of Madras, *see* Mad.R.& O., Vol. I.

[4] For rules under this sections. 84 and S. 85 as to notices of accidents occurring in the course of working a Railway, *see* Genl. Stats. R. and O., Vol. III.

NOTES.

Sec. 84.—The Act does not empower a Magistrate to make an inquiry as to the true heirs of a deceased Railway servant. 35 I. C. 672=10 S.L.R. 64. On this section, *see* 52 B. 238=30 Bom.L.R. 392=1928 B. 162.

Sec. 86.—*Cf.* the Regulation of Railways Act, 1868 (31 & 32 Vict., c. 119), S. 26.

Penalty for default in compliance with requisitions under section 13.

section 13, it shall forfeit to the [1][safety controlling authority] the sum of two hundred rupees for the default and a further sun of fifty rupees for every day after the first during which the default continues.

Penalty for contravention of section 16, 18; 19; 20, 21 or 24.

88. If a railway company moves any rolling-stock upon a railway by steam or other motive power in contravention of section 16, sub-section (2), or opens or uses any railway or work in contravention of section 18, section 19, section 20 or section 21, or reopens any railway or uses any rolling-stock in contravention of section 24, it shall forfeit to the [1][safety controlling authority] the sum of two hundred rupees for every day during which the motive power, railway, work or rolling-stock is used in contravention of any of those sections.

Penalty for not having certain documents kept or exhibited at stations under section 54 or 65.

89. If a railway company fails to comply with the provisions of [2][* * * * * *] section 54, sub-section (2) or section 65, with respeft to the books or other documents to be kept open to inspection or conspicuously posted at stations on its railway, it shall forfeit to the [1][Federal Railway Authority] the sum of fifty rupees for every day during which the default continues.

Penalty for not making rules as required by section 47.

90. If the railway company fails to comply with the provisions of section 47 with respect to the making of general rules [3][and the keeping thereof open to inspection] it shall forfeit to the [1][general controlling authority] the sum of fifty rupees for every day during which the default continues:

[3][Provided that where the safety controlling authority is dixerent from the general controlling authority, the safety controlling authority may take proceedings for the recovery of the said penalty if in the opinion of the safety controlling authority the default is a default which relates to safety.]

LEG. REF.

[1] Substituted for "Government" by A.O., 1937,

[2] The words "section 47, sub-section (6)" omitted by *ibid*.

[3] Inserted by *ibid*.

NOTES.

Sec. 89: SCOPE OF CHAPTER IX and the nature of offences and penalties contemplated therein. *See* 11 C.W.N. 583=5 C.L.J. 47; 11 C.W.N. 100.

POWER OF MAGISTRATE TO INQUIRE ABOUT HEIRS OF DECEASED RAILWAY SERVANT.—The Railways Act does not empower a Magistrate to make an inquiry as to the true heirs of a deceased Railway servant. 17 Cr.L.J. 368=35 I.C. 672=10 S.L.R. 64.

JURISDICTION OF MAGISTRATE UNDER RAILWAYS ACT—CASE-LAW—RULINGS UNDER THE OLD LAW.—A Subordinate Magistrate (First Class) has no jurisdiction to punish for an offence under S. 17 of Act XVIII of 1854. It was suggested that the Act in this respect required amendment so as to give Subordinate Magistrates such jurisdiction. 3 B.H.C.R. (C.) 54. *See also* 7 M.H.C. (App.) 8; 4 M.H.C.R. (App.) 9. A full power Magistrate had no jurisdiction to convict a person of an offence punishable under S. 26 of Act XVIII of 1854. 3 B.H.C.R. (Cr.) 10. S. 30 of Act XVIII of 1854 and S. 2 of the Cr. P. Code, show that offences under the former Act punishable with fine exceeding twenty rupees are not triable by Magistrates inferior to a First-class Magistrate. Rat. Un. Cr. C. 83=Cr. Rg. 28—7—74. A Sessions Judge had no authority to direct a fresh trial of a charge of an offence under S. 26 of the old Railways Act which has been dismissed by the Magistrate. 6 M.H.C.R. (App.) 41. *See* now 110 I.C. 589=29 Cr.L.J. 733 =1928 B. 909; 43 B. 888.

FINE, HOW TO BE RECOVERED.—S. 34 of Act XVIII of 1854 prescribed the mode in which fines are to be recovered by distress and sale. It was only on the return of the warrant of distress unsatisfied, or on the Magistrate being otherwise satisfied that no sufficient distress existed that imprisonment could be imposed. 6 M.H.C.R. (App.) 37.

Penalty for failure to comply with decision under section 48.

91. If a railway company refuses or neglects to comply with any decision of the [1][safety controlling authority] under section 48, it shall forfeit to the [2][safety controlling authority] the sum of two hundred rupees for every day during which the refusal or neglect continues.

Penalty for delay in submitting returns under section 52 or 85.

92. If a railway company fails to comply with the provisions of section 52 or section 85 with respect to the submission of any return, it shall forfeit to the [2][authority to which the return should have been submitted] the sum of fifty rupees for every day during which the default continues after the fourteenth day from the date prescribed for the submission of the return.

Penalty for neglect of provisions of section 53 or 63 with respect to carrying capacity of rolling-stock.

93. If a railway company contravenes the provisions of section 53 or section 63, with respect to the maximum load to be carried in any wagon or truck, or the maximum number of passengers to be carried in any compartment, or the exhibition of such load on the wagon or truck or of such number in or on the compartment, or knowingly suffers any person owning a wagon or truck passing over its railway to contravene the provisions of the former of those sections, it shall forfeit to the [2][appropriate authority] the sum of twenty rupees for every day during which either section is contravened.

[3][In this section 'the appropriate authority' means in relation to a contravention with respect to the maximum load to be carried in any wagon or truck, the safety controlling authority, and, in relation to any other contravention, the general controlling authority.]

Penalty for failure to comply with requisition under section 62 for maintenance of means of communication between passengers and railway servants.

94. If a railway company fails to comply with any requisition of the [1][safety controlling authority] under section 62 for the provision and maintenance in proper order, in any train worked by it, which carries passengers, of such efficient means of communication as the [1][safety controlling authority] has approved, it shall forfeit to the [2][safety controlling authority] the sum of twenty rupees for each train run in disregard of the requisition.

Penalty for failure to reserve compartments for females under section 64.

95. If a railway company fails to comply with the requirements of section 64 with respect to the reservation of compartments for females or the provision of closets therein, it shall forfeit to the [2][general controlling authority] the sum of twenty rupees for every train in respect of which the default occurs.

Penalty for omitting to give the notices of accidents required by section 83 and under section 84.

96. If a railway company omits to give such notice of an accident as is required by section 83 and the rules for the time being in force under section 84, it shall forfeit to the [2][safety controlling authority] the sum of one hundred rupees for every day during which the omission continues.

LEG. REF.

[1] Substituted for "Governor-General in Council" by A.O., 1937.
[2] Substituted for "Government" by *ibid.*
[3] Inserted by *ibid.*

NOTES.

Sec. 91.—*Cf.* the Railway Regulation Act, 1842 (5 & 6 Vict., c. 55), S. 11.

Sec. 94.—*Cf.* the Regulation of Railways Act, 1868 (31 & 32 Vict., c. 119), S. 22.

97. (1) When a railway company has through any act or omission forfeited any sum [1][* *] under the foregoing provisions of this Chapter, the sum shall be recoverable by suit in the District Court having jurisdiction in the place where the act or omission or any part thereof occurred.

Recovery of penalties.

[2][(2) Nothing in this Chapter shall be construed as requiring any authority to recover any penalty in any case in which it thinks it proper to refrain from so doing.]

98. Nothing [3][in the foregoing provisions of this Chapter] shall be construed to preclude the [4][appropriate authority] from resorting to any other mode of proceeding instead of, or in addition to, such a suit as is mentioned in the last foregoing section, for the purpose of compelling a railway company to discharge any obligation imposed upon it by this Act.

Alternative or supplementary character of remedies afforded by the foregoing provisions of this Chapter.

Offences by Railway Servants.

99. If a railway servant whose duty it is to comply with the provisions of section 60 negligently or wilfully omits to comply therewith, he shall be punished with fine which may extend to twenty rupees.

Breach of duty imposed by section 60.

100. If a railway servant is in a state of intoxication while on duty, he shall be punished with fine which may extend to fifty rupees, or, where the improper performance of the duty would be likely to endanger the safety of any person travelling or being upon a railway, with imprisonment for a term which may extend to one year, or with fine or with both.

Drunkenness.

101. If a railway servant, when on duty, endangers the safety of any person—

Endangering the safety of persons.

LEG. REF.

[1] The words "to the Government" omitted by A.O., 1937.

[2] Substituted for the original sub-sections (2) and (3) by *ibid*.

[3] Substituted by Act XXXIV of 1939.

[4] Substituted for 'Government' by *ibid*.

NOTES.

Sec. 97.—As to recovery of fine, *see* 6 M.H.C.R. (App.) 37.

Sec. 99.—*Cf.* the Railway Regulation Act, 1842 (5 & 6 Vict., c. 55), S. 17.

LIABILIY OF COMPANY FOR TORT FOR ITS SERVANTS.—*See* 13 M. 34. There would ordinarily be no difficulty in prosecuting a railway company in a suitable case in respect of a breach of a statutory provision for which a penalty had been provided and a State Railway does not occupy a more favourable position with reference to such matters. The *general manager of a state railway is a legal entity in the same degree as a railway company* is such an entity and it would be legal to prosecute him in his representative capacity in suitable cases. To such a prosecution no sanction under S. 197, Cr. P. Code and S. 270 of the Government of India Act is necessary, as it is not sought to enforce against him personally any criminal liability which he has incurred in his personal capacity but merely to prosecute the railway administration for breach of statutory provision. 45 C.W.N. 347.

Sec. 100: DRUNKENNESS OF RAILWAY SERVANT, while on duty, is an offence. 1 M.H.C. 193. *Practice and Procedure* as to trial and conviction. *See* 5 M.L.T. 204.

Sec. 101.—*Cf.* the Railway Regulation Act, 1840 (3 & 4 Vict., c. 97), Ss. 13 and 14 and the Railway Regulation Act, 1842 (5 & 6 Vict., c. 55), S. 17. For rules made by the Government of Bengal under S. 46 (2) of the Police Act, 1861 (V of 1861) for the guidance of Railway Police as to arrest and prosecution for offences under this section, *see* Calcutta Gazette, 1904, Pt. I, p. 884.

SCOPE OF OFFENCE.—*See* 5 Cr.L.J. 16=11 C.W.N. 173; 6 I.C. 483; 9 Cr.L.J. 352; 22 I.C. 161; 13 N.L.R. 90.

OBJECT OF SECTION.—The object of S. 101 and R. 100 is to lessen the risk of accidents through shunting on a through line, after the line clear has been given, and a breach of the rule will render the rule-breaker liable to punishment even though no accident might have occurred. 37 B. 685=14 Cr.L.J. 460=20 I.C. 620=15 Bom.L.R. 702.

ESSENTIALS FOR CONVICTION.—Breach of a

(*a*) by disobeying any general rule made, sanctioned, published and notified under this Act, or

(*b*) by disobeying any rule or order which is not inconsistent with any such general rule, and which such servant was bound by the terms of his employment to obey, and of which he had notice, or

(*c*) by any rash or negligent act or omission,

he shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to five hundred rupees, or with both.

NOTES.

rule of the railway company without evidence that it endangered the safety of passengers is not sufficient for conviction. 81 I.C. 917=26 O.C. 363=25 Cr.L.J. 1093=1924 O. 250. *See also* 37 B. 685.

DISOBEDIENCE OF A RULE.—S. 101 does not provide for cases in which the disobedience of a rule is merely 'likely or calculated' to endanger the safety of any person. To render a person liable to conviction under S. 101, it must be proved that the safety of a person was actually endangered in point of fact. 7 L.B.R. 72=15 Cr.L.J. 17=22 I.C. 161 (2). *See also* 14 Cr.L.J. 676=21 I.C. 996; 37 B. 685=20 I.C. 620. As to *validity of rules* under the Act, *see* 8 I.C. 134=12 Bom.L.R. 930. *Breach of Rule by Railway Servant—Proof of offence, see* 26 O.C. 363=81 I.C. 917=25 Cr.L.J. 1093=1924 O. 250. Where a train is stopped outside a distant signal, the *omission of the guard to place detonators to protect the train,* is a disobedience under R. 9 of G.I.P. Ry. Working Instructions and punishable under S. 101 (*a*). Where a guard is charged under S. 101 (*b*) the *onus of proving* that he did not comply with General Rule 86 is on the prosecution, which burden can be discharged by the Railway authorities inspecting the line to see if any metallic remnants are formed there. The standing of a train outside the distant signal is "authorized" detention and not due to "accident, failure or obstruction." The *wording of G.I.P. Ry., R. 9 is somewhat inappropriate* and allowance should be made, considering that even a District Traffic Superintendent misreads the rule. 21 I.C. 996=14 Cr.L.J. 676 (Nag.).

DISOBEDIENCE OF R. 187 (8) (3)—WHAT AMOUNTS TO.—The words "when it is required to change the position of a permanently locked point" in R. 187, Cl. (8), sub-Cl. (3) would indicate that the rule assumes that the man on duty is aware that a permanently locked point has been unlocked. It is only in that case that he is bound to relock it before any train is allowed to enter the station yard. Where, therefore, a Station Master who unlocks a permanent point fails to reset it before he is relieved by the Assistant Station Master and omits to inform the latter or to note that he has allowed the point to remain unlocked in the Journal or Diary kept in the Station in which these matters are noted, the Assistant Station Master cannot be said to have had notice that any permanent point has remained unlocked even though he would have discovered it if he had gone on a visit of inspection before taking over the charge and it is very doubtful whether according to the rule as it stands, he can be said to be guilty of having disobeyed it. 154 I.C. 1059=36 Cr.L.J. 630=1935 A. 121.

"ENDANGERING"—MEANING OF—SHUNTING TRAIN TO A WRONG LINE.—In every case where a travelling train is unexpectedly shunted on to a wrong line by an erroneous laying of the points in a station yard, the safety of the persons in the train or about the yard is endangered, within the meaning of that term in S. 121; and if the error in the points is due to such disobedience as is *referred* to in the Act, an offence punishable under the Act is committed. 18 Cr.L.J. 822=41 I.C. 646=13 N.L.R. 90. From the facts of one case, no safe analogy can be drawn as to whether danger has arisen in the other case. 18 Cr.L.J. 822=41 I.C. 646=13 N.L.R. 90.

ACT LIKELY TO ENDANGER SAFETY OF PASSENGERS.—Where there is no evidence that a Station Master, in sending a train without previously obtaining a line clear message, knew that his act was likely to endanger the safety of the passengers travelling therein, a conviction under S. 45 of the Act is illegal. 1882 A.W.N. 172. On this point, *see also* 5 Cr.L.J. 81=59 P.L.R. 1902=13 P.R. 1907 (Cr.). The prisoner was convicted under S. 29 of Act XXV of 1871 of endangering the safety of persons in a certain goods train by negligence. Although he was shown to have neglected his duty, there was no evidence whatever of the safety of any person in any train having been endangered by his neglect of duty, *held*, that he could not be convicted under S. 29 of Act XXV of 1871, as it was plainly apparent that, by reason of the precautions taken by other persons any possible danger which might have resulted from his neglect was avoided. 5 N.W.P. 240. As to other cases of endangering public safety, *see* 1 Weir 869 (*driver running train at full speed* with danger signals against him); Rat. 721 (*starting train without whistling*); 9 P.R. 1892 (Cr.) (*Gateman being asleep*, at time when train is due); 8 I.C. 134 (*Guard not liable for not doing a thing for which he is not responsible*); 11 C.W.N. 173=5 Cr.L.J. 16 (*case of station master's negligence*). For a case where Station Master was held not liable, *see* 32 C. 73=8 C.W.N. 645.

NOTES.

OMISSION TO SET POINTS.—Under R. 12 of the rules framed under the Railways Act, it was the duty of the accused, who was a station master when he knew that a train was approaching the station to send the passed porter to the facing points with instructions for him to set and lock the points for the line on which the train was to come. The station master neglected to send the porter to the points. The signals were down to allow the train to pass into the station. But under the rules the engine driver should have stopped the train when he found that there was no porter at the points signalling him to pass on. The points were not properly locked and the consequence was that some of the carriages of the train were derailed. No person was hurt but the derailment of part of the train caused danger to persons travelling therein. *Held*, that it was not quite clear whether the engine driver could have avoided the derailment by stopping the train in time because the signals were in his favour. But if the station master had complied with the rules and had sent the passed porter out to the points to properly set and lock them, no accident would have occurred. Hence, the disregard by the accused of R. 12 enhanced the danger to the persons travelling in the train and therefore the accused was liable. 86 I.C. 61=6 Lah. 324=26 Cr.L.J. 685=1925 Lah. 423. The duty of a person in control of a railway station is *first* to give the fundamental orders regulating the arrival of a train and *secondly* to see that they are accurately carried out. Where such an order was given to set the points to the loop but the slides showed main the failure to act upon a defect in the working of the machinery is an act of grave negligence. Omitting to set the points, which would prevent a train after a clear line signal is given, from running into, another train is an act endangering the safety of the persons in either of the two trains. 22 A.L.J. 20=25 Cr.L.J. 993=1924 All. 438. Station master allowing train contrary to rules to run over loop line instead of main line—Station master acting on signal of pointsman—One of the points not properly set—Collision and injuries to persons. *Held*, that the station master was not guilty under this section as the breach of the rules was not the proximate cause of the accident, but only the improper setting of one of the points and with reference to this the station master was entitled to rely on the pointsman on actual duty. 1936 A.L.J. 951=1936 All. 745.

PLACING OBSTRUCTION ON THE RAILS.—Where the accused was charged with pulling up an iron mail post and placing it across the rails on a dark-night, *held*, that the act being wrongful in itself, rashness cannot be usually predicated, and that the offence, falling within S. 45 of the Railways Act, should be committed to the Sessions Court and not tried by a Magistrate as falling within S. 46. Rat. 458.

FAILURE TO REMOVE STONE FROM RAIL.—A person who fails to remove a stone from a rail is not guilty of negligently doing an Act which is likely to endanger the safety of persons travelling upon the railway, unless it be proved that he was legally bound to remove it. Rat. 394.

NEGLIGENCE OF RAILWAY SERVANT—LIVES LOST—PUNISHMENT.—Where a Railway servant was convicted under S. 29 of Act IV of 1879 for his gross negligence by which an accident happened in which several lives were lost, *held*, that three months' simple imprisonment was too light a sentence. 1890 A.W.N. 171.

RAILWAY ACCIDENTS—DUTY OF GUARD.—Where some coolies were employed in assisting a ballast train into motion at a Railway station, and one of them, after pushing the train or in attempting to do so, fell and was so injured that he afterwards lost his life, *held*, that the evidence did not show that it was the duty of the guard to see that no one got up on the train when in motion. 8 W. R. (Cr.) 43.

ACCIDENT—MESSAGE BY GUARD.—If under Rr. 87 and 87 (*a*) of the rules framed under Railways Act, the Guard of a train sends a message asking for assistance, it is the duty of the driver to ascertain the terms of the message. His omission to do so would make him liable under S. 101 (*c*), if it results in endangering the safety of any person. 54 I.C. 988=21 Cr.L.J. 264 (Nag.).

DUTY OF DRIVER—MINOR BRIDGES.—The drivers have regarded R. 131 as applying to what are known as important bridges; it is not fair when an accident does happen, to charge a driver with breach of the rules because in the accounts and engineering departments comparatively small bridges are called major bridges. 143 I.C. 220=34 Cr. L.J. 576=1933 Pat. 94. It is not duty of the driver to stop the train merely because way-farers shout to him. 34 Cr.L.J. 576 =143 I.C. 220=1933 Pat. 94. Where an engine driver is being prosecuted for breach of S. 101 for disobeying the guard, the evidence of the fire-man cannot be summarily neglected on the mere ground that he is subordinate to the driver. On the other hand he is the most important witness. 143 I.C. 220=34 Cr.L.J. 576=1933 Pat. 94.

RAILWAY POLICE—NEGLECT OF DUTY.—The Railway Police, who are in the pay of a Railway Company, are amenable for neglect of duty to the provisions of the above section, notwithstanding that they hold commissions from the Commissioner of Police under S. 9, Bom. Act VII of 1867. Rat. Un. Cr. C. 51.

OFFENCE FALLING UNDER TWO ENACTMENTS —PUNISHMENT UNDER BOTH, WHETHER LEGAL.—When an accused by one act endangered the lives of the public and committed an offence under S. 101 of the Act and S. 353 of the Penal Code he can be punished

Compelling passengers to enter carriages already full,

102. If a railway servant compels or attempts to compel, or causes, any passenger to enter a compartment which already contains the maximum number of passengers exhibited therein or thereon under section 63, he shall be published with five which may extend to twenty rupees.

Omission to give notice of accident.

103. If a station master or a railway servant in charge of a section of a railway omits to give such notice of an accident as is required by section 83 and the rules for the time being in force under section 84, he shall be punished with fine which may extend to fifty rupees.

Obstructing level-crossings.

104. If a railway servant unnecessarily—

(*a*) allows any rolling-stock to stand across a place where the railway crosses a public road on the level, or

(*b*) keeps a level-crossing closed against the public,

he shall be punished with fine which may extend to twenty rupees.

False returns.

105. If any return which is required by this Act is false in any particular to the knowledge of any person who signs it, that person shall be punished with fine which may extend to five hundred rupees, or with imprisonment which may extend to one year, or with both.

Other Offences.

Giving false account of goods.

106. If a person requested under section 58 to give an account with respect to any goods gives an account which is materially false, he and, if he is not the owner of the goods, the owner also shall be punished with fine which may extend to ten rupees for every maund or part of a maund of the goods, and the fine shall be in addition to any rate or other charge to which the goods may be liable.

Unlawfully bringing dangerous or offensive goods upon a railway.

107. If in contravention of section 59 a person takes with him any dangerous or offensive goods upon a railway, or tenders or delivers any such goods for carriage upon a railway he shall be punished with fine which may extend to five hundred rupees, and shall also be responsible for

NOTES.

under one Act only and not under both. 1 Pat. L.J. 373=18 Cr.L.J. 321=38 I.C. 433.

PUNISHMENT.—In determining the punishment, the gravity of the offence should be estimated not by the ultimate consequences but by the risk involved. 37 Bom. 685=14 Cr.L.J. 460=20 I.C. 620=15 Bom.L.R. 702 (6 M. 201 Ref.). In order to support a conviction under this section, there must be actual danger to a person's safety. 6 I.C. 483=11 Cr.L.J. 362=8 P.L.R. 1910; mere likelihood of danger not sufficient. 7 L.B.R. 72; 4 L.B.R. 353.

PROCEDURE.—*See* 1 Pat.L.J. 313.

CHARGE OF ONE OFFENCE—CONVICTION FOR ANOTHER—LEGALITY.—A person charged under S. 101 for disobeying railway rules requiring him to stop engine near signal, cannot be convicted for disobeying rules regarding maintaining vacuum. 1933 Sind 225.

Sec. 102.—As to who is a "passenger" under this section, *see* 7 I.C. 354=11 Cr. L.J. 451=26 P.R. 1910=31 P.W.R. 1910 =200 P.L.R. 1919 (Ticket holder).

Sec. 103.—*See* 54 I.C. 980 (Nag.) and 8 W.R. (Cr.) 43 noted under S. 101, *supra*.

Sec. 104.—*Cf.* the Railway Clauses Act, 1863 (26 & 27 Vict., c. 92), S. 5.

Sec. 105.—*Cf.* the Regulation of Railways Act, 1871 (34 & 35 Vict., c. 78), S. 10.

FALSE ACCOUNTS OF GOODS DESPATCHED.—The duty imposed of giving an account of the quantity or description of property sought to be despatched by rail being limited to the case of a demand being made, *held*, that a person giving false account of goods despatched without being so demanded by railway authorities could not be convicted under S. 29 of the old Act. 36 P.R. 1885 (Cr.).

Sec. 106.—*Cf.* The Railway Clauses Act, 1845 (8 and 9 Vict., c. 20), Ss. 99 and 152 respectively. *See* 36 P.R. 1885 (Cr.); 24 P.L.R. 1905.

Sec. 107.—*Cf.* The Railway Clauses Act, 1845 (8 and 9 Vict., c. 20), Ss. 99 and

any loss, injury or damage which may be caused by reason of such goods having been so brought upon the railway.

Needlessly interfering with means of communication in a train.

108. If a passenger, without reasonable and sufficient cause, makes use of or interferes with any means provided by a railway administration for communication between passengers and the railway servants in charge of a train, he shall be punished with fine which may extend to fifty rupees.

NOTES.

152 respectively. *Company not bound to search passengers' luggage* to see if there are *offensive or dangerous goods*, see 28 I. A. 144=28 C. 401 (P.C.). On this section, *see also* 7 P.R. 1900 (Cr.); 22 P.R. 1905 (Cr.).

Sec. 108.—*Cf.* The Regulation of Railways Act, 1868 (31 and 32 Vict., c. 119), S. 22.

TEST.—The risk of danger, of loss and of discomfort to the other passengers on a train by stopping the train by pulling the communication cord is one element that has to be considered for the purpose of deciding whether there was reasonable and sufficient cause to stop the train by pulling the communication cord. But this must be considered in relation to the risk arising from the circumstances to the person pulling the cord. In other words if the risk to the passenger pulling the cord is incommensurate with the risk and discomfort, etc., to the other passengers, he cannot be said to have had just and reasonable cause. But where the risk to the passenger is very great as compared to the risk to the other passengers, he must be said to have just cause for pulling the cord. Another element of great importance is whether the necessity or occasion for pulling the cord has arisen from the fault of the railway administration. The third element to be considered is the importance of the line and train. 105 I.C. 679=25 A.L.J. 975=28 Cr.L.J. 967=1927 All. 647.

PULLING THE CHAIN—OVERCROWDING.—Where a person without sufficient and reasonable cause pulls the emergency chain, he renders himself liable for prosecution under S. 108 only, and not under S. 121 for preventing the running of the train and thus obstructing or impeding a railway servant in the discharge of his duty. (43 Bom. 103, Foll.) 32 Bom.L.R. 111=1930 Bom. 160. Pulling the communication chain of a railway compartment to remove the overcrowding, which it was the duty of the railway administration to prevent under S. 93 is a reasonable and sufficient cause under S. 108 of the Act. (1922 Pat. 8, Rel. on.) 32 Bom.L.R. 111=1930 Bom. 160. *A* who had instituted a civil suit against *B* was travelling with the latter in the same compartment with his account books. While the train was in motion *B* seized the account books and threw them through the window. *A* pulled the alarm chain and stopped the train. *Held*, that *A* had sufficient and reasonable cause for getting alarm signal and could not be convicted under S. 108. 8 Lah. 196=28 Cr.L.J. 603=28 P.L.R. 485. =1927 Lah. 476. *See also* 1936 P.W.N. 679=1936 Pat. 499. Primarily, S. 108 is intended for the protection of the personal safety of passengers who are travelling by train. The mere fact that the accused left his coat even though it contains valuables is not a reasonable and sufficient cause within the meaning of S. 108. Accordingly if he pulls the communication cord for that purpose he can be convicted under the section. 95 I.C. 58=28 Bom.L.R. 486=27 Cr.L.J. 730=1926 Bom. 288. But *see* 17 Pat.L.T. 569=1936 Pat. 499, where it was held that the pulling of chain by a passenger who had dropped certain valuable articles did not constitute an offence under this section. It was also held that what constitutes 'reasonable and sufficient cause' is a question of fact depending upon the circumstances of each case. (*Ibid.*) The accused is not deprived of the defence under S. 108 of sufficient and reasonable cause merely because there was an additional reason for pulling the chain which in the opinion of the Magistrate was not sufficient and reasonable. 32 Bom.L.R. 111=1930 Bom. 160. Where a passenger in the inter-class pulled the chain, because it was overcrowded and because third class passengers had entered it *held*, he was justified in pulling the chain and in stopping the train for enforcing his right to have the compartment vacated so as to bring down the number of passengers therein within the maximum limit prescribed by S. 66. 1 P. 260=3 P.L.T. 195= 1922 P.H.C.C. 63=23 Cr.L.J. 257=66 I. C. 221=1922 P. 8. *Ticket holder* is a passenger, *see* 7 I.C. 354. Where a railway compartment became overcrowded and the train was allowed to proceed in spite of a complaint and became overcrowded and the train was allowed to proceed in spite of a complaint and thereupon the accused who was a passenger in the overcrowded compartment pulled the alarm chain and brought the running train to a standstill and in a prosecution under the Railways Act the accused gave it as one of the reasons for repeatedly pulling the chain that he wanted to take down the names of certain fellow passengers who had abused him for his conduct. *Held*, that the accused was not liable to be convicted under S. 108 or 121. 32 Bom.L.R. 111=1930 B. 160.

109. (1) If a passenger, having entered a compartment which is reserved by a railway administration for the use of another passenger, or which already contains the maximum number of passengers exhibited therein or thereon under section 63, refuses to leave it when required to do so by any railway servant, he shall be punished with fine which may extend to twenty-rupees.

Entering compartment reeserved or already full or reserved or already full or partment not full.

(2) If a passenger resists the lawful entry of another passenger into a compartment not reserved by the railway administration for the use of the passenger resisting or not already containing the maximum number of passengers exhibited therein or thereon under section 63, he shall be punished with fine which may extend to twenty-rupees.

110. (1) If a person without the consent of his fellow-passengers, if any, in the same compartment, smokes in any compartment except a compartment specially provided for the purpose, he shall be punished with fine which may extend to twenty-rupees.

Smoking.

NOTES.

Sec. 109: OBJECT OF SECTION is to prevent annoyance to other passengers. 24 B. 293; 1 Bom.L.R. 688.

PROVIDING SPECIAL ACCOMMODATION FOR SPECIAL INDIVIDUALS OR CLASSES OF INDIVIDUALS.—A bye-law or rule providing for special accommodation or for the special convenience of a particular individual or of a particular class of individuals and for the general convenience of the travelling public is legal under S. 47. The "preference" forbidden by Ss. 42 and 43 refers to goods traffic and rates charged upon traders and does not apply to passengers. A person who enters a compartment of a Railway carriage reserved by a Railway Company, for the use of passengers of a particular class to which he does not belong, and refuses to leave when required to do so by a Railway servant, is liable to penalty under S. 109 of the Act. 42 A. 327=21 Cr.L.J. 294=55 I.C. 342=18 A.L.J. 254.

RESERVING COMPARTMENT FOR EUROPEANS AND ANGLO-INDIANS.—"Traffic" in S. 42 includes passenger traffic. In reserving a compartment for Europeans and Anglo-Indians, the company gives undue preference to one class of passengers and contravenes S. 42 (2). But the Civil Court cannot try the question of legality of the reservation, the proper remedy in the case being to prefer a complaint to the Governor-General in Council under S. 28. 45 B. 1324 =62 I.C. 1004=23 Bom.L.R. 809. A Railway Company can legally reserve a compartment for the use of Europeans and Anglo-Indians only. 45 M. 215=42 M.L.J. 21=66 I.C. 520; 23 Cr.L.J. 296=30 M.L.T. 134=15 L.W. 207=1922 M. 35. Per *Ayling, Officiating Chief Justice* and *Oldfield, J.* (*Krishnan, J., dissenting*). A person who is not a European or Anglo-Indian commits an offence under S. 109 (1) by entering and persisting in remaining in a 3rd class compartment to which a card has been attached purporting over the signature of a senior ticket examiner, to reserve it for European and Anglo-Indians. (*Ibid.*) Per *Officiating, C.J.*—There is nothing in any of the rules of the Traffic Working Orders indicating that a compartment can only be legally reserved by a label or notice signed or initialled, since the direction in the R. 172-A to the effect that a station master should label a carriage or compartment does not necessarily imply that he must do so with his own hands or himself sign label. (*Ibid.*) Per *Krishnan, J.*—The expression "traffic" in S. 42 (2) is not confined to conveyance of animals and goods and fixing the charges thereof. Where the label was in the carriage door and was not the usually printed label signed or initialled, by the station master, the compartment is not reserved. (*Ibid.*) Per *Officiating, C.J.* and *Oldfield, J.*—The term "passenger" in S. 109 (1) is not restricted to a person who actually enters a railway carriage for the purpose of travelling but also includes possible passengers who may join at any later station. (*Ibid.*) The object and the result of making rules under S. 47, Cl. (1) with the sanction of the Governor-General in Council are only to make their breach an offence punishable by the Courts. The Traffic Working Orders are not such rules. (*Ibid.*) The reservation of a compartment for Europeans and Anglo-Indians or for any class of passengers is not an undue or unreasonable preference in favour of a particular description of traffic within S. 42, Cl. (4). 45 M. 215. The expression "Passenger" in S. 109 includes class of passengers. 51 C. 168=28 C.W.N. 388=25 Cr.L.J. 1012=1924 C. 687. On this point, *see also* 5 S.L.R. 140 (Refusal to leave compartment reserved for Europeans not an offence). *See also* 7 I.C. 365 (preventing passengers from enterig and standing against door).

Sec. 110: "COMPARTMENT".—Meaning of 24 B. 293=1 Bom.L.R. 688.

(2) If any person persists in so smoking after being warned by any railway servant to desist, he may, in addition to incurring the liability mentioned in sub-section (1) be removed by any railway servant from the carriage in which he is travelling.

Defacing public notices.

111. If a person, without authority in this behalf, pulls down or wilfully injures any board or document set up or posted by order of a railway administration on a railway or any rolling-stock, or obliterates or alters any of the letters or figures upon any such board or document, he shall be punished with fine which may extend to fifty rupees.

Fraudulently travelling or attempting to travel without proper pass or ticket.

112. [1][(1)] If a person, with intent to defraud a railway administration,—

(*a*) enters [2][or remains in any carriage on a railway in contravention of section 68], or

(*b*) use or attempts to use a single pass or single ticket which has already been used on a previous journey or, in the case of a return ticket a half thereof which has already been so used,

he shall be punished [3][with imprisonment for a term which may extend to three months or] with fine which may extend to one hundred rupees in addition to the amount of the single fare for any distance which he may have travelled.

[4][(2) Notwithstanding anything contained in section 65 of the Indian Penal Code, the Court convicting an offender under this section may direct that the offender in default of payment of any fine inflicted by the Court, shall suffer imprisonment for a term which may extend to three months.]

LEG. REF.

[1] S. 112 has been renumbered as sub-S. (1) by Act VI of 1941.

[2] Substituted by Act VI of 1941.

[3] Inserted by Act VI of 1941.

[4] Sub-S. (2) of S. 112, added by Act VI of 1941.

NOTES.

Sec. 111.—*Cf.* the Companies Clauses Act, 1845 (8 & 9 Vict., c. 16), S. 146.

Sec. 112.—As to *scope and construction of section*, see 11 C.W.N. 100. A person charged under S. 112 for *entering a railway carriage without a ticket* pleaded guilty as to entering the carriage but said that he did not purchase the ticket because the train was about to start. *Held*, that this conviction is bad as his statement amounted to a positive denial of an intention to defraud. 57 I.C. 825=21 Cr.L.J. 665 (All.).

ESSENTIALS OF OFFENCE.—To constitute an offence under S. 112 (*b*) it is not necessary that the used ticket should be relevant to the journey which the passenger wished to undertake. (11 C.W.N. 100, Diss.) 112 I. C. 771=23 S.L.R. 39=30 Cr.L.J. 3=1928 Sind 191.

WRONG TICKET.—Where a passenger travelling by a Railway train on being called upon, produces a ticket bearing date of a previous day, throwing away another in his possession, he cannot be held to have dishonest intention so as to justify a conviction under S. 112 as the essence of the offence under that section is an intent to defraud the Railway Company. Unless there is clear evidence to show that a passenger knows that the ticket he is holding has been used before, an *intention* on his part *to cheat the Railway Company* cannot be inferred from the mere fact that the passenger knows that he is committing a breach of the Railways Act or rules framed under the Act. 35 I.C. 665 (Cal.)=17 Cr.L.J. 361. If the ticket does not show to its holder that, under the Railway rules, it is only available for a particular train or on a particular day, his knowledge of the Railway rules posted on the stations will not be assumed unless it is proved that the attention of the traveller was drawn to them. 35 I.C. 665 (Cal.)=17 Cr.L.J. 361. As to other cases under this section, *see* 21 M. L.J. 748 (*Travelling with a forged Railway pass*); 7 P.R. 1868 (Travelling with old *expired pass*); 1 Bom. H. C. R. 140 (*Travelling in higher class* is no offence under the section); 9 C.P.L.R. 1 (*Travelling beyond place* to which ticket is issued is no offence under the section); Rat. 123 (Purchasing *unused half of a ticket*, is not offence.) (*See also* 1 Weir 871; 27 P.R. 1905 (Cr.) (Fraudulent *entry without ticket* not offence); 11 C.W.N. 100 (Travelling with *false ticket* is an offence). *See also* 1 Weir 870.

Secs. 112 and 114: SEASON TICKET—USE BY ANOTHER—OFFENCE.—A season ticket issued in the name of one person was found to be used by his brother. It was not contended by the former that the latter had

113. (1) If a passenger travels in a train without having a proper pass or a proper ticket with him, or, being in or having alighted from a train, fails or refuses to present for examination or to deliver up his pass or ticket immediately on requisition being made therefor under section 69, he shall be liable to pay, on the demand of any railway servant appointed by the railway administration in this behalf, the excess charge hereinafter in this section mentioned, in addition to the ordinary single fare for the distance which he has travelled or, where there is any doubt as to the station from which he started, the ordinary single fare from the station from which the train originally started, or if the tickets of passengers travelling in the train have been examined since the original starting of the train, the ordinary single fare from the place where the tickets were examined or, in case of their having been examined more than once, were last examined.

Travelling without pass or ticket or with insufficient pass or ticket or beyond authorized distance.

NOTES.

taken the ticket without his consent or knowledge. *Held*, that it must be presumed that the former had given the ticket to the latter for use and that his conduct amounted to an offence under S. 112 committed by the latter. 146 I.C. 162=35 Bom.L.R. 875 =1933 Bom. 412. A conviction of a father accused of evading the payment of fare due for his child aged 6 sustained as a conviction of abetting the offence charged. 1 Weir 869 (F.B.). *See also* 17 C.P.L.R. 32.

Sec. 113.—*Cf.* the French and German Railway law.

ESSENTIALS FOR ARREST.—To justify an arrest without a warrant much more than trespass or travelling without ticket would be necessary. In the case of trespass it must be shown that there was reason to believe that the person to be arrested would abscond or that his name and address were unknown and he refused to give his name and address or that there was reason to believe that the name or address given to him was incorrect. In the case of travelling without ticket it must further be shown that their was refusal to pay the sum charged. 33 C.W.N. 751=1929 Cal. 730.

NATURE OF PROCEEDINGS.—An application under S. 113 (4) is not a prosecution for criminal offence and on such application the Magistrate has no power to fine the defaulter or to order a sentence of imprisonment in default of such fine. The Magistrate can only direct him to pay the fare and the excess charge under sub-S. (3) and then proceed to recover it as if it were a fine. 6 Rang. 619=30 Cr.L.J. 57=1929 Rang. 11. There is no room in the phraseology of S. 113 of the Railways Act for a loose interpretation of its terms, and it has obviously been framed with a view to preventing the enormous inconvenience and trouble which would otherwise arise in the matter of checking and collecting tickets from passengers. Under the section, passengers must have in their possession immediately available throughout the journey the tickets which entitle them to travel. If excess is realized for failure to produce the tickets, the mere fact that the tickets are produced later on does not entitle the passengers to a refund. 23 N.L.R. 120. *See also* 101 I.C. 158.

OBJECT OF SECTION 113—INTENTION TO DEFRAUD, NOT NECESSARY.—The intention to defraud is not necessary for the offence under S. 113. The section only provides a summary remedy to recover the charge incurred by a passenger together with a penalty provided in the section. S. 113, Cl. (2) is clear and explicit and admits of no implications or exceptions. A passenger travelling in a lower class has no right to travel in a higher class without the previous permission of a Railway servant and without a proper ticket for that class and the fact that he was obliged so to do as there was no accommodation in the class for which he had purchased a ticket is no justification and does not afford a defence in proceedings against him under S. 113. 34 Bom.L.R. 1666.

PROCEEDINGS UNDER—NATURE OF—REVISION.—The act referred to in S. 113 is not an offence; the proceeding under that section is not a prosecution for an offence but nevertheless it is a judicial proceeding and an order passed by a Magistrate under S. 113 (4) is subject to revision by High Court. 34 Bom.L.R. 1666. A person travelled without a ticket but with guard's permission. He was asked to pay extra charge which he refused. Application to a Magistrate under S. 113 (4) was rejected. *Held*, that High Court could not go into the merits of the order when it had no jurisdiction to revise that order. (5 S.L.R. 54, Dist.). 1930 Cr. C. 646=1930 Sind 162. Order of a Magistrate under S. 113 (4), is merely an administrative or a ministerial order and the proceedings before him are not criminal proceedings in a Criminal Court within the scope of the Criminal Procedure Code and is not subject to revision under S. 439. (1926 Sind 57; 1927 Sind 23, Foll. Other case-law referred). 1930 Sind 162.

PERSON TRAVELLING WITHOUT TICKET.—It

(2) If a passenger travels or attempts to travel in or on a carriage, or by a train, of a higher class than that for which he has obtained a pass or purchased a ticket, or travels in or on a carriage beyond the place authorized by his pass or ticket, he shall be liable to pay, on the demand of any railway servant appointed by the railway administration in this behalf, the excess charge hereinafter in this section mentioned, in addition to any difference between any fare paid by him and the fare payable in respect of such journey as he has made.

[1][(3) The excess charge referred to in sub-section (1) and sub-section (2) shall be a sum equivalent to the amount otherwise payable under those sub-sections, or eight annas, whichever is greater:

Provided that where the passenger has immediately after incurring the charge and before being detected by a railway servant notified to the railway servant on duty with the train the fact of the charge having been incurred, the excess charge shall be one-sixth of the excess charge otherwise payable calculated to the nearest anna, or two annas, whichever is greater:

Provided further that if the passenger has with him a certificate granted under sub-section (2) of section 68, no excess charge shall be payable];

(4) If a passenger liable to pay the excess charge and fare mentioned in sub-section (1), or the excess charge and any difference of fare mentioned in sub-section (2), fails or refuses to pay the same on demand being made therefor under one or other of those sub-sections, as the case may be, [2][any railway servant appointed by the railway administration in this behalf may apply to any Magistrate of the first or second class for the recovery of the sum payable as if it were a [3]fine, and the Magistrate if satisfied that the sum is payable shall order it to be so recovered, and may order that the person liable for the payment shall in default of payment suffer imprisonment of either description for a term which may extend to one month. Any sum recovered under this sub-section shall, as it is recovered, be paid to the railway administration.]

[4][113-A. Any person who, without having obtained the permission of a railway servant, travels or attempts to travel in a carriage without having a proper pass or ticket with him, or in a carriage of a higher class than that for which he has obtained a pass or purchased a ticket, or in a carriage beyond the place authorized by his pass or ticket, or who being in a carriage fails or refu-

Power to remove person from railway carrriage.

LEG. REF.

[1] Sub-S. (3) of S. 113 substituted by Act VI of 1941.

[2] Substituted by Act VI of 1941.

[3] As to procedure for recovery of fines, *see* Ss. 386 to 389 of the Code of Criminal Procedure, 1898 (Act V of 1898).

[4] S. 113-A added by Act VI of 1941.

NOTES.

is not a criminal offence to travel in a train without a pass or ticket, when there is no intent to defraud the company, but a person so travelling is liable under S. 113 to pay on demand an excess charge in the nature of a penalty. 44 Cal. 279=18 Cr.L.J. 647 =40 I.C. 295=25 C.L.J. 610. *See also* 1926 Bom. 266; 50 Bom. 355; 20 M. 385. (*See* now amendment by Act VI of 1941). *Excess charge* is not fine. 18 B. 440. (*See* now amended section). *See also* 20 M. 385. *How recoverable*, see *ibid.*; 4 I. C. 236=1 Bom.L.R. 166. *Imprisonment* not to be imposed in default of payment of fine. 20 A. 95; 11 C.W.N. 100. On this section, *see also* Rat. 871; L.B.R. (1872-1892) 606. 1 Weir 872; U.B.R. (1892-1896) Vol. I, Cr. p. 300 (Court-fees).

CONVICTION—LIABILITY TO PAY HIGHER FARE—DISTRESS WARRANT.—The petitioner was prosecuted for an offence under S. 113 (*i.e.*) travelling without a ticket and he pleaded in defence that he had not travelled by the train. The Magistrate without any enquiry issued a distress warrant for the amount of penalty imposed. *Held*, the Magistrate could pass orders only after taking evidence on the question whether the accused was liable to pay and how much was payable by him. 21 Cr.L.J. 320=55 I.C. 593=24 C.W.N. 195. *Revision* of Magistrate's order *see* 13 P.R. 1891 (Cr.). *Attempt to evade payment of railway fare*, when amounts to an attempt to cheat—*See* 6 P.R. 1868 (Cr.).

ses to present for examination or to deliver up his pass or ticket immediately on requisition being made therefor under section 69, may be removed from the carriage by any railway servant authorized by the railway administration in this behalf or by any other person whom such railway servant may call to his aid, unless he then and there pays the fare and the excess charge which he is liable to pay under section 113:

Provided that nothing in this section shall be deemed to preclude a person removed from a carriage of a higher class from continuing his journey in a carriage of a class for which he holds a pass or ticket:

Provided further that women and children, if unaccompanied by male passengers shall not be so removed except either at the station at which they first enter the train or at a junction or terminal station or station at the headquarters of a civil district and only between the hours of 6 a.m. and 6 p.m.]

Transferring any half of return ticket.

114. If a person sells or attempts to sell, or parts or attempts to part with the possession of [1][any half] of a return ticket in order to enable any other person to travel therewith, or purchase such half of a return ticket, he shall be punished with fine which may extend to fifty rupees, and, if the purchaser of such half of a return ticket travels or attempts to travel therewith, he shall be punished with an additional fine which may extend to the amount of the single fare for [1][the journey] authorized by the ticket.

Disposal of fines under the two last foregoing sections.

115. That portion of any fine imposed under section 112 or the last foregoing section which represents the single fare therein mentioned shall, as the fine is recovered, be paid to the railway administration before any portion of the fine is credited to the Government.

Altering or defacing pass or ticket.

116. If a passenger wilfully alters or defaces his pass or ticket so as to render the date, number or any material portion thereof illegible, he shall be punished with fine which may extend to fifty rupees.

Being or suffering person to travel on railway with infectious or contagious disorder.

117. (1) If a person suffering from an infectious or contagious disorder enters or travels upon a railway in contravention of section 71, sub-section (2), he, and any person having charge of him upon the railway when he so entered or travelled thereon, shall be punished with fine which may extend to twenty rupees, in addition to the for-

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LEG. REF.

[1] Substituted by Act IX of 1896, S. 6.

NOTES.

Sec. 114: APPLICABILITY OF.—S. 114 applies to purchasers and transferees of tickets and not to transferors alone. (23 S.L. R. 39=112 I.C. 771=1928 S. 191, Overr.) 155 I.C. 697=1935 S. 90 (F.B.).

OFFENCE UNDER S. 114—IF CAN BE DEALT WITH UNDER S. 562, CR. P. CODE.—Per *Full Bench* and *Dadiba C. Mehta, A.J.C., Dissenting*.—Offences punishable under S. 114, are easy to commit but not easy to detect. When detection has been successfully effected, an offender should not go scot-free even if he has not been convicted before. 155 I.C. 697=1935 S. 90 (F.B.). Per *Dadiba, C. Mehta, A.J.C.*—When a particular penal section of a statute is interpreted in a particular way in favour of a subject by a Divisional Bench, the subject has a right to say that he has not committed any offence, that he had no guilty intention whatsoever in doing an act in the belief that the interpretation was correct. If subsequently that interpretation is found fault with by a Full Bench, so that the very act which at one time was not looked upon as an offence, is now regarded as an offence, the altered interpretation should not have a retrospective effect as if the subject should have anticipated the second decision of the High Court. Even if a technical conviction is recorded, the accused should have the benefit of S. 562. 155 I.C. 697=1935 S. 90 (F.B.).

feiture of any fare which either of them may have paid, and of any pass or ticket which either of them may have obtained or purchased, and may be removed from the railway by any railway servant.

(2) If any such railway servant as is referred to in section 71, subsection (2), knowing that a person is suffering from any infectious or contagious disorder, wilfully permits the person to travel upon a railway without arranging for his separation from other passengers, he shall be punished with fine which may extend to one hundred rupees.

Entering carriage in motion, or otherwise improperly travelling on a railway.

118. (1) If a passenger enters or leaves, or attempts to enter or leave, any carriage while the train is in motion, or elswhere than at the side of the carriage adjoining the platform or other place appointed by the railway administration for passengers to enter or leave the carriage, or opens the side door of any carriage while the train is in motion, he shall be punished with fine which may extend to twenty rupees.

(2) If a passenger, after being warned by a railway servant to desist, persists in travelling on the roof, steps or footboard of any carriage or on an engine, or in any other part of a train not intended for the use of passengers, he shall be punished with fine which may extend to fifty rupees and may be removed from the railway by any railway servant.

Entering carriage or other place reserved for females.

119. If a male person, knowing a carriage, compartment, room or other place to be reserved by a railway administration for the exclusive use of females, enters the place without lawful excuse. or, having entered it,remains therein after having been desired by any railway servant to leave it, he shall be punished with fine which may extend to one hundred rupees, in addition to the forfeiture of any fare which he may have paid and of any pass or ticket which he may have obtained or purchased, and may be removed from the railway by any railway servant.

Drunkenness or nuisance on a railway.

120. If a person in any railway carriage or upon any part of a railway—

NOTES.

Sec. 118: PASSENGER—MEANING OF.—The word "Passenger" in S. 118 is used in a restricted sense and denotes a person who enters any Railway carriage for the purpose of travelling as a passenger. 14 Cr.L.J. 654=21 I.C. 894=15 Bom.L.R. 996. On this section, *see also* 1 Weir 873 (*Platform fruit seller* is not punishable under this section); 5 N.L.R. 151 (*Riding on footboard* after warning); *see also* 25 P.R. 1903 (Cr.); 31 P.R. 1905 (Cr.). Refusing to leave ice-vendor's compartment after warning that it has been reserved for the ice-vendor commits an offence under the section, sub-S. (2). 1936 A.L.J. 117=161 I.C. 17 =1936 A. 439.

Sec. 119.—*See* 76 P.L.R. 1903.

Sec. 120: APPLICABILITY TO RAILWAY SERVANTS.—The latter portion of S. 120 has a reference to the forfeiture of fares and of passes or tickets and to the removal of the offender from the railway by any railway servant, and thus shows its inapplicability to railway servants. 118 I.C. 197=23 S.L.R. 409=30 Cr.L.J. 879=1929 S. 249. S. 120 applies to Railway servants and the word 'person' in the section includes an employee of the Railway. 14 Pat.L.T. 652=146 I.C. 937. *See also* I.L.R. (1937) Bom. 666=39 Bom.L.R. 610=1937 Bom. 357.

REMOVAL OF PASSENGERS BY RAILWAY OFFICIALS.—The word "person" in S. 120 includes railway official and a railway guard who removes a passenger from a compartment which they are entitled to occupy, is guilty of an offence under S. 120. 19 Cr. L.J. 313=44 I.C. 329 (Mad.). But *see* I.L.R. (1937) Bom. 666=39 Bom.L.R. 610=170 I.C. 575=1937 Bom. 357. (Railway servant may well be dealt with by departmental action). There is no provision in the Railways Act for ejecting passengers except in certain circumstances specified in S. 120 and the expression 'railway' in S. 122 does not include a railway carriage. 44 Cal. 279=18 Cr.L.J. 647=40 I.C. 295 =25 C.L.J. 610. Travelling without a ticket is not one of the circumstances mentioned in S. 120 as justifying removal from a Railway carriage by a railway servant

(*a*) is in a state of intoxication, or

(*b*) commits any nuisance or act of indecency, or uses obscene or abusive language, or

(*c*) wilfully and without lawful excuse interferes with the comfort of any passenger or extinguisshes any lamp,

he shall be punished with fine which may extend to fifty rupees, in addition to the forfeiture of any fare which he may have paid and of any pass or ticket which he may have obtained or purchased, and may be removed from the railway by any railway servant.

Obstructing railway servant in his duty.

121. If a person wilfully obstructs or impedes any railway servant in the discharge of his duty, he shall be punished with fine which may extend to one hundred rupees.

Trespass and refusal to desist from trespass.

122. (1) If a person unlawfully enters upon a railway, he shall be punished with fine which may extend to twenty rupees.

NOTES.

where there is no evidence that the persons were travelling without tickets with fraudulent intent. 68 I.C. 846=23 Cr.L.J. 622 =1923 Lah. 71 (1).

USING THE DELIVERY SHED AS A MARKET PLACE FOR SELLING FISH.—A person who persists in selling fish in the delivery shed of Railway, which is not meant to be a market, and obstructs the business for which the shed is prepared is guilty of nuisance within S. 120 (*b*). 25 C.W.N. 603=22 Cr. L.J. 604=62 I.C. 876=33 C.L.J. 293. A conviction under S. 120 (*b*) is not sustainable when the particular words used are not in evidence. The mere statement of witnesses that words of abuse were used is not sufficient to support a conviction. 6 Lah.L.J. 469=1925 Lah. 151. But see *contra* 1936 A. L.J. 82=160 I.C. 1088=1936 A. 140 (Conviction can be sustained although the exact words used are not proved). On this section, *see also* 1 C.W.N. 74; Rat. 675; 1 N.L.R. 139; 7 I.C. 355; 30 B. 348; 8 Bom.L.R. 22. As to allowing cattle to stray on railway line, *see* 8 M.H.C. App. 1=1 Weir 874.

Sec. 121: ESSENTIALS FOR CONVICTION.—Before a person can be convicted of wilfully obstructing or impeding a railway servant in the discharge of his duties, it must be shown that the obstruction or resistance was offered to such railway servant in the discharge of his duties as authorised by law. (1 C.W.N. 74 Ref.) 91 I.C. 33=6 Lah. 467=27 Cr.L.J. 1=1925 L. 650. Where a person without sufficient and reasonable cause *pulls the emergency chain*, he renders himself liable for prosecution under S. 108 only, and not under S. 121 for preventing the running of the train and thus obstructing or impeding a railway servant in the discharge of his duty. (43 Bom. 103, Foll.) 32 Bom.L.R. 111=1930 Bom. 160. *Abuse or insult does not necessarily constitute obstruction* or impediment to a railway servant in the discharge of his duty. 68 I.C. 846 =23 Cr.L.J. 622=1923 L. 71 (1). Rules 244, 229 and 23 of the General Rules empower a Station Master to appoint a Signaller temporarily to do the duties of a Ticket Collector. When a *Signaller* so appointed undertakes such duties and acts in the discharge thereof, he is a *"Railway servant"* within S. 121. *Obstruction to him* is punishable under S. 121. 37 M.L.J. 656 =10 L.W. 669=21 Cr.L.J. 62. *See also* A.W.N. (1902) 24.

REFUSAL TO PAY EXCESS FARE.—Refusal to pay excess fare cannot possibly amount to obstructing or impeding a railway servant in the discharge of his duty within the meaning of S. 121. 1933 M.W.N. 874; Rat. 675.

Sec. 122: SCOPE AND OBJECT OF SECTION —ESSENTIALS OF LIABILITY UNDER THE SECTION.—Two things are necessary to bring a man under that section: (1) that the place of entry must be "railway" as defined in S. 3 (4) of the Act, and (2) the entry should have been unlawful in the inception. 25 A. L.J. 710=28 Cr.L.J. 648=1927 A. 646. The most important words in S. 122 are the words "unlawfully enters", for unless and until a person has made an unlawful entry upon the railway premises he cannot be brought within this penal provision. The word "unlawful" means "contrary to the law laid down in the statute." 88 I.C. 522= 1925 P. 525. If the railway made a general rule under the Act that nobody should enter upon railway platforms except passengers with tickets, any other persons entering upon the platform might be guilty of unlawful entry. But where no such rule exists, and where the station master leaves the platform gate open, those who enter upon the platform can hardly be considered to be other than licensees. A person who enters in this manner may be quite lawfully ordered to leave the railway premises, but as he has not entered unlawfully he can never be brought within the mischief of S. 122. 88 I.C. 522=6 P.L.T. 437=26 Cr.

(2) If a person so entering refuses to leave the railway on being requested to do so by any railway servant, or by any other person on behalf of the railway administration, he shall be punished with fine which may extend to fifty rupees, and may be removed from the railway by such servant or other person.

Disobedience of omnibus drivers to directions of railway servants.

123. If a driver or conductor of a tramcar, omnibus, carriage or other vehicle while upon the premises of a railway disobeys the reasonable directions of any railway servant or police officer, he shall be punished with fine which may extend to twenty rupees.

Opening or not properly shuttings gates.

[1]124. In either of the following cases, namely:—

(*a*) if a person knowing or having reason to believe that an engine or train is approaching along a railway, opens any gate set upon either side of the railway across a road, or passes or attempts to pass, or drives or takes, or attempts to drive or take, any animal, vehicle or other thing across the railway,

(*b*) if, in the absence of a gate-keeper, a person omits to shut and fasten such a gate as aforesaid as soon as he and any animal, vehicle or thing under his charge have passed through the gate,

the person shall be punished with fine which may extend to fifty rupees.

Cattle-trespass.

125. (1) The owner or person in charge of any cattle straying on a railway provided with fences suitable for the exclusion of cattle shall be punished with fine which may extend to

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LEG. REF.

[1] *Cf.* the Railway Clauses Act, 1845 (8 & 9, Vict., c. 20), S. 75.

NOTES.

L.J. 1162=1925 P. 535. The word "unlawful" has practically the same meaning as "illegal" which can be interpreted as including actionable. Hence an entry upon railway premises may be held to be unlawful, if it constitutes an actionable trespass. 146 I.C. 684=1933 A.L.J. 1432=1933 A. 891. *Crossing Railway line* even if it be to enter the platform is offence under S. 122. 142 I.C. 202=33 Cr.L.J. 291=1933 M. 372; 44 C. 279. *Object of section.* (1914) M. W.N. 124; 22 I.C. 177. *Unlawful entry is the essence of the offence* under both the clauses of S. 122. If the entry was lawful, refusal to leave on being desired to do so would not make the original entry unlawful. Nor would it make a person guilty under Cl. (2) which is but an aggravated form of the offence under Cl. (1). 19 Cr. L.J. 878=47 I.C. 74=22 C. W. N. 575. The word *"unlawful"* in S. 122, means without the leave of the Railway Administration and a person entering the railway line without such leave is guilty under S. 122. S. 47 or the bye-laws made under Cl. (*g*) thereof have no reference to this offence of trespass. 4 P.R. 1914=24 I.C. 348=15 Cr.L.J. 468 (11 C.W.N. 583, Rel.). A railway platform, to which the general public have free access, without having to show tickets, or without having to obtain special permission of any sort, is a part of the railway premises which may be entered by the members of the general public under the implied permission of the railway authority. Hence a person who enters such premises cannot be treated to be trespasser merely because he enters the platform without express permission and his entry is not unlawful within the meaning of S. 122. 146 I.C. 684=1933 A.L.J. 1432=1933 A. 891. Even a passenger with a ticket cannot trespass on Railway lines. 152 I. C. 615=40 L.W. 664. *Subsequent unlawful act, i.e.*, breaking lock of a wagon does not make the original entry itself unlawful under S. 122, when it was found that the Dalals like the accused were freely allowed to enter the station premises. 20 Cr.L.J. 96= 48 I.C. 896=15 N.L.R. 34. *See also* 22 B. 525. There is nothing in the Act to forbid the *reservation of compartment for different communities* and any member of any other community entering such compartment becomes a trespasser and could therefore be removed under S. 122. 21 I.C. 499=7 S. L.R. 42. S. 122 (2) cannot be applied to eject a *Railway employee,* from the *staff quarters* occupied by him while under service as they are not part of a Railway within the meaning of S. 3 (4). 15 Cr.L.J. 225 =23 I.C. 177=1914 M.W.N. 124. *Procedure under the section.* 1902 A.W.N. 24; 4 P.R. 1914 (Cr.) (Summary trial). It is within the competence of the police to put up a charge sheet in respect of an offence under S. 122 of the Act, without a written complaint from the Railway authorities. A complaint filed by the police without such written complaint of the railway authorities is a proper complaint. 1939 M.W.N. 876 =1940 Mad. 268.

Sec. 125.—The *owners of cattle straying*

five rupees for each head of cattle, in addition to any amount which may have been recovered or may be recoverable under the Cattle Trespass Act, 1871.

(2) If any cattle are wilfully driven, or knowingly permitted to be, on any railway otherwise than for the purpose of lawfully crossing the railway or for any other lawful purpose, the person in charge of the cattle or, at the option of the railway administration, the owner of the cattle shall be punished with fine which may extend to ten rupees for each head of cattle, in addition to any amount which may have been recovered or may be recoverable under the Cattle Trespass Act, 1871.

(3) Any fine imposed under this section may, if the Court so directs, be recovered in manner provided by section 25 of the Cattle Trespass Act, 1871.

(4) The expression "public road" in sections 11 and 26 of the Cattle Trespass Act, 1871, shall be deemed to include a railway, and any railway servant may exercise the powers conferred on officers of police by the former of those sections.

(5) The word "cattle" has the same meaning in this section as in the Cattle Trespass Act, 1871.

Maliciously wrecking or attempting to wreck a train.

[1]126. If a person unlawfully—

(*a*) puts or throws upon or across any railway any wood, stone or other matter or thing, or

(*b*) takes up, removes, loosens or displaces any rail, sleeper or other matter or thing belonging to any railway, or

(*c*) turns, moves, unlocks or diverts any points or other machinery belonging to any railway, or

(*d*) makes or shows, or hides or removes, any signal or light upon or near to any railway, or

(*e*) does or causes to be done or attempts to do any other act or thing in relation to any railway,

with intent, or with knowledge that he is likely, to endanger the safety of any person travelling or being upon the railway, he shall be punished with transportation for life or with imprisonment for a term which may extend to ten years.

LEG. REF.

[1] *Cf.* the Malicious Damage Act, 1861 (24 and 25, Vict., c. 97), S. 35 and the Offences Against the Person Act, 1861 (24 & 25 Vict., c. 100), S. 32.

NOTES.

on a railway line cannot be convicted of an offence under S. 125 for the negligence of their keeper. 34 All. 91=12 Cr.L.J. 614=12 I.C. 990=8 A.L.J. 1249. *See also* 18 M. 228=1 Weir 874; 8 M.H.C.R. (App.) 1. S. 125 (2) of the Act applies only if cattle were *wilfully* driven on any railway otherwise than for crossing the railway. There is no provision in the Railways Act by which the public is forbidden to cross railway lines or drive animals across them at places other than level crossings and if the railway erects no fence the public will continue to cross the line and drive their animals across it until they are stopped. 7 O.W.N. 461=1930 Oudh 250.

Sec. 126.—Person charged with having placed stones on the rails under S. 126 cannot be allowed to plead that no train was due at that time. Rat. 829. Unlocking and turning a turn-table is an offence under S. 126 though not likely to cause injury to any person. 1 Weir 875. Knowledge of attempt to wreck train by another and keeping watch, while the Act is being done is abetment and hence punishable under S. 126. 1 Bom.L.R. 682. *See* 43 Bom. 888, noted under S. 130, *infra*.

Secs. 126 and 128: LYING ON RAILS.—The offence of lying on the rails cannot be said to endanger the safety of persons travelling on the railway and comes under S. 128 and not under S. 126. Where several persons are charged with having conspired for the purpose, the proper conviction will be under S. 129 (*b*) of the Penal Code, for conspiring to commit an offence under S. 128 of the Railways Act. 1930 M.W.N. 1264.

[1]127. If a person unlawfully throws or causes to fall or strike at, against, into or upon any rolling -stock forming part of a train any wood, stone or other matter or thing with intent, or with knowledge that he is likely, to endanger the safety of any person being in or upon such rolling-stock or in or upon any other rolling-stock forming part of the same train, he shall be punished with transportation for life or with imprisonment for a term which may extend to ten years.

Maliciously hurting or attempting to hurt persons travelling by railway.

[2]128. If a person, by any unlawful act or by any wilful omission or neglect, endangers or causes to be endangered the safety of any person travelling or being upon any railway, or obstructs or causes to be obstructed or attempts to obstruct any rolling-stock upon any railway, he shall be punished with imprisonment for a term which may extend to two years.

Endangering safety of persons travelling by railway by wilful act or omission.

129. If a person rashly or negligently does any act, or omits to do what he is legally bound to do, and the act or omission is likely to endanger the safety of any person travelling or being upon a railway, he shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both.

Endangering safety of persons travelling by railway by rash or negligent act or omission.

130. (1) If a minor under the age of twelve years is with respect to any railway guilty of any of the acts or omissions mentioned or referred to in any of the four last foregoing sections, he shall be deemed, notwithstanding anything in section 82 or section 83 of the Indian Penal Code, to have committed an offence, and the Court convicting him may, if it thinks fit, direct that the minor, if a male, shall be punished with whipping, or may require the father or guardian of the minor to execute, within such time as the Court may fix, a bond

Special provision with respect to commission by children of acts endangering safety of persons travelling by railway.

LEG. REF.

[1] *Cf.* The Offence against the Person Act, 1861 (24 & 25 Vict., c. 100), S. 33.

[2] *Cf.* The Offences against the Person Act, 1861 (24 & 25, Vict., c. 100), S. 34 and the Malicious Damage Act, 1861 (24 & 25 Vict., c. 100), S. 36.

NOTES.

Sec. 127: OBSTRUCTION BY ASSEMBLY—CONVICTION OF A MEMBER OF THE ASSEMBLY—LEGALITY.—The term "offence" in S. 149, Penal Code, is confined to offence under the Penal Code and so a conviction under S. 128, with reference to S. 149 is illegal and cannot be sustained. (1923 Mad. 187 and 1925 Mad. 239, Foll.). 57 M.L.J. 114. Where a large body of men set out to obstruct a railway line and throw stones at trains they form an unlawful assembly and if in carrying out their common object they commit offences under Ss. 127 and 128, only those of them who are proved themselves to have committed these offences under Ss. 127 and 128 can be convicted under those sections. The rest are not constructively guilty as S. 149 cannot be invoked against them although the offences committed by them are the very offences they set out to commit and committed in prosecution of their common object. 52 Mad. 882=30 Cr.L.J. 869=1929 Mad. 880=57 M. L. J. 114.

Secs. 127 and 130.—Where two boys of tender years threw stones at a Railway train, it was held that the offence, if any, would fall under S. 130 and not under S. 127, and that the action would also ordinarily be protected under Ss. 82 and 83, Indian Penal Code. 30 S.L.R. 9=165 I.C. 642=1936 Sind 185.

Sec. 128: OFFENCE UNDER—PULLING COMMUNICATION CORD AND SITTING IN FRONT OF ENGINE.—A passenger pulled the communication cord of a railway train and stopped the train several times on the ground that his compartment was overcrowded. On the vacuum break being disconnected he sat down after warning the authorities, in front of the engine and commenced playing a musical instrument, thus delaying the train for about eighty minutes. *Held,* that an offence under S. 128 had been committed. *Held,* however, that in passing sentence the fact that the accused had in the interests of the public protested against the maladministration of the Railway Company should be taken into consideration. Sentence of one day imprisonment passed. 130 I. C. 384=32 Cr.L.J. 547=1931 Oudh 85.

Sec. 130.—An offence punishable under

binding himself, in such penalty as the Court directs, to prevent the minor from being again guilty of any of those acts or omissions.

(2) The amount of the bond, if forfeited, shall be recoverable by the Court as if it were a [1]fine imposed by itself.

(3) If a father or guardian fails to execute a bond under sub-section (1) within the time fixed by the Court, he shall be punished with fine which may extend to fifty rupees.

Procedure.

Arrest for offences against certain sections.

131. (1) If a person commits any offence mentioned in sections 100, 101, 119, 120, 121, 126, 127, 128 or 129 or in section 130, sub-section (1), he may be arrested without warrant or other written authority by any railway servant or police-officer, or by any other person whom such servant or officer may call to his aid.

(2) A person so arrested shall, with the least possible delay, be taken before a Magistrate having authority to try him or commit him for trial.

Arrest of persons likely to abscond or unknown.

[2]132. (1) If a person commits any offence under this Act, other than an offence mentioned in the last foregoing section, or fails or refuses to pay any excess charge or other sum demanded under section 113, and there is reason to believe that he will abscond or his name and address are unknown, and he refuses on demand to give his name and address, or there is reason to believe that the name or address given by him is incorrect, any railway servant or police-officer, or any other person whom such railway servant or police-officer may call to his aid, may, without warrant or other written authority, arrest him.

(2) The person arrested shall be released on his giving bail or, if his true name and address are ascertained, on his executing a bond without sureties for his appearance before a Magistrate when required.

(3) If the person cannot give bail and his true name and address are not ascertained, he shall with the least possible delay be taken before the nearest Magistrate having jurisdiction.

(4) The provisions of Chapters XXXIX and XLII of the [3]Code of Criminal Procedure, 1882, shall, so far as may be, apply to bail given and bonds executed under this section.

Magistrates having jurisdiction under Act.

133. No Magistrate other than a Presidency Magistrate or than a Magistrate whose powers are not less than those of a Magistrate of the second class shall try any offence under this Act.

LEG. REF.

[1] *See* Ss. 386 to 389 of the Code of Criminal Procedure, 1898 (Act V of 1898).

[2] *Cf.* the Companies Clauses Act, 1845 (8 and 9, Vict., c. 16), S. 156.

[3] *See* now the Code of Criminal Procedure (Act V of 1898).

NOTES.

S. 130 read with S. 126 (*a*) of the Railways Act, 1890, is not exclusively triable by a *Court of Session*, but can be tried by a competent Magistrate. 43 Bom. 888=20 Cr. L. J. 699=52 I.C. 667=21 Bom.L.R. 768. In view of provisions of S. 29-B of Cr. P. Code, a Magistrate other than a District Magistrate has no jurisdiction to try an offence under S. 130 of Railways Act. (43 Bom. 888, Diss. from.) 110 I.C. 589 =29 P.L.R. 536=29 Cr.L.J. 733=1928 Lah. 909. *See also* 11 C.P.L.R. 8; 14 C. P.L.R. 176; U.B.R. (1892-1896), Vol. I (Cr.) 302.

Sec. 132: CONSTRUCTION—WHAT SHOULD BE PROVED.—S. 132 does not require that both the name and address should be believed to be incorrect but either the name or address. Nor does the section require that either the name or the address should be in fact incorrect. 42 Cr.L.J. 786=1941 Sind 117.

Sec. 133.—In the absence of any ex-

Place of trial.

134. (1) Any person committing any offence against this Act or any rule thereunder shall be triable for such offence in any place in which he may be or which the Provincial Government may [1]notify in this behalf, as well as in any other place in which he might be tried under any law for the time being in force.

(2) Every notification under sub-section (1) shall be published in the Official Gazette, and a copy thereof shall be exhibited for the information of the public in some conspicuous place at each of such railway stations as the Provincial Government may direct.

CHAPTER X.

SUPPLEMENTAL PROVISIONS.

Taxation of railways by local authorities.

135. Notwithstanding anything to the contrary in any enactment, or in any agreement or award based on any enactment, the following rules shall regulate the levy of taxes in respect of railways and from railway administrations in aid of the funds of local authorities, namely:—

(1) A railway administration shall not be liable to pay any tax in aid of the funds of any local authority[2] unless the [3][general controlling authority] has, by notification in the Official Gazette, declared the railway administration to be liable to pay the tax.[4]

(2) While a notification of the [3][general controlling authority] under clause (1) of this section is in force, the railway administration shall be liable to pay to the local authority either the tax mentioned in the notification or, in lieu thereof, such sum, if any, as an officer[5] appointed in this behalf by the [3][general controlling authority] may, having regard to all the circumstances of the case, from time to time, determine to be fair and reasonable.

(3) The [3][general controlling authority] may at any time revoke or vary a notification under clause (1) of this section.

LEG. REF.

[1] For instances of notifications issued under this power, *see* Suppl. to Assam R. M., Assam Gazette, 1898, Pt. II, p. 134 and *ibid.*, 1901, Pt. II, p. 482; *Gazette of India,* 1899, Pt. I, p. 255; Beng. Stat. R. and O. Vol. I, and *Calcutta Gazette,* 1907, p. 202; and U.P. List of Local R. and O., Vol. I and *U. P. Gazette,* 1906, Pt. I, p. 983.

[2] For definition of "local authority," *see* sub-S. (5), *infra,* and the General Clauses Act (X of 1897), S. 3 (28).

[3] Substituted for 'Governor-General in Council' by A.O., 1937.

[4] (1) For notification under this section declaring every railway administration to be liable to pay every tax which it is lawfully required to pay by or on behalf of any local authority in aid of the funds of such authority, see *Gazette of India,* 1907, Pt. I, p. 1075. (2) For notification imposing water rates on the East Indian Railway in respect of certain Municipalities, see *Gazette of India,* 1893 and 1894, Pt. I, pp. 358 and 438, respectively. (3) For notifications declaring that certain Railway Companies shall pay certain taxes to certain Municipalities, *see* Mad. R. and O., Vol. I. (4) For notification declaring that the administration of the Burma Railways shall be liable to tax in respect of its property within the Rangoon Municipality, see *Gazette of India,* 1906, Pt. I, p. 811.

[5] For such appointment, *see* Genl. Stat. R. and O., Vol. III.

NOTES.

press provision as to trial of offences falling under S. 130 of the Railways Act, the provisions of S. 133 of that Act cannot be invoked so as to confer jurisdiction upon a Magistrate to try such an offence, when he is not specially empowered to try such offences by Sch. II of the Cr. P. Code, more especially when S. 29-B of the Cr. P. Code provides for an adequate machinery for trial of such offences. Such offences should be tried by superior Magistrates contemplated by S. 29-B, Cr. P. Code. 30 S.L.R. 9=1936 S. 185.

Sec. 135.—A notification issued under S. 135 cannot impose on a railway company any liability to pay a tax when such liability is not imposed by the taxing statute. But in the absence of such a notification, the railway company will be relieved from paying a tax which is imposed by the taxing

(4) Nothing in this section is to be construed as debarring any railway administration from entering into a contract with any local authority for the supply of water or light, or for the scavenging of railway premises, or for any other service which the local authority may be rendering or be prepared to render within any part of the local area under its control.

(5) "Local authority" in this section means a local authority as defined in the General Clauses Act, 1887,[1] and includes any authority legally entitled to or entrusted with the control or management of any fund for the maintenance of watchmen or for the conservancy of a river.

Restriction on execution against railway property.

136. (1) None of the rolling-stock, machinery, plant, tools, fittings, materials or effects used or provided by a railway administration for the purpose of the traffic on its railway, or of its stations or workshops, shall be liable to be taken in execution of any decree or order of any Court [2][or of any local authority or person having by law power to attach or distrain property or otherwise to cause property to be taken in execution] without the previous sanction of the [3][safety controlling authority].

(2) Nothing in sub-section (1) is to be construed as affecting the authority of any Court to attach the earnings of a railway in execution of a decree or order.

Railway servants to be public servants for the purposes of Chapter IX of the Indian Penal Code.

137. (1) Every railway servant shall be deemed to be a public servant for the purposes of Chapter IX of the Indian Penal Code.

(2) In the definition of "legal remuneration" in section 161 of that Code, the word "Government" shall, for the purposes of sub-section (1), be deemed to include any employer of a railway servant as such.

(3) A railway servant shall not—

(*a*) purchase or bid for, either in person or by agent, in his own name or in that of another, or jointly or in shares with others, any property put up to auction under section 55 or section 56, or,

(*b*) in contravention of any direction of the railway administration in this behalf, engage in trade.

(4) Notwithstanding anything in section 21 of the Indian Penal Code, a railway servant shall not be deemed to be a public servant for any of the purposes of that Code except those mentioned in sub-section (1).

138. If a railway servant is discharged or suspended from his office, or

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LEG. REF.

[1] *See* now the General Clauses Act (X of 1897), S. 3 (28).

[2] Inserted by Act IX of 1896, S. 7.

[3] Substituted for "Governor-General in Council" by A.O., 1937.

NOTES.

statute. I.L.R. (1940) 1 Cal. 585=44 C. W.N. 648=1940 Cal. 531. Applicability of section—Notifications under—Effect of—Land vested in G.I.P. Railway Administration—If subject to charge for Municipal taxes—Bombay City Municipal Act, S. 212. *See* 37 Bom.L.R. 513=1935 B. 352.

Sec. 136.—*Cf.* the Railway Companies Act, 1867 (30 & 31 Vict., c. 127), S. 4.

Sec. 137.—*See* 9 P.R. 1898 (Cr.) (Goods clerk is public servant). *See also* 44 C. 279. An isolated investment made on the security of property by a Railway employee does not amount to 'engaging in trade' under S. 137 (3) (*b*). There must be more than occasional disconnected loans. There must be a business of money-lending. 1941 A.L.J. 370=1941 All. 318.

Sec. 138.—*Cf.* the Railway Clauses Act 1845 (8 & 9 Vict., c. 20), S. 106. Possession of staff quarters lawfully obtained by a railway employee can be determined only by steps taken under S. 138 and for that possession to become unlawful, there must have been an interruption thereof and reentry. The fact of dismissal of the servant by itself does not put an end to his right of possession. 15 Cr.L.J. 225=23 I.C. 177. Where by an agreement with a contractor of a refreshment room the Railway Admi-

Procedure for summary delivery to railway administration of property detained by railway servant.

dies, absconds or absents himself, and he or his wife or widow, or any of his family or representatives, refuses or neglects, after notice in writing for that purpose, to deliver up to the railway administration, or to a person appointed by the railway administration in this behalf, any station, dwelling-house, office or other building with its appurtenances, or any books, papers or other matters, belonging to the railway administration and in the possession or custody of such railway servant at the occurrence of any such event as aforesaid, any Magistrate of the first class may, on application made by or on behalf of the railway administration, order any police-officer, with proper assistance, to enter upon the building and remove any person found therein and take possession thereof, or to take possession of the books, papers or other matters, and to deliver the same to the railway administration or a person appointed by the railway administration in that behalf.

139. [*Mode of signifying communications from the Governor-General in Council.*] *Rep. by A. O.*, 1937.

Service of notices on railway administrations.

140. Any notice or other document required or authorized by this Act to be served on a railway administration may be served, in the case of a railway administered by the Government or a Native State, on the Manager and, in the case of a railway administered by a railway company, on the Agent in India of the railway company—

(*a*) by delivering the notice or other document to the Manager or Agent; or

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LEG. REF.

[1] *See* now the Indian Post Office Act (VI of 1898).

NOTES.

nistration both overlooks and directs him in the performance of his work, the contractor must be deemed to be a railway servant and not an independent contractor and the termination of his services by the railway amounts to discharge within the meaning of S. 138 of the Act. (A.I.R. 1924 Rang. 373 and *Sadler* v. *Henlook*, (1835) 4 El. & Bl. 570, Rel. on.) 38 Cr.L.J. 793=1937 Lah. 547.

Sec. 140.—S. 140 refers not only to notices but to documents which have to be served on the Company and when a claim is made under S. 77, it is a claim in writing to be preferred to the Railway Administration which involves the service of the document on the Company. 10 Pat. L. T. 24=112 I. C. 616. Where a copy of notice under S. 77 was addressed to the Traffic Manager, N. W. Ry. and was sent to the Agent, E. I. Ry., *held*, there was no valid service of notice. 134 I.C. 93=35 C.W.N. 338=1931 C. 585. Notice of suit against a Railway Company can only be served in one of three ways described by S. 140 of the Railways Act. 117 I.C. 769=1929 S. 238. Notice given to some official other than Agent or Manager is not sufficient. 1927 N. 276=24 N.L.R. 1. (*See also* 28 A. 552; 44 A. 645; 45 A. 353, Foll.; 79 I.C. 602, Diss. from.) 134 I.C. 93=35 C.W.N. 338=1931 C. 585. Section must be strictly construed. 1927 N. 276. "May" in the section is not to be taken as equivalent of "must". 7 L. 238=1926 L. 253 (F.B.). But *see* 34 C.W.N. 1079=1931 C. 306, *contra*. *See also* 1927 N. 276. Notice to Traffic Manager, if notice to agent—Proof of authority to receive notice: *see* 76 I.C. 1; 8 Pat.L. T. 401; 5 Pat. 488; 3 O.W.N. 869. Service of notice by post—Acceptance by manager —Effect. 99 I.C. 622=1927 A. 215. Notice on Divisional Traffic Manager, if sufficient: *see* 93 I.C. 22=3 O.W.N. 156. Sufficiency of notice for suit against Secretary of State in cases of State-managed railways: *see* 30 Bom.L.R. 970. Notice under this section is no substitute for notice under S. 80, C. P. Code. (*Ibid.*) On this section, *see also* 18 S.L.R. 25=1925 Sind 229; 42 M.L.J. 202=45 M. 135 (F.B.). [*See also* Note under S. 77, *supra.*]

Secs. 140 and 77: NOTICE—'MAY BE SERVED'—'MAY' IF MEANS 'MUST'.—Per *Costello, J.*—There are number of authorities which have decided that the word "may" in the section is to be read as if it were the word "must" and accordingly it is obligatory in making a claim under S. 77 to put forward that claim and to give notice in one or other of the three ways indicated in S. 140. If the matter had been an open one, personally I should have been more disposed to take the view which was enunciated in the case of 42 M.L.J. 202=45 M. 135 (F.B.), in which *Kumaraswami Sastri, J.*, observed that S. 140 is merely an enabling provision and that the word "may" does not mean "must". However, on the facts of the case, it was held there was a valid service of notice by

(*b*) by leaving it at his office; or

(*c*) by forwarding it by post in a prepaid letter addressed to the Manager or Agent at his office and registered under Part III of the Indian Post Office Act, 1866.[1]

Service of notices by railway administrations.

141. Any notice or otherwise document required or authorized by this Act to be served on any person by a railway administration may be served—

(*a*) by delivering it to the person; or

(*b*) by leaving it at the usual or last known place of abode of the person; or

(*c*) by forwarding it by post in a prepaid letter addressed to the person at his usual or last known place of abode and registered under Part III of the Indian Post Office Act, 1866.[1]

Presumption where notice is served by post.

142. Where a notice or other document is served by post, it shall be deemed to have been served at the time when the letter containing it would be delivered in the ordinary course of post, and in proving such service it shall be sufficient to prove that the letter containing the notice or other document was properly addressed and registered.

Provisions with respect to rules.

143. (1) A rule under section 22, section 34 or section 84, or the cancellation, rescission or variation of a rule under any of those sections or under section 47, sub-section (4), shall not take effect until it has been published in the Official Gazette.

(2) Where any rule made under this Act, or the cancellation, rescission or variation of any such rule, is required by this Act to be published in the Official Gazette, it shall, besides being so published, be further notified to persons affected thereby in such manner as the [2][authority making, cancelling, rescinding or varying the rule], by general or special order, directs.

[3][* * * * *]

144. [*Delegation of Powers of Governor-General in Council.*] *Rep. by A. O.*, 1937.

Representation of Managers and Agents of Railways in Courts.

145. (1) The Manager of a railway administered by the Government or a Native State, and the Agent in India of a railway administered by a railway company, may, by instrument in writing, authorize any railway servant or other person to act for or represent him in any proceeding before any Civil, Criminal or other Court.

(2) A person authorized by a Manager or Agent to conduct prosecutions

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LEG. REF.

[1] *See* now the Indian Post Office Act (VI of 1898).

[2] Substituted for 'Governor-General in Council' by A.O., 1937.

[3] Sub-S. (3) omitted by *ibid*.

NOTES.

registered post. 34 C.W.N. 1079=1931 C. 306. *See also* 13 Pat. L. T. 695; 137 I.C. 205=1932 A. L. J. 505=1932 A. 381, cited under S. 77, *supra*.

Sec. 141.—*Cf.* the Companies Clauses Act, 1845 (8 & 9 Vict., c. 16), S. 136, and the Railway Clauses Act, 1845 (8 & 9 Vict., c. 20), S. 34. On this section, *see* 24 A. L. J. 360=1926 A. 214.

Sec. 145 (2).—Section contemplates private prosecutions. 1925 P. 755=92 I. C. 697.

on behalf of a railway administration shall, notwithstanding anything in section 495 of the [1]Code of Criminal Procedure, 1882, be entitled to conduct such prosecutions without the permission of the Magistrate.

Power to extend Act to certain tramways.

[2][146. (1) This Act or any portion thereof may be extended by notification in the Official Gazette—

(*a*) to any tramway which is a Federal Railway within the meaning of the Government of India Act, 1935, by the Federal Railway Authority; and

(*b*) to any other tramway, by the Provincial Government.

(2) This section does not apply to any tramway not worked by steam or other mechanical power.]

Power to exempt railway from Act.

[2][147. The general controlling authority may, with the sanction of the safety controlling authority, by notification in the Official Gazette, exempt any railway from any provisions of this Act:

Provided that the safety controlling authority shall not refuse its sanction unless it appears to it necessary so to do for the purpose of securing safety.]

Matters supplemental to the definitions of "railway" and "railway servant".

148. (1) For the purposes of section 3, clauses (5), (6) and (7), and sections 4 to 19 (both inclusive), 47 to 52 (both inclusive), 59, 79, 83 to 92 (both inclusive), 96, 97, 98, 100, 101, 103, 104, 107, 111, 122, 124 to 132 (both inclusive), 134 to 138 (both inclusive), 140, 141, 144, 145 and 147, the word "railway", whether it occurs alone or as a prefix to another word, has reference to a railway or portion of a railway under construction and to a railway or portion of a railway not used for the public carriage of passengers, animals or goods as well as to a railway falling within the definition of that word in section 3, clause (4).

(2) For the purposes of sections 5, 21, 83, 100, 101, 103, 104, 121, 122, 125 and 137, sub-sections (1), (2) and (4), and section 138, the expression "railway servant" includes a person employed upon a railway in connection with the service thereof by a person fulfilling a contract with the railway administration.

149. [*Amendment of the Indian Penal Code.*] *Rep. by the Repealing Act* (*I of* 1938), *section* 2 and Sch.

150. [*Amendment of the Sindh-Peshin Railway Act,* 1887.] *Rep. by the Repealing Act* (*I of* 1938), *section* 2 *and* Sch.

THE FIRST SCHEDULE.

[ENACTMENTS REPEALED.]

Rep. by the Repealing Act (*I of* 1938), *section* 2 *and* Sch.

LEG. REF.

[1] *See* now the Code of Criminal Procedure (Act V of 1898).

[2] Substituted by A.O., 1937 for the original section.

NOTES.

Sec. 146.—For notifications extending the Act to certain steam-tramways, see *Gazette of India,* 1896, Pt. I, p. 408, and to the Bukhtiarpur-Behar Light Railway, see *Gazette of India,* 1903, Pt. I, p. 797, and *ibid.*, 1898, Pt. I, p. 467; *ibid.*, 1904; Pt. I, p. 744. For notification extending the whole Act except S. 135 to the Shahdara (Delhi) Saharanpur Light Railway, see *Gazette of India,* 1907, Pt. I, p. 569. For notification extending the whole of the Act except S. 135 to the Parlakimidi Steam Railway, *see* Mad. R. & O., Vol. I.

Sec. 147.—For notification exempting the Barsi Light Railway Company from the provisions of S. 85 of the Act, see *Gazette of India,* 1896, Pt. I, p. 303.

THE SECOND SCHEDULE.

ARTICLES TO BE DECLARED AND INSURED.

(*See section 75.*)

(*a*) Gold and silver, coined or uncoined, manufactured or unmanufactured;

(*b*) plated articles;

(*c*) cloths and tissue and lace of which gold or silver forms part, not being the uniform or part of the uniform of an officer, soldier, sailor, police-officer or person enrolled as a volunteer under the Indian Volunteers Act, 1869, or of any public officer, British or foreign, entitled to wear uniform;

(*d*) pearls, precious stones, jewellery and trinkets;

(*e*) watches, clocks and time-pieces of any description;

(*f*) Government securities;

(*g*) Government stamps;

(*h*) bills of exchange, hundies, promissory notes, bank-notes and orders or other securities for payment of money;

(*i*) maps, writing and title-deeds;

(*j*) paintings, engravings, lithographs, photographs, carvings; sculpture and other works of art;

(*k*) art pottery and all articles made of glass, china or marble;

(*l*) silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials;

(*m*) shawls;

(*n*) lace and furs;

(*o*) opium;

(*p*) ivory, ebony, coral and sandalwood;

(*q*) musk, sandalwood oil and other essential oils used in the preparation of *itr* or other perfume;

(*r*) musical and scientific instruments;

(*s*) any article of special value which the [1][Federal Railway Authority] may, by notification in the Official Gazette, add to this schedule.[2]

EXTRACT FROM THE GOVERNMENT OF INDIA (ADAPTATION OF INDIAN LAWS) ORDER, 1937.

Private Railway Acts.

Any power conferred by any Private Act on a Railway Company to make and carry out contracts with the Secretary of State in Council shall be deemed to include a power to make and carry out contracts with the Federal Railway Authority (as defined in the Indian Guaranteed Railways Act, 1879) or any Government in British India for the like purposes; references in any Private Act relating to railways in India to the Secretary of State in Council in relation to contracts or anything to be done in relation to contracts shall, where the context and the circumstances so admit or require, be construed as including references to that Authority or any such Government; any provision in any such Act requiring the previous sanction of the Secretary of State in Council to the payment of any portion of the remuneration of a director of a railway company as part of the working expenses of the company shall be construed as requiring the previous sanction of the Governor-General thereto; and any provision in any such Act vesting any property in the Secretary of State in Council shall be construed as having vested that property in His Majesty for the purposes of the Government of India.

General and Private Railway Acts.

So much of any enactment relating to railways in India, whether contained in a Public General Act or a Private Act, as directs the Secretary of State in Council to hold unclaimed moneys subject to the claims of persons entitled thereto or authorises him to apply such moneys as part of the revenues of India, or to apply them as part of the revenues of India or otherwise as he thinks fit, shall be construed as requiring the Secretary of State to treat such moneys (subject to any claims which may be established

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LEG. REF.

[1] Substituted for 'Governor-General in Council' by A.O., 1937.

[2] *See* Genl. Stat. R. & O., Vol. III.

thereto in accordance with the relevant enactments) as part of the revenues of the Governor-General in Council or, after the establishment of the Federation of India, as part of the revenues of the Federation.

THE RAILWAYS (LOCAL AUTHORITIES' TAXATION) ACT (XXV OF 1941).

[26*th November*, 1941.

An Act to regulate the extent to which railway property shall be liable to taxation imposed by an authority within a Province.

WHEREAS it is expedient to regulate the extent to which property vested in His Majesty for the purposes of the Central Government, being property of a railway, shall be liable to taxation imposed by an authority within a Province;

It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE RAILWAYS (LOCAL AUTHORITIES' TAXATION) ACT, 1941.

(2) It extends to the whole of British India.

Definitions.

2. In this Act,—

(*a*) "local authority" means a local authority as defined in the General Clauses Act, 1897, and includes any authority legally entitled to or entrusted with the control or management of any fund for the maintenance of watchmen or for the conservancy of a river;

(*b*) "railway administration" has the meaning assigned to the expression in clause (6) of section 3 of the Indian Railways Act, 1890.

Liability of railways to taxation by local authorities.

3. (1) In respect of property vested in His Majesty for the purposes of the Central Government, being property of a railway, a railway administration shall be liable to pay any tax in aid of the funds of any local authority, if the Central Government, by notification in the Official Gazette, declares it to be so liable.

(2) While a notification under sub-section (1) is in force, the railway administration shall be liable to pay to the local authority either the tax mentioned in the notification or in lieu thereof such sum, if any, as a person appointed in this behalf by the Central Government may, having regard to the services rendered to the railway and all the relevant circumstances of the case, from time to time determine to be fair and reasonable. The person so appointed shall be a person who is or has been a Judge of a High Court or a District Judge.

Modification of existing liability to taxation.

4. The Central Government may, by notification in the official Gazette, revoke or vary any notification issued under clause (1) of section 135 of the Indian Railways Act, 1890; and where a notification is so revoked any liability arising out of the notification to pay any tax to any local authority shall cease, and where a notification is so varied the liability arising out of the notification shall be varied accordingly.

Saving.

5. Nothing in this Act shall be construed as debarring any railway administration administering a railway from entering into a contract with any local authority for the supply of water or light or for the scavenging of railway premises, or for any other service which the local authority may be rendering or be prepared to render within any part of the local area under its control.

THE INDIAN RED CROSS SOCIETY ACT (XV OF 1920).[1]

EFFECT OF SUBSEQUENT LEGISLATION.—Amended by Government of India (Adaptation of Indian Laws) Order, 1937 and by Act XVII of 1937.

[20*th March*, 1920.

An Act to constitute an Indian Red Cross Society.

WHEREAS it is expedient to provide for the future administration of the various monies and gifts received from the public for the purpose of medical and other aid to the sick and wounded, and other purposes of a like nature during the late war, and more especially for the administration of the monies and property held by a Committee known as the Joint War Committee, Indian Branch, of the Order of St. John of Jerusalem in England and the British Red Cross Society;

AND WHEREAS it is expedient to constitute an Indian Red Cross Society with a view to the continuation in peace time, on a wider basis and with a wider purpose, of the work carried on by the said Committee during the war, and to provide for the affiliation therewith of other societies and bodies having similar objects; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE INDIAN RED CROSS SOCIETY ACT, 1920.

(2) It extends to the whole of British India, including British Baluchistan, the Sonthal Parganas and the District of Angul.

Constitution of Indian Red Cross Society.

2. There shall be constituted by this Act a Society to be known as the Indian Red Cross Society (hereinafter called the Society). The first members of the society shall be nominated by persons who immediately before the commencement of this Act were members of the Joint War Committee, Indian Branch, of the Order of St. John of Jerusalem in England and the British Red Cross Society (hereinafter called the Committee) at a meeting to be summoned and held for that purpose in accordance with the usual practice of the Committee within three months from the commencement of this Act. The number of members to be so nominated shall not be less than twenty-five or more than fifty.

Appointment of Managing Body.

3. The Committee shall also at the same meeting appoint from among the members nominated under section 2 the Managing Body of the Society (hereinafter called the Managing Body), the members of which shall hold office as such until a new Managing Body is appointed as hereinafter provided. The number of members of the Managing Body shall not be less than ten or more than thirty.

Incorporation.

4. The first members of the Society and all persons who may hereafter become members thereof so long as they continue so to be, are hereby constituted a body corporate under the name of the Indian Red Cross Society, and the said Body shall have perpetual succession and a common seal with power to hold and acquire property, movable and immovable, and shall sue and be sued by the said name.

Power to make rules.

5. The Managing Body shall, within six months from the commencement of this Act and subject to the condition of previous publication, make rules for the management, control and procedure of the Society. The rules may provide among other matters for the following, namely:—

LEG. REF.

[1] For Statement of Objects and Reasons, see *Gazette of India*, 1920, Pt. V, p. 83; and for Proceedings in Council, see *ibid*., 1920, Pt. VI, pp. 511 and 830.

(*a*) the conditions of membership of the Society;

(*b*) the appointment and term of office of members of the Managing Body;

(*c*) the choice of representatives on International and other Committees;

(*d*) representation on the Managing Body of Provincial and State Branch Committees and affiliated societies and bodies;

(*e*) the constitution of Finance, Medical and other Committees and the delegation of powers to them; and

(*f*) the regulation of the procedure generally of the Society and Managing Body.

Dissolution and transfer of property of Joint War Committee.

6. Upon the nomination of the first members of the Society and the appointment of the Managing Body—

(*a*) the Committee shall be dissolved;

(*b*) all property, movable or immovable, of or belonging to the Committee shall vest in the Society and shall be applied by the Managing Body to the objects and purposes hereinafter set out; and

(*c*) all the debts and liabilities of the Committee shall be transferred to the Society, and shall thereafter be discharged and satisfied by it out of the aforesaid property, and each and every member of the Committee shall be wholly discharged therefrom.

Purposes to which funds of Society may be applied.

7. Notwithstanding anything contained in any appeal for subscriptions or gifts to or for the purposes of the Committee, the Managing Body may in its discretion apply—

(*a*) either the corpus of the income or any part of such corpus or income of any property vested in it under clause (*b*) of section 6 for the relief of sickness, suffering or distress caused by the operation of war in India or in any other country in which Expeditionary Forces from India may, from time to time, be employed and for purposes cognate to that object and in maintaining Red Cross Depots for military purposes;

(*b*) in accordance with the provisions of section 8 the income only of any such property but not the corpus or any part thereof for the relief of sickness or suffering in India, whether due to the operation of war or not, or in pursuance of any of the objects set forth in the First Schedule.

Constitution of Branch Committees.

[1][8. (1)] If Branch Committees consisting of Members of the Society are constituted in any of the Provinces, States and other parts of India specified in the Second Schedule, then, subject to the requirements of the Managing Body for the purposes of clause (*a*) of section 7 and any provision for expenses of management, the income of the property which has been vested in the Society under clause (*b*) of section 6 shall be distributed annually among such Branch Committees in the proportion shown in the said Schedule, to be expended by them and at their discretion upon all or any of the objects referred to in clause (*b*) of section 7.

[1][(2) The Central Government may, by notification in the Official Gazette, direct that any Province, State or other part of India specified in the

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LEG. REF.

[1] Original S. 8 was re-numbered as S. 8 (1) and sub-Ss. (2) to (4) added by Act XVII of 1937.

first column of the Second Schedule shall be excluded therefrom or that any Province, State or other part of India not specified therein shall be included therein and that the percentages specified in the third column of the said Schedule shall be varied as required by any such exclusion or inclusion.

(3) On the issue of a notification under sub-section (2) the Second Schedule shall be deemed to be amended in accordance with such notification.

(4) No notification under sub-section (2) shall be made without the consent of every Branch Committee constituted in the Provinces, States and other parts of India for the time being included in the Second Schedule.]

Affiliation of other Societies.

9. The Managing Body may also affiliate to the Society any other society or body having all or any of the objects and purposes referred to in section 7, and may provide for the allocation and distribution of funds, through such society or body, to or for any such objects or purposes.

Decision of Managing Body as to purposes final.

10. The Managing Body shall have authority to determine in all cases what matters properly fall within the scope of clause (*b*) of section 7, and its decision in all such matters shall be binding on all Branch Committees and affiliated societies or bodies.

Receipt and use of gifts.

11. The Managing Body may also receive and hold gifts of whatsoever description either for the general purposes of the Society or for any particular purpose for which the corpus or income of the property vested in it under clause (*b*) of section 6 may be applied under the provisions of section 7, and on receipt of such gifts may, subject to the provisions of rules made under section 5, apply the same to such purposes, either directly or through Branch Committees, or societies or bodies affiliated under section 9.

Powers of Branch Committees.

12. Subject to the provisions of rules made under section 5, each Branch Committee shall have all power to regulate its own procedure and constitution, to receive gifts and expend all monies received by it for its purposes, either directly or through other societies or bodies.

FIRST SCHEDULE.

(*See section 7.*)

Objects to which the funds of the Society may be applied.

(1) The care of the sick and wounded men of His Majesty's Forces, whether still on the active list or demobilised.

(2) The care of those suffering from tuberculosis, having regard in the first place to soldiers and sailors, whether they have contracted the disease on active service or not.

(3) Child welfare.

(4) Work parties to provide the necessary garments, etc., for hospitals and health institutions in need of them.

(5) Assistance required in all branches of nursing, health and welfare work, ancillary to any organisations which have or may come into being in India and which are recognised by the Society.

(6) Home Service Ambulance Work.

(7) Provision of comforts and assistance to members of His Majesty's Forces, whether on the active list or demobilised.

(8) Such other cognate objects as may, from time to time, be approved by the Society.

(9) The expenses of management of the Society and its branches and affiliated societies and bodies.

(10) The representation of the Society on or at International or other Committees formed for furthering objects similar to those of the Society.

[1][SECOND SCHEDULE.

(*See section* 8.)

Statement showing contributions made by Provinces and States in India to the Central "Our Day" Fund and the approximate percentage of their claim on the interest on the capital fund of the joint War Committee, Indian Branch.

Names of Provinces, States, etc.	Amount of contribution.	Approximate percentage of claim on the interest of Capital Fund.
	Lakhs.	
United Provinces ..	15	18·70
[2]Bombay ..	10	8 15
Western India States ..		3·14
Sind ..		1·25
Bengal ..	10	12 54
Punjab ..	11	13·47
Central Provinces ..	4	4 87
Bihar ..	4½	5 74
Orissa ..	1	1 08
Madras ..	5¾	7·25
Rajputana ..	4	4·87
Central India ..	3½	3 80
Gwalior ..	1⅝	1 62
North West Frontier ..	2¼	2·70
Hyderabad (Deccan) ..	3	3·80
Assam ..	1¼	1·62
Baluchistan ..	1¼	1·62
Mysore ..	1¼	1·62
Kashmir ..	1	1·08
Baroda ..	½	·54
Delhi ..	⅔	·54]

THE RED CROSS SOCIETY (ALLOCATION OF PROPERTY) ACT (XVIII OF 1936).[2]

[*27th October*, 1936.

An Act to provide out of the property of the Indian Red Cross Society a Fund to be administered in Burma by a Burma Red Cross Society, and to terminate in Burma the existing functions of the Indian Red Cross Society.

WHEREAS it is expedient to provide out of the property of the Indian Red Cross Society a Fund to be administered in Burma by a Burma Red Cross Society, and to terminate in Burma the existing functions of the Indian Red Cross Society; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE RED CROSS SOCIETY (ALLOCATION OF PROPERTY) ACT, 1936.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

Apportionment of corpus of property of Indian Red Cross Society.

2. Notwithstanding anything contained in the Indian Red Cross Society Act, 1920, an amount equal to seven per cent. of the corpus of the property vested by the said Act in the Indian Red Cross Society (which amount is in this Act referred to as the Fund) shall be set apart to be administered in the Province of Burma as a trust by such body of trustees as the High Court of Judicature at Rangoon may appoint, and in accordance with, and

LEG. REF.

[1] Substituted by Act XVII of 1937, S. 3 for original schedule.

[2] For Statement of Objects and Reasons, see *Gazette of India*, 1936, Pt. V, p. 316.

for such of the purposes referred to in section 7 of the said Act as may be contained in, any scheme settled by the said High Court.

Transfer of apportioned property to trustees and dissolution of Burma Branch Committee of Indian Red Cross Society.

3. As soon as the High Court of Judicature at Rangoon has settled a scheme and made an order vesting the Fund in the body of trustees referred to in section 2 the Managing Body of the Indian Red Cross Society shall transfer the Fund to the said body of trustees and thereupon the Burma Provincial Committee of the Indian Red Cross Society, known as the Indian Red Cross Society, Burma Branch, shall be dissolved and all property of or belonging to that Committee, including the unexpended balance, if any, of any moneys distributed to that Committee under section 8 of the Indian Red Cross Society Act, 1920, shall be transferred to and shall vest in the said body of trustees to be held by them in the same manner and, subject to the scheme settled by the said High Court, for the same purposes as such property was held by that Committee.

Cesser of provisions of Indian Red Cross Society Act, 1920.

4. On the making of the vesting order referred to in section 3, the provisions of the Indian Red Cross Society Act, 1920, and of any rules made thereunder relating to Branch Committees in the provinces, their constitution, powers or functions, their representation on the Managing Body of the Indian Red Cross Society, and their right to receive a proportion of the income of property vested in the Society, shall cease to have effect in respect of the province of Burma and of the Indian Red Cross Society, Burma Branch Committee.

THE INDIAN REGISTRATION ACT (XVI OF 1908).

Rep. in part, Act V of 1917; Acts X of 1927 and I of 1938.

EFFECT OF SUBSEQUENT LEGISLATION.—Amended Act IV of 1914; Act XV of 1917; Act XXXVIII of 1920; Act XIII of 1926; Act II of 1927; Act XV of 1929; Act XXI of 1929; Act XXXII of 1940; Act XXXIII of 1940 and Mad. Act III of 1936; Government of India (Adaptation of Indian Laws) Order, 1937.

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93. [*Repealed.*]
THE SCHEDULE.—[*Repealed.*]

THE INDIAN REGISTRATION ACT (XVI OF 1908).[1]

[18*th December*, 1908.

An Act to consolidate the enactments relating to the Registration of Documents.

WHEREAS it is expedient to consolidate the enactments relating to the registration of documents; It is hereby enacted as follows:—

PART I.

PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called THE INDIAN REGISTRATION ACT, 1908.

(2) It extends to the whole of British India, except such districts or tracts of country as the Provincial Government may [2][6 * * * * *] exclude from its operation.

(3) It shall come into force on the first day of January, 1909.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

LEG. REF.

[1] For Statement of Objects and Reasons, see *Gazette of India*, 1908, Pt. V, p. 325; for Report of Select Committee, see *ibid.*, 1908, Pt. V, p. 387, and for Proceedings in Council, see *ibid.*, 1908, Pt. VI, pp. 148, 154 and 182.

[2] The words "within the previous sanction of the Governor-General in Council" were omitted by Act XXXVIII of 1920.

NOTES.

Sec. 1: GENERAL.—The object of registration is not to give information to third parties but to check forgery and afford good evidence. 24 M.L.J. 664=20 I.C. 385; 25 P.L.R. 1917. *See also* 48 C. 1=47 I.A. 239=39 M.L.J. 243 (P.C.). It is the duty of the Registrar to examine the grantor or his representative before a deed is registered. 48 I.A. 365=64 I.C. 299. The Board of Revenue cannot refer to High Court a question under the Regn. Act. 38 A. 351 (F.B.).

STRICT CONSTRUCTION.—The Act has to be strictly construed; but there is a point at which it is unnecessary to multiply technicalities. Non-compliance with R. 30 of the Act held to be an irregularity. 58 C. 133=1931 C. 478. There is nothing in the Act which forbids the splitting up of a transaction. Thus a person may execute several mortgages of the value of less than Rs. 100 so as to avoid registration. 15 R.D. 380=12 L.R. 167 (Rev.). The question whether a document is compulsorily registrable has to be decided on a perusal of that document itself, and rulings upon other documents not shown to be of an exactly similar character are no guide to a proper decision of the questin. 1935 L. 448.

AMENDING ACT II OF 1927—IF RETROSPECTIVE.—The Amending Act is retrospective in its operation and is intended to cover not only documents which may in future be executed but also to documents which have been previously executed. 58 C. 449=34 C. W. N. 881=1931 C. 171.

THE EFFECT OF THE AMENDMENT BY ACT II OF 1927 is to restore the law relating to the admissibility of documents, effecting a contract for sale of immovable property and reciting payment of the purchase-money, as it was understood prior to the decision of the P.C. in *Dayal Singh* v. *Indar Singh*, 53 I.A. 214=51 M.L.J. 788; 124 I.C. 606 (1). *See also* 1931 M.W.N. 297.

(1) "addition" means the place of residence, and the profession, trade, rank and title (if any) of a person described, and, in the case of a Native of India, his caste (if any) and his father's name, or where he is usually described as the son of his mother, then his mother's name:

(2) "book" includes a portion of a book and also any number of sheets connected together with a view of forming a book or portion of a book:

(3) "district" and "sub-district" respectively mean a district and sub-district formed under this Act:

(4) "District Court" includes the High Court in its ordinary original civil jurisdiction:

(5) "endorsement" and "endorsed" include and apply to an entry in writing by a registering officer on a rider or covering slip to any document tendered for registration under this Act:

(6) "immovable property" includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass:

(7) "lease" includes a counterpart, kabuliyat, an undertaking to cultivate or occupy, and an agreement to lease:

(8) "minor" means a person who, according to the personal law to which he is subject, has not attained majority:

(9) "movable property" includes standing timber, growing crops and grass, fruit upon and juice in trees, and property of every other description, except immovable property: and

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NOTES.

Sec. 2 (6).—Standing trees, whether immovable property. 9 I.C. 478. As to what is standing timber, *see* 35 I.C. 713; 30 I. C. 281; 93 I.C. 358 (2)=1926 P. 350; 18 O.C. 122=28 I.C. 180. Mango trees. 2 O.W.N. 947; 10 P.L.T. 19. Palmyra trees 19 L.W. 494. Right to collect palmyra or bidi leaves is not immovable property. 1937 N. 116. *See also* 1938 Nag. 377=I.L. R. (1939) Nag. 432; 42 Bom. L. R. 750 ("Benefits to arise out of land—Toll collected from vehicles in public road"). Where the object of the sale of trees is to convert them into movables by getting them cut and removed and the parties to the transaction do not contemplate that the trees should continue to stand and be enjoyed as such, the documents relating to the transaction do not create any interest in immovable property and are admissible in evidence even though unregistered. 1929 O. 93. A right of way is immovable property. 20 C.W.N. 1158. A mortgage-debt is within the definition of immovable property. 57 C. 328=34 C.W. N. 605. But *see* 58 I.A. 323, *infra*. A debt, though secured on immovable property, is still only movable property. 58 I. A. 323=1931 P.C. 245=61 M.L.J. 589 (P. C.). Flour mill, as such, can change hands and be removed from one place to another and so it is not immovable property. 38 P. L.R. 375=1936 L. 242.

Cl. (7).—As to difference between the definition of lease in this Act and in the T. P. Act, *see* 5 R. 95. Agreement to grant a lease on a future contingency is not lease. 24 C.W.N. 177=37 M.L.J. 525=47 C. 485 (P. C.); 130 I.C. 6=1931 A. 252. *See also* 19 S. L. R. 306. An 'agreement to lease' must be an actual demise and should operate as a lease. Where the document recited that on the happening of a certain event within six months and upon a certain indeterminate act a lease would be granted to the plaintiff. *Held,* that the document did not amount to an 'agreement to lease' within the meaning of this Act. 130 I.C. 6=1931 A. 252. Unilateral letter passed to lessee—Rent fixed—Execution of formal document contemplated—Agreement to lease—Need for registration. 7 R. 70. An undertaking to cultivate lands is lease. 3 R. 379=1925 R. 273. Agreement to pay rent for occupation of house is lease. 1928 N. 27=105 I.C. 43. *See also* 134 I.C. 263 =1931 N. 128. Agreement to renew kanom whether amounts to. 13 M. L. J. 217. Amalnama. 33 C. 502. Both under the Agra Tenancy Act and the Registration Act, a lease includes a kabuliyat. Hence if a lease required registration, the Kabuliyat likewise required it and could not be admitted in evidence without registration. 1942 O.W.N. (B.R.) 79=1942 A.W.R. (Rev.) 46. *"Yajman virthi"* is immovable property within the meaning of S. 2 (6). But where the agreement regarding the same merely amounts to a delegation of duties connected with it, the transfer does not amount to a lease so as to require registration. 137 I. C. 136=1932 S. 60.

Cl. (9).—Movable property—An allowance paid by Government as remuneration

(10) "representative" includes the guardian of a minor and the committee or other legal curator of a lunatic or idiot.

PART II.

OF THE REGISTRATION-ESTABLISHMENT.

Inspector-General of Registration.

3. The Provincial Government shall appoint an officer to be the Inspector-General of Registration for the territories subject to such Government:

Provided that the Provincial Government may, instead of making such appointment, direct that all or any of the powers and duties hereinafter conferred and imposed upon the Inspector-General shall be exercised and performed by such officer or officers, and within such local limits, as the Provincial Government appoints in this behalf.

(2) Any Inspector-General may hold simultaneously any other office [1][under the Crown].

4. [*Branch Inspector-General of Sind.*] *Rep. by A. O.*, 1937.

Districts and sub-districts.

5. (1) For the purposes of this Act, the Provincial Government shall form districts and sub-districts, and shall prescribe, and may alter, the limits of such districts and sub-districts.

(2) The districts and sub-districts formed under this section, together with the limits thereof, and every alteration of such limits, shall be notified in the Official Gazette.

(3) Every such alteration shall take effect on such day after the date of the notification as is therein mentioned.

Registrars and Sub-Registrars.

6. The Provincial Government may appoint such persons, whether public officers or not, as it thinks proper, to be Sub-Registrars of the several districts, and to be Sub-Registrars of the several sub-districts, formed as aforesaid, respectively:

[2][* * * *]

Officers of Registrar and Sub-Registrar.

7. (1) The Provincial Government shall establish in every district an office to be styled the office of the Registrar and in every sub-district an office or offices to be styled the office of the Sub-Registrar or the offices of the Joint Sub-Registrars.

(2) The Provincial Government may amalgamate with any office of a Registrar any office of a Sub-Registrar subordinate to such Registrar, and may authorize any Sub-Registrar whose office has been so amalgamated to exercise and perform, in addition to his own powers and duties, all or any of the powers and duties of the Registrar to whom he is subordinate:

Provided that no such authorization shall enable a Sub-Registrar to hear an appeal against an order passed by himself under this Act.

LEG. REF.

[1] Substituted for 'under Government' by A.O., 1937.

[2] Proviso to S. 6 inserted by Act IV of 1914 was omitted by A.O., 1937.

NOTES.

for public services. 51 I.C. 954=21 Bom. L.R. 716. Fruit not in existence but to grow is movable property. 47 A. 738=1925 A. 411. "Crop" may include leaves of trees. 1938 Nag. 377=I.L.R. (1939) Nag. 432.

Sec. 2 (10).—The word "representative" in S. 2 (10) includes the *de facto* guardian of a minor. 120. I.C. 77 (2)=1930 M. 425; and in the absence of a legally appointed guardian the term includes the natural father of an adopted boy. 56 I.A. 21=52 M. 175=56 M.L.J. 218 (P.C.).

Inspectors of Registration offices.

8. (1) The Provincial Government may also appoint officers, to be called Inspectors of Registration-offices, and may prescribe the duties of such officers.[1]

(2) Every such Inspector shall be subordinate to the Inspector-General.

9. [*Military cantonments may be declared sub-districts or districts.*] *Rep. by Act X of* 1927, *S.* 3 *and Sch. II.*

Absence of Registrar or vacancy in his office.

10. (1) When any Registrar, other than the Registrar of a district including a Presidency-town, is absent otherwise than on duty in his district, or when his office is temporarily vacant, any person whom the Inspector-General appoints in this behalf, or, in default of such appointment, the Judge of the District Court within the local limits of whose jurisdiction the Registrar's office is situate, shall be the Registrar during such absence or until the Provincial Government fills up the vacancy.

(2) When the Registrar of a district including a Presidency-town is absent otherwise than on duty in his district, or when his office is temporarily vacant, any person whom the Inspector-General appoints in this behalf shall be the Registrar during such absence, or until the Provincial Government fills up the vacancy.

Absence of Registrar on duty in his district.

11. When any Registrar is absent from his office on duty in his district, he may appoint any Sub-Registrar or other person in his district to perform, during such absence, all the duties of a Registrar except those mentioned in sections 68 and 72.

Absence of Sub-Registrar or vacancy in his office.

12. When any Sub-Registrar is absent, or when his office is temporarily vacant, any person whom the Registrar of the district appoints in this behalf shall be Sub-Registrar during such absence, or until [2][the vacancy is filled up].

Report to Provincial Government of appointments under Ss. 10, 11 and 12.

13. (1) [3][* * * *] All appointments made under section 10, section 11 or section 12 shall be reported to the Provincial Government by the Inspector-General.

(2) Such report shall be either special or general, as the Provincial Government directs.

[4][* * * * * * * * * *]

Establishments of registering officers.

14. [5][* * * * * *]

(2) The Provincial Government may allow proper establishments for the several offices under this Act.

Seal of registering officers.

15. The several Registrars and Sub-Registrars shall use a seal bearing the following inscription in English and in such other language as the Provincial Government directs:—

"The seal of the Registrar (*or* of the Sub-Registrar) of ."

LEG. REF.

[1] The proviso to sub-S. (1) of S. 8 inserted by Bom. Act V of 1929, S. 2 was omitted by A.O., 1937.

[2] Substituted for the words "Local Government fills up the vacancy" by Act IV of 1914.

[3] The words "All appointments . . . S. 6 and" inserted by Act IV of 1914 were omitted by A.O., 1937.

[4] Sub-S. (3) of S. 13 omitted by A.O., 1937.

[5] Sub-S. (1) to S. 14 omitted by *ibid*.

NOTES.

Sec. 11.—Appointment of an official by Registrar to do registration—Presumption—Defect in appointment—Effect of. 1935 L. 301.

Register books and fire-proof boxes.

16. (1) The Provincial Government shall provide for the office of every registering officer the books necessary for the purposes of this Act.

(2) The books so provided shall contain the forms from time to time prescribed by the Inspector-General with the sanction of the Provincial Government, and the pages of such books shall be consecutively numbered in print, and the number of pages in each book shall be certified on the title-page by the officer by whom such books are issued.

(3) The Provincial Government shall supply the office of every Registrar with a fire-proof box, and shall in each district make suitable provision for the safe custody of the records connected with the registration of documents in such district.

PART III.

OF REGISTRABLE DOCUMENTS.

Documents of which registration is compulsory.

17. (1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:—

(*a*) instruments of gift of immovable property;

(*b*) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

NOTES.

Sec. 17.—The section should be strictly construed. 62 I.C. 809; 69 I.C. 608; 92 I.C. 791; 92 I.C. 762 (2)=1926 L. 530 (2). Thus, where a document simply recites an act already done, it does not require registration. 108 I.C. 892. *See also* 44 C.L.J. 490=100 I.C. 296=1927 C. 197; 1926 L. 220. S. 17 as amended in 1929 cannot be read as requiring a document to be registered which did not require registration when it was executed before the amending Act came into force. 187 I.C. 353=1940 Pat. 497. S. 17 (1) should not be construed in its most literal sense so as to involve the conclusion that a document which did not require registration when it was executed and which could not now be registered owing to lapse of time would be shut out of evidence. The more reasonable view is to hold that S. 17 (1), when read along with S. 6 of the Indian General Clauses Act does not destroy the validity or admissibility in evidence of a document which complied with all the necessary formalities as they existed at the time of its execution. 53 L.W. 634=1941 Mad. 602=(1941) 1 M.L.J. 759. A document creating a charge on immovable property is compulsorily registrable. 152 I.C. 772=40 L.W. 677=1934 M. 713. Also a document which purports to create any right, title or interest in immovable property. 30 S.L.R. 115=1936 Sind 79 (F.B.). Whether registration is sufficient notice to all parties concerned depends on the facts of each case. 48 C. 1=47 I.C. 239=39 M.L.J. 243 (P. C.); 89 I.C. 625=1925 N. 398; 88 I.C. 398=1925 A. 557. As to document affecting both movable and immovable properties, *see* 152 I.C. 431=1934 R. 303. Transfer by Mahomedan husband to wife in lieu of dower—Nature of transaction—Deed—If registrable—Test—Value of property or consideration for transfer. 16 L. 177=156 I.C. 70=37 P.L.R. 424. [*See* now the definition of 'Notice' in the T. P. Act, S. 3.] As to what are "documents", *see* 30 M.L.J. 519=33 I.C. 439.

Sec. 17 (1) (a).—Instruments of gift by bridegroom to bride at the time of marriage. *See* 33 I.C. 129. A document containing the terms of disposition in favour of a wakf requires registration. 8 P. 484=117 I.C. 638=1929 P. 410. A deed of hiba basharat-ul-Ewaz is nominally a gift with a condition for consideration. But once the condition is fulfilled, the contract becomes a sale. Therefore such a deed requires registration. 122 I.C. 158=1930 P. 530. Gift to a mosque requires registration. 94 I.C. 7 (2)=1926 L. 372. A petition in mutation proceedings reciting a gift, must be registered to prove title by gift. 38 M.L.J. 313=53 I.C. 901 (P.C.); 48 P.R. 1913; 22 I.C. 712; 3 O.W.N. 45. An agreement by collaterals not to contest a gift by a childless person need not be registered. 89 I.C. 212=1926 L. 148.

Sec. 17 (1) (b): SCOPE.—The words of clause are very true as it includes documents which create as well as documents which

NOTES.

purport to create any right, title or interest. 30 S.L.R. 115=163 I.C. 455=1936 S. 79 (F.B.). A deed by the owner of poggalika property declaring the property to be *dwitantaka* property of himself and another person amounts to creation of an interest in immovable property and therefore it must be registered under the provisions of S. 17 (1) (*b*). 1941 Rang.L.R. 204=1941 Rang. 159. For meaning and implication of the words "create," 'limit", "assign" or "extinguish," *see* 35 I.C. 770=19 O.C. 75. For meaning of "declare," *see* 4 L.W. 472=35 I.C. 874; 93 I.C. 193=1926 N. 301. The word 'declare' implies a declaration of will, not a mere statement of fact. The distinction is between a mere recital of a fact and something which in itself creates a title. Where the statement in a petition merely acknowledged as a fact that another person had a right and itself did not create any right, it does not require registration. 59 I.A. 130=11 P. 272=1932 P. C. 55=62 M.L.J. 296 (P.C.). *See also* 1938 O.W. N. 454=1938 Oudh 119; 136 I.C. 14=1932 L. 154; 55 B. 103=32 Bom.L.R. 1385= 1931 B. 105; 140 I.C. 387=1932 L. 592. The words 'declare an interest' imply a definite change of legal relation to the property by an expression of will. So a *deed of adoption* which is only a recital of an act of adoption that has already taken place is not the expression or declaration of will by which the right is constituted and so is not compulsorily registrable. 128 I.C. 901=32 Bom.L.R. 1385. *See also* 11 R. 481=1933 R. 307. "Declare" in S. 17 (1) (*b*) is to be taken in the same sense as the words "create", "assign", etc., as implying a definite change of legal relation to the property by an expression or declaration of will and not merely a statement of a fact. A *record of family arrangement* which is based on a recognition of a pre-existing right cannot be regarded as creating or declaring a new title and is not therefore liable to compulsory registration. 11 O.W.N. 1071=1934 O. 462. But *see* 14 L. 635=144 I.C. 396= 1933 L. 648. The word '*operate*' in S. 17 (*b*) refers to the immediate intention of the instrument and not to the ultimate consequences or collateral effects. 58 C. 136= 1931 C. 223; 16 P. 34=17 Pat.L.T. 835= 1937 P. 214.

ANY RIGHT, TITLE OR INTEREST—CHARGE—DEBENTURES OF COMPANY.—The words "any right, title or interest" in S. 17 (1) (*b*) are intended to be very wide and include a mere charge on immovable property as it is a right in immovable property—a right to have it brought to sale to realise a sum of money to be paid to the charge. *Held*, that the debentures created by a company granting a floating charge on the company's assets require registration. 58 C. 136=1931 C. 223. *Quaere*.—If a debenture executed by a bank creating a floating charge over its assets and registered under S. 109, Companies Act, is inoperative to affect its immovable property in the absence of registration under the Registration Act. 58 I.A. 323= 1931 P.C. 245=61 M.L.J. 589 (P.C.). An agreement between parties to mutation proceedings praying for mutation in a certain way does not require registration. 25 A. L.J. 797=1927 A. 616. *See also* 132 I.C. 537=1931 O. 296. Assignment of decree for money (or for possession of immovable property) does not require registration. 17 Pat.L.T. 536. A right to execute a decree for partition is not a right in or to immovable property and an agreement not to exercise that right does not require registration. 49 M.L.J. 675=1925 M. 1149. The section covers only cases of present rights being created. 69 I. C. 608. An agreement to divide property at a future date need not be registered. 27 Bom.L.R. 1441=1926 B. 24; nor is an agreement by a person that, after the acquisition of the proprietary rights, he would have a mutation made in the names of his brothers jointly with himself. 165 I.C. 156 =1936 L. 576. For operation of section, interest created may be absolute or contingent. Case of creation of contingent interest which was held to require registration. 1936 L. 1002. The value of property transferred must be determined as on the date of transfer. 39 I.C. 931. An agreement to transfer land it must be registered. 1925 L. 78. (*See* now Act II of 1927.) In a suit for specific performance of a contract, the agreement ran as follows: "I have executed this contract in respect of Jiroyati land . . . . . I shall execute a sale deed (in one month) and get the same registered." *Held*, the document was only a contract to sell and not a sale and that by virtue of the retrospective provisions of Act II of 1927 which nullified the effect of. 53 I.A. 214=51 M.L.J. 788 (P.C.), it did not require to be registered. 1931 M.W.N. 297. *See also* 124 I.C. 606. Transfer of property where registration is compulsory can only be effected by registration or a decree of Court. 33 A. 728=12 I.C. 109. An assignment of a decree does not require registration. 107 I.C. 603 (2)=1928 L. 70. *See also* 106 I.C. 485=1928 M. 142. Registration of a *deed transferring mortgage decree* is unnecessary, especially where the transfer deed does not disclose on its face what kind of decree is transferred. 1931 M. 302=131 I.C. 151; nor security bond executed to Court. 52 B. 72=1928 B. 42. A deed of assignment of arrear of maintenance charged on the income of tarwad lands executed by a member of a Malabar tarwad, requires registration. 43 L. W. 711 =1936 M. 573. An instrument which is not testamentary, but is final, irrevocable and immediately operative against immovable property must be registered. 33 A. 344= 38 I.A. 104=21 M.L.J. 637 (P.C.). No registered document is necessary to empower an agent to transfer property of more than

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Rs. 100 in value. 43 I.C. 536. A tenant, holding ryoti land, can relinquish any portion of it in favour of his landlord. Such an arrangement does not require to be evidenced by any writing, much less does it require registration for its validity. 121 I. C. 765=1930 M. 1. An order by an inamdar to village officers that certain lands be continued to be enjoyed as hithertofore for services is not compulsorily registrable. 85 I.C. 184=1925 B. 194. Letter to patwari by the owner that he had given the land to another. 108 I.C. 191=29 Punj.L.R. 287. An *undertaking given in a criminal Court* whether a compromise. *See* 85 I.C. 586= 1925 A. 605. *See also* 11 O.W.N. 450= 1934 O. 116; 1921 A. 248; 35 C. 1010. A mere statement in a Magistrate's Court by an owner of property that he had given up a portion of the property worth more than Rs. 100 to another is not sufficient to effect a transfer of the same which cannot be done except by a registered instrument. I.L.R. (1939) Kar. 563=1939 Sind 128. Writing off amount in a will, in lieu of transfer of share of property, if requires registration. 1924 A. 277. An *exchange* of immovable property more than Rs. 100 in value by an unregistered deed cannot be recognized. 24 I.C. 894; 93 I.C. 843=27 P.L.R. 162. Documents extinguishing rights also are covered by the sub-section. 55 P. W. R. 1915=27 I.C. 769. A deed of transfer in lieu of dower fixed at less than Rs. 100 does not require registration; but where the dower is fixed not in money but in property itself, a deed which transfers such immovable property (which is worth more than Rs. 100) requires registration even if the deed is stamped with a stamp of one rupee only. 172 I.C. 447=1937 Pesh 107. *See also* 1937 Pesh. 39. A letter containing an *agreement to transfer* certain lands is admissible in evidence without registration. 21 I. C. 777. A petition informing the Court of a compromise between the parties by which lands have been sold in discharge of debt needs no registration. 26 I.C. 791=12 A. L.J. 1316; 58 I.C. 732=43 A. 1; 13 L. 70= 1932 L. 281. But *see* 96 I.C. 227=1926 L. 586 (2) (mutation proceedings in Revenue Court). *See also* 40 P. L. R. 682=1938 Lah. 760. *Compromise* relating *to immovable property* embodied in a decree of Court does not require registration. 132 I.C. 7 =32 P.L.R. 959. *See also* 1934 P. 644; 59 C.L.J. 328=1934 C. 799. A *petition of compromise* which does not create a right in favour of a party but merely enables the parties to go to Court and have a right created or extinguished is not compulsorily registrable. 14 P.L.T. (Sup.) 1. *See also* 1940 O.W.N. 1092. *Semble*.—There is a distinction between a petition of compromise being used in the Court to which it is presented and its being subsequently used in another Court for the purpose of proving the right if any under that petition. 14 Pat. L. T. (Sup.) 1. A compromise which does not create or declare any new right but only recognizes a pre-existing right does not require registration. When such a compromise has been accepted by the Revenue Court and embodied in its order, no question of registration arises as proceedings of mutation and orders thereon are not "instruments" within the meaning of S. 17. 1933 O. 347; 1940 O.W.N. 1092. A compromise which merely defines or varies some of the terms of an already existing tenancy does not require registration and is admissible even though unregistered. 1933 P. 457. An *attachment before judgment* does not create any title or interest but merely prevents any alienation to the prejudice of the attaching creditor. Hence an agreement by the attaching creditor consenting to sale of the property does not require registration, as he has no right or interest in such property by virtue of his attachment before judgment. 151 I.C. 683 =1934 P. 413. Where the charge created by *compromise amounts to a mortgage* and is not registered, it is of no effect. 148 I.C. 417=1934 A. 444. An admission of title in an application in mutation proceedings need not be registered. 1924 A. 304. On a partition of property, *A* got a house and *B* got a vacant site adjacent to it. *A* executed a document containing an agreement permitting *B* to build a house on the vacant site irrespective of any sources of light or air in that portion of the house which fell to the share of *A*. *Held*, registration was not necessary. 1936 L. 905. An agreement creating a right of pre-emption is not compulsorily registrable. 47 B. 283. Document declaring heirship does not require registration. 1923 L. 497 (2). As to *acknowledgment* see 145 I.C. 156=1933 L. 174. *Adoption deeds* are not compulsorily registrable, as it is the adoption and not the deed that confers the status of an adopted son or any interest in the property of the adoptive father. 128 I.C. 901=32 Bom. L.R. 1385=1932 B. 105. A will which deals with immovable property is not compulsorily registrable. 35 P.L.R. 231. A document stating merely an existing fact requires no registration. 45 M.L.J. 100; 60 I.C. 484; 8 P.W.R. 1913=18 I.C. 583. *See also* 1922 N. 262; 29 C.W.N. 784; 8 N.L.J. 157; 1935 S. 136=89 I.C. 849. The documents which are drafted for effecting sales and mortgages of immovable property are always worded in such manner as to show that the transfer had already taken place. Hence merely on this account it cannot be argued that these documents do not require proper stamp and registration. 1935 L. 122. An agreement to withdraw a suit to set aside a mortgage does not require registration. 1928 L. 792 (2). An *agreement to refer to arbitration*, when must be registered. 13 I.C. 500. Where a document merely recites that the executants accept the award of the panchayat and does not by itself create any such right, title or

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interest as is contemplated by S. 17, it does not require registration. 1935 L. 955. *See also* 1935 S. 136; 1932 A.L.J. 1090=1933 A. 59; 146 I.C. 1094. A sale of a mortgagee's interest can only be effected by means of a registered deed of transfer. 51 A. 494=1929 A. 161. The question whether a document is compulsorily registrable, to be admissible in evidence, should be decided by perusal of the contents of the document. The undertaking that a person will sell the lands to any other person to whom the defendants might ask him to sell and deliver possession does not create interests in land and does not therefore bring it under S. 17. 1929 M. 807. *Agreement to sell* does not require registration. 1932 L. 95. *See also* Act II of 1927. An agreement for sale is a contract for sale merely and not a conveyance; and it does not come within the mischief of S. 49 by reason of the fact that there is a receipt clause contained in the document. 1935 P. 237. *See also* 1933 A.L.J. 1584=1933 A. 846; 13 P. 620=15 Pat. L. T. 433=1934 P. 495. A contract for the sale of straw growing on land is not a contract for the sale of goods, but one creating an interest in the land, because the vendee derives benefit from further vegetation and from the nutriment to be afforded by the land as well as the benefit from the further growth of the straw. Therefore, an *amalnama* or *ekrar* evidencing such a contract requires registration. 62 C.L.J. 534=1936 C. 770. Interest in immovable property—Registration — Necessity —Test—Rights created and not the object of the transaction to be considered—Sale of timber with right to enter to cut and take it—Trees to be cut not specified—Fixing of time limit and payment by instalments—Presence of a forfeiture clause—Deed, requires registration. I.L.R. (1939) Nag. 81 =1938 Nag. 497=1938 N.L.J. 306.

FAMILY ARRANGEMENT—WHERE REGISTRATION IS UNNECESSARY.—A petition embodying a family settlement to a Revenue Court. 31 A. 502. *See also* 19 M.L.T. 52=32 I. C. 115 (F.B.).; 37 A. 105=90 I.C. 992; 89 I.C. 849; 43 A. 1; 98 I.C. 86=1927 A. 92. A document embodying a compromise of family disputes does not require registration. 109 I.C. 624=1928 N. 254; 48 A. 213=24 A.L.J. 116=1926 A. 173; 1940 O. W.N. 1092=1940 O.A. 1090. A grant of immovable property to a widow for maintenance. 26 I.C. 835=10 N.L.R. 111.

FAMILY ARRANGEMENT—WHERE REGISTRATION IS NECESSARY.—A *family arrangement*, if it is in fact reduced to the form of a document, requires registration if it affects property of the value of over Rs. 100. 1930 A. 341; 1935 R. 355. *See also* 1937 A.L. J. 627=1937 All. 578 (F.B.). But where it has been fully given effect to and acted upon for a long time as a final partition of the property, the parties thereto are bound by it, even though it was not registered. [42 C. 801 (P.C.) and 46 M. 919, Rel. on.] 14 L. 635=1933 L. 648. But *see* 11 O.W. N. 1071=1934 O. 462. A document declaring widow's right to maintenance out of family properties. 8 P.R. 1916=32 I. C. 522. A deed of assignment of arrears of maintenance charged on the income of tarwad lands executed by a member of a malabar tarwad whether viewed as a transfer of an interest in immovable property or a transfer of a charge requires registration. 43 L.W. 711=1936 Mad. 573. Transfer of property—Value of Rs. 100. 1923 A. 338; 1923 L. 392; 19 P.L.R. 1914; 26 A.L.J. 952 (F.B.). A family arrangement as an agreement regulating respective rights must be registered. 83 I.C. 193=28 O.C. 65. Distribution of property among relatives. 18 I.C. 636=13 M.L.T. 102. Inclusion of the property of a separated member into the joint stock of the family. 5 L.W. 400= 47 I.C. 716.

MORTGAGES AND EQUITABLE MORTGAGE BY DEPOSIT OF TITLE-DEEDS.—As to when registration is necessary in case of an equitable mortgage by deposit of title-deeds, *see* 50 C. 338=44 M.L.J. 602=50 I.A. 77 (P. C.). Ordinarily a mortgage by deposit of title deeds would be an oral transaction. But, as a matter of practice, it is not unusual for the deposit to be accompanied by a memorandum in writing. If there is such a writing, the question is whether it creates the mortgage or whether the mortgage is complete without the writing, the writing being merely the statement of facts which would evidence the mortgage. If the writing creates the mortgage, it must be registered. Where the writing embodies the terms of the loan and it is contemporaneous with the transaction and it accompanies the delivery of title deeds and also contains a calculation of the amount of interest, it creates the mortgage and should, therefore, be registered. I.L.R. (1938) 1 Cal. 187= 1937 Cal. 741; 102 I.C. 34=54 M.L.J. 179; 59 C. 781=36 C.W.N. 420=1932 C. 589; 59 C. 586=36 C.W.N. 193=1932 C. 356; 139 I.C. 95=1932 S. 73; 138 I.C. 247 (L.); 55 B. 677=1931 B. 337; 141 I.C. 541=1933 Pesh. 35; 11 R. 481=1933 R. 307; 42 P.L. R. 29=1940 Lah. 166; 1940 Sind 204; 1938 M.W.N. 235; 1940 Lah. 166; 1940 Lah. 285=42 P.L.R. 307; 163 I.C. 709; 1941 Lah. 224. At the time of making a deposit of title-deeds as security for money lent, the mortgagor gave a memorandum which contained a list of the title-deeds with the introductory words: "As agreed upon in person, I have delivered to you the undermentioned documents as security". It did not create or declare any interest in the property included in the deeds. It was and remained a list of the document deposited and nothing more. It did not embody the terms of the agreement between the parties and therefore did not require registration. 60 M.L.J. 506=58 I.A. 68=1931 P.C. 36 (P.C.). *See also* 61 C.L.J. 473; 164 I.C. 63 (L.); 1937 Cal. 741=I.L.R. (1937) Cal. 187; 39 P.L.R. 253=1937 Lah. 135; 1936

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Lah. 65; 1937 Lah. 135; 42 P.L.R. 29= 1940 Lah. 166 (List of documents deposited does not require registration); 1940 Lah. 285. Where the parties professing to create a mortgage by deposit of title-deeds contemporaneously enter into a contractual agreement, in writing, which is made an integral part of the transaction and is itself an operative instrument and not merely evidential, such a document must under the statute be registered. If a memorandum relating to deposit of title-deeds states that it is *hereby* agreed between the parties that in consideration of the sums advanced the title-deeds of the property shall be held as security on the said property and refers to any proceedings which may be had for the protection of *this security* or for procuring payment of the moneys *hereby secured*; and then it not only sets out all the terms on which the moneys were advanced but expressly confers a power of sale on the mortgagee, the memorandum does not merely evidence a transaction already completed but it is contractual in form and constitutes the agreement between the parties, and therefore requires registration. The mere fact that in a parenthetical passage the title-deeds are stated to have been previously delivered with intent to create a security does not alter the character of the memorandum itself, which if the parenthetical passage be disregarded is an instrument effective to create an interest in the property in favour of the mortgagee. 66 I.A. 184=I.L.R. (1939) 2 Cal. 243=43 C.W.N. 806=1939 A. L. J. 869=1939 P.C. 167=(1939) 2 M.L.J. 522 (P.C.). In deciding the question as to whether a document evidencing an equitable mortgage requires registration under S. 17 or not, the question to be considered is whether the document constituted the bargain between the parties or it was merely a record of an already completed transaction. In the former case the document would come within the purview of S. 17 and would require registration; but in the latter case it would not be a document which would create, etc., a right in immovable property and would not require registration. For the purpose of considering whether the document is to be taken as embodying a bargain between the mortgagor and mortgagee or as merely evidencing a transaction which has already been completed before the document was executed or delivered, not only the terms of the document must be looked into but also the attending circumstances. 180 I.C. 813=1938 Cal. 823. A memorandum signed by the mortgagor in relation to a mortgage by deposit of documents of title may be a document which S. 17 requires to be registered, even though it does not embody all the particulars of the transaction, but registration is not so required unless the memorandum on its face embodies such terms and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that so far as the deposit is concerned it constitutes the agreement between the parties. If the document is not the operative instrument and it does not contain the conditions of the transaction and it is merely a record of the title-deeds that had been deposited as collateral security for the amount agreed to be advanced, it need not be registered. 43 P.L.R. 177=1941 Lah. 224. A mortgage by deposit of title-deeds can be inferred from the mere fact of such a deposit accompanying a loan, and no agreement whether in writing or by word of mouth is necessary for the purpose. But, if the parties choose to reduce their bargain to writing, the question will arise: "Does the writing, constitute bargain between the parties or was it merely the record of an already completed transaction?" The answer to this question must necessarily depend upon the facts of each case. The fact that a memorandum evidencing an "equitable" mortgage is contemporaneous with the deposit of title-deeds does not *per se* render the memorandum inadmissible in evidence for want of registration. To be inadmissible in evidence the memorandum must in itself purport to create a mortgage of immovable property and not be a mere record of an already completed transaction. A mere list of documents showing that the documents included therein had been deposited by way of security or an entry on a voucher (prepared in ordinary course of business), though written on the same day when the deposit is made, cannot be considered to embody the terms of the mortgage transaction, and hence inadmissible in evidence for want of registration. 1930 L. 920; 121 I.C. 878=1930 S. 159. A letter accompanying deposit of title-deeds need not be registered if it mentions merely the fact of deposit of title-deeds. 3 L.L.J. 373; 45 I.C. 918; 31 C.W.N. 703=1927 C. 538; 22 S.L.R. 222=105 I.C. 765=1928 S. 17; 164 I.C. 63 (L.). If the letter contains terms of contract, it must be registered. 24 Bom.L.R. 502=1922 B. 440. *See also* 24 C.W.N. 599=57 I.C. 686; 163 I.C. 709 (L.). Where in a letter the defendant wrote offering certain title-deed as security, but the title-deed was not sent with the letter and left it open to the creditor bank to lend money either with or without accepting the security offered, it was held that registration was not necessary. 162 I.C. 523=1936 L. 65. A letter written by the mortgagor the next day after an agreement to deposit the title-deeds had been concluded ran as follows: "I am sending you the title-deeds with the intention of depositing the same with you as per the memorandum of yesterday executed by me and then referred to the schedules annexed to the letter. *Held,* the two documents must be read together and so read, they embodied the terms of the transaction, and not having been registered, the mortgage was not valid. 1931 M. 124=60 M.L.J. 309. *See also* 1940 Sind 204; 1940 Mad. 671=51 L. W. 213=(1940) 1 M.L.J. 561; (1937) 2

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Cal. 566; 163 I.C. 709; 60 Bom. 220=38 Bom.L.R. 205=1936 Bom. 175; 1936 Rang. 152. The defendant having executed a promissory note for a sum of money entered into a written agreement by which it was agreed that he should deposit title-deeds relating to immovable properties by way of equitable mortgage to secure the repayment of the amount under the promissory note. On the next day after the agreement the defendant deposited with the plaintiff title-deeds in pursuance of the agreement and a letter was passed evidencing the same. *Held,* that the memorandum of agreement and the subsequent letter must be read together and that they must be registered, because they constituted the bargain between the parties. 1930 M.W.N. 865. *See now* the amended T. P. Act, S. 59. Redemption of a mortgage cannot be proved by an unregistered receipt. 54 I.C. 117; 48 A. 705; 1926 M. 693. See *contra* 43 M. 803=60 I.C. 255. Where in a document the usufructuary mortgagee admitted that his claim had been paid off and that he released the property to the plaintiff's mortgagor's possession, *held,* that the document did not require registration. 56 C. 910. Regarding necessity for registration of a receipt given in full discharge of mortgage, *see* 1925 M. 348=48 M.L.J. 155. *See also* 1933 M.W.N. 141=37 L.W. 677. An extinguishment of a mortgage right for an amount exceeding Rs. 100 can be effected only by a registered document. 45 L. W. 602=1937 Mad. 501=(1937) 1 M.L. J. 469. Letter purporting to extinguish the mortgage security is not receipt and requires registration. 48 M.L.J. 155; 1938 Rang. 285 (Agreement to reduce rate of interest requires registration); 1933 M. 432. *See also* 37 C.W.N. 424 (partial release of mortgaged property does not require registration). But *see* 35 A. 202=19 I.C. 449. Where the receipt evidences a prior discharge of mortgage debt and the release of the mortgaged property, it does require registration. 1928 M. 1050=112 I. C. 559. An endorsement of payment on the back of a mortgage deed reciting that the mortgage was extinguished requires registration. 100 I.C. 129=1927 L. 237. *See also* 1940 O.W.N. 1293=1941 Oudh 193. The right of redemption cannot be transferred except by a registered instrument. 19 I.C. 818=11 A.L.J. 407. But a *transfer of an equitable mortgage* need not be registered. 23 I.C. 129; 45 I.C. 918; 24 Bom. L.R. 502. But see *contra* 14 R. 494=163 I.C. 645=1936 R. 152. If an agreement to reconvey property sold is part of the sale transaction, it must be registered. 27 Bom. L.R. 465=97 I.C. 527=1926 B. 131. Terms regarding rents and profits in a registered mortgage deed cannot be varied by an unregistered document. 35 A. 48=40 I.A. 31=25 M.L.J. 91 (P. C.). Contemporaneous *varthamanam providing for payment of debt out of rent* is a mere provision for extinguishment of debt and need not be registered. 107 I.C. 808=1928 M. 382. An unregistered letter is inadmissible in evidence to show that a deed of mortgage and a deed of sale executed previously were not to be acted on. 103 I.C. 421 (2)=1927 L. 626. A *deed altering interest* payable need not be registered. 50 I.C. 647. A letter converting a sale into a mortgage must be registered. 23 I.C. 400=26 M.L.T. 151; 15 R.D. 144. Under the terms of the mortgage-deed redemption was not permissible for 54 years. But mortgagor sued mortgagee before the expiry of that period relying on the agreement between himself and the mortgagee, which allowed him to redeem regardless of the term of 54 years if he paid to the mortgagee Rs. 200 by a certain date. The agreement was not registered. *Held,* that the covenant which the mortgagor sought to enforce was one by which the mortgagor's right to retain possession for 54 years was limited, if not extinguished, in so far as it became redeemable at any time after payment of the amount agreed on and as such the agreement was compulsorily registrable and not admissible in evidence for the purpose for which mortgagor desired to use it. 1930 A. 506. The defendant executed a mortgage to a Bank. The Bank went into liquidation and an arrangement was come to between the Bank and its creditors by which the whole assets of the Bank were transferred to a purchasing company. But the agreement was not registered. Subsequently the Bank filed a suit on the mortgage. *Held,* that the transfer of this mortgage debt was effective as between the transferor and the transferees. But any proceedings to recover the debt brought against the mortgagor must be, not in the name of the transferee, but in that of the transferor and as such a suit by the Bank in its own name to recover the mortgage-debt was maintainable. 57 A. 314=62 I.A. 115=39 C.W.N. 834=69 M.L.J. 158 (P.C.). The mortgagee under a hypothecation bond wrote to the mortgagor a *varthamanam,* which after referring to the bond recited: "Inasmuch as no amount is due to me thereunder and it is benami, I have executed this *varthamanam* in token of my cancelling the said deed and the deed previous thereto when required by you and of my having no right to take an action thereunder." It was not registered. *Held,* that it did not create, declare or extinguish any right, but that it only contained a statement of fact that there was no money due under the bond, and promised that another document would be executed if so required by the mortgagor; and that consequently it did not require registration. 40 L.W. 727=67 M.L.J. 690. An *option to purchase* not being an interest in land need not be registered. 37 I.C. 91=9 Bur.L.T. 177. A *security bond* in pursuance of an order staying execution must be registered if of more than Rs. 100 in value. 53 I.C. 463=122

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P.R. 1919; 103 I.C. 702. But *see* 52 B. 72, *supra*. 121 I.C. 878=1930 S. 159. Document creating equitable charge over immovable property requires registration. 28 Bom.L.R. 939=1926 B. 495. *See also* 1938 N.L.J. 123 (Usufructuary mortgage). If an agreement of sale of land creates a charge either by implication of law or by the terms of the agreement itself then it is an agreement affecting immovable property and cannot be regarded as an agreement merely creating a right to demand a sale-deed. A specific charge created by an agreement would render it liable to registration though the agreement also contains a provision relating to the execution of a further document such as a sale-deed. 19 Pat. 90=21 P.L.T. 1033=1940 Pat. 92. It is doubtful whether it is not compulsory to embody in writing an agreement to give up ex-proprietary rights. The document will in such a case require registration. 15 R.D. 91. A deed of *further charge* for less than Rs. 100 is not compulsorily registrable. 92 I.C. 762=1926 L. 530 (2). A mere charge on immovable property is within S. 17, Cl. (*b*). Where a bank advanced money to another bank on the security of a debenture which created a charge on its entire assets but it appeared that the debenture was unregistered, *held*, that the lending bank was not entitled to a charge on the borrowing bank's assets, because the debenture did not contain a description of the borrowing bank's properties and was not registered. Effect of *floating charge* discussed with reference to Ss. 17 and 49. 57 C. 328=34 C.W.N. 605. *See also* 58 C. 136=1931 C. 223: 58 I.A. 323 =1931 P.C. 245=61 M.L.J. 589 (P.C.). An award made out of Court creating charge on immovable property and made before the Amending Act of 1929 (which made registration compulsory) came into operation is not necessary to be registered, even though it was made after the said Act became Law. The material question that should be considered is not when an Act became law, but when it came into operation. 166 I.C. 947 =1937 S. 7. An award made by arbitrators on a reference without the intervention of Court, which declares the rights of the parties in immovable properties of the value of Rs. 100 or upwards, is compulsorily registrable. 15 P. 579; 30 S.L.R. 115=1936 S. 79 (F.B.). But not award made through intervention of Court. 1937 S. 156. Private award relating to immovable property—Provision for payment of money by one party to another—Clause that "ownership shall not cease" until such payment—*Held*, that award did not operate as instrument of title but only reserved existing rights of parties, and did not therefore require registration. 16 P. 34=17 Pat.L.T. 835= 1937 P. 214. So also where award merely directs one of the parties to pay a certain sum of money to other periodically. 1937 L. 794. Award incorporated in a decree does not require registration. 146 I.C. 1094= 1933 Pesh. 83. *See also* 27 S.L.R. 121= 1933 S. 151. Charge created by award. 143 I.C. 863=27 S.L.R. 121 (F.B.); 37 P. L.R. 459. Award dividing immovable property. 1933 A. 424.

PARTITION.—The question whether a document is a partition deed or a mere list of partition is one of fact to be gathered from its contents. 87 I.C. 285=1925 M. 1097; 30 M.L.J. 404. A mere memorandum containing a list of bonds allotted to the plaintiff's share on a partition does not require registration. 37 C.W.N. 112. *See also* 1937 M. W. N. 393. Mere lists of property allotted to different members at a partition do not form an instrument of partition requiring registration. But the question in each case would be whether these lists merely contain the recital of past events or in themselves embody the expression of will necessary to effect the change in the legal relationship contemplated. 1941 N.L.J. 266=1941 Nag. 209. Where a document described as a list of shares of immovable properties equally divided between co-sharers purports to effect a partition of the properties comprised therein between the co-sharers and the allotment thereunder is intended to be final, the document clearly falls within S. 17 (1) (*b*) of the Registration Act requiring registration; and if unregistered, must be held to be inadmissible in evidence. The mere fact that the parties contemplate the execution of a more comprehensive partition deed later on does not make the document purporting to effect a division any the less operative to create interests in the immovable properties comprised therein so as to justify the view that it does not require registration. In such a case even if a co-sharer happens to be in sole enjoyment of a particular piece of property, he cannot sue in ejectment, basing his title on such a document, if another co-sharer disturbs such enjoyment. 54 L.W. 499 =1941 M.W.N. 944=(1941) 2 M. L. J. 707. A *butwara chitta* is such a list. 62 C.L.J. 513=1936 C. 700. An unregistered document styled a "share list" set out "particulars of the immovable property which fell to the share of one member" in the decision of the family properties effected between two brothers. It was of the same date as the alleged oral agreement to divide. The document was intended to be evidence of partition, and not being registered, was not admissible in evidence to prove the partition in so far as it affected immovable properties. 1930 M. 883=59 M. L. J. 558; 1936 A.L.J. 1165=1936 All. 16. The question whether a particular document falls within the scope of S. 17 (1) (*b*) has to be decided on a perusal of that document and rulings upon other documents not shown to be of an exactly similar character are no guide to a proper decision of the question. Where certain partition lists endorsed upon and signed by the parties indicate that they were intended by the parties to be the only evidence of an arrangement of partition as

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between them, it must be held that such lists declare the rights of the parties within the meaning of S. 17 (1) (*b*); and if unregistered, they cannot be admitted in evidence to prove the terms of the partition. 1935 L. 448: 151 I.C. 787=1934 Pesh. 100. *See also* 40 Bom.L.R. 202=1938 Bom. 257. A document effecting a partition requires registration. 1923 B. 464. *See also* 95 I. C. 256=1926 L. 540; 15 I.C. 28; 1923 N. 75; 95 I.C. 256. A writing which sets forth the details of property allotted to the share of the parties on partition must be treated as a partition deed and, unless registered, is not available as evidence of the transaction. 118 I.C. 59. A kararnamah which in reality is a partition deed requires registration. 1922 N. 236. *See also* 1941 N.L.J. 266= 1941 Nag. 209; 1940 O.A. 1090=1940 O. W.N. 1092 (Compromise petition based on family settlement not compulsorily registrable). Different receipts cannot be admitted in evidence to prove a partition unless they are registered. 58 I.C. 415=44 B. 881; 19 I.C. 646. A deed creating division in status extinguishes rights within the meaning of this section. 39 M.L.J. 382= 57 I.C. 18. *See also* 1923 N. 75; 46 M. 349. A map and chitta put in to prove a partition need not have been registered. 47 I.C. 159. A memorandum mentioning a prior partition need not be registered. 56 I. C. 182: 53 I.C. 423: 54 I.C. 804; 13 P.R. 1918; 15 I.C. 28: 30 M.L.J. 404; 4 R. 412 =99 I.C. 381=1927 R. 40; 4 R. 110=97 I.C. 876=1926 R. 172; 1929 N. 131. Where, while the proceedings before the Revenue Officer for partition of land were pending, the parties entered into a compromise, whereby the joint property was divided in a certain manner, an application made to the Revenue Officer embodying the terms on which the partition had been effected by the parties and requesting him to give effect to the same, does not require registration. The document itself is not an instrument of partition. Either it is an application to effect a partition or it is a recital of partition which had already been effected by the parties. 38 P.L.R. 567=1936 L. 708. Even for a collateral purpose, an unregistered partition deed cannot be admitted in evidence. 35 P.R. 1916=33 I.C. 948. But *see* 10 L.L.J. 75, *infra*. It can be looked into to prove a separation in status, though inadmissible to prove the actual distribution of the property. 10 L.L.J. 75=29 Punj. L.R. 413; 39 Bom.L.R. 1102=1938 Bom. 69; 99 I.C. 448=1927 N. 113; or to prove the fact of partition. 100 I.C. 153. A partition effected by panchayats does not require registration to complete it. 45 I.C. 854. As to award dividing immovable property, *see* 1932 A.L.J. 1090=1933 A. 59. Agreement to divide property if successful in obtaining it—Registration not necessary. 1938 Lah. 721. *See also* 1932 Cal. 356. An agreement not to execute a decree for partition need not be registered. 49 M.L.J. 675. A father and a son with a view to partition, exchanged two documents, one by which the son agreed in consideration of certain property to give up his claim to the rest and the other by which the father agreed to transfer the property to the son's name and to execute in writing any legal document that may be necessary. Possession was not given. *Held*, the documents did not require registration. 33 Bom.L.R. 802 =1931 B. 419 (1).

PARTNERSHIP.—Where on the dissolution of a partnership which owned immovable properties held in the names of some of the partners among its assets, the partners agree, *inter alia*, that they (three persons) who had constituted the partnership had equal rights in the immovable properties which had been purchased out of the profits, and such agreement is set out in the firm's day-book and signed by all the partners, it amounts to a declaration falling within S. 17 and if unregistered cannot be admitted in evidence by reason of S. 49. It cannot be said that it is a mere recital of fact as opposed to something which creates title. On the other hand it is an instrument which declares the rights of the partners in the properties from the date of the dissolution of the partnership and therefore requires registration. The fact that it is entered in the day-book and not drawn up separately makes no difference. I.L.R. (1939) Mad. 971=50 L.W. 331=1939 Mad. 884=(1939) 2 M.L.J. 649. *See also* 1938 Mad. 133= (1938) 2 M.L.J. 511. Dissolution of partnership—Assignment of his interest in partnership assets which included immovable property of over Rs. 100 in value by one of the partners requires registration. 132 I.C. 305=1931 M. 580=60 M.L.J. 527. *See also* 49 M. 738=51 M.L.J. 410.

POWER OF ATTORNEY.—The only circumstances in which a power-of-attorney is compulsorily registrable under S. 17 (1) (*b*) are where it has been executed to authorise the donee to recover the rent of an immovable property to the donor for the donee's own benefit; for, in such a case, it amounts to an assignment and hence under Cl. (*b*) it requires registration. Similarly a power-of-attorney, which is intended to create a charge in favour of the donee on immovable property referred to therein requires registration. 1939 R.D. 203=1939 A.W.R. (B. R.) 200.

RECEIPT OF MONEY.—S. 17 (1) (*b*) does not apply to a receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage. 132 I.C. 66=1931 O. 288. *See also* 133 I. C. 867=32 P.L.R. 407; 35 C.W.N. 861 (kistibundi receipt); 52 L.W. 401.

RELINQUISHMENT OR RELEASE.—A release if in writing must be registered. But it may be oral. 8 N.L.J. 157; 42 C.L.J. 582=1926 C. 170. *See also* 133 I.C. 861 =33 Bom.L.R. 802=1931 B. 419; 1933 L.

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422. Whether gratuitous surrender requires registration: *see* 1925 L. 183; 132 I.C. 66=1931 O. 288. *See also* 63 C.L.J. 52=1936 Cal. 774. An unregistered deed of relinquishment does not become effective by being acted upon in a partition proceeding affecting a wholly different property. 85 I.C. 285=1925 L. 125; 26 C.W.N. 201=49 I.A. 16 (P.C.). *Cf.* 26 I.C. 790=27 M.L.J. 396. An unregistered agreement relinquishing immovable property and not acted upon by the parties is inadmissible in evidence. 103 I.C. 369=28 P.L.R. 258; 35 P.L.R. 570=1934 L. 604.

RECEIPT AND RELINQUISHMENT.—There is obviously a distinction between a receipt for money and a relinquishment of a claim by a creditor. Where a receipt does not purport to extinguish a mortgage-deed, but merely operates to do so, it may be admissible in evidence without registration on account of exception (*xi*) mentioned in sub-S. (2) of S. 17 of the Registration Act. But when a document is not a receipt of money but something more and does not come within the ambit of S. 17 (2) (*xi*) it would require registration to be admissible in evidence. 1940 M.W.N. 895=52 L.W. 401. So also a document surrendering a lease. 28 Bom.L.R. 152=1926 B. 573. Also agreement giving up claim to balance of sale price from vendee after deducting amount due on previous mortgage-deed. 43 Bom.L.R. 1014. An agreement by reversioners to forego their right to question an alienation by a widow need not be registered. 40 A. 384. *See also* 1933 A. 854. An agreement surrendering reversionary rights must be registered. 12 P.L.R. 1915=27 I.C. 699; 11 I.C. 211. *See also* 1939 Lah. 414; 15 R.D. 91=12 L.R. 1 (Rev.) (agreement to give up exproprietary rights). A document executed by a Hindu widow by which she surrenders her estate in the immovable properties of her husband worth more than Rs. 100 clearly requires registration and, if unregistered, it is inadmissible in evidence; but it can be looked at to see the nature of the possession of the persons to whom the documents have been executed. 116 I.C. 186. An agreement by a widow surrendering her rights to certain properties of her husband must be registered. 14 I.C. 749. An agreement relinquishing portion of mortgage-debt must be registered. 24 M.L.J. 79; 10 I.C. 733. *See also* 20 I.C. 429; 45 L.W. 602=1937 M.W.N. 132=(1937) 1 M.L.J. 467. But relinquishment by usufructuary mortgagee of right to take possession need not be registered. 31 I.C. 565. Release of rights in immovable property must always be registered. 66 I.C. 705=25 C.W.N. 990; 145 I.C. 691=1933 L. 422; 50 I.C. 922. If value of property is less than Rs. 100, it need not be registered. 57 I.C. 949. A document by which the defendant relinquished his interest in a mortgage bond in favour of his brother, the plaintiff, and authorised the latter to collect the full amount of the debts is inadmissible in evidence in so far as it operates to extinguish his right, in the mortgage security; but there is no bar to its being admitted for showing the transfer of the debt itself, apart from the security. 66 M.L.J. 380=1934 M. 178. A document by which a partner releases his interest in the property for consideration need not be registered, though the partnership owns immovable property. 49 M. 738=51 M.L.J. 410. An agreement by which a partner assigns his interests in a firm owing immovable property in favour of another partner requires to be registered. 132 I.C. 305=60 M.L.J. 527. The registration is compulsory, even though the title of the party relinquishing is doubtful. 39 P.R. 1919=51 I.C. 391. But a letter stating that the writer has nothing to do with certain property is not a relinquishment and need not be registered. 40 I.C. 455; 37 L.W. 677=1933 M. 432. No registration is necessary in the case of a surrender by tenant to landlord. 53 I.C. 17. The right to hold a market is an incident to the ownership of the land. The allocation of a particular day for holding the bazaar, coupled with the condition that the parties are not to be allowed to hold the bazaar on certain other days is a restriction on the general right possessed by the owner to hold the market, and so where an agreement deals with such a right and the value of the same is more than Rs. 100, the document requires registration. 5 Luck. 504. Endorsement on mortgage bond releasing certain items does not require registration. 37 C.W.N. 424=1933 C. 586.

SALE AND AGREEMENT FOR SALE AND RESALE.—Sale of property above Rs. 100 in value cannot be effected by an unregistered deed. 78 P.L.R. 1917=36 I.C. 374. Agreement for sale of earth and sand requires registration. 1932 M. 734=63 M.L.J. 587. The construction of a sale-deed must be based on the recitals. 44 B. 961. An entry relating to payment in advance for a shop which is to be sold is no more than a memo. of a sum advanced and cannot be considered as a receipt of money received for a sale of an immovable property, and, therefore, does not need registration. 41 P.L.R. 513=1939 Lah. 562. An unregistered *bynapatra* under which certain money was paid and which provided that the sale-deed was to be executed at a later date is admissible in evidence. Effect of Amending Act II of 1927 indicated. 34 C.W.N. 881=58 C. 449=1931 C. 171. Where the language employed in an agreement of sale clearly purports to transfer the vendor's interest in the immovable property which he had inherited from his deceased brother, particulars of which are set out in the schedule annexed to the agreement, it requires registration. 56 I.A. 363=1929 P.C. 269=57 M.L.J. 765 (P.C.). An agreement to sell immovable property does not require registration under S. 17 and, therefore, even if unregistered, is admissible in evidence. 125 I.C. 549=1930

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M. 683=58 M.L.J. 688. An agreement to sell need not be registered. 1924 L. 337; 63 I.C. 22; 37 I.C. 132=98 P.R. 1916; 21 I.C. 778=1925 L. 284; 31 P.L.R. 636=1930 L. 1020. An *agreement to re-convey* property sold by a contemporaneous deed does not require registration, nor does the agreement to relinquish the right so created. 1930 A.L.J. 799=1930 A. 101; 1934 M. 703=67 M.L.J. 635. But *see* 35 P.L.R. 337=1934 L. 453, *contra*. The purchaser of certain property passed a certain document to the vendor in the following terms:—"I pass this agreement to you that on receipt of Rs. 2,500 for that *bhag*, I will re-convey it to you or your heirs or your assigns. In case I fail to re-convey or in case I raise any sort of objection to such re-conveyance, then you can on the basis of this writing file a suit against me and obtain a decree and take it back through Court." *Held*, that the document did not in itself create any right, title or interest or limit the title of the vendor so as to require compulsory registration under S. 17 and would be admissible in evidence in a suit for recovery of damages for breach of the agreement. *Held, further*, that the document, though it required registration under the law as it existed at the time of the execution of the document, namely, Act VIII of 1871 as being a conveyance of an equitable estate, yet it can get the benefit of the mitigation of the rigour of the law by virtue of the enactments contained in S. 17 (*h*) of Act III of 1877 and S. 17 (2) (*v*) of Act XVI of 1908. 31 Bom.L.R. 493=1929 B. 290. *See also* 11 O.W.N. 1184=1934 O. 447. Document conveying properties in lieu of mortgage-debts needs registration. 46 C.L.J. 573. A turn of worship is not an interest in immovable property and a sale thereof does not require registration. 97 I.C. 332=1927 P. 7=6 P. 245. A letter showing that a prior sale-deed is a *nominal transaction* is admissible in evidence without registration. 91 I.C. 452=1926 M. 362. *See also* 1936 Lah. 1002 (agreement creating contingent interest in immovable property is also compulsorily registrable).

SECURITY BOND TO COURT—ASSIGNMENT.—Where a Court obtains a security bond hypothecating immovable property to secure a proper disposal of the money due to minors deposited with it, an assignment of the security bond in favour of the minors on their attaining majority in order to enable them to realise the money from the surety can be made by an order of the Court without any registered deed of transfer. 133 I.C. 904 =1931 A. 389 (F.B.). A security bond executing in pursuance of an order of Court, whereby the judgment-debtor hypothecates his immovable property for satisfaction of the decree passed against him, falls within S. 17 (1) (*b*). The Court's acceptance of such a bond merely indicates that the Court considers the security sufficient and does not give validity to the bond. In other words, the Court approves the substance not the form of the security, the execution of the bond being the mode and the bond the form in which the security is subsequently furnished. In such circumstances, it cannot be said that the execution of the bond is an act of the Court or "a step of judicial procedure," or that the Court merely by approving the substance of the security tendered can, or purport to, convert the security bond—which by law is incapable of affecting the title to immovable property—into an operative, valid and admissible document of title. (31 M. 330, Foll.; 52 B. 72 and 15 L. 282, Not foll.) 13 R. 359=1935 R. 168. A security bond executed in accordance with an order passed under O. 41, Rr. 5 and 6 staying execution of a decree pending decision of the appeal, whereby the surety hypothecates his immovable property for satisfaction of such decree as might be passed by the appellate Court, and which is duly accepted by the Court and execution stayed accordingly, does not require registration as it is a step in judicial proceeding, and the decree-holders can move the Court to realize the decretal amount from the immovable property of the surety mentioned in the bond, even though it had not been registered. 15 L. 282=1934 L. 138 (F.B.).

SURETY BOND.—A security bond charging immovable property executed by a receiver for the due discharge of his functions requires to be registered under the Registration Act. 45 C. W. N. 298. Where the surety bond is not registered, the creditor cannot claim the amount secured as a charge on the property in the hands of the surety. 132 I.C. 798 (1)=1931 O. 310.

SOLENAMA—EVIDENCE OF DISCHARGE OF MORTGAGE DEBT.—There is nothing in law to exclude oral evidence of the discharge or release of a mortgage-deed, when the plea is that the payment was made partly by payment of money or partly by release of the debt. Where a solenama was not entered into for the purpose of varying the terms of a mortgage security, but was a mere contract for discharge or satisfaction of the mortgage, *held*, that the deed did not require registration for the purpose of being used in evidence. 58 C. 532=1931 C. 667.

TRANSFER OF FUTURE RIGHTS.—An assignment of future rents requires registration. 59 C. 586=36 C.W.N. 193=1932 C. 356. *See also* 1938 Lah. 721; 1936 Lah. 576 (agreement to have mutation when proprietary rights are acquired). An agreement to re-convey does not require registration. 1924 B. 174=48 B. 166. A bond containing a covenant to re-convey and not to encumber immovable property is not compulsorily registrable. 8 Pat.L.T. 137=1927 P. 17. Where a registered sale and an unregistered agreement to re-convey are executed, if the transaction is really one of mortgage, the second deed is inadmissible for want of registration, as it limits the rights of the ostensible owner. If it is a sale with a contract of re-purchase, the

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second document does not require registration. 28 Bom.L.R. 954=50 B. 566=1926 B. 497 (F.B.). *See also* 27 Bom. L. R. 1465. An assent of a reversioner to a conveyance need not be registered since his interest is only a *spes successionis*. 38 B. 224=22 I.C. 292; 4 L.L.J. 52=1922 L. 95. *See also* 56 I.C. 272=1 L. 124; 6 L. 87.

TRUSTS.—A deed appointing trustees but not vesting property in them need not be registered. 42 A. 609=47 I.A. 224=39 M. L.J. 263 (P.C.). Though a declaration of trust executed by the donees of certain properties specifying the objects for which they would hold them and reserving a power of revocation of the trust at the will of the donor, does declare or extinguish a right or title to an immovable property, where there is no evidence of the real value of the properties which, in all probability, might be less than Rs. 100 in value, in view of the donor's power of revocation, the document is admissible in evidence even though not registered. 34 Bom.L.R. 218=1932 B. 188. A vendor under an unregistered contract for the sale of immovable property cannot be treated as holding the property as a trustee for the purchaser by reason of what he had said or done. 1934 R. 209=12 R. 589.

VENDOR'S LIEN.—The unpaid vendor's lien under S. 55 (4), T. P. Act, is an interest in immovable property and therefore an instrument assigning such a right, when the property with respect to which the right exists, is worth more than Rs. 100 in value, is compulsorily registrable under S. 17, Registration Act, despite the provisions of S. 8, T. P. Act. 142 I.C. 730=1933 M. 181. A document creating a charge for vendor's lien under S. 55 (4), T. P. Act, requires registration; and it follows from this that any document which purports to transfer what the vendor has under such document, also requires registration under S. 17 (1) (*b*). 40 L.W. 481=1934 M. 615.

Sec. 17, sub-S. (1) (b): LEASE DEEDS.—Very strict interpretation is to be placed on the words in S. 17 (1) (*b*), and if there is doubt the document should be admitted. 1939 Rang. 410=188 I.C. 228. S. 17 (1) (*b*) must be deemed entirely to exclude leases as there is a separate Cl. (*d*) which deals with leases. Lease of agricultural land may be by oral agreement. But when an instrument is executed for that purpose, it comes under S. 17 (1) (*d*) and requires registration. 62 C.L.J. 534=1936 C. 770. A lease not falling under Cl. (*d*) does not require registration. 9 L.R. 186 (Rev.)= 12 R.D. 426; 17 R.D. 8=13 L.R. 387 (Rev.); 41 L.W. 351=1935 M. 305; 11 O. W.N. 1565=1935 Oudh 90; 152 I.C. 757= 1934 All. 902; 13 L.R. 387 (Rev.). Document purporting to be a lease or an agreement to lease must be registered. 82 I.C. 949=1925 C. 370; 52 I.C. 695. An agreement to lease not importing a present demise is not compulsorily registrable. 54 I. C. 134=21 Bom.L.R. 1130; 35 Bom.L.R. 722 =1933 Bom. 381. The word "declare" in S. 17 is *ejusdem generis* with the other words create, assign or limit with which it is in contiguity. 11 R. 481=1933 R. 307; 1935 Pesh. 69; 44 M. 399=40 M.L.J. 161. *See* for cases of immediate demise. 27 I. C. 91; 6 N.L.J. 151=1923 N. 171. A document admitting a lessee to statutory tenancy does not require registration. 14 L. R. 381 (Rev.)=17 R.D. 503. Permission to plant a grove in *sir* land need not be in writing or registered. 14 L. R. 284 (Rev.) =17 R.D. 399. Under the T. P. Act, a permanent lease can be created only by a registered instrument. Where the document is not registered, no title passes. It cannot be construed as an agreement to lease, but even if it could be so construed, it would require registration before it can be put forward as an agreement on the basis of which a claim for specific performance could be made. 37 C.W.N. 473. *Acceptance of the highest bid in an auction for farming out the rents of some villages* does not by itself give the purchaser any right in the property which he could obtain only by the execution of a muchalika. In the absence of a muchalika, there is no agreement which requires registration. 1933 M.W.N. 818. A conditional agreement to execute a lease is not compulsorily registrable. 1925 S. 54; *also* 14 Pat.L.T. 628=1933 P. 544; nor lease for drawing toddy. 38 M. 883= 23 I.C. 102. A subsequent unregistered lease, fixing a smaller rent than the one in a prior registered lease, cannot be admitted in evidence. 41 C. 493=40 I.A. 223=26 M.L.J. 25 (P.C.); 148 I.C. 558=1934 L. 743. But where a *solenamah* was executed modifying the rental payable under a prior *darputni* and excluding one of the items originally included, it was held to be not compulsorily registrable. 55 C. 701=32 C. W.N. 268=1928 C. 441. *See also* 60 C.L. J. 384=1935 C. 261. A *jamabandi* prepared on the basis of a survey made subsequent to an oral settlement of an agricultural *jama* with a tenant, showing an increase in the area of agricultural land in the *jama* and consequent enhancement of rent, and signed by the tenant, does not fall under either Cl. (*b*) or Cl. (*d*) of sub-S. (1) of S. 17 and is not compulsorily registrable when such a lease can be created orally. It is therefore admissible in evidence to prove an increase of rent in respect of increased area. 40 C. W.N. 1330. A compromise filed in Court agreeing to an enhancement in rent, unless registered, is not admissible in evidence. 3 O.W.N. 60. *See also* 197 I.C. 360.

VALUE—INTEREST CONVEYED AND NOT CONSIDERATION.—The value of Rs. 100 refers to the value of the right, title or interest conveyed thereby and not necessarily the consideration. Where the defendant executed a deed out of affection towards his wife granting her the life-interest in property producing Rs. 90 a year, *held*, the value of

(*c*) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(*d*) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

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the interest conveyed was more than Rs. 100 and that the document required registration. 138 I.C. 274=34 Bom.L.R. 459=1932 B. 217. Where a mortgage decree concerning immovable property is assigned for a consideration of less than Rs. 100, the deed does not require registration under S. 17 of the Registration Act, although the amount due under the decree assigned, is more than Rs. 100. The test for registration is the value of the property affected by the deed of assignment and the pecuniary consideration stated in the deed of assignment for the transfer is the amount to be taken into consideration for the purpose of determining whether it is compulsorily registrable. 44 Bom.L.R. 164. *See also* 2 Bom. 97; 2 Bom. 353. A document releasing a charge created on immovable property comes directly within the terms of S. 17 (*b*) and requires registration. 62 I. A. 23=59 B. 180=65 M.L.J. 339=39 C.W. N. 440 (P. C.). Applicability—"Composition deed"—"Decree or order"—Agreement between debtor and creditor creating charge over immovable properties—If exempt from registration. 1934 M. 697=67 M.L.J. 836.

VALUE OF 100 RUPEES.—There is nothing illegal in the parties splitting, what is apparently one mortgage transaction of more than Rs. 100, into several mortgages of even date, each for a sum of less than Rs. 100. In such a case, the charge on the particular plot dealt with in each instrument is below Rs. 100 and therefore none of them requires registration under S. 17. 188 I.C. 502 =1940 Lah. 98. Different mortgage-deeds between same parties—Each relating to separate land—Valued at less than Rs. 100 —Each deed containing clause that mortgagor would redeem his land when he would pay up entire money —Need for registration. 41 P.L.R. 585=1939 Lah. 173. A husband executed a deed of transfer of his house to his wife in lieu of dower. The dower was fixed at a certain sum below hundred. The market value of the house was over hundred rupees. *Held*, it is the amount for which the property is transferred that determines the necessity for registration, and not the market value of the property transferred. The deed does not require registration. 168 I.C. 390=1937 Pesh. 39. A sale-deed executed by the mortgagor conveying the equity of redemption to the mortgagee for a consideration less than Rs. 100 does not require registration, even though the mortgage debt is for more than Rs. 100. 60 B. 220=38 Bom.L. R. 205=1936 B. 175.

Sec. 17, sub-S. (1) (c).—*Receipt of earnest money* must be registered. 37 I.C. 132=98 P.R. 1916.

RECEIPT.—Receipts purporting to put an end to the mortgage rights do not come within the exception embodied in S. 17 (2) (*xi*). It follows therefore that these receipts are compulsorily registrable under S. 17 (1). These receipts can be relevant only as evidence of payments of mortgage-debts either in full or in part. Otherwise they would be irrelevant. And if they are relevant only for proving payments of the mortgage-debts, they certainly would affect the mortgage-debts by reducing them considerably. Hence the mortgagor cannot rely on these receipts as evidence of payment of the mortgage-debts in question. 1938 Mad. 533=(1938) 1 M.L.J. 586. *See also* 41 P. L.R. 38=1939 Lah. 185; 40 P.L.R. 833=1938 Lah. 497. There is a clear distinction between a discharge of a debt and the extinguishment of a mortgage contract, though one may be the result of the other. All that the S. 17 (2) (*xi*) exempts is a receipt for the payment of money due under a mortgage. A receipt which merely acknowledges payment and refers to the payment as a naked fact does not fall within S. 17 (1) (*c*), unless the fact is referred to as a consideration for a contractual engagement whereby the interest created by the principal registered instrument is limited or extinguished. 60 Bom. 220=38 Bom.L.R. 205 =1936 Bom. 175. Sale-deed—Money left with vendee to pay off vendor's creditor—Amount paid not to creditor but to vendor—Receipt by vendor to vendee—Registration not necessary. 1937 A. L. J. 749 =1937 All. 636. Where a sale of mortgagee rights took place two months before the execution of the *receipt*, the receipt cannot be regarded as a contract of sale. It merely evidences the payment of consideration for a contract that has been completed two months previously, and is therefore admissible in evidence without registration. Even if it is compulsorily registrable under S. 17 (1) (*c*), the payment can be proved by means of oral evidence. 151 I.C. 884=35 P.L.R. 491=1934 L. 472. S. 17 (1) (*c*) is perfectly clear and the simple meaning of it is that any document which records the receipt of money due on a mortgage, or on any other instrument indicated in S. 17 (1) (*b*) comes within it. Therefore, a document which is a receipt and which recites certain oral mortgages said to have been executed previously and records the receipt of the consideration for all those mortgages on the date of the execution of the receipt, requires to be registered under S. 17 (1) (*c*). 36 P.L.R. 211=1934 L. 970. *See also* 23 Pat.L.T. 46=1942 P.W.N .444.

Sub-Sec. (1) (d): LEASE DEEDS.—For

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meaning of tenancy from year to year, *see* 36 I.C. 378=10 Bur.L.T. 109; 105 I.C. 43. Where a lease is for a fixed period of one year, the mere fact that a certain amount mentioned therein is to be paid under it for the year to which it relates, does not make the lease one from year to year or reserving an yearly rent. 41 P.L.R. 29=1939 Lah. 234. *See also* 42 P.L.R. 75; 1940 M. 379. A lease which is for one year certain with the option to the landlord to permit the tenant to continue to live thereafter, is a lease for a term not exceeding one year and is not compulsorily registrable when it does not reserve a yearly rent. 42 P.L.R. 442 =1940 Lah. 409. *See also* 1939 Lah. 558 =41 P.L.R. 646. For this sub-section to apply it must effect an actual present demise. 45 C. 485=46 I.A. 240=37 M.L.J. 525 (P.C.). *See also* 64 I.C. 747=25 C. W.N. 550; 1930 P. 601; 116 I.C. 630= 1929 C. 186. Lease-deed creating tenancy at will does not require registration. 34 Bom.L.R. 959=1932 B. 493; nor lease for one year only. 152 I.C. 757=1934 A. 902. Agricultural leases which do not exceed the term of one year are exempt from stamp duty and registration. A consent statement in the form of an agreement by a tenant to pay the landholder rent in money for the crops raised is, however, on a different footing, as it amounts to an agreement to pay rent in money instead of in grain and contemplates a permanent tenancy at a definite money rent. Such an agreement which varies the rent payable by the lessee under the patta requires registration. I. L. R. (1940) Mad. 487=1940 Mad. 379=(1940) 1 M.L.J. 391 (F.B.). Lease for more than one year must be in writing and registered. 63 C. 31; 39 P.L.R. 590. A document which is a definite lease of immovable property for seven years requires registration, and if unregistered cannot be received in evidence. 38 P.L.R. 590. "Reserving a yearly rent"—meaning of, *see* 193 I.C. 786 =1941 Pesh. 30. A compromise petition which did nothing more than express an agreement that a lease would be interpreted in a particular way does not create a new lease and no registration is necessary. 1941 Cal. 536. An agreement to lease, in order to be compulsorily registrable under S. 17 (1) (*d*) must be one which effects an actual demise or creates a present and immediate interest in the land which is the subject of the agreement. Although the parties to an agreement might intend that a formal lease should be executed and registered, if possession of the property is given under the agreement and parties act as though the tenancy is in force, it must be held that there is a present demise and the agreement to lease requires registration, and not merely an agreement to execute a lease at a later date under S. 17 (2) (*v*) of the Act. The fact that the tenancy is to commence at a date subsequent to the agreement would not prevent there being a present demise. 43 Bom. L.R. 603=1941 Bom. 346. All decrees and orders are not excluded from compulsory registration by reason of the provisions of S. 17 (2) (*vi*) of the Registration Act, but only those are excluded which partake of the character of documents mentioned in Cls. (*b*) and (*c*) of S. 17 (1); a decree embodying a compromise purporting to grant a lease within the meaning of Cl. (*d*) of S. 17 (1) is not exempt from registration. 194 I.C. 428=1941 Pat. 536. Clause in lease-deed creating charge for rent requires registration. 11 P. 98=12 Pat.L.T. 871=1932 P. 97. As to deed containing double contract, *see* 140 I.C. 681=1932 S. 217. The right to levy toll under the Bombay Tolls on Road and Bridges Act is independent of the ownership of Government in the soil of the road and is therefore not immovable property as defined by the Registration Act. A right conferred by a lease or kabuliyat to recover toll for a period of one year from carriages or vehicles passing over a particular public road, is not an incident of ownership of immovable property so as to come under the expression "benefits to arise out of land" within the meaning of S. 2 (6) of the Registration Act. The right of Government to levy toll is not an incident of ownership of land. Toll is collected in exercise of a statutory right. Consequently a writing which purports to be an assignment or extinguishment of the rights of the lessee of the tolls is not compulsorily registrable under S. 17 (1) (*b*). 42 Bom.L.R. 780=1940 Bom. 369. An agreement purporting to vary the rent reserved in a previous registered lease requires registration, even though the previous lease is not compulsorily registrable. 69 C.L.J. 163=1939 Cal. 416. Where the terms of the grant of sanad are that a person is to claim land within certain boundaries and that at the end of the period of three years a lease would be entered at a rent to be fixed of the portions of the land re-claimed, the sanad is not a lease and it is not a title to land and therefore it is unnecessary to register it for being admissible in evidence. 1930 P. 356. A license which is not a lease, does not require compulsory registration. 120 I.C. 673 (1). A letter which was passed between the parties stated as follows: "I beg to note that I have agreed to take a lease from you of the vacant land.....The lease is to be for a period of five years, I am to pay rent for every month in advance at.....I am not to use the demised premises for any purpose other than that of storing timber. A formal lease is to be executed and such lease will contain besides other terms a covenant for re-entry in case of default in payment of rent." The letter constituted a present demise of the land and the condition that a formal lease was to be thereafter drawn up and executed was in the nature of a further assurance only. Consequently the letter falls under S. 17 (1) (*d*). 32 Bom.L.R. 188=1930 B. 210. Memo. granting reclamation lease, if unregistered, is inadmissi-

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ble in evidence. 46 I.A. 279=37 M.L.J. 578=24 C.W.N. 369 (P.C.); 27 A.L.J. 1134=1929 A. 831. *See also* 40 C.W.N. 1330 (Oral lease of agricultural land). Where in a correspondence relating to a lease, the one letter which was intended to create the contract fixing the terms was unregistered, the whole lease is ineffectual. 45 A. 220=1923 A. 112. This section does not apply to a lease constituted by a number of documents, none of which can be regarded as a lease if taken singly. 35 I. C. 108. *See contra* 33 I.C. 439=30 M.L. J. 519. Though an unregistered lease is inadmissible in evidence, the transaction might be completed by part performance by putting the lessee in actual possession. 5 P. 40=7 Pat.L.T. 183=1926 B. 184. *See* 1937 Nag. 289. A document which merely varies the rent in respect of an existing tenancy may require registration if the earlier lease is registered. (39 Cal. 284, Rel. on.) 173 I.C. 996=1937 Cal. 499. *See also* 42 C.W.N. 107. *See also* 1940 Mad. 379=(1940) 1 M.L.J. 391. (*See* now T. P. Act, S. 53-A as to the doctrine of part performance.) Splitting up of lease to avoid registration fees renders the lease deeds invalid. 7 L.R. 733 (Rev.). But *see* 15 R.D. 380=12 L.R. 167 (Rev.), *contra*. In reply to a letter from the tenant the landlord wrote as follows: "I have given three shops at Rs.....I will execute an agreement for three years as from 31st December, 1921, whenever you like. Possession will be given from the 31st December, 1921." The letter amounted to an agreement to lease and it was inadmissible in evidence except on registration. 125 I.C. 618 ==1930 L. 675. *See also* 36 Bom.L.R. 174= 1934 B. 140. Decree embodying contract stating that existing lease would continue on same terms. Registration not necessary. 41 P.L.R. 346=1939 L. 49. A decree which confirms a mulgeni lease, which did not require registration, but varies the stipulated rent payable by making the lessee pay the Government revenue and local fund tax and whatever taxes may be imposed in future if the same be due to Government, cannot be read as creating a new lease, and is not registrable under S. 17 (1) (*d*). I.L.R. (1940) Bom. 480=42 Bom.L.R. 501=1940 Bom. 281. Lease—Oral lease of agricultural land — Subsequent survey — *Jamabandi* showing increase in area of land and increase of rent and signed by tenant—Registration —Necessity—Admisibility without registration. I.L.R. (1937) 1 Cal. 313=40 C.W. N. 1330. Where no date was fixed for expiry of the lease, but the landlord could terminate it on the happening of a particular event named, it must be registered. 41 B. 458=39 I.C. 625. If option is given to terminate the lease, unless the option vests in the lessor, it need not be registered. 37 C. L.J. 177=1923 C. 524; 41 B. 458=39 I.C. 625. A rent note evidencing tenancy at will and terminable at the option of lessor requires no registration. 39 I.C. 58=13 N. L.R. 30. A lease was executed in the following terms 'I have taken the land of the above two numbers for cultivation from the current year 1897-98 from you," and after reciting the amount to be paid by two instalments it said: "Thus I shall go on paying the amount of assessment as stated above from year to year so long as I cultivate the lands" and then after referring to the boundaries, it said: "I shall deliver the said numbers without any objection at any time you may ask me to vacate and deliver the same to you." *Held*, that the deed did not create a lease of immovable property from year to year but that it merely constituted a tenancy at will and that consequently it did not require registration. 31 Bom.L. R. 335=118 I.C. 702. Where nothing remains to be done by the tenant, no fresh document being required nor any notice to be given, and the tenant is entitled to hold on so long as he continues to pay the stipulated rent or render the stipulated service, the tenancy is one for a period exceeding one year and the lease must be registered. 123 I.C. 293=1930 S. 178. A suit for specific performance will not lie on the basis of an unregistered agreement to lease, which would be inadmissible in evidence. 26 C. W. N. 329; 49 C. 507=1922 C. 436; 4 L. 44. *See also* 67 I.C. 144=3 L.L.J. 173. *See contra* 38 C.L.J. 177=1923 C. 524. An unregistered lease-deed can be looked into to ascertain the nature of the possession of the lessee. 108 I.C. 161. *See also* 1942 R. D. 605. Although the figure as to rent mentioned in an unregistered lease cannot be looked into to establish the rent fixed, it may be looked at to establish what damages the landlord suing for arrears of rent, is entitled to by way of rent. 1930 L. 915. A permanent tenure always required a registered deed, even though the land be agricultural land. 40 I.C. 100. *See also* 1922 P. 265; 21 Cr.L.J. 374=55 I.C. 854; 62 C. L.J. 534; 58 B. 419=36 Bom.L.R. 359= 1934 B. 194. *See contra* 50 I.C. 177=22 C.W.N. 190. A document varying terms of a lease must be registered. 41 I.C. 804 =27 C.L.J. 107; 16 I.C. 52; 39 C. 284=12 I.C. 723 (F.B.); 1937 Nag. 289. A document varying the amount of rent to be paid under a registered deed requires registration. 8 P. 585=1929 B. 664. A compromise deed which embodies a contract for variation of the rent payable in respect of a lease is in essence a lease and is compulsorily registrable, if it is not registered it is not only not admissible in evidence, but it does not constitute a valid and operative contract between the parties. 10 L. 685=117 I.C. 240=1929 L. 291. *See also* 40 C.W.N. 585; 42 C. W.N. 107. A compromise decree creating a lease of immovable property is compulsorily registrable under S. 17 (1) (*d*) as the exemption contained in S. 17 (2) (*vi*) does not extend to decrees embodying leases. If the decree is not registered, S. 49 of the Act prevents its being put in evidence to

[1][(*e*) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property:]

Provided that the Provincial Government may, by order published in the Official Gazette, exempt from the operation of this sub-section any leases executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.

(2) Nothing in clauses (*b*) and (*c*) of sub-section (1) applies to—

(*i*) any composition deed; or

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[1] Added by Act XXI of 1929.

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prove the rent of the tenancy, and S. 91 of the Evidence Act stands in the way of any other evidence being given of the rate of rent as the rate of rent is one of the terms of the lease. 72 C.L.J. 132=45 C.W.N. 129. *See also* 43 C.W.N. 956. An agreement undertaking not to enhance the rent of the tenant comes under S. 17 (*b*). 13 R.D. 704. A lease of palmyra trees for toddy only need not be registered. 38 M. 883. On this clause, *see also* 17 R.D. 8; 54 C.L.J. 220 (Amalnama containing all terms of tenancy requires registration); so also document varying terms of tenancy permanently. 1931 M. 751. So also lease for 12 years. 15 R.D. 106. So also agreement not to eject tenant at any time. 15 R.D. 278. As to lease for one year, *see* 15 R.D. 399. A *lease from month to month* which requires registration under S. 107, T. P. Act, but not under S. 17 of the Registration Act, is admissible in evidence to prove the nature of possession under the instrument. S. 49 of the Registration Act applies only to instruments which are required to be registered by S. 17 of the Act. 32 P.L.R. 361=1931 L. 501. Although a document regarded as a *kobala* may be invalid by reason of its being *registered in a district because the only property covered by it as lying within that district had no existence and was merely fictitiously introduced*, if the document satisfies the requirements of S. 17 (1) (*b*) as being a non-testamentary instrument purporting to create or declare, though in future, a right vested or contingent, in favour of the claimants, the document would be registrable, and as such would not be invalid. 39 C.W.N. 120=60 C.L.J. 243. *See also* 13 P. 111=15 P.L.T. 73=1934 P. 127.

PROVISO.—Proviso applies to *rent payable in kind* also and is not restricted to money rents. 11 M.L.T. 405=15 I.C. 682.

Sec. 17 (1) (e): ASSIGNMENT OF MORTGAGE DECREE—NON-REGISTRATION—EFFECT OF.—An assignment of a mortgage decree requires registration and such an assignment is invalid unless registered, but the want of registration will not have the effect of extinguishing the original rights of the assignor mortgagee and a subsequent mortgagee bringing a suit on his mortgage, and whose mortgage is admittedly subject to the mortgagee rights of the prior mortgagee, cannot claim a decree free of the mortgagee rights of the prior mortgagee. His rights cannot be held to have disappeared merely because the assignments by him have been found to be invalid for want of registration. 178 I.C. 278=1938 Lah. 430. *See also* 17 Pat.L.T. 536. A *Kobala* transferring a rent decree for more than Rs. 100 requires to be registered under S. 17 (1) (*e*), as the decree creates a charge on the property. The fact that the *Kobala* transfers both the decree for back rent and the actual back rents is immaterial. 43 C.W.N. 858. *See also* 1940 Rang.L.R. 372=1940 Rang. 228.

Sec. 17, sub-S. (2) (i).—For meaning of "composition deed," *see* 38 B. 576; 15 I.C. 880=14 Bom.L.R. 506. Sub-S. (2) of S. 17, reserves only those documents which are included in Cls. (*b*) and (*c*) of sub-S. (1); and Cl. (*d*) of sub-S. (1) which mentions leases of immovable property from year to year is not controlled by this subsection. 173 I.C. 996=1937 Cal. 499. *Kabuliyats and razinamahs* are exempt from registration. 42 B. 359; 41 B. 510; 11 I.C. 409. An admission in a *solenama* filed in a criminal complaint is admissible in evidence though unregistered. 46 I.C. 442; 19 I.C. 551. A petition for mere mutation of names based on a compromise is admissible to prove an adjustment of a dispute between the parties. 38 A. 75; 26 I.C. 79=12 A.L.J. 1316. But *see* 33 A. 475.

COMPROMISE.—A compromise relating to matters not in dispute, is inadmissible later on unless registered, in a suit as to those matters. 22 I.C. 687. But *see* 98 I.C. 1069=1927 A. 156 *contra*; 1926 A. 563; 27 M.L.J. 656. A compromise deed giving effect to some arrangement about an estate is compulsorily registrable. 26 I.C. 424=254 P.W.R. 1925. *See also* 1936 A.L.J. 288=1936 All. 621; 1940 O. A. 1090=1940 O.W.N. 1092 (Compromise based on family settlement not compulsorily registrable). *See also* 199 I.C. 341. A compromise petition recorded by Court requires no regis-

(*ii*) any instrument relating to shares in a Joint Stock Company, notwithstandig that the assets of such Company consist in whole or in part of immovable property ; or

(*iii*) any debenture issued by any such Company and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immovable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the Company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures ; or

(*iv*) any endorsement upon or transfer of any debenture issued by any such Company ; or

(*v*) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest ; or

(*vi*) any decree or order of a Court [1][except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding] ; or

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[1] Substituted for the words "and any award" by Act XXI of 1929.

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tration. 43 M. 688=39 M.L.J. 77 (F.B.) ; 12 P. 359=145 I.C. 1=1933 P. 306; 39 C. W.N. 485; 22 I.C. 35. *See also* 85 I.C. 633=1925 A. 176; 26 I.C. 791; 1926 L. 586; 132 I.C. 7=31 P.L.R. 959. This is so even where part of the matters comprised in a compromise were extraneous to the matter in dispute in the suit. 98 I.C. 1069 (1)=1927 A. 156; 14 I.C. 210; 1926 A. 563; 163 I.C. 64=1936 Pesh. 125; 40 C.W. N. 1176; 40 C.W.N. 585. A compromise affecting land must either be registered or be embodied in a decree of Court, to be valid. 27 M.L.J. 656=27 I.C. 379. *See also* 99 I.C. 1002=1927 L. 156; 37 P.L.R. 231. A document reciting the terms of a compromise, if it relates to immovable property of the value of more than Rs. 100 must be registered unless it is incorporated in the decree of the Court. A document affecting property of similar nature need not be registered if it has been acted upon by both the parties. 122 I.C. 493=1930 L. 446; 37 P.L.R. 238; 39 C.W.N. 485. A compromise agreement operating as a lease requires registration, notwithstanding the fact that it has been embodied in a decree, and such an agreement, if unregistered, will not be admissible as a lease. 1930 C. 559. But *see contra* 40 C.W.N. 585.

Sec. 17 (2) (v).—A contract to enter into a contract is not contemplated in this sub-section nor is any such contract known to law. 52 C. 695=1925 C. 1087. Deed of maintenance and residence—Arrangement in favour of first wife—No registration necessary. 34 Bom.L.R. 1317=1932 B. 602. A landlord passed a letter to a tenant in the following terms:—"This is to inform you that as long as you occupy room . . . . . we shall not ask you to vacate the said room the rent of which will be Rs. 5 per day . . . . . you are not to sublet the same". There was no mention of the payment of *salami*. *Held*, that the letter was unilateral, that there was no mutual agreement and that it contemplated the execution of a formal document and that consequently it did not require registration. 7 R. 70=117 I.C. 255 (2)=1929 R. 164. A *memo. of partition* providing for execution of a separate deed in future does not in itself create any right and need not be registered. 27 C.W.N. 501=44 M.L.J. 745= 1922 P.C. 266 (P.C.) ; 16 L.W. 784=1923 M. 160; 13 P. 620=15 Pat.L.T. 443=1934 P. 495. *See also* 1937 A.L.J. 729=1937 All. 456. A document reciting agreement to see the property and payments of money and creating a right to obtain a conveyance in future need not be registered. 50 B. 334 =28 Bom.L.R. 591=1926 B. 375. *See also* 1939 P.W.N. 880. An agreement by a borrower to create a mortgage requires no registration. 25 Bom. L. R. 313. An agreement to re-convey is not compulsorily registrable. 38 B. 703; 1923 R. 242; 50 B. 505 (F.B.) ; 49 B. 862=27 Bom.L.R. 261; nor an agreement to re-purchase. 1 R. 472 =1924 R. 57. Agreement to share in property forming subject of litigation. 4 L.L. J. 301. *See also* 1923 N. 47; 51 M.L.J. 418=1926 M. 1117. A collateral agreement to cancel a lease deed on non-fiulfilment of certain conditions. 32 I.C. 941=30 M.L. J. 302.

Sec. 17 (2) (vi).—As to application of this clause to compromise decrees passed before 1—4—1930, *i.e.*, prior to the amendment of the section, *see* 40 C.W.N. 1176; 40 C.W.N. 585. The amendment made in

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1929 with reference to S. 17 (2) (*vi*) has no retrospective operation. 14 Luck. 763 =1939 O.W.N. 809=1939 Oudh 269. A compromise decree passed prior to 1st April, 1930, is not a decree of which registration is necessary under S. 17 of the Registration Act, even though the consent decree may include properties not the subject-matter of the suit. The fact that the decree has not been made in accordance with O. 23, R. 3, C. P. Code, does not make it any the less a compromise decree not requiring registration for its validity. 64 C.L.J. 431=40 C. W.N. 1176. *See also* 1937 Lah. 708=39 P.L.R. 496; 40 C.W.N. 585; 1939 Oudh 269; 1937 A.L.J. 1090; 1936 Lah. 603; 1938 Mad. 202; I.L.R. (1939) Nag. 607=1939 Nag. 233; 42 Bom.L.R. 1023; 1941 Bom. 1. S. 17 (2) (*vi*) does not exempt from registration documents coming within S. 17 (1) (*d*). 65 C.L.J. 590=1938 Cal. 172. *See also* I.L.R. (1937) Cal. 65=40 C.W. N. 974. S. 17 (2) (*vi*) which exempts certain classes of decrees from registration applies only to documents falling under Cls. (*b*) and (*c*) of S. 17 and not to those falling under Cl. (*d*) of that section. 178 I. C. 760=40 P.L.R. 567=1938 Lah. 685. A final decree for sale on a simple mortgage drawn up in the ordinary form must be regarded as immovable property for the purposes of Ch. III of the Transfer of Property Act, relating to sale of immovable property and a deed of assignment of such a decree is compulsorily registrable under S. 17 (1) (e) of the Registration Act as amended by the T. P. (Amendment) Supplementary Act of 1929, if the value thereof is Rs. 100 or upwards. I.L.R. (1940) Mad. 306=1940 Mad. 140=(1940) 1 M.L. J. 922.

SCOPE.—The saving clause in S. 17 (2) (*vi*) has no application to the case of a lease created by decree, compromise decree or order of a Court and it falls under S. 17 (1) (*d*). 1930 C. 94; 39 C.W.N. 485; 37 P.L.R. 238. Only such decrees and orders which partake of the character of the documents mentioned in cl. (*b*) and (*c*) of sub-S. (1) are excluded from compulsory registration. If, however, a consent decree operated to create a lease, it requires to be compulsorily registered. 11 P. 98=136 I. C. 54=1932 P. 97. Cl. (*vi*), S. 17, exempts from registration "*any* decree or order, of a Court" and not "any *final* decree or order, etc." Thus the exemption is not restricted to decrees, which have become final and conclusive but includes within its purview, decrees which have been set aside wholly or in part on appeal or review or have otherwise become inoperative. The circumstance that the decree is subsequently varied or reversed, might affect its enforceability but not its value as a "method" of proof of the terms of the transaction, which were embodied in it. Therefore, it is open to a party in a later suit to have the terms of the compromise proved by reference to the decree. 6 L. 217=1934 L. 721. *"Court,"* meaning of. *See* 132 I. C. 537=1931 O. 296. The exception regarding registration covers all pleadings in and orders of a Court. 31 I.C. 260=29 M.L.J. 749. But *see* 36 M. 46=21 M.L.J. 870; 3 Pat.L.J. 255= 46 I.C. 358 (F.B.). An application for attachment is a "proceeding" within the meaning of S. 17 (2) (*vi*). 41 L.W. 301 =1935 M. 232=68 M.L.J. 41. A memorandum or agreement requires registration if the parties intend it to be a declaration of rights and if it is so worded, but a memorandum drawn up for the purpose of obtaining another document to declare rights, for example, a compromise decree to be obtained later on in terms of the agreement—does not require registration. 1940 M. 897=52 L.W. 339=(1940) 2 M.L.J. 319. "Subject-matter of the suit or proceeding"—Meaning—Compromise of suit and application for attachment before judgment—Creation of charge and dismissal of application for attachment — Compromise requires no registration. 68 M.L.J. 41. *See also* 45 L.W. 501=1937 Mad. 504=(1938) 1 M.L. J. 325; 42 Bom. L. R. 1016. Suit for money—Compromise creating rights in immovable property—Decree based on compromise requires registration—If not registered, it will be incapable of execution so far as immovable property is concerned. 1937 A. L.J. 120=1937 A. 282. *See also* 20 Pat. L.T. 328=1939 Pat. 406; 1938 Pat. 212. Exchange of shares in immovable property among co-owners under a compromise decree, does not create or extinguish title and does not require registration. 1937 P. W. N. 51=1937 P. 232. Even where a material which does not concern the subject-matter of the suit has been embodied in a decree, there is no necessity for registration. This means in effect that the document embodying that material can be given in evidence and used as proof of title. 1930 A. L. J. 324=1930 A. 118; 33 P.L.R. 761; 133 I.C. 403=1931 A.L.J. 835=1931 A. 745. Where an unregistered *solenama* was held before the Collector in proceedings taken under the Land Registration Act for mutation of names and the name of a co-sharer was registered in respect of certain property and it was stated in the *solenama* that he was in exclusive possession for over 30 years and the other co-sharer gave up all rights to the property on payment of some money, ***held,*** that the *solenama* did not form a part of the decree of the Land Registration Collector; that there should have been a deed of sale which in order to be effective was necessary to be registered, having regard to the provisions of S. 54, T. P. Act, and that the *solenama* was not admissible in evidence. 118 I.C. 574=1929 C. 231: *See also* 132 I.C. 537=1931 O. 764. Under S. 17, the provisions as regards registration do not apply to any decree or order of a Court. S. 29 (2) is only a permissive section and,

(*vii*) any grant of immovable property by [1][the Crown]; or

(*viii*) any instrument of partition made by a Revenue-officer; or

(*ix*) any order granting a loan or instrument of collateral security granted under the Land Improvement Act, 1871, or the Land Improvement Loans Act, 1883; or

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[1] Substituted by A.O. 1937, for "Government.

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though no doubt a copy of a decree may be presented for registration, there is no obligation to do so. 120 I.C. 218=1930 N. 17. A decree or order adjusting the claim of the judgment-creditor in execution of his decree, whereby a charge is created in his favour on immovable property, of the value of more than Rs. 100, not the subject-matter in suit, which is compulsorily registrable under S. 17 (1) of the Registration Act is not required to be sent to the Registrar for registration; a copy of such decree or order can be accepted for registration. There is nothing in the Act which prevents any party from applying that a true copy of the decree or order should be sent to the Registrar for being registered. The decree or order should always remain on the records of the Court. 174 I.C. 954=40 Bom.L.R. 160=1938 Bom. 212.

AWARDS.—Award may under certain circumstances amount to a partition deed. Then it requires registration. 19 C.L.J. 123=20 I.C. 860=18 C.W.N. 475; 42 I.C. 617. *See also* 46 I.C. 685; 39 I.C. 912=77 P.W.R. 1917; 42 I.C. 116; 1936 Sind 79=30 S.L.R. 115. Where an award is made without the intervention of the Court and filed under para. 20 of Sch. II, C. P. Code, it is the application to the Court which is to be registered and numbered as a suit, and the application must contain and show what the award is, and it is on the award that the Court has to pronounce judgment and pass a decree which must be in accordance with the award. When a charge is created by the award on the immovable properties of one of the parties to the arbitration and award, and mentioned in the award, it cannot be said that the compromise relates to properties outside the suit and not the subject-matter of the suit, within the meaning of S. 17 (2) (*vi*). Such an award and the decree passed thereon do not require registration under S. 17. 42 Bom.L.R. 1123. An award which merely directs one of the parties to pay a certain sum of money to the other periodically does not require registration and therefore must be treated as a valid award to that extent. 168 I.C. 213=1936 Lah. 794. An award made by arbitrators appointed by the Court with a view to having its terms incorporated in a decree of the Court is not an award which is compulsorily registrable. 154 I.C. 557=1935 R. 16. *See also* 1935 Pesh. 69; 31 S.L.R. 8=1937 Sind 156. An award made by arbitrators under orders of the Court has no force until a decree is passed on it. A private award, if it is valid, is operative, even though neither party has sought to enforce it by a regular suit. A private award therefore falls within the class of documents specified in S. 17 (1) (*b*), whereas an award of the other class does not. By the amendment of S. 17, Registration Act, by S. 10 of T. P. Supplementary Act, 1929, the exception contained in S. 17 (2) (*vi*) having been removed, a private award, if it satisfies the requirement as to value, is compulsorily registrable. 62 C. 201=39 C.W.N. 54=1934 C. 815; 36 Bom.L.R. 174=1934 B. 140. *See also* 30 S.L.R. 337=1937 Sind 7; 44 Bom.L.R. 158; 1937 Cal. 201; 42 Bom.L.R. 1113; 1937 Pat. 183=15 Pat. 579; 6 Cut. L. T. 47; 1938 Mad. 55; 1937 A.L.J. 1303; 1937 Pat. 214=16 Pat. 34=17 Pat.L.T. 835; As to construction of awards, *see* 52 L.W. 800=1940 P.C. 222=45 C.W.N. 204=43 Bom.L.R. 381 (P.C.). An award under which claims to property were relinquished, though unregistered, is still admissible in evidence. 1936 L. 877. An award which only recognises the fact that the mortgagee never had any interest in a portion of the mortgaged property for the simple reason that the mortgagor had also no interest in that property, does not create, or extinguish or limit any right, and therefore does not need registration. 1938 Lah. 481. An award altering the rate of interest in a mortgage deed does not require registration, as a change in the rate of interest is not a change in the mortgagee's interest in the property. 180 I.C. 917=40 P.L.R. 291=1938 Lah. 481. A document signed by the arbitrators as their award does not cease to be an award, merely because the settlement was arrived at by the parties and was also signed by them. Though it may take effect as a partition, it does not require registration as an award. (22 I.C. 412, Rel. on.) 51 A. 659=1929 A. 365; 1933 A. 49. Mere signature of the parties in the award does not remove the same from the category of an award. 81 P.R. 1913=20 I.C. 868; 66 I.C. 118; 10 P.R. 1917. But *see* 102 I.C. 277=1927 S. 206. A document signed by the arbitrators as their award does not cease to be an award, merely because over and above the signatures of the *panchas*, the parties themselves signed it in token of their acceptance of the partition and as such the document does not require registration. (51 A. 659 and 1927 B. 656, Rel. on). 146 I.C. 937 (2)=1934 P. 48. An award made on arbitration comes under S. 17 (1) (*b*) of the Registration Act, and if it purports or operates to create,

(*x*) any order granting a loan under the Agriculturists Loans Act, 1884, or instrument for securing the repayment of a loan made under that Act; or

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declare, assign, limit or extinguish any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, it is compulsorily registrable; where the award is compulsorily registrable but not registered, the Court is not competent to file it and pass a decree upon it, as that is contrary to the provisions of S. 49 of the Registration Act. If the Court passes a decree on the award without adverting to S. 49, the decree may be set aside on review on the ground of a mistake or error apparent on the face of the record, as the Court has been misled into making an order contrary to the statute. 40 Bom.L.R. 952=1938 Bom. 422.

COMPROMISE.—A compromise in a criminal case agreeing to give up possession of certain lands does not require registration. 43 I.C. 26. A compromise embodied in a decree does not require registration. 6 L. 344=1925 L. 542. Decree in terms of a *solenama*, see 30 C.W.N. 307=1926 C. 666. *See also* 40 C.W.N. 585; 42 C.W.N. 107. As to whether portions of a compromise recorded in a decree but which are not embodied in the decree require registration. *See* 27 L.W. 544=1928 M. 713 (F.B.) following 43 M. 688 (F.B.); 98 I.C. 169 (1) =1927 A. 156; 1930 A.L.J. 324=1930 A. 118; 17 Pat.L.T. 164=162 I.C. 787=1936 P. 300. *See also* I.L.R. (1938) 2 Cal. 312= 1939 Cal. 235; 1936 Pat. 300=17 Pat.L.T. 164; 1938 Lah. 737; 1941 A.L.J. 587. As to terms of compromise not incorporated in the decree, *see* 100 I.C. 783; 28 M.L.J. 548. Where, in a compromise deed, executed between the parties to a suit, a charge is created on immovable property in favour of a third party, the latter cannot enforce the charge in the absence of registration of the compromise deed, even though its terms are incorporated in the decree. 1936 A.L.J. 288=1936 A. 621. *See also* 1937 A.L.J. 120=1937 All. 282; 1938 Pat. 140 (Compromise decree granting occupancy right is compulsorily registrable). The same is the case even when charge is created in favour of a party to the suit where the charged property is not the subject-matter of the suit. 164 I.C. 1009=40 C.W.N. 974. To attract the operation of S. 17 (2) (*vi*), specific immovable property must be the subject-matter of the litigation. There must be a claim or right in or to the specific immovable property asserted in the litigation and relief sought in respect thereof in order to make the said property the subject-matter of a suit. A claim to have a liability satisfied out of the general estate of a person is not enough. 45 L.W. 501= 1937 M. 504. *See also* 1936 Pesh. 125; 42 Bom.L.R. 165=1940 B. 143. Where therefore a claim is made in a suit on a promissory note executed by a Hindu, impleading his sons also, to a decree against the joint family properties of the father and sons, and a compromise decree is passed in and by which a charge is created on certain items of immovable property as security for the due payment of the decretal amount, the decree is not exempt from registration under S. 17 (2) (*vi*); and unless so registered, the charge in favour of the decree-holder cannot prevail in law. 1937 Mad. 504. As to what property would be the subject-matter of suit, *see* 43 P.L.R. 9=1941 Lah. 164. If a decree or order is made on a compromise which comprises immovable property other than that which is the subject-matter of the suit or proceeding, the decree requires registration. A decree in a purely money suit which creates or purports to create a charge on immovable property *prima facie* falls within S. 17 (2) (*vi*) of the Registration Act and requires registration. The fact that the immovable property over which a charge is created by the decree is attached before judgment does not make it the subject-matter of the suit, as the application for attachment before judgment cannot be considered to be a "proceeding" within the meaning of S. 17 (2) (*vi*). The natural meaning of "proceeding" in S. 17 (2) (*vi*) is an independent originating proceeding which may be constrasted with a suit, a proceeding that is under some special Act. Nor can the land be said to be the subject-matter of the order for attachment before judgment, because an order for attachment is merely an injunction restraining the defendant from disposing of certain land, which operates *in personam* and not *in rem*, and which does not create any right or interest in the land. 42 Bom.L.R. 1016. Where a money suit was compromised by a decree which provided that the defendant should not dispose of his share in certain property until the debt had been discharged, *held*, that the decree was sufficient evidence of its terms and that it did not require registration though it affected lands. 6 O. W.N. 908=1929 O. 539. The decree is evidence of the terms of compromise, even apart from the compromise deed itself. The decree as such is exempt from registration under S. 17 (2) (*vi*). A decree though set aside or modified, is a decree within the abovementioned clause. 1930 L. 937. The parties having compromised, the Court passed an order to the following effect: "Parties and counsel present. They have compromised. In accordance with the terms of the compromise the suit is dismissed. No costs." It appeared that under the compromise one party was to retain possession of certain immovable property on payment of a sum of money. There was a substantial compliance with the reservation in S. 17 (2) (*vi*) of the Registration Act and the compromise was not inad-

(*xi*) any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage-money, and any other receipt for

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missible for want of registration. 128 I.C. 300=1930 L. 855 (2). A compromise not incorporated in a decree is compulsorily registrable. 100 I.C. 783=28 Punj.L.R. 143. Even though a suit is dismissed in accordance with the terms of a deed of compromise, if that compromise has not been recorded under the provisions of O. 23, R. 3, C. P. Code, the deed is not exempt from registration (1927 L. 865, Foll.) 165 I.C. 199=1936 L. 605. Where, while passing a decree on a compromise, the Judge does not comply with the provisions of O. 23, R. 3, C. P. Code, and the compromise, so far as it concerns certain lands, was never ordered to be recorded in the suit, this portion of the compromise does not become a part of the judicial proceedings and is not exempt from registration. 1937 L. 353=39 P.L.R. 591. In the case of a compromise beyond the scope of the suit, even though the decree might not embody the terms of the compromise, if the parties have acted on its terms, the parties are not entitled to resile therefrom. 42 C. 801=42 I.A. 1=28 M.L.J. 548 (P.C.). A compromise petition requires no registration. 78 P.R. 1917 =40 I.C. 675; 90 P.W.R. 1915=29 I. C. 311; 34 I.C. 446; 46 I.C. 913; 39 I.C. 545. But *see* 96 I.C. 227=1926 L. 585 (2). A compromise effecting a family settlement does not necessarily involve a transfer of rights and the parties cannot resile from the same. 43 A. 1=18 A.L.J. 877. *See also* 37 A. 105=27 I.C. 497. Though a compromise may amount to a conveyance of properties of more than Rs. 100 in value, if it is embodied in a decree, it need not be registered. 88 P.R. 1917=42 I.C. 380; 54 I.C. 538=24 C.W.N. 328; 4 L. 363=1923 L. 581; 45 I.C. 331; 20 I.C. 817=20 P.R. 1914; 43 M. 688=39 M.L.J. 77 (F.B.); 37 I.C. 764; 36 M. 46=21 M.L.J. 870. *See also* 42 Bom.L.R. 1016; 1938 Bom. 461. Where under a compromise decree there has been an exchange of shares in immovable property amongst co-owners, such compromise does not create or extinguish title in immovable property so as to affect it. Such exchange is not a transfer of immovable property within the meaning of the Transfer of Property Act, and it does not therefore require registration. 1937 P. W. N. 51=1937 Pat. 232. A compromise of a disputed claim in a Revenue Court is not a decree and unless registered, the compromise is ineffective. 38 A. 366=35 I.C. 701 (F.B.). Proceedings under S. 145, Cr. P. Code, in respect of a site valued less than Rs. 100 was compromised by which defendant was allowed to erect a building and plaintiff also was allowed to build a new room on the site and Rs. 50 were paid to the plaintiff. The compromise was acted on by the parties but subsequently the plaintiff sued for the removal of the defendant's building. *Held*, that the compromise, though not registered, was admissible and that, as the parties had enjoyed benefit under it, plaintiff could not be allowed to resile from it. (1922 A. 248, Ref.; 35 C. 1010, Dist.) 148 I.C. 867=11 O.W.N. 450=1934 O. 116. An order of Court made prior to the amendment of S. 17 (2) (*vi*) in 1929 is admissible without any qualification and is admissible in evidence for the purpose of proving a charge on immovable property. Where in proceedings under S. 145, Cr. P. Code, a compromise is filed by the parties creating a charge on immovable property which was the subject-matter of the proceedings, and the Court passes an order on the compromise, merely stating "lodged", the order must be taken to convey a good deal more than a mere order of dismissal; such an order is meant to incorporate the statements made by the parties in the compromise and to convey that in view of those statements it was unnecessary to proceed with the case any further; the charge created by the compromise "lodged" by the Court falls under S. 17 (2) (*vi*). 47 L.W. 435=1938 Mad. 531=(1938) 1 M.L.J. 536. Where in a money suit the immovable property of the defendant is provisionally attached before judgment, but such attachment is subsequently cancelled on the defendant giving an undertaking not to alienate the property by mortgage or sale till the suit was decided, and subsequently a consent decree is made by which the very property which is attached and released from attachment is charged under the consent decree, the decree does not require registration, because the property attached has been the subject-matter of a proceeding, *viz.*, the attachment proceeding, under S. 17 (2) (*vi*) of the Registration Act. The undertaking of the defendant not to alienate operates in law as an injunction against him with regard to the property till disposal of the suit. I.L.R. 1938 Bom. 738=40 Bom.L.R. 929=1938 Bom. 461. *See also* 175 I. C. 256=1938 Pat. 212. Where a property is mortgaged by the owner who subsequently sells it and the purchaser redeems the mortgage out of the money left with him, the receipt reciting the fact of extinction of the mortgage is admissible in evidence on the ground that the transaction is not between original parties to the mortgage. The purchaser can enforce the contract by means of a suit and also can raise the question by way of defence in a suit brought by the mortgagee. (7 All. 820 and 27 All. 305, Foll.). 178 I.C. 168=40 P. L. R. 776=1938 Lah. 485. A transfer of decree for sale of immovable property requires no registration. 35 A. 524=21 I.C. 462.

payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage; or

(*xii*) any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue officer.

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Sec. 17 (2) (xi).—The words "purport to extinguish" in S. 17 (2) (*xi*) cannot mean "have the effect of extinguishing". A receipt saying "whole of the mortgage debt has been paid is not to be taken to purport" the extinction of the mortgage. 41 P.L.R. 104=1939 Lah. 272. An endorsement of payment on a mortgage-deed which does not on its face purport to extinguish the mortgage, does not require registration. The return of the mortgage-deed, by the mortgagee is not conclusive in such cases nor even of itself any indication that the mortgage is extinguished. 34 L.W. 921=1932 M. 141. *See also* 1940 O.W.N. 1293=1941 Oudh 193; 1941 O.A. 123. An endorsement on the back of the mortgage-deed releasing some of the mortgaged properties does not extinguish the mortgage, but falls within sub-S. (2), Cl. (*xi*) of S. 17 and does not require registration. 61 C. 894=1934 C. 775. An endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage money is exempt from registration under S. 17 (2), (*xi*) even if it purports to extinguish the mortgage. It is only an independent receipt for payment of mortgage money that requires registration when it purports to extinguish the mortgage. 43 P.L.R. 214=1941 Lah. 246. A receipt for payment of money due under a mortgage does not require registration, unless it purports to extinguish the mortgage. A receipt acknowledging payment of a smaller sum of money in full satisfaction of a larger amount due under the mortgage is not admissible without registration, as it purports to exonerate the mortgagor from any liability under the mortgage. 36 C.W.N. 738=55 C. L. J. 571. *See also* 42 P.L.R. 27; 1937 Nag. 402. Where the document merely amounted to a promise to release part of the mortgage debt in the event of the promisee performing his obligation and there was no provision that the mortgage-deed should be returned for endorsement of any kind and the mortgage interest was not referred to, it was not a receipt within Cl. (*xi*) of sub-S. (2) of S. 17, nor would it fall within either Cl. (*b*) or (*c*) of sub-S. (1) of the section and it was admissible in evidence without registration. 8 R. 257=1930 R. 277; 68 M.L.J. 91. *See also* 1941 Mad. 197. A receipt alleged to be executed by the mortgagee purporting to remit a portion of the mortgage dues is, without registration, inadmissible in evidence. 1931 M.W.N. 261. An *agreement relinquishing portion* of principal and interest in mortgage-debt must be registered. 35 A. 202=19 I. C. 449. But *see* 37 C.W.N. 424; 1931 M. W.N. 261=1931 M. 601. Endorsement on the mortgage-deed releasing certain items does not require registration. 145 I.C. 657 =37 C.W.N. 424=1933 C. 588. Where the receipt makes no reference at all to the extinction of the mortgage, but being a receipt for the last payment, it may have had the effect of extinguishing the mortgage, it does not require registration unless it purports to extinguish the mortgage. 10 L. 709=118 I.C. 533 (2)=1929 L. 312. It is not the law that, unless there was a recital clearly expressed that a mortgage was extinguished, a receipt for payment of money due on the mortgage, extinguishing the mortgage, would fall under S. 17 (2) (*xi*) and become admissible though unregistered. 64 C.L.J. 10=1937 Cal. 178. A receipt executed by the mortgagee recited: "On receiving Rs. 5,000 in cash in respect of your entire debt and our entire dues, after amicably giving remissions, I release you from your entire debt. Be it mentioned that from to-day nothing is due to us." The receipt was unregistered. *Held*, it was not admissible in evidence. 64 C.L.J. 10=1937 Cal. 178. Where the debt is a mortgage-debt it may be that a document in writing purporting to extinguish the mortgage is inadmissible in evidence, but the payment itself cannot be inadmissible. 30 L. W. 293=1929 M. 794. A receipt showing that simple and not compound interest has been charged on a mortgage-bond need not be registered. 30 I.C. 804=42 C. 546. An agreement between the mortgagor and the mortgagee superseding the agreement embodied in the mortgage-deed, whereby the mortgagee agrees to receive only the principal amount secured by the mortgage and impliedly undertakes to forego his claim with regard to interest must be registered if the interest is Rs. 100 or more, because it extinguishes the claim for interest which is a charge upon the mortgaged property; consequently, if it is unregistered, it is not admissible in evidence under S. 49 of the Registration Act. 119 I.C. 690. The essence of redemption consists in either the cancellation and return of the mortgage-deed or where the mortgage is with possession, in the restoration of possession of the mortgaged property to the mortgagor after the mortgage-money has been paid. Where a receipt recites that the balance of the mortgage-money had been paid to the mortgagee and possession had been given back, the receipt is inadmissible in evidence if it is not registered. 1940 Lah. 68.

Sec. 17 (2) (xii): SCOPE—SALE OF, BY RECEIVER IN INSOLVENCY—IF EXEMPT FROM REGISTRATION.—A deed of transfer executed by an O.R. in insolvency, in pursuance of a public auction held by him, conveying to the highest bidder at the sale promissory

[1][*Explanation.*—A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase-money.]

(3) Authorities to adopt a son, executed after the first day of January, 1872, and not conferred by a will, shall also be registered.

Documents of which registration is optional.

18. Any of the following documents may be registered under this Act, namely:—

(*a*) instruments (other than instruments of gift and wills) which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of a value less than one hundred rupees, to or in immovable property;

(*b*) instruments acknowledging the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest;

(*c*) leases of immovable property for any term not exceeding one year and leases exempted under section 17;

[2][(*cc*) instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of a value less than one hundred rupees, to or in immovable property;]

(*d*) instruments (other than wills) which purport or operate to create, declare, assign, limit or extinguish any right, title or interest to or in movable property;

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[1] Explanation to S. 17 added by Act II of 1927.

[2] Inserted by Act XXXIII of 1940.

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notes, mortgage-debts, etc., belonging to the insolvent, the sale being afterwards confirmed by the Court, is not exempt from registration under S. 17 (2) (*xii*). 40 L. W. 747=67 M.L.J. 746.

EXPLANATION.—53 I.A. 214=51 M.L.J. 788 (P.C.) and 51 B. 231=29 Bom.L.R. 269 holding that a document evidencing payment of earnest money should be registered is no longer good law. The explanation is retrospective as its wording shows. *See* 1928 N. 216; 49 A. 806=25 A.L.J. 513 =1927 A. 287 (F.B.). S. 2 of the Registration Amendment Act (II of 1927), which added the *Explanation* to S. 17 *is clearly retrospective*. It does not, however, deal with those contracts in which a lien has been specifically created, as a specific charge would certainly "affect" immovable property within the meaning of S. 49. 13 P. 620=15 P.L.T. 443=1934 P. 495.

Sec. 17 (3).—Authority to adopt not contained in a will must be registered. 55 I.C. 38. An authority to adopt executed in a Native State by a person domiciled there need not be registered. 43 M. 288=38 M. L.J. 149. Whether a document is a will or merely an adoption deed is a question of fact. 44 M. 733=48 I.A. 482=41 M.L.J. 648 (P.C.). *See also* 49 I.C. 929; 18 I.C. 1008=1913 M.W.N. 199. Authority to adopt, even though contained in a minor's will, need not be registered. 60 I.C. 146=12 L.W. 596. A family arrangement under which one person consents to another adopting a son is not an authority to adopt. 114 I.C. 711=1929 L. 16. A deed executed after adoption reserving life interest in property for the adoptive mother must be registered. 38 Bom. 227=24 I.C. 716.

Secs. 17 and 28.—In determining whether the requirements of the law as to registration have been complied with, the intention of the parties is the criterion by which the matter must be decided. Where it could not be said that there was no intention on the part of a donor to vest the property in the donee, the inclusion of a particular plot in the gift, though the title of the donor with reference to it was doubtful, cannot lead to the inference that the donor was guilty of any fraud, in so including it. In the absence of collusion between the donor and donee, the registration of such a deed cannot be challenged as being defective. 1941 O.W.N. 532=1941 Oudh 348.

Sec. 18.—An unregistered document of transfer of property of value of less than Rs. 100 can be adduced in evidence to prove nature of possession transferred. 41 I.C. 273=41 B. 550. A will legally made can operate, though illegally registered. 62 I. C. 246=4 N.L.J. 46.

(*e*) wills; and

(*f*) all other documents not required by section 17 to be registered.

Documents in language not understood by registering officer.

19. If any document duly presented for registration be in a language which the registering officer does not understand, and which is not commonly used in the district, he shall refuse to register the document, unless it be accompanied by a true translation into a language commonly used in the district and also by a true copy.

Documents containing interlineations, blanks, erasures, or alterations.

20. (1) The registering officer may, in his discretion, refuse to accept for registration any document in which any interlineation, blank, erasure or alteration appears, unless the persons executing the document attest with their signatures or initials such interlineation, blank, erasure or alteration.

(2) If the registering officer registers any such document, he shall, at the time of registering the same, make a note in the register of such interlineation, blank, erasure or alteration.

Description of property and maps or plans.

21. (1) No non-testamentary document relating to immovable property shall be accepted for registration unless it contains a description of such property sufficient to identify the same.

(2) Houses in towns shall be described as situate on the north or other side of the street or road (which should be specified) to which they front, and by their existing and former occupancies, and by their numbers if the houses in such street or road are numbered.

(3) Other houses and lands shall be described by their name, if any, and as being in the territorial division in which they are situate, and by their superficial contents, the roads and other properties on which they abut, and their existing occupancies, and also, whenever it is practicable, by reference to a Government map or survey.

(4) No non-testamentary document containing a map or plan of any property comprised therein shall be accepted for registration unless it is accompanied by a true copy of the map or plan, or, in case such property is situate in several districts, by such number of true copies of the map or plan as are equal to the number of such districts.

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Sec. 20.—The registering officer must refuse registration when an interlineation is not admitted by the parties. 30 I.C. 507=1915 M.W.N. 543. As to whether appeal lies against a refusal to register a document, *see* 15 I.C. 370=1912 M.W.N. 412.

Sec. 21: SCOPE OF SECTION—INADEQUATE DESCRIPTION—EFFECT OF.—S. 21 only lays down certain particulars to be complied with before registration of a document. If the properties are sufficiently identifiable, there is no reason why the document, if registered, would not be operative in respect of such properties as would be found to answer the description contained in the document. 60 C.L.J. 243=39 C.W.N. 120. Registration is not vitiated by an immaterial error in the description of the property. 35 A. 250=18 I.C. 923; 49 B. 40=1925 B. 34. As to the meaning of the section, *see* 52 M.L.J. 140=99 I.C. 846=1927 M. 369. Where one item of property could not be identified, misdescription invalidates the whole deed. 32 C.W.N. 241=1928 C. 385. Registration without map referred to in the document is ineffective. 43 I.C. 455. Absence of description of property as required does not render the registration null and void. 16 I.C. 337=10 A.L.J. 33. It cannot be held that a Registrar has no jurisdiction to register a mortgage-deed or a sale-deed on the ground that the description of the property given in the deed is inadequate to identify the property. 19 Pat. 578=1940 Pat. 504. In a partition "all the family property" is a sufficient description. 16 L.W. 287=1923 M. 81; 52 M.L.J. 482=25 L.W. 563=1927 M. 586=102 I.C. 360. Proper description of a house in town is by street name and door number. 41 C. 972=41 I.A. 110=27 M.L.J. 80 (P.C.).

Sec. 21 (3).—"Practicable"—Meaning of. *See* 52 M.L.J. 140.

22. (1) Where it is, in the opinion of the Provincial Government, practicable to describe houses, not being houses in towns, and lands by reference to a Government map or survey, the Provincial Government may, by rule made under this Act, require that such houses and lands as aforesaid shall, for the purposes of section 21, be so described.

Description of houses and land by reference to Government maps or surveys.

(2) Save as otherwise provided by any rule made under sub-section (1), failure to comply with the provisions of section 21, sub-section (2) or sub-section (3), shall not disentitle a document to be registered if the description of the property to which it relates is sufficient to identify that property.

PART IV.

OF THE TIME OF PRESENTATION.

23. Subject to the provisions contained in sections 24, 25 and 26, no document other than a will shall be accepted for registration unless presented for that purpose to the proper officer within four months from the date of its execution:

Time for presenting documents.

Provided that a copy of a decree or order may be presented within four months from the day on which the decree or order was made, or, where it is appealable, within four months from the day on which it becomes final.

[1][23-A. Notwithstanding anything to the contrary contained in this Act, if in any case a document requiring registration has been accepted for registration by a Registrar or Sub-Registrar from a person not duly empowered to present the same, and has been registered, any person claiming under such docu-

Re-registration of certain documents.

LEG. REF.

[1] Inserted by Act XV of 1917, S. 2.

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Sec. 22 (2).—*See* 52 M.L.J. 140. Where the description given of the mortgaged properties in the mortgage-deed is inadequately meagre and not in compliance with the terms of Ss. 21 and 22, the document can nevertheless be admitted for registration, if description given is not misleading and if from a very careful study of the document it would be possible to discover the property mortgaged. 7 R. 118=1929 R. 117. As to misdescription of sub-registry in which the property is situated, *see* 33 C.W.N. 1211.

Sec. 23.—Registration after the time fixed is invalid. 43 M. 288=38 M.L.J. 149. Parties cannot agree to extend time for registration. 1923 N. 76. Registration can be enforced only by proper proceedings under the Act, and by a suit if necessary under S. 77, and in no other way. 1923 N. 76. Where the presentation for registration is made after the expiry of the four months allowed by S. 23 but the document is still registered, the person presenting the document must prove that the days prior to the presentation of the document were holidays or that the office of the Sub-Registrar was closed and the presumption is against the person who presented the deed for registration. Where no such proof is forthcoming the registration is invalid. 11 R. 15=1933 R. 5. The words "the date on which decree was made" in the proviso to S. 23 mean the day when the decree was signed. 41 C. W. N. 945. Where an original award is merely re-written by the arbitrators, the award comes within the mischief of S. 23 and must be presented for registration within four months from the date of execution. 1941 Pat. 215.

Secs. 23 and 24.—"Execution," meaning of—Date of execution where there are several executants. *See* 24 N.L.R. 106=1928 N. 239.

Secs. 23, 25 and 75: DOCUMENT PRESENTED AFTER MORE THAN FOUR MONTHS—VALIDITY OF REGISTRATION.—Where five months after its execution, a document was presented for registration when the executant denied execution and on application under S. 73, the Registrar found that it had been executed and requirements of law had been complied with and registered it under S. 75 even without there being an application under S. 25 to extend the original period of four months, the registration is illegal and the mere fact that Registrar found that the document was actually executed does not validate it as the original delay of more than four months was never excused. 42 P.L.R. 267=1939 Lah. 292.

Sec. 23-A: CONSTRUCTION—"PERSON NOT DULY EMPOWERED"—MEANING OF.—The section applies to all cases where the former presentation was by a person not entitled to

ment may, within four months from his first becoming aware that the registration of such document is invalid, present such document or cause the same to be presented, in accordance with the provisions of Part VI for re-registration in the office of the Registrar of the district in which the document was originally registered; and upon the Registrar being satisfied that the document was so accepted for registration from a person not duly empowered to present the same, he shall proceed to the re-registration of the document as if it had not been previously registered, and as if such presentation for re-registration was a presentation for registration made within the time allowed therefor under Part IV, and all the provisions of this Act, as to registration of documents, shall apply to such re-registration; and such document, if duly re-registered in accordance with the provisions of this section, shall be deemed to have been duly registered for all purposes from the date of its original registration:

Provided that, within three months from the twelfth day of September, 1917, any person claiming under a document to which this section applies may present the same, or cause the same to be presented for re-registration in accordance with this section whatever may have been the time when he first became aware that the registration of the document was invalid.]

Documents executed by several persons at different times.

24. Where there are several persons executing a document at different times, such document may be presented for registration and registration within four months from the date of each execution.

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present. Whenever the presentation by a person who (not entitled in his own right to present) has not got a proper authority of another to present the document is accepted, it is the case of a person not duly empowered to present. It may be that the section often comes in to play when the presentation is by a person who purports to act as agent but without a power of attorney, but that does not mean the section is confined only to such cases. The section is on the face of it intended to cure a technical defect in the registration which though technical is also a vital defect. It applies to all cases where the person presenting the document for registration, is one other than a person properly empowered, whether he was one acting under a defective or imperfect power but not entitled at all to present it. 1933 M.W.N. 1148. If the will confers an authority to the widow to adopt a son, the son subsequently adopted by the widow is a "person claiming under the document," even though the adopted son is not named in the document and the document by itself does not confer all the rights of an adopted son. The phrase "claiming under such document" in Ss. 71, 73, 77 and 23-A is intended to cover all the persons specifically enumerated in Ss. 32 and 40 and perhaps to include other persons not falling under the list of persons enumerated but certainly not to cut down the list. 1933 M.W.N. 1148.

RE-REGISTRATION—OBJECTION TO, AS BEING OUT OF TIME—PRESUMPTION.—The presumption of law is that all official acts are properly performed. It is for the Registrar before whom the re-presentation was made under S. 23-A to satisfy himself that the re-presentation was made within the proper time and if he proceeded to register the document, the presumption is that he was so satisfied. 1933 M.W.N. 1148.

DOCUMENT REGISTERED AS WILL—WILL FOUND INVALID, BUT DOCUMENT GOOD AS POWER TO ADOPT—RE-REGISTRATION AS POWER—PERMISSIBILITY.—All that the section requires before it can be applied is that the document which was erroneously registered when it was accepted for registration by the registration officer should be one requiring registration. There is no further condition in the section that the former presentation must have been made on the footing of the correct description of the document, and the section is inapplicable if the former presentation was made on the basis of an incorrect description of it. The section does not say "a document requiring registration and presented for registration under its correct description." So, where a document was originally registered as a will, but as a will it was found to be invalid and valid only as a power to adopt, re-registration of the document as a power can be sought under S. 23-A notwithstanding the fact that it was originally presented for registration only as a will. 1933 M.W.N. 1148.

VALIDITY OF REGISTRATION DISPUTED IN SUIT—APPELLATE COURT HOLDING REGISTRATION INVALID—PERIOD OF FOUR MONTHS,—STARTING POINT.—The object of S. 23-A is to enable parties to get technical defects cured and removed, and when a document is re-registered under the section, it takes effect from the date of the prior registration; and evidence of such re-registration can be produced in appeal or second appeal. When validity of the registration is disputed in a suit, but the registration is held to be invalid only on appeal, the period of four months starts

Provision where delay in presentation is unavoidable.

25. (1) If, owing to urgent necessity or unavoidable accident, any document executed, or copy of a decree or order made, in British India is not presented for registration till after the expiration of the time hereinbefore prescribed in that behalf, the Registrar, in cases where the delay in presentation does not exceed four months, may direct that, on payment of a fine not exceeding ten times the amount of the proper registration fee, such document shall be accepted for registration.

(2) Any application for such direction may be lodged with a Sub-Registrar, who shall forthwith forward it to the Registrar to whom he is subordinate.

Documents executed out of British India.

26. When a document purporting to have been executed by all or any of the parties out of British India is not presented for registration till after the expiration of the time hereinbefore prescribed in that behalf, the registering officer, if satisfied—

(*a*) that the instrument was so executed, and

(*b*) that it has been presented for registration within four months after its arrival in British India,

may, on payment of the proper registration fee, accept such document for registration.

Wills may be presented or deposited at any time.

27. A will may at any time be presented for registration or deposited in manner hereinafter provided.

PART V.

OF THE PLACE OF REGISTRATION.

Place for registering documents relating to land.

28. Save as in this part otherwise provided, every document mentioned in section 17, sub-section (1), clauses (*a*), (*b*), (*c*), [1][(*d*) and (*e*), section 17, sub-section (2) in so far as such document affects immovable property], and section 18, clauses (*a*), (*b*) and (*c*), shall be presented for registration in the office of a Sub-Registrar within whose sub-district the whole or some portion of the property to which such document relates is situate.

LEG. REF.

[1] Substituted by Act XXXIII of 1940.

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only from the date of the appellate decree, and if it is re-registered within four months from that date, it is valid. 152 I.C. 611 =1935 L. 32. *See also* 1942 Pesh. 37.

Sec. 25.—The Registrar is given a discretion to extend the time condoning the delay in the presentation of a document for registration, and the Civil Court has no right to question the propriety of such discretion vested in the Registrar 11 L. 218=120 I.C. 488=1931 L. 710. A Sub-Registrar has no power to extend the time beyond the standard four months for the registration of document and he has no jurisdiction to proceed with the registration of a document which is already four months old. Where therefore a document already four months old is registered by a Sub-Registrar, the registration is bad. 174 I.C. 490=1938 Rang. 53. *See also* 1939 Lah. 292. A Civil Court cannot compel registration when the presentation was after four months. 39 P.R. 1917=41 I.C. 64. But *see contra* 34 I.C. 769. *See also* 41 A. 389=49 I.C. 543; 41 I.C. 3=39 A. 523; 26 I.C. 52; 29 I.C. 413; 3 L. 242; 31 Bom.L.R. 676.

Sec. 28.—Inclusion of property not belonging to mortgagor or of non-existing property, and not intended as security, to enable registration at a particular place, renders registration invalid. 48 C. 509=48 I.A. 127 (P.C.); 40 M.L.J. 489 (P.C.); 41 C. 972=41 I.A. 110=27 M.L.J. 80 (P.C.); 43 M. 436=38 M.L.J. 327. So also in the case of a conveyance, the registration would be a fraud on the Registration Law, and would not be effective, nor would the deed be valid as a conveyance. 63 I. A. 169=59 M. 539=1936 P.C. 91=70 M. L.J. 378 (P.C.). *See also* I.L.R. (1937) N. 111; 52 I.C. 446=4 P.L.J. 433; 43 M. 405=38 M.L.J. 251; 54 M. 352=1931 M. 45=60 M.L.J. 701; 55 M. 507=1932 M. 311=63 M.L.J. 77 (but a plaintiff who is a

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party to such fraud cannot be allowed to plead his own fraud as a basis of his claim or a necessary step towards the success of his claim); 28 Bom.L.R. 75=1926 B. 165; 1927 A. 797; 9 P.L.T. 829=1928 P. 89; 5 O.W.N. 725; 100 I.C. 25; 4 Luck. 13. *See also* 1940 Pat. 504. Where the property is not in existence at all and has been included in an instrument for the purposes of registration, the registration would be invalid. Similarly, if the property exists and the parties did not intend it to be affected by the document, the registration would be invalid. But if the property actually exists and the parties intended to transfer it, the registration would not be affected merely because the mortgagee or transferee fails to prove the title of the mortgagor or transferor. I.L.R. (1941) All. 320=1941 A.L.J. 168 =1941 O.W.N. 295=1941 All 179. Unless both the parties had the intention to evade the registration law by including a property simply to give jurisdiction to the Sub-Registrar, the document is not necessarily invalid. 25 L.W. 327=1927 M. 92. As to whether motive of parties is material, *see* 10 L. 381=116 I.C. 457 (2)=1929 L. 812. The crucial question always is "Did the parties intend or not that a certain item should form part of the security?" If the parties did, then fraud is out of question. 117 I.C. 124=1929 M. 432. Assignment of mortgage right—Registration in place in which one item of property lay without intention to pass that item under assignment—Assignor having no title to such item—Effect on registration—Assignment not valid. 49 L.W. 387=1934 M. 467.

FRAUD ON REGISTRATION.—The word "fictitious" used in 41 C. 972 (P.C.) is not confined to non-existing properties. It is satisfied if the deed does not 'relate' to a specified property for any effective purpose of enjoyment or use. An insignificant item of property included in the sale-deed was of no value, both in respect of the interest taken in it and in respect of its complete inaccessibility. It was incapable either of being utilized or enjoyed by the purchaser; the vendor refused to include in the sale any property to which these disadvantages did not attach in the place where registration was effected. *Held*, that one of two inferences alone was possible, either that it was never intended by either party that the item should, for any purpose other than that of registration, be subject of sale at all, or that the vendor only included it because he knew that it never could become an effective subject of enjoyment or occupation by the purchaser. The so-called sale was a mere device to evade the Registration Act. 61 I.A. 286=56 A. 468=67 M.L.J. 274 (P.C.). [52 A. 793 is not good law.] Where a small item of land, about a yard of land, is included in a sale-deed, in order to get the deed registered in the place where the small items is situate, the other items being situate in another district, and no value is placed on the included item and it also appears that the title to that item was not intended to be conveyed and the purchaser lives in another place and has no use for it and never attempts to take possession of it or to regard it as his property, the inclusion of the item must be held to be a mere device to evade the Registration law, and the registration of the deed is neither effective nor valid as a coeveyance. 63 I.A. 169=59 Mad. 539= 63 C.L.J. 382=40 C.W.N. 545=43 L. W. 456=1936 A.L.J. 258=38 Bom.L.R. 457=1936 P.C. 91=70 M.L.J. 378 (P. C.). There is no doubt that the mere fact that a part of the land which is said to have been situated in a particular place for the purpose of registration is unsubstantial in character will not, by itself, be a bar to registration at that particular place. S. 28 of the Registration Act is satisfied by registration being effected in the place where any portion of the registered property is situated. It is not necessary that such portion should be a substantial portion. But it is, however, necessary that the alleged portion which is said to be situated within the sub-district, should have a real existence. It sometimes happens that parties to a deed of conveyance include in the deed a parcel or piece of land described as situated in a particular place but which does not in fact exist, and they get the document registered in the office of the Sub-Registrar within whose sub-district the parcel or piece of land is alleged to be situated. In such a case, if the fictitious entry was intentionally made use of by the parties solely for the purpose of obtaining registration in a particular sub-district, where in fact no part of the property actually transferred or intended to be transferred in fact exists, it is a fraud on the registration law, and no registration obtained by means thereof is valid. It is permissible and right that the Court should go behind the face of the instrument, whether conveyance or mortgage, and ascertain for itself upon evidence whether or not the property which is said to be within the jurisdiction of the Court, is a real property included in the conveyance or mortgage as the case may be and fit for registration and whether it was the intention of the parties that a particular property should really be the subject-matter of a sale or mortgage as the case may be. 41 C. W.N. 854. *See also* 1941 O.W.N. 532= 1941 Oudh 348; 1937 Nag. 330. As in the case of every other kind of fraud, a party, who sets up in defence the plea of fraud on the Registration Law, is bound to make it out by clear and cogent evidence. There should be the strongest evidence of collusion between the transferor and the transferee, before the latter can be deprived of

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the benefit of the transfer by reason of its registration being invalid, because a small item of property not belonging to the transferor is included in it. A mere failure to make out a good title to the property dealt with will not amount to fraud so as to invalidate the instrument. The real question is whether it was intended or not that the document should take effect as regards the particular item. The fact that it is a fictitious item may be evidence of fraud. But when the item does exist, the transaction cannot be invalidated, merely because the party has not adduced satisfactory evidence of his title. 1935 M. 26=40 L.W. 749. Where a property included in a document has an existence in fact, and the document relates to that property, transferring it from the exclusive ownership of one party to the joint ownership of the family, and the property is also capable of effective enjoyment, it cannot be said that the inclusion of the property is a fraud on the law of registration. There is no flaw in the act of presentation of the document to the Sub-Registrar within whose jurisdiction that property is situate. An inquiry as to whether the Sub-Registrar had jurisdiction to register a document should relate to the time when the document was presented before him under S. 28 of the Registration Act. If the parties intended that the document should relate to a property lying within the territorial jurisdiction of the particular Sub-Registrar, S. 28 is complied with; and if later on, by operation of law, a fact contrary to the intention of parties is obtained because of non-registration, for any reason whatever, that matter is foreign and should not affect the original enquiry. The fact that because of the Sub-Registrar's refusal, the deed does not perhaps operate on the particular item of property has no effect on the original question of his jurisdiction. It is only the act of the parties that has to be considered, and if the parties themselves intended to perpetrate a fraud on the law of registration, the matter then assumes a different complexion; but if on account of any action of the Sub-Registrar certain consequences flow, the act of presentation itself would not become invalid. I.L.R. (1938) All. 125=1938 A.L.J. 23=1938 All. 170. Where property which does not in fact exist at all is included in a deed to enable registration being effected in a particular place, it is a fictitious inclusion and the registration is invalid; so also where property which exists, but to which the grantor has no title, is included in the deed, but neither party to the deed intends to include it as a fact as a subject-matter of the deed, the registration is invalid as the inclusion is made only with a view to effect registration in the particular place fraudulently. But where existing property, which is not proved to belong to the grantor is included, and the grantee *bona fide* believes that it belongs to the grantor, the registration is not invalid, and the burden is on the party challenging the validity to prove that the inclusion of the property was intended to be fictitious by both the parties. In the absence of proof that the grantee was aware of the want of title of the grantor or that the grantee colluded with the grantor in committing a fraud on the registration office, the registration would not be fraudulent or invalid. 152 I. C. 715=36 Bom.L.R. 738. Where the parties intended to hoodwink the Sub-Registrar by entering a piece of property within his jurisdiction in the sale-deed, in order to give that officer jurisdiction, the parties contemplated a fraud on the Law of Registration and so should not be granted any relief in a Court of justice. 118 I.C. 589=1929 A. 578 (2). The inclusion of fictitious property in the deed for the purpose of giving jurisdiction to the Sub-Registrar is a fraud on the registry and the effect is that there is no proper registration. There is no material difference in principle between the inclusion of a property not intended to pass by a deed and a property to which the vendor has no title. 13 P. 111 =15 P.L.T. 73=1934 P. 127. *See also* 39 C.W.N. 120=60 C.L.J. 243. Where a small spot of land belonging to the mortgagees themselves was inserted in the mortgage-deed with the object of obtaining registration in Sub-Registrar's office, not having jurisdiction otherwise, and it was found that the mortgagees, through their agent had knowledge of this inclusion and the purpose therefor, the insertion was fraud on the Registration Law which rendered the mortgage-deed void. 1929 M. 426. *See also* 19 Pat. 578=1940 Pat. 504; 70 M.L.J. 378=63 I.A. 169=59 Mad. 539 (P.C.); 1937 Nag. 330; 1937 Mad. 32; 1937 O.W.N. 944=1937 Oudh 493; I.L.R. (1939) Nag. 64=1939 N.L.J. 44=1939 Nag. 57. Where property to which the vendor had no title was included to the knowledge of both the parties and without the intention of either of the parties to have a sale transaction of that property, *held,* that the registration was invalid and no title was conveyed to the purchaser even in respect of the property intended to be conveyed. 119 I.C. 255=1929 A. 984. *See also* 27 A.L.J. 801=1929 A. 659. Want of title in the vendor in a portion of the property by itself does not render invalid registration at the place where that portion is situate, for, title to property cannot be gone into in a proceeding for registration. 4 P. 394=92 I.C. 1034. *See also* 117 I. C. 124=1929 M. 432. The inclusion of a small plot of land in a different locality intentionally for the purpose of obtaining registration at a particular place will not render the registration invalid if the parties intended the transfer of plot. 105 I. C. 172; 5 P. 646=1926 P. 582; 10 L. 381=116 I.C. 457 (2)=1929 L. 812; 119 I.C. 701= 1929 N. 318; 52 A. 793=1930 A. 797. Pur-

29. (1) Every document [1][not being a document referred to in section 28, or a copy of a decree or order], may be presented for registration either in the office of the Sub-Registrar, in whose sub-district the document was executed, or in the office of any other Sub-Registrar under the Provincial Government at which all the persons executing and claiming under the document desire the same to be registered.

Place for registering other documents.

(2) A copy of a decree or order may be presented for registration in the office of the Sub-Registrar in whose sub-district the original decree or order was made, or, where the decree or order does not affect immovable property, in the office of any other Sub-Registrar under the Provincial Government at which all the persons claiming under the decree or order desire the copy to be registered.

LEG. REF.

[1] Substituted by Act XXXII of 1940.

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chase of new property and including it in the document to give jurisdiction to a particular office, is not fraud but is satisfying requirements of law. 2 O.W.N. 947=91 I. C. 512=1926 O. 136. *See also* 49 B. 821. A finding of fraud on registration can be based on the conduct of the parties to render registration invalid. 89 I.C. 367=1925 N. 460; 91 I.C. 1018=1926 N. 93. In such cases it is the knowledge of the mortgagee as well that is material. The mortgagor cannot be permitted to take advantage of his own fraud to get the registration rendered invalid. 1922 A. 231; 41 A. 22; 1925 M. 430 (1); 117 I.C. 124=1929 M. 432. Where owing to a *bona fide* mistake of every one including the Sub-Registrar a document is registered at a place where it could not be registered, as the properties concerned were not within the jurisdiction of the Sub-Registrar concerned, the document is inoperative. But in such a case the document can be presented for re-registration and the Registering officer could proceed as if it is presented for registration for the first time. No question of limitation could arise as there is no limitation for re-registration of documents. 1938 N. L. J. 403=1938 Nag. 550. *See also* 1940 Nag. 13. The fact that an item of property not belonging to the mortgagor has been included in the mortgage will not render the registration invalid unless such inclusion was made with a view to commit a fraud on the registration and the mortgagees were parties to that fraud. If the properties were non-existent, its inclusion would invalidate the mortgage, but where it is existent, there should be strong evidence of the mortgagee's collusion. The onus of proving such collusion is on those who attack the validity of the registration. 60 M. L. J. 302=1931 M. 335. The burden of proving fraud on registration lies on the party setting up the plea. 54 M. 352=1931 M. 45 =60 M.L.J. 701. *See also* 1938 All. 170 =1938 A.L.J. 23=I.L.R. (1938) All. 125. A mortgagor defendant is not precluded from pleading that the registration of the mortgage-deed sued on is invalid under S. 28 as being a fraud on registration, on the ground that he is a party to the fraud on the registration law. 19 Pat. 578=1940 Pat. 504; 1930 A.L.J. 926=1930 A. 786; Though in such cases the mortgage right falls through, the deed being registered would be operative so far as any personal covenant may go and the 6 years rule of limitation under Art. 116 of the Limitation Act will apply. 44 M.L.J. 373=46 M. 435. *See also* 107 I.C. 517=1928 N. 1; 102 I.C. 326=1927 O. 214. *See also* 18 Pat. 429= 1939 Pat. 502. Where the registration of a mortgage bond was obtained by fraud by representing that a certain property was within the jurisdiction of the registering officer in order to entitle him to register the said deed when such property was a fictitious property and had no existence in fact, the registration is invalid for all purposes. The deed must be treated as unregistered even for the purpose of the personal covenant to pay, and the proper article applicable to a suit on such covenant is Art. 66 of the Limitation Act which allows only three years from the due date. 41 C.W.N. 783 =1937 Cal. 347. If a mortgage document requiring registration is registered in a district where no part of the mortgaged property is situate, the registration is invalid and the document cannot be sued upon in a Court of law. It the document happens to be a mortgage with possession with no personal covenant to pay, it cannot be treated even as a registered bond so as to enable the mortgagee to obtain a money decree on the basis of the document. 1937 A.L.J. 815=1937 All. 711. *See also* 1939 Pat. 502.

Secs. 28 and 29.—A compulsorily registrable mortgage, registrable under S. 28 by reason of its being registered in a wrong Registrar's office, cannot be treated as an optionally registrable document falling within S. 29. A Court has to consider the document as a whole to find out to which class a document belongs and it cannot cut

Registration by Registrars in certain cases.

30. (1) Any Registrar may in his discretion receive and register any document which might be registered by any Sub-Registrar subordinate to him.

(2) The Registrar of a district including a Presidency-town and the Registrar of the Lahore District may receive and register any document referred to in section 28 without regard to the situation in any part of British India of the property to which the document relates.

Registration or acceptance for deposit at private residence.

31. In ordinary cases the registration or deposit of documents under this Act shall be made only at the office of the officer authorized to accept the same for registration or deposit:

Provided that such officer may on special cause being shown attend at the residence of any person desiring to present a document for registration or to deposit a will, and accept for registration or deposit such document or will.

PART VI.

OF PRESENTING DOCUMENTS FOR REGISTRATION.

Persons to present documents for registration.

32. Except in the cases mentioned in section 31 and section 89, every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper registration office,—

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out some of its provisions and treat a mortgage as a bond. I.L.R. (1939) Nag. 64 =1939 N.L.J. 44=1939 Nag. 57. *See also* 18 Pat. 429=1939 Pat. 502 (F.B.).

Sec. 30.—A conveyance dealt with several plots of land some of which were described to be within the local limits of the jurisdiction of Sub-Registrar and the others within the local limits of the Sadar Sub-Registrar, both of whom were subordinate to same Registrar. The office of the Sub-Registrar was amalgamated with that of the Registrar and the conveyance was registered with the Registrar, and the Registrar did not state that he was acting as Registrar pursuant to discretion under S. 30. It was found subsequently that the plots of land described to be within the local limits of the jurisdiction of the Sub-Registrar had no existence. *Held*, that having regard to S. 87 the fact that the Registrar did not state that he was acting as Registrar pursuant to discretion under S. 30 did not make the registration invalid and ineffective. 58 C. 133=1931 C. 478. The registration of a document by a Registrar who has no jurisdiction to register under S. 28, would be valid if he is empowered to act under S. 30 of the Act, although he does not purport to act under that section and the fee charged for registration was the fee chargeable under S. 28 and not the fee chargeable for registration under S. 30. 41 C. W.N. 854. The discretion conferred by S. 30 (1) of the Registration Act is wide and unfettered. But it should not be lightly exercised and should not be exercised at all when there is gross negligence or carelessness or fraud. In a case where even the registering authorities themselves were misled and accepted a document and registered it, and were thus instrumental in lulling the parties into a sense of security, it is preeminently right and proper that resort should be had to the exercise of these exceptional powers. The Act does not prohibit re-registration or impose a time limit between which it must be done and hence in order to prevent injustice to the parties flowing from the mistaken act of the registering authorities themselves, these authorities have, like Courts, inherent powers to remedy their own wrongs. It is open to the Registrar to order re-registration by a proper officer, when there has been a *bona fide* mistake which had resulted in a registration in a wrong place. I.L.R. (1940) Nag. 74=1939 N.L.J. 520=1940 Nag. 13. *See also* 1938 N. 550.

Sec. 31.—Registration in places not having jurisdiction is permitted in cases of necessity under extraordinary circumstances. 58 I.C. 906=23 O.C. 275.

Sec. 32.—The provisions of this section are imperative, and unless the specified persons present the document, the registration is invalid. 49 I.A. 395=50 C. 166=44 M. L.J. 732 (P.C.); 137 I.C. 41=1932 L. 276 (strict compliance with the section necessary). *See also* 1940 Rang. 297=1940 Rang.L.R. 638. "Representative" in this section includes the case of one of several representatives. 139 I.C. 234=1932 C. 588. Where a suit was instituted by a person under S. 77 on the footing that the defendant was a *benamidar* for him in respect of a sale-deed, *held*, the plaintiff claiming to be the ostensible owner was not a representative of the alleged *benamidar*, that he could not present the sale-deed for registration and that a suit under S. 77 could not be main-

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tained by him. 58 C. 681=133 I.C. 591=1931 C. 664. The fact that the Sub-Registrar accepted a document from the executant and duly registered it, is *prima facie* proof that the executant was not in an intoxicated condition when he presented it for registration. 1931 S. 78. Even if the endorsement by a Sub-Registrar on a mortgage-deed as regards presentation purports to show an invalid presentation, there is nothing in the Act to prevent a person from showing that the endorsement made by the Sub-Registrar was inaccurate and proving the real facts. 58 I.A. 115=9 R. 170=60 M. L. J. 652 (P.C.). The presumption under S. 87 of the Evidence Act of a valid presentment is rebuttable. 34 A. 331. On appeal, *see* 28 I.C. 422=37 A. 49 (P.C.). *See also* 34 A. 253; 1 R. 121=1923 R. 254. When the executant admits before the Registrar that a document had been voluntarily executed by him, it does not matter who actually presents it. 47 I.A. 177=42 A. 487=39 M.L.J. 41 (P.C.). *Also* 35 A. 134; 35 A. 72; 34 A. 355. But *see also* 1940 Rang. 297=1940 Rang.L.R. 638; 37 A. 49=42 I.A. 22=28 M.L.J. 577 (P.C.). Where on first presentation, registration was refused but on appeal it was ordered to be registered, a fresh presentation is unnecessary. 49 I.A. 375=44 A. 514=1922 P.C. 279 (P.C.). Under S. 33 a special power-of-attorney is required. A general power-of-attorney will not do. 34 A. 331. On appeal, *see* 28 I.C. 422=37 A. 49 (P.C.). A power-of-attorney to do all acts "in the District Registration Office" is sufficient under this and the next section. 23 C.W. N. 534. *See also* 1938 Lah. 255. A mortgage-deed, dated 4—8—1910, was presented for registration and registered by a person who produced a power-of-attorney, dated 9—2—1910, for purposes of presentation which stated that the executants authorised him to present the deed which they had already executed on 8—2—1910 which was subsequently changed to 4—10—1910. *Held*, that the date of deed in the power-of-attorney was obviously altered and that the registration of the mortgage of the 4th October, 1910, was not effected in accordance with the provisions of the Registration Act. 35 C.W.N. 354=1931 P.C. 52=60 M.L.J. 441 (P.C.). When a deed is not properly registered having been presented for registration by an agent not duly authorised, the executants cannot be estopped from urging its invalidity because there can be *no estoppel against the statute*. 60 M.L.J. 441. *See also* 56 M.L.J. 218 (P.C.). Presentation by executant—Physical act of presentation, if necessary. 132 I.C. 881=1931 L. 677. If a document is executed by two or more persons, it is not necessary that all of them should present it for registration; the presentation thereof by one of them is a sufficient compliance with the law. 1937 P.C. 46=(1937) 1 M.L.J. 479 (P.C.). Hence, where a document which is executed by several persons is presented for registration by a person having a general power-of-attorney from only one of them, and the power-of-attorney authorizes him to represent his principal in various matters including the registration of documents, there is sufficient compliance with the law regarding presentation. (1937) 1 M.L.J. 479; *see also* 1938 Lah. 255. A person, who executes a sale-deed on behalf of another under a power-of-attorney, can present the deed for registration under S. 32 (*a*) and admit execution under S. 34 (3) (*a*) of the Act. I.L.R. (1939) Lah. 255=41 P.L.R. 8=1939 Lah. 127. The words "person executing" in the Act cannot be read merely as "person signing." They mean something more, namely, the person who by a valid execution enters into obligation under the instrument. 40 C. W. N. 1051=1936 C. 442. Presentation by a minor having a claim under the deed is invalid. 33 I.C. 33. A presentation of a sale-deed in favour of a minor orphan by his *de facto* guardian for registration is valid under S. 32 of the Registration Act. 120 I.C. 77 (2)=1930 M. 425. Natural father of a minor adoptee can validly present a deed of adoption. 43 M. 288=38 M.L.J. 149. S. 32 provides that a document may be presented for registration by a person claiming under it. A minor so claiming is entitled to present it for registration. 1938 Cal. 120. Presentation for registration by a minor claiming under a document is valid. 142 I.C. 646=1933 M. 407=64 M.L.J. 449. A son when unauthorised cannot represent father for presentation. 18 I.C. 286. Even the husband cannot present for wife, even though she be a pardanashin woman, if she is a major. 35 A. 34 (F.B.). *See also* 92 I.C. 345=1924 A. 799. *See also* 1940 Oudh 152. A father of a minor married girl cannot present for registration. The husband alone could do it. 26 C.W.N. 369=14 L. W. 575=1922 P.C. 135 (P.C.). "Representative" includes legal representatives, guardian and committee of persons described but not clerks and agents. 49 I.A. 395=50 C. 166=44 M.L.J. 732 (P.C.). Presentation by one or some of the heirs-at-law when the executant is dead. *See* 47 A. 294; 112 I.C. 721; 32 C.W.N. 646. The registration of a document presented by some of the representatives of an executant, who is dead at the time of the presentation of the document is good registration. Even assuming the procedure adopted is defective such a defect is curable by S. 87. 58 C. 876=133 I.C. 191. When more than one execute the document, presence of one of them is insufficient. 36 C.L.J. 109=50 C. 180. A man signs as agent whether he signs himself so expressly or whether he signs it on behalf of some one else. 1923 B. 37. Where an award is written on behalf of an arbitrator the mere fact that the parties signed it will not convert the origi-

(*a*) by some person executing or claiming under the same, or, in the case of a copy of a decree or order, claiming under the decree or order, or

(*b*) by the representative or assign of such person, or

(*c*) by the agent of such person, representative or assign, duly authorized by power-of-attorney executed and authenticated in manner hereinafter mentioned.

Power-of-attorney recognizable for purposes of section 32.

33. (1) For the purposes of section 32, the following powers-of-attorney shall alone be recognized, namely:—

(*a*) if the principal at the time of executing the power-of-attorney resides in any part of British India in which this Act is for the time being in force, a power-of-attorney executed before and authenticated by the Registrar or Sub-Registrar within whose district or sub-district the principal resides;

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nal nature of the document. It is he alone who can present it for registration. The parties are not the executants of the document and cannot therefore be the proper persons to present it in any circumstances. I.L.R. (1940) Lah. 599=1940 Lah. 73.

SECURITY-BOND FILED IN COURT—BY WHOM TO BE PRESENTED.—Where, in a security bond filed in Court, no person is named as the obligee, the bond is given to the judge of the Court and therefore if not presented by the obligors, ought to be presented by the judge or by a person holding a duly authenticated power-of-attorney from him. 155 I.C. 511 =1935 R. 39.

Secs. 32 and 33.—Ss. 32 and 33, relating to the presentation of documents for registration, are imperative, and their provisions must be strictly followed; and where the agent who presented a mortgage-deed for registration has not been authorized in the manner prescribed by the Act, the deed is invalid and cannot affect the immovable property to which it relates. 1933 A.L.J. 159=1933 A. 233. The registration of a document presented by some of the representatives of an executant, who is dead at the time of the presentation of the document, is good registration. Even assuming the procedure adopted is defective, such defect is curable by S. 87. 58 C. 876=133 I.C. 191. *See also* 1937 Rang. 293; 1938 Lah. 255.

Sec. 33.—S. 33 requires that a power of attorney, in order to be recognised as giving authority to the agent to get the document registered, should be executed before, and then authenticated by, the Registrar within whose district or sub-district the principal resides. I.L.R. (1938) All. 125=1938 A. L.J. 23=1938 All. 170. The expression "resides," as used in S. 33 (1) (*a*), is not defined in the statute; but there is no reason for assuming that it contemplates only permanent residence and excludes temporary residence. 41 C.W.N. 590=1937 P.C. 46 =(1937) 1 M.L.J. 479 (P.C.). This section applies only where the person presenting is the general attorney of the person executing. 1924 A. 148. The Sadar Registrar of Rampur State is not a Court or judge within the meaning of S. 33, Registration Act. (15 A. 141 and 1924 A. 265, Rel. on.) 1933 A.L.J. 159=1933 A. 133. A pleader not duly authorised cannot validly present. 3 R. 398=1926 R. 17=91 I.C. 644. Invalid power: *see* 51 B. 971=29 Bom.L.R. 1124=1927 B. 487 (F.B.); 50 B. 628=28 Bom.L.R. 949. In S. 33 (1) (*c*), the words 'at the time aforesaid' do not relate back to S 32 which speaks about presentation, but the words obviously relate to the time mentioned in S. 33 (1) (*a*), *viz.*, at the time of executing the power-of-attorney. In a suit on mortgage the fact that the principal was residing in British India at the time of presentation of mortgage-deed for registration ceases to have any relevance, unless the power-of-attorney was drafted in such a way as to cause it to cease to be operative if and when the principal returned to India. The presentation therefore of a mortgage-deed for registration by the agent of the mortgagee is proper even if the mortgagee is residing in British India at the time of such presentation. I.L.R. (1938) Nag. 364=1937 Nag. 227. Where it is found that a pardanashin lady had executed a power of attorney while the Magistrate was present and the lady was behind the purdah and that thereafter the Magistrate made his endorsement and the lady once again signed her name below the endorsement, the execution amounts to execution 'before' the Magistrate in accordance with S. 33 (1) (*c*). 1939 A. L. J. 1151=1940 All. 108. Power-of-attorney — Executant signing it in his office and next day affixing his signature thereto before Registrar— Power-of-attorney—If properly executed. 1937 Rang. 293. The proviso to S. 33 and the sub-Ss. (2) and (3) apply only to cases mentioned in Cls. (*a*) and (*b*) of that section, which deal with power-of-attorney to be executed and authenticated in British India, and do not apply to Cl. (*c*), which provides for the manner in which powers-of-attorney are to be authenticated in a place outside British India. In such cases, the power-of-attorney must be executed before and authenticated by the officers named in

(*b*) if the principal at the time aforesaid resides in any other part of British India, a power-of-attorney executed before and authenticated by any Magistrate;

(*c*) if the principal at the time aforesaid does not reside in British India, a power-of-attorney executed before and authenticated by a notary public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of His Majesty or of the Central Government:

Provided that the following persons shall not be required to attend at any registration office or Court for the purpose of executing any such power-of-attorney as is mentioned in clauses (*a*) and (*b*) of this section, namely:—

(i) persons who by reason of bodily infirmity are unable without risk or serious inconvenience so to attend;

(ii) persons who are in jail under civil or criminal process; and

(iii) persons exempt by law from personal appearance in Court.

(2) In the case of every such person the Registrar or Sub-Registrar or Magistrate, as the case may be, if satisfied that the power-of-attorney has been voluntarily executed by the person purporting to be the principal, may attest the same without requiring his personal attendance at the office or Court aforesaid.

(3) To obtain evidence as to the voluntary nature of the execution, the Registrar or Sub-Registrar or Magistrate may either himself go to the house of the person purporting to be the principal, or to the jail in which he is confined, and examine him, or issue a commission for his examination.

(4) Any power-of-attorney mentioned in this section may be proved by the production of it without further proof when it purports on the face of it to have been executed before and authenticated by the person or Court hereinbefore mentioned in that behalf.

Enquiry before registration by registering officer.

34. (1) Subject to the provisions contained in this Part and in sections 41, 43, 45, 69, 75, 77, 88 and 89, no document shall be registered under this Act, unless the persons executing such document, or their representatives, assigns or agents authorized as aforesaid, appear before the registering officer within the time allowed for presentation under sections 23, 24, 25 and 26:

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S. 33 (*c*) personally and execution and authentication before a Commissioner will not be a sufficient compliance with that section. 1933 A.L.J. 159=1933 A. 233. Where a power-of-attorney was executed before and authenticated by the Sub-Registrar under S. 33 (1) and he did not keep a copy of the original, *held*, that it was open to a party to prove the document by a private copy and that S. 74 (2) of the Evidence Act was not applicable to such a case. 1931 A.L.J. 666=1931 A. 649.

Sec. 34.—The non-compliance with the provisions of this section is a mere defect cured by S. 87. 11 I.C. 925=14 O. C. 207. The scheme of the Act is that the Registrar should not go into questions as to whether the parties understood the nature of document or meant it to be something else than what it is. The only question which he has to decide under S. 34 is whether it bears the genuine signature of the alleged executant. If the executant admits his signature, but says that he put his signature under a misapprehension as to the contents of the document, the Registrar is not entitled to refuse execution. Execution, if admitted as a matter of fact, is good for registration, though it may be invalid for enforcing the document. 1933 M.W.N. 1373. Under S. 34, an enquiry as to whether any of the parties concerned in the registration is a major or not is not one of the duties imposed on the Registrar. The opinion of the Sub-Registrar as to the executant's age when the document was presented for registration cannot be accepted as evidence of his age at all, much less conclusive evidence. I.L.R. (1939) Nag. 324=1938 Nag. 385. One of the parties, executing on behalf of himself and another, can present a document for registration and the presence of the other is not necessary. 57 I.C. 226= 31 C.L.J. 447. *See* 48 M.L.J. 221, for nature of enquiry.

Sec. 34 (1), proviso: EXTENSION OF TIME. —Where from the form of the order it appeared to be clear that the order under S. 34 (1), proviso, extending time, was issued

Provided that, if owing to urgent necessity or unavoidable accident, all such persons do not so appear, the Registrar, in cases where the delay in appearing does not exceed four months, may direct that on payment of a fine not exceeding ten times the amount of the proper registration fee, in addition to the fine, if any, payable under section 25, the document may be registered.

(2) Appearances under sub-section (1) may be simultaneous or at different times.

(3) The registering officer shall thereupon—

(*a*) enquire whether or not such document was executed by the persons by whom it purports to have been executed;

(*b*) satisfy himself as to the identity of the persons appearing before him and alleging that they have executed the document; and

(*c*) in the case of any person appearing as a representative, assign or agent, satisfy himself of the right of such person so to appear.

(4) Any application for a direction under the proviso to sub-section (1) may be lodged with a Sub-Registrar, who shall forthwith forward it to the Registrar to whom he is subordinate.

(5) Nothing in this section applies to copies of decrees or orders.

Procedure on admission and denial of execution respectively.

35. (1) (*a*) If all the persons executing the document appear personally before the registering officer and are personally known to him, or if he be otherwise satisfied that they are the persons they represent themselves to be, and if they all admit the execution of the document, or

(*b*) if in the case of any person appearing by a representative, assign or agent, such representative, assign or agent admits the execution, or

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by the District Registrar but signed for him by the District Sub-Registrar. *Held*, that it might be more proper for the District Registrar, when he makes an order of this kind to sign it himself, but the effect of his order cannot be regarded as invalid because the District Sub-Registrar signed it for him. 16 Pat. 660=19 Pat.L.T. 67=1938 Pat. 136.

Secs. 34 and 35.—If the representatives of a deceased executant, when summoned by the Sub-Registrar, do not deny execution but raise another objection, the Court will be justified in holding that this failure to raise the point of non-execution amounts to a recognition on their part that they have no grounds to deny execution. 1940 O.W.N. 600=1940 Oudh 318. A sale-deed was presented for registration by one of the vendees. On that date all the vendors except *K* were present. The Sub-Registrar registered the document, noting in the endorsement that *K* was absent and that the deed was being registered on behalf of the other executants. Presence of *K* was not secured; possession of the land was taken by the vendees. *Held*, that the appearance of *K* before the Sub-Registrar should have been secured and the deed registered after hearing him. As this was not done the registration was not valid quoad his share. *Held, further*, that as the sale-deed was actually given effect to by all the vendors including *K*, the doctrine of "part performance" clearly applied to the case and the plaintiff was entitled to retain possession of the whole land. 154 I.C. 1088=1934 L. 751.

Secs. 34, 35 and 87.—Where after the death of the executant of a deed of gift, a deed is presented for registration by the donee within four months from the date of execution, the failure to issue notices within that period to the representatives of the deceased executant to admit or deny execution is a mistake of procedure on the part of the Sub-Registrar to which S. 87 applies, and the action of the Sub-Registrar in registering the document cannot be deemed invalid when the only objection is that there was a defect in procedure. 1940 O.W.N. 600=1940 Oudh 318.

Secs. 34 and 38: ADMISSION OF EXECUTION OBTAINED ON COMMISSION—IF CAN AFFECT TIME FIXED UNDER S. 34.—Where a Sub-Registrar visits an executant on commission and obtains an admission of execution from the executant, the date of his doing so under S. 38 has no bearing on the provision in S. 34 which is for persons not exempt from appearing under that section to appear before the Sub-Registrar. 1939 A.L.J. 604=1939 All. 486.

Sec. 35.—No act done in good faith will invalidate registration, merely because of defect in procedure. 4 L. 284=45 M.L.J. 497 (P.C.); 1 R. 22=1923 R. 176. S. 35 only requires that the document should be admitted to have been executed by the per-

(*c*) if the person executing the document is dead, and his representative or assign appears before the registering officer and admits the execution,

the registering officer shall register the document as directed in sections 58 to 61, inclusive.

(2) The registering officer may, in order to satisfy himself that the persons appearing before him are the persons they represent themselves to be, or for any other purpose contemplated by this Act, examine any one present in his office.

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son by whom it purports to be executed, and the registration of it can be refused as against him only if he denies the execution. I.L.R. (1938) All. 125=1938 A.L.J. 23=1938 All. 170. An admission on wife's behalf by husband is an irregularity curable under S. 87. 47 A. 294=1925 A. 215. A registration after limitation period is valid, if the delay is excused. 40 I.C. 215. A document cannot be registered on the admission of only one of many executants. 43 I.C. 777. A document may, under S. 35 be registered as against persons admitting execution, about whom no defect appears, and its registration may be refused as against persons about whom there is some defect. I.L.R. (1938) All. 125=1938 A. L.J. 23=1938 All. 170. An admission of execution by one agent holding a power-of-attorney is sufficient. 55 I.A. 81=55 C. 532=54 M.L.J. 473 (P.C.). Person executing does not mean merely person signing. 55 I.A. 81 (P.C.). "Assign" includes a donee under a gift deed. 37 I.C. 362=20 C.W.N. 1345. An instrument by a minor cannot be admitted to registration. 40 M. 308=31 M.L.J. 575 (F.B.). Endorsement by Registrar as to age of executant is no proof of age. 25 I.C. 645=1 C.L.J. 366. *See also* 96 I.C. 332=1926 A. 674. When execution is denied, no registration is allowable. 96 I.C. 56. Failure of the executant to appear amounts to a denial of execution by him. 53 M. 491=1930 M. 490=59 M.L.J. 585. An illiterate person stating to the Registrar that he sold only a part of the property included in a sale-deed, amounts to a denial of execution. 37 P.R. 1918=45 I.C. 161. For purposes of the Registration Act, execution means signing or affixing a mark. Where the executants admitted to the Registrar that they had marked the document but added that their marks had been obtained by fraud, it is nevertheless a sufficient admission of execution on the basis of which the registering officer is competent to register the document. 27 N.L.R. 116=1931 N. 159. Where a person is accepted by the registration officer as the representative of a deceased person though in fact he may not be legally entitled to represent the deceased and the document is registered, this constitutes merely an error in procedure on the part of the registering officer and does not invalidate the registration. 1934 M. 425=39 L.W. 715=66 M.L.J. 677. The effect of Ss. 35 and 58 to 61 is that if the person executing the document is dead, the Sub-Registrar should have before him the admission of all the legal representatives of the deceased person before he can proceed to register it. And his registering the document on the admission of only some of them is not proper registration. 1933 A.L.J. 318=1933 A. 302. The registration of a document presented by some of the representatives of an executant who is dead at the time of the presentation of the document is good registration. Even assuming the procedure adopted is defective, such a defect is curable by S. 87. 58 C. 876=133 I.C. 191. Registration is a solemn act and if there is a registration endorsement it shows that necessary formalities required by law have been complied with. Consequently where the effect of a document registered is sought to be avoided by the party executing the same by pleading insanity at the time of the execution of the same, the registration endorsement cannot be discarded or ignored in deciding the issue about the mental condition of the party when the deed was executed. The decision in ignorance of or discarding same will not bind the second appellate Court. 177 I.C. 80=1938 Nag. 204. There is no presumption from the fact of registration of a mortgage-deed that at the time of its execution the mortgagor was a major and not a minor. 68 C. L. J. 28=1939 Cal. 183. Document presented by one of mortgagees—Registrar registering it in absence of executant—Validity of registration. 16 L. 1019=1935 L. 416. Where in an enquiry under S. 35 (2), a person makes an untrue statement, without any intention to benefit himself and cheat any body, but solely with a view to save certain ladies of the household not accustomed to go to office from appearing in the Registrar's Office, no doubt the act constitutes an offence making such person liable under S. 82, but as the lie is harmless, a sentence of imprisonment should not be passed. 40 C.W.N. 1059=1936 C. 418.

Secs. 35 (2) and 82: HARMLESS LIE—SENTENCE OF IMPRISONMENT—PROPRIETY.—Where in an enquiry under S. 35 (2) a person makes an untrue statement, without any intention to benefit himself and cheat anybody, but solely with a view to save certain ladies of the household not accustomed to go to office from appearing in the Registrar's Office, no doubt the act constitutes an offence making such person liable

(3) (*a*) If any person by whom the document purports to be executed denies its execution, or

(*b*) if any such person appears to the registering officer to be a minor, an idiot or a lunatic, or

(*c*) if any person by whom the document purports to be executed is dead, and his representative or assign denies its execution,

the registering officer shall refuse to register the document as to the person so denying, appearing or dead:

Provided that, where such officer is a Registrar, he shall follow the procedure prescribed in Part XII:

[1][Provided further that the Provincial Government may, by notification in the Official Gazette, declare that any Sub-Registrar named in the notification shall, in respect of documents, the execution of which is denied, be deemed to be a Registrar for the purposes of this sub-section and of Part XII.]

PART VII.

OF ENFORCING THE APPEARANCE OF EXECUTANTS AND WITNESSES.

Procedure where appearance of executant or witness is desired.

36. If any person presenting any document for registration or claiming under any document, which is capable of being so presented, desires the appearance of any person whose presence or testimony is necessary for the registration of such document, the registering officer may, in his discretion, call upon such officer or Court as the Provincial Government directs in this behalf to issue a summons requiring him to appear at the registration office, either in person or by duly authorized agent, as in the summons may be mentioned, and at a time named therein.

Officer or Court to issue and cause service of summons.

37. The Officer or Court, upon receipt of the peon's fee payable in such cases, shall issue the summons accordingly, and cause it to be served upon the person whose appearance is so required.

Persons exempt from appearance at registration office.

38. (1) (*a*) A person who by reason of bodily infirmity is unable without risk or serious inconvenience to appear at the registration office, or

(*b*) a person in jail under civil or criminal process, or

(*c*) persons exempt by law from personal appearance in Court, and who would but for the provision next hereinafter contained be required to appear in person at the registration office,

shall not be required so to appear.

(2) In the case of every such person the registering officer shall either himself go to the house of such person, or to the jail in which he is confined, and examine him or issue a commission for his examination.

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[1] To sub-S. (3) of S. 35 the proviso was added by Act XIII of 1926, S. 2.

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under S. 82, but as the lie is harmless a sentence of imprisonment should not be passed. 40 C.W.N. 1059=1936 Cal. 418.

Sec. 36.—A suit for declaration of a right to register will lie in all cases, except where its execution is denied, especially, when registration is refused, because the executant's heirs have not been summoned. 16 I.C. 97; 34 A. 315=14 I.C. 433. *See also* 16 Pat. 660.

Sec. 38.—A document could not be registered when the commission to examine the executant was issued to a clerk of the office before whom execution was admitted. 3 R. 398=91 I.C. 644=1926 R. 17.

Law as to summonses, commissions and witnesses.

39. The law in force for the time being as to summonses, commissions and compelling the attendance of witnesses, and for their remuneration in suits before Civil Courts, shall, save as aforesaid and *mutatis mutandis*, apply to any summons or commission issued and any person summoned to appear under the provisions of this Act.

PART VIII.

OF PRESENTING WILLS AND AUTHORITIES TO ADOPT.

Persons entitled to present wills and authorities to adopt.

40. (1) The testator, or after his death any person claiming as executor or otherwise under a will, may present it to any Registrar or Sub-Registrar for registration.

(2) The donor, or after his death the donee, of any authority to adopt, or the adoptive son, may present it to any Registrar or Sub-Registrar for registration.

Registration of wills and authorities to adopt.

41. (1) A will or an authority to adopt, presented for registration by the testator or donor, may be registered in the same manner as any other document.

(2) A will or authority to adopt presented for registration by any other person entitled to present it shall be registered if the registering officer is satisfied—

(*a*) that the will or authority was executed by the testator or donor, as the case may be;

(*b*) that the testator or donor is dead; and

(*c*) that the person presenting the will or authority is, under section 40, entitled to present the same.

PART IX.

OF THE DEPOSIT OF WILLS.

Deposit of wills.

42. Any testator may, either personally or by duly authorized agent, deposit with any Registrar his will in a sealed cover superscribed with the name of the testator and that of his agent (if any) and with a statement of the nature of the document.

Procedure on deposit of wills.

43. (1) On receiving such cover, the Registrar, if satisfied that the person presenting the same for deposit is the testator or his agent, shall transcribe in his Register-book No. 5 the superscription aforesaid, and shall note in the same

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Sec. 40.—S. 40 does not exclude the provisions of S. 32, and under it the presentation of an authority to adopt may be made by the adopted son's representative; and under S. 14, the Registrar is made judge to decide whether the person presenting is entitled to do so. 56 I.A. 21=52 M. 175=56 M.L.J. 218 (P.C.). An authority to adopt not registered at the instance of the persons mentioned in sub-S. (2) is invalid. 48 M. 614=52 I.A. 305=49 M.L.J. 247 (P.C.); 51 M. 462=1928 M. 537=55 M.L.J. 102. Per *Ramesam, J.*—I doubt if a person intended to be adopted but not actually adopted will come under the phrase 'adoptive son'. 1933 M.W.N. 1148.

Sec. 41.—Deposition of witnesses in an enquiry by Registrar as to the genuineness of a will, can be used as evidence in subsequent suits. 42 M. 103=35 M.L.J. 657; 56 I.A. 21=52 M. 175=56 M. L. J. 218 (P.C.).

Secs. 42 and 43: WILL CONTAINED IN SEALED COVER—COVER WHETHER FORMS PART OF WILL—ATTESTATION.—Where a sealed cover containing a will was presented before the Sub-Registrar and a pleader signed on the cover as identifier and the Sub-Registrar signed his name in his office register, *held*, that they were not attesting witnesses. Per *Curiam*.—It is extremely doubtful whether the cover in which the will was placed and which was presented to the Sub-Registrar for deposit under S. 42 can be treated as part of the will. 8 P. 419=1929 P. 401.

book and on the said cover the year, month, day and hour of such presentation and receipt, and the names of any persons who may testify to the identity of the testator or his agent, and any legible inscription which may be on the seal of the cover.

(2) The Registrar shall then place and retain the sealed cover in his fire-proof box.

Withdrawal of sealed cover deposited under section 42.

44. If the testator who has deposited such cover wishes to withdraw it, he may apply, either personally or by duly authorized agent, to the Registrar who holds it in deposit, and such Registrar, if satisfied that the applicant is actually the testator or his agent, shall deliver the cover accordingly.

Proceedings on death of depositor.

45. (1) If, on the death of a testator who has deposited a sealed cover under section 42, application be made to the Registrar who holds it in deposit to open the same, and if the Registrar is satisfied that the testator is dead, he shall, in the applicant's presence, open the cover, and, at the applicant's expense, cause the contents thereof to be copied into his Book No. 3.

(2) When such copy has been made, the Registrar shall re-deposit the original will.

Saving of certain enactments and powers of Courts.

46. (1) Nothing hereinbefore contained shall affect the provisions of section 259 of the Indian Succession Act, 1865, or of section 81 of the Probate and Administration Act, 1881, or the power of any Court by order to compel the production of any will.

(2) When any such order is made, the Registrar shall, unless the will has been already copied under section 45, open the cover and cause the will to be copied into his Book No. 3 and make a note on such copy that the original has been removed into Court in pursuance of the order aforesaid.

PART X.

OF THE EFFECTS OF REGISTRATION AND NON-REGISTRATION.

Time from which registered document operates.

47. A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration.

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Sec. 47.—There is nothing in S. 47, which shows that it only relates to S. 17 of the Act; it relates to any requirement of registration made by any other statute for the time being in force. 1937 Rang.L.R. 375=1937 Rang. 446 (F.B.). A sale-deed operates from the date of sale and not from the date of registration. 35 I.C. 347; 27 I.C. 802; 95 I.C. 138=1926 A. 549. *See also* 1938 A.L.J. 557=1938 All. 431. The question as to when title passes on a sale to the vendee depends on the intention of the parties. If it is intended between the parties that the title should not pass until payment of the consideration money, registration alone is insufficient to pass the title without such payment. 147 I.C. 767=1934 P. 68. A document which has been registered dates back to the date of its execution. S. 47 is clear in this respect. A sale-deed of immovable property operates immediately after its registration not from the date of registration of the deed but from the date of its execution. A subsequent sale-deed in respect of the same property executed after the first but registered earlier than the first can give to the purchaser under the second deed no title. 22 Pat. L. T. 116=1941 Pat. 247. *See also* 1937 Pat. 96. Though the effect of registration of a sale-deed is that the deed under S. 47 takes effect, from the date of execution, if the deed is not registered, it cannot have any legal effect as a sale-deed under S. 54, T. P. Act, when the property is over Rs. 100 in value; and a valid sale can be said to be made only when the deed is registered. 1934 M. 637 =67 M.L.J. 380. Where a deed of gift has been accepted by the donee its registration after his death does not affect its validity. 41 C.W.N. 1201. A sale-deed exe-

48. All non-testamentary documents duly registered under this Act, and relating to any property, whether movable or immovable, shall take effect against any oral agreement or dec'aration relating to such property, unless where the agreement or declaration has been accompanied or followed by delivery of possession;

Registered documents relating to property when to take effect against oral agreements.

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cuted before but registered after institution of suit is not affected by *lis pendens*. 83 I.C. 133=1925 M. 359. Of two sale-deeds the earlier one will prevail, though its registration is only after registration of the later one. 25 I.C. 725=12 A.L.J. 993. A registered document operates from the date of its execution and not from that of its registration; so a document executed on February, 2, but registered only in the following December should be given priority over another deed executed and registered on February 13, even though the latter was accompanied by possession. 124 I.C. 371; 42 I.C. 616; 37 I.C. 817=22 C.W.N. 318; 13 I.C. 653=16 C.W.N. 612; 52 I.C. 99; 16 I.C. 29=105 P.R. 1912. Neither by reason of a decree on it nor by an order of attachment in its execution can an unregistered deed have priority over a registered one. 32 I.C. 431. Registration is a necessary solemnity in order to enable the enforcement of a mortgage of immovable property, but it does not suspend the mortgage until registration actually takes place. So, where subsequent to the execution of a mortgage and prior to its registration, the property is attached, the attachment does not affect the mortgage lien. 59 C. 1176=36 C. W. N. 733. So also in the case of sale. 1937 N. 143; 1938 Pat. 134=19 Pat.L.T. 383; 162 I.C. 900=1936 Pesh. 103. S. 47 refers to a registered document and its operation from the date on which it would have operated, if no registration had been required or made. Where a compromise decree creating a charge was passed in February, 1932, but was registered in June, 1933 and a mortgage of the same property was made in April, 1932, the mortgagee takes priority over the decree-holder. The Registrar had no jurisdiction to register the decree, if the decree were taken to operate from February, 1932. 178 I.C. 505=1939 Pat. 96.

OPERATION OF—TRANSFEROR LOSING INTEREST IN PROPERTY AFTER EXECUTION AND BEFORE REGISTRATION.—It is nowhere laid down that a person who has executed a document requiring registration renders registration of the document impossible by his being deprived of transferable interest in the property involved subsequent to the execution of the deed and before its registration. Registration, in such circumstances, does take effect so as to bring S. 47, Registration Act, into operation. 1935 R. 133.

Secs. 47 and 49: SALE-DEED EXECUTED BEFORE, BUT REGISTERED AFTER, ANOTHER—PRIORITY.—A sale-deed, dated 29-12-1920 was executed in favour of *A* but it was registered only on 13-5-1921. On 6-1-1921, the vendor executed and registered a sale-deed of the same properties in favour of *B*. *Held*, that once the sale-deed in favour of *A* was registered on 13-5-1921. S. 49 had no application and by virtue of S. 47 the deed began to operate from 29-11-1920 and was therefore entitled to priority. 146 I.C. 159 =1933 A.L.J. 1200; *see* 18 I.C. 46. A purchaser by registered deed having knowledge of a prior oral sale can claim no priority. 52 I.C. 245=132 P.R. 1919. A subsequent registered mortgage is entitled to priority over an earlier oral charge, not accompanied by delivery of possession, of which the mortgagee has no notice. 152 I.C. 267=36 Bom.L.R. 277=1934 B. 189. A mortgagee by registered deed cannot claim priority over a prior equitable mortgagee. 31 P.R. 1916=34 I.C. 937. A mortgage by deposit of title-deeds cannot be looked upon as a mere oral transaction, as the act of deposit is the essential part of it. In fact the intention to create security is inferred in such cases from the mere deposit of deeds coupled with the loan "without more, without writing, without word of mouth". A mortgage of this type does not fall within the purview of S. 48. 1930 L. 920. A subsequent registered mortgage has priority over a prior oral gift not accompanied by delivery of possession. 30 P.R. 1916=34 I.C. 920. An oral mortgage is postponed to a registered one. 19 I.C. 2. But there is no priority when there has been a delivery of possession. 12 I.C. 905.

ORAL SALE TO MORTGAGEE IN POSSESSION—SUBSEQUENT REGISTERED SALE—TRANSFER.—An oral sale to a mortgagee, who is already in possession of the land, prevails over a subsequent registered sale, especially where the vendee under the latter sale has notice of the former sale. 1935 L. 164.

DOCUMENT UNREGISTERED—EFFECT.—The fact that a sale-deed was unregistered may give priority to a third person claiming under a registered deed, but it has no bearing on the question whether the vendor did sell the land to the vendee. 1929 P.C. 303.

Sec. 48.—The principle underlying S. 48 is that possession is tantamount to notice of the interest or claim in the property of the person in possession and whoever deals with such property is put on enquiry as to the title of the person in possession. If a person, who is in possession of the property already by virtue of another title, subsequently secures another title to that property by means of a document, which requires registration but which has not been regis-

[1][and the same constitutes a valid transfer under any law for the time being in force:

Provided that a mortgage by deposit of title-deeds as defined in section 58 of the Transfer of Property Act, 1882, shall take effect against any mortgage-deed subsequently executed and registered which relates to the same property.]

Effect of non-registration of documents required to be registered.

49. No document required by section 17 [1][or by any provision of the Transfer of Property Act, 1882] to be registered shall—

(*a*) affect any immovable property comprised therein, or

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[1] Added by Act XXI of 1929.

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tered, the factum of possession prior to the subsequent acquisition of title puts a subsequent purchaser of the same property by means of a registered document on enquiry as to the title of the person already in possession and has the effect of postponing him to the title subsequently acquired by the person in possession. (8 Pat. 316, Appl.) 1938 Lah. 39.

Secs. 48 and 50: SCOPE.—All duly registered documents shall take effect against an oral agreement or declaration relating to property, unless where the agreement or declaration has been accompanied or followed by delivery of possession. In spite of the explicit wording of S. 48, it has for long been held that a subsequent registered deed will not prevail over a prior unregistered deed or a prior oral transaction if the subsequent transferee had notice of the prior transaction, and the onus lies on the person claiming under an unregistered document or under an oral transfer to establish the facts necessary to exclude the operation of S. 50 or S. 48. 119 I.C. 754=1929 L. 500.

Sec. 49: SCOPE AND APPLICABILITY OF SECTION.—The rule laid down in S. 49 is not that of adjective law. S. 49 is as much a portion of substantive law as S. 17, and they go hand in hand. S. 49 will rule out only the documents which were registrable under S. 17. S. 49 cannot therefore go beyond S. 17 and rule out documents at the time of their production which were not registrable at the time they were executed. 163 I.C. 64=1936 Pesh. 125. *See also* 50 L. W. 331; 1939 P.W.N. 880; 17 Pat.L.T. 217; 1940 M.W.N. 895. S. 49 is mandatory, and a document which, is required to be registered but is not registered shall not be received in evidence. The mere fact that the opposite party raises no objection to its admissibility will not affect the question. 15 Pat. 579=18 Pat.L.T. 41=1937 Pat. 183. No equitable doctrine can override the specific provisions of S. 49 and operate so as to make an unregistered document create title if it requires registration. 43 P.L.R. 656=1941 Lah. 407 (F.B.). There is no warrant whatever for the proposition that the provisions of Ss. 17 and 49 are inapplicable, where the contest is not between the executants of an unregistered deed *inter se,* but is between them and a third party. 36 P.L.R. 25=1934 L. 759. Compromise of criminal case—Admissibility without registration. 148 I.C. 867=11 O. W.N. 450=1934 O. 116. S. 49 is mandatory. The mere fact that the opposite party raises no objection to admissibility of the document will not affect the question. 15 P. 579. Section should be construed strictly and unless a document is clearly brought within the purview of the Act, non-registration is no bar to its being acted upon or received in evidence; and in case of doubt the benefit of the doubt should be given to the person who wants the Court to act upon or receive it in evidence. 30 S.L.R. 115=1936 S. 79 (F.B.). When a Registrar admits a document to registration he does so with jurisdiction. Hence the resulting registration cannot be regarded as void though at the same time the fact that it is registered does not in the least cure the defects in the deed so that if it deals with a prohibited subject, the ordinary law should be applied and the question whether it is good or bad should be determined with reference to that law. I.L.R. (1941) Nag. 743=1941 Nag. 328. Under S. 49 document required by law to be registered cannot if it is not registered be received as evidence of any transaction affecting the property concerned. The document itself does not create any rights or liabilities. At best it can serve only as an admission, but it is not conclusive evidence of the fact admitted. It can no doubt operate as estoppel if the necessary conditions are present. 1942 R.D. 501.

Cl. (a).—An *equitable mortgage* is ineffective where the memo. of deposit was not registered. 24 Bom. L. R. 502=1922 B. 440; 138 I.C. 247; 40 M. 547; 53 M.L. J. 179; 1931 P.C. 36; 58 I.A. 68=60 M. L.J. 506 (P.C.). Though an agreement embodied in a written document requiring registration under S. 17 and not so registered cannot be proved by the written document or by oral evidence, yet where there is no written agreement, there is no reason why the intent to create a security by deposit of title-deeds under the exception provided for in S. 59, T. P. Act, should not be evi-

(*b*) confer any power to adopt, or

(*c*) be received as evidence of any transaction affecting such property or conferring such power,

unless it has been registered:

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denced by written as well as by oral evidence. 58 I.A. 68=54 M. 257=60 M.L.J. 506 (P.C.); 1929 P.C. 141=7 R. 234=57 M.L.J. 529. *See also* 1938 M.W.N. 785. A decree for specific performance of lease does not affect the land, if the agreement to lease was unregistered. It is only a personal decree. 42 I.C. 633; 13 P. 620 =1934 P. 495=15 P.L.T. 443. An unregistered sale-deed has no priority over a subsequent registered one, even with notice of the prior sale. 9 I.C. 55=9 M.L.T. 270.

MOVABLES AND IMMOVABLES.—Where an unregistered deed relates both to movables and immovables, a suit on the document in respect of movables is not barred. 51 I.C. 954=21 Bom.L.R. 716; 47 I.C. 563. Even movable property cannot be affected by an unregistered document, unless they were intended to be separate apart from immovables dealt with by the document. 30 M.L.J. 62=32 I.C. 486 (F.B.). *Cf.* 1 Bur. L.J. 111=1923 R. 57; 60 M.L.J. 527; 1931 R. 65 (1); 138 I.C. 495=1932 L. 545; 132 I.C. 305=1931 M. 580. As to agreement for sale of earth and sand, *see* 1932 M. 734 =63 M.L.J. 587. Separate parts in a document relating to immovable property of less than Rs. 100 in value can be admitted in evidence, though the document may as a whole require registration but has not been registered. 10 I.C. 748=10 Bom. L. R. 162. A registered deed of sale not only makes the transfer but proves it as well. 36 I.C. 547=12 N.L.R. 139. Document registered without jurisdiction, as a document registered on presentation not by a proper person or at proper time, cannot be considered as properly registered and so cannot be received in evidence. 11 R. 207 =1933 R. 194.

Sec. 49 (c): AFFECTING IMMOVABLE PROPERTY.—The establishment of a title by adverse possession is a transaction affecting immovable property. 38 M. 158=27 M.L.J. 497. The right to hold a market is an incident to the ownership of the land. The allocation of particular days for holding the bazaar, coupled with the condition that the parties are not to be allowed to hold the bazaar on certain other days, is a restriction on the general right possessed by the owner to hold the market, and so where an agreement deals with such a right and the value of the same is more than Rs. 100, the document requires registration. 5 Luck. 504= 1931 O. 110.

ADMISSIBILITY IN EVIDENCE—GENERAL.—The inadmissibility applies only to those which are compulsorily registrable and the section does not forbid admissibility of a document whose registration is optional, but has been illegally registered. 62 I.C. 246. Unless there has been a transaction independent of the written instrument and capable of proof without evidence thereof, the right, title and interest in question has not been declared, etc. The Registration Act cannot be defeated by a contention to the effect that, as no written instrument was necessary, the transaction itself is independent of the written instrument which can be regarded simply as evidence thereof. 58 C. 136=131 I.C. 689=1931 C. 23. Section applies to *compromise deed* also. 27 A.L.J. 487; 11 P. 98=136 I.C. 54=1932 P. 97. Document inadmissible as evidence of the transaction may be admitted as admission. 49 C.L.J. 532.

AWARD.—A decree based on an award which is compulsorily registrable but not registered, cannot be set aside on the ground of want of registration under S. 49 in an independent suit by a stranger to the decree. There is no warrant for saying that if any inadmissible evidence is admitted and a decree is passed, the same can be challenged in another suit by any party. I.L.R. (1940) Bom. 526=42 Bom.L.R. 486=1940 Bom. 289. *See also* 40 Bom.L.R. 952; 1937 Cal. 201; 6 Cut.L.J. 47. Where part of an award is invalid as being in excess of the arbitrator's powers and is separable from the rest, the rest of the award can be maintained. But where the award partitioning the properties is, for want of registration, inadmissible in evidence as regards the immovable properties dealt with by it and it is obvious that the arbitrators had the relative values of the movables and immovables in making the partition and allowing for the differences, the award is indivisible and it cannot be admitted in evidence even so far as it relates to the movables only. 1932 A.L.J. 1090=1933 A. 59. An *acknowledgment* contained in a communication addressed to a third party does not require registration. 59 I.A. 130=11 P. 272=1932 P. C. 55=62 M.L.J. 296 (P.C.). *See also* 137 I.C. 155=1932 L. 400; 140 I.C. 387= 1932 L. 592; 1936 Lah. 276.

LEASES.—Lease of agricultural land may be made orally. But when an instrument is executed for that purpose, it must be registered under S. 17 (1) (*d*); and if not registered, it would be inadmissible under this section. 62 C.L.J. 534=1936 C. 770. An unregistered agreement to lease effecting a present demise cannot be received in evidence in a suit for specific performance. 10 I.C. 892; 1922 L. 329; 49 C. 507=1922 C. 436; 42 I.C. 948=33 M.L.J. 596; 42 I.C. 633; 1939 Mad. 391=(1939) 1 M.L.J. 82. [*See* now the proviso to the section added by Act XXI of 1929, which makes such a

[1][Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of part performance of a contract for the purposes of section 53-A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument.]

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[1] Proviso added by Act XXI of 1929.

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deed admissible.] Letter recording an oral agreement to lease is admissible without registration, where it appeared that the execution of a formal deed was in the contemplation of the parties. 45 C.L.J. 32=1927 C. 275; *see also* 11 O. W. N. 1184. *Jamabandi* relating to oral *jama* showing increase of rent for incresed area—Admissible without registration to prove increase of rent. 40 C.W.N. 1330. An unregistered lease deed cannot be used as evidence of an agreement to lease. 23 I.C. 336=1 L.W. 296; 62 C. 294; 1939 A.W.R. (B. R.) 218; 12 L.R. 93 (Rev.). *See contra* 1923 N. 73. An unregistered lease deed is inadmissible to prove even rent agreed to be paid. 31 I.C. 604=2 L.W. 1186; 31 I.C. 279=(1916) 1 M.W.N. 5; 42 C.W.N. 107; 1937 Cal. 499; 18 Pat.L.T. 1012; 19 N.L.J. 179; or to prove terms of the lease. 54 C.L.J. 220; or to prove that the lease was for three years: 63 I.C. 90; 164 I.C. 557=1936 N. 134; or for proving any fact that is essential to a tenancy. 25 I.C. 661. But an unregistered lease can be admitted to prove the amount of damages for use and occupation: 11 I.C. 23; 32 P.L.R. 361=1931 L. 501; 137 I.C. 136=1932 S. 60; 95 I.C. 957=1926 O. 304 (kabuliyat admitted); 1930 L. 915; to prove a lease for less than one year: 1931 M. 352=60 M.L.J. 293; also to prove lease from month to month. 32 P.L.R. 361=1931 L. 501. *See contra* 42 I.C. 948=33 M.L.J. 596. An unregistered lease deed can be used to prove the relationship of landlord and tenant. 45 I. C. 217; 1930 P. 110; but not to prove the terms of the relationship. 22 I.C. 65=9 N.L.R. 179. But where the defendant admits the lease the fact that the lease deed is unregistered does not affect the admission. 57 I.C. 262; 3 Lah.L.J. 253. An unregistered lease which requires registration under S. 107 of the T P. Act is admissible in evidence if it had been acted upon by the parties for a long time. [28 I.C. 930 (P. C.), Rel. on.] 1937 O.W.N. 1030=1937 Oudh 505. A sub-lease which requires registration but not registered is void; so a condition in the original lease against transfer is not broken by such sub-lease. Such illegal sub-letting would not entail forfeiture for breach of condition against transfer. 15 P. 460=17 Pat.L.T. 217=1936 P. 372.

SALES.—An agreement for the sale of immovable property is a transaction "affecting" the property within the meaning of S. 49, inasmuch as, if carried out, it will bring about a change of ownership; and to allow a document which does itself create such an interest to be used as the foundation of a suit for specific performance is an evasion of the Registration Act. (1922 C. 436; 1926 M. 530 and 1926 B. 375, Appr.) 56 I. A. 363=33 C.W.N. 1150=1929 P.C. 269=57 M.L.J. 765 (P.C.). An unregistered sale, though ineffective to pass title, may nevertheless be used to explain the nature of possession taken under it. 1940 N.L.J. 509=1941 Nag. 72. An unregistered sale-deed is not admissible in evidence so as to affect the interests of a person not a party to it. 110 P.W.R. 1916=36 I.C. 374. The position of a purchaser who has been let into possession by his vendor under an unregistered and consequently inoperative sale-deed after there has first been an oral agreement to sell and after the whole of the consideration has been made good, under the mistaken belief on both sides that the transaction is complete, whereas in fact it has remained incomplete for want of registration of the instrument purporting to effect the transfer, must be regarded as that of a purchaser under a contract for sale which has not yet been completed or rescinded with the consent of both parties and the purchaser cannot claim any title as owner in the property, whether as legal or as equitable owner. The purchaser, however, has a charge on the property for the amount paid by him in advance as purchase-money. The lien is not created by any agreement between the parties, but arises by operation of law, on payment of the purchase-money independently of the sale-deed. Though the unregistered instrument is not admissible to prove transfer of title it can be used in evidence for the purposes of showing that the purchaser entered upon the property under a contract of sale. The unregistered document is also admissible for the purpose of showing that the purchaser obtained a lien by passing of the consideration. 43 P.L.R. 656=1941 Lah. 407 (F.B.). *See also* 1941 Nag. 72. An unregistered sale-deed cannot be used to prove a contract of sale. 37 M. 480=16 I.C. 587; 1 Pat.L.J. 455=37 I.C. 994; 67 I.C. 144. *See also* 41 B. 550=41 I.C. 273. *Contra* 1929 R. 293.

EXCHANGE.—S. 49 prevents an unregistered deed of exchange of immovable property from having any effect, and the title remains in the transferor. 42 P. L. R. 294=1940 Lah. 311. An unregistered deed of ex-

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change of land is inadmissible in evidence. But the inadmissible deed cannot deprive a party to it from claiming possession of land which admittedly belonged to him before the date of the deed. He can treat the other party who has taken possession of the land under the inadmissible deed as a trespasser. 40 P.L.R. 224.

MORTGAGES.—If a document does not refer to a mortgage-debt or purport to create a mortgage or charge on the mortgage debt itself, but points to something being done in the future concerning the immovable property, the document is not inadmissible in evidence for want of registration. 123 I.C. 297=1930 S. 77. *See also* 33 P.L.R. 323. A document purporting to create an equitable mortgage is admissible in evidence though unregistered, if it is only a narrative of facts constituting the mortgage. 40 M. 547=34 I.C. 853; 31 C.W.N. 703=1927 C. 538; 53 M.L.J. 179=102 I.C. 34. *See also* 1932 A.L.J. 101=1932 A. 259; 36 C.W.N. 738=55 C.L.J. 571 (proof of payment of mortgage-debt which extinguishes the mortgage). A person can sue for the money lent on unregistered mortgage bond and use the documents as evidence of the loan. 1930 R. 142; 1925 O. 628 (evidence of possession). *See also* 1934 R. 196; 18 R.D. 90. Unregistered mortgage-deed is admissible to prove character of possession. 8 R. 556=1931 R. 40; 144 I.C. 312=1933 N. 270; or other collateral purpose, 56 B. 101. *See also* I.L.R. (1941) Lah. 601=193 I.C. 789 (proof of personal covenant to pay contained in unregistered mortgage-deed.) *See also* 1940 Lah. 486; 155 I.C. 204=1935 R. 15; 35 P.L.R. 491=1934 L. 472; so also an unregistered rent deed; 33 P.L.R. 37. Unregistered mortgage bond can be referred to in suit not to enforce charge but simply to recover the money. 37 C.W.N. 915; 131 I.C. 500=1931 R. 65; 1931 S. 151. *See also* 1937 Rang.L.R. 442 (Admissibility to prove nature of possession). 42 P.L.R. 660=1940 Lah. 486 (Admissibility to prove personal covenant to pay). Where a usufructuary mortgage of certain lands for a sum of less than Rs. 100 is made by an unregistered deed accompanied by delivery of possession, the terms of the document could only be proved by the document under S. 91 of the Evidence Act even though there is delivery of possession, and the document which requires to be registered under S. 59 of the T. P. Act is inadmissible in evidence under S. 49 of the Registration Act, as amended in 1929. 1939 Rang. 188=1939 Rang. L. R. 39. A document evidencing an agreement between the mortgagor and the mortgagee to vary the terms of the registered mortgage-deed relating to the rate of interest payable under that deed, which is in effect an *agreement to relinquish a portion of the mortgage-debt* exceeding Rs. 100, falls under S. 17 (1) (*b*) and cannot be received, when not registered, as evidence of any transaction affecting the mortgaged property. 132 I.C. 66=1931 O. 288. *See also* 1933 L. 422. An unregistered receipt for mortgage-money extinguishing the mortgage-debt cannot be received as evidence of payment of money due under the mortgage. 64 C.L.J. 10. *See also* 1938 Mad. 533.

PARTITIONS.—A partition deed, if not registered, is inadmissible in evidence. 35 P. R. 1916=33 I.C. 948; 1922 N. 36; 90 I.C. 1016=1925 M. 1195; 96 I.C. 367=1926 N. 329; 141 I.C. 487=34 P.L.R. 194. An unregistered agreement in writing arranging a partition between the parties is not available as evidence of the transaction under the Registration Act. 56 I. A. 6=52 M. 83 =1929 P.C. 13=56 M.L.J. 165 (P.C.). *See also* 151 I.C. 787=1934 Pesh. 100. *See also* 39 Bom.L.R. 1102. This is so even for the purpose of proving an unilateral declaration of an intention to divide. 46 M. 349=44 M.L.J. 45; 151 I.C. 787=1934 Pesh. 100. A *butwara chitta,* is a mere list of shares, and does not require registration. 62 C.L.J. 513=1936 C. 700; (1938) 1 M. L.J. 582=1938 Mad. 568. Under Hindu Law partition is only a change in the mode of enjoying the joint property coupled with an alteration in status, the joint title being divided into a number of separate ones. No formality is required. A document by which parties had intended to have this division effected may in the result prove ineffective for that purpose. But their common desire to act upon it, and their action in doing so would amount to a confirmation of the original agreement. If that becomes unprovable, such confirmation would itself constitute a fresh and subsequent agreement which would be provable like any other agreement. This is 'a collateral transaction not required to be effected by a registered instrument' within the meaning of S. 49. Therefore the unregistered document can be used as material in proof of it. It could be used to corroborate other evidence or facts. It could be used to show the character of the possession and the nature of the title, provided there is other evidence to establish separate possession. 1941 N.L. J. 266=1941 Nag. 209. Although documents or papers connected with a partition of immovable properties which are unregistered cannot be admitted in evidence to prove actual partition and to prove what was allotted to any person by that partition, yet they are clearly admissible to establish the status of a party or to establish separation in the family, and to rebut any case that that party died in a state of jointness. 21 Pat. L.T. 1063=1941 Pat. 167. List of partition, though unregistered, would be admissible in evidence when the question of division of status alone is sought to be proved: 1928 M. 865; 37 C.W.N. 112; 1935 L. 448; 29 Punj.L.R. 413; 99 I.C. 448; 54 M. 27 =59 M.L.J. 558; 1929 M. 291=116 I.C. 137; 117 I.C. 720; 1938 Mad. 568=(1938) 1

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M.L.J. 582; (1941) 2 M.L.J. 707. Unregistered document may be admissible to prove or determine nature of possession. 108 I.C. 892. *See also* 1933 L. 422; 1927 A. 763; 109 I.C. 795; 100 I.C. 153. An unilateral declaration of an intention to get divided contained in an unregistered instrument prior to division by metes and bounds needs no registration. 40 I.C. 36. But where a partition deed has been acted upon, it is admissible in evidence in a suit for specific performance even though it be unregistered: 4 Pat.L.T. 657=1924 P. 244. There can be valid partition in a Hindu family without any document. But if a document or list which requires registration is in existence, they cannot be received in evidence under S. 49, for proving any of the terms of the partition. Oral evidence also would be barred under S. 91, Evidence Act. 45 L. W. 639=(1937) 1 M.L.J. 676. In cases where the unregistered deed is inadmissible in evidence, secondary evidence of its contents is also inadmissible. 44 I.C. 91.

PATTA.—A person relying on an unregistered patta who is admittedly in possession is entitled to refer to the unregistered patta for the purpose of explaining the nature of his possession, *e.g.*, that he was let into possession as a tenant of the land in suit. 187 I.C. 583=1940 Pat. 498. The terms of a tenancy cannot be determined by looking at an unregistered kabuliyat or patta. 189 I.C. 745=1940 Pat. 37. *See also* 1939 Pat. 296.

PART-PERFORMANCE.—Unregistered document can be received as evidence of part-performance. [*See* Proviso to the section. 1931 M. 580=60 M.L.J. 527 is not good law.] *See also* 35 Bom.L.R. 722=1933 B. 381; 14 L.R. 157 (Rev.)=17 R.D. 201.

PARTNERSHIP.—*See* 1931 M. 580=60 M. L.J. 527.

TRANSFER OF IMMOVABLE AND MOVABLE PROPERTY—ADMISSIBILITY AS REGARDS MOVABLE PROPERTY.—Where movable as well as immovable property is transferred by a document for a single consideration, which document, though compulsorily registrable in order to affect the immovable property, is not registered, it is equally ineffectual to affect movable property, the reason being that the document embodies one transaction for one consideration and there is no separate transaction concerning the movable property. The document is therefore inadmissible in evidence even as regards a claim in respect of movable property. 152 I. C. 431=1934 R. 303.

RELEASE.—A release need not be in writing. But if written it must be registered. If not, S. 49, Registration Act, excludes the document from evidence and S. 91, Evidence Act, shuts out all oral evidence of its terms, so the actual transaction of release is unprovable. An unregistered written deed of release cannot be used to show that there must have been an agreement to release and that the parties acted on it. Hence doctrine of part performance or equitable estoppel would not apply. 174 I.C. 7=1937 Nag. 402. A document by which the defendant relinquished his interest in a mortgage bond in favour of his brother, the plaintiff, and authorised the latter to collect the full amount of the debts is inadmissible in evidence in so far as it operates to extinguish his right in the mortgage security; but there is no bar to its being admitted for showing the transfer of the debt itself, apart from the security. 1934 M. 178=66 M.L.J. 380. A document purporting to declare that the executants held no title in a house and had relinquished their connection with it and also purporting to record a payment of money described as having been spent by them in rebuilding the house, requires to be registered, and is inadmissible without registration. 35 P.L.R. 570=1934 L. 604 (2).

RELINQUISHMENT.—Where a document is produced not for any collateral purpose but for the purpose of proving the actual transfer or relinquishment of certain rights, and the property which is the subject-matter of relinquishment is valued at more than Rs. 100 the document ought to be properly stamped and registered otherwise it is inadmissible in evidence. 162 I.C. 733=1936 Lah. 109.

COLLATERAL FACT.—[*See* now 'Proviso' added by Act XXI of 1929.] "Collateral purpose" meaning of. *See* 19 Pat.L.J. 489=1938 Pat. 479; 1937 Lah. 939; I.L.R. (1941) Kar. 483. An unregistered document affecting immovable property may be received as evidence of collateral transaction not required to be effected by registered instrument. 1936 P. 634. Sub-S. (*c*) does not affect the admissibility of the unregistered document to prove a collateral fact, such as date of possession. 45 A. 565. *See also* 1933 C. 440; 59 I.A. 161=10 R. 242=63 M.L.J. 131 (P. C.); 66 M.L.J. 380; 1932 L. 655 (what is collateral purpose explained); 36 C.W.N. 583=1932 C. 634; 46 I.A. 285; 56 B. 101=1932 B. 168; 37 C.W.N. 915; or nature of possession. 1929 C. 710; 1930 P. 530=122 I.C. 158; 1934 L. 885; 18 R.D. 90; 6 L. 319 =88 I.C. 872=1925 L. 491; 39 A. 696=42 I.C. 713; 26 C.W.N. 65=34 C.L.J. 432; 1939 Lah. 558; 1939 M.W.N. 785; 44 Bom. L.R. 534; 46 C.W.N. 419; 1942 Sind 27; 1942 R.D. 505; 44 I.C. 889; 44 M. 55=39 M.L.J. 639 (F.B.); 104 I.C. 353 (2)=1927 N. 342; 100 I.C. 346=1927 A. 311. But *see* 1929 N. 115. Purposes for which an unregistered gift deed is admissible in evidence: *see* 49 M.L.J. 756=92 I.C. 470=1926 M. 191. *See contra* 48 P.R. 1913=18 I.C. 918; 38 M. 1158=27 M.L.J. 497; 23 M.L.J. 652. A "collateral transaction" within the meaning of the proviso to S. 49 is a transaction other than the transaction affecting the immovable property but which is in some way connected with it. A distinction must be

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drawn between the use of an unregistered document *as* evidence of a transaction affecting immovable property and the use of such document *in* evidence; the proviso permits the use in evidence of an unregistered document, though that document affects immovable property, if the purpose of its use is any purpose other than that of creating, declaring, assigning, limiting or extinguishing a right to immovable property. An unregistered deed of partnership which, among others, makes reference to leases of immovable properties, may therefore be admitted and used in evidence in a suit for accounts of the partnership after its dissolution to prove the partnership and profits and losses arising from the same, which is only a collateral transaction. I. L. R. (1941) Kar. 483. Per *Weston, J.*—A "collateral transaction" is to be taken as one collateral to the transaction affecting immovable property by reason of which registration is necessary, rather than one collateral to the document. The proviso speaks not of collateral purpose but of collateral transaction. I.L.R. (1941) Kar. 483. An unregistered deed is admissible to prove the fact of possession though not its terms. 41 B. 466= 40 I.C. 83; 1923 L. 371; 57 I.C. 965; 41 I. C. 779=21 C.W.N. 1149; 91 I.C. 927=1926 O. 98=1 Luck. 33. Where a party is in possession of land, a document which is unregistered but which requires registration can be used for the collateral purpose of showing the nature of his possession. 37 P.L.R. 459. A mortgagor may refer to an unregistered deed of mortgage for Rs. 100 or more in order to show the character of the possession of the mortgagee and can give evidence as to the circumstances under which the defendant obtained possession; 8 R. 656=1931 R. 40; *see also* 40 P.L.R. 833=1938 Lah. 497. (Suit for refund of mortgage-money on basis of unregistered receipt for money paid); or to prove the circumstances under which possession was delivered: 30 I.C 258=2 O.L.J. 276. *See also* 20 Pat.L.T. 399=1939 Pat. 488; or to prove state of mind of the executant at or about time of execution: 26 I.C. 547=1 O. L.J. 591; or to show that there was a talk of some intended assignment: 49 M.L.J. 756; 37 Bom.L.R. 82; or to prove and adjust personal liabilities: 42 I.C. 633; 87 I. C. 609 (1)=1925 L. 356; 1930 L. 985; or in the case of sale in lieu of dower fixed as Rs. 1,000 to prove the amount of dower and the personal liability to pay it: 44 I.C. 837 =23 P.R. 1918; or to prove earnest money paid, in a suit for its return: 18 P.R. 1917 =37 I.C. 822; or for proving an admission contained therein: 61 I.C. 328. Unregistered sale-deed may be admitted for proving acknowledgment of liability under a pronote. 162 I.C. 306=1936 L. 276. But an unregistered sale-deed is inadmissible even for the collateral purpose of ascertaining the nature of property sold: 61 P.L.R. 1919; or as to what was the consideration. 1929 N. 115. An unregistered lease cannot be admitted in evidence to prove the permanent nature of tenant's possession. 42 I.C. 375. Documents which are compulsorily registrable but which are unregistered can be admitted for a collateral purpose. In the case of partition memorandum relating to a joint Hindu family a reference to arbitration for the purpose of division of the family property may be regarded as constituting proof collateral of the fact that the parties intended to sever. The declaration of will to divide can be made even by a unilateral act, and if such declaration was manifested by a joint reference to arbitration by all the adult coparceners calling upon the arbitration to effect a division of the family property and apportion it to the respective shares, the partition memoranda can be made use of in proof of the change of status or the declaration of will to separate. *Obiter* Per Wossodew, J.

Per *Thakoor, J.*—Partition memoranda cannot be admitted in evidence to prove the fact of partition. That purpose is not a collateral purpose, nor is the purpose of showing that by these memoranda a severance in interest was created a collateral purpose. Severance in interest, which is only another expression for partition under the Hindu Law, being itself the object of the documents cannot be regarded as a purpose collateral to the main purpose and object of the documents in any sense. 175 I.C. 361=40 Bom. L.R. 202=1938 Bom. 257. *See also* 1941 Nag. 209; 1941 Pat. 167; 41 P.L.R. 123. An unregistered kobala is admissible to prove contract which must be deemed to have preceded it. 7 Pat.L.T. 730=1926 P. 89. In a suit for rent on basis of a perpetual lease, if the deed is unregistered, it is not admissible in evidence as the purpose cannot be described as collateral. The object is to establish the plaintiffs' right to recover a specific sum of money as rent by the landlord; that is, to establish the title and terms. 1936 N. 295. Where a sale-deed by which the purchaser purchased the mortgaged property from the widow of the mortgagor may be inadmissible in evidence as not having been registered, it can nevertheless be used for collateral purposes, *e.g.*, to show that he undertook thereby to pay the mortgage amount, in order to be entitled to be paid that amount before the reversioner is allowed to take possession of the property mortgaged. 13 P. 111=15 P.L.T. 73= 1934 P. 127.

COMPROMISE PETITION.—Neither an unregistered compromise, nor an order of a Revenue Court based on it, can confer a valid title. 33 A. 728. *See also* 40 P.L. R. 115. Where the compromise petition is incorporated in a decree of a Court it requires no registration. 91 P. R. 1915=31 I.C. 537; 36 M. 46=21 M.L.J. 870. Where compromise is not incorporated, *see* 100 I.C.

50. (1) Every document of the kinds mentioned in clauses (*a*), (*b*), (*c*) and (*d*) of section 17, sub-section (1), and clauses (*a*) and (*b*) of section 18, shall, if duly registered, take effect as regards the property comprised therein, against every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not.

Certain registered documents relating to land to take effect against unregistered documents.

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783=28 Punj.L.R. 143. The exemption from registration applies even when the compromise petition relates to matters not within the scope of the suit in which it is filed. 1 Pat.L.J. 208=36 I.C. 290. The proviso cannot have retrospective effect in the case of an agreement to sell, which is sought to be filed for the first time in appeal. 12 L. 172=1930 L. 1004; 98 I. C. 1069 (1)=1927 A. 156. Where one of the terms of a compromise refers to immovable properties of one of the parties, but no new rights are either created or declared by the compromise but the reference merely relates to the pre-existing state of things with regard to which there is no dispute, even though the deed may be unregistered, still it is admissible. 1935 L. 307. *See also* 1937 Lah. 939.

Sec. 49, proviso.—The proviso to S. 49 added by the amending Act of 1929, is necessarily retrospective. It is a rule of evidence and normally as it does not create or defeat substantive rights, according to the recognised canons of construction, it should be accepted as retrospective. 42 Bom.L.R. 382=1940 Bom. 193. *See also* 1937 M.W. N. 440; 1937 All. 711=1937 A.L.J. 815; 1940 Pat. 92=19 Pat. 90. An unregistered document is admissible as evidence to prove part performance of a contract under the proviso to S. 49 in a suit instituted after it came into effect, even though that document was executed prior to its coming into effect. 64 C.L.J. 558=1937 Cal. 467. *See also* 43 C.W.N. 956. *See also* 1937 Pesh. 58; 1940 O.W.N. 753; 43 C.W.N. 956; 16 Luck. 39=1941 Oudh 41. As to non-applicability of doctrine of part performance to any claim which does not relate to retention of immovable property of which a party might be in possession, *see* 45 L.W. 639=(1937) 1 M.L.J. 676. An unregistered deed of mortgage is not itself sufficient to support a suit for specific performance of an agreement to transfer. The document being a document of transfer and intended to be such must be registered in order to give it validity as a mortgage. It is not open to a party to ignore the provisions of the law of registration and to treat it as a contract to transfer—which it is not—and to compel the transferor to execute a formal transfer. The unregistered mortgage cannot itself be regarded as the contract for purposes of the new proviso added to S. 49, when there is no proof of any separate agreement to mortgage prior to the execution of the mortgage-deed. 48 L.W. 522=1938 Mad. 801=(1938) 2 M.L. J. 362.

PRACTICE AND PROCEDURE.—A question of law relating to the admissibility of a document by reason of non-registration *cannot for the first time be allowed to be raised before the Privy Council* when the plea cannot be disposed of without deciding nice questions of fact on which the evidence is not clear and the parties are at variance. 59 I. A. 161=10 R. 242=63 M.L.J. 131 (P.C.).

Sec. 50.—S. 50 of the Registration Act applies to cases in which the property conveyed by the unregistered and registered documents is the same, or in which the property conveyed by one document includes the property conveyed by the other. In other words, it applies where the two documents are antagonistic, but not where effect can be given to each without infringement of the other. 38 P.L.R. 928=164 I. C. 577=1937 Lah. 57. Thus, if *A* executes an unregistered mortgage of his property to *B*, and afterwards sells the same property out and out to *C* by a registered deed, the two documents are of an antagonistic character, and *C* is, therefore, entitled to have priority over the unregistered mortgage. But he is not so entitled, if his conveyance is, in terms, only a conveyance of the equity of redemption, for then the two documents are separate and distinct and can exist together without impugning one another. 1937 Lah. 57. The wording of S. 50 would seem *prima facie* to apply to previous unregistered deeds, whether they have taken effect by delivery of possession or not. It would be unduly restricting the scope of the section to say that it does not apply at all, when the previous unregistered transaction has taken effect by delivery of possession. I.L.R. (1939) Lah. 261=41 P.L.R. 19=1939 Lah. 29. A person who takes a property by a registered deed, with full knowledge of a previous transaction, is obviously a party to the vendor's fraud, and consequently he cannot succeed merely on the strength of his registered deed. Delivery of possession may amount to notice of the previous title and the subsequent alienee may fail owing to such notice, but that would depend upon the nature and circumstances of the possession under the prior title. 38 P.L.R. 928=1937 Lah. 57. A charge created by award prior to the amending Act of 1929, which is not registered, retains seniority over a subsequent mortgage-deed which is registered. 1933 S. 151=27 S.L.

(2) Nothing in sub-section (1) applies to leases exempted under the proviso to sub-section (1) of section 17 or to any document mentioned in sub-section (2) of the same section, or to any registered document which had not priority under the law in force at the commencement of this Act.

Explanation.—In cases where Act No. XVI of 1864 of the Indian Registration Act, 1866, was in force in the place and at the time in and at which such unregistered document was executed, "unregistered" means not registered according to such Act, and, where the document is executed after the first day of July, 1871, not registered under the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act.

PART XI.

OF THE DUTIES AND POWERS OF REGISTERING OFFICERS.

(*A*) *As to the Register-books and Indexes.*

Register-books to be kept in the several offices.

51. (1) The following books shall be kept in the several offices hereinafter named, namely:—

A—In all registration offices—

Book 1—"Register of non-testamentary documents relating to immovable property;"

Book 2—"Record of reasons for refusal to register;"
Book 3—"Register of wills and authorities to adopt;"
Book 4—"Miscellaneous Register."

B—In the offices of Registrars—

Book 5—"Register of deposits of wills."

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R. 121 (F.B.). *See also* 131 I.C. 500=1931 R. 65. For the application of this section it is not necessary that the executants of the two conflicting deeds must be the same individual. 16 I.C. 625=10 A.L.J. 114. Two documents must be of the same kind. 101 I.C. 836=1927 M. 699. Section would not apply where effect can be given to each document without infringement of the other. 30 Bom.L.R. 720=1928 B. 269. Section applies only where the prior document is optionally registrable and the transaction is not completed. 1928 M. 546. Where both the documents are registered, S. 50 has no application. 147 I.C. 767=1934 P. 68. The section does not give priority to a registered deed where it was obtained by fraud. 49 I.C. 839. The section does not apply where the subsequent registered-deed-claimant has notice of the prior unregistered deed. 18 C.W.N. 657. *See also* 146 I.C. 40=1933 L. 69; 1930 R. 188. The onus of proving such notice lies on the person alleging such notice. 18 C.W.N. 657; 42 I.C. 393. Where the lands in dispute were sold to the defendant in three parcels for a consideration in each of the sale-deeds of less than Rs. 100 and the sale properties were subsequently conveyed to another person by a registered sale-deed, but it appeared that the purchasers under the oral sale had already obtained possession, *held*, that the oral sales were valid and that the registered sale-deed could not take effect in derogation of the same. 10 Pat. L.T. 449=1929 P. 620. An unregistered mortgage-deed cannot be enforced against a *bona fide* purchaser under a registered sale-deed without notice. 47 A. 338=1925 A. 325; 18 I.C. 724; 10 I.C. 233. *See also* 119 I.C. 754=1929 L. 500. Oral sale—Vendor remaining in possession as tenant of vendee—Subsequent registered sale by the owner to another—Effect. *See* 6 R. 315. Unregistered sale-deed—Admissibility to prove nature of possession. *See* 1929 M. 16. Prior unregistered mortgage-deed—Mortgagee's heir conveying mortgaged property by sale-deed—Suit for redeeming mortgage—Maintainability—Entries in revenue papers—Validity. *See* 113 I.C. 523.

Sec. 51.—There is no valid registration when the document is entered in the wrong book. 52 I.C. 213. But *see contra* 1927 M. 586=52 M.L.J. 482. Where a document is intended to be registered as a partnership deed under the order of the Registrar but is by mistake entered in the book pertaining to alienations, the document is not validly registered as an alienation but is only validly registered as a partnership deed. 1938 Lah. 255=181 I.C. 747.

DOCUMENT ENTERED IN WRONG BOOK—VALIDITY OF REGISTRATION.—Where a document which should have been entered in Book 1 was entered in Book 4 and the mistake was made by the registering officer in good faith and did not injure any innocent person. *Held*, that this error did not make the registration invalid. 39 C.W.N. 1191=1935 P.C. 165=69 M.L.J. 503 (P.C.); 40 C.W.N. 1012=162 I.C. 650=1936 C. 212.

(2) In Book 1 shall be entered or filed all documents or memoranda registered under sections 17, 18 and 89 which relate to immovable property, and are not wills.

(3) In Book 4 shall be entered all documents registered under clauses (*d*) and (*f*) of section 18 which do not relate to immovable property.

(4) Nothing in this section shall be deemed to require more than one set of books where the office of the Registrar has been amalgamated with the office of a Sub-Registrar.

Duties of registering officers when document presented.

52. (1) (*a*) The day, hour and place of presentation, and the signature of every person presenting a document for registration, shall be endorsed on every such document at the time of presenting it;

(*b*) a receipt for such document shall be given by the registering officer to the person presenting the same; and

(*c*) subject to the provisions contained in section 62, every document admitted to registration shall without unnecessary delay be copied in the book appropriated therefor according to the order of its admission.

(2) All such books shall be authenticated at such intervals and in such manner as is from time to time prescribed by the Inspector-General.

Entries to be numbered consecutively.

53. All entries in each book shall be numbered in a consecutive series, which shall commence and terminate with the year, a fresh series being commenced at the beginning of each year.

Current indexes and entries therein.

54. In every office in which any of the books hereinbefore mentioned are kept, there shall mbe prepared current indexes of the contents of such books; and every entry in such indexes shall be made, so far as practicable, immediately after the registering officer has copied, or filed a memorandum of, the document to which it relates.

Indexes to be made by registering officers, and their contents.

55. (1) Four such indexes shall be made in all registration offices, and shall be named, respectively, Index No. I, Index No. II, Index No. III, and Index No. IV.

(2) Index No. I shall contain the names and additions of all persons executing and of all persons claiming under every document entered or memorandum filed in Book No. 1.

(3) Index No. II shall contain such particulars mentioned in section 21 relating to every such document and memorandum as the Inspector-General from time to time directs in that behalf.

(4) Index No. III shall contain the names and additions of all persons executing every will and authority entered in Book No. 3, and of the executors and persons respectively appointed thereunder, and after the death of the testator or the donor (but not before) the names and addtions of all persons claiming under the same.

NOTES.

Sec. 52.—Omission on the part of the Sub-Registrar to give particulars as to day, hour and place of registration is a mere irregularity which can be cured under S. 87. 132 I.C. 881=1931 L. 677.

Cl. (1) (a): COMPLIANCE WITH—PERSON PRESENTING A DOCUMENT—WHO IS.—To constitute a presentation under S. 52 (1) (*a*). it is not necessary that the executant should himself or herself personally hand the document to the registering officer; it is immaterial by whom the physical act is performed. Where the document is handed at first by an unauthorised person to the Registrar, who, however, registers it only after the executant admits execution of the deed; there is no invalidity and the requirements of S. 52 (1) (*a*) are sufficiently complied with. 1931 L. 677=132 I.C. 881.

(5) Index No. IV shall contain the names and additions of all persons executing and of all persons claiming under every document entered in Book No. 4.

(6) Each Index shall contain such other particulars, and shall be prepared in such form, as the Inspector-General from time to time directs.

56. [*Repealed by Act XV of* 1929.]

Registering Officers to allow inspection of certain books and Indexes, and to give certified copies of entries.

57. (1) Subject to the previous payment of the fees payable in that behalf, the Books Nos. 1 and 2 and the Indexes relating to Book No. 1 shall be at all times open to inspection by any person applying to inspect the same; and, subject to the provisions of section 62, copies of entries in such books shall be given to all persons applying for such copies.

(2) Subject to the same provisions, copies of entries in Book No. 3, and in the Index relating thereto shall be given to the persons executing the documents to which such entries relate, or to their agents, and after the death of the executants (but not before) to any person applying for such copies.

(3) Subject to the same provisions, copies of entries in Book No. 4, and in the Index relating thereto shall be given to any person executing or claiming under the documents to which such entries respectively refer, or to his agent or representative.

(4) The requisite search under this section for entries in Books Nos. 3 and 4 shall be made only by the registering officer.

(5) All copies given under this section shall be signed and sealed by the registering officer, and shall be admissible for the purpose of proving the contents of the original documents.

(*B*) *As to the Procedure on admitting to Registration.*

Particulars to be endorsed on documents admitted to registration.

58. (1) On every document admitted to registration, other than a copy of a decree or order, or a copy, sent to a registering officer under section 89, there shall be endorsed from time to time the following particulars, namely:—

(*a*) the signature and addition of every person admitting the execution of the document, and, if such execution has been admitted by the representative, assign or agent of any person, the signature and addition of such representative, assign or agent;

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Sec. 56.—S. 56 which has been repealed by Act XV of 1929 ran as follows:—

"Every Sub-Registrar shall send to the Registrar to whom he is subordinate, at such intervals as the Inspector-General from time to time directs, a copy of all entries made by such Sub-Registrar, during the last of such intervals, in Indexes Nos. I, II and III.

Copy of entries in Indexes Nos. I, II and III to be sent by Sub-Registrar to Registrar and filed.

(2) Every Registrar receiving such copy shall file it in his office.

Sec. 57.—A copy of a deed granted under sub-S. (5) is admissible in evidence. 36 I.C. 673=3 O.L.J. 482; but only subject to the provisions of S. 65 of the Evidence Act. 103 I.C. 752.

Sec. 57 (5): CONSTRUCTION.—S. 57 only shows that, when secondary evidence has in any way been introduced as by proof of the loss of the original document, a copy certified by the Registrar shall be admissible for the purpose of proving the contents of the original, that is, it shall be admitted without other proof than the Registrar's certificate of the correctness of the copy and shall be taken as a true copy. But that does not make such a copy a document which may be given in evidence without other evidence to introduce it. 1929 R. 277. Under S. 57 (5) a copy is admissible to prove the contents of the original and the registrar's endorsements appearing in the copy is a relevant fact under S. 35 of the Evidence Act as regards presentation and admission of execution. 1940 N.L.J. 437=1940 Nag. 382.

Sec. 58.—Since the section does not enjoin the registering officer to endorse an admission of execution, such an endorsement, even if present, is not evidence of an admission of execution. 1924 L. 389. An

(*b*) the signature and addition of every person examined in reference to such document under any of the provisions of this Act; and

(*c*) any payment of money or delivery of goods made in the presence of the registering officer in reference to the execution of the document and any admission of receipt of consideration, in whole or in part, made in his presence in reference to such execution.

(2) If any person admitting the execution of a document refuses to endorse the same, the registering officer shall nevertheless register it, but shall at the asame time endorse a note of such refusal.

Endorsements to be dated and signed by registering officer.

59. The registering officer shall affix the date and his signature to all endorsements made under sections 52 and 58, relating to the same document and made in his presence on the same day.

Certificate of registration,

60. (1) After such of the provisions of section 34, 35, 58 and 59 as apply to any document presented for registration have been complied with, the registering officer shall endorse thereon a certificate containing the word "registered", together with the number and page of the book in which the document has been copied.

(2) Such certificate shall be signed, sealed and dated by the registering officer, and shall then be admissible for the purpose of proving that the document has been duly registered in manner provided by this Act, and that the facts mentioned in the endorsements referred to in section 59, have occurred as therein mentioned.

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endorsement of payment under sub-S. (1) (*c*) raises a presumption that money was so paid and onus to disprove it lies on him who questions its truth. 90 I.C. 229=1926 C. 73.

Secs. 58 and 59: ENDORSEMENT OF REGISTRATION ON BACK OF DOCUMENT—IF ATTESTATION UNDER T. P. ACT.—The signatures of the registering officer and of the identifying witnesses affixed to the registration endorsement on the back of a document under Ss. 58 and 59 of the Registration Act, are a sufficient attestation under the T. P. Act, although under S. 59 of the Registration Act, the registering officer is only required to affix his signature to all endorsements made in his presence on the same day, and does not require him to sign in the presence of the executant. 61 C. 523 =38 C.W.N. 753=1934 C. 772.

Secs. 58, 59 and 60: EFFECT OF REGISTRATION.—The facts mentioned in the endorsement of the registering officer may be proved by those endorsements provided the provisions of S. 60 have been complied with. 32 Bom.L.R. 1385=1931 B. 105.

Sec. 60.—The endorsement of a Sub-Registrar, duly made under S. 60, is relevent evidence for proving the execution of the document. 17 L. 686=1936 L. 946. No presumption of due attestation of a document can be made from the registration endorsement. 1939 O.A. 507=1939 Oudh 213=1939 O.W.N. 581. No presumption of correctness attaches under S. 60 to a statement of relationship made in the endorsement of the Sub-Registrar. 41 P.L.R. 376=1939 Lah. 458.

Sec. 60 (2) and Evidence Act (1872), Sec. 67.—If the contention that the Sub-Registrar's endorsement proving admission of execution is sufficient proof of execution is accepted, in a large majority of cases proof of execution such as is contemplated by S. 67 of the Evidence Act would become unnecessary. The effect of the registration endorsement is not to prove execution as is required by S. 67 of the Evidence Act but only to prove an admission made by the executant to the Registrar or Sub-Registrar in solemn circumstances, and the certificate of the Sub-Registrar is admissible not to prove execution of the deed but merely to prove the admission of execution. The effect of the admission is in every case a separate question. 1941 O. W. N. 906= 1941 Oudh 529. But *see* 1941 Lah. 400 *infra*. A Sub-Registrar's endorsement, duly made under S. 60 is relevant evidence for proving the execution of the document. 1941 Lah. 400. The certificate of registration has an evidentiary value attached to it by S. 60 of the Registration Act. But it is made applicable only for the purpose of proving that the document has been duly registered and that the facts mentioned in the endorsements made under Ss. 52 and 58 of the Act has occurred as there mentioned. It proves the admission of execution by the person who purported to execute the document. It may be considered for the purpose of corroboration, but it cannot serve as substantive evidence. Admission of execution though good against executants and their representatives would not be binding on third parties. Mere proof of admission of execution would not satisfy the re-

61. (1) The endorsements and certificate referred to and mentioned in sections 59 and 60 shall thereupon be copied into the margin of the Register-book, and the copy of the map or plan (if any) mentioned in section 21 shall be filed in Book No. 1.

Endorsement and certificate to be copied and document returned.

(2) The registration of the document shall thereupon be deemed complete, and the document shall then be returned to the person who presented the same for registeration, or to such other person (if any) as he has nominated in writing in that behalf on the receipt mentioned in section 52.

62. (1) When a document is presented for registration under section 19, the translation shall be transcribed in the register of documents of the nature of the original, and, together with the copy referred to in section 19, shall be filed in the registration office.

Procedure on presenting document in language unknown to registering officer,

(2) The endorsements and certificate respectively mentioned in sections

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quirements of S. 67 of the Evidence Act which requires that the signature of the executant must be proved to be in his handwriting. 1942 N.L.J. 214. A certificate of registration though *prima facie* evidence that the document has been duly registered according to law is not conclusive evidence of valid registration. 11 R. 207=1933 R. 194. Under S. 60 the certificate signed by the registering officer is evidence of the fact that the payment of money referred to in the endorsement was made as therein mentioned. But the mention in the endorsement of a certain person as mortgagor does not prove the execution of the deed as a mortgage-deed. 157 I.C. 567=1935 O.W.N. 892. Where at the back of a mortgage-deed there is an endorsement of the Sub-Registrar that a certain sum was paid to the mortgagor in his presence, the onus lies on the party disputing its correctness to rebut the endorsement. If no evidence is given on his behalf to prove either that the endorsement is incorrect and no payment was actually made or to show that the money which was paid before the Sub-Registrar was afterwards returned, it must be taken that the sum named was paid to the mortgagor and that consideration to that extent did pass. 13 Luck. 455=1937 O. W.N. 760=1937 Oudh 443. *See also* 1938 P.W.N. 773. Applicability, where provisions of the section have been complied with. 40 A. 434. Registration endorsement is complete proof of matters stated therein. 96 I. C. 401=1926 N. 482. Notwithstanding the certificate of registration, the registration is invalid, if the document has been presented by an unauthorised person. 37 A. 49=42 I. A. 22=28 M.L.J. 577 (P.C.). Even if the endorsement by a Sub-Registrar on a mortgage-deed as regards presentation purports to show an invalid presentation, there is nothing in the Act to prevent a person from showing that the endorsement made by the Sub-Registrar was inaccurate and proving the real facts. 35 C.W.N. 577=1931 P.C. 75 (P.C.). On the section, *see also* 1928 P. 304; 102 I.C. 283. The endorsement of registration no doubt raises a presumption that the executants or their duly accredited agents had appeared before the Registrar. But if a document is executed by several persons and the same is presented for registration by one who had a registered power-of-attorney but the Registrar's endorsement does not state on whose behalf this power-of-attorney was, nor is there a note by the Registrar of the absence of the signature of one of the executants, the omissions are sufficient to rebut the presumption. 35 P.L.R. 316=1934 L. 262. An endorsement by the registering officer, on a sale-deed registered by him, of payment of cash thereunder in his presence by the vendee to the vendor, is not only admissible in evidence under S. 60 but constitutes evidence of the fact of payment of the amount noted as consideration for the deed. The onus of proving the contrary is thereby shifted on to the party who derives payment of consideration. 1935 O. W. N. 11=1935 O. 86.

ACTS DONE BEFORE REGISTERING OFFICER—PRESUMPTION.—Registration is a solemn act to be performed in the presence of a competent official appointed to act as Registrar, whose duty it is to attend to parties during the registration and see that the proper persons are present and are competent to act and are identified to his satisfaction. And all things done before him in his official capacity and verified by his signature will be presumed to be done duly and in order. 4 Luck. 452=1929 O. 193. A certificate as to registration endorsed on a sale-deed by the Registering officer under S. 60 can be looked upon as a relevant piece of evidence for the purpose of proving its execution. 116 I.C. 911 =1929 L. 711.

Secs. 60 and 61: OMISSION OF DEED FROM INDEX DOES NOT INVALIDATE REGISTRATION.—Compliance with the provisions of Ss. 60 and 61 is quite enough for the completion of registration of a deed. Therefore an omission of the particulars pertaining to such deed from the index kept in the registration department does not invalidate the registration as such, but is only a matter of importance for the purposes of notice. 11 O.W.N. 770=1924 O. 283.

59 and 60 shall be made on the original, and, for the purpose of making the copies and memoranda required by sections 57, 64, 65 and 66 the translation shall be treated as if it were the original.

Power to administer oaths and record note to substance of statements.

63. (1) Every registering officer may, at his discretion, administer an oath to any person examined by him under the provisions of this Act.

(2) Every such officer may also at his discretion record a note of the substance of the statement made by each such person, and such statement shall be read over, or (if made in a language with which such person is not acquainted) interpreted to him in a language with which he is acquainted, and if he admits the correctness of such note, it shall be signed by the registering officer.

(3) Every such note so signed shall be admissible for the purpose of proving that the statements therein recorded were made by the persons and under the circumstances therein stated.

(C) Special Duties of Sub-Registrar.

Procedure where document relates to land in several-sub-districts.

64. Every Sub-Registrar on registering a non-testamentary document relating to immovable property not wholly situate in his own sub-district shall make a memorandum thereof and of the endorsement and certificate (if any) thereon, and send the same to every other Sub-Registrar subordinate to the same Registrar as himself in whose sub-district any part of such property is situate, and such Sub-Registrar shall file the memorandum in his Book No. 1.

Procedure where document relates to land in several districts.

65. (1) Every Sub-Registrar on registering a non-testamentary document relating to immovable property situate in more districts than one shall also forward a copy thereof and of the endorsement and certificate (if any) thereon, together with a copy of the map or plan (if any) mentioned in section 21, to the Registrar of every district in which any part of such property is situate, other than the district in which his own sub-district is situate.

(2) The registrar on receiving the same shall file in his own Book No. 1 the copy of the document and the copy of the map or plan (if any) and shall forward a memorandum of the document to each of the Sub-Registrars subordinate to him within whose sub-district any part of such property is situate; and ever Sub-Registrar receiving such memorandum shall file it in his Book No. 1.

(D) Special Duties of Registrar.

Procedure after registration of documents relating to land.

66. (1) On registering any non-testamentary document relating to immovable property the Registrar shall forward a memorandum of such document to each Sub-Registrar subordinate to himself in whose sub-district any part of the property is situate.

(2) The Registrar shall also forward a copy of such document, together with a copy of the map or plan (if any) mentioned in section 21, to every other Registrar in whose district any part of such property is situate.

(3) Such Registrar on receiving any such copy shall file it in his Book No. 1, and shall also send a memorandum of the copy to each of the Sub-Registrars subordinate to him within whose sub-district any part of the property is situate.

(4) Every Sub-Registrar receiving any memorandum under this section shall file it in his Book No. 1.

67. On any document being registered under section 30, sub-section (2), a copy of such document and of the endorsements and certificate thereon shall be forwarded to every Registrar within whose district any part of the property to which the instrument relates is situate, and the Registrar receiving such copy shall follow the procedure prescribed for him in section 66, sub-section (1).

Procedure after registration under section 30, sub-section (2).

(E) Of the controlling Powers of Registrars and Inspector-General.

68. (1) Every Sub-Registrar shall perform the duties of his office under the superintendence and control of the Registrar in whose district the office of such Sub-Registrar is situate.

Power of Registrars to superintend and control Sub-Registrars.

(2) Every Registrar shall have authority to issue (whether on complaint or otherwise) any order consistent with this Act which he considers necessary in respect of any act or omission of any Sub-Registrar subordinate to him or in respect of the rectification of any error regarding the book or the office in which any document has been registered.

69. (1) The Inspector-General shall exercise a general superintendence over all the registration offices in the territories under the Provincial Government, and shall have power from time to time to make rules consistent with this Act—

Power of Inspector-General to superintend registration offices and make rules.

(*a*) providing for the safe custody of books, papers and documents, [1][* * * *];

(*b*) declaring what languages shall be deemed to be commonly used in each district;

(*c*) declaring what territorial divisions shall be recognized under section 21;

(*d*) regulating the amount of fines imposed under sections 25 and 34, respectively;

(*e*) regulating the exercise of the discretion reposed in the registering officer by section 63;

(*f*) regulating the form in which registering officers are to make memoranda of documents;

(*g*) regulating the authentication by Registrars and Sub-Registrars of the books kept in their respective offices under section 51;

(*h*) declaring the particulars to be contained in Indexes Nos. I, II, III and IV, respectively;

(*i*) declaring the holidays that shall be observed in the registration offices; and

(*j*) generally, regulating the proceedings of the Registrars and Sub-Registrars.

LEG. REF.

[1] The words "and also for the destruction of such books, papers and documents as used no longer be kept" were omitted by Act V of 1917.

NOTES.

Sec. 68 (2).—The Registration Act does not give any power to the Sub-Registrar or Registrar to order the production of a document after it has been registered and delivered to the party concerned with a view to examining the stamp-duty thereon and making a reference to the Collector, if necessary, under S. 33. The subsequent production through made in compliance with an illegal demand is not sufficient to bring the case within S. 33. 13 L. 745=1932 L. 495 (F.B.). S. 68 (2) does not confer upon the Registrar the power of cancelling the registration of a document, the execution of which is not denied and which has been already registered by a Sub-Registrar. 1933 L. 786.

(2) The rules so made shall be submitted to the Provincial Government for approval, and after they have been approved, they shall be published in the Official Gazette, and on publication shall have effect as if enacted in this Act.

Power of Inspector-General to remit fines.

70. The Inspector-General may also, in the exercise of his discretion, remit wholly or in part the difference between any fine levied under section 25 or section 34, and the amount of the proper registration fee.

PART XII

OF REFUSAL TO REGISTER.

Reason for refusal to register to be recorded.

71. (1) Every Sub-Registrar refusing to register a document, except on the ground that the property to which it relates is not situate within his sub-district, shall make an order of refusal and record his reasons for such order in his book No. 2 and endorse the words "registration refused" on the document; and, on application made by any person executing or claiming under the document, shall, without payment and unnecessary delay, give him a copy of the reasons so recorded.

(2) No registering officer shall accept for registration a document so endorsed unless and until, under the provisions hereinafter contained, the document is directed to be registered.

Appeal to Registrar from orders of Sug-Registrar refusing registration on ground other than denial of execution.

72. (1) Except where the refusal is made on the ground of denial of execution, an appeal shall lie against an order of a Sub-Registrar refusing to admit a document to registration (whether the registration of such document is compulsory or optional) to the Registrar to whom such Sub-Registrar is subordinate, if presented to such Registrar within thirty days from the date of the order; and the Registrar may reverse or alter such order.

(2) If the order of the Registrar directs the document to be registered and the document is duly presented for registration within thirty days after the making of such order, the Sub-Registrar shall obey the same, and thereupon shall, so far as may be practicable, follow the procedure prescribed in sections 58, 59 and 60; and such registration shall take effect as if the document had been registered when it was first duly presented for registration.

73. (1) When a Sub-Registrar has refused to Register a document on the

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Sec. 72.—Under S. 72 all that the Registrar need do is to reverse or alter the order of the Sub-Registrar without necessarily directing the document to be registered. In other words, it is in the power of the Registrar, if the Sub-Registrar has refused registration on some ground which did not entitle him to do so, to remand the case to him with a direction to continue in accordance with the Registration Act from the stage immediately before that where the Sub-Registrar had acted contrary to that Act. 1940 O.W.N. 600=1940 Oudh 318. The Act makes a distinction between refusal to admit to registration and refusal to accept for registration: *see* 73 I. C. 182. Wilful failure of the executant to appear before the Sub-Registrar amounts to denial of execution. The partners' remedy is only under S. 73: 41 I.C. 57; 88 I.C. 494 =1925 O. 445=29 O.C. 87. A return of the document on the ground of the executant's non-appearance amounts to a refusal to register though the order be not actually written thereon. 23 I.C. 23=26 M.L.J. 397. A suit to compel registration lies where a document was not registered owing to non-appearance of executants in time. 47 B. 290=16 I.C. 614; 34 A. 165; or owing to presentation out of time. 54 I.C. 562= 24 C.W.N. 304. Appeal under this section is a pre-requisite for a suit under S. 77. 58 C. 681=133 I.C. 591.

Sec. 73.—The section is not complied with when an application under it is described as an appeal and there is no verification. 88 I.C. 149=1925 N. 235. *See contra* 5 L.L.J. 217=1924 L. 28. The words "as aforesaid" in the phrase "or agent authoris-

Application to Registrar where Sub-Registrar refuses to register on ground of denial of execution.

ground that any person by whom it purports to be executed, or his representative or assign, denies its execution, any person claiming under such document, or his representative, assign or agent authorized as aforesaid, may, within thirty days after the making of the order of refusal, apply to the Registrar to whom such Sub-Registrar is subordinate in order to establish his right to have the document registered.

(2) Such application shall be in writing and shall be accompanied by a copy of the reasons recorded under section 71, and the statements in the application shall be verified by the applicant in manner required by law for the verification of plaints.

Procedure of Registrar on such application.

74. In such case, and also where such denial as aforesaid is made before a Registrar in respect of a document presented for registration to him, the Registrar shall, as soon as conveniently may be, enquire—

(*a*) whether the document has been executed;

(*b*) whether the requirements of the law for the time being in force have been complied with on the part of the applicant or person presenting the

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NOTES.

ed as aforesaid" in S. 73 (1) are not mere surplusage, and they can only refer to the special agent mentioned in S. 32 and S. 33 of the Act. An application to the Registrar under S. 73 (1) by a person who is not such an agent does not lie, and the Registrar's order on such an application is, therefore, illegal and invalid. I. L. R. (1938) Lah. 716=40 P.L.R. 718=1938 Lah. 763.

PRESENTATION FOR REGISTRATION.—Where a minor married woman presented before a Sub-Registrar a relinquishment deed executed in her favour for registration and the Sub-Registrar having refused to register it, she executed a power-of-attorney in favour of her husband who preferred an appeal to the Registrar and got the document registered, *held*, that the presentation by the minor claiming under the document sought to be registered was perfectly valid; that the power-of-attorney in favour of the husband was valid in law by virtue of S. 5 of the Powers of Attorney Act (1882), even though his wife was a minor, and that he was competent to present the appeal to the Registrar under S. 73 (1). 142 I.C. 646= 64 M.L.J. 449. On an application under S. 73 being dismissed for default, the Registrar can restore the matter and re-hear the case. 41 I.C. 57; 34 A. 253=13 I.C. 531 =9 A.L.J. 188. "Making of order"—Meaning—Limitation—Starting point. *See* 31 L.W. 487=1930 M. 490.

Sec. 74.—The provisions of S. 74 are mandatory, and the Registrar has no jurisdiction to refer the matter to the Sub-Registrar. Consequently, any order passed by a Sub-Registrar on such reference ordering prosecution is illegal. 10 P.L.T. 889=1929 P. 500. The enquiry is a summary one. The result of a criminal trial under S. 83 may be considered by the Registrar in an enquiry under S. 74: 46 I.C. 878. A special Registrar acting under the rules has also power to record statements of witnesses. 20 I.C. 661=18 C.W.N. 605. Failure to pay penalty ordered by registering officer is non-compliance with the requirements of law within S. 74: 94 I.C. 251=1926 L. 451.

Sec. 75.—If in proceedings under S. 73, the counsel for the executant states that his client has no objection to registration, but only he does not concede the validity of the document, it is an implied admission of execution and the District Registrar has jurisdiction to order registration. 139 I.C. 61= 1932 O. 178. A deed of gift can be registered by the donee after donor's death even without consent of the legal representatives of the deceased. 40 M. 204=31 M. L. J. 690. The Registrar acts merely as if he were a Civil Court and no revision lies from his order to the High Court under S. 115, C.P. Code. 51 M. 245=54 M.L.J. 595 (1). Where a Court finds that a sale-deed registered under this section is forged, no question of burden of proof arises. 28 I.C. 138. Where a decree directs registration, limitation is 30 days from date of decree. 1 P. 146=1922 P. 408. The registering officer has no jurisdiction to register a document presented after the lapse of 30 days from the date of the order passed by the Registrar under S. 75 (1). It is wholly immaterial when the order made by the Registrar was known by or made known to the party concerned. The Registrar has no power under the Act to extend the time for presentation of a document. The registration of a document presented after the statutory period cannot, therefore, but be void. 42 C.W.N. 1174.

document for registration, as the case may be, so as to entitle the document to registration.

Order by Registrar to register and procedure thereon.

75. (1) If the Registrar finds that the document has been executed and that the said requirements have been complied with, he shall order the document to be registered.

(2) If the document is duly presented for registration within thirty days after the making of such order, the registering officer shall obey the same and thereupon shall, so far as may be practicable, follow the procedure prescribed in sections 58, 59 and 60.

(3) Such registration shall take effect as if the document had been registered when it was first duly presented for registration.

(4) The Registrar may, for the purpose of any enquiry under section 74, summon and enforce the attendance of witnesses, and compel them to give evidence, as if he were a Civil Court, he may also direct by whom the whole or any part of the costs of any such enquiry shall be paid, and such costs shall be recoverable as if they had been awarded in a suit under the Code of Civil Procedure, 1908.

Order of refusal by Registrar.

76. (1) Every Registrar refusing—

(*a*) to register a document except on the ground that the property to which it relates is not situate within his district or that the document ought to be registered in the office of a Sub-Registrar, or

(*b*) to direct the registration of a document under section 72 or section 75,

shall make an order of refusal and record the reasons for such order in his Book No. 2, and, on application made by any person executing or claiming under the document, shall, without unnecessary delay, give him a copy of the reasons so recorded.

(2) No appeal lies from any order by a Registrar under this section or section 72.

Suit in case of order of refusal by Registrar.

77. (1) Where the Registrar refuses to order the document to be registered, under section 72 or section 76, any person claiming under such document, or his representative, assign or agent, may, within thirty days after the making of the order of refusal, institute in the Civil Court, within the local limits of whose original jurisdiction is situate the office in which the document is sought to be registered, a suit for a decree directing the document to be registered in such office if it be duly presented for registration within thirty days after the passing of such decree.

NOTES.

Sec. 75 (2): PRESENTATION UNDER—IF CAN TAKE THE PLACE OF PRESENTATION UNDER S. 34.—A presentation of documents under S. 75 (2) does not take the place of a presentation under S. 34. The procedure to be followed after presentation under S. 75 (2) is different from the procedure to be followed after a presentation under S. 34 and this might make a vital difference in a particular case. 181 I.C. 747=1938 Lah. 255.

Sec. 75 (4): CONSTRUCTION—ORDER OF REGISTRAR AWARDING COSTS.—Sub-S. (4) of S. 75 expressly empowers a Registrar to send his order for costs for execution exactly as if they had been awarded in a suit, and the method of their recovery is to be in accordance with the Code of Civil Procedure, *i.e.*, under O. 21. A Civil Court receiving such an order for execution cannot refuse execution on the ground that it has no power to execute it. 45 L.W. 540=1937 Mad. 585=(1937) 1 M.L.J. 635.

Sec. 76.—Section covers all orders refusing registration. 48 M.L.J. 221. An order of refusal under this section gives a fresh starting point and a fresh cause of action. 19 M.L.T. 397=34 I.C. 769.

Sec. 77: CIRCUMSTANCES FOR CONSIDERATION.—In a suit under S. 77 all that is required to be shown by the plaintiff is as to whether the document was executed by the alleged executant, and whether the requirements of law as to presentation for regis-

(2) The provisions contained in sub-sections (2) and (3) of section 75 shall, *mutatis mutandis*, apply to all documents presented for registration in accordance with any such decree, and, notwithstanding anything contained in this Act, the document shall be receivable in evidence in such suit.

NOTES.

tration in due time to the proper officer and in the manner generally prescribed by the Act had been complied with by the person presenting the document for registration. Where a document is alleged to have been executed by a pardanashin lady, the question whether the document was executed under circumstances which would make it operative as against a pardanashin lady is alien to the enquiry under S. 77: 139 I.C. 234=55 C.L.J. 107=1932 C. 588. S. 77 controls S. 34. *See* 1933 M.W.N. 1373. It is settled law that in a suit under S. 77 all that is required to be shown by the plaintiff is whether the document was executed or not (or also in some cases whether certain requirements of the law as to presentation for registration have been complied with). In such a suit, the Court is concerned not with the validity but with the genuineness of the document sought to be registered, that is, whether the document has been executed by the person by whom it is alleged to have been executed. 1938 Rang.L.R. 102=1938 Rang. 176. In interpreting an order of a Registrar one should not merely look to the form but should look to its substance as well. *See* 179 I.C. 708=1939 Rang. 50. A suit for compulsory registration of a deed is liable to be dismissed if its execution is not proved. The fact that the alleged executant did not appear before the registration officers does not amount to an admission on his part in regard to the execution of the document. 39 P.L.R. (J. & K.) 45. No suit for compulsory registration under S. 77 can be based on a *tampered document*. 56 C.L.J. 413. Before a plaintiff can institute a suit under this section, he must have followed the other provisions of this Act to get the document registered. 44 I. C. 361; 27 C.L.J. 538=73 I.C. 182. So when the Sub-Registrar's refusal has not been appealed against to the Registrar, the suit is not maintainable. 102 P.R. 1917; 43 I.C. 294; 4 R. 500=99 I.C. 998. *See also* 134 I.C. 481; 58 C. 681=133 I.C. 591 (appeal under S. 72 is pre-requisite of a suit under S. 77); 134 I.C. 482 (where order of refusal is not made, suit will be premature). Registration is an act of the Registrar of an administrative character and any error committed by him may be regarded as an error of procedure covered by S. 87. The registration of a deed is not necessarily invalid by reason of a failure on the part of the registering officer to comply with the provisions of the Act. There is a clear distinction between a defect in procedure that is the fault of the registering officer for which the person presenting the document is in no way responsible, and a mistake made by such a person in complying with the statutory provisions of the Act. The requirements of the Act must be followed by the person presenting the document. 116 I.C. 317=1929 L. 409. Where on a reference under S. 34 (4), the Registrar refused registration, but there was no note of the Sub-Registrar's refusal, the party need not apply to the Registrar again, but can file a suit. 1925 M. 619=48 M.L.J. 221. *See also* 1942 Pesh. 37. Dismissal of an application for registration for absence of parties, amounts to refusal of registratiin entitling the applicant to sue. 54 I.C. 570. So also return of documents for drawing a new deed, or for clearing certain ambiguous passages. 41 P.R. 1917=41 I.C. 76. So also refusal to accept for registration as being time-barred. 40 M. 759=40 I.C. 192=33 M.L.J. 51. *See also* 1939 Rang. 50; 1939 Bom. 254=41 Bom. L. R. 470. Where the order of Sub-Registrar states that he could neither register nor refuse to register because the executant died and none of his representatives were forthcoming, it amounts to a refusal. 8 L. 208=1927 L. 395. Right of suit under S. 77 not affected by failure of Sub-Registrar to secure attendance of executants. 16 Pat. 660=1938 Pat. 136. Plaintiff claiming to be the ostensible owner is not a representative of the alleged benamidar; and so he cannot present the sale-deed for registration, and a suit under S. 77 could not be maintained by him. 58 C. 681=133 I.C. 591. As regards refusal to register on account of insufficient description of property, *see* 49 B. 40=84 I.C. 416. In a suit the Court has only to consider the genuineness and not the validity of the document. 60 I.C. 869=19 A.L.J. 224; 25 I.C. 778; 62 I.C. 789=2 L. 202. *See also* 23 I.C. 10; 31 I.C. 867=11 N. L.R. 177; 89 I.C. 57=1925 C. 1257; 164 I.C. 315. No admission of execution is necessary to a decree for registration but consenting to a decree may amount to admission of execution. 63 I.C. 785. Where registration of a document is effected pursuant to an *ex parte* decree in a suit under S. 77, but the *ex parte* decree is later on set aside, the registration effected under the decree is *ipso facto* cancelled even without an application by the contesting party to have the original registration cancelled. And if within 30 days of that order, the document be not presented for registration it becomes inoperative. 141 I.C. 384=1933 Pesh. 24. As regards parties to the suit, *see* 89 I.C. 57=1925 C. 1257; 31 I.C. 867 =11 N.L.R. 177. For a suit under the section, valuation for purposes of jurisdiction is that fixed by the plaintiff. 53 C. 1023=30 C.W.N. 951=1926 C. 1091.

PART XIII.

OF THE FEES FOR REGISTRATION, SEARCHES AND COPIES.

Fees to be fixed by Provincial Government.

78. [1][* * * *] The Provincial Government shall prepare a table of fees payable—

(*a*) for the registration of documents;

(*b*) for searching the registers:

(*c*) for making or granting copies of reasons, entries or documents, before, on or after registration;

and extra or additional fees payable—

(*d*) for every registration under section 30;

(*e*) for the issue of commissions;

(*f*) for filing translations;

(*g*) for attending at private residences;

(*h*) for the safe custody and return of documents; and

(*i*) for such other matters as appear to the Provincial Government necessary to effect the purposes of this Act.

LEG. REF.

[1] The words "Subject to the approval of the Governor-General in Council" were omitted by Act XXXVIII of 1920.

NOTES.

SUIT FOR SPECIFIC PERFORMANCE—MAINTAINABILITY.—S. 77 does not provide the exclusive relief to a plaintiff who has paid consideration and earnest money to the defendant who has promised the transfer to him of the immovable property. The mere failure of a suit under that section or its infructuous termination cannot operate as *res judicata* in a suit brought for the specific performance of the original contract and for recovery of possession of the immovable property. 54 A. 68=136 I.C. 561. *See also* 1935 Pesh. 12.

SUIT UNDER S. 77—OTHER CLAIMS—JOINDER OF.—No other claim can be coupled with the prayer to enforce registration of a document under S. 77: 56 C. L. J. 413. Suit under—Decree by trial Court — Appellate Court ordering that plaintiff was not entitled to registration but entitled to return of consideration—Effect of order—Second appeal —*Held*, that the decision was merely a decision on a question of law, and the High Court was, therefore, entitled to interfere in second appeal. 164 I.C. 315.

LIMITATION.—A suit within 30 days from the date of dismissal of a review petition on a prior order refusing to register, is in time. 17 C.W.N. 585=18 I.C. 450; 40 M. 759 =33 M.L.J. 51; 141 I.C. 384=1933 Pesh. 24. *See also* 1942 Pesh. 37. When the 30th day is a holiday the suit can be filed on the next reopening day. 14 I.C. 173=16 C.W.N. 721. The period of limitation starts from the date of communication of order of refusal to register. 12 I.C. 33= 16 C.W.N. 20; 41 P.R. 1917=41 I.C. 76. *Cf.* 38 M. 291=20 I.C. 914. Where an order of refusal to register is passed in the presence of the parties immediately after enquiry by the Registrar, so that the person concerned knows that his request has been refused, then time should be calculated from the date of the order. But if the order was not so pronounced and the person concerned does not know that his request has been refused, then time should be calculated only from the date when the order was communicated to the party. 59 M.L.J. 585. Per *Venkatasubba Rao, J.*—There can be no valid order unless it is made after notice to parties affected by it or it is communicated to them in the absence of such notice. 53 M. 491=1930 M. 490=59 M.L.J. 585. A suit is competent under S. 77, where the Registrar has made an order under S. 25, which in effect is a refusal to excuse delay in presentation for sufficient cause, called in the Act "urgent necessity" or "unavoidable accident." 53 B. 644=31 Bom.L.R. 676; 1929 B. 365. The rejection of an application on the ground that it is time barred is as much an order of refusal as a refusal to register on the merits. 53 M. 491=1930 M. 490=59 M.L.J. 585. Time provided under this section for a suit cannot be extended under S. 14, Limitation Act. 24 C. W.N. 4=30 C.L.J. 455 (F.B.); *also* 54 I.C. 228=24 C.W.N. 29; 89 I.C. 884 (1) =1926 N. 126. Appellate Court can stay registration decreed by lower Court. 1925 M. 401 (1)=47 M.L.J. 735. A suit for specific performance is not maintainable if remedy by suit under section is time-barred. 50 M.L.J. 674=49 M. 302=1926 M. 530. But *see* 95 I.C. 187 (P.). Independently of S. 77 of the Act, a suit to compel the registration of a document does not lie. 95 I.C. 187=1926 P. 89. Only parties to the deed can be made parties in a registration suit and a third person is not entitled to challenge the decision in such suit in a collateral proceeding. 116 I.C. 317=1929 L. 409. Registration of a document was refused on 3-11-1928, the suit under S. 77 was filed on 1-12-1928. The defendant who was a lunatic on the date of suit died on 15-12-1928 and his heirs were substituted on

79. A table of the fees so payable shall be published in the Official Gazette, and a copy thereof in English and the vernacular language of the district shall be exposed to public view in every registration office.

Publication of fees.

80. All fees for the registration of documents under this Act shall be payable on the presentation of such documents.

Fees payable on presentation.

PART XIV.

OF PENALTIES.

81. Every registering officer appointed under this Act and every person employed in his office for the purposes of this Act, who being charged with the endorsing, copying, translating or registering of any document presented or deposited under its provisions, endorses, copies, translates or registers such document in a manner which he knows or believes to be incorrect, intending thereby to cause or knowing it to be likely that he may thereby cause, injury as defined in the Indian Penal Code, to any person, shall be punishable with imprisonment for a term which may extend to seven years, or with fine, or with both.

Penalty for incorrectly endorsing, copying, translating or registering documents with intent to injure.

82. Whoever—

Penalty for making false statements, delivering false copies or translations, false personation, and abetment.

(*a*) intentionally makes any false statement, whether on oath or not, and whether it has been recorded or not, before any officer acting in execution of this Act, in any proceeding or enquiry under this Act; or

(*b*) intentionally delivers to a registering officer, in any proceeding under section 19 or section 21, a false copy or translation of a document, or a false copy of a map or plan; or

(*c*) falsely personates another, and in such assumed character presents any document, or makes any admission or statement, or causes any summons or commission, to be issued, or does any other act in any proceeding or enquiry under this Act; or

(*d*) abets anything made punishable by this Act;

18-1-1929. *Held*, the suit was not barred by limitation; it cannot be said that there was no legally instituted suit on 1-12-1928, simply because no guardian *ad litem* was appointed; nor can it be said that the suit was instituted only on the date of substitution of the heirs of the original defendant. 38 C.W.N. 900=1934 C. 833.

Sec. 82.—Fraudulent or dishonest intention is not a necessary ingredient for an offence under S. 82: 23 Cr.L.J. 303=1922 N. 86. Conviction based on a comparison of a thumb impression on the document with that taken in Court is not legal. 1 P. 242 =23 Cr.L.J. 638. But *see* 6 P. 305=104 I.C. 626 (2)=28 Cr.L.J. 850 (2).

Sec. 82 (c): APPLICABILITY—ASSUMING NAME OF NON-EXISTENT PERSON—IF OFFENCE.—The wording of S. 82 (*c*), Registration Act, is "whoever falsely personates another" which is quite different from "whoever falsely assumes a fictitious name." To constitute an offence under S. 82 (*c*), the accused should have personated another person. Merely assuming the name of a person not in existence is not an offence under the section. (Cr. Appeal No. 1930 of 1922 and 4 M.H.C.R. 18. Foll.) 42 L.W. 662=1935 M. 913. As to sentence in case of a harmless lie, *see* 1936 Cal. 418.

Sec. 82 (d).—Where a person assists another in wrongful personation before the registration officer, he is guilty of an offence under S. 82 (*d*). 143 I.C. 15=1933 C. 481.

Secs. 82 and 83: SANCTION FOR PROSECUTION—IF CONDITION PRECEDENT.—Permission of the authorities mentioned in S. 83 is necessary before an accused can be prosecuted under S. 82. A prosecution without sanction is illegal and not merely an irregularity which can be cured. A sanction obtained after committal to sessions and before the hearing commences in the Sessions Court is of no avail and does not validate the trial. Nor is the defect one curable by S. 537 of the Criminal Procedure Code. 1934 A.L.J. 965=1934 A. 963 (F.B.).

shall be punishable with imprisonment for a term which may extend to seven years, or with fine, or with both.

Registering officer may commence prosecutions.

83. (1) A prosecution for any offence under this Act coming to the knowledge of a registering officer in his official capacity may be commenced by or with the permission of the Inspector-General [1][* * *] the Registrar or the Sub-Registrar, in whose territories, district or sub-district, as the case may be, the offence has been committed.

(2) Offences punishable under this Act shall be triable by any Court or officer exercising powers not less than those of a Magistrate of the second class.

Registering officers to be deemed public servants.

84. (1) Every registering officer appointed under this Act shall be deemed to be a public servant within the meaning of the Indian Penal Code.

(2) Every person shall be legally bound to furnish information to such registering officer when required by him to do so.

(3) In section 228 of the Indian Penal Code, the words "judicial proceeding" shall be deemed to include any proceeding under this Act.

PART XV.

MISCELLANEOUS.

Destruction of unclaimed documents.

85. Documents (other than wills) remaining unclaimed in any registration office for a period exceeding two years may be destroyed.

Registering officer not liable for thing *bona fide* done or refused in his official capacity.

86. No registering officer shall be liable to any suit, claim or demand by reason of anything in good faith done or refused in his official capacity.

Nothing so done invalidated by defect in appointment or procedure.

87. Nothing done in good faith pursuant to this Act or any Act hereby repealed, by any registering officer, shall be deemed invalid merely by reason of any defect in his appointment or procedure.

LEG. REF.

[1] Words "the Branch Inspector-General of Sindh" omitted by A.O., 1937.

NOTES.

Sec. 83.—There can be no trial under this section without permission from the officer referred to in S. 83: 22 Cr.L.J. 750 =64 I.C. 142; 38 A. 354. *See also* 4 R. 437=99 I.C. 401=1927 R. 61, overruling 1 R. 229. S. 83 of the Registration Act is not prohibitory either in terms or in intention. On the contrary it is an enabling section and provides that a prosecution for any offence which comes to the knowledge of a registering officer in his official capacity may be commenced by or with the permission of specified registration officers. The section has no application whatever to cases in which offences are committed under the Act, but those offences do not come to the knwledge of the registering officer. I.L.R. (1937) Bom. 359=39 Bom.L.R. 85=1937 Bom. 191. The first two lines in S. 83 (1) of the Registration Act clearly shows that the section applies only to prosecutions for offences under the Registration Act which have come to the knowledge of the Registering Officer in his official capacity as Registering Officer. Where an offence has not come to the knowledge of such an officer before a complaint in respect of it was made to a Court on the information of a Revenue Officer, no question of obtaining permission from the officer of the Registration Department arises. 1939 A.M.L.J. 132. On this point, *see also* 40 M.L.J. 211; 40 M. 880; 39 A. 293; 87 I.C. 913=26 Cr.L.J. 1025. Where Registrar refuses to sanction prosecution, High Court cannot interfere. The remedy of the aggrieved party is by a petition to the Board of Revenue. 23 Cr.L.J. 415=1923 P. 155.

Sec. 87.—The operation of S. 87, does not extend to those cases in which an application for registration is made out of time. 178 I.C. 505=1939 Pat. *See also* 1940 Oudh 318. Where there is nothing on the record to show that an official has not been duly appointed, the presumption would be that he has been duly appointed by the Registrar. Even if all the necessary qualifications to give power to the Registrar were not fulfilled, still S. 87 would cover any defect in such appointment. 1935 L. 301. Where the facts of a case do not show a defect of procedure, but on the contrary they disclose a want of jurisdic-

88. (1) Notwithstanding anything herein contained, it shall not be necessary for any officer of Government, or for the Administrator-General of Bengal, Madras or Bombay, or for any Official Trustee or Official Assignee, or for the Sheriff, Receiver or Registrar of a High Court, to appear in person or by agent at any registration office in any proceeding connected with the registration of any instrument executed by him in his official capacity, or to sign as provided in section 58.

Registration of documents executed by Government officers or certain public functionaries.

(2) Where any instrument is so executed, the registering officer to whom such instrument is presented for registration may, if he thinks fit, refer to any Secretary to Government or to such officer of Government, Administrator-General, Official Trustee, Official Assignee, Sheriff, Receiver or Registrar, as the case may be, for information respecting the same, and, on being satisfied of the execution thereof, shall register the instrument.

89. (1) Every officer granting a loan under the Land Improvement Loans

NOTES.

tion in the registering officer, S. 87 does not apply. 35 O.W.N. 354=1931 P.C. 52=60 M.L.J. 441 (P.C.). Where a registering officer acts with due care but takes a mistaken view of the law, the mistake must be treated as a defect in his procedure, to which the provisions of S. 87 apply. 27 N.L.R. 116=134 I.C. 286=1931 N. 159. In seeking to apply S. 87 it is important to distinguish between defects in the procedure of the Registrar and lack of jurisdiction. Where the Registrar has no jurisdiction to register, as where person, not entitled to do so, presents for registration, or where there is lack of territorial jurisdiction or where the presentation is out of time, S. 87 is inoperative. On the other hand, if the Registrar having jurisdiction has made a mistake in the exercise of it, S. 87 takes effect. Where, therefore, a document not duly stamped is admitted for registration, the mistake is an error in procedure and is cured by S. 87; 56 I.A. 379=7 R. 624=1929 P.C. 279 (P.C.), 1935 L. 416. Where a document is presented for registration after four months from date of execution, and the delay is not accounted for, the Registrar has no jurisdiction to register it, and the mere fact that he registers such document does not take the document out of the ambit of S. 49. *Presentation at the wrong time stands on the same footing as a presentation by the wrong person,* and in either event, the defect is not a mere defect in procedure on the part of the Registrar so as to bring into play the provision of S. 87. In either case the Registrar has no jurisdiction to register. 11 R. 207 =1933 R. 194. A registration by a Registrar in good faith, though having an interest in the property registered, is valid. 42 A. 609=47 I.A. 224=39 M.L.J. 263 (P.C.). As regards curing of defects in procedure; *see* 47 A. 294=84 I.C. 786. Where a document is presented to the Sub-Registrar for registration after the expiry of four months from the date of the execution, under S. 23, the Sub-Registrar has no jurisdiction to entertain the application or to register the document, and the defect cannot be cured by S. 87: 11 R. 15=141 I.C. 705. A Court cannot take cognizance of any irregularity in registration of a document when it appears to be duly stamped and registered. 36 B. 564=14 I.C. 353. Registration of a mortgage bond written on wrong stamp is not rendered invalid. 5 R. 666. An improper registration could not affect the validity of a document. 29 C. L.J. 305=51 I.C. 88=23 C.W.N. 534. Fraud on registrar is equivalent to non-registration. 50 I.C. 220=21 O.C. 341. A conveyance dealt with several plots of land, some of which were described to be within the local limits of the jurisdiction of the Sub-Registrar and the others within the local limits of the Sadar Sub-Registrar, both of whom were subordinate to same Registrar. The office of the Sub-Registrar was amalgamated with that of the Registrar and the conveyance was registered with the Registrar and the Registrar did not state that he was acting as Registrar pursuant to discretion under S. 30. It was found subsequently that the plots of land described to be within the local limits of the jurisdiction of the Sub-Registrar had no existence. *Held*, that, having regard to S. 87, the fact that the Registrar did not state that he was acting as Registrar pursuant to discretion under S. 30 did not make the registration invalid and ineffective. 58 C. 133=133 I.C. 110. Omission by Sub-Registrar to give the particulars (as to date, hour and place) mentioned in S. 52, is one which can be cured under this section. 132 I.C. 881=1931 L. 677. The registration of a document presented by some of the representatives of an executant who is dead at the time of the presentation of the document is good registration. Even assuming the procedure adopted is defective, such a defect is curable by S. 87; 58 C. 876=1932 C. 110. *See also* 1940 Oudh 318.

Sec. 89.—The failure of the Collector to

Copies of certain orders, certificates and instruments to be sent to registering officers and filed.

Act, 1883, shall send a copy of his order to the registering officer within the local limits of whose jurisdiction the whole or any part of the land to be improved or of the land to be granted as collateral security, is situate, and such registering officer shall file the copy in his Book No. 1.

(2) Every Court granting a certificate of sale of immovable property under the Code of Civil Procedure, 1908, shall send a copy of such certificate to the registering officer within the local limits of whose jurisdiction the whole or any part of the immovable property comprised in such certificate is situate, and such officer shall file the copy in his Book No. 1.

(3) Every officer granting a loan under the Agriculturists' Loans Act, 1884, shall send a copy of any instrument whereby immovable property is mortgaged for the purpose of securing the repayment of the loan, and if any such property is mortgaged for the same purpose in the order granting the loan, a copy also of that order, to the registering officer within the local limits of whose jurisdiction the whole or any part of the property so mortgaged is situate, and such registering officer shall file the copy or copies, as the case may be, in his Book No. 1.

(4) Every Revenue-officer granting a certificate of sale to the purchaser of immovable property sold by public auction shall send a copy of the certificate to the registering officer within the local limits of whose jurisdiction the whole or any part of the property comprised in the certificate is situate, and such officer shall file the copy in his Book No. 1.

Exemptions from Act.

Exemption of certain documents executed by or in favour of Government.

90. (1) Nothing contained in this Act or in the Indian Registration Act, 1877, or in the Indian Registration Act, 1871, or in any Act thereby repealed; shall be deemed to require, or to have at any time required, the registration of any of the following documents or maps, namely:—

(*a*) documents issued, received or attested by any officer engaged in making a settlement or revision of settlement of land-revenue, and which form part of the records of such settlement; or

(*b*) documents and maps issued, received or authenticated by any officer engaged on behalf of Government in making or revising the survey of any land, and which form part of the record of such survey; or

(*c*) documents which, under any law for the time being in force, are filed periodically in any revenue-office by patwaris or other officers charged with the preparation of village-records; or

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NOTES.

send a copy of the order to the Sub-Registrar for registration as required by S. 89 of the Registration Act cannot affect the operation of S. 7 of the Land Improvement Loans Act. The Registration Act itself provides no penalty for non-compliance with the provisions of S. 89. There is also no provision in the Land Improvement Loans Act which requires that a copy of the order sanctioning the loan should be sent to the Sub-Registrar. 182 I.C. 635=41 Bom.L. P.L.R. 770=1936 L. 26.

Sec. 90.—*Rajinama* notices under the Revenue Code need no registration. 45 B. 898; 41 B. 170. A lease by Government needs no registration. 43 M. 65=37 M.L. J. 332; 9 O.L.J. 629=1923 O. 114; 6 P. 446=104 I.C. 209. Where the wording of the leases clearly and definitely refers to the use and occupation of each of the buildings, they must be taken as leases of immovable property falling under S. 17 (i) (*d*), but not exempt under S. 90 (i) (*d*) as grants or assignments of an interest in land. 38 R. 257=1939 Bom. 183.

(*d*) sanads, inam title-deeds and other documents purporting to be or to evidence grants or assignments by Government of land or of any interest in land; or

(*e*) notices given under section 74 or section 76 of the Bombay Land Revenue Code, 1879 of relinquishment of occupancy by occupants or of alienated land by holders of such land.

(2) All such documents and maps shall, for the purposes of sections 48 and 49, be deemed to have been and to be registered in accordance with the provisions of this Act.

Inspection and copies of such documents.

91. Subject to such rules and the previous payment of such fees as the Provincial Government prescribes in this behalf, all documents and maps mentioned in section 90, clauses (*a*), (*b*), (*c*) and (*e*), and all registers of the documents mentioned in clause (*d*), shall be open to the inspection of any person applying to inspect the same, and, subject as aforesaid, copies of such document shall be given to all persons applying for such copies.

[1][* * * *]

93. [*Repeals.*] *Repealed by Act I of* 1938, *Sec. 2, and Sch.*

THE REGISTRATION OF FOREIGNERS ACT (XVI OF 1939).

[*8th April,* 1939.

An Act to provide for the registration of foreigners in British India.

WHEREAS it is expedient to provide for the registration of foreigners entering, being present in, and departing from, British India;

It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE REGISTRATION OF FOREIGNERS ACT, 1939.

(2) It extends to the whole of British India.

Definitions.

2. In this Act—

(*a*) the word "foreigner" shall denote a person who is not—

(i) a British subject domiciled in the United Kingdom; or

(ii) a British Indian subject; or

(iii) a ruler or subject of an Indian State; or

(iv) a person duly appointed by a foreign Government to exercise diplomatic functions; or

(v) a consul or a vice-consul;

(*b*) "prescribed" means prescribed by rules made under this Act.

Power to make rules.

3. The Central Government may, after previous publication, by notification in the Official Gazette, make rules with respect to foreigners for any or all of the following purposes, that is to say—

(*a*) for requiring any foreigner entering, or being present in, British

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LEG. REF.

[1] S. 92 Omitted by A.O., 1937.

[2] The Schedule repealed by Act I of 1938, S. 2 and Sch.

India to report his presence to a prescribed authority within such time and in such manner and with such particulars as may be prescribed;

(*b*) for requiring any foreigner moving from one place to another place in British India to report, on arrival at such other place, his presence to a prescribed authority within such time and in such manner and with such particulars as may be prescribed;

(*c*) for requiring any foreigner who is about to leave British India to report the date of his intended departure and such other particulars as may be prescribed to such authority and within such period before departure as may be prescribed;

(*d*) for requiring any foreigner entering, being present in, or departing from, British India to produce, on demand by a prescribed authority, such proof of his identity as may be prescribed;

(*e*) for requiring any person having the management of any hotel, boarding-house, sarai or any other premises of like nature to report the name of any foreigner residing therein for whatever duration, to a prescribed authority within such time and in such manner and with such particulars as may be prescribed;

(*f*) for requiring any person having the management or control of any vessel or aircraft to furnish to a prescribed authority such information as may be prescribed regarding any foreigner entering, or intending to depart from, British India in such vessel or aircraft, and to furnish to such authority such assistance as may be necessary or prescribed for giving effect to this Act;

(*g*) for providing for such other incidental or supplementary matters as may appear to the Central Government necessary or expedient for giving effect to this Act.

Burden of proof.

4. If any question arises with reference to this Act or any rule made thereunder, whether any person is or is not a foreigner, or is or is not a foreigner of a particular class or description, the onus of proving that such person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, shall, notwithstanding anything contained in the Indian Evidence Act, 1872, lie upon such person.

Penalties.

5. Any person who contravenes, or attempts to contravene, or fails to comply with, any provision of any rule made under this Act shall be punished, if a foreigner, with imprisonment for a term which may extend to one year or with fine which may extend to one thousand rupees or with both, or if not a foreigner, with fine which may extend to five hundred rupees.

Power to exempt from application of Act.

6. The Central Government may, by order, declare that any or all of the provisions of the rules made under this Act shall not apply, or shall apply only with such modifications or subject to such conditions as may be specified in the said order, to or in relation to any individual foreigner or any class or description of foreigner:

Provided that a copy of every such order shall be placed on the table of both Houses of Central Legislature as soon as may be after its promulgation.

Protection to persons acting under this Act.

7. No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act.

8. The provisions of this Act shall be in addition to, and not in derogation of, the provisions of the Foreigners Act, 1864 and any other law for the time being in force.

Application of other laws not barred.

THE RELIGIOUS ENDOWMENTS ACT (XX OF 1863).[1]

PREFATORY NOTE.—The Religious Endowments of the country in the early part of the 19th century were under the direct charge and superintendence of the Board of Revenue. But owing to missionary agitation in England and from the Government's consistent and old fixed policy of non-connection with the religious or the religious endowments of the Indians, the endowments were restored to their former trustees by the middle of the 19th century. The Religious Endowments Act is the result of the decision of the Government to divest its officers of all direct superintendence and control of religious and charitable institutions in India, transferring their functions to managers or managing committees, and merely making provision for intervention by the Civil Courts on application made by any person interested in the institution. This policy, however, did not long remain unchallenged, and since 1866 there have been constant complaints, especially in the Madras Presidency, as to the inefficacy of the Act to prevent the squandering or misappropriation of the funds of such endowments. The Dharma Rakshana Sabah of Madras is a Society formed with the object of facilitating the working of this Act and prevent abuse. (*See* Mr. Ganapathi Iyer's book on Religious Endowments; *see also* for Madras, the Madras Hindu Religious Endowments Act.)

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LEG. REF.

1 Short title "Religious Endowments Act, 1863". *See* the Indian Short Titles Act (XIV of 1897).

For the Statement of Objects and Reasons of the Bill which became Act XX of 1863, see *Calcutta Gazette*, 1862, p. 573, and for Proceedings in Council relating to the Bill, see *ibid.*, Supplement, p. 28; and *ibid.*, 1863, p. 105.

The Act has been extended to Kanara by Bombay Act VII of 1865, which was specially passed for that purpose. *See* Bom.Code.

Year.	No.	Short title.	Extent of repeal.
1863	XX	Religious Endowments Act ..	Rep. in part VII of 1870; XIV of 1870; XVI of 1874; X of 1914, Repealed (Locally) as to Hindu Religious Endowments by Madras Act II of 1927. Amended Act XII of 1891; XXI of 1925; Government of India (Adaptation of Laws) Order, 1937.

[10*th March*, 1863.

An Act to enable the Government to divest itself of the management of religious Endowments.

Preamble.

WHEREAS it is expedient to relieve the Boards of Revenue, and the Local Agents, in the Presidency of Fort William in Bengal, and the Presidency of Fort Saint George, from the duties imposed on them by Regulation XIX 1810, of the Bengal Code (*for the due appropriation of the rents and produce of lands granted for the support of Mosques, Hindu Temples, Colleges and other purposes; for the maintenance and repair of Bridges, Sarais, Kattras and other public buildings; and for the custody and disposal of Nazul Property or Escheats*), and Regulation VII, 1817, of the Madras Code (*for the due appropriation of the rents and produce of lands granted for the support of Mosques, Hindu Temples and Colleges or other public purposes; for the maintenance and repair of Bridges, Choultries, or Chattrams, and other public buildings; and for the custody and disposal of Escheats*), so far as those duties embrace the superintendence of lands granted for the support of Mosques or Hindu Temples and for other religious uses; the appropriation of endowments made for the maintenance of such religious establishments; the repair and preservation of buildings connected therewith, and the appointment of trustees or managers thereof; or involve any connection with the management of such religious establishments; [1][* *] It is enacted as follows:—

1. [Repeal of parts of Bengal Regulation XIX of 1810 and Madras Regulation VII of 1817:]

LEG. REF.

[1] The words and figures "and whereas it is expedient for that purpose to repeal so much of Regulation XIX, 1810, of the Bengal Code, and Regulation VII, 1817 of the Madras Code, as relate to endowments for the support of Mosques, Hindu Temples or other religious purposes," were repealed by the Repealing Act, 1874 (XVI of 1874).

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Sec. 1.—The religious Endowments Act does not apply to an endowment which is not a public one. 195 I.C. 313=22 P.L.T. 699=1941 Pat. 260. The Religious Endowments of 1863 applies not only to those endowments which were in existence at the time that Act was passed and had been taken control of by the Board of Revenue under Regulation XIX of 1810, but also to later institutions which come within its purview. 18 Pat. 417=20 Pat.L.T. 863=1940 Pat. 9. A dedication of a small plot of land to an idol is valid if made orally, and writing and registration are unnecessary 26 N.L.R. 60 =1924 N. 254. *See also* 3 P. 842. Public temple—Test of. 29 C.W.N. 112=19 L.W. 253=1924 P.C. 44 (P.C.). Facts and circumstances, in order to be accepted as sufficient proof of dedication of a temple as a public temple, must be considered in their historical setting; and dedication to the public is not to be readily inferred when it is known that the temple property was acquired by grant to an individual or family. Such an inference if made from the fact of user by the public is hazardous, since it would not in general be consonant with Hindu sentiments or practice that worshippers should be turned away; and as worship generally implies offerings of some kind it is not to be expected that the managers of a private tem-

Repealed by the Repealing Act XIV of 1870.

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ple should in all circumstances desire to discourage popularity. The value of public user as evidence of dedication depends on the circumstances which give strength to the inference that the user was as of right. Where the general effect of the evidence was that a particular family have treated the temple as family property, dividing the various forms of profit whether offerings or rents, closiug it so as to exclude the public from worship when marriage or other ceremonies required the attendance of the members of the family at its original home, and erecting *Samadhs* to the honour of its dead, it was held that it was not enough, in such a case, to deprive the family of their private property, to show that Hindus willing to worship had never been turned away or even that the deity had acquired considerable popularity among Hindus of the locality or among persons resorting to the annual *mela*. 67 I.A. 1=15 Luck. 1=44 C. W. N. 294= =1940 P.C. 7=(1940) 1 M.L.J. 1 (P.C.). *See also* 1936 Lah. 344; 1938 Mad. 209. A public temple is *res extra commercium*, and it is not open to a private individual to acquire by prescription any private ownership in regard thereto. The character of a temple as a public temple cannot be taken away by any assertion of private rights, especially when there is no evidence that the public have ever been excluded therefrom. 1940 Mad. 208=(1939) 2 M.L.J. 867. *See also* 1938 Mad. 209; 1936 Lah. 744; 1941 Pat. 354=1941 P.W.N. 75=22 Pat.L.T. 239. There is no legal presumption that all property acquired by individual members of a religious fraternity belongs to the religious institution to which they are attached. Ascetics and religious institutions exhibit great diversity of character and *Udasis* in particular conform to no single type. In any case to presume that a particular *Udasi* shrine followed a certain practice because on account of all religious institutions throughout the province the practice was found to obtain in a majority of the cases is a course of reasoning unwarranted by principle or authority. 1941 A.L.J. 610=43 Bom.L.R. 998=1941 O.W.N. 970=1941 P.C. 56 (P.C.). The case of dedication is not made out merely by evidence of neighbourly or considerate conduct towards a religious institution or by showing that small profits have not been churlishly exacted by the proprietor from persons held in general esteem. 1941 P.C. 56 (P.C.); 1941 Pat. 601. The fact that a light is kept eternally burning in a building will not by itself be sufficient to convert the building into a public temple. 38 P.L.R. 289=164 I.C. 313=1936 L. 744. Where succession is proved to have always been from *guru* to *chela*, the institution must be held to be *wakf*. 38 P.L.R. 1052=164 I.C. 432. Public temple—Legal position of —Shebait—Powers of. 47 M. 337=51 I.A. 83=46 M.L.J. 546 (P.C.). Public trust —Inam—Devadayam — Meaning of—Inam register—Entries in—Value of. 46 M.L.J. 245. Succession—Chela—Right to succeed. 80 I.C. 496=1924 L. 170; 18 N.L.J. 120. Temple—Right of trusteeship—Usage. 19 L.W. 221=1924 M. 400 (2). *See also* 1935 M. 483. An ascetic who builds a temple with subscriptions collected from the public for the use of the public or the people of this locality, would not be the owner of the temple. He would only be the trustee of the temple. 14 Mys.L.J. 380=41 Mys.H.C. R. 299. Trustee—Lease for 21 years—Option to renew at enhanced rates of rent—Legality of the transaction. 19 L.W. 587=46 M.L.J. 407. Mahant—Powers of alienation—Duty of alienee—Sradh of deceased Mahant—If necessity. 5 Pat.L.T. 339=76 I.C. 68. There is no rule that, unless a person belongs to a particular (caste), he should not perform worship within a temple. Even Sudras may be pujaris. 29 C.W. N. 112=19 L.W. 253=1924 P.C. 44. With regard to hereditary offices, whether religious or secular, partition can be had of such property by means of the performance of the duties of the office and enjoyment of the emoluments by the different coparceners in rotation. 47 B. 529. A temporary division of lands forming the emoluments of a religious office among the joint trustees is not *per se* objectionable, especially if it tends to convenient management. 42 M.L.J. 272= 1922 M. 8. Properties dedicated to the office of Granthi of the darbar sahib are inherited by the person who succeeds to the office. But properties acquired by the Granthi descend to his natural heirs. 59 I.C. 734=1 L. 540. Where a deed of endowment prescribes a time, of succession for its management and also gives a power to alter it, the law is that if the power is given to two persons by name, the power can be exercised by both or not at all. But if power is given to two persons not by name, but as office holders, the power can be exercised even by the survivor of the two. In cases where power is given to two persons by name coupled with their description of their office, then, in order to decide whether the power can be exercised by the survivor, the Court has to gather the intention from the terms of the deed, whether the power was given as *persona designata* or has holders of the office and the rule set forth above, has then to be applied. I.L. R. (1940) All. 235=1940 A.L.J. 193=1940 All. 252. Mutwallishiip of Mosque—Succession to—Right of females for possession claiming through females. 68 M.L.J. 684. The law and custom of gosavis of maths is that chela who has been declared unfit or *nalayak* by his guru is debarred from all interest and cut off from the guru family; there is nothing to prevent a guru from severing the spiritual connection between himself and an unfit chela. And when the

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presiding *Mahant* of a math declares a chela unfit, the latter is excluded from the family and is not entitled to claim heirship at all in any event; he is not merely postponed to a fitter chela as the immediate heir. 39 Bom.L.R. 867=1938 Bom. 23. The mere fact that in the revenue papers the *Mahant* is named as owner of the revenue-paying land does not amount to anything. The usual entry in the revene papers is in the *Mahant's* name. 146 I.C. 432=38 P.L.R. 1052=1937 Lah. 14.

Although muth property may not vest in the *Mahant* as owner it is he that has the right to its possession. The property is attached to the office of *mahant* and none but the *mahant* has the right to hold the property. The property passes with the office. There is no distinction between the property and the office of the endowment. The one is attached to the other. Where the office of *mahant* devolves by succession, the successor not only succeeds to the office of *mahant*, but, by virtue of such office, he acquires the right to possession of the *muth* property. Although the position of a *mahant* is that of a manager, it does not follow that the *mahant* has no higher right than a mere manager. He has large powers over the property of the *muth* akin to those of an owner in trust. He has some interest in the *muth* property which on his death devolves by inheritance on his successor. 1941 P.W.N. 755. Mahant—Succession to office of—Chela — Qualifications — Kanka ceremony — When to be performed. 18 N.L.J. 120. Mahanth—Powers of alienation—Permanent lease, power to grant. *See* 17 Pat. 594=1938 Pat. 613; 41 Bom.L.R. 1317; 18 Mys. L. 429; 1936 Cal. 256=64 C.L.J. 65; 63 Cal. 1054; 63 C.L.J. 22 (mortgage). Recovery of endowment property improperly alienated by shebait—Procedure. *See* 1938 Pat. 394. Where the testator dedicated the house in the first instance in the name and honour of his family deity and provided that his Vamsathar were to live in the house and arranged for the performance of various festivals and charities, *held*, the provisions did not offend the rule against perpetuities and that more than one object of bounty in themeslves could not go to defeat the trust, so long as they did not conflict with each other; further; the persons who were entitled to be trustees or managers of the trust were sufficiently indicated; they had to be in the line of the founder's heirs and willing to take up the duties imposed by the trust. 8 Mys.L.J. 351. An alienation of a religious office, such as that of an archakaship of a temple, is not invalid when it is made in favour of one in the line of the alienor's heirs, and when it is neither for consideration, nor in any way opposed to or inconsistent with the interests of the institution. The right of delegation has been expressly recognised in the case of archakas by permitting the system of proxies. Consequently, a devise by will of the archakaship to the testator's sister's son who is not in any way personally unfit or disqualified from performing the duties of the office, is valid. 1935 M. 220=68 M.L.J. 295. *See also* 55 L. W. 303=(1942) 1 M.L.J. 564. Management—Village temple — Villagers allowing archakas to manage property of temple for some years—If lose right of management. See 1941 Mad. 312=(1940) 1 M.L.J. 935. *See also* (1939) 2 M.L.J. 867=1940 Mad. 208. As to alienation of hereditary archaka right, *see* 40 L.W. 799=67 M.L.J. 759. A trustee cannot delegate his trusteeship to a stranger. But that principle does not apply to case where all the trustees of a religious endowment, fifty in number, in order to facilitate management, authorise a Committee of five of the trustees to look after the management of the temple. Such a delegation of the power of management is not invalid; and a suit by such a Committee on behalf of the endowment is maintainable, even if the other trustees are not impleaded, especially when the plaintiffs have obtained permission to sue on behalf of all the trustees. 40 L.W. 540=1934 M. 672. An agreement by a mahant of an Udasi institution under which he hands over the management of a strictly Udasi institution, to a committee, the majority of which are Sikhs belonging to a different sect, is null and void and not enforceable. 41 P.L.R. 777=1939 Lah. 239. A transfer of the office of trustee of a temple for a monetary consideration is opposed to public policy and cannot be recognised as being in accordance with law. 1938 Mad. 713=(1938) 1 M.L.J. 517. Trustee — Duty of — Temple committee directing trustee to perform temple festival at fixed amount—Trustee notifying that amount inadequate—Festival conducted on grand scale and at expense exceeding sanctioned amount—If guilty of breach of trust—Trustee submitting accounts immediately—Committee acquiescing and making no complaint—Right to sue for recvery of excess amount spent by trustee. 46 L.W. 782=1937 M. 970=(1937) 2 M.L.J. 660. An alienation or relinquishment of the office of trustee of a religious endowment in favour of a person who is not the next heir would be invalid as contravening the intention of the founder if there is a deed which says that the office should be enjoyed by a trustee and his heirs. An alienation of the office of trustee, in order to be valid, must be in favour of the immediate heir. An alienation or release or relinquishment of an office of trustee not for value in favour of the next or immediate heir would be valid; otherwise, it is invalid, even though the person in whose favour it is alienated or released or relinquished is in the line of heirs, *e.g.*, a brother. 53 L.W. 290=1941 Mad. 552=(1941) 1 M. L.J. 510. Temple—Archaka miras right—Removal of idol from principal shrine to

2. In this Act [1]* * * * * *.

"Civil Court" and "Court".

the words "Civil Court" and "Court" shall [1][save as provided in section 10] mean the principal Court of original civil jurisdiction in the district in which [2][or any other Court empowered in that behalf by the Provincial Government] within the local limits of the jurisdiction of which the mosque, temple or religious establishment is situate, relating to which or to the endowment whereof, any suit shall be instituted or application made under the provisions of this Act.

LEG. REF.

[1] The words "words importing the singular number shall include the plural, and words importing the plural number shall include the singular;

words importing the masculine gender shall include females";
were omittd by Act X of 1914, Sch. II. The words "save as provided by s. 10" were inserted by Act XXI of 1925. *See* 37 M.L.J. 162.

[2] Inserted by Act XXI of 1925.

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new shrine—Right of old archakas to mirasi rights in new shrine. 1935 M. 220=68 M.L.J. 295. Respective rights of temple archakas and kavalgars in offering made to temple. *See* 1937 M.W.N. 975. *Obiter*—A person without legal right, but in actual possession of a math or any other endowment is entitled to maintain a suit for recovery of possession appertaining to it, not for his own benefit, but for the benefit, of the mutt or endowment. [19 C. 776 1927 C. 130, Not foll. 12 P. 351 and 57 A. 159 (P.C.) Rel. on.] 1935 C. 623. A Civil Court has no authority and is not entitled to disqualify a mahant or remove him from his position because of his bad behaviour, but the Civil Court is entitled to oust a mahant who has been declared disqualified by authority. 173 I.C. 113=39 Bom.L.R. 867=1938 Bom. 23. Religious procession. Right to conduct—Nature and limits of such right. In India there is a right to conduct a religious procession with its 'appropriate observances' through a public street provided it does not interfere with the right of the public to use such street. A civil suit for its enforcement against those who interfere with the exercise of the right is maintainable. It is necessarily a question of fact in each case to what constitutes an "appropriate observance" in this connection. I.L.R. (1939) All. 237=1939 AL.J. 19=1939 All. 280. Right to conduct in public streets and before mosques—Limitations to exercise of such right. The law is well settled that any community can use a public street for processions attended with music, provided that they do not thereby cause a disturbance to any other community when assembled for prayer or worship. Where a decree entitled the Hindus to take processions through the public streets with music, etc., "except during the hours of public congregational worship in the mosque," it was held, that the exception introduced was a proper one, but that it should have been limited to the neighbourhood of the mosque prescribing a certain radius with the mosque as the centre, within which area there should be no music during the prescribed time. *Held, further,* that though the prohibition of music before a mosque at all times, may be a practical solution of the ever recurrring disputes between the two communities, it is not possible to give a judicial *imprimatur* to such a solution, as it would be inconsistent with the existing state of the law. 47 L.W. 683=1938 Mad. 305=(1938) 2 M.L.J. 165.

Secs. 1 and 3.—A compromise by the manager of the Court of Wards, in whose hands the management of the idol's property is placed, which is not for the benefit of the idol, is bad. 22 P.L.T. 699=1941 Pat. 260. The scheme of the Act in so far as religious institutions in the Madras Presidency are concerned, is that, in all cases where Regulation VII of 1817 applied, or in cases where the appointment of trustee was either made by the Government of Madras or one of its officers, or where the confirmation of such appointment had to be made by Government or by its officers, such powers were transferred to Temple Committees, and that in all other cases, property which was subject to the endowment was transferred to the then legally entitled trustee, and the Board of Revenue had no other control over such property. In order, therefore, to give jurisdiction to Temple Committees over a temple, they must show that the case falls under s. 3. Where it is found that the Board of Revenue in Madras never exercised any control over a religious endowment in the Madras Presidency, nor was the power of appointment of trustee, manager, or superintendent vested in, or exercised by the Government of Madras or by any public officer under the Government of Madras, the Temple Committee appointed under this Act has no right or control over such a religious endowment. The words "public officer" in S. 3 mean public officer under the Government of Madras in so far as religious institutions in the Madras Presidency are concerned, and not a public officer anywhere, even outside British India, or public officer outside the control of the Government of

3. In the case of every mosque, temple or other religious establishment to which the provisions of either of the Regulations specified in [1][the preamble to this Act] are applicable, and nomination of the trustee, manager or superintendent thereof, at the time of the passing of this Act, is vested in, or may be exercised by, the Government or any public officer, or in which the nomination of such trustee, manager or superintendent shall be subject to the confirmation of the Government or any public officer, the Provincial Government shall, as soon as possible after the passing of this Act, make special provision as hereinafter provided.

Government to make special provision respecting mosques, etc.

4. In the case of every such mosque, temple or other religious establishment which, at the time of the passing of this Act, shall be under the management of any trustee, manager or superintendent, whose nomination shall not vest in, nor be exercised by, nor be subject to the confirmation of the Government or any public officer, the Provincial Government shall, as soon as possible after the passing of this Act, transfer to such trustee, manager or superintendent, all the landed or other property which, at the time of the passing of this Act, shall be under the superintendence or in the possession of the Board of Revenue or any local agent, and belonging to such mosque, temple or other religious establishment, except such property as is hereinafter provided;

Transfer to trustees, etc., of trust-property in charge of Revenue Board.

and the powers and responsibilities of the Board of Revenue, and the local agents, in respect to such mosque, temple or other religious establishment, and to all land and other property so transferred, except as regards

Cessation of Board's powers as to such property.

LEG. REF.

[1] These words were substituted for the word and figure "section 1" by the Repealing and Amending Act XII of 1891.

NOTES.

Madras. 30 L.W. 509=57 M.L.J. 448. It is within the power of a mahant to make a compromise creating an interest in the property beyond his own lifetime, where such compromise is for the benefit of the estate. In determining whether a compromise is for the benefit of the estate, the test is whether the compromise was in fact concluded with the object of saving the estate from unnecessary loss. 1934 L. 964. Where there is no deed of endowment or where it is ambiguous, usage is relevant evidence to determine whether the lands and income were after their acquisition endowed for the math or were only burdened with the actual expenses thereof, the surplus being held by the mahant for his own benefit. (53 M. 608, Rel. on.) 15 L. 732 =1934 L. 421. Public officer, meaniug of, *see* 57 M.L.J. 448.

Secs. 3 and 4.—A Temple Committee constituted under the Act can appoint a trustee temporarily. 61 I.C. 783=18 L.W. 153. Endowments under the control of Committee. 40 C. 323=16 I.C. 908=17 C.L.J. 183. Though a temple may be subject to the control and superintendence of a Temple Committee, that fact does not give the Committee any right of supervision over the *Kattalai* which is an independent trust. 16 L.W. 340=1923 M. 209. Section transfers powers of Board of Revenue to the Temple Committee. *See* 1 I.A. 209; 39 M. 700; 21 M. 179; 12 B. 247. Committee must prove that the right of appointing trustee vested in it. 28 I.C. 833=2 L.W. 371. Temple Committee has power to appoint additional trustee: 58 I.C. 566=1915 M.W.N. 280. A private religious endowment by a family can only be converted into secular property, if at all, by the consensus of the whole family; this can only be done with the consent of all the male and female relations of the founder interested in the endowment. 157 I.C. 181=1935 M. 483. A religious institution, such as a temple, may be endowed by a person of any caste, and yet there can be a custom existing in that institution in favour of the opponents of the founder of the temple and against the members of the community or family of the founder, and restricting the entry by the members of his caste into the sanctum of the temple. Such customs do exist and have been judicially recognised. There is nothing unreasonable or obnoxious in such customs. 37 Bom. L. R. 584. Temple—Dewasthanam—Scheme—Construction — Power of trustee "to fine, suspend, reduce or remove servant" —If confers power of summary dismissal. 69 M.L.J. 206.

Secs. 3 and 14.—A Temple Committee has power to frame rule for the guidance of trustee. The rules should not reduce the trustee to the position of a servant of the Committee. 38 I.C. 695=5 L.W. 672. A

acts done and liabilities incurred by the said Board of Revenue or any local agent, previous to such transfer, shall cease and determine.

Procedure in case of dispute as to right of succession to vacted trusteeship.

5. Whenever from any cause a vacancy shall occur in the office of any trustee, manager or superintendent, to whom any property shall have been transferred under the last preceding section, and any dispute shall arise respecting the right of succession to such office, it shall be lawful for any person interested in the mosque, temple or religious establishment to which such property shall belong; or in the performance of the worship or of the service thereof, or the trusts relating thereto, to apply to the Civil Court to appoint a manager of such mosque, temple or other religious establishment, and thereupon such Court may appoint such manager to act until some other person shall by suit have established his right of succession to such office.

Powers of managers appointed by Courts.

The manager so appointed by the Civil Court shall have and shall exercise all the powers which, under this or any other Act, the former trustee, manager or superintendent, in whose place such manager is appointed by the Court, had or could exercise in relation to such mosque, temple or religious establishment, or the property belonging thereto.

Rights, etc., of trustees to whom property is transferred under section 4.

6. The rights, powers and responsibilities of every trustee, manager or superintendent, to whom the land and other property of any mosque, temple or other religious establishment is transferred in the manner prescribed in section 4 of this Act, as well as the conditions of their appointment, election and removal, shall be the same as if this Act had not been passed, except in respect of the liability to be sued under this Act, and except in respect of the authority of the Board of Revenue and local agents, given by the Regulations hereby repealed, over such mosque, temple or religious establishment, and over such trustee, manager or superintendent, which authority is hereby determined and repealed.

Appointment of committees.

All the powers which might be exercised by any Board or local agent for the recovery of the rent of land or other property transferred under the said section 4 of this Act, may, from the date of such transfer, be exercised by any trustee, manager or superintendent to whom such transfer is made.

Constitution and duties of committees.

7. In all cases described in section 3 of this Act the Provincial Government shall once for all [1]appoint one or more committees in every division or district to take the place, and to exercise the powers, of the Board of Revenue and the local agents under the Regulations hereby repealed.

NOTES.

temple of which one of the trustee is a hereditary trustee and the other trustees are appointed by the Committee comes under S. 3 39 M. 700=30 M.L.J. 29.

Sec. 5.—Temporary manager—Court when can appoint. 43 A. 50. S. 5 only applies where there is a vacancy existing at the time the application is made. 1935 A.L.J. 311= 1935 A. 273. A decree under S. 5 of the Act does not bar a suit under S. 92 of the C.P. Code. 63 I.A. 418. The committee cannot dismiss a dharmakartha for not voluntarily rendering accounts for failure to voluntarily furnish security or mere absence from the temple locality. 18 I.C. 58=24 M.L.J. 358. An order passed on an application under S. 5 is not a decree and therefore no appeal lies against such order. 43 A. 55.

Sec. 7: COMMITTEE APPOINTED UNDER—DEATH OF ONE MEMBER PENDING SUIT—SUIT MAY BE CONTINUED BY OTHERS.—A Committee appointed by the Government under S. 7 is not *ipso facto* dissolved on the death

Such committee shall consist of three or more persons, and shall perform all the duties imposed on such Board and local agents, except in respect of any property which is specially provided for under section 21 of this Act.

Qualifications of member of committee.

8. The members of the said committee shall be appointed from among persons professing the religion for the purposes of which the mosque, temple or other religious establishment was founded or is now maintained, and in accordance, so far as can be ascertained, with the general wishes of those who are interested in the maintenance of such mosque, temple or other religious establishment.

The appointment of the committee shall be notified in the Official Gazette.

In order to ascertain the general wishes of such persons in respect of such

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LEG. REF.

1 For Committees appointed in—
(1) Ajmer-Merwara, *see* Aj. R.&O., Vol. I.
(2) Madras, see Mad.R.&O., Vol. I.

NOTES.

of one of its members pending the suit, and the suit can be continued by the surviving members of the Committee. 61 C. 80=38 C. W.N. 214.

COMMITTEE—POWERS OF.—Under the Act of 1863, the Committee appointed under S. 7 was to have the same powers that the Board of Revenue had under Regulation XIX of 1810, the powers being of supervision and control. The power to suspend or remove a mutwalli for just cause, which was properly incident to the principal duties ad responsibilities of the Board of Revenue under Regulation XIX of 1810 was impliedly given to the Committee. The trustee, manager or superintendent of the religious establishment appointed by the Committee, has no possession strictly so called. The property is vested in the Committee, and the manager is only an agent or servant of the Committee. The Committee can always under the law take over such custody or management from the manager, provided they act in the interest of the institution. (1) The powers of the Committee appointed under Act XX of 1863 are not the powers exercisable under the general Mahomedan Law in the matter of appointment of mutwallis and not the powers exercised by the creator of the endowment itself, but the power vested in the Ruling power, the power exercised by the Board of Revenue under Regulation XIX of 1810 and the powers conferred upon the Committee under the Act of 1863. The mutwalli appointed under the Regulation has no power to appoint his successors and that was the scheme followed by the Board of Revenue in supersession of the general rule of Mahomedan Law. The Committee has the power vested in them under the law to decide the duration of tenure of a mutwalli and the conditions of service, and regard being had to the past history of the institution their decision to appiont a mutwalli for a term and subject to good behaviour is *bona fide* and in the interests of the institution. (2) The position of a mutwalli appointed by the Committee is that of a servant of the Committee; he has no freehold in his office. He is not a mutwalli under the endowment or under the general Mahomedan Law. (3) The onus would be on the defendant to show that his dismissal was actuated by improper motives. 61 C. 80=38 C.W.N. 214=1934 C. 328. A Committee constituted under Act XX of 1863 have all the powers which the Revenue Board had under Regulation VII of 1817, and in general terms their powers can be described as powers of superintendence. 1937 M. 327=46 L.W. 695=(1937) 2 M.L.J. 477. It may take all steps which may seem to them reasonably necessary for the due preservation of the properties of the temple and the only limitation to be imposed upon their powers is that they should not unnecessarily interfere with anything that may be described as the existing management. The management of the temple is *prima facie* in the dharmakarthas and the Committee ought not to exercise their powers arbitrarily nor reduce them to the position of servants nor interfere with the internal affairs of the temple. (1937) 2 M.L.J. 477. The Committee has also power to appoint overseers to be in joint possession and cuctody of temple jewels and other movables of the temple along with the trustees and may also appoint additional trustees without bringing any chargee against the existing trustees. (1937) 2 M.L.J. 477. A trustee of a kattalai or a minor endowment can be removed only by the Court and in a properly instituted suit. 150 I.C. 156 =39 L.W. 513=1934 M. 381.

Secs. 7 and 12.—The powers of a Committee are not suspended by the occurrence of a vacancy among its members. 39 M. 700 =30 M.L.J. 29. The Committee under S. 7 is a corporation having a legal entity and is similar in all respects to every other corporation. If one member is dead, the survivors can act until another is appointed. 1 Pat.L.J. 437=38 I.C. 13. *See also* 61 C. 80 =38 C.W. N. 214=1934 C. 328. Originally subject to the Committee of one taluk—Lands assigned to another taluk in revenue redistribution — Former Committee to have jurisdiction. 39 M. 949=31 M.L.J. 360.

Ascertaining wishes of persons interested.

appointment, the Provincial Government may cause an election to be held, under such [1]rules (not inconsistent with the provisions of this Act) as shall be framed by such Provincial Government.

Tenure of office.

9. Every member of a committee appointed as above shall hold his office for life, unless removed for misconduct or unfitness;

Removal.

and no such member shall be removed except by an order of the Civil Court as hereinafter provided.

Vacancies to be filled.

10. Whenever any vacancy shall occur among the members of a committee appointed as above, a new member shall be elected to fill the vacancy by the persons interested as above provided.

Procedure.

The remaining members of the committee shall, as soon as possible give public notice of such vacancy, and shall fix a day, which shall not be later than three months from the date of such vacancy, for an election of a new member by the persons interested as above provided, under [2]rules for elections which shall be framed by the Provincial Government;

and whoever shall be then elected, under the said rules, shall be a member of the committee to fill such vacancy.

When Court may fill vacancy.

If any vacancy as aforesaid shall not be filled up by such election as aforesaid within three months after it has occurred, the Civil Court, on the application of any person whatever, may appoint a person to fill the vacancy or may order that the vacancy be forthwith filled up by the remaining members of the committee, with which order it shall then be the duty of such remaining members to comply; and, if this order be not complied with, the Civil Court may appoint a member to fill the said vacancy.

[1][*Explanation.*—In this section "Civil Court" means the principal Court of original civil jurisdiction in the district in which the mosques, temples or religious establishments for which the committee has been appointed or any of them are situate.]

LEG. REF.

[1] For rules made under S. 8 for Madras, see Mad. R.&O., Vol. I.

[2] For rules under S. 10 for the U.P., *see* U.P. List of R. & O., Vol. I.

NOTES.

Secs. 8 and 9.—If a District Judge appoints, against the clear intention of the Act under S. 8, an improper and unfit person by reason of his religious qualifications or moral conduct, such person could be removed by procedings equivalent to proceedings by *Quo warranto in England.* 29 M.L.J. 671. On this section, *see also* 40 M. 793 (P.C.), under s. 10

Sec. 10.—Where on the occurrence of a vacancy in a Temple Committee the remaining members of the Committee have failed to fill it by holding an election as provided by S. 10 and they have been ordered to fill up the vacancy forthwith, they must themselves make the appointment. The Civil Court has no power, after expiration of the said three months, to direct the remaining members of the Committee to fill up the vacancy by election or to validate the appointment of the person so elected. If the Court does so, the order is without jurisdiction and is open to revision by the High Court. 40 M. 793=44 I.A. 261=33 M.L.J. 69 (P.C.). (On appeal from 38 M. 594). Where "the remaining members" of a committee are ordered by the District Court to fill up a vacancy in the Committee under S. 10 it is not necessary for all of them to be unanimous in their selection of a candidate. The duty of filling up the vacancy is conferred upon them as a body; and therefore the ordinary rule that the opinion of the majority suffices would prevail. The very wording of S. 10 shows that the remaining

11. No member of a committee appointed under this Act shall be capable of being, or shall act, also as a trustee, manager or superintendent of the mosque, temple or other religious establishment for the management of which such committee shall have been appointed.

No member of committee to be also trustee, etc., of mosque, etc.

12. Immediately on the appointment of a committee as above provided for the superintendence of any such mosque, temple or religious establishment, and for the management of its affairs, the Board of Revenue, or the local agents acting under the authority of the said Board, shall transfer to such committee all landed or other property which at the time of appointment shall be under the superintendence, or in the possession of the said Board or local agents, and belonging to the said religious establishment, except as is hereinafter provided for,

On appointment of committee, Board and local agents to transfer property.

and thereupon the powers and responsibilities of the Board and the local agents, in respect to such mosque, temple or religious establishment and to all land and other property so transferred, except as above, and except as regards acts done and liabilities incurred by the said Board or agents previous to such transfer, shall cease and determine.

Termination of powers and responsibilities of Board and agents.

LEG. REF.

[1] This explanation was inserted by Act XXI of 1925.

NOTES.

members are not the Committee, they are a select body given statutory powers under the section to fill up the existing vacancy. The nature of that body is very similar to that of a corporation with one sole object and power. Their power is an alterative to exercise his powers to fill the vacancy, the power and once the District Judge fails other provision in S. 10 operates, under which the remaining members of the Committee are empowered to fill the vacancy. They are not specified persons but such members of the Committee as are still alive. An appointment of a member by the majority only is a valid appointment, and cannot be set aside by the District Judge. Having referred the matter to the surviving members, he cannot express dissatisfaction with their choice and attempt to override their decision and avoid it. 1937 Mad. 597= (1938) 1 M.L.J. 386. Neither R. 94 of the Madras Civil Rules of Practice nor S. 41, C. P.C., has application to proceedings under S. 10 by the District-Court for the appointment of a Committee member. 29 M.L.J. 671. Committee of management—Death of one member—Suit to compel others to get pursuance thereof—Setting aside of. *See* the seat filled up—Decree and election in 92 I.C. 902.

REVIEW.—There being no explicit provision in the Act for a review, a District Judge has no power to review an order passed by him under S. 10; nor has he any inherent power to do so. 37 M.L.J. 162 (40 C. 552; 33 M. 65; 22 C. 419, Rel.).

Sec. 11.—The members of a Temple Committee are not trustees; but if they usurp the trustee's functions, they become liable as trustees *de son tort* for all acts of breach of trust. 23 M.L.J. 278. If a managing committee appointed by Court in respect of a debutter estate executes repairs without any reference to the Court, it would be open to the Court to overlook the fact that sanction for incurring the costs had not been previously asked for, and the Court may properly sanction the payment of costs which had been actually incurred on being satisfied that the repairs done were really necessary. 43 C.W.N. 435.

Sec. 12.—There is no warrant for holding that the Madras Hindu Devasthanam Committee can only appoint trustees for life. The committee has an unfettered discretion, subject to the special conditions of a particular endowment to make an appointment for a term of years. If it considers that it is better in the interests of a particular trust that an appointment for life should not be made, the committee has in the absence of some overriding factor, the right of making the appointment for a term of years. So far as Madras is concerned, it must be held that a trustee is not a servant of the committee. I.L.R. 1941 Mad. 942=1941 Mad. 546=(1941) 2 M.L.J. 35 (F.B.). A trustee is not a mere servant of the Devasthanam Committee which appoint him; nor is he liable to be dismissed at the committee's will and pleasure. A trustee can only be dismissed on good and sufficient grounds and after an enquiry into the fact; a dismissed which is ot soo so justiled may be set aside by the Courts of law. *See* 52 L.W. 185= 1940 Mad. 823=(1940) 2 M.L.J. 5; 1939 Mad. 346=(1939) 1 M.L.J. 9.

Commencement of powers of committee.

All the powers which might be exercised by any Board or local agent for the recovery of the rent of land or other property transferred under this section may from the date of such transfer be exercised by such committee to whom such transfer is made.

Duty of trustee, etc., as to accounts;

13. It shall be the duty of every trustee, manager and superintendent of a mosque, temple or religious establishment to which the provisions of this Act shall apply to keep regular accounts of his receipts and disbursements in respect of the endowments and expenses of such mosque, temple or other religious establishment;

and of committee.

and it shall be the duty of every committee of management, appointed or acting under the authority of this Act, to require from every trustee, manager and superintendent of such mosque, temple or other religious establishment, the production of such regular accounts of such receipts and disbursements at least once in every year; and every such committee of management shall themselves keep such accounts thereof.

NOTES.

Secs. 12 and 13.—A Devasthanam Committee has no power to interfere with the acts of the temple trustee in a question of purely temporal honours to definite persons. An archaka of a temple is bound to obey the orders of the trustee and not those of the Committee in those matters. 54 I.C. 281= 10 L.W. 616.

Secs. 13 and 14.—*Held*, (1) that under S. 13 of the Act it is the duty of the trustees to keep accounts of receipts and disbursements and it is the duty of the committee to require production of the accounts at least once a year. Only if his conduct amounts to misfeasance, breach of trust or neglect of duty as mentioned in S. 14 of the Act could the Civil Court be empowered to dismiss the trustee. The Committee could not have greater powers than the Court has in regard to the matter. The trustee is not a clerk or a servant of the Committee to be dealt with in any way at their pleasure. The acts complained of by the committee would not amount to neglect of duty, if the acts of neglect are not of the same seriousness as misfeasance or breach of trust. The committee could not without jurisdiction dismiss the trustee from office; (2) that without proper enquiry into the matter, that is, without charges being framed and opportunity for explanation being given the trustee to meet the charges, the dismissal would be invalid; (3) notice of the meeting at which enquiry will have to take place should set out the subjects of enquiry in the agenda; (4) it is irregular and opposed to natural justice to dismiss the trustee without the necessary requirements of an enquiry; (5) the trustee though appointed *interim*, has what might be called a freehold in his possession, where his appointment is up to the event of a permanent holder of the office being found; and until that event occur he is entitled to hold office of a trustee; (6) where the dismissal of the *interim* trustee was irregular and invalid, it would follow that the committee has no power to appoint any fresh person in his place. 184 I.C. 378= 1939 Mad. 346=(1939) 1 M.L.J. 9; *see also* (1941) 1 M.L.J. 35.

Sec. 14.—S. 14 applies where the object is to protect the endowment against misfeasance, breach of trust or neglect of duty. The Act applies to all trusts whether established prior to 1863 or after. 4 P. 741=88 I.C. 1035=1925 P. 544. The provisions of S. 14 are not applicable to temples for the maintenance of which no endowment has been made. 137 I.C. 42=1932 O. 152 (F.B.) In a suit under section 14 the Court has not to pass any order against a person who is alleged to have intruded into management without authority, but the only question to be considered is whether a person in whom property has vested should be removed for misfeasance or malfeasance, etc. A suit under the section can lie only against those persons in whom the property has been vested or to whom certain funds are confided. No suit can lie against a person who is a mere trespasser. I.L.R. (1938) Bom. 362=40 Bom.L.R. 365=1938 Bom. 311. The words "appointed under this Act" in S. 14 only refer to the committee and not to the trustee, manager or superintendent. 38 C. W.N. 1056=1934 C. 741. But *see* 1935 A. 273 *infra*. The words "appointed under this Act XX of 1863 apply not only to the members of the Committee" but also to the words "trustee, manager or superintendent." 1935 A.L.J. 311=1935 A. 273. Suit under S. 14 is a representative suit. 1928 M. 614 (41 M. 237, Foll.); 7 Pat.L.T. 4. Suit for declaration of the invalidity of a resolution of a Committee would lie in a Civil Court. 91 I.C. 352=1926 C. 583. In a

14. Any person or persons interested in any mosque, temple or religious establishment, or in the performance of the worship or of the service thereof, or the trusts relating thereto, may, without joining as plaintiff any of the other persons interested therein, sue before the Civil Court the trustee, manager or superintendent of such mosque, temple or religious establishment or the member of any committee appointed under this Act, for any misfeasance, breach of trust or neglect of duty, committed by such trustee, manager, superintendent or member of such committee, in respect of the trusts vested in, or confided to them respectively;

Persons interested may singly sue in case of breach of trust, etc.

and the Civil Court may direct the specific performance of any act by such trustee, manager, superintendent or member of a committee,

Powers of Civil Court.

and may decree damages and costs against such trustee, manager, superintendent or member of a committee,

and may also direct the removal of such trustee, manager, superintendent or member of a committee.

NOTES.

suit for removal of a trustee under S. 14, the only question for the Court to decide is, if the trustee has been guilty of any misfeasance, breach of trust or neglect of duty. 89 I.C. 429. Lease by mutwalli—Suit by worshipper to declare invalidity of, is not within the section. 49 I.C. 355=23 C.W. N. 115. *See also* 52 M.L.J. 541. Position of mutwalli discussed. 58 C.L.J. 356 =150 I.C. 124=1934 C. 348. A suit was brought under S. 14 against the sole surviving member of a Committee appointed under S. 3 for his removal for neglect of duty. *Held,* that the relief claimed was purely personal, and the cause of action did not survive against his heir on his death pending the litigation. 40 C. 323=16 I.C. 908=17 C.L.J. 183. The words in S. 14 "any mosque" must necessarily mean not only mosques which were in existence in 1863 but mosques which are now in existence. 124 I.C. 710 (2)=1930 A. 577 (1). Where lands are granted for a service to be performed, *viz.*, the upkeep of a mosque and its buildings and the performance of religious services therein the grantee or his descendants need not strictly account for the disposal of the income of the lands so long as the services are performed properly. 42 M.L.J. 272=1922 M. 8. Misfeasance and breach of trust—Error of judgment not sufficient—Alleged division of funds of endowment—Proof of detriment to funds of endowment necessary. *See* 58 C.L.J. 356=1934 C. 348. Where the sajjadanashin chooses not to produce his full accounts, unless the failure is explained away, he would be removed from his office. 1934 P. 443.

Secs. 14 and 15.—A Temple Committee has the power of suspending or dismissing a temple trustee for sufficient cause, but the power must be exercised at a meeting of the members of the Committee duly convened. 41 M. 357=33 M.L.J. 660. Reliefs that can be given under this section: *see* 48 A. 158=24 A.L.J. 21=1926 A. 308. Duty of Court in a suit for removal of trustee: *see* 1926 L. 16.

APPEAL.—Appeal from order refusing leave to sue—No appeal lies. 1925 P. 138.

Secs. 14 and 18.—All that is necessary in order to attract the provisions of S. 14 and S. 18 of the Act of 1863 is to show that the endowment is of a nature that the superintendence of it could vest in the Board of Revenue under Regulation XIX of 1810 if it were in force. As the preamble of that Regulation stated that when endowments had been granted in land by an individual for the support of a Hindu temple, such endowments were to be considered as for public purposes to which the Regulation would be applicable, the Act of 1863 would equally be applicable to them. 11 P. 594=1932 P. 177. Where an office of the mutawalli of a wakf falls vacant, the District Judge is entitled under proper circumstances to make an appointment to fill the vacancy but he has no general power to remove a mutawalli in miscellaneous proceedings on an application by one of the beneficiaries, his power in this respect being limited and defined by Ss. 18 and 14, Religious Endowments Act, 1863 and S. 92, C.P. Code; nor has he power in sueh proceedings to require the mutawali of a private endorsement to render account. 19 Pat.L. T. 934=1938 Pat. 5v7. The worts *"any mosque, Trustee or religious endowment"* in S. 14 mean a mosque, temple or religious endowment to which the provisions of Regulation XIX of 1810, would have applied if they were in force now, and therefore include religious endowments of a public character which came into existence, not only before 1863 but also afterwards. Leave can

15. The interest required in order to entitle a person to sue under the last preceding section need not be a pecuniary, or a direct or immediate, interest or such an interest as would entitle the person suing to take any part in the management or superintendence of the trusts.

Nature of interest entitling person to sue.

Any person having a right of attendance, or having been in the habit of attending, at the performance of the worship or service of any mosque, temple or religious establishment, or of partaking in the benefit of any distribution of alms, shall be deemed to be a person interested within the meaning of the last preceding section.

16. In any suit or proceeding instituted under this Act it shall be lawful for the Court before which such suit or proceeding is pending to order any matter in difference in such suit to be referred for decision to one or more arbitrators.

Reference to arbitrators.

Whenever any such order shall be made, the provisions of [1][Chapter IV of the Arbitration Act, 1940] shall in all respects apply to such order and arbitration, in the same manner as if such order had been made on the application of the parties under [2][section 21 of the said Act].

17. Nothing in the last preceding section shall prevent the parties from applying to the Court, or the Court from making the order of reference, under the said [2][section 21 of the Arbitration Act, 1940].

Reference under Arbitration Act, 1940.

18. No suit shall be entertained under this Act without a preliminary application being first made to the Court for leave to institute such suit. [3][* * * * *].

Application for leave to institute suits.

The Court, on the perusal of the application, shall determine whether there are sufficient *prima facie* grounds for the institution of a suit, and, if in the judgment of the Court there are such grounds, leave shall be given for its institution. [4][* * *].

LEG. REF.

[1] Substituted for words "Chapter VI of the Code of Civil Procedure" by Act X of 1940.

[2] Substituted by Act X of 1940.

[3] The words "the application may be made upon unstamped paper" were repealed by Act VII of 1870.

[4] Omitted by Act VII of 1870.

NOTES.

therefore be granted under S. 18 of the Act to sue the mutwalli of a wakf which is created after 1863. 38 C.W.N. 1056=1934 C. 741. Where the object of a dharmasala is that Granth should be read daily and no member of the Sikh community behaving properly can be excluded and where the Granth is to be remunerated partly at least from Government grants, it is a public institution. 17 I.C. 270=216 P.L.R. 1912. So a suit for the removal of the manager must have sanction according to S. 18. 17 I.C. 270. A suit for the removal of a trustee may be instituted with the leave of the Court. 9 I.C. 168=21 M.L.J. 450. A suit instituted by four persons under S. 14, with leave of Court under S. 18, does not abate by reason of death of one of the plaintiffs during the pendency of such suit. 41 M. 237=33 M.L.J. 173, it being a representative suit. 1928 M. 614. Suit for removal of trustees of *wakf* requires sanction of the Advocate-General and not leave of Court under S. 18 of Act. 35 I.C. 880. Leave to sue under S. 18 should not be granted on the basis of vague and indefinite allegations, nor should sanction be given against all or any of the respondents without specifically mentioning the party against whom the right to sue is sanctioned. 1924 M. 644. Where sanction is given to two persons, one of them alone cannot sue without getting the sanction amended, the sanction being a condition precedent and the object of requiring sanction being to protect managers from vexatious suits. 38 M. 1192 =26 I.C. 208=27 M.L.J. 24. So far as pleaders are concerned, the control over them is vested in the Court to suspend them or strike them off the rolls, and if a man has really repented, the Court has always the right to restore the man to the profession. But the question of repentance has nothing to do with the interpretation of a clause in a scheme framed by Court for management of a temple which provides that a person guilty of a non-compoundable offence involving moral turpitude would be disqualified to stand for the election of trusteeship. 1939 M.W.N. 1009=1939 Mad. 605.

Sec. 18.—Plaintiff can proceed either under S. 18 of this Act or S. 92, C.P. Code. 1934 P. 443. Where the founder has divested himself completely of his interest in the property and transferred it in favour of the temple and for the maintenance of the images therein the protection of the

If the Court shall be of opinion that the suit has been for the benefit of the trust and that no party to the suit is in fault, the Court may order the costs or such portion as it may consider just to be paid out of the estate.

Costs.

19. Before giving leave for institution of a suit, or, after leave has been given, before any proceeding is taken, or at any time when the suit is pending, the Court may order the trustee, manager or superintendent, or any member of a committee, as the case may be, to file in Court the accounts of the trust, or such part thereof as to the Court may seem necessary.

Court may require accounts of trust to be filed.

20. No suit or proceeding before any Civil Court under the preceding sections shall in any way affect or interfere with any proceeding in a Criminal Court for criminal breach of trust.

Proceedings for criminal breach of trust.

21. In any case in which any land or other property has been granted for the support of an establishment partly of a religious and partly of a secular character,

Cases in which endowments are partly for religious and partly for secular purposes.

or in which the endowment made for the support of an establishment is appropriated partly to religious and partly to secular uses,

the Board of Revenue, before transferring to any trustee, manager or superintendent, or to any committee of management appointed under this Act, shall determine what portion, if any, of the said land or other property shall remain under the superintendence of the said Board for application to secular uses,

and what portion shall be transferred to the superintendence of the trustee, manager or superintendent, or of the committee,

and also what annual amount, if any, shall be charged on the land or other property which may be so transferred to the superintendence of the said trustee, manager or superintendent, or of the committee, and made payable to the said Board or to the local agents, for secular uses as aforesaid.

In every such case the provisions of this Act shall take effect only in respect to such land and other property as may be so transferred.

22. Except as provided in this Act, it shall not be lawful [1][* * *] for any Government in India or for any officer of any Government in his official character,

Government not to hold charge henceforth of property for support of any mosque, temple, etc.

LEG. REF.

[1] The words "after the passing of this Act" were repealed by Act XVI of 1874.

NOTES.

endowment according to the Hindu Law ultimately vests in the Crown, and as such it must be treated to be of a public nature. 11 P. 594=13 P.L.T. 256=1932 P. 177. S. 18 does not require any elaborate inquiry; if there are sufficient *prima facie* grounds, the Judge is justified in "granting leave". 124 I.C. 719 (2)=1930 A. 577 (1). A suit by a temple trustee to recover the amount due by defendant under the terms of the trust cannot be maintained without leave, as the suit is not exempt from S. 92, C.P. Code or S. 18 of this Act. 62 I.C. 911=14 L.W. 238. A person seeking relief under the Act can get only that much relief beyond which he must seek the help of C. P. Code, Ss. 92 and 93, the proper parties to the suit being the trustees only. 35 I.C. 880. Leave to sue mutwalli of wakf created after 1863 can be granted under S. 18: *see* 38 C.W.N. 1056=1934 C. 741.

FRESH PETITION.—The leave of the District Court under S. 18 once refused may subsequently be granted on a fresh petition to that effect on proper grounds. 12 I.C. 128=(1911) 2 M.W.N. 167.

APPEAL.—The order of a District Judge refusing to grant leave to sue under S. 18 is not appealable. 3 P. 1018=1925 P. 138.

REVISION AND COSTS.—S. 18 gives the Court a very wide discretion in regard to matters coming under it. 2 L.W. 345=28 I.C. 637.

to undertake or resume the superintendence of any land or other property granted for the support of, or otherwise belonging to, any mosque, temple or other religious establishment, or

to take any part in the management or appropriation of any endowment made for the maintenace of any such mosque, temple or other establishment, or

to nominate or appoint any trustee, manager or superintendent thereof, or to be in any way concerned therewith.

Effect of Act in respect of regulations therein mentioned, and of buildings of antiquity, etc.

23. Nothing in this Act shall be held to affect the provisions of the Regulations mentioned in this Act, except in so far as they relate to mosques, Hindu temples and other religious establishments; or to prevent the Government from taking such steps as it may deem necessary, under the provisions of the said regulations, to prevent injury to and preserve buildings remarkable for their antiquity, or for their historical or architectual value or required for the convenience of the public.

"India."

[2][24. The word "India" in this Act shall mean British India.]

THE RELIGIOUS SOCIETIES ACT (I OF 1880).[3]

Year.	No.	Short title.	Amendment.
1880	I	The Religious Societies Act.	Reapled in part, Act X of 1914, Amended Act XXXVIII of 1920. Amended by Government of India (Adaptation of Indian Laws) Order, 1937.

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PREAMBLE.

SECTIONS.

1. Short title. Local extent.
2. Appointment of new trustee in cases not otherwise provided for.
3. Appointment under section 2 to be recorded in a memorandum under the hand of the chairman of the meeting.
4. Property to vest in new trustees without conveyance.
5. Saving of existing modes of appointment and conveyance.
6. Provision for dissolution of societies and adjustment of their affairs.
7. Upon a dissolution no member to receive profit.
8. Saving of certain provisions of instrument.
9. Questions may be submitted to High Court.

[*9th January*, 1880.

An Act to confer certain powers on Religious Societies.

Preamble.

WHEREAS it is expedient to simplify the manner in which certain bodies of persons associated for the purpose of maintaining religious worship may hold property acquired for such purpose, and to provide for the dissolution of such bodies and the adjustment of their affairs and for the decision of certain questions relating to such bodies; It is hereby enacted as follows:—

LEG. REF.

[2] Substituted by A.O., for original section.

[3] For Statement of Objects and Reasons, see *Gazette of India*, 1879, Pt. V, p. 770; for Proceedings in Council, see *ibid.*, 1879, Supplement pp. 598, 745; and 174, *ibid.*, 1890, Supplement, pp. 23 and 170.

Short title.

1. This Act may be called THE RELIGIOUS SOCIETIES ACT, 1880.

Local extent.

It [1][* * * *] shall extend to the whole of British India;

but nothing herein contained shall apply to any Hindus, Muhammadans or Buddhists, or to any persons whom the Provincial Government may from time to time, by notification in the Official Gazette, exclude from the operation of this Act.

Appointment of new trustee in cases not otherwise provided for.

2. When any body of persons associated for the purpose of maintaining religious worship has acquired, or hereafter shall acquire, any property,

and such property has been or hereafter shall be vested in trustees in trust for such body,

and it becomes necessary to appoint a new trustee in the place of or in addition to any such trustee or any trustee appointed in the manner hereinafter prescribed,

and no manner of appointing such new trustee is prescribed by any instrument by which such property was so vested or by which the trusts on which it is held have been declared, or such new trustee cannot for any reason be appointed in the manner so prescribed,

such new trustee may be appointed in such manner as may be agreed upon by such body, or by a majority of not less than two-thirds of the members of such body actually present at the meeting at which the appointment is made.

Appointment under section 2 to be recorded in a memorandum under the hand of the chairman of the meeting.

3. Every appointment of new trustees under section 2 shall be made to appear by some memorandum under the hand of the chairman for the time being of the meeting at which such appointment is made.

Such memorandum shall be in the form set forth in the schedule hereto annexed, or as near thereto as circumstances allow, shall be executed and attested by two or more credible witnesses in the presence of such meeting, and shall be deemed to be a document of which the registration is required by the Indian Registration Act, 1877, [2]section 17.

Property to vest in new trustees without conveyance.

4. When any new trustees have been appointed, whether in the manner prescribed by any such instrument as aforesaid or in the manner hereinbefore provided, the property subject to the trust shall forthwith, notwithstanding anything contained in any such instrument, become vested, without any conveyance or other assurance, in such new trustees and the old continuing trustees jointly, or, if there are no old continuing trustees, in such new trustees wholly, upon the same trusts, and with and subject to the same powers and provisions, as it was vested in the old trustees.

Saving of existing modes of appointment and conveyance.

5. Nothing herein contained shall be deemed to invalidate any appointment of new trustees, or any conveyance of any property, which may hereafter be made as heretofore was by law required.

LEG. REF.

[1] The words "shall come into force at once and" were repealed by Act X of 1914, Sch. II.

[2] *See* now Act XVI of 1908.

Provision for dissolution of societies and adjustment of their affairs.

6. Any number not less than three-fifths of the members of any such body as aforesaid may at a meeting convened for the purpose determine that such body shall be dissolved; and thereupon it shall be dissolved forthwith, or at the time then agreed upon; and all necessary steps shall be taken for the disposal and settlement of the property of such body, its claims and liabilities according to the rules of such body applicable thereto, if any, and if not, then as such body at such meeting may determine:

Provided that, in the event of any dispute arising among the members of such body, the adjustment of its affairs shall be referred to the principal Court of original civil jurisdiction of the district in which the chief building of such body is situate; and the Court shall make such order in the matter as it deems fit.

Upon a dissolution no member to receive profit.

7. If upon the dissolution of any such body there remains, after the satisfaction of all its debts and liabilities, any property whatsoever, the same shall not be paid to or distributed among the members of such body or any of them, but shall be given to some other body of persons associated for the purpose of maintaining religious worship or some other religious or charitable purpose to be determined by the votes of not less than three-fifths of the members present at a meeting convened in this behalf, or in default thereof by such Court as last aforesaid.

Saving of certain provisions of instruments.

8. Nothing in sections 6 and 7 shall be deemed to affect any provision contained in any instrument for the dissolution of such body, or for the payment or distribution of such property.

Questions may be submitted to High Court.

9. When any question arises, either in connection with the matters hereinbefore referred to, or otherwise, as to whether any person is a member of any such body as aforesaid, or as to the validity of any appointment under this Act, any person interested in such question may apply by petition to the High Court for its opinion on such question. A copy of such petition shall be served upon, and the hearing thereof may be attended by, such other persons interested in the question as the Court thinks fit.

Any opinion given by the Court on an application under this section shall be deemed to have the force of a declaratory decree.[1]

The costs of every application under this section shall be in the discretion of the Court.

THE SCHEDULE.

(*See* section 3.)

Memorandum of the appointment of the new trustees of the (*describe the church, chapel, or other building and property*) situate at a meeting duly convened and held for that purpose (*in the vestry of the said*) on the day of 19 , *A.B.* of *Chairman.*

Names and descriptions of all the trustees on the constitution or last appointment of trustees, made the day of

(*here insert the same.*)

Names and descriptions of all the trustees in whom the said (*chapel and property*) now become legally vested.

First.—Old continuing trustees:—

(*here insert the same.*)

Second.—Now trustees now chosen and appointed:—

LEG. REF.

[1] As to effect of a declaratory decree, *see* S. 43 of the Specific Relief Act, 1877 (I of 1877).

(*here insert the same.*)

Dated this day of 18
Dated this day of 19
meeting, at and in the presence of the said meeting on the day and year aforesaid in the presence of—
C. D.
E. F.

A.B.,
Chairman of the said Meeting.

THE RESERVE BANK OF INDIA ACT (II OF 1934).

Year.	No.	Short title.	Amendments.
1934	II	The Reserve Bank of India Act.	Rep. in part by Act XX of 1937. Amended by Acts IX of 1940; XIII of 1940; XXXVIII of 1940. *See also* Act VII of 1940 *infra*. Am. by Government of India (Adaptation of Indian Laws) Order, 1937; India and Burma (Burma Monetary Arrangements) Order, 1937.

N.B.—With reference to the application of this Act to Burma, *see* the India and Burma (Burma Monetary Arrangements) Order, 1937, printed as Appendix at the end of this volume.

[*6th March*, 1934.

An Act to constitute a Reserve Bank of India.

WHEREAS it is expedient to constitute a Reserve Bank for India to regulate the issue of bank notes and the keeping of reserves with a view to securing monetary stability in British India and generally to operate the currency and credit system of the country to its advantage;

AND WHEREAS in the psesent disorganisation of the monetary systems of the world, it is not possible to determine what will be suitable as a permanent basis for the Indian monetary system;

BUT WHEREAS it is expedient to make temporary provision on the basis of the existing monetary system, and to leave the question of the monetary standard best suited to India to be considered when the international monetary position has become sufficiently clear and stable to make it possible to frame permanent measures;

It is hereby enacted as follows:—

CHAPTER I.
PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called THE RESERVE BANK OF INDIA ACT, 1934.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) This section shall come into force at once, and the remaining provisions of this Act shall come into force on such date or dates as the [1][Central Government] may, by notification in the Gazette of India, appoint.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "the Bank" means the Reserve Bank of India constituted by this Act;

(*b*) "the Central Board" means the Central Board of Directors of the Bank;

LEG. REF.

[1] Substituted by the India and Burma (Bur. Mon. Arrs.) Order, 1937.

(*c*) "provincial co-operative bank" means the principal society in a province which is registered or deemed to be registered under the Co-operative Societies Act, 1912, or any other law for the time being in force in British India relating to co-operative societies and the primary object of which is the financing of the other societies in the province which are or are deemed to be so registered;

Provided that in addition to such principal society in a province, or, where there is no such principal society in a province, the [1][Provincial Government] may declare any central co-operative society in that Province to be a provincial co-operative bank within the meaning of this definition;

(*d*) "rupee coin" means silver rupees which are legal tender [2][in British India] under the provisions of the Indian Coinage Act, 1906; [2][* *].

(*e*) "scheduled bank" means a bank included in the Second Schedule.

[3][(*f*) "Burma scheduled bank", "Burma co-operative bank" and "Burma notes" have the same meanings as in Part II of the India and Burma (Burma Monetary Arrangements) Order, 1937;

(*g*) "bank notes" and "currency notes of the Government of India" do not, save as is expressly provided, include any notes which are Burma notes;

(*h*) "local authority" includes a local authority in Burma;

(*i*) "Burma" has the same meaning as in the Government of India Act, 1935;

(*j*) "Burman subject of His Majesty" includes all British subjects domiciled in Burma; and

(*k*) references to the Government of Burma include references to the Governor of Burma in his dealings with the Federal Fund of the Federated Shan States.]

CHAPTER II.

INCORPORATION, SHARE CAPITAL, MANAGEMENT AND BUSINESS.

Establishment and incorporation of Reserve Bank.

3. (1) A Bank to be called the Reserve Bank of India shall be constituted for the purposes of taking over the management of the currency from the [1][Central Government] and of carrying on the business of banking in accordance with the provisions of this Act.

(2) The Bank shall be a body corporate by the name of the Reserve Bank of India, having perpetual succession and a common seal, and shall by the said name sue and be sued.

Share capital, share registers and share-holders.

4. (1) The original share capital of the Bank shall be five crores of rupees divided into shares of one hundred rupees each, which shall be fully paid up.

(2) Separate registers of shareholders shall be maintained at Bombay, Calcutta, Delhi, Madras and Rangoon, and a separate issue of shares shall be made in each of the areas served by those registers, as defined in the First Schedule, and shares shall be transferable from one register to another.

(3) A shareholder shall be qualified to be registered as such in any area in which he is ordinarily resident or has his principal place of business in India, [1][or Burma] but no person shall be registered as a shareholder in more than one register; and no person who is not—

(*a*) domiciled in India [3][or Burma] and either an Indian [3][or Burman] subject of His Majesty, or a subject of a State in India [3][or Burma], or

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LEG. REF.

[1] Substituted by the India and Burma (Bur. Mon. Arrs.) Order, 1937.

[2] Inserted and omitted by India and Burma (Bur. Mon. Arrs.) Order, 1937.

[3] Inserted and omitted by India and Burma (Bur. Mon. Arrs.) Order, 1937.

(*b*) a British subject ordinarily resident in India [1][or Burma] and domiciled in the United Kingdom or in any part of His Majesty's Dominions the government of which does not discriminate in any way against Indian [1][or Burman] subjects of His Majesty, or

(*c*) a company registered under the Indian Companies Act, 1913, or a society registered under the Co-operative Societies Act, 1912, or any other law for the time being in force in British India relating to co-operative societies or a scheduled bank, or a corporation or company incorporated by or under an Act of Parliament or anv law for the time being in force in any part of His Majesty's Dominions the government of which does not discriminate in any way against Indian [1][or Burman] subjects of His Majesty, and having a branch in British India, [1][or in Burma], [1][or

(*d*) a company or co-operative society registered in Burma under any law relating to companies or co-operative societies, or a Burma scheduled bank,] shall be registered as a shareholder or be entitled to payment of any dividend on any share, and no person, who, having been duly registered as a shareholder, ceases to be qualified to be so registered, shall be able to exercise any of the rights of a shareholder otherwise than for the purpose of the sale of his shares.

(4) The [2][Central Government] shall, by notification in the Gazette of India specify the parts of His Majesty's Dominions which shall be deemed for the purposes of clauses (*b*) and (*c*) of sub-section (3) to be the parts of His Majesty's Dominions in which no discrimination against Indian [1][or Burman] subjects of His Majesty exists.

[3][(4-A) Without prejudice to the validity of anv registration made before the commencement of the Reserve Bank of India (Second Amendment) Act, 1940, no person shall, after the commencement of that Act, be registered as a shareholder in respect of any shares held by him whether in his own name or jointly with another person or persons in excess of a total nominal value of twenty thousand rupees, or be entitled to payment of any dividend on such shares or to exercise any of the rights of a shareholder in respect of such shares otherwise than for the purpose of selling the shares.]

(5) The nominal value of the shares originally assigned to the various registers shall be as follows, namely:—

(*a*) to the Bombay register—one hundred and forty lakhs of rupees;
(*b*) to the Calcutta register—one hundred and forty-five lakhs of rupees;
(*c*) to the Delhi register—one hundred and fifteen lakhs of rupees;
(*d*) to the Madras register—seventy lakhs of rupees;
(*e*) to the Rangoon register—thirty lakhs of rupees:

Provided that, if at the first allotment, the total nominal value of the shares on the Delhi register for which applications are received is less than one hundred and fifteen lakhs of rupees, the Central Board shall, before proceeding to any allotment, transfer any shares not applied for up to a maximum nominal value of thirty-five lakhs of rupees from that register in two equal portions to the Bombay and the Calcutta register.

A committee consisting of two elected members of the Assembly and one elected member of the Council of State to be elected by non-official members of the respective Houses shall be associated with the Central Board for the purpose of making public issue of shares and looking after the first allotment of shares.

(6) In allotting the shares assigned to a register, the Central Board shall, in the first instance, allot five shares to each qualified applicant who has applied for five or more shares: and, if the number of such applicants is greater than

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LEG. REF.

[1] Inserted by the India and Burma (Bur. Mon. Arrs.) Order, 1937.
[2] Subs. by India and Burma (Bur. Mon. Arrs.) Order, 1937.

NOTES.

Sec. 4 Sub-Sec. (4-A).—Inserted by Act XIII of 1940.

one-fifth of the total number of shares assigned to the register, shall determine by lot the applicants to whom the shares shall be allotted.

(7) If the number of such applicants is less than one-fifth of the number of shares assigned to the register, the Central Board shall allot the remaining shares firstly, up to the limit of one-half of such remaining shares, to those applicants who have applied for less than five shares, and, thereafter as to the balance, to the various applicants in such manner as it may deem fair and equitable, having regard to the desirability of distributing the shares and the voting rights attached to them as widely as possible.

(8) Notwithstanding anything contained in sub-sections (6) and (7), the Central Board shall reserve for and allot to Government shares of the nominal value of two lakhs and twenty thousand rupees to be held by Government for disposal at par to Directors, seeking to obtain the minimum share qualification required under sub-section (2) of section 11.

(9) If, after all applications have been met in accordance with the provisions of sub-sections (6), (7) and (8), any shares remain unallotted, they shall, notwithstanding anything contained in this section, be allotted to and taken up by Government, and shall be sold by the Central Government as soon as may be, at not less than par, to residents of the areas served by the register concerned.

(10) The [1][Central Government] shall have no right to exercise any vote under this Act by reason of any shares allotted to [2][Government] under sub-section (8) or under sub-section (9).

(11) A Director shall not dispose of any shares obtained from Government under the provisions of sub-section (8) otherwise than by re-sale to Government at par, and Government shall be entitled to re-purchase at par all such shares held by any Director on his ceasing from any cause to hold office as Director.

Increase and reduction of share capital.

5. (1) The share capital of the Bank may be increased or reduced on the recommendation of the Central Board, with the previous sanction of the [1][Central Government] and with the approval of the Central Legislature, to such extent and in such manner as may be determined by the Bank in general meeting.

(2) The additional shares so created shall be of the nominal value of one hundred rupees each and shall be assigned to the various registers in the same proportions as the shares constituting the original share capital.

(3) Such additional shares shall be fully paid up, and the price at which they may be issued shall be fixed by the Central Board with the previous sanction of the [1][Central Governmen].

(4) The provisions of section 4 relating to the manner of allotment of the shares constituting the original share capital shall apply to the allotment of such additional shares, and existing shareholders shall not enjoy any preferential right to the allotment of such additional shares.

Offices, branches and agencies.

6. The Bank shall, as soon as may be, establish offices in Bombay, Calcutta Delhi, Madras and Rangoon and a branch in London, and may establish branches or agencies in any other place in India [3][or Burma] or, with the previous sanction of the [1][Central Government] elsewhere.

Management.

7. The general superintendence and direction of the affairs and business of the Bank shall be entrusted to a Central Board of Directors which may exercise all powers and do all acts and things which may be exercised or done by the Bank and are not by this Act expressly directed or required to be done by the Bank in general meeting.

LEG. REF.

[1] Substituted by the India and Burma (Bur. Mon. Arrs.) Order, 1937.

[2] Substituted for "him" by *ibid*.

[3] Inserted by *ibid*.

Composition of the Central Board, and term of office of Directors.

8. (1) The Central Board shall consist of the following Directors, namely:—

(*a*) a Governor and two Deputy Governors, to be appointed by the [1][Central Government] after consideration of the recommendations made by the Board in that behalf;

(*b*) four Directors to be nominated by the [1][Central Government];

(*c*) eight Directors to be elected on behalf of the shareholders on the various registers, in the manner provided in seition 9 and in the following numbers, namely:—

(*i*) for the Bombay register—two Directors;
(*ii*) for the Calcutta register—two Directors;
(*iii*) for the Delhi register—two Directors;
(*iv*) for the Madras register—one Director;
(*v*) for the Rangoon register—one Director; and
(*d*) one Government official to be nominated by the [1][Central Government].

(2) The Governor and Deputy Governors shall devote their whole time to the affairs of the Bank, and shall receive such salaries and allowances as may be determined by the Central Board, with the approval of the [1][Central Government.

(3) A Deputy Governor and the Director nominated under clause (*d*) of sub-section (1) may attend any meeting of the Central Board and take part in its deliberations but shall not be entitled to vote:

Provided that when the Governor is absent a Deputy Governor authorized by him in this behalf in writing may vote for him.

(4) The Governor and a Deputy Governor shall hold office for such term not exceeding five years as the [1][Central Government] may fix when appointing them, and shall be eligible for re-appointment.

A Director nominated under clause (*b*) or elected under clause (*c*) of sub-section (1) shall hold office for five years, or thereafter until his successor shall have been duly nominated or elected, and, subject to the provisions of section 10, shall be eligible for re-nomination or re-election.

A Director nominated under clause (*d*) of sub-section (1) shall hold office during the pleasure of the [1][Central Government].

(5) No act or proceeding of the Board shall be questioned on the ground merely of the existence of any vacancy in, or any defect in the constitution of, the Board.

Local Boards, their constitution and functions.

9. (1) A Local Board shall be constituted for each of the five areas specified in the First Schedule, and shall consist of—

(*a*) five members elected from amongst themselves by the shareholders who are registered on the register for that area and are qualified to vote, and

(*b*) not more than three members nominated by the Central Board from amongst the shareholders registered on the register for that area, who may be nominated at any time:

Provided that the Central Board shall in exercising this power of nomination aim at securing the representation of territorial or economic interest not already represented, and in particular the representation of agricultural interest and the interests of co-operative banks.

(2) At an election of members of a Local Board for any area, any shareholder who has been registered on the register for that area, for a period of not

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LEG. REF.

[1] Substituted by India and Burma (Bur. Mon. Arrs.) Order, 1937.

less than six months ending with the date of the election, as holding five shares shall have one vote, and each shareholder so registered as having more than five shares shall have one vote for each five shares, but subject to a maximum of ten votes, and such votes may be exercised by proxy appointed on each occasion for that purpose, such proxy being himself a shareholder entitled to vote at the election and not being an employee of the Bank.

(3) The members of a Local Board shall hold office until they vacate it under sub-section (6) and, subject to the provisions of section 10, shall be eligible for re-election or re-nomination, as the case may be.

(4) At any time within three months of the day on which the Directors representing the shareholders on any register are due to retire under the provisions of this Act, the Central Board shall direct an election to be held of members of the Local Board concerned, and shall specify a date from which the registration of transfers from and to the register shall be suspended until the election has taken place.

(5) On the issue of such direction the Local Board shall give notice of the date of the election and shall publish a list of shareholders holding five or more shares, with the dates on which their shares were registered, and with their registered addresses, and such list shall be available for purchase not less than three weeks before the date fixed for the election.

(6) The names of the persons elected shall be notified to the Central Board which shall thereupon proceed to make any nominations permitted by clause (*b*) of sub-section (1); it may then decide to make, and shall fix the date on which the outgoing members of the Local Board shall vacate office, and the incoming members shall be deemed to have assumed office on that date.

(7) The elected members of a Local Board shall, as soon as may be after they have been elected, elect from amongst themselves one or two persons, as the case may be to be Directors representing the shareholders on the register for the area for which the Board is constituted.

(8) A Local Board shall advise the Central Board on such matters as may be generally or specifically referred to it and shall perform such duties as the Board may, by regulations, delegate to it.

Disqualifications of Directors and members of Local Boards.

10. (1) No person may be a Director or a member of a Local Board who—

(*a*) is a salaried government official or a salaried official of a State in India [1][or Burma], or

(*b*) is, or at any time has been, adjudicated an insolvent, or has suspended payment or has compounded with his creditors, or

(*c*) is found a lunatic or becomes of unsound mind, or

(*d*) is an officer or employee of any bank, or

(*e*) is a director of any bank, other than a bank which is a society registered or deemed to be registered under the Co-operative Societies Act, 1912, or any other law for the time being in force in British India [1][or Burma] relating to co-operative societies.

(2) No two persons who are partners of the same mercantile firm, or are directors of the same private company, or one of whom is the general agent of or holds a power of procuration from the other, or from a mercantile firm of which the other is a partner, may be Directors or members of the same Local Board at the same time.

(3) Nothing in clause (*a*), clause (*d*) or clause (*e*) of sub-section (1)

LEG. REF.

[1] Inserted by India and Burma (Bur. Mon. Arrs.) Order, 1937.

shall apply to the Governor, or to a Deputy Governor or to the Director nominated under clause (*d*) of sub-section (1) of section 8.

Removal from and vacation of office.

11. (1) The [1][Central Government] may remove from office the Governor, or a Deputy Governor or any nominated or elected Director:

Provided that in the case of a Director nominated or elected under clause (*b*) or clause (*c*) of sub-section (1) of section 8 this power shall be exercised only on a resolution passed by the Central Board in that behalf by a majority consisting of not less than nine Directors.

(2) A Director nominated or elected under clause (*b*) or clause (*c*) of sub-section (1) of section 8, and any member of a Local Board shall cease to hold office if, at any time after six months from the date of his nomination or election, he is not registered as a holder of unencumbered shares of the Bank of a nominal value of not less than five thousand rupees, or if he ceases to hold unencumbered shares of that value, and any such Directors shall cease to hold office if without leave from the [1][Central Government] he absents himself from three consecutive meetings of the Central Board convened under sub-section (1) of section 13.

(3) The [1][Central Government] shall remove from office any Director, and the Central Board shall remove from office any member of a Local Board, if such Director or member becomes subject to any of the disqualifications specified in sub-section (1) or sub-section (2) of section 10.

(4) A Director or member of a Local Board removed or ceasing to hold office under the foregoing sub-sections shall not be eligible for re-appointment either as Director or as member of a Local Board until the expiry of the term for which his appointment was made.

(5) The appointment, nomination or election as Director or member of a Local Board of any person who is a member of [1][the Federal Legislature, the Indian Legislature, a Provincial Lelislature, the Coorg Legislative Council or the Burma Legislature] shall be void, unless, within two months of the date of his appointment, nomination or election, he ceases to be such member, and, if any Director or member of a Local Board is elected or nominated as a member of any such Legislature [2][or Council], he shall cease to be a Director or member of the Local Board as from the date of such election or nomination, as the case may be.

(6) A Director may resign his office to the [1][Central Government] and a member of a Local Board may resign his office to the Central Board and on the acceptance of the resignation, the office shall become vacant.

Casual vacancies and absences.

12. (1) If the Governor or a Deputy Governor by infirmity or otherwise is rendered incapable of executing his duties or is absent on leave or otherwise in circumstances not involving the vacation of his appointment, the [1][Central Government] may, after consideration of the recommendations made by the Central Board in this behalf, appoint another person to officiate for him, and such person may, notwithstanding anything contained in clause (*d*) of sub-section (1) of section 10, be an officer of the Bank.

(2) If an elected Director is for any reason unable to attend a particular meeting of the Central Board, the elected members of the Local Board of the area which he represents may elect one of their number to take his place, and for the purposes of that meeting the substitute so elected shall have all the powers of the absent Director.

LEG. REF.

[1] Substituted by India and Burma (Bur. Mon. Arrs.) Order, 1937.

[2] Substituted by *ibid*.

(3) Where any casual vacancy in the office of any member of a Local Board occurs, otherwise than by the occurrence of a vacancy in the office of a Director elected by the Local Board, the Central Board may nominate thereto any qualified person recommended by the elected members of the Local Board.

(4) Where any casual vacancy occurs in the office of a Director other than the vacancies provided for in sub-section (1), the vacancy shall be filled, in the case of a nominated Director by nomination, and in the case of an elected Director by election held in the manner provided in section 9, for the election of Directors:

Provided that before such election is made, the resulting vacancy, if any, in the Local Board and any vacancy in the office of an elected member of such Board which may have been filled by a member nominated under sub-section (3) shall be filled by election held as nearly as may be in the manner provided in section 9 for the election of members of a Local Board.

(5) A person nominated or elected under this section to fill a casual vacancy shall, subject to the proviso contained in sub-section (4), hold office for the unexpired portion of the term of his predecessor.

Meetings of the Central Board.

13. (1) Meetings of the Central Board shall be convened by the Governor at least six times in each year and at least once in each quarter.

(2) Any three Directors may require the Governor to convene a meeting of the Central Board at any time and the Governor shall forthwith convene a meeting accordingly.

(3) The Governor, or in his absence the Deputy Governor authorized by the Governor under the proviso to sub-section (3) of section 8 to vote for him, shall preside at meetings of the Central Board, and, in the event of an equality of votes, shall have a second or casting vote.

General meetings.

14. (1) A general meeting (hereinafter in this Act referred to as the annual general meeting) shall be held annually at a place [1][in British India] where there is an office of the Bank within six weeks from the date on which the annual accounts of the Bank are closed and a general meeting may be convened by the Central Board at any other time:

Provided that the annual general meeting shall not be held on two consecutive occasions at any one place.

(2) The shareholders present at a general meeting shall be entitled to discuss the annual accounts, the report of the Central Board on the working of the Bank throughout the year and the auditors' report on the annual balance-sheet and accounts.

(3) Every shareholder shall be entitled to attend at any general meeting and each shareholder, who has been registered on any register, for a period of not less than six months ending with the date of the meeting, as holding five or more shares, shall have one vote, and on a poll being demanded each shareholder so registered shall have one vote for each five shares, but subject to a maximum of ten votes and such votes may be exercised by proxy appointed on each occasion for that purpose, such proxy being himself a shareholder entitled to vote at the election and not being an officer or employee of the Bank.

First constitution of the Central Board.

15. (1) The following provisions shall apply to the first constitution of the Central Board, and, notwithstanding anything contained in section 8, the Central Board as constituted in accordance therewith shall be deemed to be duly constituted in accordance with this Act.

LEG. REF.

[1] Inserted by India and Burma (Bur. Mon. Arrs.) Order, 1937.

(2) The first Governor and the first Deputy Governor or Deputy Governors shall be appointed by the [1][Central Government] on [1][its] own initiative, and shall receive such salaries and allowances as [1][it] may determine,

(3) The first eight Directors representing the shareholders on the various registers shall be nominated by the [1][Central Government] from the areas served respectively by those registers, and the Directors so nominated shall hold office until their successors shall have been duly elected as provided in sub-section (4).

(4) On the expiry of each successive period of twelve months after the nomination of Directors under sub-section (3), two Directors shall be elected in the manner provided in section 9 until all the Directors so nominated have been replaced by elected Directors holding office in accordance with section 8. The register in respect of which the election is to be held shall be selected by lot from among the registers still represented by nominated Directors, and for the purposes of such lot the Madras and Rangoon registers shall be treated as if they compised one register only.

First constitution of Local Boards.

16. As soon as may be after the commencement of this Act, the Central Board shall direct elections to be held and may make nominations, in order to constitute Local Boards in accordance with the provisions of section 9, and the members of such Local Boards shall hold office up to the date fixed under sub-section (6) of section 9, but shall not exercise any right under sub-section (7) of that section.

Business which the Bank may transact.

17. The Bank shall be authorized to carry on and transact the several kinds of business hereinafter specified, namely :—

(1) the accepting of money on deposit without interest from, and the collection of money for, [1][the Secretary of State], the [1][Central Government] the Federal Railway authority, the Provincial Government, the Government of Burma, the Burma Railway Board], States in India, local authorities, banks and any other person;

(2) (*a*) the purchase, sale and rediscount of bills of exchange and promistory notes, [1][drawn on India or Burma and payable in India or Burma] and arising out of *bona fide* commercial or trade transactions bearing two or more good signatures, one of which shall be that of a scheduled bank [3][or a Burma Scheduled Bank] and maturing within ninety days from the date of such purchase or rediscount, exclusive of days of grace;

(*b*) the purchase, sale and rediscount of bills of exchange and promissory notes, [1][drawn either in India or in Burma and payable either in India or in Burma] and bearing two or more good signatures, one of which shall be that of a scheduled bank, [3][a Burma Scheduled Bank, a provincial co-operative bank or a Burma co-operative bank], and drawn or issued for the purpose of financing seasonal agricultural operations or the making of crops, and maturing within nine months from the date of such purchase or rediscount, exclusive of days of grace;

(*c*) the purchase, sale and rediscount of bills of exchange and promissory notes [1][drawn either in India or Burma and payable either in India or Burma] and bearing the signature of a scheduled bank [3][or Burma scheduled bank], and issued or drawn for the purpose of holding or trading in securities of [1][the Central Government, a Provincial Government or the Government of Burma], or such securities of States in India as may be specified in this behalf by the [1][Central Government] on the recommendation of the Central Board, and maturing within ninety days from the date of such purchase or rediscount, exclusive of days of grace;

LEG. REF.

[1] Inserted by India and Burma (Bur. Mon. Arrs.) Order, 1937.

(3) (*a*) the purchase from and sale to scheduled banks [1][and Burma scheduled banks] of sterling in amounts of not less than the equivalent of one lakh of rupees;

(*b*) the purchase, sale and rediscount of bills of exchange (including treasury bills) drawn in or on any place in the United Kingdom and maturing within ninety days from the date of purchase, provided that no such purchase, sale or rediscount shall be made in India except with a scheduled bank [1][or in Burma except with a scheduled bank or a Burma scheduled bank]; and

(*c*) the keeping of balances with banks in the United Kingdom;

(4) the making to States in India, local authorities, scheduled banks, [2][Burma scheduled banks, provincial co-operative banks and Burma co-operative banks] of loans and advances, repayable on demand or on the expiry of fixed periods not exceeding ninety days, against the security of—

(*a*) stocks, funds and securities (other than immovable property) in which a trustee is authorized to invest trust money by any Act of Parliament or by any law for the time being in force in British India [1][or Burma];

(*b*) gold or silver or documents of title to the same;

(*c*) such bills of exchange and promissory notes as are eligible for purchase or rediscount by the Bank;

(*d*) promissory notes of any scheduled bank [2][Burma scheduled bank, provincial co-operative bank or Burma co-operative bank], supported by documents of title to goods which have been transferred assigned, or pledged to any such bank as security for a cash credit or overdraft granted for *bona fide* commercial or trade transactions, or for the purpose of financing seasonal agricultural operations or the marketing of crops;

(5) the making to the [2][Central Government], [3][the Federal Railway Authority Provincial Governments, the Government of Burma and the Burma Railway Board] of advances repayable in each case not later than three months from the date of the making of the advance;

(6) the issue of demand drafts made payable at its own offices or agencies and the making, issue and circulation of bank post bills;

(7) the purchase and sale of Government securities of the United Kingdom maturing within ten years from the date of such purchase;

(8) the purchase and sale of securities of the [2][Central Government a Provincial Government or the Government of Burma] of any maturity or of such securities of a local authority [2][or such Indian States] as may be specified in this behalf by the [2][Central Government] on the recommendation of the Central Board:

Provided that securities fully guaranteed as to principal and interest by [2][any such Government, authority or State] shall be deemed for the purposes of this clause to be securities of such Government, authority or State:

Provided further that the amount of such securities held at any time in the Banking Department shall be so regulated that—

(*a*) the total value of such securities shall not exceed the aggregate amount of the share capital of the Bank, the Reserve Fund and three-fifths of the liabilities of the Banking Department in respect of deposits;

(*b*) the value of such securities maturing after one year shall not exceed the aggregate amount of the share capital of the Bank, the Reserve Fund and two-fifths of the liabilities of the Banking Department in respect of deposits; and

(*c*) the value of such securities maturing after ten years shall not exceed

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LEG. REF.

[1] Inserted by India and Burma (Bur. Mon. Arrs.) Order, 1937.

[2] Substituted by *ibid*.

the aggregate amount of the share capital of the Bank and the Reserve Fund and one-fifth of the liabilities of the Banking Department in respect of deposit;

(9) the custody of monies, securities and other articles of value, and the collection of the proceeds, whether principal, interest or dividends, of any such securities;

(10) the sale and realisation of all property, whether movable or immovable, which may in any way come into the possession of the Bank in satisfaction, or part satisfaction, of any of its claims;

(11) the acting as agent for [1][the Secretary of State], the Central Government] [1][or any Provincial Government or the Government of Burma or any local authority or any Indian State] in the transaction of any of the following kinds of business, namely:—

(*a*) the purchase and sale of gold and silver;

(*b*) the purchase, sale, transfer and custody of bills of exchange, securities or shares in any company;

(*c*) the collection of the proceeds, whether principal, interest or dividends, of any securities or shares;

(*d*) the remittance of such proceeds, at the risk of the principal, by bills of exchange payable either in India or elsewhere;

(*e*) the management of public debt;

(12) the purchase and sale of gold coin and bullion;

(13) the opening of an account with or the making of an agency agreement with, and the acting as agent or correspondent of [2][* *] the principal currency authority of any country under the law for the time being in force in that country or any international bank formed by [3][banks which are such principal currency authorities], and the investing of the funds of the Bank in the shares of any such international bank;

(14) the borrowing of money for a period not exceeding one month for the purposes of the business of the Bank, and the giving of security for money so borrowed:

Provided that no money shall be borrowed under this clause from any person in India [4][or Burma] other than a scheduled bank, [4][or a Burma scheduled bank], or from any person outside India [4][and Burma] other than a bank which is the principal currency authority of any country under the law for the time being in force in that country;

Provided further that the total amount of such borrowings from persons in India [4][and Burma] shall not at any time exceed the amount of the share capital of the Bank;

(15) the making and issue of bank notes subject to the provisions of this Act [4][and the making and issue of Burma notes in accordance with the law of Burma]; and

(16) generally, the doing of all such matters and things as may be incidental to or consequential upon the exercise of its powers or the discharge of its duties under this Act [4][and the law of Burma].

Power of direct discount,

18. When, in the opinion of the Central Board or, where the powers and functions of the Central Board under this section have been delegated to a committee of the Central Board or to the Governor, in the opinion of such committee or of the Governor, as the case may be, a special occasion has arisen making it necessary or expedient that action should be taken under this section for the purpose of regulating credit in the interests of Indian [4][or Burman] trade, commerce, industry and agri-

LEG. REF.

[1] Substituted by India and Burma (Bur. Mon. Arrs.) Order, 1937.

[2] Omitted by Act IX of 1940.

[3] Substituted by Act IX of 1940.

[4] Inserted by India and Burma (Bur. Mon. Arrs.) Order, 1937.

culture, the Bank may, notwithstanding any limitation contained in sub-clauses (*a*) and (*b*) of clause (2) or sub-clause (*a*) or (*b*) of clause (3) or clause (4) of section 17,—

(1) purchase, sell or discount any of the bills of exchange or promissory notes specified in sub-clause (*a*) or (*b*) of clause (2) or sub-clause (*b*) of clause (3) of that section though such bill or promissory note does not bear the signature of a scheduled bank [1][a Burma scheduled bank, provincial co-operative bank or a Burma co-operative bank]; or

(2) purchase or sell sterling in amounts of not less than the equivalent of one lakh of rupees; or

(3) make loans or advances repayable on demand or on the expiry of fixed periods not exceeding ninety days against the various forms of security specified in clause (4) of that section:

Provided that a committee of the Board or the Governor shall not, save in cases of special urgency, authorize action under this section without prior consultation with the Central Board and that in all cases action so authorized shall be reported to the members of he Central Board forthwith.

Business which the Bank may not transact.

19. Save as otherwise provided in sections 17, 18 and 45, the Bank may not—

(1) engage in trade or otherwise have a direct interest in any commercial, industrial, or other undertaking, except such interest as it may in any way acquire in the course of the satisfaction of any of its claims: provided that all such interests shall be disposed of at the earliest possible moment;

(2) purchase its own shares or the shares of any other bank or of any company, or grant loans upon the security of any such shares;

(3) advance money on mortgage of, or otherwise on the security of, immovable property or documents of title relating thereto, or become the owner of immovable property, except so far as is necessary for its own business premises and residences for its officers and servants;

(4) make loans or advances;

(5) draw or accept bills payable otherwise than on demand;

(6) allow interest on deposits or current accounts.

CHAPTER III.

CENTRAL BANKING FUNCTIONS.

Obligation of the Bank to transact Government business.

20. The Bank shall undertake to accept monies for account of [1][the Secretary of State, the Central Government the Provincial Governments] and such States in India as may be approved of and notified by the [1][Central Government] in the Gazette of India, and to make payments up to the amount standing to the credit of their accounts respectively, and to carry out their exchange, remittance and other banking operations, including the management of the public debt.

Bank to have the right to transact Government business in India.

21. (1) The [1][Central Government] and [1][the Provincial Governments] shall entrust the Bank, on such conditions as may be agreed upon, with all their money, remittance, exchange and banking transactions in India and, in particular, shall deposit free of interest all their cash balances with the Bank:

Provided that nothing in this sub-section shall prevent the [1][Central Government] or any [1][Provincial Government] from carrying on money transactions at

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LEG. REF.

[1] Substituted by India and Burma (Bur. Mon. Arrs.) Order, 1937.

places where the Bank has no branches or agencies, and the [1][Central Government] and the [1][Provincial Governments] may hold at such places such balances as they may require.

(2) The [1][Central Government] and each [1][Provincial Government] shall entrust the Bank, on such conditions as may be agreed upon, with the management of the public debt and with the issue of any new loans.

(3) In the event of any failure to reach agreement on the conditions referred to in this section the [1][Central Government] shall decide what the conditions shall be.

(4) Any agreement made under this section to which the [1][Central Government] or any [1][Provincial Government] is a party shall be laid, as soon as may be after it is made, before the Central Legislature and in the case of a [1][Provincial Government] before the [1][Provincial Legislature] also.

Right to issue bank notes.

22. (1) The Bank shall have the sole right to issue bank notes in British India, and may, for a period which shall be fixed by the [1][Central Government] on the recommendation of the Central Board, issue currency notes of the Government of India supplied to it by the [1][Central Government,] and the provisions of this Act applicable to bank notes shall, unless a contrary intention appears, apply to all currency notes of the Government of India issued either by the [1][Central Government] or by the Bank in like manner as if such currency notes were bank notes, and references in this Act to bank notes shall be construed accordingly.

(2) On and from the date on which this chapter comes into force the [1][Central Government] shall not issue any currency notes.

[2][(3) In this section references to Bank notes include references to Burma notes].

Issue Department.

23. (1) The issue of bank notes shall be conducted by the Bank in an Issue Department which shall be separated and kept wholly distinct from the Banking Department, and the assets of the Issue Department shall not be subject to any liability other than the liabilities of the Issue Department as hereinafter defined in section 34.

(2) The Issue Department shall not issue bank notes to the Banking Department or to any other person except in exchange for other bank notes or for such coin, bullion or securities as are permitted by this Act to form part of the Reserve.

Denominations of notes.

24. Bank notes shall be of the denominational values of five rupees, ten rupees, fifty rupees, one hundred rupees, five hundred rupees, one thousand rupees and ten thousand rupees, unless otherwise directed by the Central Government on the recommendation of the Central Board.

Form of bank notes.

25. The design, form and material of bank notes shall be such as may be approved by the [1][Central Government] after consideration of the recommendations made by the Central Board.

Legal tender character of notes.

26. (1) Subject to the provisions of sub-section (2), every bank note shall be legal tender at any place in British India in payment or on account for the amount expressed therein, and shall be guaranteed by the [1][Central Government].

(2) On recommendation of the Central Board the [1][Central Government] may, by notification in the Gazette of India, declare that, with effect from such

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LEG. REF.

[1] Substituted by India and Burma (Bur. Mon. Arrs.) Order, 1937.

[2] Inserted by *ibid*.

date as may be specified in the notification, any series of bank notes of any denomination shall cease to be legal tender save at an office or agency of the Bank.

[1][(3) Every Burma note shall be guaranteed by the Central Government].

Re-issue of notes.

27. The Bank shall not re-issue bank notes which are torn, defaced or excessively soiled.

Recovery of notes lost, stolen, mutilated or imperfect.

[2][28. (1)] Notwithstanding anything contained in any enactment or rule of law to the contrary no person shall of right be entitled to recover from the [3][Central Government] or the Bank the value of any lost, stolen, mutilated or imperfect currency note of the Government of India, or bank note:

Provided that the Bank may, with the previous sanction of the [3][Central Government,] prescribe the circumstances in and the conditions and limitations subject to which the value of such currency notes or bank notes may be refunded as of grace and the rules made under this proviso shall be laid on the table of both Houses of the Central Legislature.

[1][(2) The provisions of sub-section (1) of this section, other than the proviso thereto, shall apply to Burma notes as they apply to bank notes; and refunds may be made as of grace in respect of Burma notes in accordance with the provision made in that behalf by the law of Burma.]

Bank exempt from stamp duty on bank notes.

29. The Bank shall not be liable to the payment of any stamp duty under the Indian Stamp Act, 1899, in respect of bank notes [1][or Burma notes] issued by it.

Powers of Central Government to supersede Central Board.

30. (1) If in the opinion of the [3][Central Government] the Bank fails to carry out any of the obligations imposed on it by or under this Act [1][or by or under the law of Burma], [1][the Central Government] may, by notification in the Gazette of India, declare the Central Board to be superseded, and thereafter the general superintendence and direction of the affairs of the Bank shall be entrusted to such agency as the [3][Central Government] may determine, and such agency may exercise the powers and do all acts and things which may be exercised or done by the Central Board under this Act.

(2) When action is taken under this section the [3][Central Government] shall cause a full report of the circumstances leading to such action and of the action taken to be laid before the Central Legislature at the earliest possible opportunity and in any case within three months from the issue of the notification superseding the Board.

Issue of demand bills and notes.

31. No person in British India other than the Bank or, as expressly authorized by this Act, the [3][Central Government] shall draw, accept, make or issue any bill of exchange, hundi, promissory note or engagement for the payment of money payable to bearer on demand, or borrow, owe or take up any sum or sums of money on the bills, hundis or notes payable to bearer on demand of any such person:

Provided that cheques or drafts, including hundis, payable to bearer on demand or otherwise may be drawn on a person's account with a banker, shroff or agent.

Penalty.

32. (1) Any person contravening the provisions of section 31 shall be punishable with fine which may extend to the amount of the bill, hundi, note, or engagement in respect whereof the offence is committed.

(2) No prosecution under this section shall be instituted except on complaint made by the Bank.

LEG. REF.

[1] Inserted by India and Burma (Bur. Mon. Arrs.) Order, 1937.

[2] Sec. 28 renumbered as sub-S. (1) by *ibid*.

[3] Substituted by *ibid*.

Assets of the Issue Department.

33. (1) The assets of the Issue Department shall consist of gold coin, gold bullion, sterling securities, rupee coin, and rupee securities to such aggregate amount as is not less than the total of the liabilities of the Issue Department as hereinafter defined.

(2) Of the total amount of the assets, not less than two-fifths shall consist of gold coin, gold bullion or sterling securities:

Provided that the amount of gold coin and gold bullion shall not at any time be less than forty crores of rupees in value.

(3) The remainder of the assets shall be held in rupee coin, Government of India rupee securities of any maturity and such bills of exchange and promissory notes payable in British India [1][or in Burma] as are eligible for purchase by the Bank under sub-clause (*a*) or sub-clause (*b*) of clause (2) of section 17 or under clause (1) of section 18:

Provided that the amount held in Government of India rupee securities shall not at any time exceed one-fourth of the total amount of the assets or fifty crores of rupees, whichever amount is greater, or, with the previous sanction of the Central Government such amount plus a sum of ten crores of rupees.

(4) For the purposes of this section, gold coin and gold bullion shall be valued at 8·47512 grains of fine gold per rupee, rupee coin shall be valued at its face value, and securities shall be valued at the market rate for the time being obtaining.

(5) Of the gold coin and gold bullion held as assets, not less than seventeen-twentieths shall be held in British India, and all gold coin and gold bullion held as assets shall be held in the custody of the Bank or its agencies:

Provided that gold belonging to the Bank which is in any other bank or in any mint or treasury or in transit may be reckoned as part of the assets.

(6) For the purposes of this section, the sterling securities which may be held as part of the assets shall be securities of any of the following kinds payable in the currency of the United Kingdom, namely:—

(*a*) balances at the credit of the Issue Department with the Bank of England;

(*b*) bills of exchange bearing two or more good signatures and drawn on and payable at any place in the United Kingdom and having a maturity not exceeding ninety days;

(*c*) Government securities of the United Kingdom maturing within five years:

Provided that, for a period of two years from the date on which this Chapter comes into force, any of such last mentioned securities may be securities maturing after five years, and the Bank may, at any time before the expiry of that period, dispose of such securities notwithstanding anything contained in section 17.

Liabilities of the Issue Department.

34. (1) The liabilities of the Issue Department shall be an amount equal to the total of the amount of the currency notes of the Government of India and bank notes for the time being in circulation.

(2) For the purposes of this section, any currency note of the Government of India or bank note which has not been presented for payment within forty years from the 1st day of April following the date of its issue shall be deemed not to be in circulation, and the value thereof shall, notwithstanding anything contained in sub-section (2) of section 23, be paid by the Issue Department to the [2][Central Government] or the Banking Department, as the case may be; but any such note, if subsequently presented for payment, shall be paid by the Banking

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LEG. REF.

[1] Inserted by India and Burma (Bur. Mon. Arrs.) Order, 1937.

Department, and any such payment in the case of a currency note of the Government of India shall be debited to the [1][Central Government].

[1][(3) In this section, references to Bank notes include references to Burma notes.]

Initial assets and liabilities.

35. On the date on which this Chapter comes into force the Issue Department shall take over from the [2][Central Government] the liability for all the currency notes of the Government of India for the time being in circulation and the [2][Central Government] shall transfer to the Issue Department gold coin, gold bullion, sterling securities, rupee coin and rupee securities to such aggregate amount as is equal to the total of the amount of the liability so transferred. The coin, bullion and securities shall be transferred in such proportion as to comply with the requirements of section 33:

Provided that the total amount of the gold coin, gold bullion and sterling securities so transferred shall not be less than one-half of the whole amount transferred, and that the amount of rupee coin so transferred shall not exceed fifty crores of rupees:

Provided further that the whole of the gold coin and gold bullion held by the [2][Central Government] in the gold standard reserve and the paper currency reserve at the time of transfer shall be so transferred.

Method of dealing with fluctuations in rupee coin assets.

36. (1) After the close of any financial year in which the minimum amount of rupee coin held in the assets, as shown in any of the weekly accounts of the Issue Department for that year prescribed under sub-section (1) of section 53, is greater than fifty crores of rupees or one-sixth of the total amount of the assets as shown in that account, whichever may be the greater, the Bank may deliver to the [2][Central Government] rupee coin up to the amount of such excess but not [3][without that Government's consent] exceeding five crores of rupees, against payment of legal tender value in the form of bank notes, gold or securities:

Provided that if the Bank so desires and if the amount of gold coin, gold bullion and sterling securities in the assets does not at that time exceed one-half of the total assets, a proportion not exceeding two-fifths of such payment shall be in gold coin, gold bullion or such sterling securities as may be held as part of the assets under sub-section (6) of section 33.

(2) After the close of any financial year in which the maximum amount of rupee coin held in the assets, as so shown, is less than fifty crores of rupees or one-sixth of the total amount of the assets, as so shown, whichever may be the greater, the [2][Central Government] shall deliver to the Bank rupee coin up to the amount of such deficiency, but not without its consent exceeding five crores of rupees, against payment of legal tender value.

Suspension of assets requirements.

37. (1) Notwithstanding anything contained in the foregoing provisions the Bank may, with the previous sanction of the [2][Central Government] for periods not exceeding thirty days in the first instance, which may, with the like sanction, be extended from time to time by periods not exceeding fifteen days hold as assets gold coin, gold bullion or sterling securities of less aggregate amount than that required by sub-section (2) of section 33 and, whilst the holding is so reduced, the proviso to that sub-section shall cease to be operative:

Provided that the gold coin and gold bullion held as such assets shall not be reduced below the amount specified in the proviso to sub-section (2) of section 33 so long as any sterling securities remain held as such assets.

LEG. REF.

[1] Inserted by India and Burma (Bur. Mon. Arrs.) Order, 1937.

[2] Substituted by *ibid*.

[3] Substituted by *ibid*. for "without his consent".

(2) In respect of any period during which the holding of gold coin, gold bullion and sterling securities is reduced under sub-section (1), the Bank shall pay to the [1][Central Government] a tax upon the amount by which such holding is reduced below the minimum prescribed by sub-section (2) of section 33; and such tax shall be payable at the bank rate for the time being in force, with an addition of one per cent. per annum when such holding exceeds thirty-two and a half per cent. of the total amount of the assets and of a further one and a half per cent. per annum in respect of every further decrease of two and a half per cent: or part of such decrease:

Provided that the tax shall not in any event be payable at a rate less than six per cent. per annum.

Obligations of Government and the Bank in respect of rupee coin.

38. The [1][Central Government] shall undertake not to re-issue any rupee coin delivered under section 36 nor to put into circulation any rupees, except through the Bank and as provided in that section; and the Bank shall undertake not to dispose of rupee coin otherwise than for the purposes of circulation or by delivery to the [1][Central Government] under that section.

Obligation to supply different forms of currency.

39. (1) The Bank shall issue rupee coin on demand in exchange for bank notes and currency notes of the Government of India and shall issue currency notes or bank notes on demand in exchange for coin which is legal tender under the Indian Coinage Act, 1906.

(2) The Bank shall, in exchange for currency notes or bank notes of five rupees or upwards, supply currency notes or bank notes of lower value or other coins which are legal tender under the Indian Coinage Act, 1906, in such quantities as may, in the opinion of the Bank, be required for circulation; and the [1][Central Government] shall supply such coins to the Bank on demand. If the [1][Central Government] at any time fails to supply such coins, the Bank shall be released from obligations to supply them to the public.

Obligation to sell sterling.

40. The Bank shall sell, to any person who makes a demand in that behalf at its office in Bombay, Calcutta, Delhi, Madras or Rangoon and pays the purchase price in legal tender currency, sterling for immediate delivery in London, at a rate not below one shilling and five pence and forty-nine sixty-fourths of a penny for a rupee:

Provided that no person shall be entitled to demand to buy an amount of sterling less than ten thousand pounds.

Obligation to buy sterling.

41. The Bank shall buy, from any person who makes a demand in that behalf at its office in Bombay, Calcutta, Delhi, Madras or Rangoon, sterling for immediate delivery in London, at a rate not higher than one shilling and six pence and three-sixteenths of a penny for a rupee:

Provided that no person shall be entitled to demand to sell an amount of sterling less than ten thousand pounds:

Provided further that no person shall be entitled to receive payment unless the Bank is satisfied that payment of the sterling in London has been made.

Obligation to provide remittance between India and Burma.

[2][41-A. (1) The Bank shall provide any person who makes a demand in that behalf with remittance between its office in Rangoon and such office or offices in India as may be prescribed by the Central Board, in such amounts, at such fixed rate of exchange and subject only to such

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LEG. REF.

[1] Substituted by India and Burma (Bur. Mon. Arrs.) Order, 1937.

[2] Substituted by *ibid*.

rate or rates of commission as may be approved by the Central Government and the Government of Burma:

Provided that so long as the Bank is bound under Part II of the India and Burma (Burma Monetary Arrangements) Order, 1937, to issue on demand India rupee coin in exchange for legal tender notes, the rate of exchange shall be par.

(2) Burma assets and liabilities of the bank or any scheduled bank shall be valued, for the purposes of this Act; at the rate of exchange so fixed, or, as the case may be, at par.]

Cash reserves of scheduled banks to be kept with the Bank.

42. (1) Every bank included in the Second Schedule shall maintain with the Bank a balance the amount of which shall not at the close of business on any day be less than five per cent. of the demand liabilities and two per cent. of the time liabilities of such bank in India [1][and Burma] as shown in the return referred to in sub-section (2).

Explanation.—For the purposes of this section liabilities shall not include the paid-up capital or the reserves, or any credit balance in the profit and loss account of the bank or the amount of any loan taken from the Reserve Bank.

(2) Every scheduled bank shall send to the Central Government and to the Bank a return signed by two responsible officers of such bank showing—

[2][(*a*) the amounts of its demand and time liabilities, respectively, in India,

(*b*) the amounts of its demand and time liabilities, respectively, in Burma,

(*c*) the total amount held in India in currency notes of the Government of India and bank notes,

(*d*) the total amount held in India in Burma notes,

(*e*) the total amount held in Burma in currency notes of the Government of India and bank notes,

(*f*) the total amount held in Burma in Burma notes,

(*g*) the amounts held in India in rupee coin and subsidiary coin, respectively,

(*h*) the amounts held in Burma in rupee coin, subsidiary coin and Burma coin, respectively,

(*i*) the amounts of advances made and of bills discounted in India, respectively,

(*j*) the amounts of advances made and of bills discounted in Burma, respectively, and

(*k*) the balance held at the Bank.]

at the close of business on each Friday, or if Friday is a public holiday under the Negotiable Instruments Act, 1881, at the close of business on the preceding working day; and such return shall be sent not later than two working days after the date to which it relates:

Provided that where the Bank is satisfied that the furnishing of a weekly return under this sub-section is impracticable in the case of any scheduled bank by reason of the geographical position of the bank and its branches, the Bank may require such bank to furnish in lieu of a weekly return a monthly return to be dispatched not later than fourteen days after the end of the month to which it relates giving the details specified in this sub-section in respect of such bank at the close of business for the month.

(3) If at the close of business on any day before the day fixed for the next return, the balance held at the Bank by any scheduled bank is below the minimum prescribed in sub-section (1), such scheduled bank shall be liable to

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LEG. REF.

[1] Inserted by India and Burma (Bur. Mon. Arrs.) Order, 1937.

[2] Substituted by *ibid.* for the original clauses (*a*) to (*e*).

pay to the Bank in respect of each such day penal interest at a rate three per cent. above the bank rate on the amount by which the balance with the Bank falls short of the prescribed minimum, and if on the day fixed for the next return such balance is still below the prescribed minimum as disclosed by this return, the rates of penal interest shall be increased to a rate five per cent. above the bank rate in respect of that day and each subsequent day on which the balance held at the Bank at the close of business on that day is below the prescribed minimum.

[1][(3-A) When under the provisions of sub-section (3) penal interest at the increased rate of five per cent. above the bank rate has become payable by a scheduled bank, if thereafter on the day fixed for the next return the balance held at the Bank is still below the prescribed minimum as disclosed by this return,—

(*a*) every director and any managing agent, manager or secretary of the scheduled bank, who is knowingly and wilfully a party to the default, shall be punishable with fine which may extend to five hundred rupees and with a further fine which may extend to five hundred rupees for each subsequent day on which the default continues, and

(*b*) the Bank may prohibit the scheduled bank from receiving after the said day any fresh deposit,

and, if default is made by the scheduled bank in complying with the prohibition referred to in clause (*b*), every director and officer of the scheduled bank who is knowingly and wilfully a party to such default or who through negligence or otherwise contributes to such default shall in respect of each such default be punishable with fine which may extend to five hundred rupees and with a further fine which may extend to five hundred rupees for each day after the first on which a deposit received in contravention of such prohibition is retained by the scheduled bank.

Explanation.—In this sub-section 'officer' includes a managing agent, manager, secretary, branch manager, and branch secretary.]

(4) Any scheduled bank failing to comply with the provisions of sub-section (2) shall be liable to pay to the [2][Central Government] or to the Bank, as the case may be, or to each, a penalty of one hundred rupees for each day during which the failure continues.

(5) The penalties imposed by sub-sections (3) and (4) shall be payable on demand made by the Bank, and, in the event of a refusal by the defaulting bank to pay on such demand, may be levied by a direction of the principal Civil Court having jurisdiction in the area where an office of the defaulting bank is situated, such direction to be made only upon application made in this behalf to the Court by the [2][Central Government] in the case of a failure to make a return under sub-section (2) to the [2][Central Government] or by the Bank with the previous sanction of the [2][Central Government] in other cases.

(6) The [2][Central Government] shall, by notification in the Gazette of India, direct the inclusion in the Second Schedule of any bank not already so included which carries on the business of banking in British India and which—

(*a*) has a paid-up capital and reserves of an aggregate value of not less than five lakhs of rupees, and

(*b*) is a company as defined in clause (2) of section 2 of the Indian Companies Act, 1913, or a corporation or a company incorporated by or under any law in force in any place outside British India,

and shall by a like notification direct the exclusion from that Schedule of any scheduled bank the aggregate value of whose paid-up capital and reserve becomes at any time less than five lakhs of rupees, or which goes into liquidation or otherwise ceases to carry on banking business.

LEG. REF.

[1] Sec. 42, sub-S. (3-A) inserted by Act XXXVIII of 1940.

[2] Substituted by India and Burma (Bur. Mon. Arrs.) Order, 1937.

Publication of consolidated statement by the Bank.

43. The Bank shall compile and shall cause to be published each week a consolidated statement showing the aggregate of the amounts under each clause of sub-section (2) of section 42 exhibited in the returns received from scheduled banks under that section [1][and from Burma Scheduled Banks under the corresponding provisions of the Law of Burma].

Power to require returns from co-operative banks.

44. The Bank may require any provincial co-operative bank with which it has any transactions under section 17 to furnish the return referred to in sub-section (2) of section 42, and if it does so, the provisions of sub-sections (4) and (5) of section 42 shall apply so far as may be to such co-operative bank as if it were a scheduled bank.

Agreement with the Imperial Bank.

45. (1) The Bank shall enter into an agreement with the Imperial Bank of India which shall be subject to the approval of the [2][Central Government,] and shall be expressed to come into force on the date on which this Chapter comes into force and to remain in force for fifteen years and thereafter until terminated after five years notice on either side, and shall further contain the provisions set forth in the Third Schedule:

Provided that the agreement shall be conditional on the maintenance of a sound financial position by the Imperial Bank and that if, in the opinion of the Central Board, the Imperial Bank has failed either to fulfil the conditions of the agreement or to maintain a sound financial position, the Central Board shall make a recommendation to the [2][Central Government] and the [2][Central Government] after making such further enquiry as [1][it] thinks fit, may issue instructions to the Imperial Bank with reference either to the agreement or to any matter which in [2][its] opinion involves the security of the Government monies or the assets of the Issue Department in the custody of the Imperial Bank, and in the event of the Imperial Bank disregarding such instructions may declare the agreement to be terminated.

(2) The agreement referred to in sub-section (1) shall, as soon as may be after it is made, be laid before the Central Legislature.

[1][(3) As from the commencement of Part III of the Government of India Act, 1935, references in the said agreement to the Governor-General in Council in relation to his general banking business, his accounts, and sums due to or from him, and references to Government in relation to receipts and disbursements dealt with on account of Government shall be construed as including references to the Provincial Governments and the Federal Railway Authority.]

CHAPTER IV.

GENERAL PROVISIONS.

Contribution by Central Government to the Reserve Fund.

46. The [2][Central Government] shall transfer to the Bank rupee securities of the value of five crores of rupees to be allocated by the Bank to the Reserve Fund.

Allocation of surplus.

47. After making provision for bad and doubtful debts, depreciation in assets, contributions to staff and superannuation funds, and such other contingencies as are usually provided for by bankers, and after payment out of the net annual profits of a cumulative dividend at such rate not exceeding five per cent. per annum on the share capital as the Central Government may fix at the time of the issue of shares, a portion of the surplus shall be allocated to the payment of an additional dividend to the shareholders calculated on the scale set forth in the Fourth Schedule and the balance of the surplus shall be paid to the [2][Central Government];

LEG. REF.

[1] Inserted by India and Burma (Bur. Mon. Arrs.) Order, 1937.

[2] Substituted by *ibid*.

Provided that if at any time the Reserve Fund is less than the share capital, not less than fifty lakhs of rupees of the surplus, or the whole of the surplus if less than that amount, shall be allocated to the Reserve Fund.

Exemption of Bank from income-tax and super-tax and provision for deduction at source of income-tax on dividends.

48. (1) Notwithstanding anything contained in the Indian Income-tax Act, 1922, or any other enactment for the time being in force relating to income-tax or super-tax, the Bank shall not be liable to pay income-tax or super-tax on any of its income, profits or gains:

Provided that nothing in this section shall affect the liability of any shareholder in respect of income-tax or super-tax.

(2) For the purposes of section 18 of the Indian Income-tax Act, 1922, and of any other relevant provision of that Act relating to the levy and refund of income-tax, any dividend paid under section 47 of this Act shall be deemed to be "Interest on Securities".

Publication of bank rate.

49. The Bank shall make public from time to time the standard rate at which it is prepared to buy or re-discount bills of exchange or other commercial paper eligible for purchase under this Act.

Auditors.

50. (1) Not less than two auditors shall be elected and their remuneration fixed at the annual general meeting. The auditors may be shareholders, but no Director or other officer of the Bank shall be eligible during his continuance in office. Any auditor shall be eligible for re-election on quitting office.

(2) The first auditors of the Bank may be appointed by the Central Board before the first annual general meeting and, if so appointed, shall hold office only until that meeting. All auditors elected under this section shall severally be, and continue to act as, auditors until the first annual general meeting after their respective elections:

Provided that any casual vacancy in the office of any auditor elected under this section may be filled by the Central Board.

Appointment of special auditors by Government.

51. Without prejudice to anything contained in section 50, the [1][Central Government] may at any time appoint the Auditor-General or such auditors as [1][it] thinks fit to examine and report upon the accounts of the Bank.

Powers and duties of auditors.

52. (1) Every auditor shall be supplied with a copy of the annual balance-sheet, and it shall be his duty to examine the same, together with the accounts and vouchers relating thereto; and every auditor shall have a list delivered to him of all books kept by the Bank, and shall at all reasonable times have access to the books, accounts and other documents of the Bank, and may, at the expense of the Bank if appointed by it or at the expense of the [1][Central Government] if appointed by [1][that Government] employ accountants or other persons to assist him in investigating such accounts, and may, in relation to such accounts, examine any Director or officer of the Bank.

(2) The auditors shall make a report to the shareholders or to the Central Government, as the case may be, upon the annual balance-sheet and accounts, and in every such report they shall state whether in their opinion, the balance-sheet is a full and fair balance-sheet containing all necessary particulars and properly drawn up so as to exhibit a true and correct view of the state of the Bank's affairs, and, in case they have called for any explanation or information from the Central Board, whether it has been given and whether it is satisfactory. Any such report made to the shareholders shall be read together with the report of the Central Board, at the annual general meeting.

LEG. REF.

[1] Substituted by India and Burma (Bur. Mon. Arrs.) Order, 1937.

Returns.

53. (1) The Bank shall prepare and transmit to the [1][Central Government] a weekly account of the Issue Department and of the Banking Department in [2][such] form as the [1][Central Government] may, by notification in the Gazette of India, prescribe. The [1][Central Government] shall cause these accounts to be published weekly in the Official Gazette.

(2) The Bank shall also, within two months from date on which the annual accounts of the Bank are closed, transmit to the [1][Central Government] a copy of the annual accounts signed by the Governor, the Deputy Governors and the Chief Accounting Officer of the Bank, and certified by the auditors, together with a report by the Central Board on the working of the Bank throughout the year, and the [1][Central Government] shall cause such accounts and report to be published in the Gazette of India.

(3) The Bank shall also, within two months from the date on which the annual accounts of the Bank are closed, transmit to the [1][Central Government] a statement showing the name, address and occupation of, and the number of shares held by, each shareholder of the Bank.

Agricultural Credit Department.

54. The Bank shall create a special Agricultural Credit Department the functions of which shall be—

(*a*) to maintain an expert staff to study all questions of agricultural credit and be available for consultation by the [1][Central Government,] [3][Provincial Governments, the Government of Burma], provincial co-operative banks, [4][Burmah co-operative banks], and other banking organisations.

(*b*) to co-ordinate the operations of the Bank in connection with agricultural credit and its relations with provincial co-operative banks [2][Burma Co-operative Banks], and any other banks or organisations engaged in the business of agricultural credit.

Reports by the Bank.

55. (1) The Bank shall, at the earliest practicable date and in any case within three years from the date on which this Chapter comes into force, make to the Central Government a report, with proposals, if it thinks fit, for legislation, on the following matters, namely :—

(*a*) the extension of the provisions of this Act relating to scheduled banks to persons and firms, not being scheduled banks, engaged in British India in the business of banking, and

(*b*) the improvement of the machinery for dealing with agricultural finance and methods for effecting a closer connection between agricultural enterprise and the operations of the Bank.

(2) When the Bank is of opinion that the international monetary position has become sufficiently clear and stable to make it possible to determine what will be suitable as a permanent basis for the Indian monetary system and to frame permanent measures for a monetary standard it shall report its views to the [1][Central Government].

Power to require declaration as to ownership of registered shares.

56. (1) The Local Board of any area may at any time require any shareholder who is registered on the register for that area to furnish to the Local Board within a specified time, not being less than thirty days, a declaration, in such form as the Central Board may by regulations prescribe, giving particulars of all shares on the said register of which he is the owner.

LEG. REF.

[1] Substituted by India and Burma (Bur. Mon. Arrs.) Order, 1937.

[2] Substituted by *ibid*.

[3] Substituted for "Local Governments" by *ibid*.

[4] Inserted by *ibid*.

(2) If it appears from such declaration that any shareholder is not the owner of any shares which are registered in his name, the Local Board may amend the register accordingly.

(3) If any person required to make a declaration under sub-section (1) fails to make such declaration within the specified time, the Local Board may make an entry against his name in the register recording such failure and directing that he shall have no right to vote, either under section 9 or section 14, by reasons of the shares registered in his name on that register.

(4) Whoever makes a false statement in any declaration furnished by him under sub-section (1) shall be deemed to have committed the offence of giving false evidence defined in section 191 of the Indian Penal Code, and shall be punishable under the second paragraph of section 193 of that Code.

(5) Nothing contained in any declaration furnished under sub-section (1) shall operate to affect the Bank with notice of any trust, and no notice of any trust expressed, implied or constructive shall be entered on the register or be receivable by the Bank.

(6) Until Local Boards have been constituted under section 9 the powers of a Local Board under this section shall be exercised by the Central Board in respect of any area for which a Local Board has not been constituted.

Liquidation of the Bank.

57. (1) Nothing in the Indian Companies Act, 1913, shall apply to the Bank, and the Bank shall not be placed in liquidation save by order of the [1][Central Government] and in such manner as [1][it] may direct.

(2) In such event the Reserve Fund and surplus assets, if any, of the Bank shall be divided between the [1][Central Government] and the shareholders in the proportion of seventy-five per cent. and twenty-five per cent., respectively:

Provided that the total amount payable to any shareholder under this section shall not exceed the paid-up value of the shares held by him by more than one per cent. for each year after the commencement of this Act subject to a maximum of twenty-five per cent.

Power of the Central Board to make regulations.

58. (1) The Central Board may, with the previous sanction of the [1][Central Government] make regulations consistent with this Act to provide for all matters for which provision is necessary or convenient for the purpose of giving effect to the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing provision, such regulations may provide for all or any of the following matters, namely:—

(*a*) the holding and conduct of elections under this Act, including provisions for the holding of any elections according to the principle of proportional representation by means of the single transferable vote;

LEG. REF.

[1] Substituted by India and Burma (Bur. Mon. Arrs.) Order, 1937.

NOTES.

Sec. 58. Reserve Bank Rules, R. 22 (iii): ENQUIRY UNDER—SCOPE.—When a servant who is entitled to an inquiry under R. 22 (*iii*) of the Reserve Bank Rules is afforded an inquiry it must not be wholly illusory. If he submits an explanation with regard to the charges made against him the bank cannot take any action till they are satisfied that a charge (or charges) is proved; it is not enough that it is merely made. The framing of charges is not an enquiry and if it is proved, they must be satisfied that the act or omission which form the basis of the charge (or acts or omissions which form the basis of the charges) justify them in taking disciplinary action. And he must know exactly what is the nature of his offence and what is considered proved at the time when such action is taken. The fact that he does not desire to answer charges in person, but puts in a written statement, does not absolve the employer from paying regard to the elementary rules of justice and fairplay. Since a right of appeal is clearly given against dismissal of employee of Reserve Bank there must be satisfactory evidence upon which an appellate authority can act. 186 I.C. 339=1939 Rang. 357.

(*b*) the final decision of doubts or disputes regarding the qualifications of candidates for election or regarding the validity of elections;

(*c*) the maintenance of the share register, the manner in which and the conditions subject to which shares may be held and transferred, and, generally, all matters relating to the rights and duties of shareholders;

(*d*) the manner in which general meetings shall be convened, the procedure to be followed thereat and the manner in which votes may be exercised;

(*e*) the manner in which notices may be served on behalf of the Bank upon shareholders or other persons;

(*f*) the manner in which the business of the Central Board shall be transacted, and the procedure to be followed at meetings thereof;

(*g*) the conduct of business of Local Boards and the delegation to such Boards of powers and functions;

(*h*) the delegation of powers and functions of the Central Board to the Governor, or to Deputy Governors, Directors or officers of the Bank;

(*i*) the formation of Committees of the Central Board, the delegation of powers and functions of the Central Board to such Committees, and the conduct of business in such Committees;

(*j*) the constitution and management of staff and superannuation funds for the officers and servants of the Bank;

(*k*) the manner and form in which contracts binding on the Bank may be executed;

(*l*) the provision of an official seal of the Bank and the manner and effect of its use;

(*m*) the manner and form in which the balance-sheet of the Bank shall be drawn up, and in which the accounts shall be maintained;

(*n*) the remuneration of Directors of the Bank;

(*o*) the relations of the scheduled banks with the Bank and the returns to be submitted by the scheduled banks to the Bank;

(*p*) the regulation of clearing-houses for the scheduled banks;

(*q*) the circumstances in which, and the conditions and limitations subject to which, the value of any lost, stolen, mutilated or imperfect currency note of the Central Government or bank note may be refunded; and

(*r*) generally, for the efficient conduct of the business of the bank.

(3) Copies of all regulations made under this section shall be available to the public on payment.

[1][* * * *].

THE FIRST SCHEDULE.

(*See* section 4.)

AREAS SERVED BY THE VARIOUS SHARE REGISTERS.

I. The WESTERN AREA, served by the BOMBAY Register, shall consist of—

the Bombay Presidency including Sind, the Central Provinces, Berar, Hyderabad, Baroda, Khairpur, the Western India States, the Central India States (including Makrai but excluding Rewah and other States of Bundelkhand and Baghelkhand), the Gujerat States, Kolhapur and the Deccan States.

II. THE EASTERN AREA, served by the CALCUTTA Register, shall consist of—

the Bengal Presidency, Bihar and Orissa, Assam, Sikkim, Manipur, Cooch-Behar; Tripura, the Eastern States, Rewah and other States of Bundelkhand and Baghelkhand, and the Khasi States.

III. The NORTHERN AREA, served by the DELHI Register, shall consist of—

the United Provinces, Delhi, the Punjab, the North-West Frontier Province, Ajmer-Merwara, Baluchistan, Kashmir, the Punjab States excluding Khairpur, the Simla Hill States, Dujana, Pataudi, Kalsia, Rampur, Tehri Garhwal, Benares, the Rajputana States

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LEG. REF.

[1] Ss. 59, 60 and 61, repealed by Act XX of 1937.

including Palanpur and Danta, Gwalior, Khaniadhana, Kalat, Las Bela, Hunza, Nagir, Amb, Chitral, Dir, Phulera and Swat.

IV. The SOUTHERN AREA, served by the MADRAS Register, shall consist of—the Madras Presidency, Coorg, Mysore and the Madras States.

V. The BURMA AREA, served by the RANGOON Register, shall consist of—

[1][Burma and the Andaman and Nichobar Islands.]

THE SECOND SCHEDULE.

[*See* section 42 and section 2 (*e*).]

Ajodhia Bank, Fyzabad.
Allahabad Bank.
American Express Company. Incorporated.
Banco National Ultramarino.
Bangalore Bank.
Bank of Baroda.
Bank of Behar.
Bank of Chettinad, Madras.
Bank of Hindustan, Madras.
Bank of India, Bombay.
Bank of Taiwan.
Benares Bank.
Bengal Central Bank.
Bhagwan Das & Co., Dehra Dun.
Canara Bank.
Central Bank of India.
Chartered Bank of India, Australia and China.
Comptair National d' Escompte de Paris.
Eastern Bank.
Grindlay and Company.
Hongkong and Shanghai Banking Corporation.
Imperial Bank of India.
Indian Bank, Madras.
Industrial Bank of Western India, Ahmedabad.
Karnani Industrial Bank.
Lloyds Bank.
Mercantile Bank of India.
Mitsui Bank, Bombay.
National Bank of India.
National City Bank of New York.
Nederlandsche Indischie Handels-bank.
Nederlandsche Handel-Maatschappij.
Nedungadi Bank, Calicut.
Oudh Commercial Bank.
P. and O. Banking Corporation.
Punjab and Sind Bank, Amritsar.
Punjab Co-operative Bank, Amritsar.
Punjab National Bank, Lahore.
Simla Banking and Industrial Company.
Thomas Cook & Sons.
Travancore National Bank, Tiruvella.
Union Bank of India, Bombay.
Yokohama Specie Bank.
[Quilon Bank, Quilon, S. India.]
Nadar Bank, Tuticorin.
Comilla Union Bank, Comilla.
Indo-commercial Bank, Mayavaram.
Comilla Banking Corporation, Comilla.]

THE THIRD SCHEDULE.

(*See* section 45.)

Provisions to be contained in the agreement between the Reserve Bank of India and the Imperial Bank of India.

1. The Imperial Bank of India shall be the sole agent of the Reserve Bank of India at all places in British India where there is a branch of the Imperial Bank of India which was in existence at the commencement of the Reserve Bank of India Act, 1934, and there is no branch of the Banking Department of the Reserve Bank of India.

2. In consideration of the performance at the places referred to in clause (1) by the Imperial Bank of India on behalf of the Reserve Bank of India of the functions which the Imperial Bank of India was performing on behalf of the [1][Central Government] before the coming into force of the Reserve Bank of India Act, 1934, the Reserve Bank of India shall pay to the Imperial Bank of India as remuneration a sum which shall be for the first ten years during which this agreement is in force a commission calculated at one-sixteenth of one per cent. on the first 250 crores and one thirty-second of one per cent. on the remainder of the total of the receipts and disbursements dealt with annually on account of Government by the Imperial Bank of India on behalf of the Reserve Bank of India. At the close of the said ten years the remuneration to be paid by the Reserve Bank of India to the Imperial Bank of India for the performance of these functions shall be revised and the remuneration for the ensuing five years shall be determined on the basis of the actual cost to the Imperial Bank of India, as ascertained by expert accounting investigation, of performing the said functions. The remuneration so determined shall thereafter be subject to revision in like manner at the end of each period of five years so long as this agreement remains in force. If any dispute arises between the Reserve Bank of India and the Imperial Bank of India as to the amount of the said remuneration the matter shall be referred for final decision to the [1][Central Government] who may require from the Imperial Bank such information and may order such accounting investigation as [1][it] thinks fit.

LEG. REF.

[1] Substituted by India and Burma (Bur. Mon. Arrs.) Order, 1937.

3. In consideration of the maintenance by the Imperial Bank of India of branches not less in number than those existing at the commencement of the Reserve Bank of India Act, 1934, the Reserve Bank of India shall, until the expiry of fifteen years from the coming into force of this agreement, make to the Imperial Bank of India the following payments namely:—

(*a*) during the first five years of this agreement—nine lakhs of rupees per annum;

(*b*) during the next five years of the agreement—six lakhs of rupees per annum; and

(*c*) during the next five years of the agreement—four lakhs of rupees per annum;

4. The Imperial Bank of India shall not without the approval of the Reserve Bank of India open any branch in substitution for a branch existing at the time this agreement comes into force.

THE FOURTH SCHEDULE.

(*See* section 47).

SCALE OF ADDITIONAL DIVIDED PAYABLE TO SHAREHOLDERS.

A. If the maximum rate of dividend fixed under section 47 is five per centum and so long as the share capital of the Bank is five crores of rupees—

(1) if the surplus does not exceed four crores of rupees—*Nil*,

(2) if the surplus exceeds four crores of rupees—

(*a*) out of such excess up to the first one and a half crores of rupees—a fraction equal to one-sixtieth;

(*b*) out of each successive additional excess up to one and a half crores of rupees—one-half of the fraction payable out of the next previous one and a half crores of excess:

Provided that the additional dividend shall be a multiple of one-eighth of one per cent. on the share capital, the amount of the surplus allocated thereto being rounded up or down to the nearest one-eighth of one per cent. on the share capital.

B. If the maximum rate of dividend fixed under section 47 is below five per centum, the said fraction of one-sixtieth shall be increased in the ratio of the difference between six and the fixed rate to unity.

C. When the original share capital of the Bank has been increased or reduced, the said fraction of one-sixtieth shall be increased or diminished in proportion to the increase or reduction of the share capital.

THE FIFTH SCHEDULE.

[Omitted by India and Burma (Burma Monetary Arrangements) Order, 1937.]

THE REVENUE RECOVERY ACT (I OF 1890).[1]

Year.	No.	Short title.	Amendments.
1890	I	The Revenue Recovery Act.	Repealed in part, XIII of 1898; X of 1914. Amended, IV of 1914; Government of India (Adaptation of Indian Laws) Order, 1937.

Rep. in pt. (as to Burma), Act XIII of 1891, S. 18.

Modified in its application to the Benares Family Domains, U.P. Act III of 1904, S. 15.

Declared in force—

in the Sonthal Parganas, Reg. III of 1872, S. 3, as amended by Reg. III of 1899, S. 3;

LEG. REF.

[1] For Statement of Objects and Reasons, see *Gazette of India*, 1887, Pt. V, p. 128; for Report of the Select Committee, see *ibid.*, 1890, Pt. V, p. 11 and for Proceedings in Council, see *ibid.*, 1887, Pt. VI, pp. 7 and 12.

in the Angul District, Reg. III of 1913, S. 3;
in Upper Burma (except the Shan States), Act XIII of 1898, S. 4;
in the Arakan Hill District, Reg. I of 1916, S. 2.

[14*th February*, 1890.

An Act to make better provision for recovering certain public demands.

WHEREAS it is expedient to make better provision for recovering certain public demands; It is hereby enacted as follows:—

Title and extent.

1. (1) This Act may be called THE REVENUE RECOVERY ACT, 1890.

(2) It extends to the whole of British India inclusive of [1][* * * *] British Baluchistan; [2][*]

(3) [2][* * *].

Definitions.

2. In this Act, unless there is something repugnant in the subject or context,—

(1) "district" includes a presidency-town;

(2) "Collector" means the chief officer in charge of the land revenue administration of a district; and

(3) "defaulter" means a person from whom an arrear of land revenue, or a sum recoverable as an arrear of land-revenue, is due, and includes a person who is responsible as surety for the payment of any such arrear or sum.

Recovery of public demands by enforcement of process in other districts than those in which they become payable.

3. (1) Where an arrear of land-revenue, or a sum recoverable as an arrear of land-revenue, is payable to a Collector by a defaulter being or having property in a district other than that in which the arrear accrued or the sum is payable, the Collector may send to the Collector of that other district a certificate in the form as nearly as may be of the schedule, stating—

(*a*) the name of the defaulter and such other particulars as may be necessary for his identification, and

(*b*) the amount payable by him and the account on which it is due.

(2) The certificate shall be signed by the Collector making it, [3][or by any officer to whom such Collector may, by order in writing, delegate this duty] and, save as otherwise provided by this Act, shall be conclusive proof of the matters therein stated.

(3) The Collector of the other district shall, on receiving the certificate, proceed to recover the amount stated therein as if it were an arrear of land-revenue which had accrued in his own district.

Remedy available to person denying liability to pay amount recovered under last foregoing section.

4. (1) When proceedings are taken against a person under the last foregoing section for the recovery of an amount stated in a certificate, that person may, if he denies his liability to pay the amount or any part thereof and pays the same under protest made in writing at the time of payment and signed by him or his agent, institute a suit for the repayment of the amount or the part thereof so paid.

(2) A suit under sub-section (1) must be instituted in a Civil Court having jurisdiction in the local area in which the office of the Collector who made the certificate is situate, and the suit shall be determined in accordance with the law in force at the place where the arrear accrued or the liability for the payment of the sum arose.

LEG. REF.

[1] The words "Upper Burma and" were repealed by the Fifth Schedule to the Burma Laws Act, 1898 (XIII of 1898), Bur. Code.

[2] The word "and" at the end of Cl. (2) and the words "and shall come into force at once" were repealed by Act X of 1914.

[3] Inserted by Act IV of 1914.

(3) In the suit the plaintiff may, notwithstanding anything in the last foregoing section, but subject to the law in force at the place aforesaid, give evidence with respect to any matter stated in the certificate.

[1][(4) This section shall apply if under this Act as in force as part of the law of Burma, or under any other similar Act forming part of the law of Burma, proceedings are taken against a person in Burma for the recovery of an amount stated in a certificate made by a Collector in British India].

Recovery by Collectors of sums recoverable as arrears of revenue by other public officers or by local authorities.

5. Where any sum is recoverable as an arrear of land-revenue by any public officer other than a Collector or by any local authority, the Collector of the district in which the office of that officer or authority is situate shall, on the request of the officer or authority, proceed to recover the sum as if it were an arrear of land-revenue which has accrued in his own district, and may send a certificate of the amount to be recovered to the Collector of another district under the foregoing provisions of this Act, as if the sum were payable to himself.

Property liable to sale under this Act.

6. (1) When the Collector of a district receives a certificate under this Act, he may issue a proclamation prohibiting the transfer or charging of any immovable property belonging to the defaulter in the district.

(2) The Collector may at any time, by order in writing, withdraw the proclamation, and it shall be deemed to be withdrawn when either the amount stated in the certificate has been recovered or the property has been sold for the recovery of that amount.

(3) Any private alienation of the property or of any interest of the defaulter therein, whether by sale, gift, mortgage or otherwise, made after the issue of the proclamation and before the withdrawal thereof, shall be void as against the [2][Crown] and any person who may purchase the property at a sale held for the recovery of the amount stated in the certificate.

(4) Subject to the foregoing provisions of this section, when proceedings are taken against any immovable property under this Act for the recovery of an amount stated in a certificate, the interests of the defaulter alone therein shall be so proceeded against, and no incumbrances created, grants made or contracts entered into by him in [3]good faith shall be rendered invalid by reason only of proceedings being taken against those interests.

(5) A proclamation under this section shall be made by beat of drum or other customary method, and by the posting of a copy thereof on a conspicuous place in or near the property to which it relates.

Saving of local laws relating to revenue.

7. Nothing in the foregoing sections shall be construed—

(*a*) to impair any security provided by, or affect the provisions of, any other enactment for the time being in force for the recovery of land-revenue or of sums recoverable as arrears of land-revenue, or

(*b*) to authorize the arrest of any person for the recovery of any tax payable to the corporation, commissioner, committee, board, council or person having authority over a municipality under any enactment for the time being in force.

LEG. REF.

[1] Sub-S. (4) to S. 4 inserted by A.O., 1937.

[2] Substituted by *ibid*.

[3] *See* definition in the General Clause Act, 1897 (X of 1897), S. 3 (20).

NOTES.

Sec. 5.—Sale of estate not in arrears—Jurisdiction of Collector—Title of real owner is not affected. 1922 P. 445.

Recovery in British India of certain public demands arising beyond British India.

8. When this Act has been applied to any local area which is under the administration of the [1][Central Government or the Crown Representative] but which is not part of British India, an arrear of land-revenue accruing in that local area, or a sum recoverable as an arrear of land-revenue and payable to Collector or other public officer or to a local authority in that local area, may be recovered under this Act in British India.[2]

Recovery in India of land-revenues, etc., accruing in Burma.

[3][9. (1) The Central Government may direct than an arrear of land-revenue accruing in Burma or a sum recoverable in Burma as an arrear of land-revenue and payable to a Collector or other public officer or to a local authority in Burma may be recovered under this Act in British India and thereupon such arrear or sum shall be so recoverable:

Provided that the Central Government shall not give any such direction unless it is satisfied that the remedy available under section 4 of this Act in British India to a person paying under protest in British India an arrear accruing in British India is available under Burma law in Burma to a person paying under protest in British India an arrear accruing in Burma.

(2) For recovering by virtue of this section any arrears of tax or penalty due under the enactments relating to income-tax or super-tax in force in Burma, the Collector shall have such additional powers as he has in the case of Indian income-tax and super-tax under the proviso to section 46 (2) of the Indian Income-tax Act, 1922.]

Duty of Collectors to remit moneys collected in certain cases.

[3][10. Where a Collector receive a certificate under this Act from a Collector of another Province or a Collector in Burma he shall remit any sum recovered by him by virtue of that certificate to that Collector, after deducting his expenses in connection with the matter.]

THE SCHEDULE.

CERTIFICATE.

[*See* section 3, sub-section (1).]

From

The Collector of

To

The Collector of

Dated the *of* 19.....

The sum of Rs. is payable on account of by

, son of , resident of , who is believed (to be at) (to have property consisting of at) in your district.

Subject to the provisions of the Revenue Recovery Act, 1890, the said sum is recoverable by you as if it were an arrear of land-revenue which had accrued in your own district, and you are hereby desired so to recover it and to remit it to my office at .

A.B.,

Collector of .

LEG. REF.

[1] Substituted by A.O., 1937.

[2] For notification applying the Act to all territories which are under the administration of the Governor-General in Council but which are not part of British India including the territories for the time being administered by the Agent to the Governor-General in Baluchistan as such Agent, *see* No. 1415-I, dated 30th April, 1890, Western India, volume of Macpherson's Lists of British Enactments in force in Native State.

[3] Ss. 9 and 10 inserted by A.O., 1937.

THE RULES AND REGULATIONS CONTINUANCE ACT (XXIV OF 1937).

[*7th October*, 1937.

An Act to provide for the continuance in force of certain rules and regulations.

WHEREAS it is expedient to provide for the continuance in force of certain rules made under the Indian Electricity Act, 1910, and certain regulations made under the Indian Boilers Act, 1923; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE RULES AND REGULATIONS CONTINUANCE ACT, 1937.

Continuance in force of rules and regulations made under Act IX of 1910 and Act V of 1923.

2. Rules made before the 31st day of March, 1937, under section 37 of the Indian Electricity Act, 1910, and regulations made before the 28th day of March, 1937, under section 28 of the Indian Boilers Act, 1923, by the Governor-General in Council shall, on and from the said dates respectively, be deemed to have been made under the said sections of the said Acts by the authority substituted for the Governor-General in Council by the Indian Electricity (Amendment) Act, 1937, and the Indian Boilers (Amendment) Act, 1937, respectively, and shall continue to be in force until superseded by rules or regulations made under the said sections of the said Acts by the Central Electricity Board or the Central Boilers Board, as the case may be.

THE INDIAN SALE OF GOODS ACT (III OF 1930).

PREFATORY NOTE.—HISTORY OF THE ACT.—The history of this enactment has been explained as follows by the First Select Committee in their report. The Committee was composed of lawyers of eminence, as Sir D.F. Mulla, Mr. Jayakar, Mr. Alladi Krishnaswami Iyer, the Advocate-General, Madras, with the Hon. Sir B. L. Mitter, Law Member of the Council of the Governor-General as Chairman.

REPORT OF THE FIRST SELECT COMMITTEE.....A Bill to amend and define the law relating to the sale of goods, with the notes setting forth the reasons for the proposed amendments, which had already been prepared in the Legislative Department of the Government of India, was placed before us, and formed the basis of our discussions.

Before the passing of the Indian Contract Act, 1872, Chapter VII of which contains the law relating to the sale of goods or movables, the law on this subject was not only not uniform throughout British India but was also outside the limits of the original jurisdiction of the High Courts, extremely uncertain in its application. Within the limits of the presidency-towns, the rules of English law, including those in the Statute of Frauds, were applied, whilst in the mufassal it was doubtful whether the Statute of Frauds was applicable and, as observed by the Indian Law Commissioners in their second report, the Judge was to a great extent without the guidance of any positive law beyond the rule that his decision should be such as he deemed to be in accordance with "justice equity and good conscience". To remedy this unsatisfactory state of affairs, the Indian Law Commissioners framed, in their second report, dated the 28th July, 1866, a set of rules relating to the general law of contracts including therein provisions relating to the sale of movables. The draft of the Law Commissioners underwent several changes at the hands of the then Law Members, Sir Henry Maine and Sir James Stephen, and also in the Select Committee of the Indian Legislature. But, as stated by Sir James Stephen himself while presenting the report of the Select Committee on the Indian Contract Bill, the chapter on the sale of goods except in regard to the rule as to market overt, represented generally the English law on the subject as if then stood.

The rules of English law relating to the sale of goods had grown up mainly out of judicial decisions. Along with the general law of contract, they were the product of many generations and were adapted to the circumstances and exigencies of the times and the dealings of the people. They were, however, largely dominated by the provisions of the Statute of Frauds which was passed in the reign of Charles the Second. The Law Commissioners, as well as those who were ultimately responsible for framing the Indian Contract Act, at once realized that the provisions of the Statute of Frauds, although followed in the presidency towns, were not suitable to the conditions prevailing in this country, and that "any law relating to this important subject must at any rate be free from the inexpressible confusion and intricacy which is thrown over every part of that Statute in consequence of its vague language".

In 1870, various branches of law were being codified in British India. The main object in view was, in the words of Sir James Stephen, "that of providing a body of law to the Government of the country so expressed that it might be readily understood both by English and Native Government servants without extrinsic help from the English law libraries". What was urgently needed was a guide for the Judge or Magistrate who had but little legal training, derived little or no assistance from the Bar and worked at a distance from any law library.

Whatever merit the simple and elementary rules embodied in the Indian Contract Act may have had, and however sufficient and suitable they may have been for the needs which they were intended to meet in 1872, the passage of time has revealed defects the removal of which has become necessary in order to keep the law abreast of the developments of modern business relations. The law relating to the sale of goods appertains mainly to mercantile transactions. There can be no doubt that during the last half century conditions in this country relating to trade and business have undergone material changes. Methods of business have largely altered and new relations have arisen between man and man. In dealing with these relations, it has been necessary to give recognition to new principles, and the Indian Courts have found that a law enacted more than fifty years ago is entirely inadequate to enable them to deal with these new relations or give effect to the new principles. The result has been that on various occasions the Courts have had to hold that Chapter VII of the Indian Contract Act is not exhaustive, and to import therein analogies from the decisions of the English Courts.

The English law relating to the sale of goods which was admittedly the basis of Chapter VII of the Indian Contract Act has itself since 1872 undergone drastic changes, and was finally codified in 1893 by the present Sale of Goods Act (56 & 57 Vict., c. 71), which discards many of the old common law rules upon which Chapter VII of the Indian Act was based, in favour of provisions more suited to modern conditions or more convenient in actual practice.

By the Bill referred to for our consideration, the law relating particularly to the sale of goods is embodied in a separate enactment, although many of the general principles contained in the Indian Contract Act will continue to be applicable thereto. When Sir James Stephen moved the Indian Contract Bill, he admitted that it was not, and could not pretend to be, a complete Code upon the branch of law to which it related. He, however, expressed a hope that in later years it would be easy to enact supplementary chapters relating to the several branches of the law of contract which the Bill did not touch. This hope has never been fulfilled. In later years it was found more convenient to have separate enactments for the several branches of the law of contract, *e.g.*, the Transfer of Property Act, the Negotiable Instruments Act, and the Merchant Shipping Act. In our opinion, in view of the Complexity of modern conditions, the time has now come when this process should be accelerated by embodying the different branches of law relating to contract in separate self-contained enactments; and we hope that the Bill which we attach to our Report may be passed into law at an early date and may be but the first of the series required to complete the task which we have outlined above.

The Bill referred to us was mainly based on the English Sale of Goods Act, 1893. This Act has stood the test of nearly thirty-five years of practical application, and in the words of Lord Parker in *The Parchim,* (1918) A.C. 157 at pages 160-161, "is a very successful and correct codification of this branch of English mercantile law." As is shown in the note below, most of the Colonies and Overseas Dominions have adopted and re-enacted the Act with only such small variations as have been found necessary to adapt its provisions to local circumstances. It is also remarkable that the Uniform Sales Act, passed in 1906 in the United States of America and adopted in twenty out of fifty-three States and territories, is based very largely on the English Act. These facts constitute striking evidence of the completeness and the universal suitability of its provisions.

In mercantile transactions a conflict of laws should, as far as possible, be avoided. Uniformity of law in various countries, particularly in those which have business or trade dealings with one another, is highly convenient and desirable. We, therefore, approve of the proposal to adopt the provisions of the English Sale of Goods Act so far as they are suitable to Indian conditions as the basis for the present Bill, and thus to make the Indian Law relating to the sale of goods as nearly as possible uniform with the law in force in other parts of the British Empire.

The provisions of the English Act are far more elaborate and comprehensive than those of Chapter VII of the Indian Contract Act, and in their arrangement the English Act is more logical and methodical. As we have already observed, it has revised and brought up to date the rules of the English Common Law. Moreover, the adoption of the English Act as the basis of the present Bill will enable Indian Courts to interpret its provisions in the light of the decisions of the English Court.

In adopting the provisions of the English Act we have not been unmindful of the needs and exigencies of this country. Wherever it has been found that a rule obtaining in England, such as that relating to market overt, is not suitable to Indian conditions the

rule has been rejected. We have moreover, carefully scrutinised the provisions of the English Act in the light of the decisions of English Courts since 1893, and where those decisions have shown the provisions of the English Act to be defective or ambiguous, we have attempted to improve upon them. We have also retained several of the provisions of the Indian Contract Act which we consider necessary or useful to meet special conditions existing in India. The Bill as revised by us on the above lines is attached to our Report as Appendix C.

A detailed explanation of the various clauses of the Bill is set out in our notes on clauses. But we think it desirable to draw attention to the following few points of importance:

(*a*) The present Bill embodies the principle that the question whether a contract for the sale of goods does or does not pass the property in the goods from the buyer to the seller must in all cases be determined by the intention of the parties to the contract. The provisions of Chapter VII of the Indian Contract Act are vague and conflicting on this point. The Bill codifies the rules by which that intention may be ascertained, but the operation of these rules will be displaced by any terms of the contract defining the intention or by any attendant circumstances, including the conduct of the parties, rendering it ascertainable. In following this principle, we have borne in mind that in mercantile matters the certainty of the rule is often of more importance than the substance. If the parties know beforehand what their legal position is, they can provide for their particular wants by express stipulations. Sale, after all, is a consensual contract, and the Bill does not prevent the parties from making any bargain they please. Its object is to lay down clear rules for the cases where the parties have either formed no intention or failed to express it.

(*b*) The distinction between a sale and an agreement to sell, which was not clear in Chapter VII of the Indian Contract Act, has been clearly brought out. This distinction is very necessary to determine the rights and liabilities of the parties to the contract.

(*c*) It is made clear that a contract of sale can be made by mere offer and acceptance. Neither payment nor delivery is necessary for the purpose.

(*d*) Before 1893 the law in England relating to warranties and conditions was in a very confused state. In the Indian Contract Act the word "warranty" has been used in a very vague sense. In some provisions it denotes a condition which would enable a party aggrieved by its breach to repudiate the contract, while in others it enables him to claim damages only. In the Bill this ambiguity has been removed.

(*e*) There is much conflict of decisions in India regarding the meaning of section 108 of the Indian Contract Act which relates to sales by ostensible owners. This is to a certain extent due to the obscure phraseology of the section itself. We had tried to remove this obscurity in clauses 27 to 30 of the Bill to simplify the law on the subject.

(*f*) We have elaborated the rules relating to delivery to carriers, stoppage in transit and auction sales.

(*g*) We have anxiously considered the question of the retention of the illustrations appearing in Chapter VII of the Indian Contract Act and of the insertion of illustrations to new provisions. Our decision is that the better policy is to forego all illustrations, leaving the Courts to construe the sections as they stand.—(*Report of the First Select Committee.*)

REPORT OF THE SECOND SELECT COMMITTEE:—This being a highly technical piece of Legislation, the Bill was again referred to another Select Committee who, in the course of their report, said:

"After considering the opinions received, we find ourselves in agreement with almost all the provisions contained in the Bill. We entirely approve of the scheme followed in the Bill in adopting as far as possible the provisions of English Sale of Goods Act, 1893, in arrangement as well as wording. As pointed out in paragraph 9 of the Committee's Report referred to above, that Act has met with uniform approval and has stood the test for more than a third of a century. It has been adopted in most of the overseas Dominions and Colonies and also in the United States of America. We find in commercial transactions there ought to be as far as possible uniformity of law in countries which have dealings with one another."—(*Report of the Second Select Committee.*)

As stated above, the Act is based to a very large extent on the English Sale of Goods Act. It may also be useful to refer to the history of legislation on this subject in England.

The history of the English Sale of Goods Act is as follows:—The English Sale of Goods Bill was originally drafted by Mr. Chalmers in 1888. He then settled it in consultation with Lord Herschel, who kindly consented to take charge of it. In 1889, Lord Herschel introduced it in the House of Lords, not to press it on, but to get criticisms on it. In 1890 there was no opportunity of proceeding with it, but in 1891, the Bill was again introduced in the Lords, and referred to a Select Committee. It had, in the meantime, been criticised by Lord Bramwell, Mr. Walter Ker, and other lawyers, and the Bar Committee, had submitted a valuable memorandum on it. In the Lords it was carefully con-

sidered by a Select Committee consisting of Lords Herschel, Halsbury, Bramwell, and Watson. Professor Richard Brown and Mr. Spens of Glasgow took an infinity of pains to suggest the necessary amendments. In 1893 the Bill was again passed through the Lords in the form in which it was settled in 1892. It was then considered by a Select Committee of the House of Commons and further amended. The Committee consisted of Sir Charles Russell, A. G. Sir R. Webster, Q.C., Mr. Asher, Q.C. (the Scotch Solicitor-General), Mr. Shiress Will, Q.C., Mr. Bousfield, Q.C., Mr. Ambrose, Q.C.; and Mr. Mather. Some of the amendments introduced by the Commons were modified on its return to the Lords, and it was finally settled in its present form. The Bill, in its original form, was drafted on the same lines as the Bills of Exchange Bill. On Lord Herschel's advice it endeavoured to reproduce as exactly as possible the existing law, leaving any amendments that might seem desirable to be introduced in committee on the authority of the Legislature. In mercantile matters, the certainty of the Rule is often of more importance than the substance of the rule (Cf. *Lockyer* v. *Offley,* 1 T.R. at p. 259). If the parties know beforehand what their legal position is, they can provide for their particular wants by express stipulation. Sale is a consensual contract, and the Act does not seek to prevent the parties from making any bargain they please. Its object is to lay down clear rules for the case where the parties have either formed no intention, or failed to express it.

The codification in England of the law relating to the sale of goods has produced a somewhat unexpected benefit. It has to a great extent produced uniformity in this branch of the law throughout the dominions of the Crown. Most of the Colonies have adopted and re-enacted the Act, with, of course, small variations to adapt it to local circumstances.

GENERAL OPERATION OF THE ENGLISH SALE OF GOODS ACT.—"The English Sale of Goods Act, 1893", says Lord Parker, "is in fact merely a codification, and, as is generally admitted, a very successful and correct codification of this branch of English mercantile law. It embodies the principle that the question whether a contract for sale of goods does or does not pass the property in the goods contracted to be sold must in all cases be determined by the intention of the parties to the contract. The Act codifies the rules by which that intention is to be ascertained, but the inference based on the rules may always be displaced by terms of the contract itself, or the surrounding circumstances, including the conduct of the parties. No doubt the municipal law with reference to which the parties enter into the particular transaction is material in considering their intention as to the passing of the property; and if it appears that they contracted with reference to a municipal law other than English and if it be further proved that that municipal law is different in any material respect from the English law, this will of course be taken into account in determining their intention. But having regard to the presumption that, unless the contrary be proved, the general law of a foreign country is the same as the English law the mere fact that the contract was entered into with reference to the law of another country will be immaterial." [*The Parchim,* (1918) A.C. 157 at pp. 160, 161 (P.C.).]

THE SALE OF GOODS ACT (III OF 1930).

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[15*th March*, 1930.

An Act to define and amend the law relating to the sale of goods.

WHEREAS it is expedient to define and amend the law relating to the sale of goods ; it is hereby enacted as follows :—

CHAPTER I.

PRELIMINARY.

Short title extent and commencement.

1. (1) This Act may be called THE INDIAN SALE OF GOODS ACT, 1930.

(2) It extends to the whole of British India, including British Baluchistan and Sonthal Parganas.

(3) It shall come into force on the first day of July, 1930.

Definition.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) " buyer " means a person who buys or agrees to buy goods ;

NOTES.

Sec. 1.—The provisions of this Act do not apply to a case relating to immovable property. 9 R. 13=134 I.C 511=1931 R. 109. The provisions of a Special Act, as the Sale of Goods Act cannot, except in the branch of law to which it specially applies, cover a statute of the nature of the General Clauses Act. 9 R. 13. It is doubtful if the Act applies to electricity. 1936 C. 753.

SHOPKEEPER — WHETHER BOUND TO SERVE MEMBER OF PUBLIC—Apart from special legislation it is open to a shopkeeper at any time to refuse to deal with any member of the public and it is not necessary for the shopkeeper to assign any reason for his refusal. 147 I.C. 982 =1934 A.L.J. 43=1934 A. 203.

Sec. 2.—*Cf.* English Sale of Goods Act, S. 62 and the English Factors Act.

(2) "delivery" means voluntary transfer of possession from one person to another ;

(3) goods are said to be in a "deliverable state" when they are in such state that the buyer would under the contract be bound to take delivery of them ;

(4) "document of title to goods" includes a bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, railway receipt, warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented ;

(5) "fault" means wrongful act or default ;

(6) "future goods" means goods to be manufactured or produced or acquired by the seller after the making of the contract of sale ;

(7) "goods" means every kind of moveable property other than actionable claims and money ; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale ;

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Sec. 2 (2).—"*Symbolic delivery*" may be effected by giving the buyer the key of the place where the goods are stored. The key is not the symbol of the goods, but the transaction "consists of such a transfer of control in fact, as the nature of the case admits, and as will practically suffice for causing the new possessor to be recognised os such." (Pollock on Possession, p. 61); *Wrightson* v. *Mc Arthur*, (1921) 1K.B. 807 at p. 816—delivery of key of locked room. *See* 24 I.C. 441, in which it has been held that in rice tracts in Burma delivery of milling notice is equivalent to delivery of actual rice. *See also* 7 Bur.L.T. 54.

Sec. 2 (3).—*See* S. 62, cl. (4) of the English Sale of Goods Act.

Sec. 2 (4).—*Cf.* English Sale of Goods Act, S. 62 and S. 1 (4) of the English Factors Act (1889). *See* 43 I.A. 164 (168, 169). Where goods are in existence and ascertained, delivery order is a document of title and passes from hand to hand and generally represents the goods themselves. 18 T.L.R. 224. *See also* 36 I.C. 593.

Sec. 2 (6): "READY GOODS".—A contract for sale of "ready goods" would be sufficiently complied with if at the time of entering into the contract or during the period intervening between that date and the due date the seller could at any moment, if called upon by his buyer, deliver the goods. 57 I.C. 140=47 C. 458.

Sec. 2 (7).—*Cf.* S. 62 of the English Sale of Goods Act. *See also S.* 76 of the Contract Act. The *First Select Committee* said in their report : "In the definition of the term 'goods' we have included shares. In I.L.R. 46 B. 489, it was held that the term 'goods' as used in Chapter VII of the Indian Act, 1872, has a much wider sense than it has in the English Law, and includes share certificates." (*Report of the First Select Committee.*) The *Second Select Committee* said: "In the definition of 'goods' we have substituted 'stock and share' for the words 'stock and share certificates' for greater accuracy."

MONEY is excluded from the definition of the term "goods" because, in a sale the goods and the price are contrasted, and wholly different considerations apply to them. 3 C. 379; 18 P. R. 1905. This applies only to current coins. So also currency notes are not "goods". 18 P.R. 1905; 3 C. 379 ; so also are other emblems of money which constitute legal tender. (*Ibid.*) Jubilee five pound gold pieces bought as a curiosity, are goods, and they cannot be treated as money. [*Moss* v. *Hancock*, (1899) 2 Q.B. 111.]

The following come within the definitions of goods:—

SHARES in a Company : 25 Bom.L.R. 414= 1923 B. 372. *See also* 50 B. 365=53 I.A. 92= 1926 P.C. 38=51 M.L.J. 1 (P.C.); 92 I.C. 9= 1925 B. 314.

SHARE CERTIFICATES.—27 Bom.L.R. 514 at 524 =1925 B. 314 ; 46 B. 489: 66 I.C. 726=46 B. 489=1922 B. 303. "Goods" comprehends all *corporeal moveable property*, but not mere choses in action. 14 C.P.L.R. 57 (59). Transfer of house without site and not merely of its materials is sale of immovable property and not merely sale of goods or movables. 8 M.H.C.R. 100 (102). By an agreement in writing between plaintiff and the Secretary of State, the plaintiff purchased certain buildings and materials situated at *S*. and undertook to remove them within a given period. Subsequently, the defendants became the owners by purchase of the land at *S*. Plaintiff brought an action on the original side of the High Court claiming an injunction and damages for the wrongful and tortious act of the defendants in the fact that they prevented him from carrying out his contract to remove the buildings and materials in his original agreement. The defence was that the buildings and materials in dispute or some of them were the property of the defendants and were not covered by his contract and he was not entitled to take them away. *Held*, that the provisions of the Sale of Goods Act could not apply to the case because the suit related to immovable property. The provisions of a special Act such as the Sale of Goods Act cannot except in the branch of the law to which it specially applies overrule a statute of the nature of the General Clauses Act. 9 R. 13=1931 R. 109=134 I.C. 511. A decree is "movable" property as defined by S. 3 (34) of the General Clauses Act, and as

(8) a person is said to be "insolvent" who ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of insolvency or not ;

(9) "mercantile agent" means a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods or to raise money on the security of goods ;

(10) "price" means the money consideration for a sale of goods ;

(11) "property" means the general property in goods, and not merely a special property ;

(12) "quality of goods," includes their state or condition ;

(13) "seller" means a person who sells or agrees to sell goods ;

(14) "specific goods" means goods identified and agreed upon at the time a contract of sale is made ; and

(15) expressions used but not defined in this Act and defined in the Indian Contract Act, 1872, have the meanings assigned to them in that Act.

Application of provisions of Act IX of 1872.

3. The unrepealed provisions of the Indian Contract Act, 1872, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts for the sale of goods.

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such falls within the definition of "goods" in S. 2 (7). A sale of a decree may be made orally and it is not necessary that the assignment of a decree to be valid should be in writing. O. 21, R. 16, C. P. Code, can only be construed as laying down that the requirement of a transfer in writing is a mere requirement of procedure. It is not a substantive enactment which says that unless there is an assignment in writing of a decree, a transfer, though made orally, shall be inoperative or void. 41 Bom.L.R. 33=1939 Bom. 84.

Sec. 2 (9).—*Cf.* English Factors Act, S. 1. A broker in jewellery who is given the jewelleries by their owners for sale is a mercantile agent. The fact that they were given to the broker because of false representation is immaterial. Such broker can make a valid pledge provided the pawnee acts in good faith and had not at the time of the pledge notice that the pawnor had no authority to pledge. 151 I.C. 413=35 Cr.L. J. 1375=1934 R. 198.

Sec. 2 (11).—"Property"—"Special property". *Cf.* S. 62, English Sale of Goods Act.

Sec. 2 (12).—"Quality of Goods". *Cf. ibid.*

Sec. 2 (13).—*Cf. ibid.*

Sec. 2 (14).—*Cf., ibid* and S. 77, contract Act. Office and emoluments of temple priest, if can be sold. 7 M.H.C.R. 32, 210; 4 M. 391. *See also* 34 C. 173 and 63 C. 736. 'Specific goods' is not identical with 'ascertained goods', nor goods which have been examined by the buyer. 4 M. 391 (sale of unascertained goods.) On this section the *Select committee* said : "Though the chapter on the sale of goods has been taken out of the Indian Contract Act, the Bill will form part of the general law of contract. We have therefore provided in this clause that the general provisions of the Indian Contract Act shall continue to be applicable to contracts of sale of goods in so far as they are not inconsistent with the special provisions of the Bill." The terms "specific goods" is not identical with "ascertained goods." It does not certainly mean goods which have been examined by the buyer. 63 C. 736=1937 Cal. 140. In sale of ascertained goods property in the goods passes to purchaser as soon as the contract of sale is made even though delivery is postponed. 20 A.L.J. 579=58 I.C. 239=1922 A. 458. In a c.i.f. contract property in the goods passes as soon as the goods are shipped, but when the first buyer sells to another party, the property in the goods does not pass until the bills of lading are endorsed to the second purchaser. 59 I.C. 515=22 Bom.L.R. 1165. Where goods were purchased on condition that they would be undamaged, and subject to inspection and approval, there is an implied warranty that they are undamaged goods. In such a case, the goods cannot be said to be ascertained until they are inspected and approved. 79 I.C. 183=5 Pat.L.T. 558=1924 P. 240. Where goods are sent by railway, the railway receipts being addressed to the consignor to be delivered to the purchaser only on receipt of the price for the goods, property in the goods does not pass to purchaser till the price is paid. 100 I.C. 725=1927 L. 269. *See also* 1923 B. 125; 1924 L. 239=4 L. 423. Where the intention of the parties as expressed in the conditions of the contract was that the property in the goods should not pass until full price had been paid. *Held*, that intention would prevail in spite of S. 78, Contract Act. 25 Bom.L.R. 778=77 I.C. 150=1924 B. 41. *See also* 17 I.C. 963. In a *hire-purchase agreement*, the hirer has an option to return the article hired or to become its owner on full payment. It is not an absolute sale within the Act. The hirer is merely a bailee. 24 I.C. 161; 67 I.C. 638 ; 46 C. 342=22 C.W.N. 1042. *Transfer of stolen property* passes no ownership to buyer. 51 C. 796=82 I.C. 163=1924 C. 816. Sale of goods— Indivisible contract — Breach—Accrual of cause of action. 12 L. 254. A plea that an agreement is not a sale but merely an agreement to sell as defined in S. 4 (3) cannot be raised for the first time in revi-

CHAPTER II.

FORMATION OF THE CONTRACT.

Contract of Sale.

4. (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.

Sale and agreement to sell.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale, when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

Formalities of the Contract.

5. (1) A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer. The contract may provide for the immediate delivery of the goods or immediate payment of the price or both, or for the delivery or payment by instalments, or that the delivery or payment or both shall be postponed.

Contract of sale how made.

(2) Subject to the provisions of any law for the time being in force, a contract of sale may be made in writing or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties.

Subject-matter of Contract.

6. (1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or future goods.

Existing or future goods.

(2) There may be a contract for the sale of goods the acquisition of which by the seller depends upon a contingency which may or may not happen.

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sion, when there has been no suggestion of it in the trial Court. 20 N.L.J. 108=1937 N. 198.

Sec. 4: PRICE.—There can be no sale without a price. 9 M. 141; 11 M. 459 at p. 467. In a contract for the sale of goods the most essential condition is the price. Where there is no evidence as to price, there is no binding contract. 147 I.C. 982=1934 A.L.J. 43=1934 A. 203. The supply of liquor as wages to a watchman does not amount to sale since 'price' means money only. 9 M. 141. *See also* 18 P.R. 1905; 11 M. 459. Where a contract is for a chattel to be made and delivered, it is clearly a contract for the sale of goods. A contract to make and deliver a set of false teeth is therefore contract for the sale of goods and the principles of the Sale of Goods Act apply to such a contract. 1939 N.L.J. 118=1939 Nag. 19. A plea that an agreement is not a sale but merely an agreement to sell as defined in S. 4 (3) cannot be raised for the first time in revision, where there has been no suggestion of it in the trial Court. 20 N.L.J. 108=1937 Nag. 198.

Sec. 5.—*Cf.* S. 3 of the English Sale of Goods Act and S. 78 of the Indian Contract Act. A sale is complete on the purchase-money being agreed to be paid. 21 P.R. 1875; 85 P.R. 1879; 4 C. 801; 27 M. 540; 32 C. 816 at p. 823. In the absence of contract to the contrary, delivery of possession or the compliance with any other condition cannot be regarded as essential to completion of sale. 62 P.R. 1879. Acceptance of hundi or cheque operates as payment, though it may be only conditional payment. 27 M. 540. Right to reject the goods which are not in accordance with the description of goods bargained for is different from and independent of the question whether the property therein has passed to the purchaser or not. 15 C. 1 (5). A deposit or earnest is not only part-payment but is also a guarantee for the performance of the contract, and the depositor, who fails to perform the contract within a reasonable time, has no right to a return of the deposit. 19 A. 489 (492). If, on the other hand, the seller is in default and unable to give the title contracted for, he should return the deposit earnest-money to the purchaser. 21Bom.827

PART DELIVERY means delivery of part of goods in progress of the delivery of the whole. 15 C. 1 at 6.

Sec. 5 (2).—*See* S. 88 of Act VII of 1913 (Companies Act).

WRITING.—*Cf.* General Clauses Act, S. 3 (58). Where a contract is partly in print and partly in writing, if there is doubt as to the meaning, the written words must be given effect to as having been written with greater deliberation. 30 B. 1. But the whole document should be construed as a whole so as to make, if possible, an intelligible transaction. 30 Bom. L.R. 415. If the typewritten and printed portions of a contract can be read together effect must, be given to all the provisions, but if they cannot be reconciled the typewritten portion must prevail. I.L.R. (1942) Mad. 33 =(1941) 2 M.L.J. 281.

Secs. 6 to 8.—*Cf.* Eng. Act, S 5 and Contract Act, S. 88.

(3) Where by a contract of sale, the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

Goods perishing before making of contract.

7. Where there is a contract for the sale of specific goods, the contract is void if the goods without the knowledge of the seller have at the time when the contract was made, perished or become so damaged as no longer to answer to their description in the contract.

Goods perishing before sale but after agreement to sell.

8. Where there is an agreement to sell specific goods, and subsequently the goods without any fault on the part of seller or buyer perish or become so damaged as no longer to answer to their description in the agreement before the risk passes to the buyer, the agreement is thereby avoided.

The Price.

Ascertainment of price.

9. (1) The price in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed or may be determined by the course of dealing between the parties.

(2) Where the price is not determined in accordance with the foregoing provisions, the buyer shall pay the seller a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Agreement to sell at valuation.

10. (1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party and such third party cannot or does not make such valuation, the agreement is thereby avoided :

Provided that, if the goods or any part thereof have been delivered to, and appropriated by, the buyer, he shall pay a reasonable price therefor.

(2) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain a suit for damages against the party in fault.

Conditions and warranties.

Stipulations as to time.

11. Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

Condition and warranty.

12. (1) A stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or warranty.

(2) A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated.

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Sec. 7.—*Cf.* S. 6, English Sale of Goods Act ; also S. 20, Indian Contract Act.

Secs. 7 and 8.—The *Select Committee* said: "This clause follows S. 6 of the English Sale of goods Act. The rule is based either on the ground of mutual mistake or on the ground of impossibility of performance. (Chalmers' Sale of Goods, p. 30, 10th Ed; Rep. of Sel. Com.)

Sec. 8—*Cf.* S. 7, English Sale of Goods Act.

Sec. 9.—*Cf.* S. 8, English Sale of Goods Act.

In a contract for sale of goods, if, before goods are tendered, customs duty is increased, the seller is entitled to claim the excess duty imposed from the buyer, provided he proves that such excess duty on the goods tendered has been already paid. It is immaterial whether such duty has been paid by the seller himself or that some one else has paid it. (21 B. 628 and 1933 M. 21, Explained) 1933 S. 404.

Sec. 9 (2)—Mixed contract for storage of paddy and its subsequent sale—Provision for exercise of option by seller—Price payable on exercise of option. 165 I.C. 308=1936 R. 419.

Sec. 10.—*Cf.* S. 9, English Sale of Goods Act.

Sec. 11.—The *First Select Committee* said: "This clause is based on S. 10 of the English Act. The principle underlying that section is to be found in S. 55 of the Indian Contract Act. In our opinion, the present Bill should contain a specific provision on the point. As the General Clauses Act, 1897, contains a definition of the word 'month,' sub-S. (2) of the English section has been omitted." (*Report of the First Select Committee.*)

Sec. 12.—*Cf.* S. 11, English Sale of Goods Act.

(3) A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.

(4) Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

When condition to be treated as warranty.

13. (1) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.

(2) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect.

(3) Nothing in this section shall affect the case of any condition or warranty fulfilment of which is excused by law by reason of impossibility or otherwise.

Implied undertaking as to title, etc.

14. In a contract of sale, unless, the circumstances of the contract are such as to show a different intention there is—

(*a*) an implied condition on the part of the seller that, in the case of a sale

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Sec. 13.—*Cf.* S. 11, English Sale of Goods Act; also Ss. 117 and 118, Indian Contract Act.

The *Select Committee* said: "Having regard to the conflict which has arisen over the right of the buyer after he has accepted the goods, we have endeavoured to make it clear that once the buyer has accepted the goods, he cannot reject them on any ground. If there be a breach of condition disclosed for instance on subsequent inspection of the goods, he can treat the breach as a breach of warrantv only and not as a breach of condition. The word 'acceptance' has been explained in cl. 41 and 42. Cl. 13 (1) and cl. 40 of the Bill take the place of S. 118 of the Indian Act; Cl. 13 (2) takes the place of S 117 of the Indian Act." (*Report of the first Select Committee*).

CLAUSE (1)—WAIVER.—A party may waive a stipulation which is for his own benefit. *See* 70 I.C. 877=24 Bom.L.R. 991=1923 B. 92. If a stipulation operates for the benefit of both parties, it can only be waived by mutual consent. (1917) 23 Commercial Cases, 216 (219). *See also* 14 I.C. 135. When there has been a contract of sale of unascertained goods, with warranty and the warranty is broken, the buyer may accept the goods or refuse to accept them when tendered. It is however open to the buyer to keep the goods for a reasonably sufficient time in order to examine or try them in order to decide whether he would refuse or accept them. The user of the goods, however, must be limited to the trial and must not go beyond that. 27 A.L.J. 674=119 I.C. 853=1929 A. 801. *See also* 7 L.B.R. 110; 27 A.L.J. 674=1929 A. 801; 65 I.C. 464=1922 L. 127; 4 C. 801. Vendee who decides to reject the goods must object within reasonable time on the ground of breach of warranty; but where damage is nil he must pay contract price if he did not object within reasonable time. 1925 M. 221. Onus is upon the vendees to prove that they had rejected them as of inferior quality within a reasonable time, 34 I.C. 290=23 C. L. J. 415. *See also* 5 P.R. 1870; 13 I.A. 60=13 C. 237. Mere acquiescing in delivery of goods, in order to avoid further loss, does not necessarily show acceptance. 14 I.C. 248; 70 I. C. 877=24 Bom.L.R. 991=1923 B. 92. So also mere receipt of goods for inspection and examination is no legal acceptance. 65 I.C. 464=1922 L. 127; 23 C.L.J. 415; acceptance will be presumed in the above case if goods are not rejected within a reasonable time. 1922 L. 127; 1925 M. 221; 34 I.C. 290; 1929 A. 801. In a contract by instalments or a contract which according to its terms is treated as an instalment contract, the buyer can reject the quantity under any instalment. But under an indivisible contract, the buyer loses his right to reject if he accepts part. 59 C. 928=1932 C. 879.

Sec. 13 (2).—S. 13 (2) has been framed with an eye to the special case of "bargain and sale"; and its operation is limited to genuine cases of "bargain and sale" according to the Common Law of England as distinguished from cases of goods "sold and delivered." In the case of a transaction giving rise to a claim on account of "goods sold and delivered," where the sale is a sale of specific goods by sample, the buyer, in the event of the goods being inferior to sample, has not only a right to damages, but also a right to reject the goods. 63 C. 736=1937 Cal. 140.

Sec. 14.—*Cf.* S. 12 of the English Sale of Goods Act and S. 109, Indian Contract Act.

Cl. (a): TITLE.—Under the sub-section the seller is deemed to warrant by implication his

he has a right to sell the goods and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass ;

(*b*) an implied warranty that the buyer shall have and enjoy quiet possession of the goods ;

(*c*) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made.

NOTES.

title to goods which he contracts to sell. The cases in which an implied undertaking as to title has been negatived appear to have arisen out of Court sales or forced sale by public auction, where the circumstances were such as to indicate that the seller was only selling such right as he might have in the goods. A Court officer selling an execution debtor's goods gives no implied undertaking as to title. *Ex parte V Ilars*; (1874) L.R. 9 Ch. App. 432 (437). *See also* 3 Pat.L.J. 516; 46 I.C. 614; 74 I.C. 134; 37 C. 67; 42 I.C. 453; 46 I.C. 783; 4 N.L.J. 274; 25 C.W.N. 756; 63 I.C. 126.

CASE-LAW.—The application of the English legal maxim of *caveat emptor* to the sale of goods seems, so far, at least, as concerns title, to be excluded under the Indian law (*see* S. 109 of the Contract Act) and so, the seller is responsible to the buyer for loss caused to the latter, by reason of the invalidity of the seller's title. 2 B. 258 (263). The purchaser's right to recover consideration money was held to depend upon establishing that he was fraudulently induced by the seller to pay the sum by a false representation that he had a good title or that the seller warranted and covenanted with the purchaser that he had a good title. 6 W.R. 152 (153). *See also* 7 W.R. 196. There is an implied warranty of title in the case of the sale of goods and the *onus* is on the seller to prove his title to the goods sold by him. 86 I.C. 1020=1925 L. 366 (2). Where one of the conditions of sale of land is that the vendor shall not be bound to show any title prior to an instrument of a certain date, the purchaser may, nevertheless, insist upon a defect of title appearing *aliunde* and before that date, and may, on proof of such defect, rescind the contract and get back his earnest money. Where the ability of the vendor to make a good title to the thing sold depended on a doubtful question of fact or law, the title would not be deemed a good or sufficient title as between the vendor and purchaser and the purchaser is entitled, in an action against the vendor, to recover back his deposit and interest and the expenses of investigating the title. 1 B.H.C.O. C.J. 77. On a fraudulent concealment of the defect in the vendor's title, the purchaser would be entitled to damages, even though he had not insisted on a covenant for title. 9 M. 89. An advertisement in this respect to the property to be sold, calling upon purchasers to come forward, is substantially an implied warranty of title and would, in any case, make the vendor responsible to the purchaser deceived by any misrepresentation therein. 9 W. R. 371. Shares in a company are goods within the meaning of the Sale of Goods Act. In the case of a contract of sale of such shares therefore, there is an implied warranty under S. 14 (c) of that Act, that the shares are free from any charge or incumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made, unless the circumstances of the contract are such as to show a different intention. Assuming that the circumstance that the shares are sold by a pledgee of those shares under a power of sale shows a different intention within the meaning of the section, that circumstances can show a different intention on the part of the parties to the contract only if it is known to the buyer. The burden is on the seller to show that the buyer was aware that the seller was selling not as owner but as pledgee. A buyer of shares in a company must, no doubt, be presumed to have notice of the provisions of the Articles of Association of the company with respect to the shares generally. But it does not follow from that that he is to be presumed to have notice of circumstances affecting particular shares. If therefore, the Articles of Association of a company provide that the directors may decline to register any transfer of shares upon which the company has a lien, the buyer will be presumed to have notice that shares in the company are liable to be affected by a lien where the registered shareholder is indebted to the company, but the buyer is still entitled to rely on the implied warranty given by the seller under S. 14 (c) that the shares with which he proposes to fulfil the contract are not shares which are so affected. 44 C.W.N. 505. The condition in a sale-deed that the purchaser shall take the thing sold with "such title only as the vendor can give him" implies that the vendor had some title, however defective it might be. 12 B. 1. Where there is a breach of the implied warranty under S. 14 (c), the remedy of the buyer is to sue for damages. He is not entitled to ask for rescission of the contract. 44 C.W.N. 505.

EXECUTION SALE.—A purchaser of goods, seized and sold in execution in the ordinary course by the sheriff, cannot recover the purchase-money he has paid, by reason that it turns out that the goods did not belong to the execution debtor. The reason is, that the fact of the sale taking place under such circumstances, is notice to buyers, who consequently, buy at their own peril. 2 B. 258 (264). *See also* 3 Pat.L.J. 516=46 I.C. 614 ; 74 I.C. 134 ; 37 C. 67 ; 25 C.W.N. 756 ; 63 I.C. 136 ; 4 N.L.J. 274 ; 42 I.C. 453 ; 46 I.C. 783 ; C. P. Code, O. 21, R. 91. A sheriff has the authority under a writ of *Fieri Facias*, to seize the property of the judgment-debtor and to pass on his title to it to the execution purchaser, without warranting that title to be good, and consequently if the purchaser is afterwards evicted under a title paramount to that of the judgment-debtor, he has

15. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

Sale by description.

16. Subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows :—

Implied conditions as to quality or fitness.

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no remedy against either the sheriff or the judgment-creditors. 3 C. 806 (813)=2 I.A. 116. But if, in sale by the sheriff, there is not only no disclaimer of warranty of title, but even an express assertion that the goods are the property of the execution debtor, the sheriff, or the execution creditor may be held bound by such warranty. 2 B. 258 (264). The fact that the purchase-money had actually passed to some other person can make no difference. U.B.R. (1892-1896) 306.

Sec. 15.—*Cf.* S. 10, English Sale of Goods Act; *also* S. 113, Indian Contract Act.

The section is based on the principle that a man is not bound, unless he has altered his position by some conduct of his own, to accept and to pay for goods which are not in accordance with the description of the goods he bargained for. 15 C. 1 (4, 5). There has been a growing strictness in the matter of regarding the particulars in the contract as part of the description of the goods. If a stipulation is a part of the description, the only question that remains is if the goods supplied conformed to it, and it is irrelevant to enquire whether it was considered in the trade a matter of importance or whether it affected market-value of the goods. 59 C. 928 =1932 C. 879. Where a sale of goods is by description as well as by sample, the goods supplied must be in accordance with both the description and sample. 44 C.W.N. 1069. Purchaser is not bound to examine all the articles delivered under an entire contract; and purchaser can reject all the articles *in toto*, even when some only of the articles have been found not equal to the sample. 79 P.R. 1888; 6 C. W.N. 495=29 C. 323. When seller sues for price, purchaser can prove breach of warranty in reduction of the claim. 62 P.R. 1866. If goods delivered do not answer to the contract, the buyer may return them; but he is not bound to do so; if he gives notice that the goods are not accepted and remain at the risk of the seller, that will be sufficient. But if he exercises any act of dominion, he would be taken to have accepted the goods. 4 A.L.J. 245. Where there is a dispute between a buyer and a seller with reference to quality the *onus* would generally be on the seller to prove that the goods were of the quality contracted for. 80 I.C. 151=1924 C. 490=28 C.W.N. 261; 1925 L. 366. (Burden of proof as to title of seller to convey. 59 I.C. 424).

Sec. 16.—*Cf.* S. 14 of the English Sale of Goods Act; *also* Ss. 110 to 116, Indian Contract Act. On this section, *see* 1929 S. 161=116 I.C. 588; 55 I.C. 201; 7 L.B.R. 110; 12 B. 50; 35 M.L.J. 180. According to S. 16 (1), there is an implied condition that the goods should be reasonably fit for the particular purpose for which they are required and a purchaser, if he does not find the goods to be reasonably fit for the purpose for which they are required, is legally entitled to reject them. 1939 N.L.J. 118 =1939 Nag. 19. The article is not to be fit generally, not to be fit for the "purpose" of the buyer; it must be fit for a particular purpose notified to the seller and notified in a particular way so that the seller shall know that his skill and judgment is relied upon to supply an article which shall be fit for that purpose. I.L.R. (1938) 2 Cal. 88=182 I.C. 397=1939 Cal. 210. Per *Ameer Ali, J.*—The warranty of fitness implied by law is not logically different in principle from the warranty implied by law of merchantability. The condition as to merchantability requires the goods to be reasonably fit to be sold as goods of the particular description. The other condition as to fitness requires the goods to be reasonably fit for use for the particular purpose for which they were ordered. In both cases they are required to be intrinsically fit, and not fit having regard to some particular legislation or particular rules framed by the state or a third patty. I.L.R. (1938) 2 Cal. 88=1939 Cal. 210. In the case of sale of tyres by person who is the distributor of Continental Solid tyres, and those tyres only, there is no implied condition as to the fitness of the tyres for any particular purpose, though the goods sold must be of merchantable quality. 157 I.C. 12. To recover special damages for a breach of warranty in a resale, it is necessary that the buyer should not have been negligent in failing to detect the inferiority of goods before he re-sells or deals with them. 22 P.L.R. 1921=59 I.C. 424. *See also* 34 M. 453=21 M.L.J. 1110 (P.C.) Where goods offered for sale in execution of a decree are described as of a particular denomination and the goods tendered do not answer that description, the purchaser is entitled to reject them and if he has paid for them, to recover the price as money had and received for his use. 54 I.C. 315. Where a contract was made for the supply of goods at the seller's godowns and the purchasers complained the goods were not of the quality stipulated for, the purchasers have no right to ask for a sample of the goods to be delivered before taking delivery. Their only right is to take delivery, and if, on delivery, they found the goods were not as stipulated for, to make their claim for damages. [(1913) M.W. N. 895.] If the buyers expressly communicated to the sellers the purpose for which the goods are wanted (and the other conditions are pre-

(1) Where the buyer expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be reasonably fit for such purpose :

Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufcaturer or producer or not), there is an implied condition that the goods shall be of merchantable quality :

Provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

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sent), then there is an implied condition of fitness. Apart from express communication, that knowledge may be imputed to the sellers by reason of the circumstances of the case. Where the goods may be utilised for a variety of purposes known to the supplier, then, unless he is notified of the particular purpose for which these goods are wanted, there is no condition of fitness that they shall be fit for that particular purpose. 59 C. 928=1932 C. 879. "Fitness" for particular purpose—Meaning—Sale of boiler —Boiler not conforming to Government regulations and therefore not fit for use—Breach of implied warranty of fitness. *See* 1939 Cal. 210.

Sec. 16 (2) : APPLICABILITY.—When there is an express condition as to the quality of the goods in the contract itself, such as that the goods shall be of "fair average quality," it is unnecessary to invoke S. 16 (2). Such an express condition gives the purchaser a higher right than he would possess under a contract when the term would be merely implied by law. I.L.R. 1937 M. 479=1937 M. 40=(1937) 2 M.L.J. 131.

"MERCHANTABLE" — MEANING OF.—"Merchantable" in S. 16 (2) means not merely marketable or saleable in the ordinary sense of the term, and goods to be merchantable under S. 16 (2) should be not only marketable or saleable ; in the statutory sense the significance of the word "Merchantable" is relative, the test being, whether the goods are merchantable or not according to the particular description in the contract of sale. In other words, a term that the goods shall be of merchantable quality is fulfilled, when they do not differ from the normal quality of the described goods, including under the term "quality" the state or condition as required by the contract. I.L.R. 1937 M. 479=1937 M 40=(1937) 2 M.L.J. 731.

Sec. 16 (2), proviso.—Section does not apply to a sale of specific goods which were before the parties at the time of the negotiations, because such a sale is not one of goods as being of a certain denomination, as to give rise to the warranty referred to in the section, that the goods were such as are "commercially known by that denomination." 7 O.L.J. 312=57 I.C. 481; 35 M.L.J. 180. Under S. 16 (2) and the proviso thereto, in the case of a sale by description, the implied condition extends to merchantable quality less patent defects. The defects contemplated by S. 16 (2) are those "apparent on reasonable examination" within the meaning of S. 17 of the Act. The implied warranty will be excluded only as regards any defects which a buyer of ordinary diligence and experience would have detected by due diligence in the use of all ordinary and usual means. If merchants possessed of ordinary skill, using due care and diligence, would not have thought of the existence of the particular defect which gives rise to the action, such a defect would be a latent or hidden defect as distinguished from a patent defect, and for such a latent defect, the seller is liable under the section. I.L.R. 1937 M. 479=1937 M. 40=(1937) 2 M.L.J. 131. Where a person purchases goods on his own independent judgment, he cannot make the seller responsible on the ground that the article has turned out to be unfit for the purpose for which it was required; but if he relied upon the judgment of the seller and informed him of the use to which the article is to be applied, the transaction carries with it an implied warranty that the thing shall be fit and proper for the purpose for which they were designed. 116 I.C. 588=1929 S. 161 (2). Where goods are sold by description there is an implied warranty that the goods shall be of merchantable quality. This is so even when the purchase is after inspection, but if the buyer has examined the goods there is no implied warranty as regards defects which such examination would have revealed. 35 M.L.J. 180=47 I.C. 555. *See also* 54 I.C. 315; 1913 M.W.N. 895. The most important exceptions to the rule of *caveat emptor* are the implied conditions of fitness for a particular purpose and merchantableness. *See* 43 M.L.J. 208. When there is no express warranty in the sale of goods, there is an implied *warranty of merchantability.* The question whether goods are "merchantable" in

17. (1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

Sale by sample.

(2) In the case of a contract for sale by sample there is an implied condition—

(*a*) that the bulk shall correspond with the sample in quality;

(*b*) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;

(*c*) that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

CHAPTER III.

EFFECTS OF THE CONTRACT.

Transfer of Property as between seller and buyer.

18. Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.

Goods must be ascertained.

19. (1) Where there is a contract for the sale of specific or ascertained goods

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law is a question of mixed fact and law. 43 M. L.J. 208. A bale of a thousand pieces of piece-goods of which nine-tenths are damaged, however slightly, is radically unmerchantable and a seller cannot force such goods on an unwilling buyer. In such cases, there is no room for the application of the principle of *de minimis*. 43 M.L.J. 208=1923 M. 252.

Sec. 17.—*Cf.* S. 14, English Sale of Goods Act; *also* S. 112, Indian Contract Act.

The *Select Committee* said: "This clause relates to sale by sample. Although old text writers were inclined to the view that the term 'bulk shall correspond with sample' is a warranty collateral to the contract, *Abbott, C. J.*, *held*, that the buyer was entitled to *reject* the commodity, if it did not correspond with a sample. [*Parker* v. *Palmer*, (1821) 4 B. & Ald. 387.] Benjamin after reviewing all the cases observes that this so-called warranty was even at Common Law really a condition. (Benjamin on Sale, p. 736.) The buyer is also entitled to have reasonable facilities for inspecting the bulk independently of any local or trade usage to that effect. [*Larymer* v. *Smith*, (1822) 1 B. & C. 1]; and if there is any latent defect in the sample, *i.e.*, a defect not discernible by the ordinary examination of a prudent buyer which if present in the bulk would render the bulk unmerchantable, the sample is to be taken as if free from it. [*Heilbut* v. *Hickson*, (1872) 7 C.P. 438.] These rules have now been embodied in S 15 of the English Act. S. 112 of the Indian Act refers only to the right of the buyer to reject the goods if the bulk does not correspond with the sample. The use of the word 'warranty' in the section is also misleading. The section therefore has been drafted on the lines of S. 15 of the English Act." (*Report of the Select Committee.*) *See also* 21 P.R. 1879. Provided a specimen of the goods sold has been in existence on the basis of which an offer was made and the offer was accepted, the sale remains a sale by sample, notwithstanding the disappearance or destruction of the specimen. Though the specimen has turned into formula, the offer and acceptance must be regarded as having been made on the basis of the accepted specimen. 63 C. 736=1937 Cal. 140.

Sec 18.—*Cf.* S. 16, English Sale of Goods Act, *also* Ss. 79, 82 and 87, Indian Contract Act.

The *Select Committee* said: "This clause follows S. 16 of the English Act. It provides that property in unascertained goods does not pass till they are ascertained. Ss. 79, 80 and 87 of the Indian Act deal with the same point, but as they overlap one another, we have adopted the English section." (*Report of the Select Committee.*)

SCOPE OF SECTION.—Where the goods agreed to be sold are not ascertained at the time of the contract, it is necessary for the completion of contract that goods shall be ascertained. 3 S. L.R. 156=14 I.C. 1147, [and property in the goods is not transferred to buyer unless and until the goods are ascertained. *See* 35 I.C. 440 =10 S.L.R. 14; 68 I.C. 969=1923 O. 15; 103 I.C. 222.] *See also* 1941 Mad. 769=(1941) 2 M.L.J. 571. The intention of the parties, and the circumstances of the case, determine the time when, and the conditions subject to which, the property in the goods is to pass. 15 B.L.R. 276 (289). Question of appropriation is one of fact. 9 I.C. 255=21 M.L.J. 413. Law does not require any particular mode of appropriation. (*Ibid.*) The commonest form of appropriating goods to a contract for sale of unascertained goods is by delivering them to a carrier. 24 Bom.L.R. 1140=70 I.C. 138. As to appropriation, *see also* 48 A. 622; 1926 A. 679.

Secs. 18 and 19.—Transfer of shares in company—When complete—Title—When passes—Agreement to transfer and delivery of share certificate—Effect of. 1941 Mad. 769=(1941) 2 M.L.J. 571. According to the principle underlying Ss. 18 and 19 of the Sale of Goods Act the property in the goods does not pass to the purchaser until he exercises an option and selects the article. Consequently where it was left to the purchaser to choose one of the two tins of 'Rung' the sale would not be complete until he had exercised his choice and on his failure to do so he could not be held liable for the price. 1939 Mar.L.R. 103 (Civ.).

Sec. 19.—*Cf.* S. 16 of the English Sale of Goods Act; *also* Ss. 78 and 81 to 84, Indian Contract Act.

Secs. 19-24.—The *Select Committee* said:—"Clauses 19 (1) and (2) follow S. 17 of the

Property passes when intended to pass.

the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

(3) Unless a different intention appears, the rules contained in ss. 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

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English Act; while cl. 19 (3) and cls. 20 to 24 follow S. 18. The four rules annexed to S. 18 of the English Act are stated in separate cls. 20 to 24. Cl. 19 is based on the principle of the English Law that the property may pass by the contract itself, if such be the intention of the parties (Chalmers' Sale of Goods, p. 58). On this point there appears to be conflict of opinion in Indian Courts. Dealing with a question of the passing of property Sir William Markby observed: 'I think this is not a question to be decided simply upon the construction of the Contract Act, but upon the intention of the parties upon which all questions of this kind ultimately depend.' 15 B.L.R. 276 (289). A contrary view was held by *Maclean, C.J.* in 32 C. 816 in which, without referring to Sir William Markby's judgment, the learned Chief Justice held that S. 78 of the Indian Act laid down a rule which the parties could not by their arrangement vary. In a recent case the Bombay High Court was of opinion that *Maclean, C. J's* view in the above case was unsound. 25 Bom. L.R. 778. This conflict is due to the rigid terms of S. 78 which fails to state that its provisions will be subject to the intention of the parties. S. 78 provides that when an offer and acceptance have taken place, the property in the thing does not pass until any one of the following conditions have been complied with:—(i) earnest or tender, payment or part payment of the price, or (ii) delivery or part delivery of the thing, or (iii) an agreement, expressed or implied, for the postponement of delivery or of payment, or of both. It is, however, clear that neither the payment of the price nor the delivery, either whole or in part, is necessary for the completion of a sale. S. 89 of the Indian Act shows that not only is there no necessity for such payment, but that the price need not even be fixed. As far back as 1833, it was stated in England that the sale of a specific chattel passes the property in it to the vendee without delivery. [*Dixon* v. *Yates*, 5 B. & Ad. 313 (346).] The last paragraph in S. 78 regarding the agreement about the postponement of the payment of price or delivery has been held to imply that it restores the old English common law rule. Cunningham and Shepherd are of opinion that it revives the necessity for an agreement to postpone payment or delivery in cases where there it neither payment, tender, earnest or delivery (p. 316, Ed. II). Pollock and Mulla are of opinion that the wording of the last paragraph does not show how readily an agreement to give credit is to be inferred (p. 449). S. 78, therefore, lays down a rule which is vague and indefinite. The passing or transfer of property constitutes the most important element in the law relating to contracts for the sale of goods. In mercantile contracts, the certainty of the rule is often of more importance than the substance of the rule. (*Lockyer* v. *Offley*, 1 T.R. 259). In our opinion it is desirable to follow the clear and definite rule recognized in English Law that unless a contrary intention appears by the contract, the contract itself is sufficient to pass the property in the goods sold. That rule is laid down in S. 17 of the English Act and is adopted in cl. 19 (1) and (2). The parties, no doubt, may make any bargain they like and the law will give effect to it. When the parties express their intention clearly, no difficulty arises. *See* 44 C. 98=36 I.C. 119=22 C.W.N. 1224. The contract may pass the property at once, or at a future time or contingently on the performance of some condition. But in many cases, the parties either form no intention on the point or fail to express it. To meet such cases, the Courts have worked out a series of definite rules for determining when the property is to be deemed to pass according to the imputed intention of the parties. These rules have been reproduced in S. 18 of the English Act (Chalmers on Sale of Goods, pp. 9 and 10) and they have been adopted in cls. 20 to 24.

Cl. 19 (3) states the general proposition that, unless a different intention appears, the property passes in accordance with rules mentioned in cls. 20 to 24. Cl. 20 makes it clear that in the case of an unconditional contract for the sale of specified goods, the payment of the price or the delivery of the goods is not necessary for passing the property. Cl. 21 following R. 3 in S. 18 (English Act) provides that the property does not pass until the goods are put in a deliverable state. The same principle is laid down in S. 80 of the Indian Act. Cl. 22 embodies R. 4 in S. 18 of the English Act and corresponds to S. 81 of the Indian Act. Cl. 23 (1) following R. 5 of the English section provides for a case of unascertained or future goods sold by description. This sub-clause corresponds to S. 83 of the Indian Act. S. 84 of the Indian Act contains a proposition which appears to be subordinate to the principle laid down in S. 83, and it is rather difficult to see why it was embodied in a separate section. Sub-cl. (2) of cl. 25 which relates to delivery to a carrier is based on R. 5 (2) of S. 18 of the English Act. The principle has been recognized in Indian Law (*see* Pollock and Mulla's Contract Act, pp. 472-473; 24 Bom.L.R. 1146). (See *Report of the Select Committee*).

Sec. 19.—SCOPE AND APPLICATION OF SEC-

20. Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed.

Specific goods in a deliverable state.

21. Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof.

Specific goods to be put into a deliverable state.

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TION.—The intention of the parties determines whether property in the goods sold has passed to the buyer or not. Ascertainment of price may precede or follow the ascertainment of goods by weighing or measurement. Local trade usage may help to ascertain the intention and to interpret the ambiguous terms of an agreement. 44 C. 98=20 C.W.N. 1224. *See also* 35 I.C. 449=10 S.L.R. 44; 68 I.C. 969=1923 O. 15; 22 S.L.R. 32. The fact that the goods are not to be re-measured by the buyer would not be sufficient by itself to prevent the property in the goods passing to the buyer. 95 I.C. 453=1926 S. 246. *See also* 33 C. 547. Although the incidence of risk is a good test in determining in which of the two parties the property in the goods vests, it is not a conclusive test and the question always is as to intention of the parties, as otherwise circumstances may show that the property in the goods was retained by one party in spite of the fact that they were shipped or booked and thereafter remained at the risk of the other party. Where therefore the dominion over the goods, *i.e.*, the right to dispose of them is retained by the sellers and they do not intend that the goods should be delivered to the purchasers till they pay for the same, the property in goods does not pass to the purchasers and a suit by the sellers for recovery of the price of the goods does not lie. 134 I.C. 1110=1931 L. 260. In a mixed contract for storage of paddy and for its subsequent sale, the paddy was in the first instance handed over by seller to the purchaser for storage, and, although the purchaser was entitled to do as he liked with the paddy and convert it into rice, yet under the terms of agreement, he was looked upon nominally as being the bailee only of the paddy until such time as the seller decided that time was favourable for him to sell and exercised that option thereby compelling purchaser to purchase it at the daily buying rate of the purchaser prevailing on the date of exercise of option. *Held*, that the property in the paddy did not pass to the purchaser until the seller exercised his option. *Held*, *further*, that if there be no daily buying rate of the purchaser on the date fixed for exercise of option, provided the option is exercised by the seller, the purchaser must purchase at a reasonable rate, which must be fixed in accordance with the market price on that date. 165 I.C. 308=1936 R. 419.

Secs. 19 and 9 (2)—Mixed contract for storage of paddy and its subsequent sale—Provision for exercise of option by seller—Property when passes to purchaser—Price payable. *See* 1936 Rang. 419.

Sec. 20.—In case of sale of shares, sale is complete as soon as the seller hands over the certificates and the buyer accepts them. 50 B. 360=53 I.A. 92=51 M.L.J. 1=1926 P.C. 38 (P.C.). Where the defendant instructed plaintiff to send him rice on board a ship and defendant sent it without any further conditions, the property in the rice passed to the purchaser when the rice is shipped. 31 I.C. 334=18 M.L.T. 457. Where there is a contract non-severable for the sale of specific goods and of an agreement to sell an interest in land, the transfer of the property in the goods is *prima facie* conditional on the conveyance of the interest in land. [*Lanyon* v. *Toogoowd*, (1844) 13 M. & W. 27, even although separate prices may have been fixed for the goods and for the interest in land: *Neal* v. *Viney*, (1808) 1 Camp. 471]. As to contracts for sale of property, *partly movable and partly immovable*, see 12 I.C. 805=4 Bur.L.T. 127. As to contract for sale of 'ready goods', *see* 47 C. 458.

Secs. 20 and 22.—The mere fact that goods are bought by lot after inspection will not make S. 20 applicable so as to pass property in the goods to the buyer the very moment the sale is effected. Where the seller has to deliver the goods to the buyer at a place different from that where the contract of sale is effected and to tranship the goods by rail to the place of delivery, and the buyer has to pay only for the actual weight of goods delivered to him at the place of delivery, property in the goods cannot pass to the buyer until the goods, if so required by the buyer, are weighed at the place of delivery. In such a case S. 22 applies. This is particularly so in the case of goods such as scrap iron, the weight of which decreases to certain extent in transit. 173 I.C. 535=A.I.R. 1938 Sind. 18

Sec. 21.—*Cf.* S. 18 (2) of the English Sale of Goods Act; *also* S. 80, Indian Contract Act.

Secs. 21 and 23.—A contract to sell some liquor out of a big cask containing much larger quantity, the required quantity not being separated or bottled, cannot be held to be a contract of sale of specific goods within the meaning of S. 21 of the Sale of Goods Act. The expression "Specific goods" necessarily means goods capable of being ascertained with certainty—*certum est quod certum reddi potest*. A sale of some specified quantity of liquor out of a store house or cask would not be capable of ascertainment until it was removed or separated. "Specific goods" would, according to their natural interpretation, mean goods whose delivery can be demanded *in specie*. A contract of sale of a small quantity of liquor stored in bulk would more appropria-

22. Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof.

Specific goods in a deliverable state, when the seller has to do anything thereto in order to ascertain price.

23. (1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

Sale of unascertained goods and appropriation.

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

Delivery to carrier.

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tely be regarded as a contract for sale of unascertained goods and would fall under S. 23 of the Sale of Goods Act. The ownership will not pass till the quantity ordered by the purchaser is ascertained and appropriated. The bottling of the quantity of liquor ordered would be an act of ascertainment and appropriation. Where the servant of a licensed vendor of liquor goes about canvassing order for liquors and gets orders from customers and thereafter gets the quantities so canvassed measured off at the shop of the vendor and carries the quantities to the respective houses of the customers it cannot be held that the sale is completed at the houses of buyers upon delivery of liquor and not before. Under S. 23 (2), the servant of the seller can very well be treated as a bailee for the purpose of transmission to the buyer, and delivery to such servant at the place of the licensed vendor would be effective delivery to the buyer himself. It is immaterial whether the price of the liquor is paid at the shop of the vendor or at the house of the buyer, for the completion of the sale does not depend upon payment of the price of the goods sold. The sale must be taken to be completed within the premises of the licensed vendor and the latter cannot therefore be convicted under S. 45 ( ) of the Bombay Abkari Act for contravention of a clause in his licence prohibiting sale of liquor at any place except the licensed premises. 194 I.C. 302=43 Bom.L.R. 95=A.I.R. 1941 Bom. 106.

Sec. 22.—*See* 24 I.C. 833; 35 I.C. 449; 1923 O. 15; 32 I.C. 720; 68 I. C. 969. Where a contract for sale of specific goods, which were in a deliverable state, did not contain any express intention of parties as to when the property was to pass to the buyer, but the price of goods was expressed at certain rate and the quantity sold was mentioned in the notes exchanged between the parties, and it required only a simple calculation to determine the total price to be paid. *Held*, that the parties to the contract intended that the buyer should become the owner of the property on payment of the total price, and that the passing of the property did not depend upon the measurment to be done by the seller. The measurement, if any, was to be made by the buyer in order to satisfy himself that he had got the quantity he had bargained for, and that the price paid by him was really due. Such measurement did not affect the transfer of the property in the goods. 69 M.L.J. 467=62 I.A. 242=39 C.W.N. 1217=1935 P.C. 182 (P.C.)

Sec. 23.—*Cf.* S. 18, cl. (5), English Sale of Goods Act; *also* S. 83, Contract Act. In case of the sale of unascertained goods, the ownership does not pass till the goods are ascertained and appropriated by the purchaser. Goods are not ascertained until the appropriation by one party has been assented to by the other. The performance of a contract of sale is not complete until there is a complete sale; for, the contract being for the sale of goods, it cannot be performed in absence of a sale. 4 S.L.R. 20=7 I.C. 593. *See also* 1925 L. 581; 24 Bom.L.R. 991=1923 B 92. Where goods agreed to be sold are not ascertained at the time of making the agreement but goods answering the description in the agreement are subsequently appropriated by one party for the purposes of the agreement and that appropriation is assented to by the other, the sale is complete, and the property in the goods passes to the buyer. 24 Bom.L.R. 991=1923 B. 92. In order that the property may pass to the buyer, it is necessary that the goods appropriated to the contract by the seller must answer the description in the agreement. 1923 B. 92. Mere appropriation by the seller does not pass the property in the goods to the buyer. The effect of appropriation is that the seller loses the possibility of withdrawing the goods from the contract and he would break his contract with the buyer if he offered any other goods to him. The appropriation must be assented to by the buyer to pass the property. 1923 B 92. *See also* 88 I C. 910=29 C.W.N. 808. The question of appropriation is one of fact; no particular mode of appropriation is prescribed by law. Once there has been an appropriation, the consignor, if still in possession, holds as trustee for the consignee. 9 I.C. 255=21 M.L.

Goods sent on approval or "on sale or return."

24. When goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer—

(*a*) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction ;

(*b*) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time.

Reservation of right of disposal.

25. (1) Where there is a contract for sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods

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J. 413. *See also* 7 Bur.L.T. 93=22 I.C. 952; 1925 L. 586; 1925 L. 581; 88 I.C. 910=29 C. W.N. 808.

ILLUSTRATIVE CASES.—An offer of performance is not valid, if the buyer being entitled, under the contract, to some time for inspection, is not given any such opportunity, or, being entitled to goods free from demurrage, is offered goods under demurrage. 26 C. 142=3 C.W. N. 116; 4 C.W.N. 313. So also, where the contract is for delivery by plaintiff of certain goods to arrive by a particular ship, and the same not bringing him the subject-matter of the contract the plaintiff procures some other goods of the same or similar quality and tenders them, the defendant will not be bound to accept. 2 B.L.R. (O.C.) 154. Where defendants had given orders that the goods to be supplied to them should be ordered out from England by the plaintiff, an offer by the latter of goods not got from England, would not be fulfilment of the contract. 12 B. 50. When the thing sold is in the hands of the bailee of seller, the bailee must, in order to effect a delivery, agree to hold it for the buyer. There must be a triplicate agreement. 8 B. 501. If the bailee agrees to hold the goods on behalf of the buyer, the delivery is complete and the property in the goods sold passes to the buyer. So, where a person accepts bills of exchange, on the security of a railway receipt, on which the Railway Company has promised to act, the possession of the goods has passed to that person, and the authority given to him to receive the goods cannot be revoked. 8 B.L.R. 581. *See also* 17 W.R. 533; 5 C. 669. When a vendor is unable to complete the sale by delivery of possession the purchaser may rescind the contract of sale. 3 N.W.P. 336. The obligation of a common carrier to properly deliver goods shipped with him under a bill of lading, is subject expressly to the condition inserted in the bill. 25 C. 654. Where a delivery order is sold to a person, the purchaser contracts not merely for the delivery order, but also for the goods. So, a refusal by him to take the delivery order, unless the assent of the firm which should deliver the goods is obtained, does not entitle the seller to rescind the contract. 21 C. 173.

Sec. 24.—*Cf.* S. 18, cl. (4) of the English Sale of Goods Act; and *Illustration* (*b*) of S. 78 of the Indian Contract Act.

APPLICABILITY OF SECTION—SALE OR RETURN—JANGAD TRANSACTION.—A *jangad* transaction is a "sale or return" and involves a representation that the purchaser will (*a*) signify his approval or acceptance of the goods and pay for it ; and (*b*) if not, return the same within the period fixed, or where no time is fixed on the expiration of a reasonable period. But until one or the other condition is fulfilled, no property passes to the buyer. In such a transaction, the owner of the goods gives credit to the delivery, though it is subject to certain conditions. 58 B. 646=152 I.C. 706=36 Bom.L.R. 731=1934 B. 360.

Secs. 24 and 27.—There is no reason to assume that goods entrusted *jangad* are goods to be sold on approval, rather than goods to be shown for approval. By delivery of goods to a broker even on *jangad terms*, no property can pass to him under S. 24 of the Sale of Goods Act. Goods or jewellery may be delivered by the owner to the buyer, with the intention that he may inspect the same and ultimately purcase them. The goods in such cases are stated to be delivered for approval, *i.e.*, *jangad*. S. 24 covers such a situation. Where goods are handed over to a mercantile agent *jangad* to be shown for approval to his customers, if the mercantile agent effects a sale, the title of the purchaser is protected under S. 27, provided there is no want of good faith. On a comparison of the words of Ss. 24 and 27 of the Act, it is clear that a mercantile agent who receives goods on *jangad* acquires no property by reason of S. 24, and if want of good faith is established, the sale can be avoided under S. 27. But if the case is covered by S. 24, no question of want of good faith arises and property must pass. Where the owner delivers goods to an agent who is not a mercantile agent as defined by the Sale of Goods Act, on terms arranged between the owner and the agent, *jangad*, for approval by a prospective customer or to be shown for approval, neither S. 24 nor S. 25 applies to the case. In that case too no property can pass from the owner to the agent under S. 24, nor is a sale by the agent protected by S. 27. I.L.R. (1939) Bom. 454=41 Bom.L.R. 609=1939 Bom. 435.

Sec. 25.—*Cf.* S. 19, English Sale of Goods Act. The principle of this section has been laid down in 24 Bom.L.R. 1140=70 I.C. 138=1923

to a buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading to the buyer together, to secure acceptance or payment of the bill of exchange the buyer is bound to return the bill of lading if he does not honour the bill of exchange and if he wrongfully retains the bill of lading, the property in the goods does not pass to him.

Risk *prima facie* passes with property.

26. Unless otherwise agreed the goods remain at the seller's risk until the property therein is transferred to the buyer but when the property therein is transferred to the buyer, the goods are at the buyer's risk, whether delivery has been made or not :

Provided that, where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault :

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party.

Transfer of title.

Sale by person not the owner.

27. Subject to the provisions of this Act and of any other law for the time being in force, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell :

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B. 125. A provision in a contract of sale for postponement of delivery until payment of the entire price will not *per se* stay the passing of the property in the goods sold. The fact that the seller is also given a right to re-sell after notice on default of payment. does not reserve to the seller the right to sell the goods pending the fulfilment of a condition precedent. 39 P. L.R. 778=1938 Lah. 30.

Sec. 25 (2) and (3).—The same or a similar principle applies where the seller takes in his own name or in that of his agent, a mate's receipt, boat master's receipt, or other document giving control of the goods. 22 I.C. 311=41 C. 670=18 C.W.N. 457 (P.C.). Where the seller sends the goods to the buyer by rail taking out the railway receipt in his own name, and sends the railway receipt to his banker instructing him as his agent not to part with the railway until payment by the buyer. S. 25 (2) of the Sale of Goods Act applies and there is a *prima facie* presumption that the seller intends to reserve to himself the right of disposal of the goods and that the property in the goods does not pass to the buyer until the condition as to actual payment is fulfilled. The fact that the buyer accepts a bill of exchange or hundi presented by the banker, drawn on the seller, has not effect of the transferring the property in the goods to the buyer, especially when the goods after arrival have got to be weighed and the buyer has to be satisfied that they are in accordance with the contract and that the price charged is correct according to the actual weight of the goods which the buyer gets. 173 I.C. 535=1938 Sind 18.

Sec. 26.—*Cf.* S. 20, English Sale of Goods Act ; *also* S. 86, Indian Contract Act.

Sec. 27.—*Cf.* S. 21 of the English Sale of Goods Act; *also* Ss. 108 and 178 of the Indian Contract Act.

CONSTRUCTION OF SECTION.—*See* 42 L.W. 431 =158 I.C. 535=69 M.L.J. 691.

"GOODS" includes all movable property. 48 I.C. 966=46 C. 331. Share certificates: 46 B. 489 ; 46 C. 342 ; 1922 B. 303 ; 10 I.C. 359=38 C. 127.

SCOPE OF PROVISO : PARA. (2).—*Bona fide* purchaser of pledged goods from pledgor without notice of pledge gets a good title. 42 M. 59= 32 M.L.J. 450 ; 27 P.R. 1902 ; 5 R. 633 ; 1923 R. 98 ; 42 M. 59 ; 6 Bur.L.T. 238. S. 27 which deals with the transfer of title incorporates the well-known rule that a person who is not the owner of goods and who does not sell them under the authority or with the consent of the owner cannot give to the buyer a better title than the seller himself has. Even in the case of a mercantile agent, it must be shown that he was in possession of the goods with the consent of the owner ; if that is not shown, the words of the proviso to S. 27 will not apply even apart from the question of good faith and notice. I. L.R. (1939) Bom. 454=41 Bom.L.R. 609=1939 Bom. 435. The relation of a dealer and a broker is that of a principal and agent and not of a seller and buyer. The extent of the autho-

Provided that, where a mercantile agent is, with the consent of the owner, in possession of the goods or of a document of title to the goods, any sale made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorized by the owner of the goods to make the same : Provided that the buyer acts in good faith and has not at the time of the contract of sale notice that the seller has not authority to sell.

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rity of the agent is to be found in the document under which the goods are delivered to him. Where the owner of certain diamonds gives them to a broker to be shown to intending purchasers for approval only, it cannot be held that the broker is a mercantile agent within the meaning of the Sale of Goods Act having general authority to sell. I.L.R. (1939) Bom. 454=41 Bom. L.R. 609=1939 Bom. 435. In order that the buyer may be absolved of his liability for having purchased goods from person not owner thereof and in order that the plea of purchase in good faith may be available to him, he must bring his case within the proviso to S. 27. 164 I.C. 1100=1936 R. 383. The principle of law on which S. 108 of the Contract Act is based is that where one of two innocent parties must suffer from the fraud of the third, the loss should be borne by him who has enabled the third party to commit the fraud if he has neglected some duty owing to the other or has done something which has in fact misled the other. 27 S. L.R. 249=1933 S. 401. The possession contemplated by the proviso 1 does not extend to every case of detention of chattels with the owner's consent. It particularly covers cases of persons allowed by owners to have possession under such circumstances, as may naturally induce others to regard the former as real owners and constituting some degree of negligence or defect of precaution imputable to the true owners. 11 B. 704 ; 81 P.L.R. 1902 ; U.B.R. (1892-96) 303. The protection given to pledgees is similar to that given to buyers under this proviso, and the possession intended is the same in both sections. 27 M. 424 (425)=14 M.L.J. 69 ; 86 I.C. 908 =1924 R. 379.

POSSESSION UNDER HIRE PURCHASE AGREEMENT. —To draw the operation of the proviso, the possession must be unqualified, and not be restricted otherwise than by the owner giving instructions to the person who has it. The section does not, therefore, apply to a person in possession under a hire-purchase agreement. The possession intended must be similar to that of a factor or agent. 20 W.R. 467=12 Beng.L.R. 42 ; 27 M. 424 (426)=14 M.L.J. 69 ; 56 C. 367 ; 3 Lah.L.J. 249 ; 46 C. 342=22 C.W.N. 1042. A purchaser from the hirer of a sewing machine with an option to purchase it, who has not exercised the option of purchasing the machine, cannot invoke the provisions of Exception 1 to S. 108 of the Contract Act, and is liable in trover to the owner, although he acted in perfect good faith. 67 I.C. 638=3 Lah.L.J. 249. *See also* 15 Cr.L.J. 425=24 I.C. 161 ; 86 I.C. 908=1924 R. 379. A qualified possession, such as the hire of goods, has, or possession for a specific purpose, does not attract the operation of this exception. 2 L.B.R. (1872-92) 311 and L.B.R. (1893-1900) 357, following 12 Beng.L.R. 42 ; 46 C. 342=22 C.W.N. 1042 ; 45 M. 173= 1922 M. 44=42 M.L.J. 32 ; 40 I.C. 888=54 P.R. 1919; 67 I.C. 638=3 Lah.L.J. 249 ; 53 I.C. 50. But *see* 59 I.C. 965. To create a valid pledge binding on real owner, the pledgor must be in juridical possession of the goods, and mere custody will not suffice. 24 B. 458. So, a wife in charge of her husband's articles of jewellery, as custodian, on his behalf, cannot make a valid pledge of them. 24 B. 458; 38 M. 783; 23 I.C. 174; 27 M. 424. So also a servant entrusted by his master with the custody of goods during his absence cannot sell or make a valid pledge of them. 4 C. 497. The proviso to the section has no application to the case of purchase from a *gratuitous bailee*. L.B.R. (1893-1900) 357; 42 M.L.J. 32=1922 M. 44. *Bona fide* purchaser of goods from a Burmese woman's husband acquires a good title and the woman cannot recover them whatever her interest may be. U.B.R. (1892-1896) 303 (305). The rule contained in the proviso does not apply where such possession is entirely beyond the control of the owner. 8 B. 501. In the absence of any evidence as to how a vendor has the possession of property, which he sells, the presumption is that a purchaser is entitled to retain it, having obtained possession *bona fide*. 22 B. 540.

VENDOR'S LIEN—PURCHASER WITHOUT NOTICE —DISPOSSESSION OF VENDEE—LIABILITY IN TORT. —Where a person not merely has an option to buy under the agreement, but actually buys the car and binds himself to pay the price, and a third person purchases the car from him without notice of any lien of the company on the car, he would be protected under Excep. 1 to S. 108 and the car cannot be taken from him. If the subsequent vendee is dispossessed, the prior purcharser is surely liable to his vendee for breach of the agreement and his tortious act of dispossessing the vendee. 30 N.L.R. 213=148 I.C. 822=1934 N. 78.

DOCUMENTS OF TITLE.—Test to find out what is document of title: *See* 40 I.C. 86=10 Bur.L. T. 92. The definition in S. 4 of Act XX of 1844 may be used in construing the expression "document showing title" in S. 108 of the Contract Act. But it cannot be so used in construing the expression "instrument of title" in S. 103, which relates to a subject-matter entirely different from that Act. 14 B. 57 (68). Delivery orders pass from hand to hand by mere indorsement. 38 C. 127=10 I.C. 859. In Calcutta Jute trade, delivery orders are issued only for cash payment and they are dealt with in the market as absolutely representing the goods to which they relate. 38 C. 127. *See also* 46 I.C. 86=10 Bur.L.T. 92; 42 I.C. 829=11 S.L.R. 86.

MATE'S RECEIPT is not document of title. 41 C. 670=18 C.W.N. 457 (P.C.); 52 C.L.J. 365= 1931 C. 269 (S.B.). *See* notes under S. 2, *supra*. 55 I.C. 239=12 Bur.L.T. 184; 44 C. 670; 40 B. 630. A Railway receipt is a mercantile document of title and an endorsee thereof can maintain a suit for the loss of the goods covered by it. 25 I.C. 383=16 Bom.L.R. 525=38 B. 659;

28. If one of several joint owners of goods has the sole possession of them by permission of the co-owners, the property in the goods is transferred to any person who buys them of such joint owner in good faith, and has not at the time of the contract of sale notice that the seller has not authority to sell.

Sale by one of joint owners.

29. When the seller of goods has obtained possession thereof under a contract voidable under S. 19 or S. 19-A of the Indian Contract Act, 1872, but the contract has not been rescinded at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

Sale by person in possession under voidable contract.

30. (1) Where a person, having sold goods, continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

Seller or buyer in possession after sale.

(2) Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have effect as if such lien or right did not exist.

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see also 40 B. 630=31 M.L.J. 541=43 I.A. 164 (P.C.); 50 A. 227=108 I.C. 457=1928 A. 145. Share certificate allowed to be with broker. 66 I.C. 726=46 B. 489=1922 B. 303; *see also* 46 C. 342=22 C.W.N. 1042; 48 I.C. 966=46 C. 331 =22 C.W.N. 1036; 50 B. 229. As to *non-possessory hypothecation of movables*, see 42 M. 59= 35 M.L.J. 450; 5 R. 633=6 Bur.L.T. 238.

"GOOD FAITH."—Nothing is said to be done in "good faith" which is done without due care and caution; that is, the care and caution expected of a man of ordinary prudence. 12 I.C. 809. Mere good faith of purchaser or pledgee is not enough to confer a good title on him; he must also show that by some act or omission, the real owner has forfeited his right to get back his possession. 1 Bur.L.J. 164=1923 R. 98; *see also* 59 I.C. 965=(1920) 3 U.B.R. 217. An honest purchase made carelessly, without making proper inquiries, cannot be said to have been made in "good faith." 12 I.C. 809=4 Bur.L. T. 28. *See also* 1924 R. 379; 42 M. 59; 5 R. 633.

STOLEN PROPERTY.—Criminal Court cannot return stolen property to an innocent purchaser as the thief could confer no title, the purchaser has no right against the real owner. The loss in case of theft should fall on the purchaser. The thief cannot be said to be in possession "with the consent of the owner." [L.B.R. (1872-1892) 84 (85).] This section does not apply to the case of a *stolen Government currency note* having been delivered to *bona fide* holder for value, since a currency note is not "goods," and a change of it for money is not a sale within the meaning of this Act. 3 C. 379; 115 P.L.R. 1904=18 P.R. 1905; 7 M.H.C.R. 233; 73 P.R. 1878; 115 P.R. 1904. This section has no application to the case of a *bona fide* holder of *stolen money or coins* received by him as current coin in payment of a lawful debt. 83 P.R. 1890.

Sec. 28.—*See also* notes under S. 27. *Cf.* S. 108, Indian Contract Act, Exception II and the English Factors Act. Where one member of a Joint Hindu family is found to be in possession of property, the family being presumed to be joint in estate, the presumption is, not that he was in possession of it as separate property acquired by him, but as a member of the joint family. 11 B.L.R. 193; U.B.R. (1892-95) 303. One of several co-owners holding a jewel in his safe custody is a person in possession as is contemplated by this section. 1 P.R. 1895; U.B.R. (1892-1896) 303; 15 M.L.J. 375.

Sec. 29.—*Cf.* S. 23, English Sale of Goods Act and *also* S. 108, Indian Contract Act.

Gross carelessness is not consistent with "good faith". *See* 12 I.C. 809.

Sec. 30.—*Cf.* English Sale of Goods Act, S.25; English Factors Act, Ss. 8 and 9: *also* S. 108 of the Indian Contract Act.

As to application of section, *see* 5 C. 633; 46 C. 342; 27 P.R. 1902.

PERSON IN POSSESSION UNDER HIRE-PURCHASE AGREEMENT.—Having only an option to purchase, is not a person who has "agreed to buy goods" under this section. See *Belrize Motor Co. v. Cox*, (1914) 1 K.B. 244; *see also* 46 C. 342; 2 L.B.R. 311; 14 L.W. 599; 45 M. 173; 42 M.L.J. 32; 40 I.C. 888: 67 I.C. 638; 59 I.C. 596

CHAPTER IV.

PERFORMANCE OF THE CONTRACT.

Duties of seller and buyer.

31. It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

Payment and delivery are concurrent conditions.

32. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer shall be ready and willing to pay the price in exchange for possession of the goods.

Delivery.

33. Delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorized to hold them on his behalf.

34. A delivery of part of goods, in progress of the delivery of the whole, has

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Sec. 31.—*Cf.* S. 27, English Sale of Goods Act; *also* S. 51, Indian Contract Act. No man is bound to take nor pay for goods unless the seller is ready and willing to deliver goods in accordance with the bargain. 15 C. 1 (5); 1923 S. 50=16 S.L.R. 278. *See also* 106 I.C. 823 (if one of two reciprocal agreements cannot be enforced, the other also need not be performed).

Sec. 2.—*Cf.* S. 28, English Sale of Goods Act, *also* S. 51 of the Indian Contract Act.

The *Select Commitee* said: "The general rule is that the obligation of the seller to deliver and that of the buyer to pay are implied concurrent conditions in the nature of mutual conditions precedent, and that neither can enforce the contract against the other without showing performance or offering to perform or averring readiness and willingness to perform his own promise. (Benjamin on Sales; pp. 682-683.) The words 'unless, otherwise agreed' save sales on credit or such special contracts as c.i.f. contracts. The rule has been embodied in S. 28 of the English Act and has been adopted in this clause. The principle of this rule is implied in S. 51 of the Indian Contract Act." (*Report of the Select Committee.*)

"CASH ON DELIVERY" mean cash in exchange for and simultaneously with the delivery of the things promised. 16 C. 417 (422).

WHERE NO TIME IS FIXED FOR PAYMENT OR DELIVERY, delivery is to take place on payment of price, and buyer will pay the price on receipt of the goods. 2 N.W.P. 60; 8 C. 809. *See also* 3 C.L.J. 287 (294)=4 C. 252. Inability of vendor to deliver possession will justify rescission of contract by buyer. 15 C. 1. Repudiation of contract by buyer on one ground—Subsequent justification of refusal on another ground after expiry of time for delivery—Not permissible: 56 M. 304=141 I.C. 632=1933 M. 176=64 M.L.J. 119; 11 R. 201=146 I.C. 440=1933 R. 79.

Sec. 33.—*Cf.* S. 90, Indian Contract Act.

The *Select Committee* said: "This clause provides for the manner in which delivery of goods can be made and corresponds to S. 90 of the Indian Contract Act. The words 'which the parties agree shall be treated as delivery', have been added to make it clear that delivery may also be made by means of an act or thing which the parties agree shall be treated as a delivery." [Halsbury's Laws of England, Vol. 25, p. 206.] Constructive delivery must have the effect of putting the goods in the possession of the person entitled: 22 I.C. 952=7 Bur.L.T. 93; 8 B. 501; 38 C. 127. The liability of the seller ceases with the transmission of the delivery order, on receipt of which the buyer should, under the terms of the contract for sale, clear the goods, and from that date the seller can claim interest and godown rent. The seller's holding of the goods for the buyer is as effective as physical delivery to the buyer. 41 B. 518=37 I.C. 271 =18 Bom.L.R. 532. Where the wood of certain trees which had fallen down was sold, the mere fact that the buyer had cut up the fallen trees does not amount to taking possession of them, so long as the wood still remained in the grove of the seller. Possession would pass to the buyer when he puts that wood into carts and takes it away. Where he is prevented from doing this, the buyer does not get possession and there is no delivery of goods within the meaning of S. 33. 1936 A.L.J. 1270=1936 A.W.R. 1010=1936 A. 880.

Secs. 33 and 36.—A buyer of goods obtained from his seller a delivery order on a third person. But he was not in fact able to obtain delivery from that third person. Meanwhile the seller unaware of such non-delivery paid the price to the third person and sued to recover it from the buyer on the ground that he was made to pay the third person by the failure of the buyer to inform him as to non-delivery of goods. It was held that the seller could not recover from the buyer the price for the goods which though were purchased, were not in fact delivered. It was further held that a buyer who had obtained a delivery order was not in law bound to inform the seller of the goods that he had failed to obtain delivery. 1940 A.L.J. 395=1940 All. 405.

Sec. 34.—The *Select Committee* said: "This clause repeats the provisions of S. 92 of the Indian Act. It affirms the English common law rule that the delivery of the part may be a delivery of the whole, if it is so intended and agreed, but not otherwise. (Pollock and Mulla's

Effect of part delivery.

the same effect, for the purpose of passing the property in such goods, as a delivery of the whole ; but a delivery of part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder.

Buyer to apply for delivery.

35. Apart from any express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery.

Rules as to delivery.

36. (1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express, or implied, between the parties. Apart from any such contract, goods sold are to be delivered at the place at which they are at the time of the sale, and goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement to sell, or, if not then in existence, at the place at which they are manufactured or produced.

(2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf :

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Contract Act, p. 489)."—(*Report of the Select Committee*). Section does not apply to money or currency notes as they are not goods under this Act. 33 M. 196.

Sec. 35.—*Cf.* S. 93 of the Indian Contract Act.

PREVIOUS AND PRESENT STATE OF LAW.—The *Select Committee* said : "In this clause the provisions of S. 93 of the Indian Act are repeated. It is true that there is no specific provision in the English Act corresponding to it. But the principle seems to have been well recognized in England also. There was some difference of opinion amongst us on the question as to whether the expression 'apart from any contract or in the absence of a contract to the contrary' should be substituted for the expression 'apart from any express contract,' and Cls. 5, 36 (1) and 62 of the Bill were referred to. We have, however, retained the expression 'apart from any express contract' as the rule enunciated in Cl. 35 has been in existence since 1872 and has been adopted in actual practice".—(*Report of the Select Committee.*) It is for the purchaser to apply for delivery on tendering the price, in the absence of a contract to the contrary. 7 L. 442 = 94 I.C. 304 = 1926 L. 318. *See also* 15 B. 1 : 1928 L. 20; 8 L. 501 (mutual contract). Vendor of goods is not liable to damages, for failure to deliver goods contracted for, unless purchaser has made an application for delivery. 24 W. R. 178 ; 1928 L. 20. Even where the contract provides that as soon as the railway receipt and the invoice arrive, the buyers would receive the same on payment of price, the buyers must apply for delivery, although the seller gives notice of arrival. 9 L. 148 = 111 I.C 498 = 1928 L. 20 ; 2 N.W.P. 60 ; 6 C. 681; 1 M.H.C.R. 162 ; 3 B.L.R. 103 (O.C.J.). "Express promise", meaning of. *See* 154 I.C. 1097 = 1935 P.C. 67 = 68 M.L.J. 635 (P.C.).

Sec. 36.—*Cf.* S. 29, English Sale of Goods Act ; *also* S. 94 of the Indian Contract Act. The *Select Committee* said : "This clause is a combination of S. 29 of the English Act and S. 94 of the Indian Act. We have omitted the second part of S. 29 (1) of the English Act and substituted in its place the provisions of S. 94 of the Indian Act, adding the words 'manufactured or' before the word 'produced' in sub-Cl. (2) corresponding with S. 94 of the Indian Act. Sub-Cl. (1) corresponds to sub-S. (1) of S. 29. The latter part of S. 29 (1) of the English Act provides that apart from any contract, express or implied, the place of delivery is the seller's place of business if he has one, and if not, his residence. Before this provision was made by the English Act, there was no settled rule in England. In the opinion of Chalmers a more definite *prima facie* rule ought to have been included in the English Act. (Chalmer's Sale of Goods, p. 86.) The rule embodied in S. 94 has been found to have caused no difficulty in India and we propose to retain it."—(*Report of the Select Committee.*) Section applies only when the contract is silent as to place of delivery. 24 C. 8 ; 5 Bom.H.C.R. 126. Vendors who had agreed to supply a certain number of tins of matches at a particular rate refused to give delivery to vendee under the contract, unless in addition to the contract price, the vendee paid the sum equal to the proposed excise duty imposed on such goods by the Tariff Act : which was published in the Gazette and which had come into force subsequently. *Held*, that the vendors were not entitled to refuse delivery, as no excise duty had been imposed when they refused to give delivery and that S. 20, Contract Act, had no application to the case. 1933 R. 79.

Sec. 36 (2) : "REASONABLE TIME" is a question of fact. *See* S. 63, *infra*. Where the choice of the place for delivery had been given originally to the buyer, a mention by him of a reasonable place would be sufficient. 24 C. 8 = 23 I.A. 119

Provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state *shall* be borne by the seller.

Delivery of wrong quantity.

37. (1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them; but if the buyer accepts the goods so delivered he shall pay for them at the contract rate.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest or he may reject the whole. If the buyer accepts the whole of the goods so delivered, he shall pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement or course of dealing between the parties.

Instalment deliveries.

38. (1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2) Where there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and the seller makes no delivery or defective delivery in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated.

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(P.C.). A contract of sale differs from a contract to pay an existing debt in specific articles. In the latter case, the obligor is not bound to carry the articles about him, but must first go to the obligee and ascertain where he will receive them and deliver the same there; and where the creditor fails to fix a place, the debtor himself may name a reasonable place, giving notice to the creditor, and a tender of the articles at that place will be good. 5 B.H.C.R. 127 (A.C.).

Sec. 37.—*Cf.* S. 30 of the English Sale of Goods Act; *also* S. 119 of the Indian Contract Act. The *Select Committee* said: "S. 119 of the Indian Act provides for one of the contingencies with regard to the quantity of the goods. S. 30 of the English Act is comprehensive and deals with all possible contingencies which generally occur. We have, therefore, adopted the provisions of the English section."—(*Report of the Select Committee.*) Where the contract is divisible the rule in sub-S. (1) does not apply. *See* 5 L. W. 149=37 I.C. 792; 74 I.C. 923=1924 A. 53. The buyer cannot reject if there is a substantial compliance with the contract. 105 I.C. 613=1924 M. 880. *See also* 1927 M. 880.

Sec. 37 (3).—Where the buyer refused to take delivery of goods on the ground that, contrary to the custom of trade, delivery was not made as and when the bales were ready at the Mills, he is not entitled after the time for delivery has expired, to justify his refusal on another ground, *viz.*, that some of the goods tendered were not of the kind or quality contracted for. (49 M. 791 and 49 M.L.J. 1, Foll.) 56 M. 304=1933 M. 176=64 M.L.J. 199. In a contract by instalments or a contract which according to its terms is treated as an instalment contract, the buyer can reject the quantity under any instalment. But under an individual contract, the buyer, loses his right to reject if he accepts part. 59 C. 928=1932 C. 879.

Sec. 38.—*Cf.* S. 31 of the English Sale of Goods Act; *also* Ss. 39 and 120, Indian Contract Act. Contract of sale by instalments—Defaults—Separate suits in respect of each default not barred. 178 I.C. 538=1938 Rang. 364; *see also* (1941) 2 M.L.J. 281.

WRONGFUL REFUSAL to accept goods sold is a breach of contract. 19 I.C. 93=80 P.R. 1913; 36 C. 736. In deciding whether there has been a repudiation of the contract regard must be had to the ratio quantitatively which the breach bears to the contract and the degree of probability or improbability that the breach will be repeated. When there is a contract for the sale of goods to be delivered in two equal instalments and the buyer wrongly refuses to take delivery of the first instalment the breach of contract is

39. (1) Where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody, is *prima facie* deemed to be a delivery of the goods to the buyer.

Delivery to carrier or wharfinger.

(2) Unless otherwise authorized by the buyer, the seller shall make such contract with the carrier or wharfinger on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits so to do, and the goods are lost or damaged in course of transit or whilst in the custody of the wharfinger, the buyer may decline to treat the delivery to the carrier or wharfinger as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, in circumstances in which it is usual to insure, the seller shall give such notice to the buyer as may enable him to insure

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so extensive that the seller is entitled to cancel the contract and be compensated for any loss suffered by him. 54 L.W. 217=I.L.R. (1942) Mad 33=(1941) 2 M.L.J. 281. Tender for goods made of "mild steel"—Stipulation that misdescription would not invalidate tender and sale—Goods delivered found to be of "wrought iron"—Liability for damages. 192 I.C. 175.

Sec. 39.—*Cf.* S. 32 of the English Sale of Goods Act and S. 91 of the Indian Contract Act.

SCOPE OF SECTION and the corresponding English Law. *See* 24 Bom.L.R. 1140=70 I.C. 138=1923 B. 125.

Sec. 39 (2): SELLER'S DUTY.—Delivery of goods to carrier or wharfinger, with due care and diligence by the seller is sufficient to charge the purchaser, 73 I.C. 537=1924 M. 517; 24 I.C. 423=1914 M.W.N. 803; 1 M.H.C.R. 200; 40 P.L.R. 789=1937 Lah. 785. Section does not impose a legal restriction on the freedom of buyer and seller to make their own arrangements as to the terms on which the goods are to be delivered to a carrier for transit from seller to buyer. It applies only to cases where there is no specific arrangement or course of dealing between the parties that posits the absence of any such condition of liability against the carrier being secured. Hence where parties to a transaction agree between themselves that the seller should send the goods to the buyer at the owner's risk, the effect of the agreement notwithstanding S. 91, Contract Act, that the delivery to the carrier holds good as a delivery to the buyer. 117 I.C. 136=1929 M. 685=57 M.L.J. 110. Where goods are consigned to a Railway Company property passes to the consignee, and he alone can thereafter sue the Railway Company for loss arising out of the contract of freight. 73 I.C. 537=1924 M. 517. As S. 91, Contract Act, does not provide for cases where the seller delivers the goods to a carrier and reserves the right of disposal, Courts of British India resort to the rules of English common law so far as they are not inconsitent with the text of the Contract Act. One of those rules is that where in pursuance of the contract, the seller delivers the goods to a carrier for the purpose of transmission to the buyer, but retains a *jus disponendi* until certain conditions are fulfilled, the property in the goods does not pass to the buyer until the conditions imposed by him are not fulfilled. This rule applies not only to delivery of goods to be carried by sea, but to delivery to carriers by land and to canal boat companies. 24 Bom.L.R. 1140=70 I.C. 138=1923 B. 125. The legal effect of the transaction of a purchase of specified goods by a commission agent has not the effect of turning his contract as between principal and agent wholly or partly into one as between vendor and purchaser. The agency contract is in some respects analogous to that of a contract of purchase and sale and not identical with it, analogous in the sense that it will attract to the commission agent certain reliefs ordinarily open to a vendor, for example, the rights of stoppage *in transitu*. On the other hand, property in goods specified would pass to the principal immediately on purchase by the agent. The passing of the property in the goods would not depend on the manner of delivery. Hence if the commission agent is liable for the loss of the goods it must be on proof of negligence or proof of breach of duty as agent [*e.g.*, where the purchaser had not indicated any particular railway to which the goods sold were to be handed over, so as to make the company liable to him, the goods should be held to have been at the vendor's risk until they reached the purchaser's hands] 76 P.R. 1876. Where a buyer and seller reside in different places, the cause of action for a suit by the seller for balance of accounts due from the buyer arises where the goods are consigned by the Railway. 24 I.C. 423=1914 M.W.N. 803. *See also* 89 I.C. 751=1925 L. 555; 82 I.C. 536=1925 M. 46=47 M.L.J. 312. Where a railway receipt for transmission of the goods through the railway was taken in the name of the consignor and subsequently endorsed by him and delivered to the consignee, the railway becomes responsible to the consignee for delivery of goods and where loss or damage occurs to the goods during transit, the consignee cannot proceed against the consignor for the damages. 108 I.C. 758.

Sec. 40.—*Cf.* S. 33 of the English Sale of Goods Act. The *Select Committee* said: "This clause is based on S. 33 of the English Act. It was pointed out in the course of the discussion that this clause might be deleted, as it might be

them during their sea transit, and if the seller fails so to do, the goods shall be deemed to be at his risk during such sea transit.

Risk where goods are delivered at distant place.

40. Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer shall, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

Buyer's right of examining the goods.

41. (1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

Acceptance.

42. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

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difficult to work it side by side with the other clauses in the Bill which enjoin a duty on the seller to comply with the conditions as to merchantability, fitness for a particular purpose, and so on. And it was also urged that the principle that the buyer should bear the risk of deterioration incidental to the transit is inconsistent with the fundamental basis of the contract postulated by the section that the seller should undertake the transit, that the delivery should be after the transit and that the seller should take the risk in the meantime. We have, however, decided to retain the section, as it is in accordance with the principles recognized by the common law of England and as the section of the English Act which is based upon the common law has been in force for a long time."—*Report of the Select Committee.*)

Sec. 41.—*Cf.* S. 34, English Sale of Goods Act ; *also* S. 38 (2), Indian Contract Act. The *Select Committee* said : "This clause is based on S. 34 of the English Act. The rules stated in both the clauses are common law rules. (Benjamin on Sale, pp. 842 and 856). Sub-cl. (1) enacts the well-established proposition that no acceptance can properly be said to have taken place until the buyer has had an opportunity of rejection. The rule stated in sub-clause (2) is a corollary to the above rule and was applied in *Isherwood* v. *Whitmore*, 11 M. & W. 347. In that case, the defendants, having received notice that the goods were at a certain wharf ready for delivery on payment of the price, went there, but on application to inspect the goods were shown two closed casks said to contain them. It was held that no sufficient opportunity was given to the buyer to examine the goods and the plaintiff, therefore, had not made a valid offer of delivery. Although there is no section in Chapter VII of the Indian Act laying down the rule, the principle underlying it has been embodied in S. 38 (2) of that Act. The rule has also been applied by Latham, J., in a Bombay case in 6 B. 692. The words "unless otherwise agreed" save special contract.—(*Report of the Select Committee.*) In contract of sale, physical possession of goods is unnecessary for seller to be held ready and willing to deliver. 86 I.C. 299=1925 M. 971=49 M.L.J. 300 ; 49 M.L.J. 530=1925 M. 1168 ; 1925 M. 1290=48 M.L.J. 522. The normal place of inspection is the place of delivery. If *A* agrees to deliver goods to *B* at Calcutta, the place of inspection is Calcutta, even though *A* knows *B* intends to ship them to New York, unless *Calcutta* is not suitable for inspection, having regard to the nature of the goods and the way in which they are packed. 59 C. 928=1932 C. 879.

Sec. 42.—*Cf.* S. 35, English Sale of Goods Act ; *also* Ss. 83 and 87, Indian Contract Act. *See also* illustrations to Ss. 83 and 87, Contract Act. The buyer's right of rejection may be lost by (*i*) acts of ownership such as sub-sale, shipment sending forward, etc.; (ii) delay in giving notice of rejection ; and (iii) part retention of the goods. 59 C. 928=1932 C. 879. Where the buyer, who was responsible for not discovering an alleged breach of warranty earlier, sued to recover damages after having effected a re-sale, *held*, that the claim was unsustainable. 32 P.L.R. 734. A reasonable time for examining goods is a question of fact depending on the circumstances of each case. Where the goods reached the plaintiffs-buyers on the 21st October, and the buyer for resale sent the intimation on 30th October, but the plaintiffs delayed another fortnight, *held*, that the plaintiffs were not entitled to recover damages in view of their prolonged failure to give notice. 32 P.L.R. 734.

Buyer not bound to return rejected goods.

43. Unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to return them to the seller; but it is sufficient if he intimates to the seller that he refuses to accept them.

Liability of buyer for neglecting or refusing delivery of goods.

44. When the seller is ready and willing to deliver the goods and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods:

Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

CHAPTER V.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

"Unpaid-seller" defined.

45. (1) The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act—

(*a*) when the whole of the price has not been paid or tendered;

(*b*) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2) In this Chapter, the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

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Sec. 43.—*Cf.* S. 36, English Sale of Goods Act.

The *Select Committee* said: "This clause is based on S. 36 of the English Act. Although there is no specific provision in the Indian Contract Act laying down the rule stated in the section the rule has been applied in several cases in India." [*Sumer Chand* v. *Ardeshir*, 1907 A.W.N. 67; *Buch & Co.* v. *Govardhandas*, 24 Bom.L.R. 991.]—[*Report of the Select Committee.*) Purchaser who rightly refuses to take delivery is not bound to return the goods to the seller from the place of delivery at his cost. 35 A. 325=19 I.C. 254. If the buyer rightly rejects the goods, the cost of returning them must be borne by the seller. (*Ibid.*)

Secs. 44.—*Cf.* S. 37 of the English Sale of Goods Act.

The *Select Committee* said: "This clause is based on S. 37 of the English Act. There is no specific provision in the Indian Contract Act on the point, but the rule is based on the remarks of Lord Ellenborough in *Greaves* v. *Ashlin*, (1873) 3 Camp. 426, and is a salutary rule of law. The reference to the charge for custody shows that the clause applies to cases in which the property has passed and the buyer neglects to take possession. The proviso to the section saves all the rights of the seller which he is entitled to enforce in case of the repudiation of the contract on the part of the buyer."—(*Report of the Select Committee.*) Where the buyer refused to take delivery of goods on the ground that, contrary to the custom of trade, delivery was not made as and when the bales were ready at the Mills, he is not entitled, after the time for delivery has expired, to justify his refusal on another ground, *viz.*, that some of the goods tendered were not of the kind or quality contracted for. (49 M. 791 and 42 M.L.J. 1, Foll.) 56 M. 304=141 I.C. 632=1933 M. 176=64 M.L.J. 199. Under a contract to sell paddy to the appellant, delivery to be made in the month of August, respondent delivered some paddy and then repudiated the contract with reference to the remainder on the 6th August. Appellant claimed damages on the basis of the difference between the contract price and the market price on the 6th August, *i.e.*, the date of repudiation. *Held*, that the damages must be assessed on the basis of the market rate prevailing on the last due date of the delivery and not on the date of repudiation by the seller. 150 I.C. 760=1933 R. 25.

Sec. 45.—*Cf.* S. 38 of English Sale of Goods Act and also S. 95 of the Indian Contract Act. The *Select Committee* said: "This clause defines an unpaid seller and is based on S. 38 of the English Act. There is no similar provision in the Indian Act. One of the rights of an unpaid seller is dealt with in S. 95. We think it desirable to define an unpaid seller. The trend of the decisions in England before 1893 was to give rights of an unpaid seller against the goods to any one whose position can be shown to be substantially analogous to that of an ordinary seller. (Chalmer's Sale of Goods p. 102.) Sub-cl. (2) gives effect that view."—(*Report of the Select Committee.*)

COMMISSION AGENT, who buys on his own credit for another, is a *quasi* vendor and is in the position of a vendor for the purpose of stoppage in transit. 7 S.L.R. 163=24 I.C. 798.

Secs. 45, 46 and 54.—Under the Sale of Goods Act, there is no question about it that

Unpaid seller's rights.

46. (1) Subject to the provisions of this Act and of any law for the time being in force, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

(*a*) a lien on the goods for the price while he is in possession of them ;

(*b*) in case of the insolvency of the buyer a right of stopping the goods in transit after he has parted with the possession of them ;

(*c*) a right of re-sale as limited by this Act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer.

Unpaid seller's lien.

Seller's lien.

47. (1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely :—

(*a*) where the goods have been sold without any stipulation as to credit ;

(*b*) where the goods have been sold on credit, but the term of credit has expired ;

(*c*) where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

Part delivery.

48. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien.

Termination of lien.

49. (1) The unpaid seller of goods loses his lien thereon—

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the commission agent is entitled to the remedy given to an unpaid seller in S. 45 and in S. 46 an unpaid seller has a right of re-sale as limited by the Act. Under S. 54, the unpaid seller can re-sell after giving a due notice. 162 I.C. 745= 1936 O.W.N. 528=1936 O. 308.

Sec. 46.—*Cf.* S. 39, English Sale of Goods Act; *also* Ss. 95 to 98, and 100 to 107, Indian Contract Act. *See also* notes under S. 47. Unpaid vendor's lien is dependent on possession of goods by vendor. 50 B. 360=1926 P.C. 38=51 M.L.J. 1=94 I.C. 824 (P.C.). So long as he retains possession, whether it be personal, or through an agent, he retains a right of lien and, as soon as he utterly relinquishes his possession, he generally loses his lien. 50 B. 360 (P.C.). *See also* 53 B. 360.

Secs. 46 and 51.—S. 46 must be read with S. 51 of the Act, and where as a matter of fact, the transit is at an end and the goods are at home, then the right of stoppage of the unpaid seller is gone. Where goods are unloaded from the Railway and delivered over to the buyer in his godowns, the transit is at an end. The fact that, later on, the Railway Company passes an order to the effect that the goods should not pass to the buyer, until freight had been paid is of no avail to the seller so as to enable him to retain or exercise his lien. 30 S.L.R. 154= 165 I.C. 559 (2)=1936 S. 200.

Sec. 47.—*Cf.* S. 41, English Sale of Goods Act; *also* Ss. 95 to 97, Indian Contract Act. The only lien which a seller of goods has under the Contract Act is his lien for unpaid purchase-money under S. 95 of the Contract Act. He has no other kind of lien. But the lien under S. 95 only exists for the purpose of enabling him to recover the price, and when the price is paid and accepted by the seller, the lien terminates, and he cannot thereafter retain the goods for any other charges which he may have incurred. 151 I.C. 117=11 O.W.N. 958=1934 O. 80.

Sec. 48.—*Cf.* S. 42, English Sale of Goods Act; *also* S. 106, Indian Contract Act, illustration).

PREVIOUS AND PRESENT STATE OF LAW COMPARED.—The *Select Committee* said: "This clause follows S. 42 of the English Act. The principle is to be found in the Illustration to S. 106 of the Indian Act."—(*Report of the Select Committee.*) *See also* notes under S. 57 and cited under S. 47, *supra*. 20 L.W. 725=1925 M. 292. The fact that a seller retains a lien on undelivered goods, even after the title has passed, by no means amounts to saying that wherever the seller retains a lien on undelivered goods, it is to be assumed that the title has passed in the sense that there has been full unconditional appropriation. 86 I.C. 794=1925 L. 586.

Sec. 49.—*Cf.* S. 43, English Sale of Goods Act. The *Select Committee* said: "Very often a

(*a*) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods ;

(*b*) when the buyer or his agent lawfully obtains possession of the goods ;

(*c*) by waiver thereof.

(2) The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained a decree for the price of the goods.

Stoppage in transit.

50. Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller, who has parted with the possession of the goods, has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in the course of transit, and may retain them until payment or tender of the price.

Right of stoppage in transit.

51. (1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee.

Duration of transit.

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question arises whether the lien of a seller has terminated. There is no express provision to Chapter VII of the Indian Act on the point except such as is implied by S. 100. S. 43 of the English Act, following the common law rules, declares when such lien terminates. We consider that these rules should be adopted in the present Bill. Sub-cl. (3) of the present clause, which is based on S. 43 (2) of the English Act, recognises the principle in the following cases, *viz.*—*Houldʻitch* v. *Desanges*, (1818) 2 Stars. 337; *Scrivener* v. *Great N.-W. Railway*, (1871) 19 W.R. 388."—(*Report of the Select Committee.*)

Sec. 50.—"This clause follows S. 44 of the English Act. The principle is recognized in Ss. 99-106 of the Indian Contract Act."—(*Report of the Select Committee.*) The right of stoppage in transit is an equitable right which arises wholly from the insolvency of the buyer and is based upon the plain reason of justice and equity that one man's goods shall not be applied in payment of another's debts. The right continues so long as the goods are in the possession of a carrier or other bailee for transmission in his capacity as such to the buyer and are made deliverable to him, and it is immaterial whether the document obtained from the carrier or other bailee for transmission of goods is made out in the name of the buyer both as consignor and as consignee of the goods or not, provided the goods are delivered for transmission by the vendor and not by the buyer. 30 S.L.R. 148=163 I.C. 875=1936 S. 106. Right of stoppage is not a merely equitable right. Where the buyer of certain goods while they were in transit became an insolvent, but had meanwhile assigned the document of title to a third party and the vendor exercises his right of stoppage in transit it is for the assignee to show that he acted in good faith and paid valuable consideration. 50 C. 399=27 C.W.N. 231=1923 C. 182. Seller's lien is not affected by the law of limitation. 22 C. 21. The right survives though the remedy may be barred. (*Ibid.*)

WHO MAY EXERCISE RIGHT OF STOPPAGE.—Vendor-consignor, though he be only a commission agent. 16 I.C. 61=14 Bom.L.R. 532: 45 C. 111; 46 C. 831. Vendor includes any person standing in the shoes of the vendor. 53 I.C. 986=46 C. 831; 41 I.C. 944=45 C. 111; 24 I.C. 798=7 S.L.R. 163; 16 I.C. 61. So long as the goods are subject to a lien for freight, the transit has not ended. The goods are not at home. So also when the shipowner lands the goods and his freight has been paid, his right of control and lien over the goods is gone, and thenceforth the goods are held by the wharfingers for the consignee alone. 17 B. 62 (92). *See also* 14 B. 57. In order to divest the consignor's right to stop in transit, there ought to be such a delivery to the consignee as to divest the carrier's lien: and the freight due to a Railway Company has been paid and the goods have been loaded into the purchaser's carts. 14 B. 57 (65); 15 C. 573. Mere non-payment of freight, although if sometimes raises a presumption that the *transitu* is not at an end, is not sufficient. Where the first consignment of the goods purchased by the insolvent vendee had actually been unloaded in the godown of the vendee without payment of freight before the countermanding order was given by the vendor, the right to the freight is waived and the consignment ceases to be in transit and the vendor has no right over it. 30 S.L.R. 148=163 I.C. 875=1936 S. 106.

Sec. 51.—"This clause is based on S. 45 of the English Sale of Goods Act. The same principle is embodied in S. 100 of the Indian Contract Act, but we prefer to adopt the provisions of the English section." (*Report of the Select Committee.*) The right of stoppage also exists when the goods are in transit to any one who derives his title from the buyer except a sub-buyer or pledgee (as described in Ss. 102 and 103) to whom a document of title had been assigned. 7 S.L.R. 163=24 I.C. 798. As to what are documents of title, *see* 40 B. 630=

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent, the transit is at an end and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4) If the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5) When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.

(6) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transit, unless such part delivery has been given in such circumstances as to show an agreement to give up possession of the whole of the goods.

How stoppage in transit is effected.

52. (1) The unpaid seller may exercise his right of stoppage in transit either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, shall be given at such time and in such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2) When notice of stoppage in transit is given by the seller to the carrier or other bailee in possession of the goods, he shall re-deliver the goods to, or according to the directions of, the seller. The expenses of such redelivery shall be borne by the seller.

Transfer by buyer and seller.

Effect of sub-sale or pledge by buyer.

53. (1) Subject to the provisions of this Act, the unpaid seller's right of lien or stoppage in transit is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto:

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31 M.L.J. 541 (Railway receipt). *See also* 1 Bur. L.J. 90=68 I.C. 694; 14 Bom.L.R. 532=16 I. C. 8; 38 B. 255=21 I.C. 343; 24 I.C. 798: 1923 B. 1; 24 I.C. 798=7 S.L.R. 163 (Bill of lading); 16 I.C. 61=14 Bom.L.R. 532. If bailee has *notice of conflicting claimants*, he delivers at his peril; and his only mode of protecting himself is to take an indemnity, and if that he refused, to interplead. 11 Bom.L.R. 1250. *See also* 26 I.C. 424=8 S.L.R. 65; 34 B. 292. Telegram to the Railway Company by unpaid seller not to deliver is sufficient notice to effect a stoppage in transit. When goods are sold to be sent to a particular destination named by vendee, the right of the vendor to stop continues until they arrive at place of destination. 11 Bom.L.R. 1250; 34 B. 292. *See also* 1936 Sind 200.

Sec. 52.—"This section is based on S. 46 of the English Sale of Goods Act. The rules contained in that section correspond to Ss. 104 and 105 of the Indian Contract Act." (*Report of the Select Committee.*) No particular form of notice is prescribed by the section and the intention of the parties prevails and it is a question of fact. 8 S.L.R. 65=26 I.C. 424. A wrongful delivery of goods by the carrier after notice to stop does not defeat right of the unpaid vendor. 17 B. 62. In order to exercise right of stoppage, it is not necessary for the vendor to take possession of the goods by a manual seizure of them, but it will be sufficient if he make claim to them, adversely to the buyer, during their passage. A telegram to Railway Company not to deliver goods is sufficient notice to effect stoppage in transit. 26 I.C. 424=8 S.L.R. 65. *See also* 1925 M. 292.

Sec. 53.—*Cf.* S. 47, English Sale of Goods Act; *also* Ss. 98, 101 to 103 Indian Contract Act. Apart from any established trade custom a delivery chit or a delivery order is nothing more than a token of authority to receive possession of the goods which it covers. A

Provided that where a document of title to goods has been issued or lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for consideration, then, if such last mentioned transfer was by way of sale, the unpaid seller's right of lien or stoppage in transit is defeated, and, if such last mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or stoppage in transit can only be exercised subject to the rights of the transferee.

(2) Where the transfer is by way of pledge, the unpaid seller may require the pledgee to have the amount secured by the pledge satisfied in the first instance, as far as possible, out of any other goods or securities of the buyer in the hands of the pledgee and available against the buyer.

Sale not generally rescinded by lien or stoppage in transit.

54. (1) Subject to the provisions of this section a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or stoppage in transit.

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delivery chit which is part and parcel of a contract on Sukkur Pass Godown delivery terms and which is received without payment and which cannot be effectively used for obtaining delivery without payment of 90 per cent. of the price of the goods is not a document of title within the meaning of S. 2 (4), Sale of Goods Act. The delivery chit does not represent the goods or transfer possession thereof or entitle the holder to receive delivery from the original seller. Irrespective of whether he had received the purchase price of the goods the original seller is entitled to refuse delivery to the holder of the chit in the exercise of his right of lien as unpaid vendor. The delivery chit therefore does not fall within the purview of S. 53 (1). I.L.R. (1941) Kar. 89=1941 Sind 78. *See also* 18 Cal. 573.

Sec. 54.—*Cf.* S. 48, English Sale of Goods Act; *also* S. 107, Contract Act. Section is permissive and not compulsory. Seller of goods, who gives notice of his intention to re-sell the goods, in pursuance of the provisions of the section, is not bound to carry out such intention and can change his mind if he likes. 7 L.B.R. 252=25 I.C. 799. Before sellers can exercise right of re-sale, and claim damages on that footing, the property in the goods must have passed to the buyers. 66 I.C. 510=11 L.B.R. 182. *See also* 8 L. 514; 15 L. 496=150 I.C. 109=36 P. L.R. 348=1934 L. 191; 27 Bom.L.R. 1168=1925 B. 547; 100 I.C. 307=1927 R. 81; 1 C.W. N. 71=24 C. 124. But *see also* 29 I.C. 933=9 S.L.R. 20; 70 I.C. 843=1923 P. 36; 100 I.C. 795=1927 L. 269; 1923 A. 242; 1925 L. 70. Mere sending of a memorandum giving notice of appropriation of goods by seller to the buyer on the due date and the buyer's silence thereon cannot be said to justify the conclusion that there was an implied assent to appropriation. When, after a contract has been made between the parties, nothing further happens and the seller on the due date appropriates certain goods to the contract and gives notice of the same to the buyer and the buyer keeps quiet, his silence may be due either to assent to the appropriation or to refusal to perform the contract. 1929 L. 268; 76 I.C. 77=1925 L. 70.

RIGHT OF RE-SALE UNDER THE STATUTORY PROVISION AND BY AGREEMENT OF PARTIES.—The right of re-sale may be the result either of a statutory provision or of agreement between the parties. The statutory provision can only be exercised if the property in the goods has passed to the buyer. 100 I.C. 307=1927 R. 81. Where the right of re-sale is reserved by the terms of contract, it can be exercised, if any of the conditions of the sale on which the right of re-sale depends, is broken. A power of re-sale implies a power of annulling or rescinding the contract, in other words, the sale is conditional and not absolute. The property in the goods sold in such a case passes to the buyer subject to the conditions attached to the contract of the sale; and if those conditions justify a right to rescind the contract or to re-sell the goods, such a right can be enforced and is not penal. (72 Revised Report 502, Foll.) 25 O.C. 186=1922 O. 265; 72 I.C. 772=1924 L. 319. *See also* 25 C. 505. Re-sale by auction must be within a reasonable time. The provision in a contract that 'the company is at liberty to keep the said goods or re-sell them on our account and at our risk' cannot be construed as a power to keep the goods as along as the company liked before it re-sold them. 27 Bom.L.R. 1168=1925 B. 542. *See also* 1924 L. 319=72 I.C. 772.

ENGLISH AND INDIAN LAW.—"So far as the English Law is concerned, when an unpaid seller of goods re-sells them under an express power reserved by him, he thereby rescinds the contract. Under the Contract Act, there is no reason why an unpaid vendor should not re-sell the goods 'on account and risk of the purchaser' as specified in the contract, and enforce at the same time all other rights given to him by the contract in so far as those rights are not affected by the re-sale." 3 L. 296=67 I.C. 228=1922 L. 369. *See also* 1937 Lah. 842. If a vendor exercises the right of resale not only is the *vendor bound to wait for a reasonable time* after giving notice to the vendee of his intention to re-sell before actually re-selling, but he is also bound to exercise his right of re-sale within reasonable time after the date of the breach. 100 I.C. 795=1927 L. 269. *See also* 8 L. 501; 56 I.C. 647; 27 Bom.L.R. 1168=1925 B. 547; 19 A. 535. *See also* 39 P.L.R. 945 (Delay in re-sale—Measure of damages). 1938 A.L.J. 227

(2) Where the goods are of a perishable nature, or where the unpaid seller who has exercised his right of lien or stoppage in transit gives notice to the buyer of his intention to re-sell, the unpaid seller may, if the buyer does not within a reasonable time pay or tender the price, re-sell the goods within a reasonable time and recover from the original buyer damages for any loss occasioned by his breach of contract, but the buyer shall not be entitled to any profit which may occur on the re-sale. If such notice is not given, the unpaid seller shall not be entitled to recover such damages and the buyer shall be entitled to the profit, if any, on the re-sale.

(3) Where an unpaid seller, who has exercised his right of lien or stoppage in transit, re-sells the goods, the buyer acquires a good title thereto as against the original buyer, notwithstanding that no notice of the re-sale has been given to the original buyer.

(4) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and, on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim which the seller may have for damages.

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=1938 All. 272 ; 41 P.L.R. 148=1939 Lah. 260. The option of re-sale is exercisable only after the lapse of a reasonable time, and it cannot be exercised before the last date up to which delivery would have been taken by the purchaser. 95 I.C. 188=1926 N. 410.

NOTICE OF RE-SALE.—*Vendor agent of vendee.*—Where vendees did not refuse to take delivery of the goods and all that they were asking was that delivery should be held over a little longer, *held*, that vendors could not sell without giving notice. Even as agents, they ought to hold the goods at the disposal of their principals, and unless they had express authority to sell them, they were not entitled to sell them without either requesting payment or asking the vendees to take delivery and giving notice that, in the event of their failure to do so, they would sell the goods for their account. 1924 P. 687. *See also* 1924 N. 162.

RE-SALE WITHOUT NOTICE TO VENDEE.—When the vendor re-sells the goods illegally without notice at a profit, the vendee is entitled to recover the earnest money but not damages or profits earned by vendor. 84 I. C. 472=1925 O. 310. After re-sale the defaulting purchaser has no right, under the original contract, and he cannot claim the goods upon payment of the contract price. The re-sale must be fairly conducted ; otherwise, the purchaser can recover damages as would put him in the same position as if the re-sale had been properly held and proper price obtained. 36 I.C. 252=8 L.B.R. 367. A re-sale would be invalid, if it is hurried in an unusual manner and without sufficient advertisement. 15 Beng. L.R. 276. Where a seller putting up the property for sale does not advertise such sale in the locality in which the property is situate or the advertisement is inadequate, the buyer is not responsible for the difference between the contract price and the inadequate price realised at such sale. 35 I.C. 373=10 Bur.L.T. 35. In notice of re-sale, date of re-sale whether need be mentioned. Circumstances justifying re-sale. 1927 M.W.N. 549. The giving of a notice is a condition precedent to exercising the right of re-sale and the person who re-sells must plead and prove notice. He cannot get over the statutory obligation by saying the purchaser did not suffer any loss by want of notice of the re-sale. 1924 N. 162 (2).

PLAINTIFF'S DUTY TO MITIGATE DAMAGES.—27 Bom.L.R. 1168=1925 B. 547. *See also* 43 C. 493=43 I.A. 6=30 M.L.J. 73 (P.C.).

LIABILITY TO ACCOUNT FOR HIGHER PRICE.—If on re-sale, the seller realizes a higher price, he is bound in claiming damages from the buyer to account for the higher price so obtained. 7 L.B.R. 252=25 I. C. 799. Where the property in the goods re-sold, has not passed to the buyer, a re-selling commission cannot be allowed. Re-selling brokerage and commission for goods not actually re-sold cannot be allowed, as they are unreasonable and as being merely imaginary and fictitious. 29 I.C. 933=9 S.L. R. 20. *See also* 30 C. 649=7 C.W.N. 562. (Right of vendor's broker in possession to exercise right of re-sale.)

POSSESSION THROUGH BROKER.—Where, after acts on the part of the purchaser evidencing an acceptance of the goods, they remained in the possession of the seller, through his broker, the latter has a lien on the goods, for the unpaid purchase-money, authorising a re-sale of the goods under this section. 30 C. 649=7 C.W.N. 562.

Sec. 54 (4).—If, in exercise of his right of re-sale, the unpaid vendor of certain piece-goods sold some of the unpaid-for goods, he is entitled to be reimbursed for the loss thereby sustained by him inclusive of all out-of-pocket expenses in effecting the re-sale but not to a re-sale commission in respect of goods sold by him as his own so as to inflate his claim for damages. The result is the same even where the property has passed but goods have not been parted with by the vendor. 129 I.C. 912=1931 S. 26. The contract for sale of goods gave a right of re-sale to the seller in case of default on the part of the buyer and provided that any dispute arising out of the contract whatever its nature shall, unless amicably settled, be referred to arbitration. *Held*, that the arbitration clause being an integral part of the contract was also wiped out on the rescission of the contract by the seller by the exercise of his right of re-sale and hence no reference to arbitration could be

CHAPTER VI.

SUITS FOR BREACH OF THE CONTRACT.

Suit for price.

55. (1) Where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods.

(2) Where under a contract of sale the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price the seller may sue him for the price although the property in the goods has not passed and the goods have not been appropriated to the contract.

Damages for non-acceptance.

56. Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance.

Damages for non-delivery.

57. Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery.

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made in pursuance of the arbitration clause. *Held further*, that the fact that S. 54 (4) kept alive the seller's right to damages arising out of buyer's default did not entitle the seller to enforce that claim by reference to arbitration under the arbitration clause which was no longer subsisting. The only way of enforcing the claim for damages was by way of a suit in a Court of law. 43 P.L.R. 693=1941 Lah. 427.

Sec. 55.—*Cf.* S. 49 (1) and (2), English Sale of Goods Act. *See* Ss. 23 and 24 of the Contract Act, *also* the provisions of the Indian Abkari Act and rules made thereunder. 87 I.C. 353=1925 S. 55 ; 35 M. 582=21 M.L.J. 425 ; 27 I.C. 919=1915 M.W.N. 25. When tender is pleaded as a defence, sum tendered must be brought into Court. *See also* 16 B. 141 ; 89 I. C. 484 ; 1925 Oudh 533; 39 M. 959. In considering whether the terms of a transaction constitute an out-and-out sale or a mere agreement to sell, the Court must endeavour to ascertain when it was the intention of the parties that the property in the goods, the subject of the sale, was to be transferred. Where it is plain from the terms that from the time when they were entered into the seller could not have dealt with the property, and had he attempted to do so the buyer could clearly have restrained him by injunction immediately and when further the buyer was to be at liberty to deal with the property and to take steps to realise it, the intention of the parties must be held to be that the property in the goods should pass from the seller to the buyer forthwith. The fact that the buyer is given some time for paying the money fixed as the sale price can in such cases be taken only as an option given to the buyer and to amount to the seller agreeing to give credit to the buyer for that period of time. If in such a case, the buyer wrongfully refuses to pay the price the seller is entitled to maintain an action for the price, under S. 55 (1). Even if it be held in such a case that the property in the goods has not passed, the seller would be, nevertheless, entitled to maintain his claim under S. 55 (2). 180 I.C. 858 (2)=41 Bom.L.R. 33=1939 Bom. 84. *See also* 1937 Nag. 198.

Sec. 56.—*Cf.* S. 50 (1) English Sale of Goods Act ; and Ss. 73 and 74, Contract Act.

Where the property in the goods has not passed to buyer sellers' only remedy is an action for non-acceptance. Where the property passed to buyer, seller may sue, either for the price, or if he has re-sold, he must sue for damages, caused on re-sale or for damages for non-acceptance. It is however open to the parties to fix the quantum of damages by the contract itself in which case it will be deemed to be liquidated damages. *See* 103 I.C. 805=1927 L. 659 ; 105 I.C. 789=1927 M. 965=53 M.L.J. 562 ; 84 I. C. 865=1925 L. 284 ; 1926 A. 278=24 A.L.J. 210.

Sec. 56 (2).—In the case of a sale of a decree in which the seller is not to have any right to proceed to execute the decree from the time of the transaction, and the buyer is given the liberty to take steps to realise the decree at his cost at any moment, it cannot be said that the agreement is subject to an implied condition that the decree should remain capable of execution, in other words it cannot be said that the parties regard that the terms are subject to any implied condition that the debtor should remain solvent. If therefore the judgment-debtor becomes insolvent before the payment of the sale price and the formal execution of a deed of assignment in writing, it cannot be said that contract of sale becomes "impossible" and so void under S. 56 (2) of the Act. 41 Bom. L.R. 33=1939 Bom. 84.

Sec. 57.—*Cf.* S. 51 (1), English Sale of Goods Act.

"When a contract to deliver goods is broken, the proper measure of damages in general is the difference between the contract price and the market price of such goods at the time when the contract is broken. So, if a contract to accept and pay for goods is broken, the same rule may be properly applied, for the seller may take his goods into the market and obtain the current price for them." 43 C. 493=43 I.A. 6 (P.C.) ; 36 C. 617 ; 41 M. 409 ; 22 M.L.J. 413 ; 102 I.C. 628 ; 97 I.C. 871 ; 1926 Mad. 1021=57 M.L.J. 243.

Specific performance.

58. Subject to the provisions of Chapter II of the Specific Relief Act, 1877, in any suit for breach of contract to deliver specific or ascertained goods the Court may, if it thinks fit, on the application of the plaintiff, by its decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The decree may be unconditional, or upon such terms and conditions as to damages, payment of the price or otherwise, as the Court may deem just and the application of the plaintiff may be made at any time before the decree.

Remedy for breach of warranty.

59. (1) Where there is a breach of warranty by the seller or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may—

(*a*) set up against the seller the breach of warranty in diminution or extinction of the price; or

(*b*) sue the seller for damages for breach of warranty.

(2) The fact that a buyer has set up a breach of warranty in diminution or extinction of the price does not prevent him from suing for the same breach of warranty if he has suffered further damage.

Repudiation of contract before due date.

60. Where either party to a contract of sale repudiates the contract before the date of delivery, the other may either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach.

61. (1) Nothing in this Act shall affect the right of the seller or the buyer

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Sec 58.—*Cf.* S. 52 of the English Sale of Goods Act. *See* 63 I.C. 114=13 L. W. 591.

Secs. 59.—*Cf.* S. 59, cls. (1) and (4), English Sale of Goods Act.

Under S 59 the buyer is not, by reason of a breach of warranty, entitled to reject the goods; he may set up against the seller the breach of warranty "in diminution or extinction of the price." 42 P.L.R. 172. In respect of a claim for a breach of warranty under S. 59 (1) the measure of damages is not the full consideration that has passed from the defrauded party; it is only the difference between the actual value of the property and its value if the property had been what it was represented to be. 1939 O. W.N. 339=1939 Oudh 186. Where the buyer repudiates the contract on the ground that the goods were not tendered within the time agreed, he cannot afterwards plead non-liability on the ground that the goods were not of the quality contracted for. 49 M. 781; 25 Bom.L.R. 1063. Where the buyer refused to take delivery of of goods on the ground that, contrary to the custom of trade, delivery was not made as and when the bales were ready at the Mills, he is not entitled after the time for delivery has expired, to justify his refusal on another ground, *viz.*, that some of the goods tendered were not of the kind or quality contracted for. (49 M. 791 and 49 M.L.J. 1, Foll.) 56 M. 304=141 I.C. 632=37 L.W. 210=1933 M. 176=64 M. L.J. 199. *See also* 11 R. 201=146 I.C. 440= 1933 R. 79.

Sec. 60.—*Cf.* Ss. 39 and 120, Indian Contract Act.

See 47 B. 924; 50 A. 82. Section is only an enabling one. 9 M.L.T. 479; 29 B. 46. As to anticipatory breach of contract, *see* 1 M.H.C. R. 162; 1924 C. 427; 8 L. 306; 10 C.W.N. 932; 10 I.C. 238; 10 I.C. 18; 1926 O. 12; 1926 C. 399; 19 I.C. 653; 22 M.L.J. 207. Wrongful refusal by the purchaser to accept goods sold to him amounts to a breach of contract. 19 I.C. 93=80 P.R. 1913 (*see also* 34 B. 192; 36 C. 736). *See* 4 C. 252. *See also* 4 O. W.N. 550=104 I.C. 587=1927 O. 265; 7 Lah. L.J. 19=85 I.C. 118=1925 L. 217. A party to contract may put an end to it when the other party to it fails to perform his promise in its entirety. But if he does not choose to do so the contract holds good. 10 I.C. 258=9 M.L. T. 479. *See also* 10 I.C. 18; 38 I.C. 877; 22 M.L.J. 207; 17 I.C. 37=6 S.L.R. 103; 19 I. C. 653=6 S.L.R. 187; 1927 O. 12; 1926 C. 399. To be relieved from future performance by the conduct of the other party, the conduct must amount to a renunciation or absolute refusal to perform the contract such as would amount to a rescission if he had the power to rescind. 28 C.W.N. 104=1924 C. 427. Where a contract is for delivery of goods on a certain day and the defendant repudiates the contract before that date, damages must be assessed for the basis of the market rate prevailing on the due date of delivery and not on the basis of the rate prevailing on the date of the repudiation. 1933 R. 42; 1933 R. 25.

Sec. 61.—*Cf.* Ss. 54 and 49 (3) of the English Sale of Goods Act. *See also* Notes under Ss. 56 and 60.

As to measure of damages, *see* 1925 P.C. 161.

Interest by way of damages and special damages.

to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover the money paid where the consideration for the payment of it has failed.

(2) In the absence of a contract to the contrary the Court may award interest at such rate as it thinks fit on the amount of the price—

(*a*) to the seller in a suit by him for the amount of the price—from the date of the tender of the goods or from the date on which the price was payable ;

(*b*) to the buyer in a suit by him for the refund of the price in a case of a breach of the contract on the part of the seller—from the date on which the payment was made.

CHAPTER VII.

MISCELLANEOUS.

Exclusion of implied terms and conditions.

62. Where any right, duty or liability would arise under a contract of sale by implication of law it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage if the usage is such as to bind both parties to the contract.

Reasonable time a question of fact.

63. Where in this Act any reference is made to a reasonable time, the question what is a reasonable time is a question of fact.

Auction sale.

64. In the case of a sale by auction—

(1) where goods are put up for sale in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale ;

(2) the sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner ; and until such announcement is made any bidder may retract his bid ;

NOTES.

The injured party must act reasonably ; and if it be open to him to take steps to *mitigate the loss* he must do so. If he fails to take such steps, the defendant may set up the failure in mitigation of damages. 43 C. 493=43 I.A. 6=23 C. W.N. 105=30 M.L.J. 73=31 I.C. 949 (P.C.).

Sec. 61 (2).—Where there is an express agreement, the general rules laid down in the section as to award of interest between vendor and purchaser do not apply. [*See* 44 C. 542=32 M.L.J. 6=21 C.W.N. 500=38 I.C. 938=44 I.A. 15 (P.C.).]

Sec. 62.—*Cf.* S. 55, English Sale of Goods Act. It is open to the parties to agree that their rights and liabilities under a contract of sale or otherwise are to be governed by a particular law, which would ordinarily not govern their case. 41 B. 636=42 I.C. 32=19 Bom.L.R. 549. The Sale of Goods Act does not prevent parties from making any contract they please. There is nothing to prevent the parties from agreeing between themselves that in spite of the fact that the property in goods has not passed as there has been no appropriation by either of them of the goods towards the contract the seller will have the right to re-sell against the defendant in breach and also to recover godown rent, insurence charges, etc. S. 62 of the Act expressly recognises that right. 175 I.C. 552=1938 A.L. J. 227=1938 All. 272.

Sec. 63.—*Cf.* S. 56, English Sale of Goods Act ; *also* Expl. to S. 46, Indian Contract Act.

Sec. 64.—*Cf.* S. 58, English Sale of Goods Act ; *also* Ss. 122 and 123, Indian Contract Act; English Puffer's Act (30 and 31 Vict., c. 48) (1867).

An agreement between two or more persons not to bid against one another at a public auction is not unlawful or against public policy. 56 I.C. 963=12 Bur.L.T. 241 ; 44 I.C. 223 ; 46 I C. 755. But *see also* 28 I.C. 40=8 S.L.R. 247. A bid is only an offer, and may be retracted before acceptance. 31 I.C. 689 (Punj.). A sale was held voidable at the instance of the buyer by reason of puffers being employed to raise the price by fictitious bids. 31 I.C. 689=40 P.L.R. 1916. Agreement by a person promising to pay money to another if the latter would not compete for the purchase of certain property with the former held legal. 10 I.C. 627 ; 10 M.L.T. 338. As to effect of fraud or mistake, *see* 6 Moore P.C. 316 ; Contract Act, Ss. 16 to 19.

(3) a right to bid may be reserved expressly by or on behalf of the seller and, where such right is expressly so reserved but not otherwise the seller or any one person on his behalf may, subject to the provisions hereinafter contained bid at the auction ;

(4) where the sale is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person ; and any sale contravening this rule may be treated as fraudulent by the buyer ;

(5) the sale may be notified to be subject to a reserved or upset price ;

(6) if the seller makes use of pretended bidding to raise the price, the sale is voidable at the option of the buyer.

[1][64-A. In the event of any duty of customs or excise on any goods being imposed, increased, decreased or remitted after the making of any contract for the sale of such goods without stipulation as to the payment of duty where duty was not chargeable at the time of the making of the contract, or for the sale of such goods duty-paid where duty was chargeable at that time,—

In contracts of sale amount of increased or decreased duty to be added or deduced.

(*a*) if such imposition or increase so takes effect that the duty or increased duty, as the case may be, or any part thereof, is paid, the seller may add so much to the contract price as will be equivalent to the amount paid in respect of such duty or increase of duty, and he shall be entitled to be paid and to sue for and recover such addition, and

(*b*) if such decrease or remission so takes effect that the decreased duty only or no duty, as the case may be, is paid, the buyer may deduct so much from the contract price as will be equivalent to the decrease of duty or remitted duty, and he shall not be liable to pay, or be sued for or in respect of such deduction.]

65. [*Repeal.*] *Repealed by Act I of 1938.*

Savings.

66. (1) Nothing in this Act, or in any repeal effected thereby, shall affect or be deemed to affect—

(*a*) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or

(*b*) any legal proceedings or remedy in respect of any such right, title, interest, obligation or liability, or

(*c*) anything done or suffered before the commencement of this Act, or

(*d*) any enactment relating to the sale of goods which is not expressly repealed by this Act, or

(*e*) any rule of law not inconsistent with this Act.

(2) The rules of insolvency relating to contracts for the sale of goods shall continue to apply thereto, notwithstanding anything contained in this Act.

LEG. REF.

[1] Sec. 64-A added by Act XLI of 1940.

NOTES.

Sec. 66.—*Cf.* S. 61, Cl. (1) and Cl. (4) of the English Sale of Goods Act.

The *Select Committee* said : "This is a saving clause. Sub-Cl. (1), items (*a*) to (*c*) save in general terms all transactions made, proceedings taken and rights and liabilities arising before this Bill comes into operation. Item (*d*) of the sub-clause saves any Act relating to the sale of goods which has not been expressly repealed by this Bill. Thus such enactments as the Indian Merchant Shipping Act, 1923, or the Code of Civil Procedure, 1908, which contain special provisions relating to the sale of goods are saved. In Cl. (4) of the present Bill we have introduced an express provision that the provisions of the Indian Act which are not inconsistent with the provisions of this Bill shall continue to apply to contracts for the sale of goods. Thus, the general Law of Contract, as embodied in the Indian Act, has been made expressly applicable to contracts for the sale of goods. Sub-Cl. (3) of this clause is based on sub-S. (1) of S. 61 of the English Act and saves the rules of Insolvency Law, whereas sub-Cl. (4) which follows sub-S. (4) of the English section enacts that the provisions of this Bill shall not apply to ostensible sale." (*Statement of Objects and Reasons—Report of the Special Committee.*)

(3) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge or other security.

THE SALT DUTIES ACT (X OF 1908).

HISTORICAL MEMOIR.

Year.	No. of Act.	Name of Act.	How affected.
1908	X	Salt Duties Act.	Am., Act IV of 1924.

[11*th September*, 1908.

An Act to make special provision for the payment of duty on salt in certain cases.

WHEREAS it is expedient to make special provision for the payment of duty on salt in certain cases ; It is hereby enacted as follows :—

Short title and extent.

1. (1) This Act may be called THE INDIAN SALT DUTIES ACT, 1908 ; and

(2) It extends to the whole of British India.

Payment of duty in certain cases.

2. Where by any enactment any duty is imposed on any salt manufactured in or imported into or transported within British India, the Central Government or [1][if so empowered by the Central Government, the Provincial Government or the Central Board of Revenue constituted under the Central Board of Revenue Act, 1924] may, by notification in the Official Gazette, make rules providing for the payment of such duty within a period not exceeding six months from the date on which payment is due, and for the furnishing of security for such payment ; and salt may be manufactured, imported or transported in accordance with rules so made as if the duty payable thereon has been paid.

THE SCHEDULED DISTRICTS ACT (XIV OF 1874).[2]

[*Omitted by the Government of India (Adaptation of Indian Laws) Order*, 1937.]

[2][NOTE.—This Act shall cease to have effect, without prejudice to the continuing validity of any notification, appointment, regulation, direction or determination made thereunder and in force immediately before the commencement of Part III of the Government of India Act, 1935 :

Provided that where immediately before the first day of April 1937 any enactment is by virtue of any notification made under this Act in force in any area in British India either with or without restrictions or modifications, the Central Government in relation to matters enumerated in List I of the Seventh Schedule to the Government of India Act 1935 and the Provincial Government, in relation to other matters, may, within six months from the said date, by notification in the Official Gazette, declare that the enactment in question shall have effect in that area subject to such modifications and adaptations specified in the notification as the Government in question may deem necessary or expedient to bring it into accord with the Government of India Act, 1935.]

LEG. REF.

[1] The words "if so empowered....Central Board of Revenue Act, 1924" were substituted for "Local Government" by Act IV of 1924.

[2] *Vide* Government of India (Adaptation of Indian Laws) Order, 1937.

THE SEA CUSTOMS ACT (VIII OF 1878).

HISTORICAL MEMOIR.

Year.	No. of Act.	Name of Act.	How affected.
1878	VIII	Sea Customs Act	Repealed in part, XVI of 1904; III of 1914; X of 1914; IV of 1916. Amended, IX of 1885, Ss. 5 and 6; II of 1887, Ss 1 to 4; II of 1888: IV of 1889 Ss. 10 and 11; VIII of 1889, Ss. 1 and 2; IX of 1891, S. 3; XII of 1891; VIII of 1894, S. 11; V of 1913; IV of 1914; XII of 1914; IX of 1915; XIII of 1919; XIV of 1922; IV of 1924; VIII of 1924; VIII of 1927; XV of 1930; XXVIII of 1933; XXI of 1934; XXXV of 1934; XII of 1939 and II of 1941; Government of India (Adaptation of Indian Laws) Order, 1937. *See* XIII of 1890, S. 9; II of 1896; VIII of 1896; XIX of 1924 and XXXV of 1939.

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(42) For withholding or removing, before examination, goods entered to be warehoused.
(43) For warehousing goods improperly.
(44) For refusing to open private warehouse when duly required.
(45) For neglecting to stow goods properly in warehouse.
(46) For importer or owner of warehoused goods clandestinely gaining access.
(47) For opening or altering warehoused goods.

SECTIONS.
167. Punishments for offences—(*Contd.*)
(48) For deficiencies in contravention of section 98 or 100 of goods in a private warehouse.
(49) For failing to produce goods when required.
(50) For concealing, removing, abstracting or transferring from one package to another goods duly warehoused.
(51) For excess, in private warehouse, over registered quantity.
(52) For removing warehoused goods improperly.
(53) For taking goods out of warehouse without paying duty.
(54) For infringing rules or orders regarding transhipment.
(55) For shipping goods before entry outwards.
(56) For shipping goods not in shipping-bill.
(57) For not giving notice of short shipping or re-landing as required by section 140.
(58) For landing at place other than that for which goods have been cleared.
(59) For deficiency in goods on which drawback has been paid, on board vessel referred to in section 142.
(60) For irregularly re-landing spirituous liquors.
(61) For contravening rules relating to spirit.
(62) For contravention of rules made under section 157.
(63) For, contrary to such rules, touching at foreign port or not declaring in writing that vessel touched at foreign port.
(64) For non-compliance with section 158, 159 or 160.
(65) For failure to produce certificate.
(66) For master of coasting-vessel violating any conditions of general pass.
(67) For contravention of the provisions of section 165.
(68) For dutiable goods entered in cargo-boat not being found, or for not entering.
(69) For failure to keep cargo-book correctly, etc.
(70) For breach in respect of lading, carrying coastwise and unlading.
(71) For refusal to produce documents.
(72) For making false declaration, destroying or refusing to produce document, or refusing to answer questions.
(73) For possession of smuggled goods.
(74) For searching persons on insufficient grounds.
(75) For Customs-officers guilty of breach of duty.
(76) For Customs-officers committing or conniving at frauds against Customs-revenue.
(77) For neglect of Police-Officer to give notice.
(78) For obstruction to Customs-officers.
(79) For Customs-officer disclosing particulars learnt officially concerning goods, or showing or parting with samples.
(80) For acting as agent without authority.
168. Packages and contents included in confiscation of goods.
Also conveyances and animals used in removal.
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CHATER XVII.

PROCEDURE RELATING TO OFFENCES, APPEALS, ETC.

169. Power to search on reasonable suspicion.
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171. Power to stop vessels, carts, etc., and search for goods on reasonable suspicion.
172. Power to issue search-warrants.
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174. Persons arrested to be taken to nearest Magistrate or Customs-collector.
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179. Things seized how dealt with.
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188. Appeal from subordinate to Chief Customs-authority.
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CHAPTER XVIII.

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A.—Form of Bond for Import-duty.
B.—Form of Bonded Warehouse Warrant.
C.—Form of Bond for the Removal of Spirit from a Licensed Distillery.

[*8th March*, 1878.

An Act to consolidate and amend the law relating to the levy of Sea Customs duties.

Preamble.

WHEREAS it is expedient to consolidate and amend the law relating to the levy of Sea Customs-duties; It is enacted as follows :—

CHAPTER I.

PRELIMINARY.

Short title.

1. This Act may be called THE SEA CUSTOMS ACT, 1878.

Local extent, Commencement.

It extends to the whole of British India, and shall come into force on the first day of April, 1878.

2. [Repeal of enactments, References to enactments repealed. Saving of appointments etc.] *Repealed by Act I of 1938.*

Interpretation.

3. In this Act, unless there be something regpunant in the subject or context,—

"Chief Customs-authority."

[1][(*a*) "Chief Customs-authority" means the Central Board of Revenue constituted under the Central Board of Revenue Act, 1924, and includes in relation to any power or duty which the Central Government may, by notification in the Official Gazette, transfer from the Central Board of Revenue to a Provincial Government or to an officer of a Provincial Government [2][and entrust under section 124 (1) of the Government of India Act, 1935, such Government or officer, as the case may be] :]

"Chief Customs-officer."

(*b*) "Chief Customs-officer" denotes the Chie Executive officer of Sea-Customs for any port to which this Act applies :

"Customs-collector."

(*c*) "Customs-collector" includes every officer of Customs for the time being in separate charge of a Custom-house, or duly authorised to perform all, or any special, duties of an officer so in charge;

LEG. REF.

[1] This sub-Cl. (*a*) was substituted by Act IV of 1924 for the original sub-Cl. (*a*) which ran as follows :—"Chief Customs-authority" denotes the person authorised to exercise, subject to the Local Government, the chief control in matter relating to Sea-customs in any place in which this Act operates."

[2] Substituted by A. O., 1937 for "to a Local Government, the Local Government or such officer as the Local Government may appoint in that behalf."

NOTES.

Sec. 1.—Intention and scope. 46 C.L.J. 455; stores imported by G. I. P. not chargeable with customs-duty. 25 Bom.L.R. 470=1923 B. 423.

(*d*) "customs-port" means any place[1] [*] declared under section 11 to be a port for the shipment and landing of goods :

"Customs-port."

(*e*) "foreign" port means [2][*] any place beyond the limits of British India :

Foreign port."

(*f*) "vessel" includes anything made for the conveyance by water of human beings or property :

"Vessel."

(*g*) "coasting vessel" denotes any vessel proceeding from one customs-port to another customs-port, whether touching at any intermediate foreign port or not, or proceeding from or to a customs-port to or from a place declared to be a port under section 12 :

"Coasting vessel."

(*h*) "master," when used in relation to any vessel, means any person, except a pilot or harbour-master, having command or charge of such vessel :

"Master."

(*i*) "warehousing-port" means any customs-port declared under section 14 to be a warehousing port :

Warehousing port."

(*j*) "warehouse" denotes any place appointed or licensed under section 15 or section 16.

"Warehouse."

[3][(*k*)* * * * *]

4. When any person is expressly or impliedly authorised by the owner of any goods to be its agent in respect of such goods for all or any of the purposes of this Act, and such authorization is approved by the Customs-collector, such person shall, for such purposes, be deemed to be the owner of such goods.

Agent of owner of goods to be deemed owner for certain purposes.

5. Anything which a master is required or empowered to do under this Act may, with the express or implied consent of such master and the approval of the Customs-collector, be done by a ship's agent.

When ship's agent may act for master.

CHAPTER II.

APPOINTMENT AND POWERS OF OFFICERS, ETC.

[4][6. The Central Government may appoint such persons as it thinks fit, to be officers of Customs, and to exercise the powers conferred, and perform the duties imposed, by this Act, on such officers.]

Appointment of Customs-officers.

[5]7. [* * * * *]

8. At any place for which there is no custom-house the Collector of the District and the officers subordinate to him shall, unless the [6][Central Government] otherwise directs, perform all duties imposed by this Act on a Customs-collector and other officers of Customs.

Performance of duties of Customs-collector where no Custom-house.

LEG. REF.

[1] Words 'except Aden' omitted by A.O., 1937.

[2] Words 'Aden and' omitted by *ibid.*

[3] Sub-Cl. (*k*) was inserted by Act IV of 1924, and now omitted by A.O., 1937.

[4] This S. 6 was substituted by Act IV of 1924 for the original section which ran as follows :—

"6. The Local Government of every place in which duties of sea customs are leviable may appoint such persons as it thinks fit to be officers of customs, and to exercise the powers conferred, and to perform the duties imposed by this Act on such officers.

Appointment of Customs-officers.

Every person so appointed may be suspended or dismissed by the Local Government which appointed him."

Suspension and dismissal of such officers.

[5] S. 7 omitted by A.O., 1937.

[6] Substituted for 'Local Government' by A.O. 1937..

NOTES.

Sec. 8.—Collector's duty, 7 M. 42; *see* 4 C.L.J. 268=10 C.W.N. 107.

Power to make rules.

9. The Chief Customs authority may from time to time, [1][* *] make rules consistent with this Act—

(*a*) prescribing and limiting the powers and duties of officers of Customs ;

(*b*) regulating the delegation of their duties by such officers ; and

(*c*) generally to carry out the provisions of this Act.

Customs-officers exempted from service on jury or inquest or as assessors.

10. No Chief Customs-authority or Chief Customs-officer and no other officer of Customs whom such Chief authority or Chief officer deems it necessary to exempt on grounds of public duty shall be compelled to serve on any jury or inquest or as an assessor.

CHAPTER III.

APPOINTMENTS OF PORTS, WHARVES, CUSTOM-HOUSES, WAREHOUSES AND BOARDING AND LANDING-STATIONS.

Power to appoint ports, wharves and custom-house.

11. [2]The Chief Customs-authority may from time to time, by notification in the Official Gazette —

(*a*) declare the places [3][* * *] which alone shall be ports for the shipment and landing of goods ;

(*b*) declare the limits of such ports ;

(*c*) appoint proper places therein to be wharves for the landing and shipping of goods or of particular classes of goods ;

(*d*) declare the limits of any such wharf ;

(*e*) alter the name of any such port or wharf ; and

(*f*) declare what shall, for the purposes of this Act, be deemed to be a customs-house, and the limits thereof.

Power to declare places to be ports for coasting trade.

12. (1) [2] The Chief Customs-authority may also from time to time in like manner declare places to be ports for the carrying on of coasting trade with customs-ports or with any specified customs-port, and for no other purpose.

Power to declare that foreign ports shall be regarded as customs-ports for certain purposes.

13. The Central Government may from time to time direct, by notification in the Official Gazette, that all goods or any specified class of goods imported from or exported to any foreign port to or from a customs-port shall, with such limitations and on such conditions (if any) as it thinks fit, be treated for any of the purposes of this Act as goods imported from, or exported to a Customs-port, as the case may be.

Power to declare Warehousing ports.

14. [2][The Chief Customs-authority] may from time to time declare by notification in the Official Gazette that any customs-port shall be a warehousing port for the purposes of this Act.

Power to appoint public warehouses.

15. At any warehousing port, the [4][Chief Customs-officer] may from time to time, appoint public warehouses wherein dutiable goods may be deposited without payment of duty on the first importation thereof, and may cancel such appointment.

LEG. REF.

[1] Repealed by Act IV of 1914.

[2] The words "The Chief Customs-authority" were substituted for "The Local Government or if so authorized by the Local Government, the Chief Customs-authority" by Act IV of 1924.

[3] The words "within the territories administered by it" were repealed by Act IV of 1924.

[4] Substituted by Act IV of 1914.

Power to license private warehouses.

16. At any warehousing port the [1][Chief Customs-officer] may from time to time license private warehouses wherein dutiable goods may be deposited as aforesaid.

Every application for a license for a private warehouse shall be in writing and shall be drawn up in such form as is from time to time prescribed by the [1][Chief Customs-officer], and shall be signed by the applicant.

Form of application for license.

Every licence granted under this section may be cancelled on conviction of the licensee of any offence under this Act relating to warehouses, unless it is otherwise provided in the licence, or on the expiration of one month's notice in writing given to the licensee by the Chief Customs-officer.

Revocation of licence.

17. The [1][Chief Customs-officer] may from time to time appoint, in or near any customs-port, stations or limits at or within which vessels arriving at, or departing from, such port shall bring-to for the boarding or landing of officers of Customs and may, unless separate provision therefor has been made under the Indian Ports Act, 1875, direct at what particular place in any such port vessels not brought into port by pilots shall anchor or moor.

Stations for Customs-officers to board and land.

CHAPTER IV.

PROHIBITIONS AND RESTRICTIONS OF IMPORTATION AND EXPORTATION.

Prohibitions.

18. No goods specified in the following clauses shall be brought, whether by land or sea, into British India :

(*a*) [2][* * * * *]

(*b*) counterfeit coin ; or coin which purports to be Queen's coin of India, or to be coin made under the Native Coinage Act, 1876, but which is not of the established standard in weight or fineness ;

(*c*) any obscene book, pamphlet, paper, drawing, painting, representation, figure or article ;

[3][(*d*) goods having applied thereto a counterfeit trade-mark within the meaning of the Indian Penal Code, or a false trade description within the meaning of the Indian Merchandise Marks Act, 1889] ;

[3][(*e*) goods made or produced beyond the limits of [4][British India] and having applied thereto any name or trade-mark being, or purporting to be, [5][* * * * *] the name or trade-mark of any person who is a manufacturer, dealer or trader in [4][British India] unless—

(i) the name of trade mark is, as to every application thereof, accompanied by a definite indication of the goods having been made or produced in a place beyond the limits of [4][British India] and

[6][(ii) the country in which that place is situated is in that indication indicated in letters as large and conspicuous as any letter in the name or trade-mark, and [4][in the English language].]

[7][(*f*) piece-goods, such as are ordinarily sold by length or by the piece, which—

(i) have not conspicuously stamped in English numerals on each piece the length thereof in standard yards, or in standard yards and a fraction of such a yard, according to the real length of the piece, and

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LEG. REF.

[1]Substituted by Act IV of 1914.
[2]Repealed by Act III of 1914.
[3]Substituted by Act IV of 1889.
[4]Substituted by Act II of 1941.
[5]Repealed by Act XVI of 1904.
[6]Substituted by Act IX of 1891.
[7]Added by Act IV of 1889.

NOTES.

Sec. 18 (d).—Collector's power to detain such goods. 34 C. 511 ; *see* 1 Weir 557.

[1][(ii) have not been conspicuously marked on each piece with the name of the manufacturer, exporter or wholesale purchaser in India of the piece and]

[1][(iii)] have been manufactured beyond the limits of India, or

[1][(iv)]having been manufactured within those limits, have been manufactured beyond the limits of British India in premises which, if they were in British India, would be a factory as defined in the Indian [2][Factories Act, 1934] ;

[3][(*ff*) goods made or produced beyond the limits of British India and intended for sale, and having applied thereto, a design in which copyright exists under the Indian Patents and Designs Act, 1911, in respect of the class to which the goods belong or any fraudulent or obvious imitation of such design except when the application of such design has been made with the licence or written consent of the registered proprietor of the design ;]

[4][(*g*) matches made with white phosphorus].

[5][(*h*) goods which are required by a notification under section 12-A of the Indian Merchandise Marks Act, 1889, to have applied to them an indication of the country or place in which they were made or produced, unless such goods show such indication applied in the manner specified in the notification ;

(*i*) cotton yarn such as is ordinarily imported in bundles, if—

(i) the bundle containing such yarn has not been conspicuously marked with the name of the manufacturer, exporter or wholesale purchaser in India of the goods, or

(ii) such bundle has not been conspicuously marked with an indication of the weight and the count of the yarn contained in it, in accordance with the rules made under section 20 of the Indian Merchandise Marks Act, 1889, and

(iii) the yarn has been manufactured beyond the limits of India, or

(iv) having been manufactured within those limits, has been manufactured beyond the limits of British India in premises which, if they were in British India, would be a factory as defined in the Factories Act, 1934 ;

(*j*) cotton sewing or darning thread, if—

(i) the units in which the thread is supplied have not been conspicuously marked with the name of the manufacturer, exporter or wholesale purchaser in India of the goods, or

(ii) if each unit has not been conspicuously marked with an indication of the weight of thread contained in it and the grist number in accordance with the rules made under section 20 of the Indian Merchandise Marks Act, 1889, and

(iii) the thread has been manufactured beyond the limits of India, or

(iv) having been manufactured within those limits, has been manufactured beyond the limits of British India in premises which, if they were in British India, would be a factory as defined in the Factories Act, 1934.]

Power to prohibit or restrict importation or exportation of goods.

19. The Central Government may from time to time, by notification in the Official Gazette, prohibit, or restrict the bringing or taking by sea or by land goods of any specified description into or out of British India [6][across any customs frontier as defined by the Central Government].

LEG. REF.

[1] Sub-Cl. (ii) inserted and old clauses (ii) and (iii) renumbered as (iii) and (iv) by Act II of 1941.

[2] Substituted by Act II of 1941.

[3] Sec. 18 cl (ff) inserted by Act XII of 1939.

[4] Added by Act V of 1913.

[5] Clauses (*h*), (i) and (*j*) inserted by Act II of 1941.

[6] Substituted by A.O., 1937.

NOTES.

Sec. 19.—*See* 33 B. 380=11 Bom.L.R. 221=1 I.C. 343. The word "issued" means "that which proceeds from any source." The words "books issued by M.N. Roy" in the notification of Governor-General in Council issued under S. 19 of the Act, mean "any book written as well as published by him". 1937 C, 49=I.L.R. (1937) Cal. 774.

[1][19-A. (1) Before detaining any such goods as are or may be specified in or under section 18 or section 19, as the case may be, or taking any further proceedings with a view to the confiscation thereof under this Act, the Chief Customs-officer or other officer appointed by the [2][Chief Customs-authority] in this behalf may require the regulations under this section, whether as to information, security, conditions or other matters, to be complied with, and may satisfy himself in accordance with those regulations that the goods are such as are prohibited to be imported.

Detention and confiscation of goods whose importation is prohibited.

(2) The Central Government may make regulations, either general or special, respecting the detention and confiscation of goods the importation of which is prohibited, and the conditions, if any, to be fulfilled before such detention and confiscation, and may by such regulations determine the information, notices and security to be given, and the evidence requisite for any of the purposes of this section and the mode of verification of such evidence.

(3) Where there is on any goods a name which is identical with, or a colourable limitation of, the name of a place in the United Kingdom, [3][India or British Burma], that name, unless accompanied in equally large and conspicuous letters, and [4][in the English language], by the name of the country in which such place is situate, shall be treated for the purposes of sections 18 and 19 as if it were the name of a place in the United Kingdom [3][India or British Burma.]

(4) Such regulations may apply to all goods the importation of which is prohibited by section 18 or under section 19, or different regulations may be made respecting different classes of such goods or of offences in relation to such goods.

(5) The regulations may provide for the informant reimbursing any public officer and the [5][Central Government] all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention.

[6][(6) All regulations under this section shall be published in the *Gazette of India*, and with the consent of the Provincial Government concerned, in the Official Gazette of each Province].

CHAPTER V.

LEVY OF, AND EXEMPTION FROM, CUSTOMS-DUTIES.

20. Except as hereinafter provided, customs-duties shall be levied at such rates as may be prescribed by or under any law for the time being in force, on—

Goods dutiable.

(*a*) goods imported or exported by sea into or from any customs-port from or to any foreign port ;

(*b*) opium, salt or salted fish imported by sea from any customs-port into any other customs-port ;

(*c*) goods brought from any foreign port to any customs-port, and, without payment of duty, there transhipped for, or thence carried to, and imported at, any other customs-port ; and

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LEG. REF.

[1]Inserted by Act IV of 1889.

[2]Substituted by Act IV of 1914.

[3]The Words "British India which were inserted by A.O., 1937 have been substituted by the word "India" by Act II of 1941.

[4]Substituted by Act II of 1941, S. 11.

[5]Substituted for 'Secretary of State for India in Council' by A.O., 1937.

[6]This new Sub-S. (6) was substituted for the old one by *ibid.*

NOTES.

Sec. 19-A.—Enquiry under the section limited in its character. 4 C.L.J. 268=10 C.W.N. 107.

Sec. 19-A. (2)—Absence of regulations immaterial. 34 C. 511.

(*d*) goods brought in bond from one Customs-port to another ;

[1][* * * * * * *]

Goods partially composed of dutiable articles.

21. Except as otherwise expressly provided by any law for the time being in force, goods whereof any article liable to duty under this Act forms a part or ingredient shall be chargeable with the full duty which would be payable on such goods if they were entirely composed of such article, or, if composed of more than one article liable to duty, then with the full duty which would be payable on such goods if they were entirely composed of the article charged with the highest rate of duty.

Power to fix tariff-values.

22. The Central Government may, from time to time, by notification in the Official Gazette, fix for the purpose of levying duties, tariff-values of any goods exported or imported by sea on which custom-duties are by law imposed,[2] and alter any such values fixed by any Tariff Act for the time being in force.

General power to exempt from customs-duties.

23. The Central Government may from time to time, by notification in the Official Gazette, exempt any goods imported into, or exported from, British India or into or from any specified port therein, from the whole or any part of the Customs duties leviable on such goods.

Power to authorise in special cases, exemption from duty.

[3][The Chief Customs-authority] may, [4][with the previous sanction of the Central Government] by special order in each case, exempt from the payment of duty, under circumstances of an exceptional nature, to be stated in such order, any goods on which customs-duties are leviable.

Baggage in actual use.

24. The Customs-collector may, subject to any general rules relating to the landing and shipping of passenger's baggage and the passing of the same through the custom-house, which may be made under section 75, pass free of duty any baggage in actual use, and for this purpose may determine, subject to any such rules, whether any goods shall be treated as baggage in actual use, or as goods subject to duty.

Re-imported articles of country produce.

25. If goods produced or manufactured in British India be imported into any customs-port from any foreign port, such goods shall be liable to all the duties, conditions and restrictions (if any) to which goods of the like kind and value not so produced or manufactured are liable on the first importation thereof :

Proviso.

Provided that, if such importation takes place within three years after the exportation of such goods, and it is proved to the satisfaction of the Customs-collector that the property in such goods has continued in the person by whom or on whose account, they were exported, the goods may be admitted without payment of duty.

Excise-duty on importation of certain country goods.

26. Any goods produced or manufactured in British India which have been exported therefrom, and on the exportation of which any drawback of excise has been received, shall, on being imported into any customs-port, be subjected, unless the [5][Chief Customs-officer] in any particular case otherwise directs by special order, to payment of excise duty, at the rate to which goods of the like kind and quality are liable at such port.

LEG. REF.

[1]The proviso which ran as follows was repealed by Act VIII of 1924 :—"Provided that no such duties shall be levied on goods belonging to the Government.".

[2]This section, so far as it relates to the Indian Tariff Act, IV of 1916, has been repealed by Act IV of 1916.

[3]The words "The Chief Customs-authority" were substituted for "The Local Government" by Act IV of 1924.

[4]Inserted by Act VIII of 1894.

[5]Substituted by Act IV of 1914.

27. All goods derelict, jetsam, flotsam, and wreck, brought or coming into any place in British India, shall be subject to the same duties, if any, to which goods of the like kind are for the time being subject on importation at any customs-port, and shall in other respects be dealt with as if they were imported from a foreign port, unless it be shown to the satisfaction of the Customs-collector that such goods are the produce or manufacture of any place from which they are entitled to be admitted duty free.

Goods derelict and wreck.

28. Provisions and stores produced or manufactured in British India, required for use on board of any vessel proceeding to any foreign port, may be shipped free of duty, whether of customs or excise, in such quantities as the Customs-collector determines with reference to the tonnage of the vessel, the numbers of the crew and passengers, and the length of the voyage on which the vessel is about to depart.

Country provisions and stores may be shipped free of duty.

Provided that no sum shall be so shipped on any vessel going on a voyage of less than thirty days' probable duration.

29. On the importation into, or exportation from, any customs-port of any goods, whether liable to duty or not, the owner of such goods shall, in his bill-of-entry, or shipping bill, as the case may be, state the real value, quantity and description of such goods to the best of his knowledge and belief and shall subscribe a declaration of the truth of such statement at the foot of such bill.

Owner to declare real value etc., of goods in bill-of-entry or shipping-bill.

In case of doubt, the Customs-collector may require any such owner or any other person in possession of any invoice, broker's note, policy of insurance or other document, whereby the real value, quantity or description of any such goods can be ascertained, to produce the same and to furnish any information relating to such value, quantity or description which it is in his power to furnish. And thereupon such person shall produce such document and furnish such information :

Power to require production of invoice, etc.

Provided that, if the owner makes and subscribes a declaration before the Customs-collector to the effect that he is unable, from want of full information, to state the real value or contents of any case, package or parcel of goods, then the Customs-collector shall permit him, previous to the entry thereof, (1) to open such case, package or parcel, and examine the contents in presence of an officer of Customs, or (2) to deposit such case, package or parcel in a public warehouse appointed under S. 15 without warehousing the same, pending the production of such information.

30. For the purposes of this Act the real value shall be deemed to be—

"Real value" defined.

(*a*) the wholesale cash price less trade discount, for which goods of the

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NOTES.

Sec. 30.—Ss. 29 and 30 not to be pressed against the tax-payer beyond their plain intendment : 56 B. 313 (P.C.).

JURISDICTION TO DETERMINE REAL VALUE. —The jurisdiction to determine the real value of the goods is vested by the legislature in the Customs- Officer and it is well settled that he has conformed to the statutory provisions of the law in arriving at his decision, the Court cannot sit in appeal against it or re-try the question at issue. In such a case, the question of burden of proof hardly arises. 164 I.C. 583= 1936 S. 127=30 S.L.R. 304.

Sec. 30 (a).—The application of Cl. (*a*) of S. 30 does not depend upon any hypothesis to the effect that at the time and place of importation an indefinite amount of further goods added to the available supply has had effect upon the wholesale price. Ordinarily, at the time of making out the bill of entry there will not be an actual price relating to the goods themselves and complying with the requirements of Cl. (*a*). As a rule, therefore, the price appropriate to the goods under assessment will under the clause be deducted, if at all, from actual prices relating to other goods of like kind and quality. But if there is an actual price for the goods themselves at the

like kind and quality are sold, or are capable of being sold, at the time and place of importation or exportation, as the case may be, without any abatement or deduction whatever, except (in the case of goods imported) of the amount of the duties payable on the importation thereof; or,

(*b*) where such price is not ascertainable, the cost at which goods of the like kind and quality could be delivered at such place without any abatement or deduction except as aforesaid.

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time and place of importation and if it is a "wholesale cash price less trade discount", the clause is not inapplicable for want of sales of other goods. The goods under assessment may under Cl. (*a*) be considered as members of their own class even although at the time and place of importation there are no other members and the price obtained for them may correctly represent the price obtainable for goods of the like kind and quality at the time and place of importation. 65 I.A. 32=I.L.R. (1938) Bom. 249=1938 A.L.J. 87=1938 P.C. 15=(1938) 1 M.L.J. 161 (P.C.). *See also* 32 S.L.R. 87=1937 Sind. 293 ; 1936 Bom. 356. The words "time and place of importation" in sub-s. (*a*) of S. 30 must be given a reasonable construction. Plainly, time cannot refer to the precise moment of time at which the goods are imported, that is, unloaded from the ship. There must be a reasonable time in which a sale can take place. "Place of importation" cannot mean the exact spot of land on which the goods are landed whether on the wharf or on the shore. It must cover a wider area, namely, the place such as Madras, Bombay, Karachi, or elswhere, as the case may be, at which the goods are imported. The phrase "time and place of importation" must no doubt be considered in relation to the particular facts of any given case. In dealing with commodities, the market price of which may vary from day to day, one would have to take the price ruling on the day of importation in considering the price at which goods of like kind and quality are capable of being sold. 60 B. 551=38 Bom.L.R. 283=1936 Bom. 356. What the Court has to find under S. 30 (*a*) is a sale of the goods at a *wholesale cash price*, and it is not legitimate to dissect the actual price paid, deduct from it such portions as may be ascertained to represent something other than the price of the goods, *e.g.*, the cost of service, and then say that the residue left is the wholesale cash price of the goods. 60 B. 551. The appellants, importers into India of cars issued from time to time a price list and the terms of business between them and the distributors of such cars, were that the retail price to be charged by the distributor to the public was that stated in the price list current at the time of arrival of the vehicles in India and the price payable by the distributor to the appellants was the same price less a certain discount. The distributor had to pay this price before obtaining delivery. Delivery was given by the appellants "free on rail," save in the case of the authorized dealers for the district of Bombay itself, *viz.*, Ford Automobiles (India), Ltd., to whom delivery was made at their own warehouse in Bombay. The price mentioned in the price list was in all cases for a vehicle in running order, and the same was true of the contract between the appellants and the distributors. *Held*, that the appellants' price to their distributors was a wholesale price within the meaning of S. 30. It was a cash price. The cars were invoiced a few days before arrival of the ship and the price became fixed then and not before. The sales were therefore sales at the time and place of importation in every reasonable sense. *Held, further*, that the overhead charges had no bearing upon any matter arising under Cl. (*a*) of S. 30. 65 I.A. 52=I.L.R. (1938) Bom. 249=40 Bom.L.R. 269=1938 P.C. 15=(1938) 1 M.L.J. 161 (P.C.). *See also* 1936 Bom. 356. The word 'ascertainable' in Cl. (*b*) of S. 30 imports more than could be satisfied by the result of a mere estimate. On the other hand the language of the section—"or are capable of being sold"—does not exclude all possibility of arriving at the price defined by Cl. (*a*) upon the basis of an actual peice. though some adjustment may be needed to eliminate the difference, *e.g.*, between cash and a month's credit. 65 I.A. 32=I.L.R. (1938) Bom. 249=(1938) 1 M.L.J. 161 (P.C.). Wholesale cash price—Meaning. 24 Bom.L.R. 198=67 I.C. 267=47 B. 174 ; 56 B. 313 (P.C.) The "*wholesale cash price*" under S. 30 (*a*) is the price current for staple articles, the amount of which, if not a subject of daily publication in the press, is easily ascertainable in the appropriate trade circles. A special low price allowed by the manufacturers in consideration of the importer purchasing a big lot is an exceptional one outside the ordinary channels of business and cannot represent the true cost at which goods of the like kind and quality could be delivered in India within the meaning of S. 30 (*b*). That cannot therefore be taken as the real value of the goods under S. 30. 30 S.L.R. 304.

Sec. 30 (b) applies when the wholesale price is not ascertainable. 30 S.L.R. 304 ; 56 B. 313 (P. C.). *See also* 60 B. 551=1936 B. 356, for object of this clause. In a prosecution of an importer of goods for abetment of cheating by causing a false declaration to be made of the real value of the goods as defined in S. 30 (*b*) of the Sea Customs Act, it is not sufficient to prove that the Customs Officers in fact applied S. 30 (*b*) of the Act, or that the importer sought to have the real value determined under S. 30 (*b*). It is incumbent on the prosecution to prove that those conditions were fulfilled which entitled the Customs-Officers to apply S. 30 (*b*) and not S. 30 (*a*). In other words, the prosecution must prove that the price mentioned in S. 30 (*a*) could not be ascertained. 46 C.W.N. 414. The mere fact that an importer paid a particular price for a particular goods is not sufficient to prove that that price is the real value for the purposes of S. 30 (*b*). It must

Examination of *ad valorem* goods.

31. Goods chargeable with duty upon the value thereof, but for which a specific value is not fixed by law for the purpose of levying duties thereon, shall, without unnecessary delay, be examined by an officer of Customs. If it appears that the real value of such goods is correctly stated in the bill of entry or shipping bill, the goods shall be assessed in accordance therewith.

Procedure where such goods are undervalued by owner.

32. If it appears that such goods are properly chargeable with a higher rate or amount of duty than that to which they would be subject according to the value thereof as stated in the bill of entry or shipping bill, such officer may detain such goods.

In every such case the detaining officer shall forthwith give notice in writing to the owner of the goods of their detention, and of the value thereof as estimated by him; and the Customs-collector shall, within two clear working days after such detention, or within such reasonable period as may with the consent of the parties be arranged, determine either to deliver such goods on payment of duty charged according to the entry of such owner, or to retain the same for the use of [1][the Central Government.]

If the goods be retained for the use of [1][the Central Government], the Customs-collector shall cause the full amount stated in the bill as their real value to be paid to the owner in full satisfaction for such goods in the same manner as if they had been transferred by ordinary sale, and shall, after due notice in the Official Gazette or some local newspaper, and without unnecessary delay, cause them to be put up to public auction in wholesale lots for cash on delivery.

If the Customs-collector deems the highest offer made at such sale to be inadequate, he may either adjourn the sale to some other day, to be notified as

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LEG. REF.

[1] Substituted by A. O., 1937.

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be shown that goods of the like kind and quality could not be delivered at that place at a lower price. Therefore, an offence of cheating by "causing a false declaration to be made of the real value" of goods cannot be made out against an importer, when all that is alleged against him is that he gave an estimate of the real value of the goods imported and furnished false evidence in support of that estimate. 46 C.W. N. 414.

Secs. 30, 31 and 32 : COURSES OPEN TO CUSTOMS OFFICER WHEN DECLARED VALUE IS NOT THE REAL VALUE.—The Sea Customs Act contemplates three procedures which a customs officer may adopt if he finds the declared value to be incorrect. He may proceed to fix the real value in the manner laid down by S. 30 and levy customs duty accordingly. He may, if he so wishes, detain the goods with the object of enabling the Collector of customs to decide whether the goods should be delivered to the importer on payment of duty in accordance with the declaration made by him, or to buy the goods. Lastly, the customs-officer duly authorized in that behalf may forfeit the goods and at the same time impose a penalty by way of fine as contemplated by S. 167 of the Act. 1936 Sind 127=30 S.L.R. 304. Ss 30 and 32 relate only to particular class of goods, non-tariff value goods, *i.e.*, *ad valorem* goods. In the case of tariff-value goods, the assessment is under the general powers and the power to detain under the general power. I.L.R. (1939) 2 Cal. 541 = 1940 Cal. 174.

Sec. 32 : CONSTRUCTION—OPTION TO BUY GOODS UNDER-VALUED—RIGHT OF OWNER OF GOODS TO ENFORCE PURCHASE.—S. 32 does not empower an importer to compel the Customs-Officer either to accept his declared value as correct, or if he challenges it, to buy the goods on behalf of Government at the declared value. The option lies with Government to buy the goods in fit cases and not with the importer. The use of the expression 'may' in the first part of S. 32 makes it abundantly clear that the option lies with Customs-Officer to detain the goods for the purpose of that section, if he so wishes. It is only when the Customs-Officer acts under that section that the procedure laid down in the rest of the section, comes into play. 164 I.C. 583=1936 Sind 127. The fact that S. 32, Sea Customs Act, refers to the delivery of goods detained by the Collector does not exclude the application of S. 415, I.P. Code, in appropriate cases when it is clear that the acts necessary to constitute an offence under that section and to attract its application exist. 32 S.L.R. 87=1937 Sind 293. S. 32 of the Sea Customs Act does not empower an importer to compel the Customs-Officer either to accept the declared value by him as correct, or, if he challenges it, to buy the goods for the Government at the declared value. To interpret the section in that way would be erroneous. 30 S.L.R. 304 =1936 Sind 127.

aforesaid, or buy in the goods, and without unnecessary delay dispose of them for the benefit of [1][the Central Government].

If the proceeds arising from such sale exceed the sum paid to the owner, together with (in the case of goods imported) the duty to which the goods are liable and all charges incurred by [1][the Central Government] in connection with them, a portion not exceeding one-half of the overplus shall, at the discretion of the Chief Officer of Customs, be payable to the officer who detected the undervaluation of the goods.

Nothing in this section shall prevent the Chief Officer of Customs, when he has reason to believe that any such undervaluation was solely the result of accident or error, from permitting the owner of the goods, on his application for that purpose, to amend such entry, on payment of such increased rate of duties on the excess of the amended over the original valuation, or on such other terms as the Chief Officer of Customs may determine.

33. If, on the first examination of any such goods under section 31, the owner thereof states in writing that such goods are, in consequence of damage sustained before delivery of the bill of entry, of value less than that stated in such bill, the Customs-collector, on being satisfied of the fact, may allow abatement of duty accordingly.

Abatement allowed on damaged goods.

Reduced duty how determined.

The reduced duty to be levied on such goods may be ascertained by either of the following methods, at the option of the owner :—

(*a*) the real value of such goods may be fixed on appraisement by an officer of Customs and the duty may be assessed on the value so fixed ; or

(*b*) the goods may, after due notice in the Official Gazette or some local newspaper, be sold by public auction at such time (within thirty days from the date of delivery of the bill of entry), and at such place, as the Customs-collector appoints ; and the duty may be assessed on the gross amount realised by such sale, without any abatement or deduction, except (in the case of goods imported) of so much as represents the duties payable on the importation thereof.

34. When any goods, the value of which has been fixed by law for the purpose of levying duties thereon, have, before delivery of the bill of entry, deteriorated to the extent of more than one-tenth of their value, the duty on such goods shall, if the owner thereof so desires, be assessed *ad valorem*.

Deterioration of tariff-value goods.

The real value of such goods shall be ascertained as provided in section 33; and the duty shall be assessed thereon.

[2][34-A. Where the Customs-collector is satisfied that any goods on which duties are levied on quantity and not on value, and which are of a kind to which the Central Government has, by notification in the Official Gazette, declared that the provisions of this section shall apply, have before delivery of the bill of entry deteriorated to the extent of more than one-tenth of their value, he may allow an abatement of duty proportionate to the extent of such deterioration.]

Abatement of duty on goods on which duty is levied on quantity.

35. No abatement of duty on account of [3][any deterioration] shall be allowed on wine, spirit or beer, or [3][save as provided by section 34-A] on any other articles on which duties are levied on quantity and not on value.

No abatement when duty is levied on quantity.

LEG. REF.

Substituted by A. O., 1937.

[2]Added by Act VIII of 1927.

[3]The words "any deterioration" were substituted for the word "damage" and "save as provided by S. 34-A" were inserted by Act VIII of 1927.

Restriction on amendment of bill of entry or shipping-bill.

36. Except as provided in section 94, no amendment of a bill of entry or shipping bill relating to goods assessed for duty on the declared value, quantity or description thereof shall be allowed after such goods have been removed from the custom-house.

Alteration of import-duty or tariff-valuation.

37. The rate of duty and the tariff-valuation (if any) applicable to any goods imported shall be the rate and valuation in force on the date on which the bill of entry thereof is delivered to the Customs-collector under section 86 :

[1][Provided that, if such goods are warehoused under this Act, the rate and valuation (if any) applicable thereto shall be the rate and valuation in force on the date [2][of the actual removal] of such goods from the warehouse in the case of goods delivered out of a warehouse for home consumption, and in the case of goods delivered out of a warehouse for removal under bond to be re-warehoused where the duty is paid on such goods without their being re-warehoused, the rate and valuation (if any) in force on the date on which duty is paid].]

Explanation.—A bill of entry shall, for the purposes of this section, be deemed to be delivered when it is first presented to the proper officer of Customs.

Alteration of export-duty or tariff-valuation.

38. The rate of duty and tariff-valuation (if any) applicable to any goods exported shall be the rate and valuation in force when a shipping bill of such goods is delivered under section 137 :

[3][Provided that where the shipment of any goods is permitted without a shipping bill, or in anticipation of the delivery of a shipping bill, the rate of duty and tariff-valuation, if any, applicable shall be the rate and valuation in force at the time when shipment of the goods commences.]

Payment of duties short-levied or erroneously refunded.

39. When customs-duties or charges have been short-lived through inadvertence, error, collusion or misconstruction on the part of the officers of Customs, or through misstatement as to real value, quantity or description on the part of the owner,

or when any such duty or charge, after having been levied, has been, owing to any such cause, erroneously refunded,

the person chargeable with the duty or charge so short-levied, or to whom such refund has erroneously been made, shall pay the deficiency or repay the amount paid to him in excess, on demand being made within three months from the date of the first assessment or making of the refund ;

and the Customs-collector may refuse to pass any goods belonging to such person until the said deficiency or excess be paid or re-paid.

No refund of charges erroneously levied or paid, unless claimed within three months.

40. No customs-duties or charges which have been paid, and of which repayment, wholly or in part, is claimed in consequence of the same having been paid through inadvertence, error or misconstruction, shall be returned, unless such claim is made within three months from the date of such payment.

Power to give credit for, and keep account current of, duties and charges.

41. The Customs-collector may, if he thinks fit, instead of requiring payment of customs-duties and charges due from any mercantile firm or public body, at the time such duties and charges are payable under this Act, keep with such firm or body an account current of such duties and charges. Such account shall be settled at intervals not exceeding one month,

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LEG. REF.

[1] Substituted by Act VIII of 1889.

[2] Substituted by Act IX of 1915.

[3] Added by Act XII of 1914.

and such firm or body shall make a deposit or furnish security sufficient in the opinion of the Customs-collector to cover the amount which may at any time be due from them in respect of such duties and charges.

CHAPTER VI.

DRAWBACK.

Drawback allowable on re-export.

42. When any goods, capable of being easily identified, which have been imported by sea into any customs-port from any foreign port, and upon which duties of customs have been paid on importation, are re-exported by sea from such customs-port to any foreign port, or as provisions or stores for use on board a ship proceeding to a foreign port, seven-eighths, [1][or in the case of silver bullion the whole,] of such duties shall, except as otherwise hereinafter provided, be repaid as drawback :

Conditions for grant of drawback.

Provided that, in every case, the goods be identified to the satisfaction of the Customs-collector at such customs-port, and that the re-export be made within two years from the date of importation, as shown by the records of the custom-house, or within such extended term as the Chief Customs-authority [2][or the Chief Custom:-officer], on sufficient cause being shown, in any case determines :

[2][Provided further that the Chief Customs-officer shall not extend the term to a period exceeding three years.]

Drawback on goods exported to customs-port and thence to foreign port.

43. When any goods, having been charged with import duty at one customs-port and thence exported to another, are re-exported by sea as aforesaid, drawback shall be allowed on such goods as if they had been so re-exported from the former port :

Proviso.

Provided that, in every such case, the goods be identified to the satisfaction of the officer in charge of the custom-house at the port of final exportation, and that such final exportation be made within three years from the date on which they were first imported into British India.

Drawback on goods taken into use between importation and re-exportation.

[3][43-A. (1) Notwithstanding anything hereinbefore contained, the re-payment of duty as drawback in respect of goods which have been taken into use between importation and re-exportation shall be subject to the provisions of the rules made under sub-section (2).

(2) The Central Government may, subject to the condition of previous publication, from time to time, by notification in the Official Gazette, make rules, in respect of goods which have been taken into use between importation and re-exportation,—

(*a*) modifying the amount of duty which shall be repaid as drawback on any such goods or class of such goods, or

(*b*) prohibiting the repayment of duty as drawback on any such goods or class of such goods, or

(*c*) varying the conditions for the grant of drawback on any such goods or class of such goods by restricting the period after importation within which the goods must be re-exported.]

Drawback of duties on wine and spirit allowed for officers of Navy.

44. A drawback of the whole of the customs-duties shall be allowed on wine and spirit intended for the consumption of any officer of Her Majesty's Navy, on board of any of Her Majesty's ships in actual service, unless such wine and spirit have been warehoused without payment of duty on the first entry thereof.

LEG. REF.

[1] Inserted by Act XV of 1930.

[2] Inserted by Act IV of 1914.

[3] Inserted by Act XXI of 1934.

The quantity of wine and spirit on which drawback may be so allowed in any one year for the use of such officers shall not exceed the quantities hereinafter allowed for each such officer respectively, that is to say—

			Gallons.
For every Admiral	..	..	1,260
Vice-Admiral	..	..	1,050
Rear Admiral	..	..	840
Captain of 1st and 2nd rate	..	..	630
Captain of 3rd, 4th and 5th rate	..	..	420
Lieutenant or other Commanding officer	Marine officer, Master, Purser or Surgeon ..	..	105

Persons entering such wine or spirit for drawback to declare name and rank of officer claiming same.

45. Every person clearing and claiming drawback for wine or spirit, as provided in S. 44, shall state in the shipping bill the name of the officer for whose use such wine or spirit is intended, and of the ship in which he serves as well as the place and date of the last supply for which drawback was allowed.

All such wine and spirit shall be delivered into the charge of the proper officers of Customs at the port of shipment, to be shipped under their care; and when the officer commanding the ship has certified the receipt of such wine and spirit into his charge, and any such officer of Customs has certified the shipment, the drawback shall be paid to the person entitled to receive the same.

Transfer of wine or spirit from one naval officer to another.

46. The Customs-collector may permit the transfer of any such wine or spirit from one naval officer to, another naval officer on board of the same, or of any other such vessel, as part of his authorised quantity;

or may permit the transhipment of any such wine or spirit from one vessel to another for the use of the same naval officer;

or the re-landing and warehousing of any such wine or spirit for future re-shipment.

The Customs-collector may also receive back the duties for any such wine or spirit, and allow the same to be cleared for home-consumption.

Provisions and stores for Her Majesty's Navy.

7. Provisions and stores for the use of Her Majesty's Navy or of any officer thereof which are subject to duty may, in like manner, be transferred, transhipped or re-landed and warehoused, free of duty;

and where duties have been paid on any such provisions or stores required for shipment, drawback of such duties, whether of customs or excise, shall be allowed on receipt of an application in writing from the officer commanding the ship for which they are intended, or from some other officer duly authorized to make such application.

Indian Navy.

48. The provisions of sections 44, 45, 46 and 47 as to officers of Her Majesty's Navy apply also to officers of Her Majesty's [1][Indian Navy] on board of any of the ships of such [1][Indian Navy] proceeding to any port out of India, and the rules prescribed by section 47 as to provisions and stores for the use of Her Majesty's Navy apply also to provisions and stores for the use of such [1][Indian Navy].

Power to declare what goods are identifiable

49. The Central Government may from time to time, by notification in the Official Gazette,—

(*a*) declare what goods shall, for the purpose of this Chapter, be deemed to be capable of being easily identified; and

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LEG. REF.

[1] Substituted by Act XXXV of 1934.

and to prohibit drawback in case of specified foreign port.

(*b*) prohibit the payment of drawback upon the re-exportation of goods [1][or any specified goods or class of goods] to any specified foreign port. [2][* * *].

When no drawback allowed.

50. Notwithstanding anything hereinbefore contained, no drawback shall be allowed—

(*a*) upon goods not included in the export manifest, or

(*b*) where the goods to be exported are of less value than the amount of drawback claimed, or

(*c*) where the claim is for drawback amounting, in respect of any single shipment, to less than five rupees, and the Customs-collector thinks fit to reject it, or

(*d*) on salt, salted fish or opium.

Time to claim drawback.

51. No drawback shall be allowed unless the claim to receive such drawback be made and established at the time of re-export.

When payment made.

No such payment of drawback shall be made until the vessel carrying the goods has put out to sea, or unless payment be demanded within six months from the date of entry for shipment.

Declaration by parties claiming drawback.

52. Every person, or his duly authorized agent, claiming drawback on any goods duly exported, shall make and subscribe a declaration that such goods have been actually exported, and have not been re-landed and are not intended to be re-landed at any customs port; and that such person was at the time of entry outwards and shipment, and continues to be, entitled to drawback thereon.

CHAPTER VII.

ARRIVAL AND DEPARTURE OF VESSELS.

Arrival and Entry of Vessels inwards.

Power to fix places beyond which inward bound vessels are not to proceed until manifest delivered.

53. The [3][Chief Customs-authority] may, by notification in the [4][*] Official Gazette, fix a place in any river or port, beyond which no vessel arriving shall pass until a manifest has been delivered to the pilot, officer of Customs or other person duly authorized to receive the same.

Delivery of manifest when vessel anchors below place so fixed.

If, in any river or port wherein a place has been fixed by the [3][Chief Customs-authority] under this section, the master of any vessel arriving remains outside or below the place so fixed, such master shall, nevertheless, within twenty-four hours after the vessel anchors, deliver a manifest to the pilot, officer of Customs or other person authorized to receive the same.

Delivery of manifest where no place has been so fixed.

54. If any vessel arrives at any customs-port in which a place has not been so fixed, the master of such vessel shall, within twenty-four hours after such vessel has anchored within the limits of the port, deliver a manifest to the pilot, officer of Customs or other person authorized to receive the same.

Signature and contents of manifest.

55. Every manifest shall be signed by the master, and shall specify all goods imported in such vessel, showing separately all goods (if any) intended to be landed, transhipped or taken to another port, and all ship's stores intended for

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LEG. REF.

[1] Added by Act XII of 1914.
[2] Repealed by Act XII of 1914.
[3] Substituted by Act IV of 1914.
[4] The word "local" was omitted by Act IV of 1924.

consumption in port or on the homeward voyage, and shall contain such further particulars, and be made out in such form, as the [1][Chief Customs-officer] may from time to time direct.

Amendment of errors in manifest.

The Customs-collector shall permit the master to amend any obvious error in the manifest, or to supply any omission which in the opinion of such Collector results from accident or inadvertence, by furnishing an amended or supplementary manifest,

and may, if he thinks fit, levy thereon such fee as the [1][Chief Customs-officer] from time to time directs.

Except as herein provided, no import manifest shall be amended.

Duty of person receiving manifest.

56. The person receiving a manifest under section 53 or 54 shall countersign the same and enter thereon such particulars as the [1][Chief Customs-officer] from time to time directs in this behalf.

Bulk not to be broken until manifest, etc., delivered, and vessel entered inwards.

57. No vessel arriving in any customs-port shall be allowed to break bulk until a manifest has been delivered as hereinbefore provided ; nor until a copy of such manifest, together with an application for entry of such vessel inwards, has been presented by the master to the Customs-collector and an order has been given thereon for such entry.

Master, if required, to deliver bill-of-lading, etc., to Customs-collector and answer questions.

58. The master shall, if required so to do by the Customs-collector at the time of presenting such application, deliver to the Customs-collector the bill of lading or a copy thereof for every part of the cargo laden on board, and any port-clearance, cocket or other paper granted in respect of such vessel at the place from which she is stated to have come, and shall answer all such questions relating to the vessel, cargo, crew and voyage as are put to him by such officer.

The Customs-collector may, if any requisition or question made or put by him under this section is not complied with or answered, refuse to grant such application.

Special pass for breaking bulk.

59. Notwithstanding anything contained in section 57, the Customs-collector may grant, prior to receipt of the manifest, and to the entry inwards of the vessel, a special pass permitting bulk to be broken.

The granting of such pass shall be subject to such rules as may from time to time be made by the Chief Customs-authority.

Manifest, etc., may be delivered by ship's agent.

60. Notwithstanding anything contained in Ss. 53, 54, 57 or 58, the Customs-Collector may accept from the ship's agents, in lieu of the master, delivery of the manifest or of any other document required by those sections to be delivered by the master.

Entry outwards, Port-clearance and Departure of Vessels.

Order for entry outwards to be obtained before export cargo is shipped.

61. No vessel shall take on board any part of her export cargo, until a written application for entry of such vessel outwards, subscribed by the master of such vessel, has been made to the Customs-collector, or before an order has been given thereon by such officer for such entry.

Every application made under this section shall specify the name, tonnage and national character of the vessel, the name of the master, and the name of every place for which cargo is to be shipped.

LEG. REF.

[1] Substituted by Act IV of 1914.

62. No vessel, whether laden or in ballast, shall depart from any customs-port until a port-clearnace has been granted by the Customs-collector or other officer duly authorized to grant the same.

No vessel to depart without port-clearance.

And no pilot shall take charge of any vessel proceeding to sea, unless the master of such vessel produces a port-clearance.

No pilot to take charge of vessel proceeding to sea without production of port-clearance.

63. Every application for port-clearance shall be made by the master at least twenty-four hours before the intended departure of the vessel.

Application for port-clearance.

The master shall, at the time of applying for port-clearance,—

Master on applying for port-clearance to deliver documents and answer questions.

(*a*) deliver to the Customs-collector a manifest in duplicate in such form as may from time to time be prescribed by the [1][Chief Customs-officer] signed by such master specifying all goods to be exported in the vessel and showing separately all goods and stores entered in the import manifest, and not landed or consumed on board or transhipped ;

(*b*) deliver to the Customs-collector such shipping bills or other documents as such Customs-collector, acting under the general instructions of such [1][Chief Customs-officer] requires ; and

(*c*) answer to the proper officer of Customs such questions touching the departure and destination of the vessel as are demanded of him.

The provisions of section 55 relating to the amendment of import manifests shall, *mutatis mutandis*, apply also to export manifest delivered under this section.

64. The Customs-collector may refuse port-clearance to any vessel until—

Power to refuse port-clearance.

(*a*) the provisions of section 63 are complied with ;

(*b*) all port-dues and other charges and penalties due by such vessel, or by the owner or master thereof, and all duties payable in respect of any goods shipped therein, have been duly paid, or their payment secured by such guarantee, or by deposit at such rate, as such Customs-collector directs ;

(*c*) the ship's agent (if any) delivers to the Customs-collector a declaration in writing to the effect that he will be liable for any penalty imposed under section 167, No. 17, and furnishes security for the discharge of the same ;

(*d*) the ship's agent (if any) delivers to the Customs-collector a declaration in writing to the effect that such agent is answerable for the discharge of all claims for damage or short delivery which may be established by the owner of any goods comprised in the import cargo in respect of such goods.

A ship's agent delivering a declaration under clause (*c*) of this section shall be liable to all penalties which might be imposed on the master under section 167, No. 17, and a ship's agent delivering a declaration under clause (*d*) of this section shall be bound to discharge all claims referred to in such declaration.

65. When the Customs-collector is satisfied that the provisions of section 63, and if necessary of clauses (*d*) and (*c*) and (*d*) of section 64 have been complied with, he shall grant a port-clearance

Grant of port-clearance.

LEG. REF.

[1] Substituted by Act IV of 1914.

NOTES.

Sec. 64. – Object : 34 Bom. L.R. 634; effect of a clause in a bill of lading providing for suits for loss or damages within a certain time. 34 Bom.L.R. 634. The liability referred to in cl. (*d*), S. 64, Sea Customs Act, is the liability of the ship's agents as agents and that liability must be limited by the liability of the ship as the principal. Where therefore the liability of a ship ceases after the period of one year, the liability of the ship's agent cannot continue there-after: 168 I.C. 330=1937 S. 11=30 S.L.R. 345.

to the master, and shall return at the same time to such master one copy of the manifest duly countersigned by the proper officer of Customs.

Grant of port-clearance on security of ship's agent.

66. Notwithstanding anything contained in sections 64 and 65, the Customs-collector may (subject to such rules as the Chief Customs-authority may from time to time prescribe) grant a port-clearance to the master when the ship's agent furnishes such security as the Customs-collector deems sufficient for duly delivering, within five days from the date of such grant, the manifest and other documents specified in section 63.

CHAPTER VIII.

GENERAL PROVISIONS AFFECTING VESSELS IN PORT.

Power to depute customs-officer to board ships.

67. The Customs-collector at any customs-port may at any time depute at his discretion one or more officers of Customs to board any vessel in or arriving at such port.

Duty of such officer.

Every officer of Customs so sent shall remain on board of such vessel by day and by night unless or until the Customs-collector otherwise orders.

Officer and servant to be received.

68. Whenever an officer of Customs is so deputed on board of any vessel, the master of such vessel shall be bound to receive on board such officer, and one servant of such officer, and to provide such officer and servant with suitable shelter and

Accommodation of officer and servant.

accommodation, and likewise with a due allowance of fresh water, and with the means of cooking on board.

Officers of Customs to have free access to every part of ship, and may seal and secure goods.

69. Every officer of Customs so deputed shall have free access to every part of the vessel, and may fasten down any hatchway or entrance to the hold and mark any goods before landing, and lock up, seal, mark or otherwise secure any goods on board of such vessel.

Power to authorize search and opening of locks.

If any box, place or closed receptacle in any such vessel be locked, and the key be withheld, such officer shall report the same to the Customs collector, who may thereupon issue to the officer on board, or to any other officer under his authority, a written order to search.

On production of such order, the officer bearing the same may require that any such box, place or closed receptacle be opened in his presence; and, if it be not opened upon his requisition, he may break open the same.

Goods ont to be shipped, discharged or water-borne except in presence of officer.

70. Unless with the written permission of the Customs-collector or in accordance with the general permission granted under section 74, no goods other than passenger's baggage, or ballast urgently required to be shipped for the vessel's safety, shall be shipped or water-borne to be shipped or discharged from any vessel in any customs-port, except in the presence of an officer of Customs.

Period allowed for discharge and shipment of cargo.

71. When an officer of Customs is deputed under section 67 to remain on board a vessel the tonnage of which does not exceed six hundred tons, a period of thirty working days, reckoned from the date on which he boards such vessel or such additional period as the Customs-collector directs, shall be allowed for the discharge of import-cargo and the shipment of export-cargo on board of such vessel.

NOTES.

Sec. 67.—*See* 43 B. 221=21 Bom.L.R. 27=49 I.C. 427.

Sec. 68.—Object. 34 Bom.L.R. 634.

One additional day shall, in like manner, be allowed for every fifty tons in excess of six hundred.

No charge shall be made for the services of a single officer of Customs for such allowed number of working days, or for the services of several such officers (if available) for respective periods not exceeding in the aggregate such allowed number of working days.

If the period occupied in the discharge and shipment of cargo be in excess of thirty working days, together with the additional period (if any) allowed under this section, the vessel shall be charged with the expense of the officer of Customs at a rate not exceeding five rupees per diem (Sundays and holidays excepted) for such excess period.

Consequence of exceeding same.

In calculating any period allowed, or any charge made under this section, the period (if any) during which a vessel, after the completion of the discharge of import-cargo, and before commencing the shipment of export-cargo, is laid up by the withdrawal of the officer of Customs, upon application from the master, shall be deducted.

Allowance for period during which vessel is laid up.

72. Except with the written permission of the Customs-collector, no goods, other than passengers' baggage, shall in any customs-port be discharged from any vessel, or be shipped or water-borne to be shipped,—

Goods not to be landed, etc., on Sundays or holidays, without permission, nor except within fixed hours.

(*a*) on any Sunday or on any holiday or day on which the discharge or shipping of cargo, as the case may be, is prohibited by the Chief Customs-authority ;

(*b*) on any day except between such hours as such authority from time to time appoints by notification in the Official Gazette.

73. No goods shall in any customs-port be landed at any place other than a wharf or other place duly appointed for that purpose, and

Goods not to be shipped, etc., except at wharves.

unless with the written permission of the Customs-collector, or when a general permission has been granted under section 74, no goods shall in any customs-port be shipped or water-borne to be shipped from any place other than a wharf or other place duly appointed for that purpose.

74. Notwithstanding anything contained in section 70 or 73, the Chief Customs-authority may, by notification in the [1][*] Official Gazette, give general permission for goods to be shipped or water-borne to be shipped in any customs-port from all or any places not duly appointed as wharves, and without the presence or authority of an officer of Customs.

Power to exempt from sections 70 and 73.

75. The Chief Customs authority may from time to time make rules for the landing and shipping of passengers' baggage and the passing of the same through the custom-house, and for the landing, shipping and clearing of parcels forwarded by Her Majesty's or other mails, or by other regular packets and passenger-vessels.

Power to make rules regarding baggage and mails.

When any baggage or parcels is or are made over to an officer of Customs for the purpose of being landed, a fee of such amount as the [2][Chief Customs-authority] from time to time directs shall be chargeable thereon, as compensation for the expense and trouble incurred in landing and depositing the same in the custom-house.

Landing fees.

76. When any goods are water-borne for the purpose of being landed from

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LEG. REF.

[1]The word "local" was omitted by Act IV of 1924.

[2]Substituted by Act IV of 1914.

NOTES.

Sec. 76.—Master allowing boat-load to leave vessel without boat-note. 1 Weir 897.

Boat-note.

any vessel and warehoused or cleared for home consumption, or of being shipped for exportation on board of any vessel, there shall be sent, with each boat-load or other separate despatch, a boat-note specifying the number of packages so sent and the marks and numbers or other description thereof.

Each boat-note for goods to be landed shall be signed by an officer of the vessel, and likewise by the officer of Customs on board, if any such officer be on board, and shall be delivered on arrival to any officer of Customs authorized to receive the same.

Each boat-note for goods to be shipped shall be signed by the proper officer of Customs, and, if an officer of Customs is on board of the vessel on which such goods are to be shipped, shall be delivered to such officer. If no such officer be on board, every such boat-note shall be delivered to the master of the vessel, or to an officer of the vessel appointed by him to receive it.

The officer of Customs who receives any boat-note of goods landed, and the officer of the Customs, master or other officer, as the case may be, who receives any boat-note of goods shipped, shall sign the same and note thereon such particulars as the [1][Chief Customs-officer] may from to time direct.

The [1][Chief Customs-authority] may, from time to time, by notification in the [2][*] Official Gazette, suspend the operation of this section in any customs-port or part thereof.

Goods water-borne to be forthwith landed or shipped.

77. All goods water-borne for the purpose of being landed or shipped shall be landed or shipped without any unnecessary delay.

Such good not to be transhipped without permission

78. Except in cases of imminent danger, no goods discharged into or loaded in any boat for the purpose of being landed or shipped shall be transhipped into any other boat without the permission of an officer of Customs.

Power to prohibit plying of unlicensed cargo-boats.

79. The [1][Chief Customs-authority] may declare with regard to any customs port, by notification in the [2][*] Official Gazette, that, after a date therein specified, no boat not duly licensed and registered shall be allowed to ply as a cargo-boat for the landing and shipping of merchandise within the limits of such port.

Issue of licenses and registration of cargo-boats.

In any port with regard to which such notification has been issued, the Chief Officer of Customs or other officer whom the [1][Chief Customs-authority] appoints in this behalf, may, subject to such rules and on payment of such fees as the [1][Chief Customs-authority] from time to time prescribes by notification in the [2][*] Official Gazette, issue licenses for and register cargo-boats. Such officer may also, subject to rules so prescribed, cancel any license so issued.

Power to require goods to be weighed or measured on board before landing or after shipment.

80. The Customs-collector may, whenever he thinks fit, require that goods stowed in bulk, and brought by sea or intended for exportation, shall be weighed or measured on board ship before landing or after shipment, and may levy duty according to the result of such weighing or measurement.

CHAPTER IX.

OF DISCHARGE OF CARGO AND ENTRY INWARDS OF GOODS.

81. When an order for entry inwards of any vessel which has arrived in

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LEG. REF.

[1] Substituted by Act IV of 1914.

[2] The word "local" was omitted by Act IV of 1924.

NOTES.

Sec. 79.—The word 'ply' in R. 1 of Cargo Boat Rules of Rangoon Port does not necessarily mean plying for hire. 12 Cr. L.J. 476 = 12 I.C. 84.

Discharge of cargo may commence on receipt of due permission.

any customs-port or a special pass permitting such vessel to break bulk has been given, the discharge of the cargo of such vessel may be proceeded with.

Goods not to leave ship unless entered in manifest.

82. Except as otherwise provided in this Act, no goods shall be allowed to leave any such vessel, unless they are entered in the original manifest of such vessel, or in an amended or supplementary manifest received under ssction 55.

Procedure in respect of goods not landed within time allowed.

83. If the owner of any goods (except such as have been shown in the import-manifest as not to be landed) does not land such goods within such period as is specified in the bill of lading of such goods, or, if no period is so specified, within such number of working days, not exceeding fifteen, after the entry of the vessel importing the same, as the [1][Chief Customs-authority] from time to time appoints by notification in the Official Gazette, or

if the cargo of any vessel, with the exception of only a small quantity of goods, has been discharged previously to the expiration of the period so specified or appointed, as the case may be—

the master of such vessel or, on his application, the proper officer of Customs, may then carry such goods to the custom-house, there to remain for entry.

The Customs-collector shall thereupon take charge of, and grant receipts for, such goods;

and if notice in writing has been given by the master that the goods are to remain subject to a lien for freight, primage, general average, or other charges of a stated amount, the Customs-collector shall hold such goods until he receives notice in writing that the said charges are paid.

Power to land small parcels.

84. At any time after the arrival of any vessel, the Customs-collector may, with the consent of the master of such vessel, cause any small package or parcel of goods to be carried to the custom-house, there to remain for entry, in charge of the officers of Customs, during the remainder of the working days allowed under this Act for the landing of such package or parcel.

Notice regarding unclaimed packages.

If any package or parcel so carried to the custom-house remains unclaimed on the expiration of the number of working days so allowed for its landing, or at the time of the clearance outwards of the vessel from which it was landed, the master may give such notice as is provided in section 83, and the officer in charge of the custom-house shall thereupon hold such package or parcel as provided in that section.

Power to permit immediate discharge.

85. Notwithstanding anything contained in sections 83 and 84, the Customs-collector in any customs-port to which the [1][Chief Customs-authority] by notification in the [2][*] Official Gazette, declares this section to be applicable, may permit the master of any vessel, immediately on receipt of an order under section 57 or a special pass under section 59, to discharge the cargo of such vessel or any portion thereof into the custody of the ship's agents if willing to receive the same, for the purpose of landing the same forthwith—

(*a*) at the custom-house or any specified landing-place or wharf; or

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LEG. REF.

[1]Substituted by Act IV of 1914.

[2]The word "local" was omitted by Act IV of 1924.

NOTES.

Sec. 85.—S. 85 must be read as a whole, and whereas in a small port the Customs authorities themselves land and take charge of the goods, in the larger ports this is done by the port trust as their agents for this purpose. But it cannot be said that the goods are any the less in charge of the Customs when they are dealt with under Cl. (*b*) instead of under Cl. (*a*). 1937 Sind 293 = 32 S.L.R. 87.

(*b*) at any landing-place or wharf belonging to any Port Commissioners, Port Trust or other public body or company.

Any ship's agent so receiving such cargo or portion shall be bound to discharge all claims for damage or short-delivery which may be established in respect of the same by the owner thereof, and shall be entitled to recover from such owner his charges for service rendered, but not for commission or the like, where any agent for the landing of such cargo or portion has been previously appointed by the owner and such appointment is unrevoked.

The Customs-collector shall take charge of all goods discharged under clause (*a*) of this section, and otherwise proceed in relation thereto as provided in sections 83 and 88.

A public body or company at whose landing-place or wharf any goods are discharged under clause (*b*) of this section shall not permit the same to be removed without an order in writing from the Customs-collector.

Entry for home-consumption or warehousing.

86. The owner of any goods imported shall, on the landing thereof from the importing ship, make entry of such goods for home consumption or warehousing by delivering to the Customs-collector a bill of entry thereof in duplicate, in such form and containing such particulars, in addition to the particulars specified in section 29, as may, from time to time, be prescribed by the [1][Chief Customs-officer].

The particulars of such entry shall correspond with the particulars given of the same goods in the manifest of the ship.

Assessment of dutiable goods.

87. On the delivery of such bill the duty (if any) leviable on such goods shall be assessed, and the owner of such goods may then proceed to clear the same for home consumption, or warehouse them subject to the provisions hereinafter contained.

Procedure in case of goods not cleared or warehoused within four months after entry of vessel.

88. If any goods are not entered and cleared for home consumption or warehoused within four months from the date of entry of the vessel, such goods may, after due notice to the owner, if his address can be ascertained, and in the local official gazette, be sold by public auction, and the proceeds thereof shall be applied, first, to the payment of freight, primage and general average, if the goods are held by the Customs-collector subject to such charges under notice given under section 83, 84 or 85; next to the payment of the duties which would be leviable on such goods if they were then cleared for home consumption, and next to the payment of the other charges (if any) payable to the Customs-collector in respect of the same.

The surplus, if any, shall be paid to the owner of the goods, on his application for the same: provided that such application be made within one year from the sale of the goods, or that sufficient cause be shown for not making it within such period.

Power to direct sale of perishable goods.

If any goods of which the Customs-collector has taken charge under section 83, 84 or 85 be of a perishable nature, the Customs-collector may at any time direct the sale thereof, and shall apply the proceeds in like manner:

Proviso.

Provided that, where any goods liable to be sold under this section are arms, ammunition or military stores, they may be sold or otherwise disposed of at such place (whether within

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LEG. REF.

[1]Substituted by Act IV of 1914.

or without British India), and in such manner as [1][the Chief Customs-authority may, with the concurrence of the [2][Central Government], direct]:

Provided also that nothing in this section shall authorize the removal for home consumption of any dutiable goods without payment of duties of customs thereon.

CHAPTER X.

OF CLEARANCE OF GOODS FOR HOME CONSUMPTION.

Clearance for home consumption.

89. When the owner of any goods entered for home consumption, and (if such goods be liable to duty) assessed under section 87, has paid the import duty (if any) assessed on such goods and any charges payable under this Act in respect of the same, the Customs-officer may make an order clearing the same; and such order shall be sufficient authority for the removal of such goods by the owner.

CHAPTER XI.

WAREHOUSING.

Of the Admission of Goods into a Warehouse.

Application to warehouse

90. When any dutiable goods have been entered for warehousing and assessed under section 87, the owner of such goods may apply for leave to deposit the same in any warehouse appointed or licensed under this Act.

Form of application.

91. Every such application shall be in writing signed by the applicant, and shall be in such form as is from time to time prescribed by the Chief Customs-authority.

Warehousing bond.

92. When any such application has been made in respect of any goods, the owner of the goods to which it relates shall execute a bond, binding himself, in a penalty of twice the amount of duty assessed under section 87 on such goods,—

(*a*) to observe all rules prescribed by this Act in respect of such goods;

(*b*) to pay, on demand, all duties, rent and charges claimable on account of such goods under this Act, together with interest on the same from the date of demand, at such rate not exceeding six per cent. per annum, as is for the time being fixed by the Chief Customs-authority; and

(*c*) to discharge all penalties incurred for violation of the provisions of this Act in respect of such goods.

Form of bond.

Every such bond shall be in the form marked A hereto annexed, or, when such form is inapplicable or insufficient, in such other form as is from time to time prescribed by the Chief Customs-authority,

and shall relate to the cargo or portion of the cargo of one vessel only.

Forwarding of goods to warehouse.

93. When the provisions of sections 91 and 92 have been complied with in respect of any goods, such goods shall be forwarded in charge of an officer of Customs to the warehouse in which they are to be deposited.

A pass shall be sent with the goods specifying the name of the importing vessel and of the bonder, the marks, numbers and contents of each package, and the warehouse or place in the warehouse wherein they are to be deposited.

Receipt of goods at warehouse.

94. On receipt of the goods, the pass shall be examined by the warehouse-keeper, and shall be returned to the Customs-collector.

LEG. REF.

[1]The words "the Chief Customs authority..... direct" were substituted for "the Local Government may from time to time direct" by Act IV of 1924.

[2]Substituted by A. O., 1937.

No package, butt, cask or hogshead shall be admitted into any warehouse unless it bear the marks and numbers specified in, and otherwise correspond with, the pass for its admission.

If the goods be found to correspond with the pass, the warehouse-keeper shall certify to that effect on the pass, and the warehousing of such goods shall be deemed to have been completed.

If the goods do not so correspond, the fact shall be reported by the warehouse-keeper for the orders of the Customs-collector, and the goods shall either be returned to the custom-house in charge of an officer of Customs, or kept in deposit pending such orders as the warehouse-keeper deems most convenient.

If the quantity or value of any goods has been erroneously stated in the bill of entry, the error may be rectified at any time before the warehousing of the goods is completed, and not subsequently.

Goods how warehoused.

95. Except as provided in section 100, all goods shall be warehoused in the packages, butts, casks, or hogsheads, in which they have been imported.

Warrant to be given when goods are warehoused.

96. Whenever any goods are lodged in a public warehouse or a licensed private warehouse, the warehouse-keeper, or, in the case of the Bengal Bonded Warehouse Association, the Secretary of the said Association, shall deliver a warrant signed by him as such to the person lodging the goods.

Form of warrant.

Such warrant shall be in the form B hereto annexed, and shall be transferable by endorsement; and the endorsee shall be entitled to receive the goods specified in such warrant on the same terms as those on which the person who originally lodged the goods would have been entitled to receive the same.

The [1][Chief Customs-authority] may, by notification in the [2][*] Official Gazette, exempt salt and salted fish from the operation of this section, and may in like manner cancel such exemption.

Rules relating to Goods in a Warehouse.

Access of Customs-officer to private warehouse.

97. The Customs-collector, or any officer deputed by him for the purpose, shall have access to any private warehouse licensed under this Act.

Power to cause packages lodged in warehouse to be opened and examined.

98. The Customs-collector may at any time by order in writing direct that any goods or packages lodged in any warehouse shall be opened, weighed or otherwise examined, and, after any goods have been so opened or examined, may cause the same to be sealed or marked in such manner as he thinks fit.

When any goods have been so sealed and marked after examination, they shall not be again opened without the permission of the Customs-collector; and, when any such goods have been opened with such permission, the packages shall, if he thinks fit, be again sealed or marked as before.

Access of owners to warehoused goods.

99. Any owner of goods lodged in a warehouse shall, at any time within the hours of business, have access to his goods in presence of an officer of Customs, and an officer of Customs shall, upon application for the purpose being made in writing to the Customs-collector, be deputed to accompany such owner.

When an officer of Customs is specially employed to accompany such owner, a sum sufficient to meet the expense thereby incurred shall, if the Customs-collector so require, be paid by such owner to the Customs-collector, and such sum shall, if the Customs-collector so direct, be paid in advance.

LEG. REF.

[1] Substituted by Act IV of 1914.

[2] The word "local" was omitted by Act IV of 1924.

100. With the sanction of the Customs-collector, and after such notice given, and under such rules and conditions as the Chief Customs-authority from time to time prescribes, any owner of goods may, either before or after warehousing the same,—

Owner's power to deal with warehoused goods.

(*a*) sort, separate, pack and repack the goods, and make such alterations therein as may be necessary for the preservation, sale, shipment or disposal thereof (such goods to be repacked in the packages in which they were imported, or in such other packages as the Customs-collector permits) ;

(*b*) fill up any casks of wine, spirit or beer from any casks of the same secured in the same warehouse ;

(*c*) mix any wines or spirit of the same sort secured in the same warehouse, erasing from the cask all import-brands, unless the whole of the wine or spirit so mixed be of the same brand ;

(*d*) bottle-off wine or spirit from any casks ;

(*e*) take such samples of goods as may be allowed by the Customs-collector with or without entry for home consumption, and with or without payment of duty, except such as may eventually become payable on a deficiency of the original quantity.

After any such goods have been so separated and repacked in proper or approved packages, the Customs-collector may, at the request of the owner of such goods, cause or permit any refuse, damaged or surplus goods remaining after such separation or repacking (or, at the like request, any goods which may not be worth the duty) to be destroyed, and may remit the duty payable thereon.

101. If goods be lodged in a public warehouse, the owner shall pay monthly, on receiving a bill or written demand for the same from the Customs-collector or other officer deputed by him in that behalf, rent and warehouse-dues at such rates as the [1][Chief Customs-officer] may fix.

Payment of rent and warehouse-dues.

A table of the rates of rent and warehouse-dues so fixed shall be placed in a conspicuous part of such warehouse.

If any bill for rent or warehouse-dues presented under this section is not discharged within ten days from the date of presentation, the Customs-collector may, in the discharge of such demand (any transfer or assignment of the goods notwithstanding) cause to be sold by public auction, after due notice in the Official Gazette, such sufficient portion of the goods as he may select.

Out of the proceeds of such sale, the Customs-collector shall first satisfy the demand for the discharge of which the sale was ordered and shall then pay over the surplus (if any) to the owner of the goods :

Provided that the application for such surplus be made within one year from the date of the sale of the goods or that sufficient cause be shown for not making it within such period.

102. No warehoused goods shall be taken out of any warehouse, except on clearance for home consumption or shipment, or for removal to another warehouse, or has otherwise provided by this Act.

Goods not to be taken out of warehouse, except as provided by this Act.

103. Any goods warehoused may be left in the warehouse, in which they are deposited, or in any warehouse to which they may in manner hereinafter provided be removed, till the expiry of three years after the date of the bond executed in relation to such goods under section 92. The owner of any goods remaining in a warehouse on the expiry of such period shall clear the same for home consumption or shipment in manner hereinafter provided :

Period for which goods may remain warehoused under bond.

LEG. REF.

[1]Substituted by Act IV of 1914.

Provided that when the license for any private warehouse is cancelled, and the Customs-collector gives notice of such cancelment to the owner of any goods deposited in such warehouse, such owner shall in manner hereinafter provided, and within seven days from the date on which such notice is given, remove such goods to another warehouse or clear them for home consumption or shipment.

Goods in private warehouse on cancellation of license.

Of the Removal of Goods from one Warehouse to another.

104. Any owner of goods warehoused under this Act may, at any time within three years from the date of the bond executed in respect of such goods under section 92, and with the permission of the Chief Customs-officer, and on such conditions and after giving such security (if any) as such officer directs, remove goods from one warehouse to another warehouse in the same port.

Power to remove goods from one warehouse to another in same port.

When any owner desires so to remove any goods, he shall apply for permission to do so in such form as the [1][Chief Customs-officer] from time to time prescribes.

105. Any owner of goods warehoused at any warehousing port may, from time to time, within the said period of three years, remove the same by sea or by inland carriage, in order to be re-warehoused at any other warehousing port.

Power to remove goods from one port to another.

When any owner desires so to remove any goods for such purpose, he shall apply to the Chief Customs-officer, stating the particulars of the goods to be removed, and the name of the port to which it is intended that they shall be removed, together with such other particulars, and in such manner and form, as the [1][Chief Customs-officer] from time to time prescribes.

Procedure.

106. When permission is granted for the removal of any goods from one warehousing port to another under section 105, an account containing the particulars thereof shall be transmitted by the proper officer of the port of removal to the proper officer of the port of destination ;

Transmission of account of goods to officers at port of destination.

and the person requiring the removal shall before such removal enter into a bond, with one sufficient surety, in a sum equal at least to the duty chargeable on such goods, for the due arrival and re-warehousing thereof at the port of destination within such time, as the [Chief Customs-officer] directs.

Bond for due arrival and re-warehousing.

Such bond may be taken by the proper officer, either at the port of removal or at the port of destination as best suits the convenience of the owner.

If such bond is taken at the port of destination, a certificate thereof, signed by the proper officer of such port, shall, at the time of the removal of such goods, be produced to the proper officer at the port of removal ; and such bond shall not be discharged unless such goods are produced to the proper officer, and duly re-warehoused at the port of destination within the time allowed for such removal, or are otherwise accounted for to the satisfaction of such officer ; nor until the full duty due upon any deficiency of such goods, not so accounted for, has been paid.

107. The [1][Chief Customs-officer] may permit any person desirous of removing warehoused goods to enter into a general bond, with such sureties, in such amount, and under such conditions, as the [1][Chief Customs-officer] approves, for the removal, from time to time, of any goods from one warehouse to another, either in the

Remover may enter into a general bond.

LEG. REF.

[1] Substituted by Act IV of 1914.

same or in a different port, and for the due arrival and re-warehousing of such goods at the port of destination within such time as such [1][officer] directs.

Goods on arrival at port of destination to be subject to same laws as goods on first importation.

108. Upon the arrival of warehoused goods at the port of destination, they shall be entered and warehoused in like manner as goods are entered and warehoused on the first importation thereof, and under the laws and rules, in so far as such laws and rules are applicable, which regulate the entry and warehousing of such last-mentioned goods.

Bond under S. 92 to continue in force notwithstanding removal.

109. Every bond executed under section 92 in respect of any goods shall, unless the Chief Officer of Customs in any case deems a fresh bond to be necessary, continue in force, notwithstanding the subsequent removal of such goods to another warehouse or warehousing port.

Clearance for Home Consumption or Shipment.

Clearance of bonded goods for home consumption.

110. Any owner of goods warehoused may, at any time within three years from the date of the bond executed under section 92 in respect of such goods, clear such goods for home consumption by paying (*a*) the duty assessed on such goods under section 87, or, where the duty on such goods is altered under the provisions hereinafter contained, such altered duty; and (*b*) all rent, penalties, interest and other charges payable to the Customs-collector in respect of such goods.

Clearance of same for shipment to foreign port.

111. Any owner of goods warehoused may, at any time within three years from the date of the bond executed under section 92 in respect of such goods, clear such goods for shipment to a foreign port on payment of all rent, penalties, interest and other charges payable as aforesaid and without payment of import-duty on the same:

Provided that the Central Government may prohibit the shipment for exportation to any specified foreign port of warehoused goods in respect of which payment of drawback or transhipment has been prohibited under section 49 or 134 respectively.

Clearance of same for shipment as provisions, etc., on vessel proceeding to foreign ports.

112. Provisions and stores warehoused at the time of importation may, within the said period of three years, be shipped without payment of duty for use on board of any vessel proceeding to a foreign port.

Form of application for clearance of goods.

113. Application to clear goods from any warehouse for home consumption or for shipment shall be made in such form as the [1][Chief Customs-officer] from time to time prescribes.

Application when to be made.

Such application shall ordinarily be made to the Customs-collector at least twenty-four hours before it is intended so to clear such goods.

Re-assessment of warehoused goods when damaged.

114. If any goods upon which duties are leviable *ad valorem* or on a tariff valuation receive damage through unavoidable accident after they have been entered for warehousing and assessed under section 87, and before they are cleared for home consumption, they shall, if the owner so desires, be re-assessed for duty according to their actual value, and a new bond for the same may, at the option of the owner, be executed for the unexpired term of warehousing.

LEG. REF.

[1] Substituted by Act IV of 1914.

Re-assessment on alteration of duty or tariff valuation.

115. If, after any goods entered for warehousing have been assessed under section 87, any alteration is made in the duty leviable upon such goods or in the tariff valuation (if any) applicable thereto, such goods shall be re-assessed in accordance with [1][such alteration].

Allowance in case of wine, spirit, beer or salt.

116. If it appear at the time of clearing any wine, spirit, beer or salt from any warehouse for home consumption that there exists a deficiency not otherwise accounted for to the satisfaction of the Customs-collector, an allowance on account of ullage and wastage shall be made in adjusting the duties thereon, as follows (namely) :—

(*a*) upon wine, spirit and beer in cask to an extent not exceeding the rates specified below, or such other rates as may, from time to time, be prescribed in this behalf by the [2][Chief Customs-authority] and notified in the Official Gazette :

For any time not exceeding		6 months,	2½ per cent.
exceeding 6 months	and not exceeding	12 ,,	5 ,,
,, 12	,,	18 ,,	7½ ,,
,, 18	,,	2 years,	10 ,,
,, 2 years	,,	3 ,,	12 ,,

(*b*) in the case of salt warehoused in a public warehouse, only the amount actually cleared shall be charged with customs-duties ;

(*c*) in the case of salt warehoused in a private warehouse, wastage shall be allowed at such rate as may be prescribed from time to time by the [2][Chief Customs-authority] and notified in the [3][*] Official Gazette.

Further special allowance.

117. When any wine, spirit, beer or salt lodged in a warehouse is found to be deficient at the time of the delivery therefrom, and such deficiency is proved to be due solely to ullage or wastage, the [2][Chief Customs-officer] may direct, in respect of any such article, that allowance be made in any special case for a rate of ullage or wastage exceeding that contemplated in section 116.

Of the Forfeiture and Discharge of the Bond.

If goods are improperly removed from warehouses or allowed to remain beyond time fixed

118. If any warehoused goods are removed from the warehouse in contravention of section 102 ; or

if any such goods have not been removed from the warehouse at the expiration of the time during which such goods are permitted by section 103 to remain in such warehouse ; or

or lost or destroyed,

if any goods in respect of which a bond has been executed under section 92, and which have not been cleared for home consumption or shipment, or removed under this Act, are lost or destroyed otherwise than as provided in section 100 or as mentioned in section 122, or are not accounted for to the satisfaction of the Customs-collector ; or

or taken as samples,

if any such goods have been taken under section 100 as samples without payment of duty,

Collector may demand duty, etc.

the Customs-collector may thereupon demand, and the owner of such goods shall forthwith pay, the full amount of duty chargeable on account of such goods, together with all rent, penalties, interest and other charges payable to the Customs-collector on account of the same.

Procedure on failure to pay duty, etc.

119. If any owner fails to pay any sum so demanded, the Customs-collector may forthwith either proceed upon the bond executed under section 92, or cause such portion as he thinks fit of the goods (if any) in the warehouse on account

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LEG. REF.

[1]Substituted by Act VIII of 1889.

[2]Substituted by Act IV of 1914.

[3]The word "local" was omitted by Act IV of 1924.

of which the amount is due, to be detained with a view to the recovery of the demand ;

and if the demand be not discharged within ten days from the date of such detention (due notice thereof being given to the owner), the goods so detained may be sold by public auction duly advertised in the Official Gazette.

The net proceeds of any sale so made of goods so detained shall be written off upon the bond in discharge thereof to the amount received, and if any surplus be obtained from such sale, beyond the amount of the demand, such surplus shall be paid to the owner of the goods : Provided that application for the same be made within one year from the sale, or that sufficient cause be shown for not making the application within such period.

No transfer or assignment of the goods shall prevent the Customs-collector from proceeding against such goods in the manner above provided, for any amount due thereon.

Noting removal of goods.

120. When any warehoused goods are taken out of any warehouse, the Customs-collector shall cause the fact to be noted on the back of the bond.

Every note so made shall specify the quantity and description of such goods, the purposes for which they have been removed, the date of removal, the name of the person removing them, the number and date of the shipping bill under which they have been taken away if removed for exportation by sea or of the bill of entry if removed for home consumption and the amount of duty paid (if any).

Register of bonds.

121. A register shall be kept of all bonds entered into for customs duties on warehoused goods, and entry shall be made in such register of all particulars required by section 120 to be specified.

Cancellation and return of bonds.

When such register shows that the whole of the goods covered by any bond have been cleared for home consumption or shipment, or otherwise duly accounted for, and when all amounts due on account of such goods have been paid, the Customs-collector shall cancel such bond as discharged in full, and shall on demand deliver it, so cancelled, to the person who has executed or who is entitled to receive it.

Miscellaneous.

Power to remit duties on warehoused goods lost or destroyed.

122. If any goods in respect of which a bond has been executed under section 92 and which have not been cleared for home consumption are lost or destroyed by unavoidable accident or delay, the [1][Chief Customs-officer] may in [1][his] discretion remit the duties due thereon :

Provided that, if any such goods be so lost or destroyed in a private warehouse, notice thereof be given to the Customs-collector within forty-eight hours after the discovery of such loss or destruction.

Responsibility of warehouse-keeper.

123. The warehouse-keeper in respect of goods lodged in a public warehouse, and the licensee in respect of goods lodged in a private warehouse, shall be responsible for their due reception therein and delivery therefrom, and for their safe custody while deposited therein, according to the quantity, weight or gauge reported by the Custom-house officer who has assessed such goods, allowance being made, if necessary, for ullage and wastage as provided in sections 116 and 117:

Provided that no owner of goods shall be entitled to claim from the Customs-collector, or from any keeper of a public warehouse, compensation for any loss or damage occurring to such goods while they are being passed into or out of such

Compensation for loss or injury.

LEG. REF.

[1] Substituted by Act IV of 1914.

warehouse, or while they remain therein, unless it be proved that such loss or damage was occasioned by the wilful act or neglect of the warehouse-keeper or of an officer of Customs.

Public warehouse to be locked.

124. Every public warehouse shall be under the lock and key of a warehouse-keeper appointed by the Chief Officer of Customs.

Power to decide where goods may be deposited in public warehouse, and on what terms.

125. The [1][Chief Customs-officer] may from time to time determine in what division of any public warehouse, and in what manner, and on what terms, any goods may be deposited, and what sort of goods may be deposited in any such warehouse.

Expenses of carriage, packing, etc., to be borne by owners.

126. The expenses of carriage, packing and stowage of goods on their reception into or removal from a public warehouse shall, if paid by the Customs-collector or by the warehouse-keeper, be chargeable on the goods and be defrayed by, and recoverable from, the owner, in the manner provided in section 119.

Bengal Bonded Warehouse Association.

127. All the provisions of this Act relating to private warehouses shall be applicable to the warehouses wherein the Bengal Bonded Warehouse Association receives bonded goods.

CHAPTER XII.

TRANSHIPMENT.

Power to permit transhipment without payment of duty.

128. In the ports of Calcutta, Madras, Bombay, Karwar, Karachi, [2][* * *] Chittagong and such other ports as the [3][Chief Customs-authority] may from time to time, by notification in the [4][*] Official Gazette direct in this behalf, the Customs-collector may, on application by the owner of any goods imported into such port, and specially and distinctly manifested at the time of importation as for transhipment to some other customs or foreign port, grant leave to tranship the same without payment of the duty (if any) leviable at the port of transhipment, and without any security or bond for the due arrival and entry of the goods at the port of destination.

In any customs-port other than a port in which the preceding clause may for the time being be in force, the Customs-collector may, on application by the owner of any goods so imported and manifested, grant leave for transhipment without payment of the duty (if any) leviable at such port : Provided that, where the goods so transhipped are dutiable,and are to be removed to some other customs-port, the applicant shall enter into a bond, with such security as may be required of him, in a sum equal at least to the duty chargeable on such goods, for the due arrival and entry thereof at the port of destination within such time as such Customs-collector directs.

Superintendence of transhipment.

129. An officer of Customs shall, in every case be deputed free of charge to superintend the removal of transhipped goods from vessel to vessel.

Subsidiary rules as to transhipment.

130. The powers conferred on the Customs-collector by section 128 shall be exercised, and the transhipment shall be performed subject to such rules as may from time to time be made by the [1][Chief Customs-authority].

LEG. REF.

[1] Substituted by Act IV of 1914.

[2] "Aden, Rangoon, Moulmien, Akyab' omitted by A.O., 1937.

[3] The words "the Chief Customs-authority" were substituted for "the Local Government" by Act IV of 1924.

[4] The word "local" was emitted by *ibid.*

NOTES.

Sec. 128.—Effect of transhipment permit. 4 B. 447.

No rules made under this section shall come into force until after the expiry of such reasonable time from the date of the publication of the same as the [1][Cheif Customs-authority] may in cach case appoint in this behalf.

131. All goods transhipped under the second clause of section 128 for removal to a customs-port shall, on their arrival at such port, be entered in like manner as goods are entered on the first importation thereof, and under the laws and rules, in so far as such laws and rules can be made applicable, which regulate the entry of such last-mentioned goods.

Entry and warehousing on arrival of goods transhipped under section 128, clause 2.

132. If two or more vessels belonging wholly or in part to the same owner be at any customs-port at the same time, any provisions and stores in use or ordinarily shipped for use on board may at the discretion of the Customs-collector, be transhipped from one such vessel to any other such vessel without payment of import duty.

Transhipment of provisions and stores from one vessel to another of same owner without payment of duty.

133. A transhipment fee on any goods or class of goods transhipped under this Act may be levied at such rates, on each bale or package, or according to weight, measurement, quantity or number, and under such rules, as [2][the Chief Customs-authority] may from time to time, by notification in the [3][*] Official Gazette, prescribe for each port.

Levy of transhipment fee.

134. The Central Government may from time to time by notification in the Official Gazette, prohibit at any specified port, or at all ports, the transhipment of any specified class of goods, generally or when destined for any specified ports, or prescribe any special mode of transhipping any specified class of goods.

Power to prohibit transhipment.

135. Except as provided in this Act, no goods shall be transhipped at any port or place in British India.

No goods to be transhipped except as provided.

CHAPTER XIII.

EXPORTATION OR SHIPMENT AND RE-LANDING.

136. Except with the written permission of the Customs-collector, no goods other than passengers' baggage, or ballast urgently required for a vessel's safety, shall be shipped or water-borne to be shipped in any vessel in a customs-port until an order has been obtained under section 61 for entry outwards of such vessel.

No goods to be shipped, etc., till entry outwards of vessel.

When such order has been obtained, the export cargo of such vessel may be shipped, subject to the provisions next hereinafter contained.

137. [4][* * * *] No goods, except passengers' baggage, shall be shipped or water-borne to be shipped for exportation until—

Clearance for shipment.

(*a*) the owner has delivered to the Customs-collector, or other proper officer, a shipping bill of such goods in duplicate, in such form and containing such particulars in addition to those specified in section 29 as may from time to time be prescribed by the [1][Chief Customs-officer] ;

(*b*) such owner has paid the duties (if any) payable on such goods ; and

(*c*) such bill has been passed by the Customs-collector :

LEG. REF.

[1] Substituted by Act IV of 1914.

[2] The words "the Chief Customs-authority" were substituted for "the Local Government subject to the control of the Governor-General in Council" by Act IV of 1924.

[3] The word "local" was omitted by *ibid.*

[4] Repealed by Act XII of 1914.

[1] [Provided that the Chief Customs-officer may, in the case of any Customs-port or wharf, by notification in the [2][*] Official Gazette, and subject to such restrictions and conditions, if any, as he thinks fit, exempt goods or any specified goods or class of goods or any specified person or class of persons, from all or any of the provisions of this section.]

Bond required in certain cases before exportation.

138. Before any warehoused goods or goods subject to excise duties, or goods entitled to drawback of customs duties on exportation, or goods exportable only under particular rules or restrictions, are permitted to be exported, the owner shall, if required so to do, give security by bond in such sum, not exceeding twice the duty leviable on such goods, as the Customs-collector directs, with one sufficient surety, that such goods shall be duly shipped, exported and landed at the place for which they are entered outwards, or shall be otherwise accounted for to the satisfaction of such officer.

Additional charge on goods cleared for shipment after port-clearance granted.

139. When goods are cleared for shipment on a shipping bill presented after port-clearance has been granted, the Customs-collector may, if he thinks fit, levy, in addition to any duty to which such goods are ordinarily liable, a charge, not exceeding—

(*a*) in the case of goods liable to duties on fixed tariff-valuations, one per cent on the tariff-value ;

(*b*) in the case of all other goods, one per cent. on the market-value.

Nothing in this section shall apply to any shipment of treasure or opium.

Notice of non-shipment or re-landing, and return of duty thereon.

140. If any goods mentioned in a shipping bill or manifest be not shipped, or be shipped and afterwards re-landed, the owner shall, before the expiration of five clear working days after the vessel on which such goods were intended to be shipped, or from which they were re-landed, has left the port, give information of such short-shipment or re-landing to the Customs-collector.

Upon an application being made to the Customs-collector, any duty levied upon goods not shipped, or upon goods shipped and afterwards relanded, shall be refunded to the person on whose behalf such duty was paid : Provided that no such refund shall be allowed unless information has been given as above required.

Goods re-landed or transhipped from a vessel returning to port, or putting into another port.

141. If, after having cleared from any customs-port, any vessel, without having discharged her cargo, returns to such port, or puts into any other customs-port, any owner of goods in such vessel, if he desires to land or tranship the same or any portion thereof for re-export, may, with the consent of the master, apply to the Customs-collector in that behalf.

The Customs-collector, if he grants the application, shall thereupon send an officer of Customs to watch the vessel, and to take charge of such goods during such re-landing or transhipment.

Such goods shall not be allowed to be transhipped or re-exported free of duty by reason of the previous settlement of duty at the time of first export, unless they are lodged and remain, until the time of re-export, under the custody of an officer of Customs, in a place appointed by the Customs-collector, or are transhipped under such custody.

All expenses attending such custody shall be borne by the owner.

142. In either of the cases mentioned in section 141, the master of the vessel

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LEG. REF.

[1]Added by Act XII of 1914.

[2] The word 'local' was omitted by Act IV of 1924.

Vessel returning to port may enter and land goods under import-rules.

may enter such vessel inwards, and any owner of goods therein may, with the consent of the master, land the same under the rules herein contained for the importation of goods.

In every such case, any export-duty levied shall be refunded to, and any amount paid in drawback shall be recovered from, such owner.

Landing of cargo during repairs.

143.* The Customs-collector may, on application by the master of any vessel which is obliged before completing her voyage to put into any Customs-port for repairs, permit him to land the cargo, or any portion thereof, and to place it in the custody of an officer of Customs during such repairs, and to re-ship and export the same free of duty.

All expenses attending such custody shall be borne by the master.

CHAPTER XIV.

SPIRIT.

Exportation of Spirit under Bond for Excise-duty.

Rules for removal of spirit from distillery without payment of duty for exportation.

144. The Chief Customs-authority may from time to time make rules prescribing the conditions on which spirit manufactured in British India may be removed from any licensed distillery for exportation without payment of excise-duty.

The person so removing any such spirit shall execute a bond with one or more sureties, in the form marked C hereto annexed, or (when such form is inapplicable or insufficient) in such other form as the said authority from time to time prescribes, conditioned that such duty shall be paid on all such spirit as is—

(*a*) not exported within four months from the date of the bond, or

(*b*) exported to a customs-port, unless [1][either] the payment of excise-duty as provided by this Chapter in respect thereof at the port of destination [1][or the delivery of the spirit into a warehouse appointed in this behalf by the [2][Chief Customs-authority] having authority at that port] is within six months from the date of the bond proved to the satisfaction of the proper officer.

The Chief Officer of Customs of the port of exportation may, on sufficient cause shown, extend for a further term not exceeding four months the period allowed for the exportation of any such spirit, or for the production of such proof that duty has been [1][so paid or the spirit so delivered].

Spirit for export to be taken direct from distillery to custom-house under pass.

145. Spirit intended for exportation under bond for the excise-duty shall, [3][except when provision is made by any enactment for the time being in force for its being intermediately deposited in a licensed warehouse,] be taken from the distillery direct to the custom-house, under passes to be granted for that purpose by the officers of Excise.

Gauging and proving of spirit.

146. Spirit brought to the custom-house for exportation under bond for the excise-duty [1][may], previous to shipment, be gauged and proved by an officer of Customs, and the quantity of spirit for which credit is to be given in the settlement of any bond [1][may] be determined in the same manner.

Duty to be recovered on any deficiency in spirit under bond.

147. Excise-duty shall be recoverable previous to shipment upon the excess (if any) of the quantity of spirit passed from a distillery over the quantity ascertained by gauge and proof at the custom-house, less an allowance for ullage and wastage at such rates as are from time to time

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LEG. REF.

[1] Insertedby Act II of 1887.

[2] Substituted by Act IV of 1914.

[3] Inserted by Act IX of 1885.

prescribed by the [1][Chief Customs-authority] and notified in the [2][*] Official Gazette.

Duty on spirit exported under bond from one Indian port to another.

148. [3][Notwithstanding anything in the Indian Tariff Act, 1882,] spirit exported under bond for excise-duty from any customs-port to any other customs-port shall be charged at the port of importation with excise-duty at the ordinary rate to which the spirit of the like kind and strength is liable at such port :

[3]Provided that the [1][Chief Customs-authority] may authorize the import of such spirit without the payment of that duty at the port of importation when the spirit is to be delivered into a warehouse appointed by the [1][Chief Customs-authority] in this behalf, and the excise-duty thereon is to be paid on the removal of the spirit from a warehouse so appointed.

Remova for local consumption of spirit intended for exportation.

149. Spirit brought to the custom-house [4][or to a warehouse licensed under any enactment for the time being in force] for exportation under bond for the excise-duty may, on payment of such duty, be removed for local consumption under passes to be granted for that purpose by the officers of Excise.

Credit for every such payment shall be given in discharge of the bond to which it relates.

Drawback of Excise-duty on Export of Spirit.

Drawback of excise-duty on spirit exported.

150. A drawback of excise-duty paid on spirit manufactured in British India and exported to any foreign port under the provisions of section 138 shall be allowed by the Customs-collector at the port of exportation :

Provided that the exportation be made within one year from the date of payment of such excise-duty, and that the spirit when brought to the custom house, be accompanied by a pass in which such payment is certified.

Such drawback shall be regulated by the strength and quantity of such spirit as ascertained by gauge and proof by an officer of Customs.

Miscellaneous.

Differential duty to be levied in certain cases.

151. [3][Notwithstanding anything in the Indian Tariff Act, 1882,] if spirit manufactured in British India upon which excise-duty has been paid is exported from one customs-port to another, and the rate of local excise-duty at the port of importation is higher than that already paid upon such spirit, a differential duty shall be charged thereon, at such rate [5][not exceeding the difference between the two rates,] as the Provincial Government at such port may by notification in the Official Gazette, from time to time prescribe :

[3][Provided that the [1][Chief Customs-authority] may authorize the import of such spirit without the payment of the differential duty at the port of importation when the spirit is to be delivered into a warehouse appointed by the [1][Chief Customs-authority] in this behalf, and the differential duty is to be paid on the removal of the spirit from a warehouse so appointed.]

Rum-shrub, etc., how charged with duty.

152. Rum-shrub, cordial and other such liquor prepared in a licensed distillery under the supervision of the surveyor or officer in charge of the distillery shall be charged with excise-duty under this Act according to the quantity of spirit used in its preparation as ascertained by such surveyor or officer.

LEG. REF.

[1]Substituted by Act IV of 1914.
[2]The words "local" was omitted by Act IV of 1924.
[3]Added by Act II of 1887.
[4]Inserted byAct IX of 1885.
[5]Inserted by A.O., 1937.

Provisions respecting spirit applied to such liquors.

The provisions of this Act respecting spirit, except such as relate to gauge and proof, shall apply to such liquor.

Conditions of drawback and remission of duty on spirit.

153. No drawback shall be allowed for any spirit on which duty has been paid, nor shall the duty due on any spirit under bond be remitted, unless the spirit is shipped from the custom-house, and in a vessel whereon an officer of customs has been appointed to superintend the receipt of export-cargo.

Re-land of spirit shipped.

154. No spirit shipped for exportation shall be re-landed without a special pass from an officer of excise, in addition to any permission of an officer of Customs which may be required by the law for the time being in force.

Power to make rules for ascertaining that imported spirit has been rendered unfit for human consumption.

155. [1][When, by any law for the time being in force, a special duty is imposed on denatured spirit, the [2][Central Government] may, [3][* * *] make rules for ascertaining and determining what spirit imported into British India shall be deemed to be denatured spirit for the purposes of such law, and for causing such spirit to be denatured, if necessary, [4][by officers of Government] at the expense of the person importing the same, before the customs-duties leviable thereon are levied.]

Decision where no rules, or their applicability disputed.

In the absence of any such rules, or if any dispute arises as to their applicability, the Chief Customs-officer shall decide what spirit is subject only to the said special duty, and such decision shall be final.

CHAPTER XV.

COASTING TRADE.

Chapters VII, IX, X and part of XIII inapplicable to coasting trade.

156. Except as hereinafter provided nothing in Chapters VII, IX, X and sections 136, 139 and 141 to 143 inclusive, of this Act, shall apply to coasting vessels or to goods imported or exported in such vessels.

Power to regulate coasting-trade.

157. The Central Government may, from time to time, make rules consistent with the provisions of this Chapter,—

(*a*) extending any provision of the Chapters and sections mentioned in section 156, with or without modification, to any coasting vessels or to any goods imported or exported in such vessels ;

(*b*) exempting any such vessels or goods from any of the other provisions of this Act except those contained in this Chapter ;

(*c*) prescribing the conditions on which goods, or any specified class of goods, may be (1) carried in a coasting-vessel, whether shipped at a foreign port, or at a customs-port, or at a place declared under section 12 to be a port ; (2) shipped in a coasting-vessel before all dutiable goods and goods brought in such a vessel from a foreign port have been unladen ;

(*d*) prohibiting the conveyance of any specified class of goods generally, or to or between specified ports in a coasting vessel.

LEG. REF.

[1]Substituted by Act XII of 1914.

[2]Substituted for words 'Local Government' by A.O., 1937.

[3]Words 'with the previous sanction of the Governor-General in Council' omitted by A.O., 1937.

[4]The words "by officers of Government" were substituted for "by its own officers" by Act IV of 1924.

158. Before any coasting vessel departs from the port of lading, or, when there are more ports of lading than one, the first port of lading, the master shall fill in, sign and deliver to the Customs-collector a manifest in duplicate, containing a true specification of all goods to be carried in such vessel, in such form, and accompanied by such shipping bills or other documents, as may from time to time be prescribed by the Chief Customs-authority.

Coasting vessels to deliver manifest and obtain port-clearance before leaving port of lading.

If the Customs-collector sees no objection to the departure of the vessel, he shall retain the duplicate and return the original manifest, dated and signed by him, together with its accompaniments ; and such manifest shall be the port clearance of the vessel, unless, under the general orders of the Chief Customs-authority, a separate port-clearance be prescribed.

159. Within twenty-four hours after the arrival of any coasting vessel at any customs-port, whether intermediate or final and before any goods are there discharged, the manifest, together with the other documents referred to in section 158, shall be delivered to the Customs-collector, who shall note on the manifest the date of delivery.

Delivery of manifest, etc. on arrival.

If the vessel has touched at any foreign port between such port of arrival and her last preceding customs-port of departure, the master shall append to the manifest a declaration to that effect, and shall also indicate on the manifest the portions (if any) of the cargo therein described which have been discharged, and subjoin thereto a true specification of all goods shipped at such port.

If the customs-port of arrival be an intermediate port, and a portion only of the cargo is to be discharged thereat, the master shall likewise so deliver an extract from the manifest signed by him, relating to such portion, and the Customs-collector shall, after verifying such extract, return to him the original manifest and all documents accompanying it except those relating to such portion.

If in any case the cargo actually on board any coasting-vessel on her arrival at any customs-port does not, owing to short-shipment, re-landing or other cause, correspond with the specification thereof in the manifest returned to the master under the second class of section 158, such master shall, before delivery of such manifest under this section, note thereon the particulars of the difference.

The Customs-collector, when satisfied with the manifest and other documents, shall grant an order to break bulk.

160. Before any coasting-vessel departs from any customs port at which she has touched during her voyage, the master shall re-deliver the original manifest to the Customs-collector, after indicating thereon the portion (if any) of the cargo therein described which have been discharged. and subjoining thereto a true specification of all goods shipped at such port. He shall also deliver a duplicate, signed by him, of the specification so subjoined.

Departure from intermediate port.

If the Customs-collector sees no objection to the departure of the vessel, he shall proceed as prescribed in the second clause of section 158.

161. The Customs-collector may, for sufficient reason, refuse port-clearance to any coasting-vessel declared to be bound to, or about to touch at, any customs-port, unless the owner or master gives a bond, with such security as the Customs-collector deems sufficient, for the production to the Customs-collector of a certificate from the proper officer of the port to which such vessel is said to be bound, of her arrival at such port within a reasonable time to be prescribed in each case by the Customs-collector.

Power to require bond before port-clearance is granted.

Discharge of cargo.

162. When permission has been granted by the Customs-collector for the discharge of cargo from any coasting-vessel—

(*a*) if the vessel has not touched at any intermediate foreign port in the course of her voyage, and has not on board any dutiable goods, the cargo may be forthwith landed and removed by the owner, without entry thereof at the custom-house and clearance for home consumption, but subject to such general check and control as the [1][Chief Customs-officer] may from time to time by rules prescribe;

(*b*) if the vessel has so touched at any such port, or has on board any such goods, such vessel shall be subject to all the provisions of Chapter VII of this Act relating to vessels arriving and such goods, and until such goods have been duly discharged all other goods on board shall be subject to the provisions of Chapter IX of this Act relating to goods imported.

Goods on coasting vessel, if excisable not to be unladen without permission.

163. If any of the goods on board of any coasting-vessel be subject to any excise-duty, they shall not be unladen without the permission of the proper officer of Excise.

Grant and revocation of general pass.

164. Notwithstanding anything hereinbefore contained [2][the Chief Customs-officer may grant or] authorize the Customs-collector to grant a general pass, on any conditions which the [1][Chief Customs-officer] thinks expedient for the lading and clearance, and for the entry and unlading, of any coasting steam vessel at any ports of despatch or destination, or at any intermediate ports at which she touches for the purpose of receiving goods or passengers.

Such pass shall be valid throughout British India, or for such ports only as may be specified therein.

Any such general pass may be revoked by order of [1][the Chief Customs-officer] by whom the grant thereof [3][was made or authorized], by notice in writing under the hand of [1][the Chief Customs-officer], delivered to the master or to the owner of such steam vessel, or to any of the crew on board.

Rules respecting cargo-book to be kept by Masters of coasting vessels.

165. The Chief Customs-authority may direct that the master of any coasting-vessel which is square-rigged or propelled by steam shall keep, or cause to be kept, a cargo-book, stating the name of the master, the vessel, the port to which she belongs, and the port to which on each voyage she is bound.

At every port of lading such master shall enter, or cause to be entered, in such book, the name of such port and an account of all goods there taken on board of such vessel, with a description of the packages, and the quantities and description of the goods, contained therein or stowed loose, and the names of the respective shippers and consignees, in so far as such particulars are known to him.

At every port of discharge of any such goods such master shall enter, or cause to be entered, in such book the respective days on which such goods or any of them are delivered out of such vessel.

The respective times of departure from every port of lading, and of arrival at every port of discharge, shall in like manner be duly entered.

Every such master shall, on demand, produce his cargo book for the inspection of any officer of Customs, and such officer shall be at liberty to make any note or remark therein.

LEG. REF.

[1]Substituted by Act IV of 1914.

[2] Substitued by *ibid* for "Chief Customs-authority may."

[3] Substituted by *ibid* for "was authorized".

The Chief Customs-authority may, in the case of any vessel the master whereof has been directed to keep a cargo-book under this section, dispense with the manifest required under sections 158, 159 and 160.

Power to board and examine coasting-vessels.

166. Any duly empowered officer of Customs may go on board of any coasting-vessel in any port or place in British India, and may at any period of a voyage search any such vessel and examine all goods on board, and all goods then lading or unlading, and may demand the production of any document which ought to be on board of any such vessel.

The Customs-collector may further require that any such document belonging to any coasting-vessel then in port shall be brought to him for inspection.

CHAPTER XVI.

OFFENCES AND PENALTIES.

Punishments for offences.

167. The offences mentioned in the first column of the following schedule shall be punishable to the extent mentioned in third column of the same with reference to such offences respectively :—

Offences.	Section of this Act to which offence has reference.	Penalties.
1.—Contravening any rule made uuder this Act.	General	Penalty not exeeeding five hundred rupees,
2.—If any goods be landed or shipped, or if an attempt be made to land or ship any goods, or if any goods be brought into any bay, river, creek or arm of the sea, for the purpose of being landed or shipped, at any port or place which, at the date of such landing, shipment, attempt or bringing, is not a port for the landing and shipment of goods.	11	such goods shall be liable to confiscation.
3.—If any person ship or land goods, or aid in the shipment or landing of goods, or knowingly keep or conceal, or knowingly permit or procure to be kept or concealed,any goods shipped or landed, or intended to be shipped or landed. contrary to the provisions of this Act; or	General	such pcrson shall be liable to a penalty not exceeding one thousand rupees,
if any person be found to have been on board of any vessel liable to confiscation on account of the commission of an offence under [1][No. 4] of this section, while such vessel is within any bay, rever, creek or arm of the sea which is not a port for the [1][shipment and landing] of goods.	11	
4.—If any vissel which has been within the limits of any port in British India with cargo on board, be afterwards found in any port. bay, river, creek or arm of the sea in British India, light or in ballast, and if the master be unable to give a due account of the customs port where such vessel lawfully discharged her cargo.	11	such vessel shall be liable to confication,

LEG. REF.

[1]Substituted by Act XII of 1891.

NOTES.

Sec. 167—Use of the expression 'offence' and 'penalty' not sufficient to show that such acts or omissions are declared as crimes—ordinary criminal law applies. 1926 S. 40; jurisdiction of High Court to interfere. 31 Bom.L. R. 1052.

Offences.	Section of this Act to which offence has reference.	Penalties.
5.—If any goods are put without the authority of the proper officer of Customs, on board of any tug steamer or pilot-vessel from any sea-going vessel inward-bound; or	11	such goods shall be liable to confiscation, and the master of every such tug-steamer or pilot-vessel shall be liable to a penalty not exceeding one thousand rupees.
if any goods are put, without such authority, out of any tug-steamer or pilot-vessel for the purpose of being put on board of any such vessel outward bound; or		
if any goods on which drawback has been granted are put, without such authority on board of any tug-steamer or pilot-vessel for the purpose of being re-landed.		
6.—If any vessel arriving at, or departing from, any customs-port fails when so required under section 17, to bring to at any such station as has been appointed by the [1][Chief Customs-officer] for the boarding or landing of an officer of Customs.	17	the master of such vessel shall be liable to penalty not exceeding one thousand rupees.
7.—If any vessel arriving at any Customs-port, after having come to its proper place of mooring or unlading, removes from such place, except with the authority of the Conservator, obtained in accordance with the provisions of the Indian Ports Act, 1875, [2]or other lawful authority, to some other place, of mooring or unlading, or		the master of such vessel shall be liable to a penalty not exceeding five hundred rupees, and the vessel if not entered, shall not be allowed to enter until the penalty is paid.
if any vessel not brought into port by a pilot be not anchored or moored in accordance with any direction of the [1][Chief Customs officer] under section 17,	17	
8.—If any goods, the importation or exportation of which is for the time being prohibited or restricted by or under Chapter IV of this Act, be imported into or exported from British India contrary to such prohibition or restriction, or	18 & 19	such goods shall be liable to confiscation;
if any attempt be made so to import or export any such goods, or		any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods, or not exceeding one thousand rupees.
if any such goods, or any dutiable goods be found either before or after landing or shipment to have been concealed in any manner on board of any vessel within the limits of any port in British India, or		
if any goods, the exportation of which is prohibited or restricted as aforesaid, be brought to any wharf in order to be put on board of any vessel for exportation contrary to such prohibition or restriction,		

LEG. REF.

[1]Substituted by Act IV of 1914.

[2]See now the Indian Ports Act, 1908 (XV of 1908).

Offences.	Section of this Act to which offence has reference.	Penalties.
9.—If, upon an application to pass any goods through the custom-house, any person not being the owner of such goods, and not having proper and sufficient authority from the owner, subscribes or attests any document relating to any goods on behalf of such owner,	General	such person shall be liable to a penalty not exceeding one thousand rupees.
10.—If any goods, on the entry of which for re-export drawback has been paid, are not duly exported, or are unshipped or re-landed at any customs-port (not having been duly relanded or discharged under the provisions of this Act),	42 & 43	such goods, together with any vessel used in so unshipping or re-landing them, shall be liable to confiscation; and the master of the vessel from which such goods are so unshipped or re-landed, and any person by whom or by whose orders or means such goods are so unshipped or re-landed or who aids or is concerned in such unshipping or re-landing, shall be liable to a penalty not exceeding three times the value of such goods or not exceeding one thousand rupees.
11.—If any wine, spirit, provisions or stores be not laden on board of the vessel on board of which they should, under the provisions of section 45, 46, 47 or 48, be laden, or be unladen from such vessel without the permission of the proper officer of Custom,	44 to 48	such wine, spirit, provisions or stores shall be liable to confiscation.
12.—If any goods be entered for drawback, which are of less value than the amount of the drawback claimed,	50	such goods shall be liable to confiscation.
13.—If, in any river or port wherein a place has been fixed under section 53, by the [1][Chief Customs-authority] any vessel arriving passes beyond such place, before delivery of a manifest to the pilot, officer of Customs, or other person duly authorized to receive the same,	53	the master of such vessel shall be liable to a penalty not exceeding one thousand rupees.
14.—If the master of any vessel arriving, which remains outside or below any place so fixed, wilfully omits, for the space of twenty-four hours after anchoring, to deliver a manifest as required by this Act,	53	such master shall be liable to a penalty not exceeding one thousand rupees.
15.—If, after any vessel arriving has entered any customs-port in which a place has not been fixed under section 53, the master of such vessel wilfully omits, for the space of twenty-four hours after anchoring, to deliver a manifest as required by this Act,	54	such master shall be liable to a penalty not exceeding one thousand rupees.
16.—If any manifest delivered under section 53, 54, 60, 63 or 66 is not signed by the person delivering the same and is not in the form or does not contain the particulars required by section 55 or 63, as the case may be, in so far as such particulars are applicable to the ship, cargo and voyage; or	55 & 63	the person delivering such manifest shall be liable to a penalty not exceeding one thousand rupees.

LEG. REF.
[1]Substituted by Act IV of 1914.

Offences.	Section of this Act to which offence has reference.	Penalties.
if any manifest so delivered does not contain a specification true to the best of such person's knowledge of all goods imported or to be exported in such vessel,		
17.—If any goods entered in the import-manifest of a vessel are not found on board of the vessel; or if the quantity so found is short, and if such deficiency is not accounted for to the satisfaction of the officer in charge of the custom-house.	55 & 64	the master of such vessel shall be liable to a penalty not exceeding twice the amount of duty chargeable on the missing or deficient goods, if they be dutiable and the duty leviable thereon can be ascertained, or otherwise to a penalty not exceeding five hundred rupees for every missing or deficient package or separate article.
18.—If any person required by this Act to receive a manifest from any master of a vessel, refuses so to do, or fails to countersign the same or to enter thereon the particulars referred to in section 56	53, 54 & 56	such person shall be liable to a penalty not exceeding five hundred rupees.
19.—If bulk be broken in any vessel previous to the grant by the Customs-collector of an order for entry inwards or a special pass permitting bulk to be broken,	57 & 59	the master of such vessel shall be liable to a penalty not exceeding one thousand rupees.
20.—If any bill-of-lading or copy required under section 58 is false and the master is unable to satisfy the Customs-collector that he was not aware of the fact; or if any such bill or copy has been altered with fraudulent intent; or if the goods mentioned in any such bill or copy have not been *bona fide* shipped as shown therein; or if any such bill-of-lading-or any bill-of-lading of which a copy is delivered, has not been made previously to the departure of the vessel from the place where the goods referred to in such bill-of-lading were shipped; or if any part of the cargo has been staved, destroyed or thrown over-board; or if any package has been opened and such part of the cargo or such package be not accounted for to the satisfaction of the Customs-collector,	58	the master of the vessel shall be liable to a penalty not exceeding one thousand rupees.
21.—If any master of a vessel attempts to depart without a port-clearance,	62	such master shall be liable to a penalty not exceeding five hundred rupees.
22.—If any vessel actually departs without a port-clearance,	62	the master of such vessel shall be liable to a penalty not exceeding one thousand rupees.
23.—If any pilot takes charge of any vessel proceeding to sea, notwithstanding that the master of such vessel does not produce a port-clearance,	62	such pilot, on conviction before a Magistrate, shall be liable to fine not exceeding one thousand rupees.

NOTES.

ITEM (17).—Construction of—"Found on board of the vessel"—"So found is short"—Meaning of. *See* 191 I.C. 867.

Sec. 167 (17).—Penalty imposed under—Special tribunal upholding—Confirmation by

Offences.	Section of this Act to which offence has reference.	Penalties.
24.—If any master of a vessel refuses to receive on board an officer of Customs deputed under section 67.	68	such master shall be liable to a penalty not exceeding five hundred rupees for each day during which such officer is not received on board; and the vessel if not entered, shall not be allowed to enter until such penalty is paid.
25.—If any master of a vessel refuses to receive on board one servant of such officer, or to provide such officer and servant with suitable shelter and accommodation, and with a due allowance of fresh water, and with the means of cooking on board,	68	such master shall, in each such case, be liable to a penalty not exceeding five hundred rupees.
26.—If any master of a vessel refuses to allow such vessel, or any box, place or closed receptacle in such vessel, to be searched when so required by an officer of Customs bearing a written order to search; or if an officer of Customs places any lock, mark or seal upon any goods in a vessel, and such lock, mark or seal is wilfully opened, altered or broken, before due delivery of such goods; or if any such goods are secretly conveyed away; or if any hatchway or entrance to the hold of a vessel, after having been fastened down by an officer of Customs, is opened without his permission,	69	the master of such vessel shall be liable, upon conviction before a Magistrate, to a fine not exceeding one thousand rupees.
27.—If the master of any vessel laid up by the withdrawal of the officer of Customs shall, before application is made by him for an officer of Customs to superintend the receipt of cargo, cause or suffer to be put on board of such vessel any goods whatever, in contravention of section 70,	70	such master shall be liable to a penalty not exceeding one thousand rupees, and the goods, if protected by a pass, shall be liable to be re-landed for examination at the expense of the vessel, and, if not protected by a pass, shall be liable to confiscation.
28.—If any master of a vessel, in any case other than that provided for by No. 27, causes or suffers any goods to be discharged, shipped or water-borne contrary to any of the provisions of sections 70, 72 or 75.	70, 72 & 75	such master shall be liable to a penalty not exceeding one thousand rupees; and all goods so discharged, shipped or water-borne shall be liable to confiscation.
29.—If, when a boat-note is required by section 76, any goods water-borne for the purpose of being landed from any vessel, and warehoused or passed for	76	such goods shall be liable to confiscation; and the person by whose authority the goods are being land-

NOTES.

Central Government—Suit in Civil Court to recover not maintainable—Jurisdiction of High Court barred. *See* 42 Bom.L.R. 532=1940 Bom. 294. The first part of S. 167 (17), Col. 1 refers to the goods not being "found on board of the vessel" and the second part deals with the case where "quantity so found is short". The word "found" in the second part must have the same meaning as in the first part, namely, actually or physically existing, and cannot mean "ascertained" or "measured." The deficiency must be in the quantity of the goods on board. There is nothing in the section to indicate that the measurement must be taken only on board the vessel and nowhere else. The section does not refer to any place of measurement at all. A measurement at another place is not prohibited. 42 Bom.L.R. 532=1940 Bom. 294.

Offences.	Section of this Act to which offence has reference.	Penalties.
importation, or of being shipped for exportation. be found without such note; or if any goods are found on board any boat in excess of such boat-note, whether such goods are intended to be landed from, or to be shipped on board of, any vessel,		ed or shipped, and the person in charge of the boat, shall each be liable to a penalty not exceeding twice the amount of duty (if any) leviable an the said goods.
30.—If any person refuses to receive, or fails to sign, or to note the prescribed particulars upon, any boat-note, as required by section 76, or if any master or officer of a vessel receiving the same fails to deliver it when required so to do by any officer of Customs authorized to make such requisition,	76	such person. master or officer shall be liable to a penalty not exceeding five hundred rupees.
31.—If any goods are, without permission, shipped or water-borne to be shipped, or are landed, except from or at a wharf or other place duly appointed for the purpose; or if any goods water-borne for the purpose of being landed or shipped are not landed or shipped without unnecessary delay; or if the boat containing such goods be found out of the proper track between the vessel and the wharf or other proper place of landing or shipping, and such deviation be not accounted for to the satisfaction of the Customs-collector; or if any goods are transhipped contrary to the provisions of section 78,	73 77 78	such goods shall be liable to confiscation; and the person by whose authority the goods are shipped, landed, water-borne or transhipped, and the person in charge of the vessel employed in conveying them, shall each be liable to a penalty not exceeding twice the amount of the duty (if any) leviable on such goods.
32.—If, after the issue of a notification under section 79 with regard to any port, any goods are found within the limits of such port on board of any boat not duly licensed and registered,	79	such goods, unless they are covered by a special permit from the Customs-collector shall be liable to confiscation, and the owner or the person in charge of the boat shall be liable to a penalty not exceeding one hundred rupees.
33.—If any master of a vessel discharges or suffers to be discharged any goods not duly entered in the manifest of such vessel,	55 & 82	such master shall be liable to a penalty not exceeding one thousand rupees.
34.—If any goods are found concealed in any place, box or closed receptacle in any vessel, and are not duly accounted for to the satisfaction of the officer in charge of the custom-house,	General	such goods shall be liable to confiscation.
35.—If any goods are found on board in excess of those entered in the manifest or not corresponding with the specification therein contained,	55 & 82	such goods shall be liable to confiscation, or to be charged with such increased rates of duty as the Chief Officer of Customs directs.
36.—If, after any goods have been landed and before they have been passed through the custom-house, the owner removes or attempts to remove them, with the intention of defrauding the revenue.	86 & 87	such goods shall be liable to confiscation; or if the goods cannot be recovered, the owner shall be liable, in addition to full duty, to a penalty not

Offences.	Section of this Act to which offence has reference.	Penalties.
		exceeding twice the amount of such duty, if the goods be dutiable and the duty leviable thereon can be ascertained; or otherwise to a penalty not exceeding one thousand rupees for every missing or deficient package or separate article.
37.—If it be found, when any goods are entered at, or brought to be passed through, a Custom-house, either for importation or exportation that— (*a*) the packages in which they are contained differ widely from the description given in the bill-of-entry or application for passing them; or (*b*) the contents thereof have been wrongly described in such bill or application as regards the denominations, characters or conditions according to which such goods are chargeable with duty, or are being imported or exported; or (*c*) the contents of such packages have been mis-stated in regard to sort, quality, quantity or value; or (*d*) goods not stated in the bill-of-entry or application have been concealed in, or mixed with, the articles specified therein, or have apparently been packed so as to deceive the officers of Customs, and such circumstance is not accounted for to the satisfaction of the Customs-collector,	86 & 137	such packages, together with the whole of the goods contained therein shall be liable to confiscation, and every person concerned in any such offence shall be liable to a penalty not exceeding one thousand rupees.
38.—If, when goods are passed by tale or by package, any omission or misdescription thereof tending to injure the revenue be discovered,	86 & 94	the person guilty of such omission or misdescription shall be liable to a penalty not exceeding ten times the amount of duty which might have been lost to Government by such omission or misdescription, unless it be proved to the satisfaction of the officer in charge of the custom-house that the variance was accidental.
39.—If without entry duly made, any goods are taken or passed out of any custom-house or wharf.	86	the person so taking or passing such goods shall, in every such case, be liable to a penalty not exceeding five hundred rupees, and such goods shall be liable to confiscation.
40.—If any prohibited or dutiable goods are found, either before or after landing, concealed in any passenger's baggage.	General	such passenger shall be liable to a penalty not exceeding five hundred rupees, and such goods shall be liable to confiscation.
41—If any goods entered to be warehoused are carried into the warehouse, unless with the authority, or under the care,	93	such goods shall be liable to confiscation, and any person so carrying them

Offences.	Section of this Act to which offence has reference.	Penalties.
of the proper officers of Customs, and in such manner, by such persons, within such time, and by such roads or ways, as such officers direct,		shall be liable to a penalty not exceeding one thousand rupees.
42.—If any goods entered to be warehoused are not duly warehoused in pursuance of such entry, or are withheld, or removed from any proper place of examination before they have been examined and certified by the proper officer,	94	such goods shall be deemed not to have been duly warehoused, and shall be liable to confiscation.
43.—If any warehoused goods be not warehoused in accordance with sections 94 and 95,	94 & 95	such goods shall be liable to confiscation.
44.—If the licensee of any private warehouse licensed under this Act does not open the same when required so to do by any officer entitled to have access thereto, or, upon demand made by any such officer, refuses access to any such officer,	97	such licensee shall be liable to a penalty not exceeding one thousand rupees, and shall further be liable to have his licence forthwith cancelled.
45.—If the keeper of any public warehouse, or the licensee of any private warehouse, neglects to stow the goods warehoused therein, so that easy access may be had to every package and parcel thereof,	Chap XI	such keeper or licensee shall, for every such neglect, be liable to a penalty not exceeding fifty rupees.
46.—If the owner of any warehoused goods or any person in the employ of such owner, clandestinely opens any warehouse, or, except in presence of the proper officer of Customs, gains access to his goods,	99	such owner or person shall, in every such case, be liable to a penalty not exceeding one thousand rupees.
47—If any warehoused goods are opened in contravention of the provisions of section 98; or if any alteration be made in such goods or in the packing thereof, except as provided in section 100,	98 & 100	such goods shall be liable to confiscation.
48.—If any goods lodged in a private warehouse are found at the time of delivery therefrom to be deficient, and such deficiency is not due solely to ullage or wastage, as allowed under sections 116 and 117,	123	the licensee of such warehouse shall, unless the deficiency be accounted for to the satisfaction of the Customs-collector, be liable to a penalty equal to five times the duty chargeable on the goods so deficient.
49.—If the keeper of any pubiic warehouse, or the licensee of any private warehouse, fails, on the requisition of any officer of Customs, to produce any goods which have been deposited in such warehouse, and which have not been duly cleared and delivered therefrom, and is unable to account for such failure to the satisfaction of the Custom-collector,	123	such keeper or licensee shall, for every such failure, be liable to pay the duties due on such goods, and also a penalty not exceeding fifty rupees in respect of every package or parcel so missing or deficient.
50.—If any goods, after being duly warehoused, are fraudulently concealed in or removed from the warehouse, or abstracted from any package, or transferred from one package to another, or otherwise, for the purpose of illegal removal or concealment.	Chap. XI	such goods shall be liable to confiscation, and any person concerned in any such offence shall be liable to a penalty not exceeding one thousand rupees.

Offences.	Section of this Act to which offence has reference.	Penalties.
51.—If any goods lodged in a private warehouse are found to exceed the registered quantity,	Chap. XI	such excess, unless accounted for to the satisfaction of the officer in charge of the custom-house, shall be charged with five times the ordinary duty thereon.
52.—If any goods removed from the warehouse in which they were originally deposited, except in the presence, or with the sanction. of the proper officer, or under the proper authority for their delivery,	Ditto	such goods shall be liable to confiscation. and any person so removing them shall be liable to a penalty not exceeding one thousand rupees.
53.—If any person illegally takes any goods out of any warehouse without payment of duty, or aids, assists or is concerned therein,	Ditto.	such person shall be liable to a penalty not exceeding one thousand rupees.
54.—If any person contravenes any rule regarding the process of transhipment made by the [1][Chief Customs authority], or	130	such person shall be liable to a penalty not exceeding one thonsand rupees; and any goods in respect of which snch offence has been committed shall be
any prohibition or order relating to transhipment notified by the Central Government, or	134	liable to confiscation.
transhipps goods not allowed to be transhipped,		
55.—If any goods be taken on board of any vessel at any customs-port in contravention of section 136,	136	the master of such vessel shall be liable to a penalty not exceeding one thousand rupees.
56.—If any goods not specified in a duly passed shipping-bill are taken on board of any vessel, contrary to the provisions of section 137,	137	the master of such vessel shall be liable to a penalty not exceeding fifty rupees for every package of such goods.
57.—If any goods specified in the manifest of any vessel, or in any shipping-bill, are not duly shipped before the departure of such vessel, or are re-landed;	140	the owner of such goods shall be liable to a penalty not exceeding one hundred rupees; and such goods shall be liable to confiscation.
and notice of such short shipment or re-landing be not given as required by section 140.		
58.—If any goods duly shipped on board of any vessel be landed, except under section 141, 142 or 143 at any place other than that for which they have been cleared,	141	the master of such vessel shall, unless the landing be accounted for to the satisfaction of the Customs-collector, be liable to a penalty not exceeding three times the value of such goods so landed.
59.—If any goods on account of which drawback has been paid be not found on board of any vessel referred to in section 142,	[2][142]	the master of such vessel shall be liable to a penalty not exceeding the entire value of such goods. unless the fact be accounted for to the satisfaction of the Customs-collector.
60.—If any person, without a special pass from an officer of Excise at the place of exportation, re-lands or attempts to re-land any spirit shipped for exportation,	154	such person shall be liable to a penalty not exceeding five hundred rupees.

LEG. REF.

[1] Substituted by Act IV of 1914.

[2] Substituted by Act XII of 1891.

Offences.	Section of this Act to which offence has reference.	Penalties.
61.—If any person wilfully contravenes any rule relating to spirits made under section 155,	155	such person shall be liable to a penalty not exceeding five hundred rupees; and all such spirit shall be liable to confiscation.
62.—If, in contravention of any rules made under section 157, any goods are taken into, or put out of, or carried in, any coasting vessel; or if any such rules be otherwise infringed,	157	the master of such vessel shall be liable to a penalty not exceeding one thousand rupees.
63.—If, contrary to any such rules, any coasting vessel touches at any foreign port, or deviates from her voyage, unless forced by unavoidable circumstances; or if the master of any such vessel which has touched at a foreign port fails to declare the same in writing to the Customs-collector at the customs port at which such vessel afterwards first arrives.	159	the master of such vessel shall be liable to a penalty not exceeding one thousand rupees; and if any goods liable to export duty have been landed from, or any goods liable to import duty have been shipped in, such vessel at such foreign port, such master shall further be liable to a penalty not exceeding three times the duty which would have been leviable on such goods if they had been exported from, or imported at, a customs port to or from a foreign port, as the case may be.
64.—If in the case of any coasting vessel any of the provisions of section 158, 159 or 160 are not complied with,	158, 159 & 160	the master of such vessel shall in each such case be liable to a penalty not exceeding five hundred rupees.
65.—If the person executing any bond given under section 161 fail to produce the certificate mentioned in the same section, or to show sufficient reason for its non-production,	161	such person shall be bound to pay a penalty equal to double the amount of customs duties which would have been chargeable on the export cargo of the vessel had she been declared to be bound to a foreign port.
66.—If the master of any coasting vessel violates any of the conditions under which a general pass for such vessel has been granted,	164	such master shall be liable to a penalty not exceeding one thousand rupees.
67.—If any master of a coasting vessel contravenes any of the provisions of section 165.	165	such master shall be liable to a penalty not exceeding five hundred rupees.
68.—If, upon examination, any package entered in the cargo-book required by section 165, as containing dutiable goods, is found not to contain such goods; or if any package is found to contain dutiable goods not entered, or not entered as such, in such book,	165	such package, with its contents, shall be liable to confiscation.
69.—If the master of any coasting vessel required under section 165 to keep a cargo-book fails correctly to keep, or to cause to be kept, such book, or to produce the same on demand; or	165	such master shall be liable to a penalty not exceeding five hundred rupees.

Offences.	Section of this Act to which offence has reference.	Penalties.
if at any time there be found on board of any such vessel any goods not entered in such book as laden, or any goods noted as delivered; or if any goods entered as laden, and not noted as delivered, be not on board,		
70.—If, contrary to the provisions of this or any other law for the time being in force relating to the Customs, any goods are laden on board of any vessel in any customs port and carried coastwise; or if any goods which have been brought coastwise are so unladen in any such port; or if any goods are found on board of any coasting vessel without being entered in the manifest or cargo-book or both (as the case may be) of such vessel,	Chap. XV	such goods shall be liable to confiscation, and the master of such vessel shall be liable to a penalty not exceeding five hundred rupees.
71.—If the master of any coasting vessel refuses to bring any document to the Customs-collector when so required under section 166.	166	such master shall be liable to a penalty not exceeding two hundred rupees.
72.—If any person makes or signs, or uses, any declaration or document used in the transaction of any business relating to the Customs, knowing such declaration or document to be false in any particular; or counterfeits, falsifies or fraudulently alters or destroys any such document, or any seal, signature, initials or other mark made or impressed by any officer of Customs in the transaction of any business relating to the Customs; or, being required under this Act to produce any document, refuses or neglects to produce such document; or, being required under this Act to answer any question put to him by an officer of Customs, does not truly answer such question,	General	such person shall, on conviction of any such offence before a Magistrate, be liable to a fine not exceeding one thousand rupees.
73.—If any person on board of any vessel or boat in any customs-port, or who has landed from any such vessel or boat, upon being asked by any such officer whether he has dutiable or prohibited goods about his person or in his possession, declares that he has not, and if any such goods are, after such denial, found about his person or in his possession,	Ditto	such goods shall be liable to confiscation, and such person shall be liable to a penalty not exceeding three times the value of such goods.
74.—If any officer of Customs require any person to be searched for dutiable or prohibited goods, or to be detained, without having reasonable ground to believe that he has such goods about his person, or has been guilty of an offence relating to the Customs.	169	such officer shall, on conviction before a Magistrate, be liable to a fine not exceeding five hundred rupees.
75.—If any officer of Customs or other person duly employed for the prevention of smuggling, is guilty of a wilful breach of the provisions of this Act,	General	such officer or person shall, on conviction before a Magistrate, be liable to simple imprisonment for any term not exceeding

Offences.	Section of this Act to which offence has reference.	Penalties.
		two years, or to fine, or to both.
76.—If any officer of Customs, or other person duly employed for the prevention of smuggling, practises, or attempts to practise, any fraud for the purpose of injuring the customs revenue, or abets or connives at any such fraud, or any attempt to practise any such fraud,	General	Ditto
77.—If any Police officer, whose duty it is, under section 180, to send a written notice or cause goods to be conveyed to a custom-house, neglects so to do.	180	such officer shall, on conviction before a Magistrate, be liable to a penalty not exceeding one hundred rupees.
78.—If any person intentionally obstructs any officer of Customs or other person duly employed for the prevention of smuggling, in the exercise of any powers given under this Act to such officer or person.	General	such person shall, on conviction before a Magistrate, be liable to imprisonment for any term not exceeding six months, or to a fine not exceeding one thousand rupees, or to both.
79.—If any officer of Customs, except in the discharge in good faith of his duty as such officer, discloses any particulars learned by him in his official capacity in respect of any goods or shows any samples delivered to him in such capacity, or if any officer of Customs, except as permitted by this Act, parts with the possession of any samples delivered to him in his official capacity,	195	he shall be liable to a penalty not exceeding one thousand rupees.
80.—If any person, without the approval of the Customs-collector under section 202, acts as an agent for the transaction of bu-iness as therein mentioned,	202	such person shall be liable to a penalty not exceeding five hundred rupees.

Nothing in the second column of the above Schedule shall be deemed to have the force of law.

Packages and contents included in confiscation of goods.

168. The confiscation of any goods under this Act includes any package in which they are found, and all the other contents thereof.

Also conveyances and animals used in removal.

Every vessel, cart or other measns of conveyance, and every horse or other animal, used in the removal of any goods liable to confiscation under this Act shall in like manner be liable to confiscation.

Tackle, etc., included in confiscation of vessels.

The confiscation of any vessel under this Act includes her tackle, apparel and furniture.

CHAPTER XVII.

PROCEDURE RELATING TO OFFENCES, APPEALS, ETC.

169. Any officer of Customs duly employed in the prevention of smuggling

NOTES.

Sec. 167 (Cl. 78).—'Obstruction' in this clause implies actual resistance, and not mere evasion or disobedience of any lawful order of an officer. 1936 M.WN. 1339 (2)=44 L.W. 885 =166 I.C. 656=1937 M. 208=(1937) 1 M.L.J. 178. So, merely because a man riding a bicycle rides and runs away without stopping when ordered to do so by a Customs peon kept to watch and arrest smugglers, he cannot be held guilty under this clause. (*Ibid.*)

Sec. 168.—Applicability. 31 Bom.L.R. 1052 =1929 B. 462.

Power to search on reasonable suspicion.

may search any person on board of any vessel in any port in British India, or any person who has landed from any vessel :

Provided that such officer has reason to believe that such person has dutiable or prohibited goods secreted about his person.

Persons may, before search, require to be taken before Magistrate or Customs-collector.

170. When any officer of Customs is about to search any person under the provisions of section 169, such person may require the said officer to take him, previous to search, before the nearest Magistrate or Customs-collector.

If such requisition be made, the officer of Customs may detain the person making it until he can bring him before the nearest Magistrate or Customs-collector.

The Magistrate or Customs-collector before whom any person is so brought shall, if he see no reasonable ground for search, forthwith discharge such person ; but, if otherwise, shall direct that the search be made.

A female shall not be searched by any but a female.

Power to stop vessels, carts, etc., and search for goods on reasonable suspicion.

171. Any duly empowered officer of Customs or other person duly employed for the prevention of smuggling, may stop and search for smuggled goods any vessel, cart or other means of conveyance : provided that he has reason to believe that smuggled goods are contained therein.

Power to issue search warrants.

172. Any Magistrate may, on application by a Customs-collector, stating his belief that dutiable or prohibited goods are secreted in any place within the local limits of the jurisdiction of such Magistrate, issue a warrant to search for such goods.

Such warrant shall be executed in the same way, and shall have the same effect, as a search-warrant issued under the law relating to Criminal Procedure.

Persons reasonably suspected may be arrested.

173. Any person against whom a reasonable suspicion exists that he has been guilty of an offence under this Act may be arrested in any place, either upon land or water, by any officer of Customs or other person duly employed for the prevention of smuggling.

Persons arrested to be taken to nearest Magistrate or Customs-collector.

174. Every person arrested on the ground that he has been guilty of an offence under this Act shall forthwith be taken before the nearest Magistrate or Customs-collector.

Persons taken before Magistrate may be detained or admitted to bail.

175. When any such person is taken before a Magistrate, such Magistrate may, if he thinks fit, either commit him to gaol or order him to be kept in the custody of the Police for such time as is necessary to enable such Magistrate to communicate with the proper officers of Customs :

Provided that any person so arrested, committed or kept shall be released on giving security to the satisfaction of the Magistrate to appear at such time and place as such Magistrate appoints in this behalf.

Person escaping may be afterwards arrested.

176. If any person liable to be arrested under this Act is not arrested at the time of committing the offence for which he is so liable, or after arrest make his escape, he may at any time afterwards be arrested and taken before a Magistrate, to be dealt with as if he had been arrested at the time of committing such offence.

177. When any person employed on the crew of any of the ships of Her Majesty's Navy, [1][or His Majesty's Indian Navy] is arrested under this Act, the arresting officer shall forthwith give notice thereof to the commanding officer of the ship, who shall thereupon place such person in security on board of such ship, until the arresting officer has obtained a warrant from a Magistrate for bringing up such person to be dealt with according to law.

Persons in Her Majesty's Navy, or His Majesty's Indian Navy when arrested, to be secured on board until warrant procured.

The Magistrate shall grant such warrant upon complaint made to him by the arresting officer, stating the offence for which the person is detained.

178. Any things liable to confiscation under this Act may be seized in any place, either upon land or water, by any officer of Customs or other person duly employed for the prevention of smuggling.

Seizure of things liable to confiscation.

179. All things seized on the ground that they are liable to confiscation under this Act shall, as soon as conveniently may be, be delivered into the care of any Customs-officer authorized to receive the same.

Things seized how dealt with.

If there be no such officer at hand, all such things shall be carried to and deposited at the Custom-house nearest to the place of seizure.

If there be no Custom-house within a convenient distance, such things shall be deposited at the nearest place appointed by the [2][Chief Customs-officer] for the deposit of things so seized.

180. When any things liable to confiscation under this Act are seized by any Police-officer on suspicion that they have been stolen, he may carry them to any police station or Court at which a complaint connected with the stealing or receiving of such things has been made, or an enquiry connected with such stealing or receiving is in progress, and there detain such things until the dismissal of such complaint or the conclusion of such enquiry or of any trial thence resulting.

Procedure in respect of things seized on suspicion.

In every such case the Police-officer seizing the things shall send written notice of their seizure and detention to the nearest Custom-house; and immediately after the dismissal of the complaint or the conclusion of the enquiry or trial, he shall cause such things to be conveyed to, and deposited at, the nearest Custom-house, to be there proceeded against according to law.

181. When anything is seized, or any person is arrested under this Act, the officer or other person making such seizure or arrest shall, on demand of the person in charge of the thing so seized, or of the person so arrested, give him a statement in writing of the reason for such seizure or arrest.

When seizure or arrest is made reason in writing to be given.

[3][181-A. (1) The Chief Customs-officer or other officer authorized by the Provincial Government in this behalf may detain any package, brought whether by land or sea into British India which he suspects to contain—

Power to detain packages containing certain publications imported into British India.

(*a*) any newspaper or book as defined in the Press and Registration of Books Act, 1867, or

(*b*) any document,

containing any seditious matter, that is to say, any matter the publication of which is punishable under section 124-A of the Indian Penal Code, and shall

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LEG. REF.

[1]Substituted by A.O., 1937.

[2]Substituted by Act IV of 1914.

[3]Inserted by Act XIV of 1922.

forward such package to such officer as the Provincial Government may appoint in this behalf.

(2) Any officer detaining a package under the provisions of sub-section (1) shall, where practicable, forthwith send by post to the addressee or consignee of such package notice of the fact of such detention.

(3) The Provincial Government shall cause the contents of such package to be examined, and if it appears to the Provincial Government that the package contains any such newspaper, book or other document, containing any such seditious matter, may pass such orders as to the disposal of the package and its contents as it may deem proper, and, if it does not so appear, shall release the package and its contents unless the same be otherwise liable to seizure under any law for the time being in force :

Provided that any person interested in any package detained under the provisions of this section may, within two months from the date of such detention, apply to the Provincial Government for release of the same, and the Provincial Government shall consider such application and pass such orders thereon as it may deem to be proper :

Provided further, that, if such application is rejected, the applicant may, within two months from the date of the order rejecting the application, apply to the High Court for release of the package or its contents on the ground that the package did not contain any such newspaper, book or other document containing any such seditious matter.

(4) In this section "document" includes also any painting, drawing or photograph, or other visible representation.]

Procedure for disposal by High Court of applications for release of packages so detained.

[1][181-B. Every application under the second proviso to sub-section (3) of section 181-A shall be heard and determined, in the manner provided by sections 99-D to 99-F of the Code of Criminal Procedure, 1898, by a Special Bench of the High Court constituted in the manner provided by section 99-C of that Code.]

Jurisdiction barred.

[1][181-C. No order passed or action taken under section 181-A shall be called in question in any Court otherwise than in accordance with the second proviso to sub-section (3) of that section.]

Adjudication of confiscations and penalties.

182. In every case, except, the cases mentioned in section 167, Nos. 26, 72 and 74 to 76 both inslusive, in which, under this Act,

anything is liable to confiscation or to increased rates of duty,

or any person is liable to a penalty,

such confiscation, increased rate of duty or penalty may be adjudged—

(*a*) without limit, by a Deputy Commissioner or Deputy Collector of Customs, or a Customs-collector ;

(*b*) up to confiscation of goods not exceeding two hundred and fifty rupees in value, and imposition of penalty or increased duty, not exceeding one hundred rupees, by an Assistant Commissioner or Assistant Collector of Customs ;

(*c*) up to confiscation of goods not exceeding fifty rupees in value, and imposition of penalty or increased duty not exceeding ten rupees, by such other subordinate officers of Customs as the [2][Chief Customs-authority] may, from time to time, empower in that behalf in virtue of their office :

LEG. REF.

[1]Inserted by Act XIV of 1922.
[2]Substituted by Act IV of 1914.

NOTES.

Sec. 182.—*See* 43 B. 221=21 Bom.L.R. 27=49 I.C. 427. Section is not exhaustive. 45 L. W. 394. Act contains no provision with regard to adjudication of confiscations and penalties. 24 Bom.L.R. 245=46 B. 732. *See* 1938 Mad. 608=I.L.R. 1938 M. 1040.

Provided that the [1][Chief Customs-authority] may, in the case of any officer performing the duties of a Customs-collector, limit his powers to those indicated in clause (*b*) or in clause (*c*) of this section, and may confer on any officer, by name or in virtue of his office, the powers indicated in clauses (*a*), (*b*) or (*c*) of this section.

Option to pay fine in lieu of confiscations.

183. Whenever confiscation is authorised by this Act, the officer adjudging it shall give the owner of the goods an option to pay in lieu of confiscation such fine as the officer thinks fit.

On confiscation, property to vest in Her Majesty.

184. When anything is confiscated under section 182, such thing shall thereupon vest in Her Majesty.

The officer adjudging confiscation shall take and hold possession of the thing confiscated and every officer of Police, on the requisition of such officer, shall assist him in taking and holding such possession.

Levy of penalty for failure to bring-to.

185. If any vessel actually departs without a port-clearance, or after failing to bring-to when required at any station appointed under section 17, the penalty to which the master of such vessel is liable may be adjudged by the Chief-Customs-officer of any Customs-port to which such vessel proceeds, or in which she is [2][* * * * *].

A certificate of such departure or failure to bring-to when required, purporting to be signed by the Chief Customs-officer of the port from which the vessel is stated to have so departed, shall be *prima facie* proof of the fact so certified.

Penalty under Act not to interfere with punishment under other law.

186. The award of any confiscation, penalty or increased rate of duty under this Act by an officer of Customs shall not prevent the infliction of any punishment to which the person affected thereby is liable under any other law.

Offences not specially provided for how tried.

187. All offences against this Act, other than those cognizable under section 182 by officers of Customs, may be tried summarily by a Magistrate.

Appeal from subordinate to Chief Customs-authority.

188. Any person deeming himself aggrieved by any decision or order passed by an officer of Customs under this Act may, within three months from the date of such decision or order, appeal therefrom to the Chief Customs-authority or, in such cases as the Central Government directs, to any officer of Customs

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LEG. REF.

[1]Substituted by Act IV of 1914.

[2]Omitted by A.O., 1937.

NOTES.

Sec. 188.—If there be no legal adjudication of the matter in accordance with the Act, jurisdiction of the Civil Court is not ousted. 44 B. 221=21 Bom.L.R. 27=49 I.C. 427. Imposition of sea customs duties relates to 'a matter concerning revenue' within the meaning of the term in S. 106 (2) of the Government of India Act, 1935, and as such, the suit in the High Court questioning such imposition is barred. Such suit is also barred under Ss. 188 and 191, as the remedy given under these sections amounts to an ouster of the jurisdiction of Courts. The Act itself provides the remedy and the tribunal to decide disputes under the Act. 45 L.W. 394=1937 Mad. 536. The sole remedy open to those who are aggrieved by a decision or order for confiscation of goods passed by an Officer of Customs under the Sea Customs Act is the appeal to the Chief Customs authority provided by S. 188. The order is not liable to be challenged or impugned by any suit. 43 C.W.N. 445=I.L.R. (1939) 1 Cal. 257=1939 Cal. 763. *See also* 187 I.C. 542=3 Fed.L.J. (H.C.) 50. There is no reason for limiting the words "any decision or order passed . . . under this Act" in S. 188 to decisions or orders passed under S. 182 of the Act. They include decisions by an officer of customs as to the rate of duty applicable to particular goods, which necessarily involve the determination of the particular category in the tariff classification into which the goods fall. An order of an Assistant Collector of Customs assessing a consignment of betel nuts as boiled nuts subject to duty on a tariff value and not as raw nuts subject to duty *ad valorem*, is not an adjudication as to increased rate of duty under S. 182, but a decision as to the

not inferior in rank to a Customs-collector and empowered in that behalf by name or in virtue of his office by [the Central Government].

Such authority or officer may thereupon make such further inquiry and pass such order as he thinks fit, confirming, altering or annulling the decision or order appealed against :

Provided that no such order in appeal shall have the effect of subjecting any person to any greater confiscation, penalty or rate of duty than has been adjudged against him in the original decision or order.

Every order passed in appeal under this section shall, subject to the power of revision conferred by section 191, be final.

Deposit, pending appeal, of duty demanded.

189. Where the decision or order appealed against relates to any duty or penalty leviable in respect of any goods, the owner of such goods, if desirous of appealing against such decision or order, shall, pending the appeal, deposit in the hands of the Customs-collector at the port where the dispute arises the amount demanded by the officer passing such decision or order.

When delivery of such goods to the owner thereof is withheld merely by reason of such amount not being paid, the Customs-collector shall, upon such deposit being made, cause such goods to be delivered to such owner.

If upon any such appeal it is decided that the whole or any portion of such amount was not leviable in respect of such goods, the Customs-collector shall return such amount or portion (as the case may be) to the owner of such goods on demand by such owner.

Power to remit penalty or confiscation.

190. If, upon consideration of the circumstances under which any penalty, increased rate of duty or confiscation has been adjudged under this Act by an officer of Customs, the Chief Customs-authority is of opinion that such penalty, increased rate or confiscation ought to be remitted in whole or in part, or commuted, such authority may remit the same or any portion thereof, or may, with the consent of the owner of any goods ordered to be confiscated, commute the order of confiscation to a penalty not exceeding the value of such goods.

Revision by the Central Government.

191. [1][The Central Government] may, on the application of any person aggrieved by any decision or order passed under this Act by any officer of Customs or Chief Customs authority, and from which no appeal lies, reverse or modify such decision or order.

LEG. REF.

[1]The words "The Governor-General in Council" were substituted for "The Local Government" by Act IV of 1924, and the present words substituted by A.O., 1937.

NOTES.

normal rate of duty. Such an order if upheld in appeal under S. 188 and confirmed in revision under S. 191, excludes the jurisdiction of the Civil Courts to entertain a challenge of the merits of that decision. The Civil Court has, therefore, no jurisdiction to entertain a suit by a person aggrieved by such assessment to recover moneys paid in compliance therewith, on the ground that such assessment is incorrect or illegal. 67 I.A. 222=I.L.R. (1940) Mad. 599=1940 P.C. 105=(1940) 2 M.L.J. 140 (P.C.). On appeal from I.L.R. (1938) Mad. 1040=47 L. W. 505=1938 Mad. 608.

Secs. 188 and 191.—The High Court will not interfere with the customs authorities by way of mandamus until the applicant before it exhausts his right of appeal under Ss. 188 and 191 of the Sea Customs Act. I.L.R. (1939) 2 Cal. 541=189 I.C. 556=1940 Cal. 174. *See also* 45 L.W. 394.

Sec. 191.—*See* 45 L.W. 394=1937 Mad. 536 noted under S. 188, *supra*. Orders passed by the Governor-General in Council under S. 191 can in no case be questioned in the Civil Courts, except possibly orders which while purporting to be made under it are clearly outside it. 43 C.W. N. 445=1939 Cal. 763=I.L.R. (1939) 1 Cal. 257. *See also* 187 I.C. 542=3 Fed.L.J. (H.C.) 50; I.L.R. (1939) 2 Cal. 541=1940 Cal. 174. Where by an act of Legislature powers are given to a person for a public purpose from which an individual may receive an injury, if the method of redressing the injury is indicated by the statute, the ordinary jurisdiction of Civil Courts is ousted and a suit does not lie. Where an order of confiscation passed by the Collector under the Sea Customs Act is taken up to the Central Board of Revenue under S. 188 of the Sea Customs Act and the Board confirms the

Goods on which penalty incurred not to be removed till payment.

192. When any fine, penalty or increased rate of duty is leviable under this Act, the goods in respect of which such fine, penalty or rate is leviable shall not be removed by the owner until such fine, penalty or rate is paid.

Other goods of person liable to fine or penalty may be detained.

If any person has become liable to any such fine, penalty or rate in respect of any goods, the Customs-collector may detain any other goods belonging to such person passing through the Custom-house until such fine, penalty or rate is paid.

Enforcement of payment of penalty.

193. When a penalty or increased rate of duty is adjudged against any person under this Act by any officer of Customs, such officer, if such penalty or increased rate be not paid, may levy the same by sale of any goods of the said person which may be in his charge or in the charge of any other officer of Customs.

When an officer of Customs who has adjudged a penalty or increased rate of duty against any person under this Act is unable to realize the unpaid amount thereof from such goods, such officer may notify in writing to any Magistrate within the local limits of whose jurisdiction such person or any goods belonging to him may be, the name and residence of the said person and the amount of penalty or increased rate of duty unrecovered ; and such Magistrate shall thereupon proceed to enforce payment of the said amount in like manner as if such penalty or increased rate had been a fine inflicted by himself.

CHAPTER XVIII.

MISCELLANEOUS.

Power to open packages and examine goods.

194. Any officer of Customs may open any package, and examine any goods brought by sea to, or shipped or brought for shipment at, any customs-port.

Power to take samples of goods.

195. [1][(1)] The Customs-collector may, on the entry or clearance of any goods or at any time while such goods are being passed through the Custom-house, take samples of such goods, for examination or for ascertaining the value thereof on which duties are payable, or for any other necessary purpose.

Every such sample shall, if practicable be at the option of the owner either restored to him, or sold and the proceeds accounted for to him.

[1][(2) In the case of goods which consist of drugs or articles intended for consumption as food, and in respect of which the taking of samples for the purposes of this sub-section may have been authorised by general or special order of the Provincial Government, the Customs-Collector may also in like circumstances take samples thereof for submission to, and examination by, such officer of Government or of a local authority as may be specified in such order. The real value of all such samples shall be paid to the owner by the Customs-collector.]

Power to make rules for determining whether mineral oil is suitable for use as an illuminant.

[2][195-A. (1) When by any law for the time being in force a duty of customs is imposed on mineral oil which is specified as being suitable or as not being suitable for use as an illuminant in wick lamps, the Chief Customs-Authority may make rules for determining in disputed cases whether any mineral oil is or is not suitable for such use.

LEG. REF.

[1]Renumbered as sub-S. (1), and sub-S. (2) added by Act XIII of 1919.

[2]Inserted by Act XXVIII of 1933.

NOTES.

order under S. 191, after hearing the advocate for the party aggrieved and no attempt is made to show that the Board in passing the order has in any way infringed the principles of justice or the provisions of the Act, there is no right of suit in the Civil Court even if the procedure of the Collector of Customs was not in accordance with the Act or with the principles of justice. There being a definite remedy provided by the Act, *viz.*, an application under S. 191 of the Sea Customs Act, no civil suit will lie. 55 L. W. 498=(1942) 2 M.L.J. 193.

(2) In particular such rules may—

(*a*) specify the design, construction and materials of test lamps to be used for testing the burning properties of mineral oil in wick lamps and provide for the standardisation of such test lamps ; and

(*b*) prescribe the manner in which and the persons by whom tests are to be carried out and the standards to be accepted for deciding whether any mineral oil is or is not suitable for use as an illuminant in wick lamps.]

Owner to pay expense incidental to compliance with Customs-law.

196. The unshipping, carrying, shipping and landing of all goods,

and the bringing of them to the proper place for examination or weighing, and the putting of them into and out of the scales, and the opening, unpacking, bulking, sorting, lotting, marking and numbering of goods, where such operations are necessary or permitted,

and the removing of goods to, and the placing of them in, the proper place of deposit,

shall be performed by or at the expense of the owner of such goods.

No compensation for loss or injury except on proof of neglect or wilful act.

197. No owner of goods shall be entitled to claim from any officer of Customs compensation for any loss or damage occurring to such goods at any time while they remain or are lawfully detained in any custom-house or on any custom-house wharf, or under charge of any officer of Customs, unless it be proved that such loss or damage was occasioned by the neglect or wilful act of such officer of Customs.

Notice of proceedings.

198. No proceeding other than a suit shall be commenced against any person for anything purporting to be done in pursuance of this Act without giving to such person a month's previous notice in writing of the intended proceeding and of the cause thereof ; or

Limitation.

after the expiration of three months from the accrual of such cause.

Wharfage fees.

199. The [1][Chief Customs-officer] may from time to time fix the period after the expiration of which goods left on any custom-house wharf, or other authorized landing place or part of the custom-house premises, shall be subject to payment of fees and the amount of such fees.

Duplicates of documents may be granted on payment of fee.

200. A duplicate of any certificate, manifest, bill or other custom-house document may, on payment of a fee not exceeding ten rupees, be furnished, at the discretion of the Customs-collector to any person applying for the same if the Customs-collector is satisfied that no fraud has been committed or is intended by the applicant.

Amendment of documents.

201. Except in the cases provided for by sections 36, 55, 63 and 94, the Customs-collector may in his discretion, upon payment of one rupee, authorise any document after it has been entered and recorded in the custom-house, to be amended.

Custom-house agents.

202. No person authorized to act as an agent for the transaction of any business relating to the entrance or clearance of any vessel or the import or export of goods or baggage shall so act in any custom-house unless such authorization is approved by the Customs-collector.

Such officer may require any person so authorised to give a bond with sufficient security in any sum not exceeding five thousand rupees for his faithful behaviour as regards the custom-house regulations and officers.

LEG. REF.

[1]Substituted by Act IV of 1914.

NOTES.

Sec. 197.—*See* 7 M. 42.

Such officer may, in case of misbehaviour of the person so authorized suspend or withdraw such approval, but an appeal against every such suspension or withdrawal shall lie to the Chief Customs-authority, whose decision thereon shall be final.

Every appeal under this section shall be made within one month of the suspension or withdrawal.

Agent to produce authority if required.

203. When any person applies to any officer of Customs for permission to transact any specified business with him on behalf of any other person, such officer may require the applicant to produce a written authority from the person on whose behalf such business is to be transacted, and in default of the production of such authority may refuse such permission.

The clerk, servant or agent of any person or mercantile firm may transact business generally at the Custom-house on behalf of such person or firm : Provided that the Customs-collector may refuse to recognise such clerk, servant or agent unless such person or a member of such firm identifies such clerk, servant or agent to the Customs-collector as empowered to transact such business and deposits with the Customs-collector an authority in writing duly signed, authorizing such clerk, servant or agent to transact such business on behalf of such person or firm.

Rules to be notified.

204. All rules made under this Act shall be notified in the Official Gazette, and shall thereupon have the force of law.

All such rules for the time being in force shall be collected, arranged and published at intervals not exceeding two years, and shall be sold to the public at a reasonable price.

Publication of notifications in Official Gazettes.

205. [1][Any notification published in the Official Gazette by the Chief Customs-authority under section 53, section 74, section 76, section 79, section 85, section 96, section 116, section 128, section 133 or section 147 shall forthwith be republished [2][with the consent of the Provincial Government in the Official Gazette of each province to which it relates].

Remission of duty and compensation to owner in certain cases.

206. If in any case relating to the removal of goods from a warehouse without payment of duty, the person offending be an officer of customs not acting in execution of his duty, and be prosecuted to conviction by the owner of such goods, no duty shall be payable in respect of such goods. For any damage so occasioned by such officer the [3][Chief Customs-officer, or the Customs-collector, with the sanction of the Chief Customs-officer, shall] make due compensation to such owner :

[4][Provided that compensation exceeding Rs. 250 shall be paid with the sanction of the Chief Customs-authority.]

Saving of Calcutta Port Commissioners' and Bombay Port Trust Acts.

207. Nothing in this Act shall affect any law for the time being in force relating to the Commissioners for making improvements in the Port of Calcutta or the Trustees of the Port of Bombay [5][or any like body hereafter created for any other port.]

LEG. REF.

[1]This S. 205 was newly inserted by Act IV of 1924, the original S. 205 having been repealed by Act X of 1914.

[2]Inserted by A.O., 1937.

[3]Substituted by Act IV of 1914.

[4]Added by Act IV of 1914.

[5]Substituted by Act IX of 1885.

SCHEDULE.

PART I.—*Repealed by the Repealing Act*, 1938 (*I of* 1938), *S. 2 and Sch.*

PART II.

FORMS.

A

FORM OF BOND FOR IMPORT-DUTY.

(*See section* 92.)

BOND.

No. 18 .

We, *A. B.*,
now of
, and *C. D.*,
of the same place, are jointly and severally bound to [1][The Governor-General in Council (or, after the establishment of the Federation of India, the Governor-General of India)] in the sum of Government rupees , to be paid to [1][the Governor-General in Council (or, after the establishment of the Federation of India, the Governor-General of India)], for which payment we jointly and severally bind ourselves and our legal representatives.

(*Date*)

(*Signed*) ( ).

The above bounden having applied to the officer in charge of the Custom-house at for and obtained permission to lodge in the warehouse for a period of the following goods, that is to say— imported by sea from on board of the ship and entered in the custom-house Books as No. of the Register of Goods imported by Sea ;

The condition of this bond is that ;

If the , or their legal representatives, shall observe all the rules prescribed in the Sea Customs Act, 1878, to be observed by owners of goods warehoused, and by persons obtaining permission to warehouse goods under the provisions thereof;

And if the said , or their legal representatives, shall pay to the officer in charge of the custom-house at the port of all dues whether, customs-duties, warehouse-dues, rent or other lawful charges which shall be demandable on the said goods, or on account of penalties incurred in respect to them, within from the date of this Bond, or within such further time as the Chief Customs-authority of shall allow in that behalf, together with interest on every such sum at the rate of six per cent. per annum from the date of demand thereof being made in writing by the said officer in charge of the custom-house ;

And, if, within the term so fixed or enlarged, the said goods, or any portion thereof, having been removed from the said warehouse for home consumption or re-exportation by sea, the full amount of all customs-duties, warehouse dues, rent and other lawful charges, penalties and interest demandable as aforesaid shall have been first paid on the whole of the said goods ;

This obligation shall be void.

Otherwise, and on breach or failure in the performance of any part of this condition, the same shall be in full force.

(*Date*)

(*Signed*) ( ).

B

FORM OF BONDED WAREHOUSE WARRANT.

(*See section* 96.)

I do hereby certify that have deposited in the warehouse of the undermentioned goods , which goods, the engage on demand, after payment of

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LEG. REF.

[1]Substituted by A.O., 1937.

rent and incidental charges and [1][Crown dues] or customs chargeable thereon, to deliver to the said or their assigns, or to the holder of this warrant to whom it may be transferred by endorsement.

C

FORM OF BOND FOR THE REMOVAL OF SPIRIT FROM A LICENSED DISTILLERY.

(See sections 144 *and* 152.)

We, are jointly and severally bound to [2][the Governor of . . . . .] in the sum of Government rupees to be paid to [2][the Governor of . . . . .] for which payment we jointly and severally bind ourselves and our legal representatives.

Dated this day of 18 .

(*Signed*) ( ).

The above bounden being indebted to [2][the Governor of . . .] in the sum of Government rupees , being the amount of duty payable at the rate of rupees per imperial gallon London proof, for gallons of (*or* for gallons of proof spirit used in the preparation of dozens of bottles, *or* gallons of cordials and liquors, as specified in the annexed schedule) manufactured at which the said have been allowed to remove thence for exportation by sea, subject to the provisions of the Sea Customs Act, 1878, without having paid such duty.

The condition of this obligation is that, if the above bounden , or their legal representatives, shall, at the expiration of four calendar months from the date of this obligation, pay or cause to be paid to the [3][Governor of . . . .] duty at the rate of rupee per imperial gallon of proof spirit for all or any portion of the abovementioned which shall not have been then exported by sea to a foreign port, subject to the aforesaid provisions (of which exportation, if any, due proof shall be given), or passed for local consumption on payment of duty, then this bond shall be void ; otherwise the same shall remain in full force.

Signed in the presence of

Place

Date

If the bond be for cordials and other liquors under section 152, *add—*

Schedule.

Description of cordials and liquors.	Quantity in bottles or gallons.	Quantity of proof spirit.
1	2	3

THE SECRETARIES TO GOVERNMENT ACT, 1834.

Year.	No.	Short title or subject.	How repealed or otherwise affected by legislation.
1834	II	The Secretaries to Government Act, 1834.	Short title given, Act XIV of 1897. Repealed in part, Act X of 1914, S. 3, Sch. II. Amended by Government of India (Adaptation of Indian Laws) Order, 1937.

LEG. REF.

[1]Substituted for 'Government dues' by A.O., 1937.

[2]Substituted for 'Her Majesty's Secretary of State for India in Council" by A.O., 1937.

[3]Substituted for 'the said Secretary of State for India in Council' by A.O., 1937.

[20*th November*, 1834.

Secretaries to Government to exercise powers of Chief Secretaries.

Be it enacted that each of the Secretaries to the Central Government [1][* * * * * *] shall be competent to perform all the duties and to exercise all the powers which by any Act of Parliament or any Regulation now in force are assigned to the Chief Secretary to the Government of Fort William in Bengal; and that each of [2][the Secretaries to the Provincial Governments of Madras and Bombay] respectively shall be competent to perform all the duties, and to exercise all the powers which, by any Act of Parliament, or any Regulation now in force are assigned to the Chief Secretaries to the Governments of Fort St. George and Bombay, respectively.

THE INDIAN SECURITIES ACT (X OF 1920).

Year.	No.	Short title.	Amendments.
1920	X	The Indian Securities Act, 1920	Repealed in part, XII of 1927; Amended XXI of 1927; II of 1928; XXVIII of 1937, Government of India (Adaptation of Indian Laws) Order, 1937.

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3. Notice of trust not receivable save as provided.
4. Right of survivors of joint or several payees of Government securities.
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6. Holding of Government securities by holders of public offices.
7. Issue of securities to rulers of States in India.
8. Indorser of Government security not liable for amount thereof.
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Issue of duplicate, renewed, converted, consolidated, or sub-divided securities.

10. Issue of duplicate securities.
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[11*th March*, 1920.

An Act to consolidate and amend the law relating to Government Securities.

WHEREAS it is expedient to consolidate and amend the law relating to Government securities; It is hereby enacted as follows :—

LEG. REF.

[1] The words "and to the Government of Fort William in Bengal" were repealed by S. 3 and Sch. II of the Repealing and Amending Act, 1914 (X of 1914).

[2] The words in brackets have been substituted by A.O., 1937.

[3] For Statement of Objects and Reasons, see *Gazette of India Extraordinary*, 29th October, 1919, p. 529. For Report of Select Committee, see *ibid.*, Part V, p. 39. For proceedings in Council, see *ibid.*, Part VI, p. 734.

Short title, extent and commencement.

1. (1) This Act may be called THE INDIAN SECURITIES ACT, 1920;

(2) It extends to the whole of British India, including British Baluchistan; and

(3) It shall come into force on the first day of April, 1920.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "Government security" means promissory notes (including treasury bills), stock-certificates, bearer bonds and all other securities issued by the Central Government or by any Provincial Government in respect of any loan contracted either before or after the passing of this Act, but does not include a currency-note; and

(*b*) "prescribed" means prescribed by rules made under this Act.

[1][(*c*) "the Government" or "Government" in relation to any loan or security, means the Government raising the loan or issuing the security.]

Notice of trust not receivable save as provided.

3. (1) Save as otherwise provided in or under this Act, no notice of any trust in respect of any Government security shall be receivable by the Government.

(2) The Government shall not be deemed to have received notice of any trust by reason only of the fact that it has recognised an indorsement on a Government security by an executor or administrator as such, nor shall it inquire into the terms of any will by which such executor or administrator may be bound, but, on being satisfied of the due appointment of such executor or administrator, it shall be entitled to treat him as the full owner of any Government security belonging to the estate of the person whom he represents.

Right of survivors of joint or several payees of Government securities.

4. (1) Notwithstanding anything in section 45 of the Indian Contract Act, 1872,—

(*a*) when a Government security is payable to two or more persons jointly, and either or any of them dies, the security shall be payable to the survivor or survivors of those persons, and

(*b*) when a Government security is payable to two or more persons severally, and either or any of them dies, the security shall be payable to the survivor or survivors of those persons, or to the representative of the deceased, or to any of them.

(2) This section shall apply whether such death occurred or occurs before or after this Act comes into force.

(3) Nothing herein contained shall affect any claim which any representative of a deceased person may have against the survivor or survivors under or in respect of any security to which sub-section (1) applies.

[2][(4) For the purpose of this section, a body incorporated under the Indian Companies Act, 1913, or the Co-operative Societies Act, 1912, or any other enactment for the time being in force whether within or without British India relating to the incorporation of associations of individuals, shall be deemed to die, when it is dissolved.]

LEG. REF.

[1]Cl. (*c*) to S. 2 inserted by A.O., 1937.

[2] S. 4, cl. (4) added by Act II of 1928.

Indorsements to be made on security itself.

5. Notwithstanding anything in section 15 of the Negotiable Instruments Act, 1881, no indorsement of a Government promissory note shall be valid unless made by the signature of the holder inscribed on the back of the security itself.

Holding of Government securities by holders of public offices.

6. (1) In the case of any public office to which the [1][Government] may, by notification in the Official Gazette, declare this sub-section to apply, a Government security may be made or indorsed payable to or to the order of the holder of the office by the name of the office.

(2) When a Government security is made or indorsed as aforesaid, it shall be deemed to be transferred without any or further indorsement from each holder of the office to the succeeding holder of the office on and from the date on which the latter takes charge of the office.

(3) When the holder of the office indorses to a third party a Government security made or indorsed as aforesaid, he shall subscribe the indorsement with his name and the name of the office.

(4) A writing on a Government security now or heretofore standing in the name of the holder of a public office, whereby the security has been or was made or indorsed payable to or to the order of the holder of the office by the name of the office, shall not be deemed to be or to have been invalid by reason only of the security having been so made or indorsed.

(5) This section applies as well to an office of which there are two or more joint holders as to an office of which there is a single holder.

Issue of securities to rulers of States in India.

7. Notwithstanding anything in the Negotiable Instruments Act, 1881, the [1][Government] may, in respect of any loan, issued to the ruler of any State in India Government securities in such form and subject to such conditions as to negotiability, succession and other matters as may be prescribed.

Indorser of Government security not liable for amount thereof.

8. Notwithstanding anything in the Negotiable Instruments Act, 1881, a person shall not, by reason only of his having indorsed a Government security, be liable to pay any money due, either as principal or as interest, thereunder.

Impression of signature on Government securities.

9. (1) The signature of the person authorised to sign Government securities on behalf of the Government may be printed, engraved or lithographed, or impressed by such other mechanical process as the [1][Government] may direct on the securities.

(2) A signature so printed, engraved, lithographed, or otherwise impressed shall be as valid as if it had been inscribed in the proper handwriting of the person so authorised.

Issue of duplicate, renewed, converted, consolidated or sub-divided securities.

Issue of duplicate securities.

10. (1) When a Government security is alleged to have been lost, [2][stolen] or destroyed either wholly or in part, and a person claims to be the person to whom but for the loss, [2][theft] or destruction it would be payable, he may, on application to the prescribed [3][autho-

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LEG. REF.

[1] Substituted for 'Governor-General in Council' by A.O., 1937.

[2] Inserted by Act XXI of 1927, S. 2.

[3] Substituted for "officer" by Act XXVIII of 1937.

NOTES.

Sec. 5.—A transfer of a Government promissory note, in order to be effectual to vest the property in the note in the transferee, can only be done by endorsement on the note itself. I. L.R. (1939) 2 Cal. 52=1939 Cal. 746. The provisions of S. 5 are only for the protection of the Government who can get a due discharge from the person who is the holder of the security. The question as to the beneficial ownership of Government promissory notes and securities is not affected by S. 5. 52 L.W. 247=1940 Mad. 878=(1940) 2 M.L.J. 278.

Advocate High Court
Jammu & Kashmir
Srinagar

rity], and on producing proof to [1][its] satisfaction of the loss, [2][theft] or destruction, and of the justice of the claim and on payment of the prescribed fee, if any, obtain from [3][it] an order for—

(*a*) the payment of interest in respect of the security said to be lost, [2][stolen] or destroyed pending the issue of a duplicate security ; and

(*b*) the issue of a duplicate security payable to the applicant.

(2) An order shall not be passed under sub-section (1) until after the issue of the prescribed notification of the loss [2][theft] or destruction.

(3) A list of the securities in respect of which an order is passed under sub-section (1) shall be published in the prescribed manner.

[2][(4) If at any time before the Government becomes discharged under the provisions of this Act from liability in respect of any security the whole of which is alleged to have been lost, stolen or destroyed, such security is found, any order passed in respect thereof under this section shall be cancelled.]

Renewal of bearer bonds.

11. The holder of a bearer bond or other Government security payable to bearer may, on application to the prescribed [4][authority], on delivery of the bearer bond or other security, and on payment of the prescribed fee, if any, obtain from such [4][authority] a renewed bearer bond or other security, as the case may be.

Renewal of promissory notes.

12. Subject to the provisions of section 13, a person claiming to be entitled to a Government promissory note, may, on applying to the prescribed [4][authority], and on satisfying [3][it] of the justice of his claim and delivering the promissory note receipted in the prescribed manner, and paying the prescribed fee, if any, obtain from such [3][authority] a renewed promissory note payable to him :

Provided that, when application is made for the renewal of a Government promissory note which appears to the prescribed [4][authority] to stand in the name of a deceased member of a Hindu undivided family governed by the *Mitakshara* law, a renewed promissory note shall not be issued to the applicant unless he furnishes a certificate signed by such authority and after such inquiry as may be prescribed to the effect that the deceased belonged to a Hindu undivided family

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LEG. REF.

[1]Substituted for 'his' by Act XXVIII of 1937.
[2]Inserted by Act XXI of 1927, S. 2 ; cl. (4) also inserted by Act XXI of 1927.
[3]Substituted for 'him' by Act XXVIII of 1937.
[4]Substituted for 'officer' by *ibid*.

NOTES.

Secs. 12 and 13.—Per *Panckridge, J.*—Ss. 12 and 13 of the Securities Act must be read together. The mere fact that there has been a dispute to which S. 13 applies, does not deprive S. 12 of its operation. It would be absurd to suppose that the existence of a dispute relieves the applicant from the obligation to deliver the promissory note and pay the prescribed fee. I. L.R. (1941) 1 Cal. 328=196 I.C. 48=45 C. W.N. 449=1941 Cal. 458.

Secs. 12 and 16 : CONSTRUCTION AND SCOPE —GOVERNMENT PROMISSORY NOTE WITH FORGED ENDORSEMENT—RENEWAL BY GOVERNMENT AND ISSUE OF NEW NOTE—EFFECT.—Under S. 12 a person claiming to be entitled to a Government promissory note is only entitled to renewal, amongst other things, on satisfying the prescribed officer of the justice of his claim, *i.e.*, satisfying the prescribed officer that he is in fact entitled to the Government Promissory Note. The prescribed officer, therefore, is entitled to require evidence which satisfies him,—not merely evidence which might prove to a Court of Law that the title to the note was valid, but which satisfies the officer—and it is true to say that the officer cannot be regarded as exercising a merely ministerial act or duty. If he acts honestly and brings his judgment to bear on the case and does not act capriciously, if he says that he is not satisfied of the justice of the claim, no Court can compel him to issue a renewed note. When the Government issue a new note in renewal of a prior note, one of the endorsements on which is a forgery the renewed note constitutes a new and fresh contract, not a contract which is void or voidable, but a valid contract—between Government and the person to whom the note is issued, and is free from the infirmities of the old note, under S. 16 (1) of the Act. Government is not entitled to the return of the renewed note or the value thereof on the basis that it was issued without consideration or under a mistake of fact, or on the ground that the note has been negotiated by the person to whom it was issued. To say that the person to whom it

governed by the *Mitakshara* law, that the promissory note formed part of the joint property of the family, and that the applicant is the managing or sole surviving male member of the family.

Explanation.—The expression "Hindu undivided family governed by the *Mitakshara* law" shall, for the purposes of this section, be deemed to include a Malabar *tarwad*.

Renewal of promissory notes in case of dispute as to title.

13. (1) Where there is a dispute as to the title to a Government promissory note in respect of which an application for renewal has been made, the prescribed [1][authority] may—

(*a*) where any party to the dispute has obtained a final decision from a Court of competent jurisdiction declaring him to be entitled to such note, issue a renewed note in favour of such party, or

(*b*) refuse to renew the note until such a decision has been obtained, or

(*c*) after such inquiry as is hereinafter provided and consideration of the result thereof, declare by order in writing which of the parties is in [2][its] opinion entitled to such note and may, after the expiration of three months from the date of such declaration, issue a renewed note in favour of such party in accordance with the provisions of section 12, unless within that period [3][it] has received notice that proceedings have been instituted by any person in a Court of competent jurisdiction for the purpose of establishing a title to such note.

Explanation.—For the purposes of this sub-section the expression 'final decision' means a decision which is not appealable or a decision which is appealable but against which no appeal has been filed within the period of limitation allowed by law.

(2) For the purpose of the inquiry referred to in sub-section (1), the prescribed [1][authority] may [4][direct one of its officers to] record, or may request the District Magistrate to record or to have recorded, the whole or any part of such evidence as the parties may produce. When such request has been made to the District Magistrate, such Magistrate may himself record or may direct any Magistrate of the first class subordinate to him, or any Magistrate of the second-class subordinate to him and empowered by general or special order of the

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LEG. REF.

[1] Substituted for 'officer' by Act XXVIII of 1937.

[2] Substituted for 'his' by *ibid.*

[3] Substituted for 'he' by *ibid.*

[4] Substituted for 'himself' by *ibid.*

NOTES.

was issued is bound to return it on the basis that it is not a good contract is inconsistent with the plain terms of the Act. It is clear that there is no failure of consideration in the case. The common law rule of indemnity, which the law normally implies, where one person acts upon the request of another, is a rule which affects obligations of a contractual nature between parties and must clearly yield to the expression of any contrary intention. The implication of such a covenant of indemnity is consistent with the provisions of the Act as to the renewal of a promissory note. No implied right of indemnity therefore exists in the case. 38 Bom.L.R. 1205=1937 B. 145.

Sec. 13. Per *Panckridge, J.*—The effect of S. 13 of the Securities Act is this: it relieves the prescribed authority of deciding on the merits of the dispute *inter partes* in a case to which the section applies. But the prescribed authority is still entitled to call upon the applicant to satisfy it of the justice of his claim from other points of view. I.L.R. (1941) 1 Cal. 328=45 C.W.N. 449=1941 Cal. 458. Where a Court of first instance has declared that the applicant is entitled to the Government promissory note for life only and the applicant is appealing against it claiming absolute ownership of the note, there is no "final decision" that the applicant is "entitled to" the note within the meaning of S. 13 of the Securities Act. The prescribed authority is therefore entitled to refuse to renew the note in the applicant's favour. I.L.R. (1941) 1 Cal. 328=45 C.W.N. 449=1941 Cal. 458. Per *Derbyshire, C. J.*—A person who is declared entitled to a Government promissory note for life only is not one "entitled to" the note within the meaning of S. 13 of the Securities Act. I.L.R. (1941) 1 Cal. 328=45 C.W.N. 449=1941 Cal. 458.

[1][Government] in this behalf, to record the evidence, and shall forward a copy thereof to the prescribed [2][authority].

Explanation.—For the purposes of this sub-section, the District Magistrate means the District Magistrate having jurisdiction in the place where interest on the promissory note is payable and, where interest is payable at a presidency-town, the Chief Presidency Magistrate, or at a place in a State in India, the Political Agent.

(3) [3][The officer of the prescribed authority] or any Magistrate acting under this section may, if he thinks fit, record evidence on oath.

Renewal of other securities.

14. Government securities other than those mentioned in sections 11 and 12 may be renewed in such circumstances and in such manner as may be prescribed.

Issue of converted, etc., securities.

15. (1) The prescribed [2][authority] may, subject to such conditions as may be prescribed, on the application of a person claiming to be entitled to a Government security or securities, on being satisfied of the justice of the claim and on delivery of the security or securities receipted in the prescribed manner and on payment of the prescribed fee, if any, convert, consolidate or sub-divide the security or securities, and issue to the applicant a new security or securities accordingly.

(2) The conversion, consolidation, or sub-division referred to in sub-section (1) may be into a security or securities of the same or different classes or of the same or different loans.

Liability in respect of promissory note renewed, etc.

16. (1) When a renewed Government promissory note has been issued under section 12, or a new Government promissory note has been issued upon conversion, consolidation or sub-division under section 15, in favour of any person, the note so issued shall be deemed to constitute a new contract between the Government and such person and all persons deriving title thereafter through him.

(2) No such renewal, conversion, consolidation or sub-division shall affect the rights as against the Government of any other person to the security or securities so renewed, converted, consolidated or sub-divided.

Discharge.

Immediate discharge in certain cases.

17. On payment by or on behalf of the Government to the holder of a bearer bond or other Government security payable to bearer of the amount expressed therein on or after the date when it becomes due, or on renewal of a bearer bond or other security payable to bearer under section 11, or on renewal of a Government promissory note under section 13, or on conversion, consolidation or sub-division of a bearer bond or other security payable to bearer under section 15, the Government shall be discharged in the same way and to the same extent as if such bearer bond, promissory note or other security were a promissory note payable to bearer :

LEG. REF.

[1] Substituted by A. O., 1937, for "Local Government".

[2] Substituted for 'officer' by Act XXVIII of 1937.

[3] Substituted for The prescribed 'officer' by *ibid.*

NOTES.

Sec. 16.—*See* 38 Bom.L.R. 1205=1937 Bom. 145 cited under S. 12, *supra*. The holder of a renewed Government promissory note obtains a new promise from Government free from any equities or disputes which might have attached to the prior note. S. 16 of the Securities Act provides in terms that a renewed Government promissory note is to be deemed to constitute a new contract between the Government and the person to whom it is issued and all persons deriving title through him. 65 I.A. 286=42 C. W.N. 957=I.L.R. 1938 Bom. 502=1938 P.C. 191=(1938) 2 M.L.J. 169 (P.C.).

Provided that, in the case of a Government promissory note renewed under section 13, nothing in this section shall be deemed to bar a claim against the Government in respect of such note by any person who had no notice of the proceedings under that section, or who derives title through any such person.

Discharge of other cases.

18. Save as otherwise provided in this Act—

(*i*) on payment of the amount due on a Government security on or after the date on which payment becomes due, or

(*ii*) when a duplicate security has been issued under section 10, or

(*iii*) when a renewed security has been issued under section 12 or section 13, or a new security or securities has or have been issued upon conversion, consolidation or sub-division under section 15,

the Government shall be discharged from all liability in respect of the security or securities so paid or in place of which a duplicate, renewed, or new security or securities has or have been issued—

(*a*) in the case of payment—after the lapse of six years from the date on which payment was due ;

(*b*) in the case of a duplicate security—after the lapse of six years from the date of the publication under sub-section (3) of section 10 of the list in which the security is first mentioned, or from the date of the last payment of interest on the original security, whichever date is later ;

(*c*) in the case of a renewed security or of a new security issued upon conversion, consolidation or sub-division—after the lapse of six years from the date of the issue thereof.

Discharge in respect of interest.

[1][18-A. Save as otherwise expressly provided in the terms of a Government security, no person shall be entitled to claim interest on any such security in respect of any period which has elapsed after the earliest date on which demand could have been made for the payment of the amount due on such security.]

Summary procedure in certain cases.

Procedure on death of holder of securities not exceeding an aggregate value of five thousand rupees.

19. (1) If within six months of the death of a person who was entitled to a Government security or securities (other than a security payable to bearer), the nominal or face value of which does not in the aggregate exceed five thousand rupees, probate of the will or letters of administration of the estate of such person or a certificate granted under the Succession Certificate Act, 1889, is not produced to the prescribed [2][authority], such [2][authority] may, after inquiry in the manner provided in sub-sections (2) and (3) of section 13, determine who is the person entitled to the security or securities or to administer the estate of the deceased, and may—

(*a*) in the case of any such security relating to a loan due for repayment, authorise payment of the amount due thereon to such person ; and

(*b*) in the case of any such security relating to a loan not due for repayment, authorise, in the case of a promissory note, the renewal of such promissory note in favour of such person, or, in the case of stock, the registration of the name of such person in substitution for the name of the deceased.

LEG. REF.

[1]Inserted by Act XXI of 1927.

[2]Substituted for 'officer' by Act XXVIII of 1937.

NOTES.

Sec. 18.—The effect of S. 18 of the Indian Securities Act is that even if the true owner of a promissory note has an enforceable claim against the Government according to the general law of limitation, he cannot enforce such payment after the lapse of six years from the date on which the payment is due under the promissory note. It does not extend the period of limitation up to the period of six years, if the person is otherwise disabled from suing because of the ordinary law of limitation. 1933 M. 376 =64 M.L.J. 172.

(2) Upon the payment or renewal of any promissory note in accordance with sub-section (1), the Government shall be discharged from all liability in respect of the note so paid or renewed; and any substitution of names made in accordance with clause (*b*) of sub-section (1), shall, for the purposes of any claim against the Government, be deemed to have effected a valid transfer of the stock in respect of which it was made.

(3) Any creditor or claimant against the estate of the deceased may recover his debt or claim out of money paid to any person under sub-section (1) and remaining in his hands unadministered in the same manner and to the same extent as if the said person had obtained letters of administration of the estate of the deceased, and nothing in this section shall affect any claim of an executor or administrator or other representative of the deceased against such person other than a claim to recover amounts lawfully paid by him in due course of administration of the estate of the deceased.

Securities held by minors and lunatics.

Payment in case of securities held by minors and lunatics.

20. Where a Government security stands in the name of or is held by a minor or a person who is insane and incapable of managing his affairs, the interest accruing thereon, or the capital sum payable in respect thereof on the maturity or discharge of the loan, shall, where, in the case of interest payable, the nominal value of the security, or in other cases the sum payable, does not exceed five thousand rupees, be paid in such manner as may be prescribed, and on any payment being so made, the Government shall, notwithstanding any provision of any enactment to the contrary, be discharged from all liability in respect thereof.

Indemnity.

Indemnity.

21. Notwithstanding anything in section 10, 12, 13 or 15, the prescribed [1][authority] may in any case arising under any of those sections—

(*i*) issue a duplicate or renewed security or convert, consolidate or sub-divide a security or securities upon the applicant giving the prescribed indemnity against the claims of all persons claiming under the original security or under the security or securities so renewed, converted, consolidated or sub-divided, as the case may be, or

(*ii*) refuse to issue a duplicate or renewed security or to convert, consolidate or sub-divide a security or securities unless such indemnity is given.

LEG. REF.

[1] Substituted for 'officer' by Act XXVIII of 1937.

NOTES.

Sec. 21.—As a matter of construction the view cannot be accepted, that S. 21 of the Securities Act, has not merely the positive effect of giving the special right which it provides for, but has also the negative effect of cutting out the implied right of indemnity which undoubtedly existed in the repealed Act of 1886. A statute is *prima facie* to be construed as changing the law to no greater extent than its words or necessary intendment require. S. 21 was not in the earlier Act of 1886. If it had been intended by the insertion of that section in the Act of 1920 to abrogate the common law indemnity existing under the repealed Act the Legislature would it seems have used words clearly expressing that intention. There is no reason to justify reading in or implying such words. On the contrary S. 21 has to be construed as giving an added statutory right, which is different from and in no way inconsistent with the common law right. 65 I.A. 286=I.L.R. (1938) Bom. 502=1938 P.C. 191=(1938) 2 M.L.J. 169 (P.C.). A broker forged the indorsement of the holder of a Government promissory note and subsequently indorsed it for value to the Bank of India. The Bank obtained a renewal of it under S. 21 of the Securities Act. No security was taken from the Bank. Subsequently the holder of the original note sued the Secretary of State in conversion and obtained damages. In a suit by the Secretary of State against the Bank of India for indemnity against the loss it was held that he was entitled to be indemnified against the loss incurred as the Public Debt office had issued the renewed note only on the request of the Bank of India. The fact that no security was taken at the time of the renewal could not affect this right of indemnity. 65 I. A. 286=I.L.R. (1938) Bom. 502=48 L.W. 8=1938 P.C. 191=(1938) 2 M.L.J. 169 (P.C.).

Inspection of registers, books and documents.

Inspection of documents.

22. No person shall be entitled to inspect, or to receive information derived from, any Government security in the possession of the Government or from any book, register or other document kept or maintained by or on behalf of Government in relation to Government securities or any Government security, save in such circumstances and manner and subject to such conditions as may be prescribed.

Penalty.

Penalty.

23. (1) If any person, for the purposes of obtaining for himself or for any other person payment of interest or of the capital sum due in respect of any Government security, or the issue of a duplicate security, or the renewal, conversion, consolidation or sub-division of a Government security or securities, makes to any authority under this Act a statement which is false and which he either knows to be false or does not believe to be true, he shall be punishable with imprisonment for a term which may extend to six months, or with fine or with both.

(2) No Court shall take cognizance of any offence under sub-section (1) save on the complaint of the authority to whom the false statement was made.

Rules.

Power to make rules.

24. (1) The [1][Government] may after previous publication make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :—

(*a*) the manner in which payment of interest in respect of Government securities is to be made and acknowledged ;

(*b*) the circumstances in which Government securities must be renewed before further payment of interest thereon can be claimed ;

(*c*) the form which in and the conditions subject to which Government securities may be issued to the rulers of States in India ;

(*d*) the fees to be paid in respect of the issue of duplicate securities and of the renewal, conversion, consolidation and sub-division of Government securities ;

(*e*) the proof which is to be produced by persons applying for duplicate securities ;

(*f*) the form and manner of publication of the notification mentioned in sub-section (2) of section 10 and the manner of publication of the list mentioned in sub-section (3) of that section ;

(*g*) the [2][authority which] is to exercise all or any of the powers and to perform all or any of the duties referred to in sections 10, 11, 12, 13, 15, 19 and 21 ;

(*h*) the manner of making the inquiry mentioned in the proviso to section 12 ;

(*i*) the circumstances and the manner in which securities other than securities payable to bearer or promissory notes are to be renewed ;

(*j*) the form in which securities delivered for discharge, renewal, conversion, consolidation or sub-division are to be receipted ;

(*k*) the conditions subject to which securities may be converted, consolidated or sub-divided ;

(*l*) the person to whom and the manner in which payments are to be made in respect of Government securities standing in the name of, or held by, minors or persons who are insane and incapable of managing their affairs ;

LEG. REF.

[1]Substituted for 'Governor-General in Council' by A.O., 1937.

[2]Substituted for 'officer who' by Act XXVIII of 1937.

(*m*) the taking of indemnities against adverse claims of third parties from persons who receive payment of interest or of the capital sum due in respect of Government securities, or who obtain duplicate, renewed, converted, consolidated or sub-divided securities ;

(*n*) the manner in which any document relating to Government securities or any indorsement on a Government promissory note may, on the demand of any person who from any cause is unable to write, be executed on his behalf ;

(*o*) enabling holders of Government stock to be described in the registers of such stock as trustees, and either as trustees of any particular trust or as trustees without qualification, and for the recognition of powers of attorney granted by holders of stock so described ;

(*p*) the holding of Government stock by the holders of offices other than public offices, and the manner in which and the conditions subject to which stock so held may be transferred ;

(*q*) the mode of attestation of documents relating to Government stock ;

(*r*) generally, all matters connected with the grant of duplicate, renewed, converted, consolidated and sub-divided securities ; and

(*s*) the circumstances and the manner in which and the conditions subject to which inspection of securities, books, registers and other documents may be allowed or information therefrom may be given under section 22.

(3) Nothing in any rule made under clauses (*o*) and (*p*) shall, as between any trustees or as between any trustees and the beneficiaries under a trust, be deemed to authorise the trustees to act otherwise than in accordance with the rules of law applying to the trust and the terms of the instrument constituting the trust ; and neither the Government nor any person holding or acquiring any interest in any Government stock, shall, by reason only of any entry in any register maintained by or on behalf of the Government in relation to any Government stock or any stockholder, or of anything in any document relating to Government stock, be affected with notice of any trust or of the fiduciary character of any stockholder or of any fiduciary obligation attaching to the holding of any Government stock.

(4) Rules made under this section shall be published in the *Official Gazette*, and shall thereupon have effect as if enacted in this Act.

25. [*Repeals.*] *Repealed by the Repealing Act*, 1927 (*XII of* 1927).

[1][26. For the avoidance of doubt it is hereby declared that the rights of all persons in relation to Indian securities are to be determined, in connection with all such questions as are dealt with by this Act in relation to Government securities, by the law of British India.]

Provision as to Indian securities.

THE SHERIFFS' FEES ACT (VIII OF 1852).[2]

N.B.—Sections 1 to 7 of this Act shall cease to have effect. [*Vide* Government of India (Adaptation of Indian Laws) Order, 1937.]

[*6th February*, 1852.

An Act for remunerating the Sheriffs of Calcutta, Madras and Bombay for the execution of Mufassal Process under Act XXIII of 1840.[3]

For making better provision for the Sheriffs of Calcutta, Madras and Bombay, in remuneration for the execution of legal process issued by Courts out of the said towns, respectively :

Preamble.

It is enacted as follows :—

LEG. REF.

[1]Added by A.O., 1937.

[2]Short-title, "The Sheriffs' Fees Act, 1852. *See* the Indian Short-Titles Act (XIV of 1897), General Acts, Vol. IV. This Act has been declared, by notification under S. 3 of the Scheduled Districts Act XIV of 1874 General Acts, Vol. II to be in force in the following Scheduled Districts, namely :—Sindh. . . . . *See* Gazette of India, 1880, Pt. I, p. 67 The Districts of Hazaribhagh, Lohardaga (now the Ranchi District, *see* Calcutta Gazette, 1899, Pt. I, p. 44), and Manbhum, and Pargana Dhalbbum and the Kolhan in the District of Singbhum . . . . . *See* Gazette of India, 1881, Pt. I, p. 504.

[3] *See* now the Code of Criminal Procedure (Act V of 1898), S. 3, General Acts, Vol. V. *See also* the Code of Civil Procedure (Act V of 1908), S. 3, General Acts, Vol. VI.

[* * * * *]

8. If any person taken in execution on any such process shall escape out of the legal custody of the Sheriff, the Sheriff shall not be liable to an action of debt for such escape, but shall be liable only to an action upon the case for damages in consequence of such escape sustained by the person or persons at whose suit the prisoner was taken.

Liability of Sheriff in case of escape of person taken in execution.

THE INDIAN SLAVERY ACT (V OF 1843).[1]

Year.	No.	Short title.	Amendment.
1843	V	The Indian Slavery Act ...	Repealed in part, XVI of 1874.

[7*th April*, 1843.

An Act for declaring and amending the Law regarding the condition of Slavery within the Territories of the East India Company.

1. [2][* * * *] No public officer shall in execution of any decree or order of Court, or for the enforcement of any demand of rent or revenue, sell or cause to be sold any person, or the right to the compulsory labour or services of any person, on the ground that such person is in a state of slavery.

Prohibition of sale of persons or right to his labour on ground of slavery.

2. [3][* * * *] No rights arising out of an alleged property in the person and services of another as a slave shall be enforced by any Civil or Criminal Court or Magistrate within the territories of the East India Company.

Bar to enforcement of rights arising out of alleged property in person as a slave.

3. [3][* * * *] No person who may have acquired property by his own industry, or by the exercise of any art, calling or profession or by inheritance, assignment, gift or bequest, shall be dispossessed of such property or prevented from taking possession thereof on the ground that such person or that the person from whom the property may have been derived was a slave.

Bar to dispossession of property on ground of owner's slavery.

4. [2][* * * *] Any act which would be a penal offence if done to a free man shall be equally an offence if done to any person on the pretext of his being in a condition of slavery.

Penal offence against alleged slave.

LEG. REF.

[1] SHORT TITLE.—"The Slavery Act, 1843." *See* the Short Titles Act, 1897 (XIV of 1897).

Declared in force—throughout British India except as regards the Scheduled Districts Act XV of 1874, section 3; in the Sonthal Parganas, Reg. III. of 1872, S. 3 as amended by Reg. III of 1899, S. 3; in the Chittagong Hill Tracts Reg. I of 1900, S. 4; in the Arakan Hill District Reg. I of 1916, S. 2; in Upper Burma (except the Shan States) Act XIII of 1898, S. 4; in Kachin Hill Tracts as regards Hill tribes, Reg. I of 1895, S. 3; in certain tracts in the Chin Hills Reg. V of 1896, S. 3; in British Baluchistan Reg. II of 1913, S. 3.

[2] Repealed by Act XVI of 1874.

[3] The words "And it is hereby declared and enacted that" in Ss. 2 and 3 and the words "and it is hereby enacted that" in S. 4 were repealed by the Repealing Act, 1874 (XVI of 1874).

NOTES.

Sec. 1.—"Slavery" does not necessarily connote an absolute and unlimited power over the life of another but falls short of it. 41 M. 334 =42 I.C. 977=33 M.L.J. 430 (7 M. 277; 2 A. 723, Cons.). *See also* 12 B.H.C.R. 156. Construction of Act and its scope and operation, *see* 3 B. 422=6 I.A. 137 (P.C.); effect of the Act on rules of Mahomedan Law as to slaves. 3 B. 422. Slavery of a pupil to his spiritual guru is not legal. 10 M. 375.

Secs. 1 to 3.—Construction and scope of—Effect on rules of Mahomedan Law. 3 B. 422

THE SOCIETIES REGISTRATION ACT (XXI OF 1860).[1]

Year.	No.	Short title.	Amendment.
1860	XXI	The Societies Registration Act.	Repealed in part, XVI of 1874. Amended, VII of 1913 ; XXII of 1927. Government of India (Adaptation of Indian Laws) Order, 1937.

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[21*st May*, 1860.

An Act for the Registration of Literary, Scientific and Charitable Societies.[2]

WHEREAS it is expedient that provision should be made for improving the legal condition of societies established for the promotion of literature, science, or the fine arts, or for the diffusion of useful knowledge, [3][the diffusion of political education] or for charitable purposes; It is enacted as follows :—

Preamble.

1. Any seven or more persons associated for any literary, scientific or charit-

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LEG. REF.

[1] SHORT TITLE.—"The Societies Registration Act, 1860." *See* The Indian Short Titles Act 1897 (XIV of 1897).

S. 14 am. (in Bombay), Bombay Act II of 1912. Declared in force—throughout British India except as regards the Scheduled Districts, Act XVI of 1874, S. 3 ; in Upper Burma (except the Shan States), Act XIII of 1898, S. 4 ; in British Baluchistan, Reg. II of 1913, S. 3.

[2] The Act (with the exception of the first four sections) is based on the Literary and Scientific Institutions Act, 1854 (17 & 18 Vict., c. 112), S. 20, *et seq*.

It has been declared to be in force in the whole of British India, except as regards the Scheduled Districts, by S. 3 of the Laws Local Extent Act, 1874 (XV of 1874).

[3] Inserted by Act XXII of 1927.

NOTES.

=6 I.A. 137 (P.C.). This Act bars enforcement of rights based on the status of slavery. 12 B. H.C.R. 155. Agreement to become slave of another is void. 10 M. 375. Religious Association—Powers of the majority—Resolution for preferential treatment of the guru of one particular mutt opposed to the basic principle of equality of treatment—Invalidity. 53 M. 737=1931 M. 12=59 M.L.J. 770. The *position of a society registered under the Societies Registration Act* is more like that of a club or a joint stock company. The position of members of the society is similar to that of the shareholders of a company. In order to redress a wrong done to the society or to recover moneys due to it, the action must *prima facie* be brought by the Society itself. Where the persons against whom the relief is sought themselves hold and control the majority and will not permit an action to be brought in the name of the society, the Courts will allow the members complaining to bring an action in their own names. But in such an action the plaintiffs cannot have a larger right to relief than the society itself would have if it were the plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the members or are capable of being confined by the majority. The cases in which the minority can maintain an action are confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the society. 43 Bom.L.R. 562=1941 Bom. 312.

Sec. 1: INSTITUTION NOT REGISTERED UNDER

Societies formed by memorandum of association and registration.

able purpose, or for any such purpose as is described in section 20 of this Act, may by subscribing their names to a memorandum of association and filing the same with the Registrar of Joint-stock Companies [1][* *] form themselves into a society under this Act.

Memorandum of association.

2. The memorandum of association shall contain the following things (that is to say)—

the name of the society;

the objects of the society;

the names, addresses, and occupations of the governors, council, directors, committee or other governing body to whom, by the rules of the society, the management of its affairs is entrusted.

A copy of the rules and regulations of the society, certified to be a correct copy by not less than three of the members of the governing body, shall be filed with the memorandum of association.

Registration. Fees.

3. Upon such memorandum and certified copy being filed, the registrar shall certify under his hand that the society is registered under this Act. There shall be paid to the registrar for every such registration a fee of fifty rupees, or such smaller fee as the [2][Provincial Government] may, from time to time, direct; and all fees so paid shall be accounted for to the [2][Provincial Government].

Annual list of managing body to be filed.

4. Once in every year, on or before the fourteenth day succeeding the day on which, according to the rules of the society, the annual general meeting of the society is held, or, if the rules do not provide for an annual general meeting, in the month of January, a list shall be filed with the Registrar of Joint-stock Companies of the names, addresses and occupations of the governors, council, directors, committee or other governing body then entrusted with the management of the affairs of the society.

Property of society how vested.

5. The property, movable and immovable, belonging to a society registered under this Act, if not vested in trustees, shall be deemed to be vested, for the time being, in the governing body of such society, and in all proceedings, civil and criminal, may be described as the property of the governing body of such society by their proper title.

Suits by and against societies.

6. Every society registered under this Act may sue or be sued in the name of the president, chairman, or principal secretary, or trustees, as shall be determined by the rules and regulations of the society, and, in default of such determination, in the name of such person as shall be appointed by the governing body for the occasion:

Provided that it shall be competent for any person having a claim or demand against the society, to sue the president or chairman, or principal secretary or the trustees thereof, if on application to the governing body some other officer or person be not nominated to be the defendant.

LEG. REF.

[1] The words and figures " under Act XIX of 1857" were repealed by the Repealing Act, 1874 (XVI of 1874).

[2] Substituted by A.O., 1937.

NOTES.

—PROMISSORY NOTE IN FAVOUR OF—SUIT ON—MAINTAINABILITY.—Where the object of an institution is to help the cause of education from the income and interest arising out of trust fund, the institution has to be registered under this Act in order to enable it to acquire a juridical status. In the absence of non-registration under the Act, all the trustees in charge of the fund have alone a legal status. Therefore a promissory note if executed in favour of the institution, which has no juridical status, is void, and no suit can be instituted to enforce it on behalf of the institution. 151 I.C. 893=1934 N. 207.

Secs. 3 and 19.—Presumption that an association is duly registered arises not on the certificate of registration granted by the Registrar under S. 3, but on the copies of the Rules and Regulations and Memorandum certified under S. 19, which constitutes them *prima facie* evidence of the matters therein contained. 65 I.A. 106=I.L.R. (1938) Lah. 53=42 C.W.N. 930=1938 P.C. 73=(1938) 1 M.L.J. 35 9) P.C.

Suits not to abate.

7. No suit or proceeding in any Civil Court shall abate or discontinue by reason of the person by or against whom such suit or proceedings shall have been brought or continued, dying or ceasing to fill the character in the name whereof he shall have sued or been sued, but the same suit or proceedings shall be continued in the name of or against the successor of such person.

Enforcement of judgment against society.

8. If a judgment shall be recovered against the person or officer named on behalf of the society, such judgment shall not be put in force against the property, movable or immovable, or against the body of such person or officer, but against the property of the society.

The application for execution shall set forth the judgment, the fact of the party against whom it shall have been recovered having sued or having been sued, as the case may be, on behalf of the society only, and shall require to have the judgment enforced against the property of the society.

Recovery of penalty accruing under bye-law.

9. Whenever by any bye-law duly made in accordance with the rules and regulations of the society, or, if the rules do not provide for the making of bye-laws, by any bye-law made at a general meeting of the members of the society convened for the purpose (for the making of which the concurrent votes of three-fifths of the members present at such meeting shall be necessary), any pecuniary penalty is imposed for the breach of any rule or bye-law of the society, such penalty, when accrued, may be recovered in any Court having jurisdiction where the defendant shall reside, or the society shall be situate, as the governing body thereof shall deem expedient.

Members liable to be sued as strangers.

10. Any member who may be in arrear of a subscription which, according to the rules of the society he is bound to pay, or who shall possess himself of or detain any property of the society in a manner or for a time contrary to such rules, or shall injure or destroy any property of the society, may be sued for such arrear or for the damage accruing from such detention, injury or destruction of property in the manner hereinbefore provided.

Recovery by successful defendant of costs adjudged.

But if the defendant shall be successful in any suit or other proceeding brought against him at the instance of the society, and shall be adjudged to recover his costs, he may elect to proceed to recover the same from the officer in whose name the suit shall be brought, or from the society, and in the latter case shall have process against the property of the said society in the manner above described.

Members guilty of offences punishable as strangers.

11. Any member of the society who shall steal, purloin or embezzle any money or other property, or wilfully and maliciously destroy or injure any property of such society, or shall forge any deed, bond, security for money, receipt, or other instrument, whereby the funds of the society may be exposed to loss, shall be subject to the same prosecution, and, if convicted, shall be liable to be punished in like manner as any person not a member would be subject and liable to in respect of the like offence.

Societies enabled to alter, extend or abridge their purposes.

12. Whenever it shall appear to the governing body of any society registered under this Act, which has been established for any particular purpose or purposes, that it is advisable to alter, extend or abridge such purpose to or for other purposes within the meaning of this Act, or to amalga-

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NOTES.

Secs. 9 and 10.—Section 9 of the Act implies that in order to be recoverable in a Court of law, a penalty imposed by a society registered under the Act, must have been imposed in the manner, prescribed by the Act, and not otherwise that is to say, for breach of a bye-law duly made in accordance with the rules and regulations of the society, or, if the rules do not provide for the making of bye-laws, a bye-law made at a general meeting by the concurrent votes of three-fifths of the members present. The mere fact that certain rules framed by a Society before registration are lodged after

mate such society either wholly or partially with any other society, such governing body may submit the proposition to the members of the society in a written or printed report and may convene a special meeting for the consideration thereof according to the regulations of the society ;

but no such proposition shall be carried into effect unless such report shall have been delivered or sent by post to every member of the society ten days previous to the special meeting convened by the governing body for the consideration thereof, nor unless such proposition shall have been agreed to by the votes of three-fifths of the members delivered in person or by proxy, and confirmed by the votes of three-fifths of the members present at a second special meeting convened by the governing body at an interval of one month after the former meeting.

Provision for dissolution of societies and adjustment of their affairs.

13. Any number not less than three-fifths of the members of any society may determine that it shall be dissolved, and thereupon it shall be dissolved forthwith, or at the time then agreed upon, and all necessary steps shall be taken for the disposal and settlement of the property of the society, its claims and liabilities, according to the rules of the said society applicable thereto, if any, and, if not, then as the governing body shall find expedient, provided that, in the event of any dispute arising among the said governing body or the members of the society, the adjustment of its affairs shall be referred to the principal Court of original civil jurisdiction of the district in which the chief building of the society is situate ; and the Court shall make such order in the matter as it shall deem requisite :

Assent required.

Provided that no society shall be dissolved unless three-fifths of the members shall have expressed a wish for such dissolution by their votes delivered in person, or by proxy, at a general meeting convened for the purpose :

Government consent.

Provided that whenever [1][any] Government is a member of, or a contributor to, or otherwise interested in, any society registered under this Act, such society shall not be dissolved [1][without the consent of the Government of the Province of registration].

Upon a dissolution no member to receive profit.
Clause not to apply to Joint-stock Companies.

14. If upon the dissolution of any society registered under this Act there shall remain after the satisfaction of all its debts and liabilities any property whatsoever, the same shall not be paid to or distributed among the members of the said society or any of them, but shall be given to some other society, to be determined by the votes of not less than three-fifths of the members present personally or by proxy at the time of the dissolution, or, in default thereof, by such Court as aforesaid : provided, however, that this clause shall not apply to any society which shall have been founded or established by the contributions of shareholders in the nature of a Joint-stock Company.

Member defined.
Disqualified members.

15. For the purposes of this Act a member of a society shall be a person who, having been admitted therein according to the rules and regulations thereof, shall have paid a subscription or shall have signed the roll or list of members thereof, and shall not have resigned in accordance with such rules and regulations ; but in all proceedings under this Act, no person shall be entitled to vote or to be counted as a member whose subscription at the time shall have been in arrear for a period exceeding three months.

16. The governing body of the society shall be the governors, council, direc-

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LEG. REF.

[1] Substituted by A.O., 1937.

NOTES.

registration, with the Registrar under S. 18, does not invest them with any special legal orce. 80 I.C. 556=1925 O. 107.

Sec. 16.—No suit lies by a member of the public against the managing committee of a society or institution, which is managed by public subscriptions, to enforce the right to subscribe and to be admitted to the privilege of membership. 34 I.C. 263=19 O.C. 15.

Governing body defined.

tors, committee, trustees or other body to whom by the rules and regulations of the society the management of its affairs is entrusted.

Registration of societies formed before Act. Assent required.

17. Any company or society established for a literary, scientific or charitable purpose, and registered under [1]Act XLIII of 1850, or any such society established and constituted previously to the passing of this Act but not registered under the said [1]Act XLIII of 1850, may at any time hereafter be registered as a society under this Act; subject to the proviso that no such company or society shall be registered under this Act unless an assent to its being so registered has been given by three-fifths of the members present personally, or by proxy, at some general meeting convened for that purpose by the governing body.

In the case of a company or society registered under [1]Act XLIII of 1850, the directors shall be deemed to be such governing body.

In the case of a society not so registered, if no such body shall have been constituted on the establishment of the society, it shall be competent for the members thereof, upon due notice, to create for itself a governing body to act for the society thenceforth.

Such societies to file memorandum, etc., with Registrar of Joint-stock Companies.

18. In order to any such society as is mentioned in the last preceding section obtaining registry under this Act, it shall be sufficient that the governing body file with the Registrar of Joint-stock Companies [2][* *] a memorandum showing the name of the society, the objects of the society, and the names, addresses and occupations of the governing body, together with a copy of the rules and regulations of the society certified as provided in section 2, and a copy of the report of the proceedings of the general meeting at which the registration was resolved on.

Inspection of documents. Certified copies.

19. Any person may inspect all documents filed with the Registrar under this Act on payment of a fee of one rupee for each inspection, and any person may require a copy or extract of any document, or any part of any document, to be certified by the Registrar, on payment of two annas for every hundred words of such copy or extract; and such certified copy shall be *prima facie* evidence of the matters therein contained in all legal proceedings whatever.

To what societies Act applies.

20. The following societies may be registered under this Act:—Charitable societies, the military orphan funds or societies established at the several presidencies of India, societies established for the promotion of science, literature, or the fine arts, for instruction, the diffusion of useful knowledge, [3][the diffusion of political education], the foundation or maintenance of libraries or reading-rooms for general use among the members or open to the public, or public museums and galleries of painting and other works of art, collections of natural history, mechanical and philosophical inventions, instruments, or designs.

LEG. REF.

[1] Act XLIII of 1850 repealed by Indian Companies Act (X of 1866), S. 219.

[2] The words and figures "under Act XIX of 1857," were repealed by the Repealing Act (XVI of 1874).

[3] Inserted by Act XXII of 1927.

NOTES.

Sec. 18.—*See* 1925 O. 107, *supra*.

Sec. 20.—A religious society, which had for its object the control and management of and the protection of property appertaining to a certain public mosque is a society which may egally be registered under this Act. 28 A. 384= 3 A.L.J. 124. "Charitable", meaning of. *See also* 41 P.R. 1917. A society or association having among its objects the conduct of the affairs of a mosque by collecting subscriptions, paying the salaries of the servants and incurring expenses for the upkeep of the mosque and doing every thing which the manager of a mosque is required to do may be formed and properly and validly registered under the Societies Registration Act. A religious society would also be a charitable society if it should be for the benefit of the public. Where a society is formed for certain purposes whose paramount object is charitable, the fact that some of the purposes may not be strictly charitable, but religious

THE INDIAN SOLDIERS (LITIGATION) ACT (IV OF 1925).

Year.	No.	Short title.	Amendment.
1925	IV	The Indian Soldiers (Litigation) Act, 1925.	Repealed in part, XII of 1927; Amended XIV of 1932, Government of India (Adaptation of Indian Laws) Order, 1937.

The following is the Statement of Objects and Reasons appended to the Bill :—See *Fort St. George Gazette*, Part III, 23rd September, 1924, pp. 265-266.

In May, 1915, an ordinance was made and promulgated for the special protection in respect of civil and revenue litigation of Indian soldiers serving under war conditions. The ordinance was replaced in the first instance by an Act passed in 1915, and the provisions of that Act were re-enacted, with certain amendments, in the Indian Soldiers (Litigation) Act, 1918. The Act applies to Indian soldiers serving under war conditions and provides *inter alia* for the postponement in certain circumstances of civil and revenue proceedings in which an unrepresented Indian soldier is a party and for the deductions from periods during which they have been serving under war conditions. The Act applies to service under war conditions during the war and for six months thereafter, and to other services which are declared by the Governor-General in Council to be service under war conditions.

2. It was suggested that the protection required in these matters by Indian soldiers serving under war conditions was also required by Indian soldiers serving on garrison duty overseas and in certain areas in India. Local Governments and Administrations were accordingly consulted in regard to the working of the existing Act. They unanimously accepted the suggestion to extend its operation, and are of opinion that it has been found to be of real benefit to the absent Indian soldier. and that the hardship caused to the general public has been negligible. Certain of the authorities consulted were, however, of opinion that the Act should not apply to suits, appeals or applications to enforce a right of pre-emption nor to cases in which the interests of the soldier in the proceeding are either identical with or are adequately represented by another party to the proceeding. The former restriction on the application of the Act may be compared with the exception in S. 8 of the Indian Limitation Act, 1908, and the restriction was proposed because of the insecurity of tenure which is involved by the present law in such cases. This Bill has been prepared to give effect to these suggestions, and it has been considered expedient to provide for them by consolidating and amending the law on the subject.

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would not render the society any the less a charitable society, if the purpose is one intended to benefit the public or a considerable portion of the public. The improvement of Islamic education and the rendering of pecuniary help to the poor musaffars, etc., are charitable purposes. When the society has this object also, the fact that one of the objects of the society is also to conduct the affairs of the mosque which does not involve the performance of any religious service by the members thereof cannot render the society a society formed for religious purposes, when it is found that the society concerns itself only with the management of the secular affairs of the institution. Such a society therefore would be a charitable society under the Act and its registration thereunder is perfectly legal and valid. There is nothing in Mahomedan Law to prevent such an incorporated society from performing the functions of a mutawalli of a mosque. If such a society holds the office of mutawalli and is in management of the mosque as such in derogation of the right of a person claiming to be mutawalli, for over 12 years, it acquires that right by prescription. I.L. R. (1940) Mad. 671=50 L.W. 734=1940 Mad. 167=(1940) 2 M.L.J. 436.

[26*th February* 1925.

An Act to consolidate and amend the law to provide for the special protection in respect of civil and revenue litigation of Indian soldiers serving under special conditions.

WHEREAS it is expedient to consolidate and amend the law to provide for the special protection in respect of civil and revenue litigation of Indian soldiers serving under special conditions ; It is hereby enacted as follows :—

Short title, extent and commencement.

1. (1) This Act may be called THE INDIAN SOLDIERS (LITIGATION) ACT, 1925.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force on the first day of April, 1925.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) " Court " means a Civil or Revenue Court ;

(*b*) " Indian soldier " means any person subject to the Indian Army Act, 1911 [1][or the Indian Air-Force Act, 1932] ;

(*c*) " prescribed " means prescribed by rules made under this Act ; and

(*d*) " proceeding " includes any suit, appeal or application.

Circumstances in which an Indian soldier shall be deemed to be serving under special conditions.

3. For the purposes of this Act, an Indian soldier shall be deemed to be or, as the case may be, to have been serving—

(*a*) under special conditions—when he is or has been serving under war conditions, or overseas, or at any place in Persia, Tibet, Afghanistan, Kashmir, Nepal or China, or with any unit the headquarters of which are situated at any place in Chitral, Waziristan, the North-West Frontier Province or British Baluchistan which is more than fifty miles distant by road from the nearest railway station ;

(*b*) under war conditions—when he is or has been, at any time during the continuance of any hostilities declared by the Central Government by notification in the Official Gazette to constitute a state of war for the purposes of this Act or at any time during a period of six months thereafter,—

(*i*) serving out of India,

(*ii*) under orders to proceed on field service,

(*iii*) serving with any unit which is for the time being mobilised, or

(*iv*) serving under conditions which, in the opinion of the prescribed authority, preclude him from obtaining leave of absence to enable him to attend a Court as a party to any proceeding, or when he is or has been at any other time serving under conditions service under which has been declared by the Central Government by notification in the Official Gazette to be service under war conditions ; and

[2][(*c*) overseas—when he is or has been serving in any place outside India (other than Ceylon) the journey between which and British India is ordinarily undertaken wholly or in part by sea.]

Particulars to be furnished in plaints, applications or appeals to Court.

4. If any person presenting any plaint, application or appeal to any Court has reason to believe that any adverse party is an Indian soldier who is serving under special conditions, he shall state the fact in his plaint, application or appeal.

Power of Collector to intervene in case of unrepresented Indian soldier.

5. If any Collector has reason to believe that any Indian soldier, who ordinarily resides or has property in his district and who is a party to any proceeding pending before any Court, is unable to appear therein, the Collector may certify the facts in the prescribed manner to the Court.

LEG. REF.

[1] Added by Act XIV of 1932, Schedule.

[2] New clause (*c*) was substituted by A.O., 1937.

NOTES.

Sec. 4.—The fact that a person has not been joined as a defendant deliberately, does not defeat the provisions of the Act. 4 U.P.L.R. (O.C.) 47.

Notice to be given in case of unrepresented Indian soldier.

6. If a Collector has certified under section 5, or if the Court has reason to believe, that an Indian soldier, who is a party to any proceeding pending before it, is unable to appear therein, and if the soldier is not represented by any person duly authorized to appear, plead or act on his behalf, the Court shall suspend the proceeding, and shall give notice thereof in the prescribed manner to the prescribed authority :

Provided that the Court may refrain from suspending the proceeding and issuing the notice if—

(*a*) the proceeding is a suit, appeal or application instituted or made by the soldier, alone or conjointly with others with the object of enforcing a right of pre-emption, or

(*b*) the interests of the soldier in the proceeding are, in the opinion of the Court, either identical with those of any other party to the proceeding and adequately represented by such other party or merely of a formal nature.

Postponement of proceedings.

7. If, on receipt of a notice under section 6, the prescribed authority certifies in the prescribed manner to the Court in which the proceeding is pending that the soldier in respect of whom the notice was given is serving under special conditions, and that a postponement of the proceeding in respect of the soldier is necessary in the interests of justice, the Court shall thereupon postpone the proceeding in respect of the soldier for the prescribed period, or, if no period has been prescribed, for such period as it thinks fit.

Court may proceed when no certificate received.

8. If, after issue of notice under section 6, the prescribed authority either certifies that the soldier is not serving under special conditions or that such postponement is not necessary, or fails to certify, in the case of a soldier resident in the district in which the Court is situate, within two months or, in any other case, within three months from the date of the issue of the notice that such postponement is necessary, the Court may, if it thinks fit, continue the proceeding.

Postponement of proceedings against Indian soldier on leave.

9. When any document purporting to be signed by the Commanding Officer of an Indian soldier who is a party to any proceeding is produced by or on behalf of the soldier before the Court in which the proceeding is pending and is to the effect that the soldier—

(*a*) is on leave of absence for a period not exceeding two months, and is on the expiration of his leave to proceed on service under special conditions, or

(*b*) is on sick leave for a period not exceeding three months, and is on the expiration of his leave to rejoin his unit with a view to proceeding on service under special conditions,

the proceeding in respect of such soldier may, in any case such as is referred to in the proviso to section 6, and shall, in any other case, be postponed in the manner provided in section 7.

Power to set aside decrees and orders passed against an Indian soldier serving under war or special conditions.

10. (1) In any proceeding before a Court in which a decree or order has been passed against any Indian soldier whilst he was serving under war conditions or at any time after the 1st day of April, 1925, whilst he was serving under any special conditions, the soldier may apply to the Court which passed the decree or order for an order to set aside the same, and, if the Court, after giving an opportunity to the opposite party of being heard, is satisfied that the interests of justice require that the decree or order should be set aside as against the soldier, the Court shall, subject to such conditions, if any, as it thinks fit to impose, make an order accordingly.

NOTES.

Sec. 6.—No notice to the prescribed authority is necessary in a case where an Indian soldier appears in a case through his own pleader, who however refused to produce evidence but continued to attend the case. 79 I.C. 225. Decree holder joining army after decree—Extension of time cannot be allowed. 25 O.C. 74=68 I. C. 205.

Sec. 10.—Compromise Signed by some of the agents— Application to set aside— C. P. Code, O. 47, R. 1. 75 I.C. 262=27 C.W.N. 193.

(2) No such application shall be entertained unless it is made within two months from the expiry of the first period of thirty days after the date of the decree or order, or where the summons or notice was not duly served on the applicant, after the date on which the applicant had knowledge of the decree or order, during no part of which the soldier was serving under special conditions :

Provided that the provisions of section 5 of the Indian Limitation Act, 1908, shall apply to such applications.

(3) When the decree or order in respect of which an application under sub-section (1) is made is of such a nature that it cannot be set aside as against the soldier only, it may be set aside as against all or any of the parties against whom it has been made.

(4) Where a Court sets aside a decree or order under this section, it shall appoint a day for proceeding with the suit, appeal or application, as the case may be.

Modification of law of limitation where Indian soldier serving under war or special conditions is a party.

11. In computing the period of limitation prescribed by the Indian Limitation Act, 1908, or any other law for the time being in force for any suit, appeal or application to any Court, any party to which is or has been an Indian soldier, the time during which the soldier has been serving under war conditions since the 4th day of August, 1914, or under any special conditions since the 1st day of April, 1925, shall be excluded :

Provided that this section shall not apply in the case of any suit, appeal or application instituted or made with the object of enforcing a right of pre-emption.

Power of Court to refer question as to whether service was under war or other special conditions.

12. If any Court is in doubt whether, for the purposes of section 10 or section 11, any Indian soldier is or was at any particular time serving under war or other special conditions, it may refer the point for the decision of the prescribed authority, and the certificate of that authority shall be conclusive evidence on the point.

Rule-making power.

13. The [1][Central Government] after consulting the HighCourt [2][concerned], may by notification in the Official Gazette make rules to provide for all or any of the following matters, namely:—

(*a*) the manner and form in which any notice or certificate under this Act shall be given ;

(*b*) the period for which proceedings or any class of proceedings shall be postponed under section 7 ;

(*c*) the persons who shall be the prescribed authorities for the purposes of this Act ;

(*d*) any other matter which is to be or may be prescribed ; and

(*e*) generally, any matters incidental to the purposes of this Act.

Power to apply the provisions of the Act to other persons in the service of the Crown.

14. [3][As respects the Provincial Public Services, the Provincial Government, and in other cases, the Central Government] may, by notification in the Official Gazette, direct that all or any of the provisions of this Act shall apply to any other class of persons in the service of His Majesty specified in such notification in the same manner as they apply to Indian soldiers.

15. [*Repealed by Act XII of* 1927.]

LEG. REF.

[1]Substituted for 'Local Government' b A.O., 1937.

[2]Inserted by *ibid.*

[3]Substituted for 'Governor-General in Council, by *ibid.*

NOTES.

Sec. 11.—S. 11 of the old Act (1918) applies only where the plaintiff is an Indian soldier and it does not become applicable by the mere fact that he was a soldier at the time when the cause of action arose. 1924 L. 395. Section applies only where plaintiff is an Indian soldier at the time of action. *See* 1923 L. 465 ; 4 L. 323= 1923 L. 656. He must be in active service at the time of suit. 5 L.L.J. 174=1923 L. 455; 72 I.C. 107 ; 73 I.C. 817. In order to attract the operation of S. 11, plaintiff must show that he was serving abroad on war conditions before the expiry of the period of limitation. 67 I.C. 379.

THE SPECIAL MARRIAGE ACT (III OF 1872).[1]

Year.	No.	Short title.	Amendment.
1872	III	The Special Marriage Act, 1872.	Repealed in part, XVI of 1874; XII of 1876. Amended VI of 1886, S. 29; XXXVIII of 1920; XXX of 1923; Government of India (Adaptation of Indian Laws) Order, 1937.

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FOURTH SCHEDULE.—[*Repealed.*]

[22*nd March*, 1872.

An Act to provide a form of marriage in certain cases.

Preamble.

WHEREAS it is expedient to provide a form of marriage for persons who do not profess the Christian, Jewish, Hindu, Muhammadan, Parsi, Buddhist, Sikh, or Jaina religion, [2][and for persons who profess the Hindu, Buddhist, Sikh or Jaina religion] and to legalize certian marriages the validity of which is doubtful; It is hereby enacted as follows :—

Local extent.

1. This Act extends to the whole of British India.

[*Commencement.*] *Rep. by the Repealing Act*, 1874 (*XVI of* 1874).

2. Marriages may be celebrated under this Act between persons neither of

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LEG. REF.

[1]Short title : The Special Marriage Act, 1872 *See* the Indian Short Titles Act (XIV of 1897), General Act, Vol. IV.

There was no Statement of Objects and Reasons; the Bill as introduced was published in the *Gazette of India*, 1868, p. 1403; for the Report of the Select Committee, dated 21st December, 1871, see *ibid.*, 1871, Pt. V, p. 519; for discussions in Council, see *ibid.*, 1868, Supplement, pp. 890 and 1197; *ibid.*, 1871, Extra-Supplement, pp. 16 and 42; *ibid.*, 1872, Supplement, pp. 2, 57, 193 and 26[1].

[2] Inserted by Act XXX of 1923.

NOTES.

Sec. 1: SCOPE OF ACT.—*See* U.B.R. (1892 1896), Vol. II, p. 338; 1 Ind. Jur. (N.S.) 290-d. A Hindu, by becoming a Brahmo, does not cease to be a Hindu. 26 C.W.N. 799=49 I.C. 1069=1923 C. 265. Special Marriage Amendment Act, 1923, is not retrospective. 30 Bom. L.R. 139=1928 B. 74. Where parties are married under this Act, succession is regulated by the personal law and not by the Succession Act. 1928 B. 74.

Sec. 2.—It is clear from S. 2 of the Special Marriage Act that two classes of persons only may be married under this Act, *viz.*, (1), persons who do not profess any of the religions mention-

Conditions upon which marriages under Act may be celebrated.

whom professes the Christian or the Jewish' or the Hindu or the Muhammadan, or the Parsi or the Buddhist, or the Sikh or the Jaina religion, [1][or between persons each of whom professes one or other of the following religions, that is to say, the Hindu, Buddhist, Sikh, or Jaina religion] upon the following conditions :—

(1) neither party must, at the time of the marriage, have a husband or wife living ;

(2) the man must have completed his age of eighteen years, and the woman her age of fourteen years according to the Gregorian calendar ;

(3) each party must, if he or she has not completed the age of twenty-one years, have obtained the consent of his or her father or guardian to the marriage ;

(4) the parties must not be related to each other in any degree of consanguinity or affinity which would, according to any law to which either of them is subject, render a marriage between them illegal.

1st Proviso.—No such law or custom, other than one relating to consanguinity or affinity, shall prevent them from marrying.

2nd Proviso.—No law or custom as to consanguinity shall prevent them from marrying, unless a relationship can be traced between the parties through some common ancestor, who stands to each of them in a nearer relationship than that of great-great-grandfather, or great-great-grandmother, or unless one of the parties is the lineal ancestor, or the brother or sister of some lineal ancestor, of the other.

Appointments of Marriage Registrars.

3. The Provincial Government may appoint one or more Registrars under this Act, either by name or as holding any office for the time being, for any portion of the territory subject to its administration. The officer so appointed shall be called " Registrar of Marriages under Act III of 1872 " and is hereinafter referred to as " the Registrar". The portion of territory for which any such officer is appointed shall be deemed his district.

One of the parties to intended marriage to give notice to Registrar.

4. When a marriage is intended to be solemnized under this Act, one of the parties must give notice in writing to the Registrar before whom it is to be solemnized.

The Registrar to whom such notice is given must be the Registrar of a District within which one at least of the parties to the marriage has resided for fourteen days before such notice is given.

Such notice may be in the form given in the first schedule to this Act.

Notice to be filed and copy entered in the Marriage Notice Book.

5. The Registrar shall file all such notices and keep them with the records of his office, and shall also forthwith enter a true copy of every such notice in a book to be for that purpose furnished to him by the [2][Provincial Government,] to be called the " Marriage Notice Book under Act III of 1872 " and such book shall be open at all reasonable times without fee, to all persons desirous of inspecting the same.

LEG. REF.

[1] The words within the brackets were inserted by Act XXX of 1923.

[2] Substituted by A.O., 1937.

NOTES.

ed in the first part of that section, and (2) persons each of whom professes one or other of the four religions mentioned in the second part of that section. There cannot, therefore, be a marriage celebrated under this Act between a person who professes the Hindu religion and a person who does not profess any one or other of the following four religions, *viz.*, the Hindu, Buddhist, Sikh or Jain religion. A suit to declare such a marriage null and void can be brought in the High Court in its ordinary original civil jurisdiction and need not be brought in its matrimonial jurisdiction. I.L.R. (1939) 1 Cal. 201 = 43 C.W.N. 215 = 1939 Cal. 544.

Sec. 3.—Where a Registrar is appointed to solemnise marriages between Arya Samajists, a solemnisation by such a Registrar of a marriage between parties neither of whom were Arya Samajists is invalid. I.L.R. (1940) All. 99 = 1940 A.L.J. 228 = 1940 All. 308 (F.B.).

Sec. 4.—*See* U.B.R. (1897-1901), Vol. II, p. 488.

Objection to marriage.

6. Fourteen days after notice of an intended marriage has been given under section 4, such marriage may be solemnized unless it has been previously objected to in the manner hereinafter mentioned.

Any person may object to any such marriage on the ground that it would contravene some one or more of the conditions prescribed in clauses (1), (2), (3) or (4) of section 2.

The nature of the objection made shall be recorded in writing by the Registrar in the register, and shall, if necessary, be read over and explained to the person making the objection, and shall be signed by him or on his behalf.

Procedure on receipt of objection.

7. On receipt of such notice of objection, the Registrar shall not proceed to solemnize the marriage until the lapse of fourteen days from the receipt of such objection, if there be a Court of competent jurisdiction open at the time, or if there be no such Court open at the time, until the lapse of fourteen days from the opening of such Court.

Objector may file suit.

The person objecting to the intended marriage may file a suit in any Civil Court having local jurisdiction (other than a Court of Small Causes) for a declaratory decree, declaring that such marriage would contravene some one or more of the conditions prescribed in clauses (1), (2), (3) or (4) of section 2.

Certificate of filing of suit to be lodged with Registrar.

8. The officer before whom such suit is filed shall thereupon give the person presenting it a certificate to the effect that such suit has been filed. If such certificate be lodged with the Registrar within fourteen days from the receipt of notice of objection, if there be a Court of competent jurisdiction open at the time, or, if there be no such Court open at the time, within fourteen days of the opening of such Court, the marriage shall not be solemnized till the decision of such Court has been given and the period allowed by law for appeals from such decision has elapsed ; or, if there be an appeal from such decision, till the decision of the Appellate Court has been given.

If such certificate be not lodged in the manner and within the period prescribed in the last preceding paragraph, or if the decision of the Court be that such marriage would not contravene any one or more of the conditions prescribed in clauses (1), (2), (3) or (4) of section 2, such marriage may be solemnized.

If the decision of such Court be that the marriage in question would contravene any one or more of the conditions prescribed in clauses (1), (2), (3) or (4) of section 2, the marriage shall not be solemnized.

Court may fine when objection not reasonable.

9. Any Court in which any such suit as is referred to in section 7 is filed may, if it shall appear to it that the objection was not reasonable and *bona fide*, inflict a fine, not exceeding one thousand rupees, on the person objecting, and award it, or any part of it, to the parties to the intended marriage.

Declaration by parties and witnesses.

10. Before the marriage is solemnized, the parties and three witnesses shall, in the presence of the Registrar, sign a declaration in the form contained in the second schedule to this Act. If either party has not completed the age of twenty-one years, the declaration shall also be signed by his or her father or guardian, except in the case of a widow, and, in every case, it shall be countersigned by the Registrar.

NOTES.

Sec. 10.—*See* 19 C. 289. The words "when the parties are of full age" and the words "when the bridegroom is of full age and the bride minor" in Bengal Forms Nos. 1622 and 1623 respectively which have been adopted without the slightest legal justification in suppression of the statutory form are misleading inasmuch as a party may have attained the age of majority according to the personal law to which he or she is subject and still be under the age of 21 years and therefore incapable of contracting a marriage under the Act except with the father's or guardian's consent. A marriage between a bride below 21 years and a bridegroom over 20 years solemnised in Bengal Form No. 1622, without the bride's guardian's or father's consent is invalid. 1942 Cal. 42.

Marriage how to be solemnized.

11. The marriage shall be solemnized in the presence of the Registrar and of the three witnesses who signed the declaration. It may be solemnized in any form, provided that each party says to the other, in the presence and hearing of the Registrar and witnesses, "I, [*A*], take thee, [*B*], to be my lawful wife (*or* husband)".

Place where marriage may be solemnized.

12. The marriage may be celebrated either at the office of the Registrar or at such other place, within reasonable distance of the office of the Registrar, as the parties desire: Provided that the Provincial Government may prescribe the conditions under which such marriages may be solemnized at places other than the Registrar's office, and the additional fees to be paid thereupon.[1]

Certificate of marriage.

13. When the marriage has been solemnised, the Registrar shall enter a certificate thereof in a book to be kept by him for that purpose and to be called the "Marriage Certificate Book under Act III of 1872," in the form given in the third schedule to this Act, and such certificate shall be signed by the parties to the marriage and three witnesses.

Transmission of certified copies of entries in marriage certificate book to the Registrar-General of Births, Deaths, and Marriages.

[2][13-A. The Registrar shall send to the Registrar-General of Births, Deaths and Marriages for the territories within which his district is situate, at such interval as the [2][Provincial Government] from time to time directs[3], a true copy certified by him, in such form as the [2][Provincial Government] from time to time prescribes, of all entries made by him in the said marriage certificate book since the last of such intervals.[4]]

Fees.

14. The Provincial Government shall prescribe the fees to be paid to the Registrar for the duties to be discharged by him under this Act.[5]

The Registrar may, if he think fit, demand payment of any such fee before the solemnization of the marriage or performance of any other duty in respect of which it is payable.

The said Marriage-Certificate Book shall at all reasonable times be open for inspection, and shall be admissible as evidence of the truth of the statements therein contained. Certified extracts therefrom shall on application be given by the Registrar on the payment to him by the applicant of a fee to be fixed by the Provincial Government for each such extract.

Penalty on married person marrying again under Act.

15. Every person who, being at the time married, procures a marriage of himself to be solemnized under this Act, shall be deemed to have committed an offence under section 494 or section 495 of the Indian Penal Code, as the case may be; and the marriage so solemnized is void.

Punishment of bigamy.

16. Every person married under this Act who, during the lifetime of his or her wife or husband, contracts any other marriage, shall be subject to the penalties provided in sections

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LEG. REF.

[1] For rules framed under this section for—(*a*) Assam, *see* Rules Manual, Ed. 1893. p. 27; (*b*) United Provinces of Agra and Oudh, *see* notification quoted at page 42 of the North-Western Provinces and Oudh List of Local Rules and Orders, Ed. 1894.

[2] S. 13-A was inserted by S. 29 of the Births, Deaths and Marriages Registration Act (VI of 1886). The words "Local Government" were substituted for "Governor-General in Council" by Act XXXVIII of 1920 which were again replaced by the words "Provincial Government" by A.O., 1937.

[3] For orders issued under this section, see *Gazette of India*, 1889, Supplement, p. 921.

[4] As to duty of the Registrar-General to make and keep indexes of the certified copies sent to his office under this section, *see* the Births, Deaths and Marriages Registration Act (VI of 1886), S. 7.

[5] For scales of fees to be paid to Registrars of Marriages prescribed by—(*a*) the Government of Bombay, *see* B.R. and O.; (*b*) Burma, see *Burma Gazette*, 1902, Pt. I, p. 737; (*c*) Chief Commissioner, Central Provinces, *see* C. P. R. and O.; (*d*) Government, United Provinces, *see* notification quoted at p. 42 of the North-Western Provinces and Oudh List of Local Rules and Orders, Ed. 1894.

494 and 495 of the Indian Penal Code for the offence of marrying again during the lifetime of a husband or wife, whatever may be the religion which he or she professed at the time of such second marriage.

Indian Divorce Act to apply.

17. The Indian Divorce Act shall apply to all marriages contracted under this Act, and any such marriage may be declared null or dissolved in the manner therein provided, and for the causes therein mentioned, or on the ground that it contravenes some one or more of the conditions prescribed in clauses (1), (2), (3) or (4) of section 2 of this Act.

Law to apply to issue of marriages under Act.

18. The issue of marriages solemnized under this Act shall, if they marry under this Act, be deemed to be subject to the law to which their fathers were subject as to the prohibition of marriages by reason of consanguinity and affinity, and the provisos to section 2 of this Act shall apply to them.

Saving of marriages solemnized otherwise than under Act.

19. Nothing in this Act contained shall affect the validity of any marriage not solemnized under its provisions; nor shall this Act be deemed directly or indirectly to affect the validity of any mode of contracting marriage; but, if the validity of any such mode shall hereafter come into question before any Court, such question shall be decided as if this Act had not been passed.

20. [*Registry of Marriages contracted before passing of Act.*] *Rep. by the Repealing Act*, 1876 (*XII of* 1876).

Penalty for signing declarations or certificates containing false statements.

21. Every person making, signing or attesting any declaration or certificate prescribed by this Act, containing a statement which is false, and which he either knows or believes to be false or does not believe to be true, shall be deemed guilty of the offence described in section 199 of the Indian Penal Code.

Effect of certain marriages on coparcenary.

[1][22. The marriage under this Act of any member of an undivided family who professes the Hindu, Buddhist, Sikh or Jaina religion shall be deemed to effect his severance from such family.

LEG. REF.

[1] Ss. 22 to 26 were added by Act XXX of 1923.

NOTES.

Sec. 21.—The burden of proving that the declaration made by the deponent under the Act was false lies heavily upon the prosecution. 11 O.W.N. 404=1934 O. 155. The offence contemplated in S. 21 only deals with the declaration of a profession of want of belief in the Christian, Jewish, Hindu, Muhammadan, Parsi, Buddhist, Sikh or Jain religion at the time when the declaration is made. A person may be born to parents professing one of these religions and may even have been practising the tenets of one of them up to the time of his marriage, but if at the time when he contracts a marriage under the Act, he makes a declaration that he does not profess any of these religions, then it cannot be said against him that, because he was born in the Christian, Jewish, Hindu, Muhammadan, Parsi, Buddhist, Sikh or Jain religion, and had not formally renounced any of these religions before he made his declaration, he is guilty of an offence under S. 21 of the Specific Marriage Act, read with S. 199, Penal Code. The declaration does not amount to an abjuration for all purposes of personal law of the declarant, but merely as a statement for purposes of the Act itself. (49 C. 1069; 31 C. 11; 1928 B. 74 and 16 A. 212, Ref.). 11 O.W.N. 404=1934 O. 155.

Secs. 22 to 26.—SCOPE—IF RETROSPECTIVE—"WHO MARRIES"—EFFECT OF S. 24 added to the Special Marriage Act of 1872, by the amending Act of 1923, only applies to persons who marry under the Act subsequent to the amending Act. The words "who marries" in S. 24 clearly shows that the marriage contemplated is one after the date of the coming into force of the newly added S. 24. In other words, S. 24 cannot have any retrospective effect and will not apply to persons who solemnised their marriage under the Special Marriage Act before its amendment in 1923. 69 M.L.J. 81. Ss. 22 to 26, added by the Amendment Act (XXX of 1923), to the Special Marriage Act (1872), are not retrospective and do not affect the rights of offspring of marriages contracted under the old law of 1872; the Act is a substantive law affecting the status and rights of property. 15 P.L.T. 380=1934 P. 427. The words 'who marries" in S. 24 of the amended Special Marriage Act (1923), mean "who shall marry hereafter," namely from the date of the enactment which brought that section into existence, and cannot mean "who has married under the Act hereby amended." Therefore, a person who has married under the old

Rights of succession in certain cases of marriage under Act.

23. A person professing the Hindu, Buddhist, Sikh or Jaina religion who marries under this Act shall have the same rights and be subject to the same disabilities in regard to any right of succession to any property as a person to whom the Caste Disabilities Removal Act, 1850, applies :

Provided that nothing in this section shall confer on any person any right to any religious office or service, or to the management of any religious or charitable trust.

Succession to the property of parties married under Act.

24. Succession to the property of any person professing the Hindu, Buddhist, Sikh or Jaina religion, who marries under this Act, and to the property of the issue of such marriage, shall be regulated by the provisions of the Indian Succession Act, 1865.

Person marrying under Act not to have right of adoption.

25. No person professing the Hindu, Buddhist, Sikh or Jaina religion who marries under this Act shall have any right of adoption.

Adoption by father of person marrying under Act.

26. When a person professing the Hindu, Buddhist, Sikh or Jaina religion marries under this Act, his father shall, if he has no other son living, have the right to adopt another person as a son under the law to which he is subject.]

FIRST SCHEDULE.

(*See section* 4.)

NOTICE OF MARRIAGE.

To , a Registrar of Marriages under Act III of 1872 for the District.

I hereby give you notice that a marriage under Act III of 1872 is intended to be had, within three calendar months from the date hereof, between me and the other party herein named and described (that is to say) :—

Names.	Condition.	Rank or profession.	Age.	Dwelling-place.	Length of residence.
A. B.	Unmarried Widower.	Landowner.	Of full age.	.....	23 days.
C.D.	Spinster.	.....	Minor.	.....	.....

Witness, my hand, this day of 187 .

(*Signed*) *A. B.*

SECOND SCHEDULE.

(*See section* 10).

DECLARATION TO BE MADE BY THE BRIDEGROOM.

I, *A. B.*, hereby declare as follows :—

1. I am at the present time unmarried ;

2. I do not profess the Christian, Jewish, Hindu, Muhammadan, Parsi, Buddhist, Sikh or Jaina religion : [1][or (as the case may be) I profess the Hindu, or the Buddhist, or the Sikh, or the Jaina religion].

3. I have completed my age of eighteen years :

LEG. REF.

[1] The words "or (as the case may be)..... religion" were inserted by Act XXX of 1923, S. 5.

NOTES.

Act does not cease to be governed by his personal law; and his offsprings are governed not by the date of the death of the father which might occur after the new Acts but by the date of the marriage which took place under the old Act. 15 P.L.T. 380=1934 P. 427.

4. I am not related to *C. D.* (*the bride*) in any degree of consanguinity or affinity which would according to the law to which I am subject, or to which the said *C. D.* is subject and subject to the provisos of clause (4) of section 2 of Act III of 1872, render a marriage between us illegal ;

[*And when the bridegroom has not completed his age of twenty-one years :*

5. The consent of my father [*or guardian, as the cacse may be*] has been given to a marriage between myself and *C. D.*, and has not been revoked :],

6. I am aware that, if any statement in this declaration is false, and if in making such statement I either know or believe it to be false, or do not believe it to be true, I am liable to imprisonment, and also to fine.

(*Signed*) *A B* [*the bridegroom*].

DECLARATION TO BE MADE BY THE BRIDE.

I *C D* hereby declare as follows :—

1. I am at the present time unmarried :

2. I do not profess the Christian, Jewish, Hindu, Muhammadan, Parsi, Buddhist, Sikh or Jaina religion: [1][or (as the case may be) I profess the Hindu or the Buddhist, or the Sikh or the Jaina religion :]

3. I have completed my age of fourteen years :

4. I am not related to *A B* [*the bridegroom*] in any degree of consanguinity or affinity which would, according to the law to which I am subject, or to which the said *A B* is subject, and subject to the provisos of clause (4) of section 2 of Act III of 1872, render a marriage between us illegal :

[*And when the bride has not completed her age of twenty-one years unless she is a widow :*

5. The consent of *M N*, my father [*or guardian as the case may be*] has been given to a marriage between myself and *A B* and has not been revoked] :

6. I am aware that if any statement in this declaration is false, and if in making such statement I either know or believe it to be false, or do not believe it to be true, I am liable to imprisonment, and also to fine.

(*Signed*) *C D* [*the bride*].

Signed in our presence by the above-named *A B* and *C D* :

G H,
I J, } [*three witnesses*].
K L

[*And when the bridegroom or bride has not completed the age of twenty-one years except in the case of a widow :*

Signed in my presence and with my consent by the above-named *A B* and *C D* :

M N, the father [*or* guardian] of the above-named *A B* (*or C D*, as the case may be)],

(*Countersigned*) *E. F.*

Registrar of Marriages under Act III *of* 1872 *for the District of* .

Dated the *day of* 18 .

THIRD SCHEDULE.

(*See Section* 13.)

REGISTRAR'S CERTIFICATE.

I, *E F*, hereby certify that, on the of 18 . appeared before me *A B* and *C D*, each of whom in my presence and in the presence of three credible witnesses, whose names are signed hereunder, made the declarations required by Act III of 1872, and that a marriage under the said Act was solemnised between them in my presence.

(*Signed*) *E F.*

Registrar of Marriages under Act III of 1872 *for the District of* .

(*Signed*) *A B.*,
C D.

G H,
I J, } [*three witnesses*].
K L

Dated the *day of* 18 .

FOURTH SHEDULE.

[*Rep. by the Repealing Act* 1876 (*XII of* 1876).]

THE SPECIFIC RELIEF ACT (I OF 1877).

Rep. in pt., Act XII of 1891; (locally) Act II of 1882; Act IV of 1882.
S. 32 application restricted, and rep. in pt. (locally) Act IX of 1899, Ss. 3, 21.
S. 45 (*f*) Am. Act VII of 1912, S. 7 ; Am. Act XI of 1923 ; Act X of 1927 ; Act XXI of 1929 ; Govt. of India (Adaptation of Indian Laws) Order, 1937.
Declared in force in Upper Burma (except the Shan States), Act XIII of 1898, S. 4.
S. 9 declared in force in British Baluchistan Reg. II of 1913, S. 3.

LEG. REF.

[1] Inserted by Act XXX of 1923,

THE SPECIFIC RELIEF ACT (I OF 1877).

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[*7th February*, 1877.

An Act to define and amend the law relating to certain kinds of Specific Relief.

Preamble.

WHEREAS it is expedient to define and amend the law relating to certain kinds of specific relief obtainable in civil suits; It is hereby enacted as follows :—

PART I.

PRELIMINARY.

Short title

1. This Act may be called THE SPECIFIC RELIEF ACT, 1877.[1]

Local extent.

It extends to the whole of British India, except the Scheduled Districts as defined in Act No. XIV of 1874.[2]

LEG. REF.

[1]For the Statement of Objects and Reasons, see *Gazette of India*, 1875, Pt. V, p. 258; for the Report of the Select Committee, *see ibid.*, 1876, Pt. V, p. 1445; for Discussions in Council, see *ibid.*, 1875, Suplement, pp. 981 and 1025; *ibid.*, 1876, Supplement, p. 1284, and *ibid.*, 1877, Supplement, p. 177.

[2]This Act has ceased to be of effect from 1-4-1937.

NOTES.

Sec. 1: LOCAL EXTENT.—In the Sonthal Parganas, a prayer for the specific performance of a contract can be granted on principles of justice, equity, and good conscience. 40 I.C. 174=2 P.L.J. 379; 30 I.C. 365. *See also* 13 L. W. 591=63 I.C. 114; 152 I.C. 634=67 M.L.J. 635; 14 P. 249=16 P.L.T. 83=1935 P. 1; 17 Pat.L.T. 115=1936 P. 171; 1936 S. 119.

The Act is not exhaustive. Per *Beaumont, C. J.*—"I should be sorry to hold that the power of this Court, which is derived from the old Court of Chancery, to grant injunctions wherever just and convenient, as those words have been construed in England, has been taken away by an Act of Parliament". 33 Bom.L.R. 19=55 B. 659=1931 B. 151. A contract to be specifically enforced must be such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. 59 M. 942=1936 M. 564=70 M.L.J. 477. *See also* 42 C.W.N. 1090. *Decree for specific performance* is capable of execution by defendant as well as plaintiff. 24 Bom.L.R. 496=46 B. 990. *See also* 59 C. 501=36 C.W.N. 172=1932 C. 579; 64 M.L.J. 536=56 M. 796. Where, however, the first defendant had, in violation of his contract with the plaintiff, alienated parts of the property to the other defendants, he cannot in equity invoke the aid of the Court to compel the plaintiff to take a conveyance of his (the first defendant's) share alone or compel the other defendants against their consent to join in the conveyance to the plaintiff. 56 M. 796=1933 M. 386=64 M.L.J. 536. After a bargain of sale has been repudiated by the vendor, the purchaser claiming specific performance can, in the absence of any evidence to the contrary, easily discharge the onus about readiness and willingness by simply showing that he is still ready and willing to carry out the bargain. 1939 N.L.J. 315=1939 Nag. 173. Where specific performance of a transfer of property is decreed, title to property relates back to the date of the agreement. 49 C. 495=1922 C. 412; *see also* 40 Bom.L.R. 545=1938 B. 357; 1938 A. 432. Decree for specific relief—Form of—Contract for sale: *see* 46 M. 148=44 M.L.J. 107. The mere fact that the contract proved is different from that set up in the plaint will not entail dismissal of a suit. 31 I.C. 1. Suit for—Right of either party to contract. 38 C.L.J. 177=1923 C. 524. A suit for specific perfermance may also ask for possession to be given to the plaintiff. 16 I.C. 988=22 C.L.J. 383. Specific performance which is not beneficial to a minor will not be decreed. 4 L. 408=1924 L. 181. *See also* 45 I.C. 192; 1937 All. 456; 1934 M. 703=67 M.L.J. 635. Contract to re-sell to the vendor—Rule of construction of Indian contracts. 14 I.C. 820=15 C.L.J. 332. Where there is no consensus as to the terms of a contract a suit for specific performance of such a contract will not lie. 4 L. 408=1924 L. 181. *See also* 1934 M. 703=67 M.L.J. 635; 17 Pat.L.T. 277. (Agreement subject to assent of another being obtained); 1936 S. 26. There can be no mutuality in respect of what are known as "option contracts," until, at any rate, the party to whom the option is given has exercised the option. 1934 M. 703=67 M.L.J. 635; 118 I.C. 220=1929 S. 83. *See also* 56 M. 433=64 M.L.J. 354 (F.B.). A decree of specific peformance cannot be obtained in the case of unregistered contract of sale whith is compulsorily registrable. 67 I.C. 144=3 Lah.L.J. 173. *See also* 71 M.L.J. 641=1937 M. 22. Agreement to re-convey cannot be ignored as *nudum pactum*, and is one which is capable of being specifically enforced 1931 A.L.J. 571=1931 A. 113. *See also* 67 M.L.J 635=1934 M. 703. In a suit for specific performance the plaintiff has to allege and if the fact is traversed, he is required to prove a continuous readiness and willingness from the date of the contract to the time of the hearing to perform the contract on his part. The failure to make good the averment brings with it the inevitable dismissal of suit. 1930 P. 121; 45 C.W.N. 837. It is the duty of the plaintiff, before he can obtain relief by way of specific performance, to allege and prove that he was ready and willing to perform his part of the contract as it really was and not as he thought it to be. 136 I.C. 557=1932 L. 265. *See also* 39 Bom.L.R. 1166. (Duty of vendor to make out a marketable title.) If parties enter into an agreement for sale and the vendor makes certain representations as to his title, the conveyance which follows must be in conformity with the terms of the agreement. If that is so a Court decreeing specific perform-

Commencement.

And it shall come into force on the first day of May, 1877.

2. [*Repeal of enactments.*] *Rep. by the Amending Act*, 1891 (*XII of* 1891).

Interpretation clause.

3. In this Act, unless there be something repugnant in the subject or context,—

"obligation" includes every duty enforceable by law:

"trust" includes every species of express, implied or constructive fiduciary ownership:

"trustee" includes every person holding, expressly, by implication or constructively, a fiduciary character.

Illustrations.

(*a*) *Z* bequeaths land to *A*, "not doubting that he will pay thereout an annuity of Rs. 1,000 to *B* for his life." *A* accepts the bequest. *A* is a trustee within the meaning of this Act, for *B*, to the extent of the annuity.

(*b*) *A* is the legal, medical or spiritual adviser of *B*. By availing himself of his situation as such adviser, *A* gains some pecuniary advantage which might otherwise have accrued to *B*. *A* is a trustee, for *B*, within the meaning of this Act of such advantage.

(*c*) *A*, being *B's* banker, discloses for his own purpose the state of *B's* account. *A* is a trustee, within the meaning of this Act, for *B*, of the benefit gained by him by means of such disclosure.

(*d*) *A*, the mortgagee of certain leaseholds, renews the lease in his own name. *A* is a trustee, within the meaning of this Act, of the renewed lease, for those interested in the original lease.

(*e*) *A*, one of several partners, is employed to purchase goods for the firm. *A*, unknown to his co-partners, supplies them, at the market-price, with goods previously bought by himself when the price was lower, and thus makes a considerable profit. *A* is a trustee for his co-partners, within the meaning of this Act, of the profit so made.

(*f*) *A*, the manager of *B's* indigo-factory, becomes agent for *C*, a vendor of indigo-seed, and receives, without *B's* assent, commission on the seed purchased from *C* for the factory. *A* is a trustee, within the meaning of this Act, for *B*, of the commission so received.

(*g*) *A* buys certain land with notice that *B* has already contracted to buy it. *A* is a trustee, within the meaning of this Act, for *B*, of the land so bought.

(*h*) *A* buys land from *B*, having notice that *C* is in occupation of the land. *A* omits to make any inquiry as to the nature of *C's* interest therein. *A* is a trustee, within the meaning of this Act, for *C*, to the extent of that interest.

"Settlement" means any instrument (other than a will or codicil as defined by the Indian Succession Act) whereby the destination or devolution of successive interests in movable or immovable property is disposed of or is agreed to be disposed of:

NOTES.

ance of an agreement to sell, is bound to put the parties in the same situation in which they were on the date of the agreement. The recitals of representation in the sale deed must reflect the spirit of the agreement. 175 I.C. 761=1938 Nag. 411. In a case of specific performance by a purchaser the Court will not direct a conveyance unless the plaintiff will pay what is due. The Court can decree that and the Court will therefore in that case give relief; but if that which the plaintiff is to give on a bill for specific performance be something to be done at a future time and which the Court cannot enforce, the understood rule has always been that the Court in that case will never give relief. 1930 P. 121. *See also* 1936 Sind 119 (Contract comprising negative agreement). On passing an *order recording a compromise under O. 23, R. 3, C. P. Code*, the Court is to pass a decree not for the specific performance of the original contract but for the specific performance of the new contract to have the suit disposed of in a particular manner. But the analogy should not be carried far. There is one difference. While the Specific Relief Act gives the Court discretion to refuse specific performance of a contract, no such exception has been made in O. 23, R. 3. The specific performance of an agreement to end the suit by a compromise decree is different from specific performance of agreed acts to be performed after such decree, which the Court may or may not be in a position to supervise or enforce. If after a compromise decree is passed, the consenting party disobeys the decree, the decree-holder has his remedy under O. 21, R. 32 and where the contract is not specifically enforceable, the party may claim damages. 12 P. 359=1933 P. 306. Specific performance, suit for—Alternative prayer for refund of amount paid—Withdrawal of claim for specific performance—Damages could be awarded—Decree for refund with interest—Proper. 1939 A.L.J. 1107=1940 A. 41.

EXTENSION OF TIME.—Where in a suit for specific performance the Court grants a decree and directs the execution of *a kobala* on payment of a certain amount within a specified time, the Court has jurisdiction to grant time for the deposit of the balance of the consideration money in the event of its being satisfied after due enquiry that there had been some adequate reason for the party's failure to deposit the money within the time fixed. 37 C.W.N. 397=1933 C. 580.

REGISTRATION.—A plaintiff who has not presented his document for registration can maintain a suit either to get it registered or to compel his vendor and a third party to execute a new deed in his favour and register that new deed. The

and all words occurring in this Act, which are defined in the Indian Contract Act, 1872, shall be deemed to have the meanings respectively assigned to them by that Act.

Words defined in Contract Act.

4. Except where it is herein otherwise expressly enacted, nothing in this Act shall be deemed—

Savings.

(*a*) to give any right to relief in respect of any agreement which is not a contract :

(*b*) to deprive any person of any right to relief, other than specific performance which he may have under any contract ; or

(*c*) to affect the operation of the Indian Registration Act, on documents.

5. Specific relief is given—

Specific relief how given.

(*a*) by taking possession of certain property and delivering it to a claimant ;

(*b*) by ordering a party to do the very act which he is under an obligation to do ;

(*c*) by preventing a party from doing that which he is under an obligation not to do ;

(*d*) by determining and declaring the rights of parties otherwise than by an award of compensation ; or

(*e*) by appointing a receiver.

6. Specific relief granted under clause (*c*) of section 5 is called preventive relief.

Preventive relief.

7. Specific relief cannot be granted for the mere purpose of enforcing a penal law.

Relief not granted to enforce penal law.

PART II.

OF SPECIFIC RELIEF.

CHAPTER I.

OF RECOVERING POSSESSION OF PROPERTY.

(*a*) *Possession of Immovable Property.*

8. A person entitled to the possession of specific immovable property may recover it in the manner prescribed by the Code of Civil Procedure.[1]

Recovery of specific immovable property.

9. If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit [2][* * *] recover possession thereof, notwithstanding any other title that may be set up in such suit.

Suit by person dispossessed of immovable property.

LEG. REF.

[1] *See* now the Code of Civil Procedure (Act V of 1908).

[2] The words "instituted within six months from the date of the dispossession" were repealed by the Amending Act (XII of 1891).

NOTES.

Registration Act does not touch or affect the equitable jurisdiction possessed by the Civil Courts to pass a decree for specific performance where circumstances exist entitling the plaintiff to such a decree. 21 Pat. 150.

Sec. 8.—*See* 20 C. 834 (P.C.) ; 33 A. 174=7 A.L.J. 1070 (F. B.).

Secs. 8 and 9.—A suit based on title under S. 8 of the Act should not be allowed to be changed into one under S. 9 in which the cause of action is not title but dispossession. But this should not be taken to mean that possession cannot be evidence of title or that a finding as to title based solely on evidence of possession is illegal. 1938 A.M.L.J. 54.

Sec. 9.—*See* as to tenancies in the Punjab, the Punjab Tenancy Act (XVI of 1887), S. 51, P. and N.W. Code.

APPLICABILITY AND SCOPE.—The object of S. 9 is to discourage people from taking the law into their own hands, however good their title may be. 2 M.H.C.R. 313 ; 24 Bom.L.R. 768= 1922 B. 216 ; 58 C. 29=1931 C. 483 (2). The remedy by a possessory suit provided in S. 9 is a special remedy under the statute, the principle underlying it being that in a summary proceeding the order of which is not appealable the condition of possession before the inroad made upon a property without any process of law should be restored. A Court in a suit under S. 9 has no jurisdiction to pass a decree in favour of a plaintiff who claims an undivided share in a property from which he and his co-sharers were ousted. Such a possession is not contemplated by S. 9. 189 I.C. 878=1940 Pat. 193. *See also* 1940 All. 261. S. 9, is a special additional remedy which is available in certain circumstances but it in no way precludes the successful assertion of a possessory title in the ordinary way in a proper case, even though the suit is brought beyond the six months contemplated

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by that section. 173 I.C. 680=1937 Nag. 281. Suit for possession is maintainable also apart from the provisions of S. 9. 1927 M.W.N. 753. Suit on possessory title after a lapse of six months from the date of dispossession is maintainable independent of the provisions of the Act. 49 A. 91=1927 A. 526. S. 9 cannot be invoked unless the defendant has deprived the plaintiff of actual physical possession. The section has no application where the plaintiff is still in physical possession of the land and what is alleged is that the defendant has induced the stall-keepers to pay him the rent on market days instead of paying it to the plaintiff. The only relief that can be granted under the section is the restoration of physical possession. As the plaintiff has not lost that possession, there can be no question of restoration. 44 C.W.N. 895=1940 Cal. 464. *See also* 31 S.L.R. 28. Title suit and suit based on possessory title—Distinction is to be drawn between them—Possessory title is good against all but true owner—Title is no defence in suit under S. 9 but is conclusive in suits based on possessory title. 25 A.L.J. 857=1927 A. 669. A person who has obtained possession peacefully and has remained in undisturbed possession for a reasonable time prior to the dispossession complained of is certainly entitled to maintain a suit under S. 9. The possession required by the section cannot mean merely juridical possession or possession under a valid title; it includes possession that is at least excusable. A transferee from an occupancy tenant under a transfer which is not in accordance with law can nevertheless maintain a suit under S. 9, if he has been in undisturbed possession of the land prior to the dispossession. 20 N.L.J. 189=1937 Nag. 326. *See also* 1937 Nag. 281. Possession is sufficient evidence of right as against a trespasser. The plaintiff who proved possession for five years is entitled to recover possession from the defendant who dispossessed him and who proved neither title nor prior possession. 1931 M.W.N. 487. Where a purchaser in execution of a decree obtains possession and persons dispossessed file objections under O. 21, R. 100, C. P. Code, which are dismissed. the suit to establish the right to possession contemplated by O. 21, R. 103 is not one under S. 9. 1932 A.L.J. 812=1932 A. 703. All that the Court can do under S. 9 is to restore the plaintiffs to physical possession. It cannot direct the defendants to remove any structures which they have erected on the land or permit the plaintiffs to pull down the structures. In a suit under that section, the question of the title of the respective parties is not adjudicated upon and, therefore, it would be wrong to pass any order regarding the structures on the land. 44 C.W.N. 895=1940 Cal. 464. Decrees and orders under S. 9 were intended by the framers of the Act to be so far as possible final. Applications in revision are not in definite terms barred by the section, but it is clear that they are not to be lightly entertained. 8 O.W.N. 1341=1932 O. 39. *See also* 1938 A.L.J. 864=1938 All. 635.

SCOPE OF ENQUIRY.—In suits under S. 9, questions of title are irrelevant; the section was enacted to afford a summary remedy against persons who had taken the law into their own hands and had ejected those in possession of land otherwise than through process of law. 58 C. 29=1931 C. 483. *See also* 1940 Cal. 464; 40 L.W. 922=1935 M. 134; 116 I.C. 816=1929 A. 428; 1921 M.W.N. 437. In a suit under S. 9 the defendant will not be allowed to plead or to prove title in himself. 29 I.C. 210. *See also* 1927 M.W.N. 753. A claim for damages ought not to be joined with a claim for recovery of possession. 11 I.C. 38=8 A.L.J. 910. Prior peaceable possession furnishes a good title as against a mere trespasser. 50 C. 23. *See also* 27 I.C. 506=10 N.L.R. 188. Only possession and dispossession are to be proved by plaintiff and not title. 48 I.C. 433. *See also* 11 I.C. 38=8 A.L.J. 910; 20 C.W.N 773. The Court has no jurisdiction to go into the question of title in a possessory suit under S. 9. 18 I.C. 298=17 C.W.N. 501. In a suit under S. 9, a claim for damages cannot be combined with that for possession nor can the defendant be allowed to plead title in such a suit. (11 I.C. 38 and 29 I. C. 210, Foll.) 1939 Mar. L.R. 221 (Civ.). *See also* 1940 All. 41. In a suit under the section, neither the Court nor the defendant has any power to enlarge the scope of that suit or to treat it as if it were an ordinary suit resting on ground of title. 41 I.C. 974=23 O.C. 237. Where the plaint discloses a cause of action, the plaintiff is entitled to get a decree on the admission of the defence. 65 I.C. 644.

"SUIT".—An application in execution proceedings is included in the term 'suit' in S. 9 and therofore an appeal is not maintainable in respect of an order of the executing Court. 54 A. 777=1932 L. 416.

DISPOSSESSION IN DUE COURSE OF LAW.—A dispossession by a legal process or under provision of law which ought not to have been applied is not a dispossession in due course of law within S. 9. 18 I.C. 727; 11 I.C. 740=15 C.W.N. 956. A third person who dispossesses the landlord between one tenant's quitting and another tenant's coming in can be ejected under S. 9. 37 I.C. 20=9 Bur.L.T. 172.

"OTHERWISE THAN IN DUE COURSE OF LAW"—IF MEAN ILLEGALLY.—The words "otherwise than in due course of law" in S. 9, are not synonymous with the word "illegally". The phrase means "in the regular, normal process and effect of the law, operating on a matter which has been laid before a Court, Civil or criminal, for adjudication". It would ordinarily exclude self-help. 39 C.W.N. 394.

ORDERS UNDER CRIMINAL PROCEDURE CODE.—If a person prevented by an order under S. 144, is dispossessed, he can sue under S. 9. 64 I.C. 572. *See also* 43 I.C. 153=22 C.W.N. 931 (Order under S. 145, Cr. P. Code); 39 C.W.N. 394 (Order under S. 147, Cr. P. Code). Prior order under S. 145, Cr. P. Code—Whether operates as a bar—Decree passed in suit under Specific Relief Act—Remedy of aggrieved party. *See* 114 I.C. 543 (1)=1929 R. 21. *See also* 1936 R. 116.

INCORPOREAL RIGHTS.—This section takes out of the operation of the Act rights classed as "incorporeal rights" though they are "immovable property." 31 I.C. 450=20 C.W.N. 1158 (19 C. 544, Ref. to). *See also* 39 C.W.N. 394.

NATURE OF POSSESSION—CONSTRUCTIVE POSSESSION.—Possession of Thakur or trustee of a

Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.

No suit under this section shall be brought against the [1][Secretary of State, the Central Government, the Crown Representative or any Provincial Government].

No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.

LEG. REF.

[1]Substituted for 'Government' by A.O., 1937.

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temple—What is. 44 I.C. 497. Not only physical but constructive possession is sufficient to sustain a suit for possession under S. 9. Constructive possession goes with title. 48 I.C. 415. *See also* 16 L.W. 931=1922 M. 183.

JOINT POSSESSION.—The words of S. 9 do not refer to exclusive possession. A Court can pass a decree for joint possession in a suit under the section. I.L.R. (1940) All. 225=1940 A.L.J. 174=1940 All. 261. (29 M.L.J. 760 and 19 C.W.N. 120 not fol.) ; 19 C.W.N. 1117. *See also* 1940 Pat. 193 , 1941 N. 130.

SYMBOLICAL POSSERSSION.—Where plaintiff is not able to prove his title and alleges that symbolical possession only was with him, the suit must be dismissed. 21 I.C. 118. *See also* 18 O.C. 353=32 I.C. 202.

DISPOSSESSION.—The act of a person claiming a right of way over certain land, in passing over that land in exercise of that right does not amount to dispossession within the meaning of S. 9 so as to give the owner of the land a right of suit under the section. 39 C.W.N. 394.

PARTICULAR CASES—(*a*) LANDLORD AND TENANT. —S. 9 is not applicable to a suit by a tenant against the landlord for recovery of possession. 9 I.C. 751=14 O.C. 60. Whether dispossession of a tenant is an ouster of a landlord and the landlord can bring a possessory suit under S. 9. *See* 10 I.C. 455=15 C.W.N. 715. A landlord whose tenant has been dispossessed can bring a suit against a third party. 12 I.C. 190=5 S.L.R. 42. But *see* 22 N.L.R. 112, overruling 22 N.L.R. 30. *See also* 96 I.C. 251=1926 N. 472. An *adhiar* is very largely a tenant for the purpose of the Sp. Rel. Act. 31 I.C. 579=19 C.W.N. 1205. A suit under S. 9 by a dispossessed tenant to recover possession is not barred by the provisions of the Chota Nagpur Tenancy Act, S. 139. 13 C.L.J. 200=15 C.W.N. 387. It is unreasonable to permit an under-raiyat to be interfered with by a trespasser apart altogether from S. 9, merely because the lease from his landlord is for a longer term than the law permits. The fact that a person is in possession paying rent to his landlords is a sufficient interest in the property to enable him to recover it against the defendants, the defendants showing no title whatever, still less a better title. 118 I.C. 852 (1)=1929 C. 384. *See also* 1935 A.L.J. 813. Where the plaintiff who had been ejected by the defendant on the strength of one decree passed by the Revenue Court declaring the plaintiff to be a sub-tenant and therefore liable to ejectment sued in the Civil Court under S. 9, *held*, that the suit was not maintainable because the plaintiff had been ejected in due course of law. 53 A. 414=1931 A. 205. *See also* 40 L.W. 922=1935 M. 134. There is nothing in S. 9 to show that possession is confined to actual physical possession. In the case of a landlord and tenant the landlord is in possession through his tenant and the proper remedy where exclusive possession of immovable property is given to a tenant is for the tenant to file a suit for possession, but the landlord, if he desires to sue immediately on the possessory right, can sue in the name of the tenant and further, for an injury to the reversion, the landlord can sue in his own name. Where the tenant was dispossessed by a third party and he having refused to join the landlord in a suit for ejectment, the latter alone filed the suit and the tenant was impleaded as a party defendant, *held*, that the suit was maintainable. 51 B. 773=31 Bom.L.R. 1042. If a suit were barred under the Tenancy Act it would be immaterial whether a civil suit is brought under S. 9 of this Act or S. 9, C. P. Code. 53 A. 532=1931 All. 663.

(*b*) MASTER AND SERVANT.—The possession of a servant is that of his master and a Court has no jurisdiction to decree possession in a suit by a servant against his master. Archaka in a Hindu temple is in the position of a servant of the trustee. 1922 M.W.N. 422=16 L. W. 931.

(*c*) CO-OWNERS.—A man in joint possession is as much in physical possession of his share as the entire body of co-sharers are in physical possession of the whole. Such joint possession can be restored by the procedure under the section. 28 I.C. 570=19 C.W.N. 1117 ; 23 I.C. 618=19 C.W.N. 120 ; 44 I.C. 557. The plaint in a suit under S. 2 must aver previous possession and dispossession by the defendants otherwise than in due course of law within six months of the suit being brought, and should aver nothing else, and the only prayer in such a suit can be a prayer for the recovery of possession. The decree must either dismiss the suit or order the plaintiff to be put into possession by the defendant, such decree being based on previous possession and dispossession merely and not on title. 1940 Rang. L.R. 237=1940 Rang. 91. It may well be that a joint owner of property is still at the date of suit under S. 9, entitled to the property and would be given possession in a suit properly instituted for that purpose. But nevertheless it is open to one co-owner of property to oust the others and to obtain exclusive possession for himself. The title of others may not be extinguished when this is done, but if that ouster took place more than 6 months before the institution of the suit under S. 9, then for purposes of S. 9 that ouster would hold good. 193 I.C. 805=1941 N.L.J. 115=1941 Nag. 130. *See also* 1940 Pat. 193 ; 1940 All. 261. Co-owners—Suit by trespasser in possession—Other co-owners not parties, effect of. 18 N.L.R. 71. A suit under S. 9 is maintainable by one co-owner in possession of specific portions of survey numbers. 12 I.C. 190=5 S.L.R. 42.

(*d*) JOINT POSSESSION.—Joint possession cannot

(*b*) *Possession of Movable Property.*

Recovery of specific movable property.

10. A person entitled to the possession of specific movable property may recover the same in the manner prescribed by the Code of Civil Procedure.[1]

Explanation 1.—A trustee may sue under this section for the possession of property to the beneficial interest in which the person for whom he is trustee is entitled.

Explanation 2.—A special or temporary right to the present possession of property is sufficient to support a suit under this section.

LEG. REF.

[1] *See* now the Code of Civil Procedure (Act V of 1908).

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be decreed under S. 9. 31 I.C. 720=29 M.L.J. 760; 16 L.W. 931. *See also* 23 I.C. 618=19 C.W.N. 120. But *see* 44 I.C. 557; 1940 All. 261 *contra* (case-law reviewed); 65 I.C. 351.

(*e*) MORTGAGE.—S. 9 does not apply to a suit wherein plaintiffs claim as mortgagees in possession and defendants plead redemption. 7 Bur. L.T. 10=23 I.C. 367; 93 I.C. 657=1926 N. 290.

(*f*) LICENSE.—A licensee of land, if dispossessed by a trespasser is entitled to maintain a suit under S. 9. 17 I.C. 469=15 O.C. 317.

(*g*) LEASE OF FERRY RIGHT.—The lessee of a public ferry under S. 8 of the Northern India Ferries Act is merely the lessee of the tolls of a public ferry. The public ferry remains in the possession of the public authorities and all that is left is a right to collect the tolls of that public ferry. Such a right to collect the tolls is in no way immovable property. Accordingly, the lessee of a public ferry has no right of suit under S. 9 of this Act. 1936 A.L.J. 1122=1936 A. 856.

(*h*) CLAIM FOR MESNE PROFITS.—Claim for mesne profits cannot be made in a suit under S. 9. 2 L.W. 157=30 M.L.J. 326; 102 I.C. 661 =1927 M. 722; 5 R. 123=1927 R. 142. *See also* 40 L.W. 922=1935 M. 134; 25 I.C. 802= 16 M.L.T. 190. A suit for possession under S. 9 is no bar to a subsequent suit for mesne profits. 46 I.C. 885.

(*i*) INSOLVENCY. — Adjudication of Hindu father—Sale of property—Obstruction by son—Removal of obstruction by Insolvency Court—Suit by son for possession—Maintainability. *See* 143 I.C. 833=1933 M. 609.

(*j*) TRESPASSER—*Quaere*: Whether a person, who is *ab initio* a trespasser and in whose favour no presumption under S. 110 of Evidence Act, can possibly arise, is entitled, though out of possession for more than six months, to a decree for restoration of his possession as against another trespasser. 1936 P. 602=18 Pat.L.T. 63. Where a person enters into possession lawfully under an alienation made by a Hindu widow, and is dispossessed by a third person, the person so dispossessed is entitled to restoration of possession on the principle that his ostensible title must be presumed to be a good title until displaced by some one having a better title, and on the principle that the alienation in his favour by the widow is in fact good and valid, unless and until the nearest reversioners elect to treat it as not binding upon them. 1936 P. 602=18 Pat.L.T. 63.

PARTIES.—It is not necessary that all dispossessed persons must be co-plaintiffs in a suit in ejectment against a trespasser. It is enough if they are parties either as plaintiffs or as defendants. 13 I.C. 125. *See also* 40 L.W. 277=1934 M. 588.

PRACTICE AND PLEADING.—Suit under the section, if vitiated by material irregularity, re-trial will be ordered. 28 P.W.R. 1912=13 I.C. 6. Seeking remedy by regular suit within six months does not alter nature of suit and does not turn suit into one under S. 9. 7 Bur.L.T. 10=23 I.C. 367.

JURISDICTION.—It cannot be said that it is only a Civil Court which can entertain a suit under S. 9. 53 A. 532=1931 A. 663.

RES JUDICATA—The decision in proceedings under S. 9 will operate as *res judicata* so as to bar a later suit for possession between the same parties. The judgment in the suit under S. 9 will be admissible in evidence in the subsequent suit. 60 C. 1171=37 C.W.N. 1148=1933 C. 923.

PLEADINGS.—*See* 1927 M. 1185; 197 I.C. 554; 1927 M.W.N. 753. Where a plaintiff bases his suit on title, he cannot be given a decree for possession under S. 9 even if he has been dispossessed within six months of the date of the suit. 1942 Pesh. 8.

APPEAL.—An order passed in execution of a decree under S. 9 is not appealable. 1923 L. 105. *See also* 45 C. 519=22 C.W.N. 446; 5 P. W.R. 1917=39 I.C. 379; 28 I.C. 282; 108 I.C. 385=1928 L. 539.

REVISION.—*See* 1938 A.L.J. 864=1938 All. 635. When a suit under S. 9 is decreed, the remedy of the defendant lies not in revision but in the institution of a suit for a declaration of the defendant's title and for possession. 156 I.C. 738=1934 A. 541. An order or decree passed under S. 9, Specific Relief Act, has not been made the subject of any appeal or review and although the High Court is not precluded from interfering with such orders in revision under S. 115, C. P. Code, such interference should be confined to cases of a very exceptional nature. 1941 O.W.N. 1237=1941 A.W.R. (Rev.) 1062.

REVIEW.—A decision passed forthwith in a suit under S. 9 is not open to review by S. 9 itself. 31 I.C. 307=2 L.W. 1067. *See also* 28 I.C. 282. But *see* 18 I.C. 298=17 C.W.N. 501.

REGULAR SUIT.—S. 9 is no bar to a suit for possession against a trespasser instituted beyond 6 months. 2 Pat.L.J. 280=39 I.C. 458; 2 Pat. L.J. 61=38 I.C. 797; 46 I.C. 885; 33 I.C. 167; 63 I.C. 809. *See also* 40 A. 637; 1935 O.W.N. 230=1935 O. 268.

MISCELLANEOUS.— An order allowing the plaintiff to remove the house built on land by defendant is beyond the jurisdiction of the Court under S. 9. 28 I.C. 473. *See also* 20 A.L.J. 972

Illustrations.

(*a*) *A* bequeaths land to *B* for his life, with remainder to *C*. *A* dies. *B* enters on the land, but *C*, without *B's* consent, obtains possession of the title-deeds. *B* may recover them from *C*.

(*b*) *A* pledges certain jewels to *B* to secure a loan. *B* disposes of them before he is entitled to do so. *A*, without having paid or tendered the amount of the loan, sues *B* for possession of the jewels. The suit should be dismissed, as *A* is not entitled to their possession, whatever right he may have to secure their safe custody.

(*c*) *A* receives a letter addressed to him by *B*. *B* gets back the letter without *A's* consent. *A* has such a property therein as entitles him to recover it from *B*.

(*d*) *A* deposits books and papers for safe custody with *B*. *B* loses them and *C* finds them, but refuses to deliver them to *B* when demanded. *B* may recover them from *C*, subject to *C's* right, if any, under section 168 of the Indian Contract Act, 1872.

(*e*) *A*, a warehouse keeper, is charged with the delivery of certain goods to *Z*, which *B* takes out of *A's* possession. *A* may sue *B* for the goods.

Liability of person in possession, not as owner, to deliver to person entitled to immediate possession.

11. Any person having the possession or control of a particular article of movable property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession, in any of the following cases :—

(*a*) when the thing claimed is held by the defendant as the agent or trustee of the claimant ;

(*b*) when compensation in money would not afford the claimant adequate relief for the loss of the thing claimed ;

(*c*) when it would be extremely difficult to ascertain the actual damage caused by its loss ;

(*d*) when the possession of the thing claimed has been wrongfully transferred from the claimant.

Illustrations.

of clause (*a*)—

A, proceeding to Europe, leaves his furniture in charge of *B* as his agent during his absence. *B*, without *A's* authority, pledges the furniture to *C*, and *C*, knowing that *B* had no right to pledge the furniture, advertises it for sale. *C* may be compelled to deliver the furniture to *A*, for he holds it as *A's* trustee.

of clause (*b*)—

Z has got possession of an idol belonging to *A's* family, and of which *A* is the proper custodian. *Z* may be compelled to deliver the idol to *A*.

of clause (*c*)—

A is entitled to a picture by a dead painter and a pair of rare China vases. *B* has possession of them. The articles are of two special a character to bear an ascertainable market-value. *B* may be compelled to deliver them to *A*.

CHAPTER II.

OF THE SPECIFIC PERFORMANCE OF CONTRACTS.

(*a*) *Contracts which may be specifically enforced.*

Cases in which specific performance enforceable.

12. Except as otherwise provided in this Chapter, the specific performance of any contract may in the discretion of the Court be enforced—

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=1923 A. 81 (Suit on invalid title). Suit for possession of land and crops—Decree—Removal of crops before execution—Subsequent suit for damages. *See* 41 A. 108=48 I.C. 422. Where the *patnidar* sued the *darpatnidar* for recovery of *thoka*, *sheha*, *jamawasil* and *hastabud* papers of the *darpatnimehal* on the basis of a registered contract and claimed in the alternative Rs. 100 as damages : *Held*, that the suit was not one for recovery of movables under S. 10, but one for special performance of an executory contract, not cognizable by S. C. Court and that a second appeal was competent. 59 C. 352=1932 C. 481.

SEC. 11.—To enable a person to obtain delivery of specific movable property by suit and enforce the decree, he should allege and prove facts which give him a right to compel the delivery of the specific movables under the provisions of S. 11. 39 M. 1=29 M.L.J. 342 (F.B.); *see also* 22 M. 478; 24 B. 458. Under S. 11 a person cannot be said to be in control of movable property when he can only obtain possession of it with the assistance of a Court of law. The word "control" in the section means control exercised when the property in question is in the physical possession of an agent or bailee who is reasonably certain to carry out the directions of the principal or bailor. 43 C.W.N. 903.

SEC. 12.—Reason of the rule in the section. 33 I.C. 323 (P.C.).

SCOPE OF SECTION.—In an action for specific performance the plaintiff has necessarily to prove the existence of a concluded contract between himself and the defendant and also that he was ready and willing at all material dates to perform his part of the contract. 15 P.L.T. 469=1934 P. 518. A purchaser may sue for specific performance and ask for an enquiry into the title;

(*a*) when the act agreed to be done is in the performance, wholly or partly, of a trust ;

(*b*) when there exists no standard for ascertaining the actual damage caused by non-performance of the act agreed to be done ;

(*c*) when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief ; or

(*d*) when it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done.

Explanation.—Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved.

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by the result of which he will be bound. 52 I.C. 971. Where compensation in money is an adequate relief to the plaintiff, a decree for specific performance of the contract should not be made. Proper decree in such cases would be one for damages which should be calculated on the price of the property at the date of the breach of the contract. 56 I.A. 280=1929 P.C. 190=57 M.L.J. 205 (P.C.). To award relief of specific performance is discretionary but it is not arbitrary. Where the plaintiff sought to enforce a contract intended for the more beneficial enjoyment of his property against the transferee of the other contracting party, *held*, that a decree for specific performance should be made. 133 I.C. 541. That alternative remedy is barred by time is no ground to grant specific relief in a proper case. 1933 A. 846=56 A. 142.

ILLUSTRATIVE CASES.—Ordinarily a suit cannot be brought for specific performance of a contract to pay money. But the case of a vendor is an exception to the general rule and the Court will grant a decree for specific performance. 49 I.C. 385=35 M.L.J. 89. *See also* 2 Luck. 299 =1927 O. 55 ; 4 R. 297. A suit to recover the unpaid consideration for a mortgage is a suit for specific performance of an agreement to lend money on a mortgage and has been held not to lie. 37 P.R. 1918=45 I.C. 161. Payment of money under award is not a specific relief. 4 R. 227=1926 R. 198. Agreement to re-convey land is not one without consideration and can be specifically enforced. 129 I.C. 719=1931 A. 113. If a man promises to deliver land for an agreed price and fails to fulfil his promise, the Court can decree specific performance of the contract. 27 I.C. 732=8 Bur. L.T. 101. Where a defendant agreed to give land to plaintiff who has to help him in recovering it, *held*, the agreement can be specifically enforced because the breach of it could not be adequately compensated for by money. 1923 N. 47. Where a purchaser accepts an unregistered document, vendor is relieved from the duty of tendering a registered document. 108 I.C. 782=1928 M. 344. Injunction should not, as a rule, be granted where pecuniary compensation would give adequate relief. 11 I.C. 807=4 Bur.L.T. 165. A report of a jury constituted under S. 139, Cr. P. Code, does not amount to a contract between the parties and cannot be made a basis for a suit for specific performance. 38 I.C. 417=18 Cr.L.J. 305. In a case of a contract to transfer immovable property, money compensation cannot give adequate relief and explanation to S. 12 consequently applies. 125 I.C 169=7 O.W.N. 135. In proper cases a decree for specific performance of an agreement to grant a *kanom* can be passed. The principle that no decree could be made for specific performance of a contract to advance or take a loan will not apply to such a case. 55 M. 519=1932 M. 305=62 M.L.J. 525. *See also* 1929 M.W.N. 686=1929 M. 777. In a suit for specific performance of an agreement which contained a covenant to pass a sale-deed and also to deliver possession of the property, the plaintiff can also ask for possession of the property. 1932 B. 595=34 Bom.L.R. 1322. S. 77 of the Reg. Act does not provide the exclusive relief to the plaintiff who has paid consideration and earnest money to the defendant, who has promised the transfer to him of the immovable property. The mere failure of a suit under that section or its infructuous termination cannot operate as *res judicata* in a suit brought for the specific performance of the original contract and for recovery of possession of the immovable property. 54 A. 68=1932 A. 96. *See also* 1935 Pesh. 12. The Explanation to S. 12 makes it clear that unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money. Where the Court below exercises its discretion to grant specific relief, before a Court of appeal thinks of interfering with that discretion, it should come to the conclusion that the discretion was exercised by the Court below arbitrarily. 167 I.C. 657=1937 A. 161.

Secs. 12 and 19.—Contract to sell land—Default by vendee—Vendor leasing property to raise money for suit for enforcement—If destroys right to specific performance—Claim to damages—Sustainability as an independent claim. *See* 49 L.W. 362=1939 Mad. 547=(1939) 1 M.L.J. 436.

Sees. 12 and 22.—Indefiniteness of time to exercise option regarding relief may be ground for refusing specific performance. 56 A. 142= 1933 A.L.J. 1584=1933 A. 846.

Secs. 12 and 27-A.—An agreement to lease which does not create a present demise is not required to be in writing or registered, and can be oral and such an oral agreement can be specifically enforced under S. 12. S. 27-A which applies to a contract in writing does not operate as a bar to a claim for specific performance of the oral agreement. I.L.R. (1938) 1 Cal 563=176 I.C. 832=42 C.W.N. 97=A.I.R. 1938 Cal. 136.

Illustrations.

of clause (*a*)—

[1]*A* holds certain stock in trust for *B*, *A* wrongfully disposes of the stock. The law creates an obligation on *A* to restore the same quantity of stock to *B* and *B* may enforce specific performance of this obligation.

of clause (*b*)—

A agrees to buy, and *B* agrees to sell, a picture by a dead painter and two rare China vases. *A* may compel *B* specifically to perform this contract, for there is no standard for ascertaining the actual damage which would be caused by its non-performance.

of clause (*c*)—

A contracts with *B* to sell him a house for Rs. 1,000. *B* is entitled to a decree directing *A* to convey the house to him, he paying the purchase-money.

In consideration of being released from certain obligations imposed on it by its Act of Incorporation, a railway company contract with *Z* to make an archway through their railway to connect lands of *Z* severed by the railway, to construct a road between certain specified points, to pay a certain annual sum towards the maintenance of this road, and also to construct a siding and a wharf as specified in the contract. *Z* is entitled to have this contract specifically enforced, for his interest in its performance cannot be adequately compensated for by money; and the Court may appoint a proper person to superintend the construction of the archway, road, siding and wharf.

A contracts to sell, and *B* contracts to buy, a certain number of railway-shares of a particular description. *A* refuses to complete the sale. *B* may compel *A* specifically to perform this agreement, for the shares are limited in number and not always to be had in the market, and their possession carries with it the status of a shareholder, which cannot otherwise be procured.

A contracts with *B* to paint a picture for *B*, who agrees to pay therefor Rs. 1,000. The picture is painted. *B* is entitled to have it delivered to him on payment or tender of the Rs. 1,000.

of clause (*d*)—

A transfers without endorsement, but for valuable consideration, a promissory note to *B*. *A* becomes insolvent, and *C* is appointed his assignee. *B* may compel *C* to endorse the note, for *C* has succeeded to *A's* liabilities, and a decree for pecuniary compensation for not endorsing the note would be fruitless.

Contract of which the subject has partially ceased to exist.

13. Notwithstanding anything contained in section 56 of the Indian Contract Act, a contract is not wholly impossible of performance because a portion of its subject-matter, existing at its date, has ceased to exist at the time of the performance.

Illustrations.

(*a*) *A* contracts to sell a house to *B* for a lakh of rupees. The day after the contract is made the house is destroyed by a cyclone. *B* may be compelled to perform his part of the co ntract by paying the purchase-money.

(*b*) In consideration of a sum of money payable by *B*, *A* contracts to grant an annuity to *B* for *B's* life. The day after the contract has been made, *B* is thrown from his horse and killed. *B's* representative may be compelled to pay the purchase-money.

Specific performance of part of contract where part unperformed is small.

14. Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value, and admits of compensation in money, the Court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

Illustrations.

(*a*) *A* contracts to sell *B* a piece of land consisting of 100 bighas. It turns out that 98 bighas of the land belong to *A*, and the two remaining bighas to a stranger, who refuses to part with them. The two bighas are not necessary for the use or enjoyment of the 98 bighas, nor so important for such use or enjoyment that the loss of them may not be made good in money. *A* may be directed at the suit of *B* to convey to *B* the 98 bighas and to make compensation to him for not conveying the two remaining bighas: or *B* may be directed, at the suit of *A*, to pay to *A*, on receiving the conveyance and possession of the land, the stipulated purchase-money less a sum awarded as compensation for the deficiency.

(*b*) In a contract for the sale and purchase of a house and lands for two lakhs of rupees, it is agreed that part of the furniture should be taken at a valuation. The Court may direct specific performance of the contract notwithstanding the parties are unable to agree as to the valuation of the furniture, and may either have the furniture valued in the suit and include it in the decree for specific performance, or may confine its decree to the house.

LEG. REF.

[1] This Illustration is repealed wherever the Indian Trusts Act (II of 1882) is in force—*See* Act II of 1882, Ss. 1 and 2.

NOTES.

Secs. 14 and 15: SCOPE OF SECTIONS.—Ss. 14 and 15 refer to cases where the inability to perform the whole contract was not contemplated

15. Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, he is not entitled to obtain a decree for specific performance. But the Court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, provided that the plaintiff relinquishes all claim to further performance, and all right to compensation either for the deficiency, or for the loss or damage sustained by him through the default of the defendant.

Specific performance of part of contract where part unperformed is large.

NOTES.

by the contracting parties ; they do not apply to the case where the obstacle to the full performance is known to the parties and no provision is made to meet it. 34 I.C. 461=12 N.L.R. 69. In exercising its jurisdiction as to specific performance, a Court of equity should look at the substance and not merely at the letter of the contract. 32 I.C. 47 (P.C.). Where the property agreed to be sold was clearly described by boundaries, number and area, but was found on measurement to be incorrect in area, the purchaser cannot claim specific performance with compensation for area by which the property was found to be less. 57 I.C. 957=22 Bom, L.R. 849. S. 14 holds good even where the deficiency in area is discovered after the execution of the conveyance and the vendee is entitled to compensation. 29 M.L.J. 122=29 I.C. 394. In cases where there is an agreement to sell but the agreement is silent as to the price, it is the duty of the Court while ordering specific performance to determine by itself or through a commissioner the price which should in reason be paid. 22 I.C. 517 =109 P.W.R. 1914.

ILLUSTRATIVE CASES.—An agreement for the sale of a whole house may be enforced specifically to the extent of the vendor's share therein when it is found that he is only part owner of it. 22 I.C. 517=109 P.W.R. 1914; 42 I.C. 378=27 C.L.J. 611. *See also* 35 C.W.N. 40=131 I.C. 849=1931 C. 463. The vendor under a contract to sell lands undertook to give security against any claim set up by the reversioners in future. *Held*, that the contract could not be specifically enforced. 27 I.C. 449. *See also* 10 I.C. 678=9 M.L.T. 318. Lease—Covenant for renewal—Assignee of portion of demised land—Right to specific performance. 52 M.L.J. 443. *See also* 32 C.W.N. 439.

MINOR'S PROPERTY.—When a *de facto* guardian contracts with a third party for the sale of a minor's property, the Court will not, in the absence of sanction, direct the fulfilment of the contract as against the minors as this would amount to sanctioning a plain breach of trust on the part of the *de facto* guardian. 4 Pat.L.T. 553=1924 P. 81; 96 I.C. 949=1926 N. 493. As a rule the Court will not compel specific performance of a contract unless it can execute the whole contract. 1924 P. 81.

COMPENSATION.—Agreement to sell immovable property—Property charged before sale—Purchaser entitled to compensation. 1923 B. 271.

Secs. 14, 15 and 19.—Defendant contracting to sell entire house to plaintiff—Defendant owning only half share—Specific performance in respect of that half share—Right of plaintiff to compensation for deficiency. 1935 O.W.N. 890=1935 O. 453.

Secs. 14, 15 and 16.—Relative scope and applicability of—Prior and later agreements to sell—Single item common to both—Reliefs in respect of—Considerations. 39 Bom.L.R. 1299= 1938 Bom. 134.

Secs. 14 to 17.—Ss. 14 to 17 constitute a complete code so far as specific performance of a part of a contract is concerned. 36 C.W.N. 1002. The law on the point of specific performance must be taken to have been codified by Ss. 14 to 17, and English authorities can only be resorted to for the purposes of explaining those sections. 33 C.W.N. 314=118 I.C. 849=1929 C. 380. Where a co-sharer professes to grant a lease of the entire estate in a property of which he held a share only, in the belief that the other party had already obtained the consent of the other co-sharer it cannot be deemed that there was a concluded contract, whereby the co-sharer undertook a binding obligation, on behalf of himself and the other co-sharer to obtain the lease of the property, and even though such co-sharer may have received the *salami* fixed, no suit for specific performance to execute a *kabuliyat* and give possession can lie against the entire body of the proprietors. 59 I.A. 47=59 C. 1025=62 M.L.J. 243 (P.C.). Where a contract for sale of an entire property is made by only one of the co-sharers of that property and the other co-sharers refuse to sell their shares, specific performance of the contract would not be enforced in part for the reason that there is obvious injustice in compelling the purchaser of the entirety to take undivided part or share of the property. 188 I.C. 383=42 P. L.R. 185=1940 Lah. 159.

Sec. 15.—S. 15 is enacted for the benefit of the purchaser and cannot operate to his detriment. It gives him an option to take only a fraction of the property contracted for on payment of the full stipulated price, and if he declines to do so, he cannot be deprived of the statutory purchaser's lien under S. 55 (6) (*b*) of the T. P. Act. 1929 M. 189=56 M.L.J. 99. It is open to the plaintiff in a suit for specific performance of a contract to relinquish his claim to any part of the property in suit on the conditions specified in S. 15 at any time before the suit is *finally* decided by the Court of appeal. 119 I.C. 491. Where certain of the co-sharers granted a lease of the entire estate to the plaintiff but no *amalnama* was executed because the other co-sharers refused to join and thereupon the plaintiff sued for a declaratory decree as to the lease with consequential relief as to possession, *held* that it was not a suit for specific per-

Illustrations.

(*a*) *A* contracts to sell to *B* a piece of land consisting of 100 bighas. It turns out that 50 bighas of the land belong to *A*, and the other 50 bighas to a stranger, who refuses to part with them. *A* cannot obtain a decree against *B* for the specific performance of the contract; but if *B* is willing to pay the price agreed upon, and to take the 50 bighas which belong to *A*, waiving all right to compensation either for the deficiency or for loss sustained by him through *A's* neglect or default, *B* is entitled to a decree directing *A* to convey those 50 bighas to him on payment of the purchase-money.

(*b*) *A* contracts to sell to *B* an estate with a house and garden for a lakh of rupees. The garden is important for the enjoyment of the house. It turns out that *A* is unable to convey the garden. *A* cannot obtain a decree against *B* for the specific performance of the contract, but if *B* is willing to pay the price agreed upon and to take the estate and house without the garden, waiving all right to compensation either for the deficiency or for loss sustained by him through *A's* neglect or default. *B* is entitled to a decree directing *A* to convey the house to him on payment of the purchase-money.

Specific performance of independent part of contract.

16. When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the Court may direct specific performance of the former part.

NOTES.

formance and that S. 15 had no application. 33 C.W.N. 314=1929 C. 380. *See also* 1940 Lah. 159. Where a person is jointly interested in an estate with another person, and purports to deal with the entirety, specific performance will not be granted against him as to his share. But that is only if the contract is indivisible and the question whether the contract was divisible or not is essentially one of fact. Where an agent without authority contracted to sell to the plaintiff the shares of five co-sharers, three of whom ratified the contract and the others refused and it was clear that each party treated his share as separate and distinct, there is no impediment in law to a decree being granted to the plaintiff in respect of the shares of such of the co-sharers who ratified the agent's contract. 36 C.W.N. 1002=1933 C. 98. Where vendor agrees to sell certain property to vendee, but he is not legally entitled to sell whole of the property, the vendee can claim specific performance of contract in respect of so much of the property as is legally saleable by vendor provided the vendee consents to pay the full price. 1927 L. 773=102 I.C. 755. *See also* 89 I.C. 422=1926 L. 136; 1926 C. 744=91 I.C. 517; 35 C.W.N. 40=131 I.C. 849=1931 Cal. 463.

Secs. 15 and 16.—Contract to sell house belonging to the person contracting and another—Specific performance. *See* 104 I.C. 192=1927 M. 1109.

Secs. 15 and 18: SCOPE AND APPLICATION.—S. 15 applies only before the contract has been executed, but if it has been performed by the execution of sale-deed and delivery of possession, the rights of the parties are governed by S. 55 of the T. P. Act. 45 I.C. 669. Right to specific performance—Act does not apply after performance of contract. 4 N.L.J. 221. Where there is no completed contract between the parties, a Court cannot decree specific performance. 65 I.C. 594.

ILLUSTRATIVE CASES.—Where a person who is jointly interested in an estate with another person deals with the entire property, specific performance will not be granted against him as to his share, the plaintiff's remedy being generally only by way of damages. 21 I.C. 528=18 C. L.J. 344. *See also* 20 I.C. 247=11 A.L.J. 456; 1 I.C. 892=16 C.W.N. 93; 38 M. 1187=26 I.C. 983. But *see* 1913 M.W.N. 995, *infra*. One member of a joint Hindu family cannot agree to sell joint property without the consent of the others and such an agreement, if made, cannot be specifically enforced. 20 I.C. 247=11 A.L.J. 456. But in a suit for specific performance of a contract for the sale of joint family property by the father, it is open to the Court to grant a decree as regards the share of the father alone. 1913 M.W.N. 995=21 I.C. 778. Specific performance of a contract to sell land by a manager of a joint Hindu family, which is binding on the other members, cannot be granted under S. 15 as against the whole property, but can be granted only against the share of the alienor and that too on payment of the whole consideration agreed upon. 44 M. 605=41 M.L.J. 129 (F.B.). *See also* 42 I.C. 378; 29 I.C. 628=13 A.L.J. 739. Where the manager of a joint Hindu family, contracted to sell family lands and the contract was not binding on the other members, specific performance could not be decreed even against the manager. 37 M. 387=15 I.C. 623. Specific performance of a part of the contract affecting some of the properties in an undivided Hindu family cannot be ordered under S. 17, but in a case falling under S. 15, the Court can grant part performance. 37 M. 403=22 M.L.J. 257. Contract to sell—Pardanashin woman—No independent advice—Consideration inadequate—Straitened circumstances—Contract if can be enforced. 13 I.C. 879=16 C.W.N. 247. Where after an agreement to sell two plots of lands, it was discovered that one of them belonged to the vendor's wife, the vendee can claim performance of so much of the contract as related to the vendor's own plot with a proportionate abatement in the price settled upon. 50 C. 700=27 C.W.N. 693.

Sec. 16.—S. 16 of the Specific Relief Act does not stand isolated but is part of a group of sections, namely, Ss. 14 to 17, which are both positive and negative and which together constitute a complete code within the terms of which relief of the character in question must be brought if it is to be granted at all. To understand the full significance of S. 16, it must be read with the other Ss. 14, 15 and 17. 45 L.W. 693=1937 M. 596. The shares of the coparceners are not separate and therefore S. 16 cannot apply to a case where specific performance

Bar in other cases of specific performance of part of contract

17. The Court shall not direct the specific performance of a part of a contract except in cases coming under one or other of the three last preceding sections.

Purchaser's rights against vendor with imperfect title.

18. Where a person contracts to sell or let certain property, having only an imperfect title thereto, the purchaser or lessee (except as otherwise provided by this Chapter) has the following rights :—

(*a*) if the vendor or lessor has subsequently to the sale or lease acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest ;

(*b*) where the concurrence of other persons is necessary to validate the title, and they are bound to convey at the vendor's or lessor's request, the purchaser or lessee may compel him to procure such concurrence ;

(*c*) where the vendor professes to sell unincumbered property, but the property is mortgaged for an amount not exceeding the purchase-money, and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem the mortgage and to obtain a conveyance from the mortgagee ;

(*d*) where the vendor or lessor sues for specific performance of the contract, and the suit is dismissed on the ground of his imperfect title, the defendant has a right to a return of his deposit (if any) with interest thereon, to his costs of the suit, and to a lien for such deposit, interest and costs on the interest of the vendor or lessor in the property agreed to be sold or let.

NOTES.

is claimed in respect of a contract of sale entered into by one of the coparceners. 35 C.W.N. 40=1931 C. 463. *See also* under S. 15. Where the defendant contracted to sell a certain plot of land to the plaintiff but subsequently sold part of the plot to a *bona fide* purchaser for value, and there is nothing in the contract to suggest that part of it stands on a separate and independent footing from another port, the Court cannot direct the defendant to convey the remainder of the property to the plaintiff, S. 16 being inapplicable to the case. 66 C.L.J. 1=1938 C. 234.

Secs. 16 and 17: SCOPE OF SECTIONS.—*See* 104 I.C. 192.

Secs. 17 and 18.—[*See also* notes under S. 15.] —Where the plaintiff called upon the defendant to perform a contract different from the real agreement between them, he cannot claim performance thereof. 51 I.C. 13=29 C.L.J. 256. A Court cannot sanction a transaction devoid of any legal effect, nor can it compel a party to do an act the effect of which would be to compel a third party to bring a suit. 37 M. 403 =22 M.L.J. 257. On this section, *see also* 32 C.W.N. 1163=55 C. 1181.

Sec. 18: REASON OF THE RULE IN THE SECTION.—In cases of specific performance, a Court of Equity looks at the substance and not merely at the letter of contract. 32 I.C. 47 (P.C.). The equitable principle governing S. 18 does not apply to a Court sale. 177 I.C. 746=40 P. L.R. 202=1938 Lah. 360. Contract of sale—Compensation for misrepresentation as to subject-matter. 32 I.C. 47 (P.C.).

ILLUSTRATIVE CASES.—Specific performance of contract which requires concurrence of other persons. 35 I.C. 840. Agreement to relinquish or release a *spes successionis* cannot be specifically enforced. 108 I.C. 390. Agreement to reconvey land purchased at Court auction. 37 I. C. 761. A judgment-debtor selling the property while the Collector is exercising powers under C. P. Code, Sch. III, must convey the property to the purchaser after the Collector's management ceases and his incompetency to sell it, is removed. *See* 36 B. 510=14 Bom. L.R. 598. Agreement to purchase property in shares —No steps taken to pay purchase money— Right to specific performance. 11 I.C. 228=14 C.L.J. 159. In an agreement by defendant to transfer *inter alia* cultivating rights in *sir lands*, there is an implied covenant on his part to do all things necessary to effectuate such transfer including an application to the Revenue Officer to sanction it. The Court has jurisdiction to enforce specific performance of such agreement by requiring defendant to apply to Revenue Officer. 57 I.A. 333=58 C. 692=60 M.L.J. 223 (P.C.). Hindu father agreeing to sell ancestral property without necessity—Vendees ought to rescind. *See* 20 S.L.R. 220=1927 Sind 219. A sale of a reversionary right of succession, though at the time of the sale it does not affect a transfer of property, gives rise to a right which the Court will enforce when the inheritance falls into possession. Such a contract is enforceable in a province where the T. P. Act is not in force. 1930 L. 928. Transfer of expectancy, if can be enforced after estate falls into possession. 1926 L. 39. Agreement for lease—Return of premium—Defective title of lessor, proof of— Onus. *See* 1931 P.C. 299=61 M.L.J. 699=59 C. 699 (P.C.). On this section, *see also* 1926 M. 597 ; 1926 M. 569=50 M.L.J. 228 ; 50 I. C. 154.

Secs. 18 (d).—S. 18 (*d*) ought not to be interpreted as depriving the Court of any discretion in the matter of costs if the vendor's suit for specific performance is dismissed on the ground of imperfect title. It would be unreasonable to hold that S. 18 (*d*) lays down an absolute rule, independent of the conduct of the purchasers as defendants in the course of the suit for specific performance. S. 35, C. P. Code, clearly enables the Court to award costs in the light of the conduct of the parties in the suit,

Power to award compensation in certain cases.

19. Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance.

If in any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

NOTES.

1940 M.W.N. 14=1940 Mad. 739. *Prima facie* a purchaser is entitled under S. 18 (*d*) to interest on the sum paid by him as advance when the vendor's title is imperfect and not free from doubt; and when there is nothing in his conduct to disentitle him to the same he must be awarded interest. 1940 M.W.N. 14=1940 Mad. 739.

Secs. 18 and 25.—S. 18 lays down certain rights which the purchaser or the lessee of a property has against the vendor or lessor who having an imperfect title thereto, contracts to sell or let. It does not make the contract invalid. Where, therefore, a lessee who has no right to sub-lease without the consent of the lessor enters into a contract to sub-lease without such consent, there is no reason why the contract cannot be specifically enforced if the lessee obtains the concurrence of his lessor when called upon to do so by the sub-lessee or by the Court. An objection that the lessee is not entitled to claim specific performance of the contract to sub-lease as he did not obtain the consent of the lessor for granting a sub-lease cannot, therefore, be raised for the first time in second appeal. 42 C.W.N. 97=I.L.R. (1938) 1 Cal. 563=1938 Cal. 136.

Sec. 19.—Suit for specific performance and damages in the alternative—Plaintiff debarring himself by his action from obtaining specific performance at the hearing—Compensation cannot be awarded. 1926 P.C. 208 (1926 B. 189, affirmed) ; *see also* 152 I.C. 552=1934 Rang. 160 ; 18 N.L.J. 76 ; 46 Mys.H.C. Rep. 125=19 Mys.L.J. 1. In a suit for specific performance of an agreement, it is always possible for the Court, if it does not think fit to enforce the agreement specifically to award damages in lieu of enforcement even if not directly claimed in the plaint. 157 I.C. 26. On this section *see also* 1926 C. 1041 ; 1926 M. 173 ; 1937 Sind 263. The doctrine of mutuality which was one of the defences in English Law to an action for specific performance has been deliberately left out from the Specific Relief Act by the Legislature and it is not applicable to India. 118 I.C. 220=1929 Sind 83 ; *see also* 152 I.C. 634=67 M.L.J. 635=1934 Mad. 703. Where in a suit for specific performance of an agreement to reconvey the lands to the plaintiff, the purchase money had been deposited in Court but the defendant refused to receive the money and convey the lands. *Held*, that in granting a decree for specific performance, the Court may award the plaintiff mesne profits by way of compensation for breach of contract under the third paragraph of S. 19 and that, on the other hand, the defendant having improperly refused to receive the money, was not entitled to any interest thereon. 1933 M.W.N. 869; *see also* 152 I.C. 552=1934 Rang. 160. Decree for specific performance—No award of compensation or mesne profits—Fresh suit—Maintainability. *See* 18 N.L.J. 76. A suit may be brought for specific performance of a contract plus damages in substitution of such performance with an alternative claim for damages for breach of contract. 44 C.W.N. 541. *See also* (1939) 1 M.L.J. 436. Where in a suit filed by a purchaser for specific performance of a contract for sale of an entire property entered into by a co-sharer, and in the alternative for damages, the plaintiff recognising that the contract is incapable of being carried out as the co-sharers who are not parties to the contract refuse to sell their shares of the property confines his claim to one for damages only, his claim can be decreed. The rule that when a party has declined to accept specific performance, he becomes disentitled to claim compensation as an additional or alternative relief, has no application in such circumstances. 188 I.C. 383=42 P.L.R. 185=1940 Lah. 159. The word "compensation" used in S. 19 should be understood in the sense of damages contemplated in S. 73 of the Contract Act. As S. 73, Contract Act, says the damages are to be awarded as compensation for any loss or damage arising naturally in the usual course of things from the breach of contract. Where, therefore, on a breach of contract of sale by the vendor, the vendee as a result of a compromise with the subsequent purchaser obtains more than he deserves, the Court would be exercising its discretion rightly in refusing to award to him any more sum as damages as against the vendor, even though the contract with the vendee provides for the return of the earnest money by the vendor besides damages. I.L.R. (1938) Nag. 283=169 I.C. 887=1937 Nag. 243. As to inapplicability of section to specific performance of part of a contract, *see* 1935 O.W.N. 890=1935 Oudh 453.

Secs. 19 and 20.—The vendors of certain leasehold property had to obtain the consent of their lessors to a sale but they failed to do so. It appeared however that the purchasers had agreed to obtain the necessary consent but owing to certain dealings between the vendors and the lessors the consent was not forthcoming and meanwhile the purchasers gave notice repudiating the contract. The purchasers having sued for the recovery of the price, the defendants claimed specific performance. *Held*, that the vendor's failure to obtain sanction deprived them of their right to claim specific performance and that the purchasers were entitled to recover the purchase-money paid by them. 34 Bom.L.R. 1629. *See also* 1939 M. 547=(1939) 1 M.L.J. 436.

Secs. 19 and 21 (a).—Contract for purchase of a money claim—Claim becoming barred—Compensation. 9 L.W. 471=51 I.C. 908. *See also* 1926 M. 173=22 L.W. 786.

Secs. 19 and 21 (b).—A contract by a lessee

If in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

Compensation awarded under this section may be assessed in such manner as the Court may direct.

Explanation.—The circumstance that the contract has become incapable of specific performance does not preclude the Court from exercising the jurisdiction conferred by this section.

Illustrations.

of the second paragraph—

A contracts to sell a hundred maunds of rice to *B*. *B* brings a suit to compel *A* to perform the contract or to pay compensation. The Court is of opinion that *A* has made a valid contract and has broken it, without excuse, to the injury of *B*, but that specific performance is not the proper remedy. It shall award to *B* such compensation as it deems just.

of the third paragraph—

A contracts with *B* to sell him a house for Rs. 1,000, the price to be paid and the possession given on the 1st January, 1877. *A* fails to perform his part of the contract, and *B* brings his suit for specific performance and compensation, which is decided in his favour on the 1st January, 1878. The decree may, besides ordering specific performance, award to *B* compensation for any loss which he has sustained by *A's* refusal.

of the Explanation—

A, a purchaser, sues *B*, his vendor, for specific performance of a contract for the sale of a patent. Before the hearing of the suit the patent expires. The Court may award *A* compensation for the non-performance of the contract, and may, if necessary, amend the plaint for that purpose.

A sues for the specific performance of a resolution passed by the directors of a public company, under which he was entitled to have a certain number of shares allotted to him, and for compensation for the non-performance of the resolution. All the shares had been allotted before the institution of the suit. The Court may, under this section, award *A* compensation for the non-performance.

Liquidation of damages not a bar to specific performance.

20. A contract, otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same.

Illustration.

A contracts to grant *B* an under-lease of property held by *A* under *C*, and that he will apply to *C* for a licence necessary to the validity of the under-lease, and that, if the licence is not procured. *A* will pay *B* Rs. 10,000. *A* refuses to apply for the licence and offers to pay *B* the Rs. 10,000. *B* is nevertheless entitled to have the contract specifically enforced if *C* consents to give the licence.

(*b*) *Contracts which cannot be specifically enforced.*

Contracts not specifically enforceable.

21. The following contracts cannot be specifically enforced :—

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to prepare and file a set of *Jama Wasil bahi papers* with the lessor every year falls under S. 21 (*b*), and cannot be specifically enforced. 42 I.C. 521.

Sec. 20.—It cannot be said that a party to an agreement of sale cannot enforce specific performance of the contract merely because there is provision for payment of damages under the agreement. 1931 L. 227=12 L. 328. Agreement to return the earnest money and pay damages if a contract of a sale is broken does not preclude a suit for specific performance being instituted by the vendee. 4 L. 327=1924 L. 151.

Sec. 21 : SCOPE AND APPLICATION OF SECTION.—Specific performance of an agreement to lease cannot be decreed if the date from which the term is to run is not fixed either expressly or impliedly. 39 M.L.J. 329=57 I.C. 626 (P. C.). As to circumstances justifying refusal of specific performance, *see* 1941 Rang. 177 (Hire purchase agreement). A document which is merely an agreement to enter into a contract cannot be specifically enforced. 50 I.C. 403=21 Bom.L.R. 302. Formal document not executed where the parties agree to the execution of a formal lease the draft of which is to be approved by them—Specific performance can be decreed though the draft is not drawn up. 46 C. 771=23 C.W.N. 563. Specific performance of an agreement to sell land against a subsequent purchaser, where the latter is entitled to a right of pre-emption against the person seeking to enforce the agreement for sale cannot be enforced. 122 I.C. 740=1930 A. 166. Specific performance can be refused on the ground of delay. 1933 R. 149. So also where other and more appropriate remedy is open to the plaintiff. 1933 Rang. 149. Where in a suit a compromise is arrived at between the parties whereby allotment of shares is agreed to be made on reference to two vakils, the agreement in substance amounts to one for submission to arbitration and such a contract cannot be specifically enforced under the section. The exceptions to this rule in S. 21 apply to those cases in which a submission to arbitration is a bar to a suit with regard to any subject which the parties have agreed to refer. 1937 P.W.N. 51=1937 Pat.

(*a*) a contract for the non-performance of which compensation in money is an adequate relief;

(*b*) a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms;

(*c*) a contract the terms of which the Court cannot find with reasonable certainty;

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232. Specific performance of a contract of lease cannot be decreed, if no date is fixed in the contract for delivery of possession. 189 I.C. 418 =42 P.L.R. 194=1940 Lah. 225. Although a Secretary of the District Board may establish that he has been wrongfully dismissed, still, assuming that he has established that point, he is not entitled to the remedy of injunction or of specific performance. He cannot get the temporary injunction for restraining the Board from enforcing its resolution. 56 A. 573=1934 A.L.J. 368=1934 All. 101.

Sec. 21 (a).—Suit to recover money payable under a bond or contract is not one for specific performance; it is one for compensation for breach of contract. 19 I.C. 376=6 S.L.R. 148. A contract under which a sum of money had been agreed to be paid but was not paid cannot be specifically enforced. It is open to the promisee to sue the promisor for the recovery of damages on account of the failure of the promisor to perform his part of the contract. 1934 A.L.J. 713=1934 All. 449; 1934 All. 448=1934 A.L.J. 773; 1935 A.L.J. 429. A contract to lend or borrow money on a mortgage will not be specifically enforced at the instance of the lender or borrower. 43 C. 59=19 C.W.N. 1332. *See also* 12 I.C. 952=8 A.L.J. 1282. A suit will not generally lie for specific performance of a contract to pay money. 49 I.C. 385=35 M.L. J. 89. Suit for payment of balance of mortgage money does not lie. 41 M. 959=49 I.C. 291= 35 M.L.J. 489. Specific performance cannot be compelled where compensation is the adequate remedy. 131 I.C. 599=1931 A. 40. But *see* 1933 L. 1, *infra*. The principle that no suit to specifically enforce a contract to lend money is maintainable does not apply to the case of an usufructuary mortgage in which a portion of the consideration is left with the mortgagee to pay off the creditors of the mortgagor and on failure of the mortgagee so to do, the mortgagor sues to recover the amount held in trust for him. Nor is the failure of the mortgagee to obtain possession through no fault of the mortgagor any defence to the action. 33 P.L.R. 1085=1933 L. 1. Where the defendant, on pressure put by the plaintiff to repay the amount due to him under the promissory notes or to furnish security by way of mortgage, handed over the title deeds of certain properties and also wrote that, if the amount is not paid without much delay, he will execute a mortgage deed on stamp paper. *Held*, that on the failure of the defendant to repay the amount, the plaintiff was entitled to a decree for specific performance of the contract to grant the mortgage of the properties. 1935 M. 560. Chit-fund—Agreement by subscriber to pay subscriptions to stake holder—If contract to lend money—Suit for money from subscriber — If barred. (1937) 1 M.L.J. 163.

Sec. 21 (b).—If the performance depends upon volition of a person not a party to the suit, a decree for specific performance should not be granted. 101 I.C. 654=1927 N. 233. A promise, contained in an ordinary power of attorney that it will not be revoked except on certain grounds is the same as a contract to keep a servant on hire and is not specifically enforceable. 121 I.C. 598=1930 M. 231. It is well settled that a contract of personal service cannot be specifically enforced. Neither affirmative nor negative covenants between an employer and an employee will be enforced at the instance of either. A contract to employ in service as a medical adviser or a legal adviser is a contract for personal service and under S. 21 (*b*) is not specifically enforceable. The fact that the employer is a company makes no difference in this respect. If the employer terminates the services of the employee on unreasonable or illegal grounds, the remedy of the aggrieved employee is to sue for damages and not for specific performance. 46 Mys.H.C.R. 125=19 Mys.L.J. 1. *See also* 1940 Lah. 243 (managing director of company). By Ss. 21 (*b*) and 56 (*f*), an injunction cannot be granted to prevent the breach of a contract to employ certain people. 1933 L. 203=14 L. 330. Court will not make an order, the effect of which is to enforce specifically any contract of personal service. 36 Bom. L.R. 907=59 B. 218=1934 B. 427. A contract for the preparation of a set of account papers relating to the *darpatni mehal* is one of which the Court cannot, from its very nature, enforce Specific performance. 59 C. 352=1932 C. 481. In this clause, *see also* 100 I.C. 399.

Sec. 21 (c).—Incomplete contract cannot be enforced. 24 Bom.L.R. 466=1922 B. 404. The Court will not enforce a contract the terms of which are uncertain. 32 I.C. 53=20 C.W.N. 66 (F.B.). If the essential terms of a contract are settled, the contract may well be regarded as complete and concluded and may be enforced or specifically performed, either as consisting of those terms only or together with such other terms and conditions as may be regarded as being usual in contracts of that description. 36 C.W.N. 1108. Where the plaintiff has asked for specific performance of an agreement and the claim is excessive he may be allowed to succeed on the basis of an alternative claim for a more limited right. 10 I.C. 503=14 C.L. J. 627. In the absence of complete agreement between the parties as to the essential terms of the contract of lease, the latter cannot be specifically enforced. 18 I.C. 911=149 P.L.R. 1913. Where the terms of certain agreement being indefinite, the plaintiff would not be able to obtain specific performance of such an agreement in case of its breach by the defendant but the defendant had wholly performed his part of the agreement: *Held*, that the plaintiff's possible

(*d*) a contract which is in its nature revocable ;

(*e*) a contract made by trustees either in excess of their powers or in breach of their trust ;

(*f*) a contract made by or on behalf of a corporation or public company created for special purposes, or by the promoters of such company, which is in excess of its powers ;

(*g*) a contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date ;

(*h*) a contract of which a material part of the subject-matter, supposed by both parties to exist, has, before it has been made, ceased to exist.

And, save as provided by [1][the Arbitration Act, 1940], no contract to refer [2][present or future differences] to arbitration shall be specifically enforced ; but if any person who has made such a contract [3][other than an arbitration agreement to which the provisions of the said Act apply,] and has refused to perform it sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.[4]

Illustrations.

to (*a*)—

A contracts to sell, and *B* contracts to buy, a lakh of rupees in the four per cent. loan of the [5][Central Government] :

LEG. REF.

[1] Substituted by Act X of 1940.

[2]These words were substituted for the words "a controversy" by the Indian Arbitration Act (IX of 1899), S. 21.

[3]Inserted by Act X of 1940.

[4]The last thirty-seven words of S. 21 do not apply to any submission to arbitration to which the provisions of the Indian Arbitration Act, 1899, for the time being apply; *see* Act IX of 1899, S. 3.

[5] Substituted by A.O., 1937.

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inability to specifically enforce the contract could not arise in the case. 25 N.L.R. 131 = 117 I.C. 271 = 1929 N. 194. *See also* 1931 P. 601 : 25 C.W.N. 320 (P.C.). As to contract which is void for want of mutuality, *see* 64 M.L.J. 354 = 1933 M. 322 (Agreement for repurchase provided for only in the sale-deed).

Sec. 21 (e).—A Court of Equity will not grant specific performance when a trustee has entered into a contract for a lease which is in excess of his power or has entered into a contract for renewal which is *ultra vires*. 36 C.L.J. 48 = 27 C.W.N. 159. *See also* 36 C.W.N. 1108. The analogy of minority of deities is a pure fiction for which no authority is to be found in Hindu Law itself and there is no principle on which on such analogy a contract, otherwise good and valid, can be taken out of the class of contracts of which specific performance may be granted under the law. 36 C.W.N. 1108. A trustee or a person in a representative capacity cannot delegate his authority except where the employment of an agent is according to the usual course of business. It is open to a trustee or a *shebait* to appoint a sub-agent, but such appointment must only be as a means of carrying out his own duties himself and not for the purpose of delegating those duties by means of such appointment. So where the sanction of the trustee is necessary for a lease of the debutter properties, a contract to lease entered into by the agent of the trustee without reference to he trustee till after the contract was entered nto is not binding and not specifically enforceable. 36 C.W.N. 1108=1933 C. 109=60 C. 111. Covenant granting right to realise rent, manage debuttar property, and perform *sheba* on behalf of the covenantee, cannot be enforced. 1929 C. 561. As to lease by trustees, *see* 16 I.C. 490.

Sec. 21 (g).—A contract involving the performance of a continuous duty as medical adviser or legal adviser for a period of 12 years falls under S. 21 (*g*). 46 Mys. H.C.R. 125=19 Mys. L.J. 1.

Sec. 21 (h).—Contract embodied in document —Document set aside by Court—Specific performance not to be granted. 44 I.C. 225.

Sec. 21 (proviso).—The proviso to S. 21 refers only to inchoate and abortive arbitration and not to contract which has been admittedly carried out. 33 I.C. 554=8 L.B.R. 157. But *see* 53 A. 16=1930 A.L.J. 1537=1930 A. 877. Where in a suit a compromise is arrived at between the parties whereby allotment of shares is agreed to be made on reference to two vakils, the agreement in substance amounts to one for submission to arbitration and such a contract cannot be specifically enforced under the section. Where there is a contract to refer any subject to arbitration the exceptions to the section only bar a suit with regard to such subject. 1937 P. 232. A party to an agreement to refer a dispute to arbitration is not debarred from bringing an independent suit on title. 24 I.C. 490=12 A. L.J. 757. *See also* 31 Bom. L.R. 1403=1930 B. 98. S. 21 does not apply to any agreement to refer to arbitration or to any award governed by Sch. II, C.P. Code. 64 I.C. 204; 33 A. 315; 35 I.C. 710=9 Bur. L.T. 98. S. 89 (1), C.P.Code, renders the concluding provision of S. 21 of the Sp. Ref. Act inapplicable to arbitration, agreements and awards governed by Sch. II, C.P.Code. 46 C. 1041=23 C.W.N. 716. A contract to refer a dispute to arbitration confers on the parties a right to have the question decided by arbitrators and not by suit. It is a substantive right and S. 21 bars a suit pending disposal of the reference. 41 I. C. 581 = 33 M.L.J. 46. Where an agreement of reference has been acted upon and terminated in an award, a suit for cancellation is not against the tenor of S. 21. That section has no app[illegible]

A contracts to sell, and *B* contracts to buy, 40 chests of indigo at Rs. 1,000 per chest :

In consideration of certain property having been transferred by *A* to *B*, *B* contracts to open a credit in *A's* favour to the extent of Rs. 10,000, and to honour *A's* drafts to that amount :

The above contracts cannot be specifically enforced, for in the first and second both *A* and *B*, and in the third *A*, would be reimbursed by compensation in money.

to (*b*)—

A contracts to render personal service to *B* :

A contracts to emply *B* on personal service ;

A, an author, contracts with *B*, a publisher, to complete a literary work ;

B cannot enforce specific performance of these contracts.

A contracts to buy *B's* business at the amount of a valuation to be made by two values, one to be named by *A* and the other by *B*. *A* and *B* each name a valuer, but before the valuation is made, *A* instructs his valuer not to proceed :

By a charter-party entered into in Calcutta between *A*, the owner of a ship, and *B*, the charterer, it is agreed that the ship shall proceed to Rangoon, and there load a cargo of rice, and thence proceed to London, freight to be paid, one-third on arrival at Rangoon, and two-thirds on delivery of the cargo in London :

A lets land to *B* and *B* contracts to cultivate it in a particular manner for three years next after the date of the lease ;

A and *B* contract that, in consideration of annual advances to be made by *A*, *B* will for three years next after the date of the contract grow particular crops on the land in his possession and deliver them to *A* when cut and ready for delivery ,

A contracts with *B* that, in consideration of Rs. 1,000 to be paid to him by *B*, he will paint a picture for *B* ;

A contracts with *B* to execute certain works which the Court cannot superintend ;

A contracts to supply *B* with all the goods of a certain class which *B* may require ;

A contracts with *B* to take from *B* a lease of a certain house for a specified term, at a specified rent, " if the drawing-room is handsomely decorated," even if it is held to have so much certainty that compensation can be recovered for its breach :

A contracts to marry *B* :

The above contracts cannot be specifically enforced.

to (*c*)—

A, the owner of a refreshment-room, contracts, with *B* to give him accommodation there for the sale of his goods and to furnish him with the necessary appliances. *A* refuses to perform his contract. The case is one for compensation and not for specific performance, the amount and nature of the accommodation and appliances being undefined.

to (*d*)—

A and *B* contract to become partners in a certain business, the contract not specifying the duration of the proposed partnership. This contract cannot be specifically performed, for, if it were so performed, either *A* or *B* might at once dissolve the partnership.

to (*e*)—

A is a trustee of land with power to lease it for seven years. He enters into a contract with *B* to grant a lease of the land for seven years, with a covenant to renew the lease at the expiry of the term. This contract cannot be specifically enforced.

The directors of a company have power to sell the concern with the sanction of a general meeting of the shareholders.

The contract to sell it without any such sanction. This contract cannot be specifically enforced.

Two trustees, *A* and *B*, empowered to sell trust-property worth a lakh of rupees, contract to sell it to *C* for Rs. 30,000. The contract is so disadvantageous as to be a breach of trust. *C* cannot enforce its specific performance.

The promoters of a company for working mines contract that the company when formed shall purchase certain mineral property. They take no proper precautions to ascertain the value of such property—and in fact agree to pay an extravagant price therefor. They also stipulate that the vendors shall give them a bonus out of the purchase-money. This contract cannot be specifically enforced.

to (*f*)—

A company existing for the sole purpose of making and working a railway contract for the purchase of a piece of land for the purpose of erecting a cotton-mill thereon. This contract cannot be specifically enforced.

to (*g*)—

A contracts to let for twenty-one years to *B* the right to use such part of a certain railway made by *A* as was upon *B's* land, and that *B* should have a right of running carriages over the whole line on certain terms and might require *A* to supply the necessary engine-power, and that *A* should

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cation except where a person, having made a contract to refer a controversy to arbitration, has refused to perform it and institutes a suit in respect of the subject-matter in defiance of the contract. 128 I.C. 755=1930 A. 877. On this section, *see also* 25 P.R. 1917=9 I.C. 736; 15 I.C. 402=130 P.W.R. 1912; 1927 L. 898.

PROCEDURE.—Suit for specific performance—Trial Court holding agreement to be inadmissible—Appellate Court differing but affirming judgment on ground that rrlief was discretionary—Legality of procedure. *See* 34 C.W.N. 881=1931 C. 171.

during the term keep the whole railway in good repair. Specific performance of this contract must be refused to *B*.

to (*h*)—

A contracts to pay an annuity to *B* for the lives of *C* and *D*. It turns out that at the date of the contract *C*, though supposed by *A* and *B* to be alive, was dead. The contract cannot be specifically performed.

(*c*) *Of the Discretion of the Court.*

Discretion as to decreeing specific performance.

22. The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal.

The following are cases in which the Court may properly exercise a discretion not to decree specific performance :—

I. Where the circumstances under which a contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part.

Illustrations.

(*a*) *A*, a tenant for life of certain property, assigns his interest therein to *B*. *C* contracts to buy and *B* contracts to sell that interest. Before the contract is completed, *A* receives a mortal injury from the effects of which he dies the day after the contract is executed. If *B* and *C* were equally ignorant or equally aware of the fact, *B* is entitled to specific performance of the contract. If *B* knew the fact, and *C* did not, specific performance of the contract should be refused to *B*.

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Sec. 22 : SCOPE OF SECTION.—40 B. 69=17 Bom.L.R, 303; 1933 M. 736=65 M.L.J. 491. Specific performance being one which is discretionary and a relief which isgranted where parties come to Court with clean hands, circumstances which would render a transaction unfair and avoidable as a fraudulent preference would materially influence the Court in decreeing specific performance. Contracts enforceable against the insolvent at the date of his insolvency would be enforceable against the O. R. in whom the properties vest by reason of insolvency. 1928 M.W. N. 617=1928 M. 860. *Sse also* 113 I.C. 129 (what contracts are enforceable against a receiver). When a plaintiff has alleged a contract of which he seeks specific performance and fails to establish it, the Court will not make a decree for Specific performance of a different contract. 29 I.C. 989=19 C.W.N. 933. The Court will not decree specific performance of an act which the defendant is not in a position to perform. 43 C.W.N. 903. The granting of sp. performance is purely discretionary and Courts in so doing generally apply equitable considerations and not merely look at the terms of the contract. 22 I. C. 910=18 C.W.N. 689. *See also* 13 I.C. 637= 16 C.L.J. 119; 1941 O.W.N. 265=1941 O. 324. The relief of specific performance is an equitable relief lying in the discretion of Court, and a plaintiff who sets up a false case cannot expect a Court of Equity to grant him such relief 1937 M.W.N. 1158. Where specific performance is sought to be enforced against a subsequent purchaser who has got a right of preemption, the Court should, in the exercise of its discretion under S. 22 refuse to decree specific performance. 198 I.C. 890. The circumstances stated in S. 22 are illustrative, not exhaustive. 10 I.C. 503=14 C.L.J. 627. A contract, which although not illegal, is detrimental to the public welfare, should not be enforced in equity. 10 I.C. 503. A Court can refuse sp. performance of a contract to sell, when plaintiff fails to prove in full the agreement set up by him. 23 I.C. 523=1914 M.W.N. 339.

ILLUSTRATIONS—WHETHER MODIFY POWER OF COURT UNDER SECTION.—The power of the Court under S. 22 should not be cut down by looking into the illustrations attached to the section. 1930 M.W.N. 638.

ILLUSTRATIVE CASES.—Where a decree would be a source of constant trouble and friction between the parties and might even become nugatory, Courts ought not to grant it. 1924 L. 163. Discretion to refuse specific performance when plaintiff may get unfair advantage. 72 I.C. 586=5 Lah.L.J. 307; or in order to avoid multiplicity of suits. 44 C.L.J. 162=1926 C. 1237. No Court would be justified in enforcing specific performance against a minor when such enforcement would be to his detri ment. 38 A. 433=34 I.C. 298. Sale-deed executed but not registered owing to vendee's fault—Specific performance not to be granted. 22 I.C. 941. The jurisdiction to decree specific performance is discretionary and the failure of a beneficiary under the contract to join in a suit to enforce the contract is an important factor in deciding how that discretion is to be exercised. 21 I.C. 778=14 M.L.T. 495; 44 M. L.J. 107=46 M. 148. In a contract of sale if title be doubtful, specific performance cannot be granted. 64 I.C. 87=4 N.L.J. 10. The Court can refuse specific performance of the contract conferring an undue advantage on the plaintiff and causing a hardship to the defendant not anticipated at the time of the contract. 17 I.C. 732=10 A.L.J. 498. Where a contract of sale is entered into by the vendor, with full knowledge before a Court of law and with the advice of his counsel and there is no suggestion whatever of his having been in any way imposed upon, a Court of Equity will not be entitled to interpose its aid on the ground of mere inadequacy of price. 1941 O.W.N. 265=1941 Oudh 324. Where a debtor agreed in writing to convey his property in liquidation of the whole debt due to him and subsequent to the execution of that document the creditor accepted a property of lesser value in part satisfaction of the obligation and in part payment of the sum due

(*b*) *A* contracts to sell to *B* the interest of *C* in certain stock-in-trade. It is stipulated that the sale shall stand good, even though it should turn out that *C's* interest is worth nothing. In fact, the value of *C's* interest depends on the result of certain partnership-accounts on which he is heavily in debt to his partners. This indebtedness is known to *A*, but not to *B*. Specific performance of the contract should be refused to *A*.

(*c*) *A* contracts to sell, and *B* contracts to buy, certain land. To protect the land from floods, it is neceesary for its owner to maintain an expensive embankment. *B* does not know of this circumstance and *A* conceals it from him. Specific performance of the contract should be refused to *A*.

(*d*) *A's* property is put up to auction. *B* requests *C*, *A's* attorney, to bid for him. *C* does this inadvertently and in good faith. The persons present, seeing the vendor's attorney bidding, think that he is a mere puffer and cease to compete. The lot is knocked down to *B* at a low price. Specific performance of the contract should be refused to *B*.

II. Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

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to him, and credited that part payment accordingly, a decree for specific performance of the contract by conveyance of the property cannot be granted. 7 R. 234=1929 P.C. 141=47 M.L.J. 529 (P.C.). *See also* 1937 M.W.N. 1158.

DELAY AND LACHES, EFFECT OF.—A plaintiff guilty of continuous delay is not entitled to a decree for specific performance. 21 I.C. 35. *See also* 42 P.L.R. 194=1940 Lah. 225; 1937 M. W.N. 1158. Mere delay in instituting a suit for specific performance, is not sufficient to defeat the plaintiff's suit. 44 I.C. 244=4 Pat. L.W. 192; 17 I.C. 399=1912 M.W.N. 1004. Mere delay is not a ground for refusing relief to the plaintiff if there has been no change in the *status quo* since the contract; but where the conduct of the plaintiff is such that though it does not amount to abandonment but shows waiver or acquiescence, especially when inaction on his part induces the defendant to change his position, the plaintiff ought not to be allowed any relief. 36 C.W.N. 285=1932 C. 493. *See also* 1933 A.L.J. 1584=1933 All. 846; 44 L.W. 749=71 M.L.J. 599; 117 I.C. 225=1929 L. 679. Plaintiff is not entitled to specific performance if he delays till the end of the limitation period unnecessarily. 58 I.C. 23 (N.); 23 I.C. 560=26 M.L.J. 518; 52 P. W.R. 1915=27 I.C. 481. *See also* 51 I.C. 704=57 P.R. 1919; 3 L. 376; 44 M.L.J. 107=46 M. 148. Time is not of the essence of a contract to sell immovable property unless expressly so stipulated at the time of the contract. Failure to keep to the dates assigned will not prevent a party from claiming specific performance unless the delay has been very gross. 40 B. 289=43 I.A. 26= 30 M.L.J. 186 (P.C.). Delay in suing—Alteration in value of property—Discretion of Court to refuse specific relief. 34 C.L.J. 364. If the plaintiff causes such a long delay as to the evidence of abandonment he cannot ask for specific performance. 50 I.C. 177=22 C.W.N. 190. *See also* 57 I.C. 763=34 C.L.J. 364. Mere delay is not always evidence of abandonment. 1923 L. 694. A delay of one month in institution of suit not ground for refusal of specific performance. 41 C. 852=19 C.L.J. 420. A suit for specific performance instituted 20 months after the date of the contract cannot be decreed on the ground of waiver. 26 I.C. 121=27 M. L.J. 482. A lapse of nine years is fatal to an action for specific performance unless the plaintiff can show that the defendant is entirely to blame for the delay or that the real right of action has accrued only a short time before the proceedings were instituted. 48 I.A. 214=63 I.C. 914 (P.C.). Delay in completing sale—Right to make time essence of contract—Earnest money—Return of. 25 Bom.L.R. 1144=1924 B. 282.

Sec. 22, Cl. (II).—Clause (II) of S. 22 contemplates a case where the vendor has entered into a contract without full knowledge of the circumstances. 41 C. 852=19 C.L.J. 420. Mere improvidence or inadequacy is no hardship unless the bargain is so hard as to be unconscionable and its performance inequitable but if the hardship were brought upon by himself, the Court will not give him relief. 41 Cal. 852. *See also* 24 Bom.L.R. 434=1923 B. 15. "Hardship" in cl. (II) is used in the sense of some collateral hardship and not merely the diminution of purchase money. 1933 M. 736=65 M. L.J. 491. The Court has a discretion under S. 22 to relieve the vendor from the improvidence of his bargain, though the vendee may not be guilty of any fraud or misrepresentation in the matter. Circumstances and considerations with reference to which such discretion should be exercised stated. 1930 M.W.N. 638. Power-of-attorney given to husband by pardanashin lady—Purchase money, adequacy of. 13 I.C. 637=16 C.L.J. 119. Where a Hindu apprehending danger to his life had executed an agreement without consideration in favour of a Mahomedan to cut down a *pipal* tree venerated by all Hindus for the convenient passing of *tazias*, *held*, that specific performance should be refused. 115 I. C. 457=1929 A. 372.

MISCELLANEOUS.—Where the trial Court has exercised discretion, appellate Court will interfere only if it is shown that this discretion has been exercised perversely, or against judicial principles. 129 I.C. 6=1930 L. 1004. Suit for specific performance or return of deposit—First claim given up—Effect. 25 Bom.L.R. 1037= =1924 B. 119. Contract for sale of equity of redemption to mortgagee—Onerous terms—No fraud or misrepresentation—Specific relief can be granted. 38 C. 805=38 I.A. 155=21 M.L.J. 1127 (P.C.).

Secs. 22, 26 and 28.—Contract for sale of house—Price fixed with reference to area—Area found to be far less than originally contemplated —No misrepresentation by plaintiff—Defendant's negligence—Specific performance not to be refused. *See* 1931 M.W.N. 234.

Illustrations.

(*e*) *A* is entitled to some land under his father's will on condition that if he sells it within twenty-five years, half the purchase money shall go to *B*. *A*, forgetting the condition, contracts, before the expiration of the twenty-five years, to sell the land to *C*. Here the enforcement of the contract would operate so harshly on *A*, that the Court will not compel its specific performance in favour of *C*.

(*f*) *A* and *B*, trustees, join their beneficiary, *C*, in a contract to sell the trust-estate to *D*, and personally agree to exonerate the estate from heavy incumbrances to which it is subject. The purchase money is not nearly enough to discharge those incumbrances, though, at the date of the contract, the vendors believed it to be sufficient. Specific performance of the contract should be refused to *D*.

(*g*) *A*, the owner of an estate, contracts to sell it to *B*, and stipulates that he, *A*, shall not be obliged to define its boundary. The estate really comprises a valuable property, not known to either to be part of it. Specific performance of the contract should be refused to *B* unless he waives his claim to the unknown property.

(*h*) *A* contracts with *B* to sell him certain land, and to make a road to it from a certain railway-station. It is found afterwards that *A* cannot make the road without exposing himself to litigation. Specific performance of the part of the contract relating to the road should be refused to *B*, even though it may be held that he is entitled to specific performance of the rest with compensation for loss of the road.

(*i*) *A*, a lessee of mines contracts with *B*, his lessor that at any time during the continuance of the lease *B* may give notice of his desire to take the machinery and plant used in and about the mines, and that he shall have the articles specified in his notice delivered to him at a valuation on the expiry of the lease. Such a contract might be most injurious to the lessee's business, and specific performance of it should be refused to *B*.

(*j*) *A* contracts to buy certain land from *B*. The contract is silent as to access to the land. No right of way to it can be shown to exist. Specific performance of the contract should be refused to *B*.

(*k*) *A* contracts with *B* to buy from *B's* manufactory and not elsewhere all the goods of a certain class used by *A* in his trade. The Court cannot compel *B* to supply the goods, but if he does not supply them, *A* may be ruined, unless he is allowed to buy them elsewhere. Specific performance of the contract should be refused to *B*.

The following is a case in which the Court may properly exercise a discretion to decree specific performance :—

III. Where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

Illustration.

A sells land to a railway company, who contract to execute certain works for his convenience. The company take the land and use it for their railway. Specific performance of the contract to execute the works should be decreed in favour of *A*.

(d) For whom Contracts may be specifically enforced.

Who may obtain specific performance.

23. Except as otherwise provided by this Chapter, the specific performance of a contract may be obtained by—

(*a*) any party thereto ;

(*b*) the representative in interest, or the principal, of any party thereto : provided that, where the learning, skill, solvency or any personal quality of such

NOTES.

Sec. 23 : ILLUSTRATIVE CASES.—A creditor is entitled to sue for the debt from an alienee of the debtor who had undertaken to pay off the debt. 41 C. 137=17 C.W.N. 1143 ; 38 M. 753 =26 M.L.J. 127. A minor, on attaining majority, cannot obtain and enforce specific performance of a contract made during minority. 55 I.C. 377=38 M.L.J. 77 ; 39 C. 232 (P.C.). Contract for sale by manager of a joint Hindu family, if can be enforced by the minor members. 18 N.L.R. 67=1922 N. 193. The word 'any' in S. 23 indicates one out of a number of persons more than two. Where one or more co-contractors want to enforce specific performance of the contract against the will of the others, they can do so under S. 23 of the Act. It is not necessary therefore that all the co-contractors should be arrayed on the same side for obtaining specific performance of contract. It is enough if all persons who are parties to the contract are before the Court. Where one of the co-contracting vendees refuses to join in the sale to be executed in their favour jointly, and the other contracting vendees bring a suit for specific performance of the contract, the suit being one to enforce the original contract as a whole, there is no variation in the contract and the suit is not one to enforce the contract piecemeal. The other willing co-contracting vendees have a right to sue for specific performance of the contract even though one of the co-contractors refuses to join them in the sale. I.L.R. (1938) Nag. 41=1937 Nag. 186. In a suit for specific performance it is not a valid defence that the person who entered into contract has no beneficial interest but is a *benamidar*. 29 I. C. 12=28 M.L.J. 617. All contracts capable of specific performance excepting those of the class prohibited by S. 23 are assignable. 33 I.C. 696 =19 M.L.T. 329.

Sec. 23 (b).—A decree for specific performance operates in favour of both parties ; and the defendant is, as much as the plaintiff, en-

party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless where his part thereof has already been performed ;

(*c*) where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder ;

(*d*) where the contract has been entered into by a tenant for life in due exercise of a power, the remainderman ;

(*e*) a reversioner in possession, where the agreement is a covenant entered into with his predecessor in title and the reversioner is entitled to the benefit of such covenant ;

(*f*) a reversioner in remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach ;

(*g*) when a public company has entered into a contract and subsequently becomes amalgamated with another public company, the new company which arises out of the amalgamation ;

(*h*) when the promoters of a public company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company.

(*e*) *For whom Contracts cannot be specifically enforced.*

Personal bars to the relief.

24. Specific performance of a contract cannot be enforced in favour of a person—

NOTES.

titled to execute the decree. 59 C. 501=1932 C. 579. Where a person has only a personal interest which he cannot assign, his assignee can in no sense be regarded as his representative as to be entitled to obtain specific performance under S. 23 (*b*). 1930 A.L.J. 799=1930 A. 101. *See also* 191 I.C. 139. A contract is ordinarily assignable, and under S. 23 (*b*) specific performance of a contract may be obtained by the representative in interest of any party thereto, excepting in cases where any personal quality of such party is a material ingredient in the contract or where the contract provides that the interest shall not be assigned. Where on a sale the vendor obtains an agreement from the vendee to reconvey the property on certain terms and he assigns that right to obtain reconveyance to his own daughter the vendee is bound to reconvey on her complying with the conditions and is not entitled to demand further money for doing something which he was bound to do. 1942 N.L.J. 322. In a contract for sale, learning, skill, etc., of a party thereto is not a material ingredient. Such a contract can therefore be assigned and it can be enforced by the representative in interest of a party in absence of any agreement to the contrary. 27 A.L.J. 1196 =1929 A. 817. Where a contract between *A* and *B* is broken by *B*, but is such as its specific performance can be obtained by *A*, the right that *A* possesses is not a mere right to sue but a right to get specific performance, which can be validly assigned and the assignee can enforce the contract specifically against *B*. (3 L.W. 435, Expl. and Rel. on.) 116 I.C. 848=1929 M. 251. *See also* 37 P.L.R. 58=1935 L. 181. Where a person sells his land or house to another person and the latter enters into a contract to convey the property back to the vendor or his heirs, the right to obtain a reconveyance from the vendee or his heirs is ordinarily assignable even to a stranger who can enforce it by a suit. But where the intention of the parties is that the vendor or his heirs alone should be given the right of repurchasing the property, the assignee outside the family cannot enforce the contract specifically. (55 I.A. 243, applied; 10 Cal. 30 (P.C.); 42 B. 344 and 35 Bom. 258, Ref.) 36 Bom.L.R. 290=1934 Bom. 171. *See also* I.L.R. (1940) Bom. 674=42 Bom.L.R. 653=1940 Bom. 339. S. 23, Cl. (*b*) permits the representative in interest of a party to an agreement to sue for its specific performance. 37 P.L.R. 58=1935 L. 181. Assignment of right by heir of vendor on his death to plaintiff—If plaintiff can claim specific performance. *See* 100 I.C. 399. On this Cl. (*b*), *see also* 49 M. 387=51 M.L.J. 229.

Sec. 23 (c).—There is neither principle nor authority which would justify a Court in holding that there can be no compromise of doubtful claims between members of the same family, falling under S. 23 (*c*) unless it is between all the members of the family. S. 23 (*c*) was specifically designed to meet such cases as where senior members of a family compromise a dispute regarding the rights both of themselves and of the other members of their respective branches. 21 Pat. 377=1942 P. W.N. 149. *Rowland, J.*—S. 23 (*c*) was not reconcilable with the rule in *Tweddle* v. *Atkinson*, and where the two conflict, the statute [S. 23 (*c*)] must prevail. 21 Pat. 377=1942 P.W.N. 149. S. 23 (*c*) is exception to rule that third party to contract cannot sue. 21 Pat. 377. A Burmese Buddhist can file a suit for specific performance of an *ante nuptial contract* entered into by the parents of both sides. 8 R. 266=1930 R. 172. [32 A. 410 (P.C.); 1928 R. 286, Rel. on.]

Sec. 24.—If time is essential in a contract for sale of land, the defaulting party cannot claim specific performance ; on the contrary the other party can make the claim though the default is slight. 38 I.C. 123 (P.C.). No specific perform-

(*a*) who could not recover compensation for its breach ;

(*b*) who has become incapable of performing, or violates, any essential term of the contract that on his part remains to be performed ;

(*c*) who has already chosen his remedy and obtained satisfaction for the alleged breach of contract ; or

(*d*) who, previously to the contract, had notice that a settlement of the subject matter thereof (though not founded on any valuable consideration) had been made and was then in force.

Illustrations—

to clause (*a*)—

A in the character of agent for *B* enters into an agreement with *C* to buy *C's* house. *A* is in reality acting, not as agent for *B* but on his own account. *A* cannot enforce specific performance of this contract.

to clause (*b*)—

A contracts to sell *B* a house and to become tenant thereof for a term of fourteen years from the date of the sale at a specified yearly rent. *A* becomes insolvent. Neither he nor his assignee can enforce specific performance of the contract.

A contracts to sell *B* a house and garden in which there are ornamental trees, a material element in the value of the property as a residence. *A*, without *B's* consent, fells the trees. *A* cannot enforce specific performance of the contract.

A, holding land under a contract with *B* for a lease commits waste, or treats the land in an unhusbandlike manner. *A* cannot enforce specific performance of the contract.

A contracts to let, and *B* contracts to take, an unfinished house *B* contracting to finish the house and the lease to contain covenants on the part of *A* to keep the house in repair. *B* finishes the house in a very defective manner ; he cannot enforce the contract specifically though *A* and *B* may sue each other for compensation for breach of it.

to clause (*c*)—

A contracts to let, and *B* contracts to take, a house for a specified term at a specified rent. *B* refuses to perform the contract. *A* thereupon sues for, and obtains, compensation for the breach. *A* cannot obtain the specifi performance of the contract.

Contracts to sell property by one who has no title or who is a voluntary settler.

25. A contract for the sale or letting of property, whether moveable or immoveable, cannot be specifically enforced in favour of a vendor or lessor—

NOTES.

ance will be granted if the plaintiff cannot complete the agreement by doing what remained to be done under it by him. 43 C. 990=43 I. A. 108=31 M.L.J. 248 (P.C.). Plaintiff must show readiness to do his part of the contract up to decree—English law is also the same. 55 I.A. 360=52 B. 597. In a bilateral contract, the party repudiating his part of the contract cannot enforce it. 24 I.C. 53. *See also* 3 O.W.N. 884=1927 O. 12. The onus lies on the plaintiff to prove that he was ready to perform his part of the contract. 9 I.C. 243. On this section, *see also* 20 L.W. 884=1924 P.C. 233; 3 P. 698. If on the purchaser refusing to complete the contract, the vendor forfeits the earnest money paid by him and rejects his offer to tender documents, the acts of the vendor may amount to an expression of intention to rescind the contract and exclude *pro tanto* the idea of specific performance but do not disentitle him to relief by specific performance under S. 24 (*b*) and (*c*) of the Specific Relief Act. There is no "incapacity" to perform within the meaning of S. 24 (*b*), where the vendor had already performed his part of the contract by putting the purchaser into possession of the property and nothing remained but the matter of executing the conveyance. Nor can the vendor be deemed to have "chosen his remedy and obtained satisfaction" within the meaning of S. 24 (*c*) under this clause, mere choice of remedy is no bar to an action for specific performance if satisfaction has not been obtained. (55 I.A. 360, explained.) 44 C.W.N. 541.

Sec. 24 (c).—Defendant indebted to plaintiff on pro-notes—Agreement by him to sell his shop to plaintiff—Plaintiff suing defendant on pro-notes and attaching shop before judgment not disentitled from claiming specific relief—Doctrine of election. 167 I.C. 657=1937 All. 161.

Sec. 24 Ill. (a).—A contract to be specifically enforced by the Court must be mutual, that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. A guardian's contract for sale or purchase on behalf of the minor is not enforceable by or against the minor. A contract for sale of immovable property is purely of a personal character and as no personal liability can be imposed on the minor, it follows that the minor cannot be compelled to perform such a contract. The purchaser cannot claim compensation from the minor for the breach of the contract. If that is so, S. 25-A debars the purchaser from claiming the relief of specific performance against the minor. I.L.R. (1940) Nag. 55=1939 Nag. 265.

Sec. 25.—A buyer of immovable property is not bound to complete the sale if there are defects in the property or in the title to the property which are material and also latent, that is to say, not discoverable by the exercise of ordinary care or if the title is not free from doubt. A vendor, who had himself purchased the property from a Hindu widow in possession under her husband's will which was unsigned and unattested and the construction of which was open to reasonable doubt as to whether it created an absolute estate or only a limited

(*a*) who, knowing himself not to have any title to the property, has contracted to sell or let the same ;

(*b*) who, though he entered into the contract believing that he had a good title to the property, cannot, at the time fixed by the parties or by the Court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt ;

(*c*) who, previous to entering into the contract, has made a settlement (though not founded on any valuable consideration) of the subject-matter of the contract.

Illustrations.

(*a*) *A*, without *C's* authority, contracts to sell to *B* an estate which *A* knows to belong to *C*, *A* cannot enforce specific performance of this contract, even though *C* is willing to confirm it.

(*b*) *A* bequeaths his land to trustees, declaring that they may sell it with the consent in writing of *B*. *B* gives a general prospective assent in writing to any sale which the trustees may make. The trustees then enter into a contract with *C* to sell him the land. *C* refuses to carry out the contract. The trustees cannot specifically enforce this contract as in the absence of *B's* consent to the particular sale to *C*, the title which they can give *C* is, as the law stands, not free from reasonabl doubt.

(*c*) *A*, being in possession of certain land, contracts to sell it to *Z*. On enquiry it turns out that *A* claims the land as heir of *B*, who left the country several years before, and is generally believed to be dead, but of whose death there is no sufficient proof. *A* cannot compel *Z* specifically to perform the contract.

(*d*) *A*, out of natural love and affection, makes a settlement of certain property on his brothers and their issue, and afterwards enters into a contract to sell the property to a stranger. *A* cannot enforce specific performance of this contract so as to override the settlement and thus prejudice the interests of the persons claiming under it.

(*f*) *For whom Contracts cannot be specifically enforced, except with a variation.*

Non-enforcement except with variation.

26. Where a plaintiff seeks specific performance of a contract in writing, to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought, except with the variation so set up, in the following cases (namely) :—

NOTES.

estate, cannot be said to have made out his title beyond reasonable doubt; the vendee is therefore entitled to repudiate the agreement, which consequently cannot be specifically enforced. 59 B. 83=36 Bom.L.R. 1041=1935 B. 16. In the case of a contract for the sale of immovable property, marketable title means a title free from reasonable doubt. 24 Bom.L. R. 978=1923 B. 148. Title free from reasonable doubt: 33 Bom.L.R. 1377. A "*title free from reasonable doubt.*" means a marketable title which can at all times be forced upon an unwilling purchaser. But specific performance should not be decreed if, in the opinion of the Court, the title may fairly and reasonably be questioned by other competent persons, though the Court itself takes a favourable view of it. 36 Bom.L.R. 1041=1935 B. 16=59 B. 83. Title to the satisfaction of purchaser's attorney—Effect of. 33 Bom.L.R. 1377=1932 B. 51. A dceree for specific performance of a contract for sale of land should not only direct the main inquiry, a rule should also direct a secondary inquiry as to *when* a good title was *shown* (*i.e.*, all matters essential to the title are stated in the abstract). 59 C. 536=1932 C. 516. The vendee can enforce specific performance of a contract to sell, even though he is not in possession of the sale-deed, provided he is able to prove the terms of his agreement. 137 I.C. 41=1932 L. 276. Sec. 25 (*b*) expressly lays down the test to be applied in determining whether the vendor is able to convey a title free from doubt, and it is not safe to attempt to paraphrase it. When a vendor's title depends not upon a question of law but upon proof of a disputed fact, that fact must be proved, and if the vendor does not prove it, he cannot be held to have made out a good title. The mere fact of knowledge on the purchaser's part of earlier transactions relating to the source and the nature of the vendor's title would not disentitle the purchaser to insist upon proof of the vendor's title unless he had agreed to limit the nature of the inquiry into title or had agreed to accept whatever title the vendor had. 1940 M.W.N. 14 =A.I.R. 1940. Mad. 739. Agreement for lease —Defective title of lessor—Return of premium paid. *See* 35 C.W.N. 1246=1931 P.C. 299=61 M.L.J. 699 (P.C.)

Secs. 25 (b) and 18 (b).—Where at a time when a contract to sub-lease for five years was entered into, the lessor had only two years to run under his own lease, but under the terms of his unexpired lease he had a right to renew the lea,se and subsequent to the contract to sub-lease he got a renewed lease in accordance with those terms for another period, his claim for specific performance of the contract to sub-lease cannot be refused on the ground that he is not in a position to give the lessee a title free from reasonable doubt. I.L.R. (1938) 1 Cal. 563=42 C.W.N. 97=A.I.R. 1938 Cal, 136.

BURDEN OF PROOF.—When the plaintiff proves in a suit for specific performance of a contract of sale, the onus of proof that a third party has subsequently purchased the property *bona fide* and without notice. is on the party who claims to be such purchaser. 15 P.L.T. 469=1934 P. 518. *See also* 61 I.A. 115=1934 P.C. 68=66 M.L.J. 255 (P.C.). On this section *see also* 47 B. 369=24 Bom.L.R. 978; 86 I.C. 895=1925 S. 342; 110 I.C. 564.

Sec. 26: SCOPE OF.—12 C. 152. The plaintiff in a suit for specific performance must show

(*a*) where by fraud or mistake of fact the contract of which performance is sought is in terms different from that which the defendant supposed it to be when he entered into it ;

(*b*) where by fraud, mistake of fact, or surprise the defendant entered into the contract under a reasonable misapprehension as to its effect as between himself and the plaintiff ;

(*c*) where the defendant, knowing the terms of the contract and understanding its effect, has entered into it relying upon some misrepresentation by the plaintiff, or upon some stipulation on the plaintiff's part, which adds to the contract, but which he refuses to fulfil ;

(*d*) where the object of the parties was to produce a certain legal result, which the contract as framed is not calculated to produce ;

(*e*) where the parties have, subsequently to the execution of the contract, contracted to vary it.

Illustrations.

(*a*) *A*, *B* and *C* sign a writing by which they purport to contract each to enter into a bond to *D* for Rs. 1,000. In a suit by *D*, to make *A*, *B* and *C* separately liable each to the extent of Rs. 1,000 they prove that the word " each " was inserted by mistake ; that the intention was that they should give a joint bond for Rs. 1,000. *D* can obtain the performance sought only with the variation thus set up.

(*b*) *A* sues *B* to compel specific performance of a contract in writing to buy a dwelling-house. *B* proves that he assumed that the contract included an adjoining yard, and the contract was so framed as to leave it doubtful whether the yard was so included or not. The Court will refuse to enforce the contract, except with the variation set up by *B*.

(*c*) *A* contracts in writing to let to *B* a wharf, together with a strip of *A's* land delineated in a map. Before signing the contract, *B* proposed orally that he should be at liberty to substitute for the strip mentioned in the contract another strip of *A's* land of the same dimensions, and to this *A* expressly assented. *B* then signed the written contract. *A* cannot obtain specific performance of the written contract, except with the variation set up by *B*.

(*d*) *A* and *B* enter into negotiations for the purpose of securing land for *B* for his life, with remainder to his issue. They execute a contract, the terms of which are found to confer an absolute ownership on *B*. The contract so framed cannot be specifically enforced.

(*e*) *A* contracts in writing to let a house to *B*, for a certain term, at the rent of Rs. 100 per month, putting it first into tenantable repair. The house turns out to be not worth repairing ; so, with *B's* consent, *A* pulls it down and erects a new house in its place : *B* contracting orally to pay rent at Rs. 120 per mensem. *B* then sues to enforce specific performance of the contract in writing. He cannot enforce it except with the variations made by the subsequent oral contract.

(G) *Against whom contracts may be specifically enforced.*

Relief against parties and persons claiming under them by subsequent title.

27. Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against—

NOTES.

that he does not require the other party to do an act which he cannot lawfully do. 20 C.W N. 929=36 I.C. 655. Where specific performance is asked for, the law provides that plaintiff must do equity and extends the provisions of the Evidence Act by giving the defendant opportunity to prove the variation set up. 1922 B. 336 (1). *See also* 29 M.L.J. 125=29 I.C. 449.

Sec. 27.—Party disabled. *See* 17 C. 223 (P. C.). Insolvent. *See* 15 M.L.T. 92=21 I.C. 576; 1925 C. 324; 1928 M.W.N. 617=1928 M. 860. Widow. 16 C.W.N. 247. Receiver. 1928 M.W.N. 617=1928 M. 860. Under S. 27 the onus of proving that subsequent vendee was a *bona fide* purchaser without notice lies on the defendant, and his subsequent registered sale-deed has no priority over even an oral contract for sale in favour of the plaintiff. 38 A. 184=32 I.C. 953. *See also* 123 I.C. 86=1930 L. 997; 131 I.C, 289=1931 L. 227; 9 P. 417=125 I.C. 158; 12 L. 328; 1930 P. 452; 1926 C. 744; 134 I.C. 211=34 L.W. 669. An agreement of sale of the immovable property of a Hindu minor entered into on his behalf by the natural guardian is not specifically enforceable against the minor even though the transction was entered into for necessity binding on the minor. Nor can the agreement be enforced against a subsequent purchaser, who took with notice of the suit agreement. 1928 M. 407=54 M.L.J. 412. But *see also* 1935 P. 237, *contra*. 26 M.L.J. 218=23 I.C. 621; 14 N.L.R. 27=43 I.C. 940; 44 I.C. 470=4 P.L.W. 152. Where a subsequent vendee has paid only a small part of the sale consideration before he had notice of previous contract and pays the bulk of the consideration after notice, it is impossible to hold that he is acting in good faith or is a person who has paid his money without notice of the original contract so as to be entitled to the protection given by S. 27 (*b*) of the Act. 1934 A.LJ. 871 =1934 A. 1045. The burden of proof is on the plaintiff to prove notice. The defendant is not bound to prove a negative, namely, that he had no notice. 25 Bom.I.R.375=1923 B. 410; 107 I. C. 254=1928 All. 307 ; but see 1935 Rang. 12 =154 I.C, 474 *contra*. Constructive notice—Oral agreement followed by delivery of possession. *See* 1923 B. 13. Of contents of deeds, *see* 26 C. W.N. 46. Registration, how far notice. *See* 48

(*a*) either party thereto ;

(*b*) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract ;

(*c*) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant ;

(*d*) when a public company has entered into a contract and subsequently becomes amalgamated with another public company, the new company which arises out of the amalgamation ;

(*e*) when the promoters of a public company have, before its incorporation, entered into a contract, the company : provided that the company has ratified and adopted the contract and the contract is warranteed by the terms of the incorporation.

Illustrations.

to clause (*b*)—

A contracts to convey certain land to *B* by a particular day. *A* dies intestate before that day without having conveyed the land. *B* may compel *A's* heir or other representative in interest to perform the contract specifically.

A contracts to sell certain land to *B* for Rs. 5,000. *A* afterwards conveys the land for Rs. 6,000 to *C*, who has notice of the original contract. *B* may enforce specific performance of the contract as against *C*.

A contracts to sell land to *B* for Rs. 5,000. *B* takes possession of the land. Afterwards *A* sell it to *C* for Rs. 6,000. *C* makes no enquiry of *B* relating to his interest in the land. *B's* possession is sufficient to affect *C* with notice of his interest, and he may enforce specific performance of the contract against *C*.

A contracts, in consideration of Rs. 1,000 to bequeath certain of his lands to *B*. Immediately after the contract *A* dies intestate, and *C* takes out administration to his estate. *B* may enforce specific performance of the contract against *C*.

A contracts to sell certain land to *B*. Before the completion of the contract, *A* becomes a lunatic and *C* is appointed his committee. *B* may specifically enforce the contract against *C*.

to clause (*c*)—

A, the tenant for life of an estate, with remainder to *B*, in due exercise of a power conferred by the settlement under which he is tenant for life, contracts to sell the estate to *C*, who has notice of the settlement. Before the sale is completed, *A* dies. *C* may enforce specific performance of the contract against *B*.

A and *B* are joint tenants of land, his undivided moiety of which either may alien in his lifetime, but which, subject to that right, devolves on the survivor. *A* contracts to sell his moiety to *C* and dies. *C* may enforce specific performance of the contract against *B*.

NOTES.

C. 1=25 C.W.N. 49 (P.C.). *See also* 1927 A. 357. Every person can be compelled specifically to perform the contract whose title to the property such as it may be, might be defeated by the election or will of the person who has contract to sell. 112 I.C. 257. Performance of a contract can be specifically enforced as against the subsequent purchaser who has notice of the previous contract, provided the contract is valid and the fact of notice has been proved. 1935 P. 237. When contract is enforceable against receiver : *see* 113 I.C. 129. Where a suit for specific performance is decreed against the vendor and the subsequent purchaser with notice, the proper course is to direct both the defendants to execute a conveyance in favour of the plaintiff. 34 C.W.N. 698=1931 C. 67. The contesting defendants to a suit for specific performance cannot object to specific performance of the contract on the ground that some of the defendants with whom the agreement was made were no parties to the contract in question. 34 C.W.N. 698=1931 C. 67. Judgment-creditors of the tenant who have attached the properties in execution are not transferees of that property for value, within the meaning of S. 27 of the Act. 1935 R. 126.

MISCELLANEOUS.—It cannot be said that a party to an agreement of sale cannot enforce specific performance of the contract merely because there is provision for payment of damages under the agreement. 12 L. 328=1931 L. 227. Where the tenants in possession of the property after the expiry of the lease alienated the property to another, and a person who obtained an agreement to sell from the landlord sued for specific performance and impleaded the tenants and their vendee also who asserted right of ownership as parties to the suit, *held*, that specific performance could be decreed against the tenants also, though notice to quit was not given to determine their tenancy, inasmuch as they had forfeited the tenancy by the alienation. 112 I.C. 257.

Sec. 27 (b).—Agreement for sale—Subsequent mortgage—Notice of prior contract—Specific performance of agreement to sell—Mortgage whether can be enforced against property sold—Registration as notice. *See* 25 A.L.J. 294 =1927 A. 357 ; 1926 M. 120 ; 132 I.C. 450= 1931 N. 60. Right of third person to sue on contract. *See* 24 A.L.J. 401=1926 A. 352. S. 27 (*b*) merely enacts the English equitable rule which allows a later legal title to prevail over an earlier equitable title in the case of a *bona fide* purchaser for value without notice; but if the title is not complete, there is no room for the application of this rule and in completing title in India, registration is necessary. Where a vendor entered into two contracts for the sale of certain property of the value of more than

[1][27-A. Subject to the provisions of this Chapter, where a contract to lease immoveable property is made in writing signed by the parties thereto or on their behalf, either party may, notwithstanding that the contract, though required to be registered, has not been registered, sue the other for specific performance of the contract if,—

Specific performance in case of part performance of contract to lease.

(*a*) where specific performance is claimed by the lessor, he has delivered possession of the property to the lessee in part performance of the contract ; and

(*b*) where specific performance is claimed by the lessee, he has in part performance of the contract, taken possession of the property, or, being already in possession, continues in possession in part performance of the contract, and has done some act in furtherance of the contract :

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

This section applies to contracts to lease executed after the first day of April, 1930].

(*h*) *Against whom Contracts cannot be specifically enforced.*

What parties cannot be compelled to perform.

28. Specific performance of a contract cannot be enforced against a party thereto in any of the following cases :—

(*a*) if the consideration to be received by him is so grossly inadequate, with reference to the state of things existing at the date of the contract, as to be either by itself or coupled with other circumstances evidence of fraud or of undue advantage taken by the plaintiff ;

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[1]S. 27-A inserted by Act XXI of 1929.

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Rs. 100 and the later transferee had merely obtained an unregistered conveyance without notice of the earlier contract: *held* that the later transferee was not "a transferee without notice" within the meaning of S. 27 (*b*) as his title was not complete. 11 P.L.T. 121=1930 P. 181 ; *also* 1936 Mad. 949 ; 139 I.C. 714=1932 A. 694 ; 1932 A.L.J. 853. Where a transferee has knowledge of such facts as would put him on inquiry, which, if prosecuted would have disclosed a previous agreement, such transferee is not a transferee without notice of the original contract. 59 I.A. 386=13 L. 687=1932 P.C. 228=63 M.L.J. 694 (P.C.). A vendee whose suit for specific performance is barred cannot recover possession of the property sold from a subsequent purchaser of the property with notice of the agreement to sell. 116 I.C. 70=1929 N. 298. In a suit for specific performance of a contract, if the plaintiff proves his prior contract, the burden of proving a subsequent *bona fide* tranfer for value without notice under S. 27 (*b*) lies on the part alleging it. Very little evidence on the party of the defendant of want of knowledge of the plaintiff's contract would discharge the onus and shift it on to the plaintiff. *Held*, also that the plaintiff being admittedly in possession it was the bounden duty of the defendants to inquire from the plaintiff as regards the nature of his possession before they can be held to be *bona fide* purchasers for value. 119 I.C. 70=1929 P. 300. *See also* 36 C.W.N. 1002 ; 42 C.W.N. 1090 ; I.L.R. (1940) Kar. 406 ; 40 C. 565 ; 9 P. 417=1930 P. 452. On this section, *see also* 27 A.L.J. 1255 =1929 A. 667. Where a document gave the plaintiff an option to claim possession of a certain field in case the amount fixed for maintenance was not paid in any year but did not contain any condition that, after delivery of possession, the executant's liability for maintenance was discharged, it follows that the right in the field was not transferred to the plaintiff. Such an agreement cannot be specifically enforced as against a *bona fide* purchaser of the field for value and without notice of the plaintiff's claim. 27 N.L.R. 24=1931 N. 60. "Any other *person claiming under him*"—Whether legal representatives of deceased are included under. 7 R. 423 =1929 R. 274. The receiver in insolvency is a person claiming under the insolvent and a contract entered into by the latter at the time of purchasing certain property is enforceable against the receivor of a transferee from him with notice. 133 I.C. 541. So where the sanction of the trustee is necessary for a lease of the debutter properties, a contract to lease entered into by the agent of the trustee without reference to the trustee till after the contract was entered into is not binding and not specificaliy enforceable. 36 C.W.N. 1108.

Sec. 27-A. Scope—Equity of part-performance—Nature and extent of—T. P. Act, S. 53-A—Distinction. 41 C.W.N. 54=1938 Cal. 136=I.L.R. (1938) 1 Cal. 563. *See also* I.L.R. 1936 N. 115. S. 27-A which was enacted by the amending Act XXI of 1929, gives a right to the lessor and the lessee to enforce specifically a contract to grant a lease by compelling registration, where there is part-performance. That right, however, applies only to contracts to lease granted after 1st April, 1930. I.L.R. 1936 N. 115=1937 Nag. 74.

Sec. 28.—The plaintiff and defendant entered into a contract for sale of a house belonging to the latter fixing the price at so much per square foot. Subsequently on actual measurement, the area of the house was found to be much less than what was considered by the parties, to be

(*b*) if his assent was obtained by the misrepresentation (whether wilful or innocent), concealment, circumvention or unfair practices, of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled ;

(*c*) if his assent was given under the influence of mistake of fact, misapprehension or surprise : Provided that, when the contract provides for compensation in case of mistake, compensation may be made for a mistake within the scope of such provision, and the contract may be specifically enforced in other respects if proper to be so enforced.

Iilustrations.—

to clause (*c*)—

A, one of two executors, in the erroneous belief that he had the authority of his co-executor, enters into an agreement for the sale to *B* of his testator's property. *B* cannot lnsist on the sale being completed.

A directs an auctioneer to sell certain land. *A* afterwards revokes the auctioneer's authority as to 20 bighas of this land, but the auctioneer inadvertently sells the whole to *B*, who has not notice of the revocation. *B* cannot enforce specific performance of the agreement.

(*i*) *The effect of dismissing a Suit for Specific performance.*

Bar of suit for breach after dismissal.

29. The dismissal of a suit for specific performance of a contract or part thereof shall bar the plaintiff's right to sue for compensation for the breach of such contract or part, as the case may be.

(*j*) *Awards and Directions to execute Settlements.*

Application of preceding sections to awards and testamentary directions to execute settlements.

30. The provisions of this Chapter as to contracts shall, *mutatis mutandis*, apply to awards and to directions in a will or codicil to execute a particular settlement.

CHAPTER III.

OF THE RECTIFICATION OF INSTRUMENTS.

When instrument may be rectified.

31. When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest, may institute a suit to have the instrument rectified ; and if the Court find it clearly proved that there has been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the Court may in its discretion rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

NOTES.

the probable area, with the result the price payable by the plaintiff was only half of the price expected by the defendant. It was found there was no misrepresentation by the plaintiff and that the hardship, if any, was due to the defendant's own negligence. It was held that the agreement could not be considered unconscionable and that the plaintiff was entitled to specific performance. 1931 M.W.N. 234.

Sec. 29.—Where minor plaintiff's suit for specific performance of a contract entered into by him is dismissed on the ground of want of mutuality for the contract, the minor can nevertheless sue for refund of the earnest money paid by him. 116 I.C. 713=1929 Lah. 332.

Sec. 31.—There are two limits to the rectification of an instrument: (1) when third parties have acquired rights in good faith and for value; (2) when a decree has been obtained upon an unrectified instrument and that decree has been executed and the money or property concerned has been recovered. 136 I.C. 850=1932 M. 275=62 M.L.J. 350. Where a purchaser, because of a clerical mistake in the sale deed, fails to obtain mutation of names, he could at that stage have instituted a suit under S. 31. But he was not bound to do so, as that section is only an enabling section and the fact of its not being made use of cannot deprive a purchaser of the rights conveyed to him. 14 Luck. 308=1938 O. W.N. 1074=A.I.R. 1939 Oudh 10. Defendant can resist a suit for possession by pleading his right to rectification of the sale-deed. 39 M. 792=29 M.L.J. 229. Suit for rectification of wrong survey number lies. 14 I.C. 404=8 N.L. R. 13. Where a person seeks to rectify a written document, containing the terms of the contract, it is always necessary for him to show that there was an actual concluded contract before the execution of the document which is sought to be rectified and that such contract is inaccurately represented in the instrument. 1930 R. 12 *See also* 59 C.L.J. 360=1934 C. 750; 1933 R. 337. The burden of proof is heavily on the person seeking rectification. The proof of error should be clear and conclusive. Rectification being an equitable remedy is subject to the equitable defence of laches on the part of the plaintiff in seeking rectification. 54 M. 973=1931 M.785= 61 M.L.J. 437. Where there is no doubt as to the identity of the property covered in the mortgage, S. 31 will not apply, merely because the Tahsil in which the property is situate is wrongly

Illustrations.

(*a*) *A*, intending to sell to *B* his house and one of three godowns adjacent to it, executes a conveyance prepared by *B*, in which, through *B's* fraud, all three godowns are included. Of the two godowns which were fraudulently included, *B* gives one to *C* and lets the other to *D* for a rent, neither *C* nor *D* having any knowledge of the fraud. The conveyance may, as against *B* and *C*, be rectified so as to exclude from it the godown given to *C*; but it cannot be rectified so as to affect *D's* lease.

(*b*) By a marriage settlement, *A*, the father of *B*, the intended wife, covenants with *C*, the intended husband, to pay to *C*, his executors, administrators and assigns, during *A's* life, an annuity of Rs. 5,000. *C* dies insolvent and the official assignee claims the annuity from *A*. The Court, on finding it clearly proved that the parties always intended that this annuity should be paid as a provision for *B* and her children, may rectify the settlement and decree that the assignee has no right to any part of the annuity.

Presumption as to intent of parties.

32. For the purpose of rectifying a contract in writing the Court must be satisfied that all the parties thereto intended to make an equitable and conscientious agreement.

Principles of rectification.

33. In rectifying a written instrument, the Court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the enquiry what the language of the instrument was intended to be.

Specific enforcement of rectified contract.

34. A contract in writing may be first rectified and then, if the plaintiff has so prayed in his plaint and the Court thinks fit, specifically enforced.

Illustration.

A contracts in writing to pay his attorney, *B*, a fixed sum in lieu of costs. The contract contains mistakes as to the name and rights of the client, which, if construed strictly, would exclude *B* from all rights under it. *B* is entitled, if the Court thinks fit, to have it rectified, and to an order for payment of the sum as if at the time of its execution it had expressed the intention of the parties.

CHAPTER IV.

OF THE RESCISSION OF CONTRACTS.

When rescission may be adjudged.

35. Any person interested in a contract in writing[1] may sue to have it rescinded, and such rescission may be adjudged by the Court in any of the following cases, namely :—

LEG. REF.

[1]The words "in writing" were repealed wherever the Transfer of Property Act (IV of 1882) is in force. *See* Act IV of 1882, Ss. 1 and 2.

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described. 102 I. C. 588=1927 N. 259. Even where a mistake in the deed is repeated in the decree on the mortgage, Court has power to rectify both deed and decree. 103 I.C. 384=1927 M. 1144. Mortgagor in satisfaction of mortgage-debt selling mortgaged property to mortgagee—Certain property misdescribed in deed by error—Judgment-creditor of mortgagor subsequenly purchasing property in execution—Mortgagee's right to rectification of deed. 1939 Rang. 93. On this point, *see also* 6 Mys.L.J. 103. Mistake in a compromise creeping into the decree can be set aside by suit. 1926 M. 1146=51 M. L.J. 464. In the absence of proof of mutual mistake the previous rectification of an unilateral instrument like a mortgage deed is not obligatory under S. 31. *See* 21 I. C. 429=16 O. C. 213. Oral evidence is admissible to show that the description of the property is a mistake. 21 I.C. 429=16 O.C. 213. A Court will not exercise its equitable jurisdiction to rectify an instrument if it is likely to prejudice a subsequent *bona fide* incumbrancer. 2 Pat.L.T. 64 As to duty of Courts in granting rectification, *see* 13 O.L.J. 452. Courts have power to rectify errors apparent on the face of the instrument. 93 I.C. 7=1926 O. 344. A suit lies to rectify a decree based on an award which has been fraudulently altered after publication and before decree. 52 I. C. 116=13 S.L.R. 144. Bond executed to Court for benefit of a party—Bond not assigned to him—Application to have bond amended dismissed—Suit for rectification of bond does not lie as the plaintiff would be a stranger to the bond and would have no *locus standi* to file suit. 1933 R. 337. As to applicability of section to a suit to set aside a decree on the ground of fraud, *see* 1928. M.W.N. 609. S. 31 is only an enabling section. It does not preclude a pardanashin lady from bringing a suit for redemption, pleading also that certain clauses in the deed of mortgage were not explained to her and are not binding upon her. It is not necessary in such a case for her to sue first for rectification of the deed. 7 Luck. 454=1932 O. 123.

Ss. 33 and 34—Rectification—Powers of Court—Suit for sale on mortgage—Wrong description of property—Oral evidence as to mistake—Admissibility—Relief on basis of rectification is awardable. *See* 47 L.W. 661=(1938) 1 M.L.J. 806.

Sec. 35 : SCOPE OF.—*See* 29 Bom.L.R. 399=104 I. C. 322=1927 B. 239. Fraud in the performance and not in making of a contract is no ground for rescission of a contract and restoration of parties to *status quo ante*. 37 B. 158=19 I.C. 406. One who seeks to set aside a contract

(*a*) where the contract is voidable or terminable by the plaintiff;

(*b*) where the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff;

(*c*) where a decree for specific performance of a contract of sale, or of a contract to take a lease, has been made, and the purchaser or lessee makes default in payment of the purchase-money or other sums which the Court has ordered him to pay.

When the purchaser or lessee is in possession of the subject-matter, and the Court finds that such possession is wrongful, the Court may also order him to pay to the vendor or lessor the rents and profits, if any, received by him as such possessor.

In the same case, the Court may, by order in the suit in which the decree has been made and not complied with, rescind the contract, either so far as regards the party in default, or altogether, as the justice of the case may require.

Illustrations—

to clause (*a*)—

A sells a field to *B*. There is a right of way over the field of which *A* has direct personal knowledge, but which he conceals from *B*. *B* is entitled to have the contract rescinded.

to clause (*b*)—

A, an attorney, induces his client *B*, a Hindu widow, to transfer property to him for the purpose of defrauding *B's* creditors. Here the parties are not equally in fault, and *B* is entitled to have the instrument of transfer rescinded.

Rescission for mistake.

36. Rescission of a contract in writing[1] cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made.

LEG. REF.

See foot-one[1] p. 4607 *supra*,

NOTES.

on the ground of fraud must ask for the whole of it being set aside. A person who impeaches the contract must take it as it stands or repudiate t *in toto*. 95 I.C. 144=1926 C. 159. The word 'contract' in Ss. 35 and 38 is used in the sense of both executed and executory contracts *i.e.*, transfers and promises. 40 M. 308=31 M. L.J. 575 (F.B.). Every sale-deed does constitute a contract. Where a contract is voidable or terminable by the plaintiff or where it becomes unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff, it can be rescinded under S. 35. 27 A.L. J. 1122=1929 A. 837. "Any person interested in contract", meaning of. 51 B. 133=1927 B. 384. *See also* 1933 R. 337. Failure to pay part of the consideration is no ground for rescission of contract, though subsequent conduct of the parties is a ground some times. 38 I.C. 877= 2 Pat. L.J. 168. A document under which one person agrees to stifle pending prosecution of a non-compoundable offence can be set aside by him. The parties in such a case are not in *pari delicto*. 75 I. C. 27=50 C. 639. Decree for specific performance—Delay in paying decree amount—Rescission, 47 B. 589=1923 B. 211. The delay of nearly five years prior to a suit for rescission of contract on the grounds of the defects in the title of plaintiff's vendors and onerous covenants is highly prejudicial to the defendants-vendors especially when the plaintiff was previously seeking to enforce the contract against his vendees notwithstanding the defects. 1930 S. 66. A decree for specific performance directed the payment by the plaintiff of the purchase-money into Court within three weeks. The plaintiff committed default and applied for extension of time after the expiry of the time allowed by the decree. *Held* the Court had the power to enlarge the time; and the power can be exercised on sufficient cause shown even if the application is made after the date fixed by the decree. 128 I.C. 875=3 L.W. 347. The words "in the same case" in the last sentence of S. 35. refer to cl. (*c*). 59 M.L.J. 351; 19 S.L.R. 281. Where the defendant, by taking advantage of the fiduciary position he occupied towards the plaintiff, got a contract in his favour and possessession of the property in pursuance thereof, he is bound when the contract, is set aside at the instance of the plaintiff, to account for mesne profits not merely from the date when the contract was avoided but from the date he got possession. 59 I.A. 147=7 luck. 64=62 M.L,J. 451 (P.C.).

Sec. 35 (c): SCOPE.—The right of rescission recognised in S. 35 (*c*) is not confined to a vendor, whether plaintiff or defendant, but is equally open to a purchaser, whether he appears in the action as plaintiff or defendant. 1933 M. 386=64 M.L.J. 536=56 M. 796.

Sec. 36.—S. 36 applies only to suits for rescission of contracts and not to a suit for refund of money advanced under a contract discovered subscquently to be void. 21 C.W.N. 404=39 I.C. 78. Where the plaintiff agreed to sell to the defendant land which was described as Government lease-hold tenure in perpetuity renewable at the expiration of every fifty years, the same having been renewed about a year ago, but it was on investigation found to be newly assessed land, *held*, the defendant was entitled to rescind the contract. 33 Bom.L.R. 1377.

37. A plaintiff instituting a suit for the specific performance of a contract in writing may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled; and the Court, if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly.

Alternative prayer for rescission in suit for specific performance.

38. On adjudging the rescission of a contract, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.

Court may require party rescinding to do equity.

CHAPTER V.

OF THE CANCELLATION OF INSTRUMENTS.

39. Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

When cancellation may be ordered.

If the instrument has been registered under the Indian Registration Act, the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

NOTE.

S. 38—COMPLETED CONVEYANCE—RESCISSION OF. Rescission can be allowed not only of a contract of sale but also of a completed conveyance. A,I.R. 1942 Sind 81.

RESCISSION OF CONTRACT—CONDITION AS TO REPAYMENT OF BENEFIT—SCOPE AND EFFECT OF. Where a contract is voidable on account of its having been induced to be entered into by fraud or misrepresentation and the person at whose option it is voidable has received benefit under the contract, it is not avoided by return of the benefit so received but by the exercise of the option of the aggrieved party to rescind the contract. He has to make the payment because the contract is voided; the contract is not voided on condition of his making such payment. The Court in passing a decree in a suit by the aggrieved party for rescission of the contract cannot limit the right of the aggrieved pary to rescind the contract. But it could enable the other party to recover his money by execution of the very decree rather than by being compelled to bring a suit for its recovery; and in making such a direction for the repayment of the benefit obtained under the contract, the Court could specify a time before the expiration of which the other party could not proceed to execute the decree. Where in such a suit by the aggrieved party the Court passes a decree declaring the contract to be void and ordering it to be set aside subject to the aggrieved party paying to the other party the amount (benefit) received under the contract within a certain time, this does not indicate that it is the intention of the Court that the suit should stand dismissed if he fails to make the required payment within the specified time. But it can only mean that by virtue of the aggrieved person's success in his suit he is bound to pay to the other party the sum of money within the period of grace allowed, with the consequence that on his failure to make this payment, not that his suit shall fail altogether but that the other party can proceed to execute the decree against him for recovering the amount. 179 I.C. 206=A.I.R. 1938 Rang. 408. *See* also 1939 Mad. 106=(1939) 2 M.L.J. 195.

Secs. 38 and 41.—The provisions of S. 38 can be invoked where a transaction is sought to be set aside on the ground of undue influence as it is only a species of fraud in equity. 33 I.C. 576=18 Bom.L.R. 27. Minor repudiating transaction has a duty to restore benefit received by him. 109 P.R. 1915=29 I.C. 804. *See also* 141 I.C. 152=1933 A. 372; 1933 A. 371; 68 I.C. 15=2 L.L.J. 184; 32 I.C. 804; 19 I.C. 755; 53 I.C. 65=15 N.L.R. 149; 53 I.C. 14=26 M.L.T. 245. Vendor being lunatic—Purchaser, rights of, to refund of consideration money paid—Equitable relief. 32 I.C. 804.

Sec. 39: SCOPE OF SECTION.—*See* 39 I.C. 912=125 P.R. 1917; 109 I.C. 408. The relief as to cancellation of an instrument is founded upon the administration of the protective justice for fear that the instrument may be vexatiously or injuriously used by the defendant against the plaintiff when the evidence to impeach it may be lost or that it may throw a cloud or suspicion over his title or of interest. S. 39 is based on this principle and before relief under that section can be granted three conditions have to be fulfilled. (1) the written instrument in question is either void or voidable as against the plaintiff; (2) the plaintiff may reasonably apprehend serious injury from the instrument being left outstanding; and (3) in view of all the circumstances of the case the Court considers

Illustrations.—

(*a*) *A*, the owner of a ship by fraudulently representing her to be seaworthy, induces *B*, an underwriter, to insure her. *B* may obtain the cancellation of the policy.

(*b*) *A* conveys land to *B*, who bequeaths it to *C* and dies. Thereupon *D* gets possession of the land and produces a forged instrument stating that the conveyance was made to *B*, in trust for him, *C* may obtain the cancellation of the forged instrument.

(*c*) *A*, representing that the tenants on his land were all at will, sells it to *B*, and conveys it to him by an instrument, dated the 1st January, 1877. Soon after that day, *A* fraudulently grants to *C* a lease of part of the lands, dated the 1st October, 1876, and procures the lease to be registered under the Indian Registration Act. *B* may obtain the cancellation of this lease.

(*d*) *A* agrees to sell and deliver a ship to *B*, to be paid for by *B's* acceptances of four bills of exchange, for sums amounting to Rs. 30,000, to be drawn by *A* on *B*. The bills are drawn and accepted, but the ship is not delivered according to the agreement. *A* sues *B* on one of the bills. *B* may obtain the cancellation of all the bills.

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it reasonable and proper to administer the protective and preventive justice asked for. The relief which the Court can grant is of a limited character, *viz.*, (1) adjudging that the instrument is void or voidable, and (2) ordering it to be delivered up and cancelled. Mere speculation as to unknown and vague complications arising in the future can hardly be a ground for taking action under S. 39. 39 Bom.L.R. 1072=A.I.R. 1938 Bom. 37. *See also* 1940 Pat. 133.

Under S. 39, it is not necessary that a plaintiff seeking cancellation of a document should have been a party to it. 1938 A. M,L.J. 54. *See also* 28 I.C. 138 (as to what interest is sufficient to give right to bring a suit for cancellation). Void document—Need not be cancelled. 37 C.L.J. 499=1923 C. 362. Non-payment of and inadequacy of consideration are not sufficient to justify the cancellation of a deed of sale. 13 M. L.T. 521=19 I.C. 746. *See also* 31 I.C. 77; 42 M. 20=35 M.L.J. 740. The cancellation of an instrument is not compulsory in a suit for possession of property conveyed by the instrument. 170 P.W.R. 1911=12 I.C. 140. Certain cases falling under S. 39 are simply declaratory suits, while others are declaratory suits in which consequential relief is claimed. Where the suit was for declaration and for having a document cancelled, *held*, that consequential relief was prayed for and that Court-fee was payable on that basis. 6 O.W.N. 885=1929 O. 491.

ILLUSTRATIVE CASES.—A suit for declaring an endorsement on a mortgage deed to be a forgery, being in fact a suit for its cancellation, is one of the kind under S. 39. 39 A. 103= 37 I.C. 80. A person suing for recovery of property which he has transferred to another under a deed of exchange which is not binding on him need not have the deed cancelled. 33 I.C. 441=17 Bom.L.R. 1137 (Note). A person sued another for cancellation of an instrument which was alleged to be a forged document. The instrument purported to transfer lands of the plaintiff to the defendant. Before the suit the plaintiff had transferred his interests in the land to a third person. It was contended that the plaintiff's suit was not maintainable under such circumstances, because he had no interest left in the property. *Held*, that a man who has parted with the property in respect of which a void or voidable instrument exists can sue to get the instrument cancelled, the test for the maintainability of the suit being reasonable apprehension of serious injury. 41 C.W.N. 312=1936 C. 714. A plaintiff seeking to avoid the statute of limitation on the ground of fraud must, besides setting forth the facts constituting the fraud, state the time when it was discovered. 35 I.C. 284=20 C. W.N. 638. Where nothing had been done to carry the fraud into effect at the time a suit for cancellation of a fraudulent transfer was brought, the plaintiff is not debarred from asking for the relief he claims. 53 I.C. 454= 126 P.R. 1919. A party to a contract can rescind it if it has been based on misrepresentation. 24 I.C. 193=42 C. 28. Declaratory decree—Principle to be followed—Cancellation of instrument. 14 I.C. 81. Declaratory suit by person out of possession—Maintainability of. *See* 109 I.C. 408.

COURT-FEE.—*See* 39 C.W.N. 250.

Secs. 39 and 42.—Suit for declaration that the plaintiff was not liable to pay any sums on the basis of entries in the defendant's book is not maintainable without seeking consequential relief. 1923 L. 491. Under S. 39 a plaintiff may bring a suit for a declaration that a document is void, without seeking its cancellation, and if he does so, it is open to the Court, though there is no prayer for it, to order the document to be delivered up and cancelled. Under the wording of the section the Court may order cancellation, though there is no specific prayer for it. 1939 P.W. N. 843=A.I.R. 194. Pat. 133. Suit for declaration—No further relief asked—Effect. 10 I. C. 1000=8 A.L.J. 462. A person who alleges a property to be *waqf*, for the sale of which a decree is passed, need not get it set aside if he is no party to it, but may ask for a declaration that it should not affect the property, 18 P.R. 1913=19 I. C. 219. Mortgage—Non-payment of consideration—Effect—Remedy of mortgagor. 42 M. 20=35 M.L.J. 740. Absence of title of mortgagor discoverd after mortgagee's obtaining possession will not entitle mortgagee to decree for cancellation during continuance of mortgage. 80 I. C. 62=1925 O. 273. Under S. 41, Court can call upon the minor to refund the consideration he has received before his prayer for cancellation of sale is granted. 43 I. C. 908=7 L. W. 124. For a suit to cancel a registered instrument, which cannot take effect till after it is registered, limitation commences from date of registration and not from date of execution. 39 I.C. 456=4 O.L.J. 108.

What instruments may be partially cancelled.

40. Where an instrument is evidence of different rights or different obligations, the Court may, in a proper case, cancel it in part and allow it to stand for the residue.

Illustration.

A draws a bill on *B*, who endorses it to *C*, by whom it appears to be endorsed to *D*, who endorses it to *E*. *C's* endorsement is forged. *C* is entitled to have such endorsement cancelled, leaving the bill to stand in other respects.

Power to require party for whom instrument is cancelled to make compensation.

41. On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.

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Sec. 40.—Applicability—Declaration that deed is not operative against plaintiff so far as it purported to transfer right of absolute ownership in land—Suit for. *See* 116 I.C. 284.

Sec. 41.—[*See also* notes under S. 39] S. 41 is not limited in its operation to void instruments, but applies to both void and voidable instruments. A Court setting aside an alienation made by a minor at his instance has power under S. 41 to order a refund of the consideration received by him as a condition to his recovering possession of the alienated property. Where the alienee has chosen to advance the money to the minor with knowledge of the minority, it would not be proper to order a refund. But where an innocent purchaser or alienee has advanced money to the minor without any knowledge of the minority, an order for refund can properly be made against the minor, even though there has been no misrepresentation on the part of the minor as to his age. I.L.R. (1939) Mad. 203=48 L.W. 604=A.I.R. 1939 Mad. 106=(1939) 2 M.L.J. 195. *See also* 1938 Rang 408; 1937 Oudh. 521. Where a minor who had fraudulently misrepresented his age seeks to set aside the transaction on the ground of his minority, S. 41 gives the Court power to direct refund of consideration received by the minor as a condition for the cancellation of the deed. 54 M. 112=1930 M. 945=60 M.L.J. 117; 141 I. C. 152=1933 A. 372. *See also* 61 C. 1075; 1933 A. 371. It may in addition make him restore any other benefit which he has derived therefrom. This power is not confined to cases in which the minor holds the property or the goods to be restored. The discretion of the Court under S. 41 must be exercised in every case according to the circumstances of that case. Where a minor, representing himself to be a major, obtained money by executing a mortgage, and there is no evidence that the money so obtained was spent on illegitimate or immoral objects, justice requires that the Court, on cancelling the mortgage, should direct the minor to refund the principal of the mortgage-money to the mortgagee. As the liability of the minor under S. 41 arises not *ex contractu* but on equitable considerations, the mortgagee could not claim interest on the loan because the liability to pay interest would arise on one of the stipulations of the contract. 165 I. C. 523=1936 O.W.N. 1167=1937 O. 170. *See also* 1939 Rang. L. R. 543=1939 Rang. 599; 161 I. C. 522=43 L. W. 589=1936 M. 140. (Mesne profits may also be allowed). Whether under S. 41, Specific Relief Act or S. 65 of the Contract Act, compensation can legally be given when an agreement entered into by a minor is found to be void. It cannot, however, be held that in every case where a sale-deed or mortgage-deed is set aside on the ground of the minority of the executant, compensation should be given to the vendee or mortgagee. Where there was no fraud or misrepresentation on the part of the minor, the Court will not exercise its discretion in favour of the vendee or mortgagee. 1937 O.W.N. 1012 =A.I.R. 1937 Oudh 521. *See also* (1939) 2 M. L. J. 195. No compensation can be allowed on cancellation of a contract which is without consideration. 171 I.C. 96=1937 O.W.N. 1034 =A.I.R. 1938 Oudh 14. Where an alienation by a Mahomedan mother is set aside, the Court may, having regard to the fact that the price was devoted to pay off debts binding on the shares of the minor sons impeaching the sale, grant a decree to the sons conditionally on their refunding the consideration. 131 I.C. 153 =1931 M. 468. *See also* (1939) 2 M.L.J. 463. [In view of these more recent rulings the older cases mentioned *below* are not to be considered good law.] Section applies to proceeding, in which the plaintiff is seeking the cancellation of an instrument and does not apply to a case where an instrument is void; and therefore a nullity. 55 C. 712=1928 C. 537. A minor who repudiates a sale effected by him on the ground that he was a minor on the date of sale, cannot be compelled to repay the purchase-money, as a contract by minor is void *ab initio*. A Court of equity cannot say that it is equitable to compel a person to pay any money in respect of a transaction which as against that person the Legislature has declared to be void. 69 I.C. 543=1924 L. 294 [30 C. 539 (P.C.), Foll.] *See also* 7 L. 35=1926 L. 170; 9 L. 701=30 Punj.L.R. 60; 23 L.W. 521=1926 M. 607. But *see* cases cited, *infra*. But there may be cases where the minor who seeks to recover the property sold is bound in equity to refund the purchase-money under S. 41 as a condition precedent to obtaining a decree for possession. 75 I.C. 261=1923 L. 510; 25 O.C. 237=1922 O. 271; 1924 R. 288; 1928 L. 609 (F. B.); 6 Mys.L.J. 196 (F.B.). A minor plaintiff praying for relief must do equity if he seeks equity and and the Court may therefore under S. 41 require him to restore any property in his possession which he had obtain d, by his misrepresentation. Such compensation does not extend

CHAPTER VI.[1]

OF DECLARATORY DECREES.

Discretion of Court as to declaration of status or right.

42. Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and, the plaintiff need not in such suit ask for any further relief:

Bar to such declaration.

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

LEG. REF.

[1]As to the Punjab, *see also* the Punjab Land Revenue Act 1887 (XVII of 1887), S. 45, P. and N.W. Code.

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to moneys received and spent by the minor. 1923 S. 5 (F.B.)

Sec. 42: SCOPE AND APPLICABILITY. *See* 38 M. 1162; 28 M. 57; 8 A. 31. Nature of suit contemplated by section. 110 I.C. 386. *See also* 9 Mys.L.J. 49. The conditions which would justify the Court in granting a declaration under S. 42 are: (1) the plaintiff must be entitled to a legal character after the time of the suit, or (2) to a right to property, (3) the defendant should have denied these, or be interested in denying this character or right, and (4) the plaintiff should not be in a position to ask for relief consequential upon the declaration sought. Even if the plaintiff has had a present existing right, no cause of action accrues to him until there is some infringement or threatened infringement of his right, in other words, a cloud must be cast on his title before he can ask for its removal. He must allege and prove hostility on the part of the defendant, for no Court will remove on merely speculative grounds. 39 Bom.L.R. 1072=1938 Bom. 37. A mere apprehension existing in the mind of the plaintiff does not give him any right to sue under S. 42 of the Act. The fact that the defendants in their written pleas did not concede the plaintiff's alleged legal character also does not have retrospective effect so as to create a cause of action for the suit. 1935 Pesh. 110 (2). Where the suit was in respect of alleged rights arising out of a contract, it cannot form the subject-matter of a declaratory suit. 127 I.C. 330=32 Bom.L.R. 207=1930 B. 331. A mere declaratory decree should not be granted where the grant of the decree would be a useless affair. 87 I.C. 182=1925 A. 745; 50 C.L.J. 257=1929 C. 422; 1933 O. 423; 103 I.C. 313=1927 P. 257. A suit for mere declaration that the plaintiff is the legitimate son of the defendant, is not maintainable when the plaintiff has no present interest in the property of his father and the father can do whatever he likes with the property during his lifetime. The mere fact that the defendant stated that the plaintiff was his illegitimate son gives him no cause of action. But *see* 1936 L. 135; 1936 L. 858; 38 P.L.R. 455. A suit for a declaration that the defendant would be liable to contribute to the plaintiff all moneys which the plaintiff as the defendant's surety would be liable to pay does not come under S. 42 as it affects only the pecuniary relationship between the parties to the contract. 39 P.L.R. 205=1937 L. 25. Where in a suit for a declaration that a decree based on a *solenama* was void on the ground of fraud, the Court negativing fraud granted the plaintiff a declaration that the *solenama* embodying the terms of a lease not being registered was not binding upon him under S. 49 of the Registration Act. *Held*, that the declaration granted was virtually a statement of the legal consequence of non-registration under S. 49 of the Registration Act of the lease embodied in the compromise decree and that such a declaration was not contemplated by S. 42 of the Specific Relief Act. 44 C.W.N. 1063. The granting of a declaration is discretionary and no Court should grant a declaration which is merely a part settlement of the dispute in question and is obtained solely to give the party getting it a tactful advantage in his future litigation. 175 I.C. 18=1937 Rang. 427. Where a chit holder or subscriber in chit assigns his rights in the chits with the consent of the stake-holder, the assignee is entitled to sue the holder and get a declaration that he is entitled to such of the rights of his assignor, of course subject to the liabilities of his assignor, as had actually accrued on the date of his assignment. S. 42, Specific Relief Act, is no bar to such a declaration. 44 L.W. 704=1936 M. 989. For a suit for declaration there may be repeated causes of action and each new cause would give a fresh right to sue. 119 I.C. 502=1929 A. 331. Declaration against foreign subjects—Maintainability of suit in British India—Discretion of Courts—Mode of exercise. *See* 30 L.W. 691. Courts have jurisdiction to grant declaratory relief, even where on the pleadings of the defendant, no case for the grant of such relief is made out, if the attitude of the defendant and the evidence put forward by him have the effect of casting a cloud on the defendant's title. In such a case the defendant can be held to be interested in denying the plaintiff's title for purposes of S. 42. 31 Punj.L.R. 578=1930 L. 803. *See* 39 C. 704; 18 C.W.N. 106; 23 A.L.J. 219; 1940 Pat. 247. A suit under S. 42 can be maintained only when the plaintiff claims to be entitled to any legal character or to any right as to any property which has been denied by the defendants. The jurisdiction to give a declaratory judgment should be exercised sparingly with great care and jealousy and with extreme

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caution. 32 C.W.N. 1084. A declaratory decree may be given in a suit to contest an unnecessary alienation if the suit is brought honestly on behalf of a minor reversioner to protect his interest. 6 L.L.J. 389=85 I.C. 284; 109 I.C. 585; 1939 A.M.L.J. 162. But it would not be proper to pass such a decree in a case in which the minor is merely a figurehead and the real plaintiff is the alienor himself who has caused the suit to be instituted for the purpose of undoing his own act. 109 I.C. 585. As the Act does not apply to the Sonthal Parganas, there is nothing in the law apart from that Act which would entitle the Court to grant a declaratory decree. 1922 P. 42. A suit for declaration that a certain award is null and void is not covered by S. 42 but is covered by S. 39. 52 I.A. 265=89 I.C. 773=1925 P.C. 216 (P.C.) Courts not to grant *negative declarations*. *See* 6 R. 291. For the purpose of deciding whether a suit is for a declaration authorised under S. 42 the substance and not the form must be regarded. Where a plaintiff asserting his mortgage rights in sixteen annas of the properties mortgaged to him asks for a declaration that the defendant has no proprietary right in the same, the suit is in substance for a declaration of his mortgage rights in the property and comes within the purview of S. 42 and is, therefore, maintainable. In seeking for a declaration which negatives the defendant's title to the properties, the plaintiff in substance asserts his own right and seeks for a declaration in respect thereto. 45 C.W.N. 470. *See also* 1942 O.A. 404 ; 1940 Pat. 502 (Declaration as to contingent rights). Where in a suit a person asks for a declaration that the record-of-rights is wrong and prays that the said record might be corrected, the suit falls under S. 42 of the Specific Relief Act. 42 C.W.N. 96=1937 Cal. 745. A suit for a declaration that the plaintiff's share in a certain tauzi should correspond to a certain proportion of the original estate cannot be held to be obnoxious to S. 42 on the ground that there is no prayer for a cancellation or correction of the entry in Land Registration Register. The Civil Court has no jurisdiction over the Land Registration Department of the Collector at all, though when moved in the right way it would give a declaration regarding the shares of parties or even a declaration that certain entry in the Collector's register is wrong. But the Civil Courts will not direct the entries in the Collector's register to be corrected and a plaintiff is not bound to ask for any declaration other than a declaration as to the extent of his share. 20 P. L.T. 136=1938 P.W.N. 631=1938 Pat. 524. As to applicability of section to arbitration, *see* 50 C. 1=49 I.A. 366 (P.C.). Where an award of arbitrators has not been filed in Court, it is competent to the plaintiff to institute a suit for a declaration that the award is not binding on him. S. 14 of the Arbitration Act is no bar to the maintainability of the suit. 4 L.L.J. 12 =1922 L. 26 (1). *See also* 35 P.L.R. 136= 1934 L. 235. Where persons interested are not parties—Suit under the section does not lie. 1923 N. 50. *Admission of title* by defendant, effect of. *See* 109 I.C. 522=1928 N. 252. Entries in revenue records as tenants for a long time raise a presumption of correctness which has to be rebutted; but tenants are not entitled to a declaration under S. 42 against their landlords. 4 L.L.J. 207=1922 L. 163. *See also* 1938 Pesh. 28=176 I.C. 486 (Mutation of name —Correction of record); 1938 A.L.J. 235=1938 All. 242; 42 C.W.N. 96=1937 Cal. 745. S. 42 does not apply to a suit for a declaration that the plaintiff will be entitled to contribution from the defendants if and when the occasion arises. 1 P. 1=3 P.L.T. 793. O. 21, R. 63, C.P. Code, gives a special right of suit to party whose claim is rejected under O. 21, r. 58, and in such a case the proviso to S. 42 does not apply 4 Pat.L.T. 409=1923 P. 556. *See also* 1942 O. A. 404; 47 L.W. 724=(1938) 1 M.L.J. 803; 1938 Lah. 574=40 P.L.R. 407. Suit to declare that property is judgment-debtor's and attachable and saleable is covered by S. 42. 1938 O.W.N. 599=1938 Oudh 165. Scope—Creditor attaching debtor's property before judgment—Subsequent decree against debtor in suit by another creditar—Attachment of same property in execution of latter decree and sale —Suit by first creditor to declare latter decree fraudulent and collusive and to declare that latter creditor had no right to attach the property—Maintainability—Injunction—Grant of —Conditions. *See* I.L.R. (1939) Bom. 302=41 Bom.L.R. 384=1939 Bom. 209. It is essential to bear in mind the distinction between a substantive right and right which is conferred by rules of procedure. The right of a judgment-creditor to attach the property of his judgment-debtor is a mere procedural right, conferred by the Code of Civil Procedure. It is not a substantive right as to the property, and therefore cannot give rise to a right of suit under S. 42. Hence a creditor cannot sue under S. 42 for a bare declaration that a transfer has been made by his judgment-debtor fraudulently with intent to defeat or delay his creditors. (7 Rang. 477, Over.) 1940 Rang.L.R. 59=A.I.R. 1939 Rang. 332 (F.B). It is not in the discretion of the Court to declare or refuse to declare a Municipal election invalid. If the case is proved the Court must pass a decree in favour of the person seeking the invalidity of the election. Evidently a suit for the purpose is maintainable. 63 I.C. 6 (P.). As to grant of relief in election cases under this section, *see* 12 P. 209=1933 P. 155; 37 C.W.N. 122; 115 I.C. 262; 1937 A.L.J. 973=1937 All 585. In a suit to restrain the defendant Association from preventing the plaintiffs who are its members from having access to the proceedings books for the purpose of perusal and inspection and from preventing the plaintiff from making extracts from these books, it is doubtful if any declaration of the right of the plaintiffs to inspect and to take copies could be obtained. A declaration, if at all possible, could only be obtained if a case for a mandatory injunction is established. 42 C.W.N. 161=A.I.R. 1938 Cal. 89.

CONSTRUCTION OF SECTION.—S. 42 prohibits a suit for pure declaration without relief. But it does not compel the plaintiff to sue for all the reliefs that could possibly be granted, nor does it debar him from obtaining a relief which

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he wants unless at the same time he seeks for a relief which he does not want. 81 I. C. 2=1925 C. 233. A suit was brought for a declaration against the Secretary of State that the declaration made by the Local Government under S. 8, U. P. Court of Wards Act, was *ultra vires*. The Court of Wards which was in possession of property was not made a party and no claim for possession was made. It was contended by the Secretary of State that the further relief for possession having been omitted, the suit was barred by S. 42. *Held*, that the suit was not barred as plaintiff was not bound to join the Court of Wards as a party and claim possession. He could bring a suit against the Secretary of State alone for declaration, the only relief which he could claim against Government. 1937 A. 569.

SECTION NOT EXHAUSTIVE.—S. 42 is not exhaustive of the declaratory suits entertainable by Courts. 39 M.L.J. 319=59 I.C. 245 (2); 39 M. 80 (82)=27 M.L.J. 634; 26 I.A. 16=22 M. 270 (282); 43 M. 410; 1933 A. 488=1933 A.L.J. 673 (F.B.), following 22 M. 270 (P.C.) and 35 A. 487 (P.C.). The illustrations to the section no doubt refer to certain well-known classes of suits; but there is no justification for limiting the scope of the section by reference to the illustrations. In dealing with declaratory suits, therefore, the Courts have in recent years laid stress not so much on the question of their maintainability as on that of the propriety and utility of granting relief by way of declaration, 59 M. 1052=43 L.W. 764=1936 M. 605=(1937) 1 M.L.J. 41. Where the plaintiff sued for a declaration that an order passed by the Board of Revenue was without jurisdiction, *held*, that the suit was maintainable, even though it did not strictly fall under S. 42, because the plaintiff was not suing as a person entitled to any legal character or to any right as to any property. 58 M.L.J. 698. But it has been recently held by the Rangoon High Court that the Courts have no power to grant merely declaratory decree apart from S. 42: 1928 R. 143. British Indian Courts have no general powers to make a declaratory decree outside the limits formulated by S. 42 and the section cannot be utilised with the object of enunciating a truism. 1931 A. 83=53 A. 316.

DISCRETION OF COURT.—It is always in the discretion of the Court to grant or refuse a declaratory decree. 45 A. 311=21 A.L.J. 168 =1923 A. 287. *See also* 16 Pat.L.T. 236=1935 P. 256; 8 Luck. 477=1933 O. 207; 1933 O. 423. The discretion has to be exercised on certain well-recognized principles and with reference to the varying circumstances of each case. No hard and fast rule can be laid down as to the circumstances in which the discretion should or should not be exercised. 1934 A. 469; 39 L.W. 510=1934 M. 293; 56 A. 293=1934 A. 176 (declaration with conditions). 1930 L. 728; 1929 P. 433; 1929 O. 292. Where the grant of a declaration would not be effective and would be useless, the Court in its discretion should not make. It is well settled that under S. 42 of the Specific Relief Act a Court would not make a declaration of an abstract right exclusive of practical utility especially when that declaration cannot or may not be productive of any benefit to the party seeking or obtaining the declaration. A declaration that a licence should have been renewed by a Municipality for the year 1936-1937 is perfectly useless when made in 1942 and the Court will therefore refuse to grant it. 21 Pat. 449. To grant a declaratory decree which is nothing more than a stepping stone for further litigation and is of no practical effect is not a proper exercise of the discretion. 20 A.L.J 557=44 A. 622=1922 A. 349. The declaratory relief being in the discretion of the Court, it should not be granted in anticipation of contingency which may not arise. Therefore, a mortgagee, who has not obtained a simple money decree under O. 34, R. 6, C.P. Code, is not entitled to a declaratory relief that a deed of transfer executed by the mortgagor in respect of certain property not mortgaged by him is void being in fraud of creditors including himself. 152 I. C. 360=1934 A. 1064. In a suit in respect of a security bond it is not competent to the plaintiff to claim a declaration that a transfer by the defendant of certain decree not covered by the bond is null and void as against him and that any decree which he might obtain in the present suit would be executable against the said decree. 1942 A. 104=1941 A.W.R. (H.C.) 389. Discretion of Court—Proper persons not parties to a suit in which declaration is sought—Declaration not to be granted. 42 M L.J. 359=1922 M. 97. *See also* 149 I.C. 93=1934 A. 770. Courts are not ordinarily prepared to grant such relief where it would only be by way of anticipation, or where the main heads of complaint have failed. 78 I.C. 981=1924 N. 387. *See also* 16 Luck 742. Object of declaration being to affect the decision of Revenue Court in a pending suit—Declaration should be refused—Jurisdiction. 89 I.C. 1013 =23 A.L.J. 941 (F.B.).

EXERCISE OF DISCRETION—DUTY OF COURT —A declaration which would be wholly futile would not be granted. 9 Pat.L.T. 210=106 I. C. 423. Court will not make declaration of an abstract right exclusive of practical utility, especially when that declaration may not be productive of any benefit to the party obtaining the declaration. 103 I.C. 313=1927 P. 286; 1933 Oudh 423 (mere declaration of correctness or otherwise of electoral roll when election is over.) *See also* 1938 A.M.L.J 33. Where the right claimed has never been denied by the defendant, it is improper to grant a declaration. A.I.R. 1937 Mad. 21=71 M.L.J. 611. Though a Court in its discretion can refuse to give a declaratory decree and can also impose certain conditions, yet the discretion should be guided by judicial principles and well-recognized equitable considerations. 1938 A.L.J. 235=A. I.R. 1938 All. 242. In cases, where no temporary injunction maintaining the *status quo ante* is or can be granted, and the consequential relief in the shape of a mandatory injunction is denied, the Court should be very careful in framing the declaration it makes in favour of the plaintiff. Nothing should be declared which does not strictly speaking come within the scope of the suit, and the effect of which might be to embarrass other parties and complicate other

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transactions which are not before the Court. 42 C.W.N. 774=67 C.L.J. 143. Suit for declaration of right to appoint a trustee is maintainable. 49 A. 435=1923 A. 257=25 A.L.J. 329. So also suit as to plaintiff's status as adopted son. 1933 N. 292. In matters of municipal election, a mere rate-payer who is not a voter cannot sue. 31 C.W.N. 926=103 I.C. 890=1927 C. 704. A Court must not dismiss a suit filed under S. 42 on the ground that a mere declaration will not suffice without taking evidence and going into the facts. 82 I.C. 851 =1925 C. 470. In a suit for a declaration, the Court ought to be satisfied that the plaintiff has a valid and subsisting interest in the property in respect of which the declaration is asked for. 78 I.C. 467=1924 P. 706. If in the exercise of its discretion a Court of first instance awards a declaratory decree under S. 42, such a decree cannot, no doubt, be reversed in appeal simply because the discretion has been improperly exercised. But this does not mean that even in cases where the discretion has been exercised wholly arbitrarily and in a manner grossly inconsistent with judicial principles the Court of appeal would have no power to interfere. 44 C.W.N. 1063.

CAUSE OF ACTION.—After a cause of action has arisen, if the plaintiff's title is admitted by his opponent in clear terms, the admission operates to keep their right of suit alive and in time, and cannot destroy the same. A cause of action does not disappear by the admission which the plaintiff's opponent makes, while the right of suit continues in existence. 109 I.C. 522= 1928 N. 252. Verbal denial of title, also constitutes cause of action. 1928 N. 16=104 I.C. 803. S. 42 gives a remedy to a person against all persons who not only claim an interest adverse to his own, but against all those who *may* do so and it is intended that all such claims must once and for all be determined in one suit. 1928 M.W.N. 98=1928 M. 489. Suit against University to declare candidate to have passed in an examination does not lie—Neither declaration nor injunction is open. 23 A.L.J. 219= 47 A. 434. Where a minor induces another to advance money by mortgage of his property, on a fraudulent misrepresentation as to his age, he can sue for a declaration that the mortgage is void provided he returns the exact sum received at the time of contract. 19 A.L.J. 578=62 I.C. 258. Alienation by guardian—Suit by minor for declaration of invalidity—Maintainablitiy without prayer for cancellation of sale. 14 Mys. L.J. 256=41 Mys. H.C.R. 30. Minor —Decree against in respect of property—Gross negligence of guardian—Suit to declare decree void—Maintainability without prayer for possession or injunction. *See* 40 Bom.L.R. 127. Where a decree is passed for the sale of property alleged to be jointly held by minors and guardian *ad litem*, the minors, whether or not they have a right to the property, are entitled to a declaration that the decree which has been passed against them is a nullity because guardian *ad litem's* interest being adverse, they were not properly represented. For the purpose of such a suit, it is immaterial whether or not they have a right to possess the land and consequently it is entirely unnecessary for them to ask the Court to restore them to possession. 180 I.C. 489=A.I.R. 1938 Rang. 468. Suit for a declaration to establish plaintiff's right to obtain payment under a cheque or for a declaration that the cheque was endorsed to him for valuable consideration. At first the Bank on which the cheque was drawn was made a party defendant, but the trial Court struck off its name as an unnecessary party. *Held*, that, after striking off the Bank's name, the suit became one for mere declaration, such a suit was sustainable and so *ad valorem* Court-fee was not necessary. 119 I. C. 158= 1929 M. 572. Suit for declaration of right of Mahomedans to kill cow—Prayer for injunction against intruding Hindus—Suit is maintainable. 1930 A.L.J. 875=1930 A. 753. A suit for a declaration that a decree is *ultra vires* cannot be maintained. 59 I. C. 566=23 O. C. 342. Suit to declare prior decree null and void owing to fraud: *see* 10 Mys. L.J. 288. Unless it is ascertained or definitely alleged on substantial grounds, that the assets realized or to be realized in execution of decrees of rival decree-holders would be insufficient to discharge in full the claims of all the decree-holders under S. 73, C. P. Code, no decree-holder has a right to maintain a suit to have the decree of his rival declared void on the ground that it was fraudulently obtained and to ask the Court to grant an injunction restraining the defendant from executing his decree against the common judgment-debtor or his property. 1933 N. 214. *See also* I.L.R. (1939) Bom. 302=41 Bom.L.R. 384=1939 Bom. 209. Decree for partition against minor—Delivery of house in execution —Suit by minor for bare declaration that decree is not binding. *Held*, that the suit was not barred by the proviso to S. 42: 123 I. C. 108 (1)=1930 A. 466. Partition decree affecting plaintiff's rights—Declaratory suit to declare its nullity is not barred. 1929 C. 586. Suit for declaration that decree is a nullity—Consequential relief to set aside decree must be prayed and paid for. 1930 P. 227. Decree for profits by Revenue Court in favour of recorded co-sharers—Suit for declaration of illegality of decree does not lie. 70 I.C. 444. The proviso to S. 42 is no bar to a suit for declaration of title to lands in possession of tenants and lessees. 63 I. C. 685=14 S.L.R. 137. Where notwithstanding a sale by him of his property a plaintiff sues for a mere declaration that he was the owner of the property covered by the sale, such a suit would be maintainable, if the sale was not a real transaction. He need not ask the sale to be set aside, for there is no real sale. The property is where it was. But when once a third party's interest is affected, the transaction becomes something other than unreal and the transaction is not a nullity and has to be set aside. 1941 Nag. 174. Where it is not proved that the plaintiff could have sought any relief other than a mere declaration, his declaratory suit is not barred by S. 42. 1941 O. A. (Supp.) 894=1941 A.W.R. (Rev.) 1101. Where a person conducts a litigation as an agent of the plaintiff and the suit is compromised, and, in accordance with the compromise, the agent

Explanation.—A trustee of property is a "person interested to deny" a title, adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.

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obtains a promissory note in his name and subsequently sues on the note and gets a decree, a suit for a declaration that the plaintiff is the actual decree-holder and that the person was merely acting as his agent in the case, is competent. Such a suit is not barred by S. 9 or O. 47, C. P. Code. 1931 R. 24. Where the plaintiff has made certain payment which the defendants were liable to pay and brings a suit for re-imbursement and for a declaration of his right to re-imbursement in the future, *held*, that there was no cause of action for a declaration in respect of a future right of indemnity under S. 42. 26 Bom.L.R. 678=1924 B. 470. Where one of the defendants is in collusion with the plaintiff and the suit against him is brought merely for the purpose of assisting to ground the suit against another defendant and the suit against such other defendant is dismissed, an equitable relief by way of declaration will not be granted to the plaintiff against the colluding defendant. 179 I.C. 956=1939 Sind. 36. Mortgagee to pay off pr or mortgage—No proper attestation—Suit for declaration of charge will lie. 45 B. 597=23 Bom. L.R. 84.

LEGAL CHARACTER AND STATUS.—Per *Nasim Ali, J.*—The words "legal character" in S. 42 are wide enough to include the status of a person. In order to entitle the plaintiff to bring a suit under this section, it is not necessary that the defendant should actually deny the plaintiff's legal character. If the defendant is interested to deny the plaintiff's legal character, plaintiff may come to Court for a declaration that he or she is entitled to the legal character. 46 C.W.N. 465. A Court will not grant a bare declaratory relief that the plaintiff is the nearest male reversioner during the lifetime of the widow or other heiress. 20 A.L.J. 282=1922 A. 100: 1933 R. 157 : 9 P.L.T. 210. A suit for a declaration that the defendant is not keittima daughter of the plaintiff and her husband does not lie under S. 42. It is a suit to establish a negative case. 196 I.C. 352=A.I.R. 1941 Rang. 220; 1938 Bom. 37=39 Bom.L.R. 1072; 1937 Mad. 555. (Hindu reversioner, right of, S. 42 of the Specific Relief Act, grants relief only in cases where the legal character or right as to any property of the plaintiff is denied by the defendants. A man's legal character is the same as legal status, that is a possession recognized by law. An allegation that one's right to celebrate a ceremony is denied or contravened by another does not involve any question of former's legal character that is status. To such a case S. 42 of Specific Relief Act has no application. I.L.R. (1939) Nag. 429=1939 N.L.J. 184=A.I.R. 1939 Nag. 154. A person in possession is considered in law to have that legal character or right which is contemplated by S. 42 and can protect his possession through Court against a mere trespasser. 1935 L. 547. Legal character—Right to receive offerings, declaration as to. 18 A.L.J. 983=43 A. 159; 10 L.L.J. 242. Suit for declaration of temple honours not connected with any office : 41 L.W. 384. Suit for declaration of exclusive right to lead prayers and for injunction : 1933 A. 284 (following 2 P.L.J. 108). As to declaration of right to worship in mosque, *see* 14 L. 518=144 I.C. 658=1933 L. 759. Suit to declare that Revenue Officer's order cancelling appointment as karnam is *ultra vires*—Not barred. 33 L.W. 294=1931 M. 502. *See also* 144 I.C. 400=65 M.L.J. 186. Legal character includes right of franchise—Election—Suit to set aside—Maintainability. 63 I.C. 229=26 C.W.N. 91. Election—Declaration of right to have name inserted in the register of voters—Maintainability. 115 I.C. 262 ; 142 I.C. 187=1933 M. 319. *See also* 1941 Cal. 136. (Suit for declaration of plaintiff as director of company). Where certain members of a registered society sued to obtain a declaration that certain amendment to the rules of the society passed at a meeting were *ultra vires* as not having complied with the rules for the purpose, and also prayed that the executive committee should continue to hold office in spite of the fresh elections held under the amended rules and it was also found, that according to the rules of the society, similar amendments could be made by a proper compliance with the rules, it was *held*. Per *Ghulam Hasan, J.*—That as any decree that might be passed is likely to be rendered nugatory by the passing of the amendments according to the rules, the decree would be *brutum fulmen* and that hence the Court should refuse to grant the declaration. 1941 O.A. 432 =1941 O.W.N. 661=1941 Oudh 422. Suit for declaration of joint right of management of charity—Decree, form of. 39 M.L.J. 403=44 M. 205. A suit wherein the relief claimed is a declaration of status is one for a substantial relief. 80 I.C. 606=27 O.C. 353=1925 O. 210. A suit for a declaration that the plaintiff is and continues to be the adoptive father of defendant is virtually a suit to declare that defendant is the adopted son of the plaintiff and is maintainable. 1933 N. 292. *See also* 38 P.L.R. 455=1938 Lah. 135 (Question of legitimacy.) 1936 Lah. 135; 1936 L. 858. Where an order for maintenance has been obtained against a Burmese Buddhist monk in respect of an alleged illegitimate child, under the provisions of the Cr. P. Code, he is entitled to sue under S. 42, for a declaration that he is not the father of the child. 1940 Rang.L.R. 668=1940 Rang. 298. A suit for a mere declaration that one person is related to another without anything more is not a suit to establish a legal character and not maintainable. 121 I.C. 417 =34 P.L.R. 900=1930 L. 795. *See also* 140 I.C. 76=36 C.W.N. 638=1932 C. 714. A declaration that certain sum deposited by the plaintiff with the defendant as margin money is accountable by the defendant to the plaintiff cannot be granted under S. 42, as it affects only the pecuniary relationship between the parties to the contract. 1937 L. 389.

DECLARATION AS TO RIGHT TO PROPERTY AND TITLE.—*See* 24 Bom.L.R. 449=1922 B. 84. As to what is a declaration to any legal right or right to property, *see* 26 A.L.J. 409=109 I.C.

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112=1928 A. 309 : 130 I.C. 366=1931 R. 24 ; 142 I.C. 606=1933 L. 412. Right to property referred to in the section is the plaintiff's individual right in a particular property and not a general right which he possesses in common with all or some of his fellow citizens. 6 R. 291. As to suit by transferee from Hindu widow against reversioner, *see* 60 I.C. 784=19 A.L.J. 275 ; 60 I.C. 343=16 N.L.R. 209. The expression "any right to any property" in S. 42 is large enough to include reversions even if remote ; and a person in whom the reversion is vested under the Hindu Law can obtain a declaratory decree as to his rights when a cloud is sought to be cast on the same. 8 P. 153= 119 I.C. 817=1929 P. 164 ; 1933 O. 555 ; 1934 A. 469 ; 1934 P. 660. As to suit by Hindu Reversioner, *see* 1937 A.L.J. 778=1937 All. 653 ; 16 Mys. L.J. 167=43 Mys.H.C. R. 181 ; 1937 Mad. 555 ; 1938 Bom. 37=39 Bom.L.R. 1072 ; 1939 All. 249. Where an unmarried daughter is under custom entitled to inherit the property of her father and to remain in possession until her marriage, a suit by a reversionary heir for a mere declaration of title against her does not lie so long as she is unmarried. 42 P.L.R. 198=1940 Lah. 184. A right to attach particular property is a right as to that property within the me ning of S. 42. Accordingly a decree-holder, who withdraws the attachment of a certain property on objection being raised under O. 21, R. 58, can maintain a suit for a declaration that that property is liable to attachment and sale in execution of his decree. Such a suit does not fall under O. 21, R. 63 ; 60 B. 226=38 Bom.L.R. 251=1936 B. 160. Court has got a discretion not to grant a declaratory decree that an authority to adop is invalid before any adoption has been made. 98 I.C. 681. It is competent to the presumptive heirs of a Hindu to maintain a suit for declaration of the invalidity of an adoption made by the widow of the last male owner. 4 L.L.J. 37=1922 L. 68 ; *See also* 155 I.C. 244=16 P.L.T. 236=1935 P. 256 ; or by widowed daughter : 26 L.W. 282= 53 M.L.J. 601 ; a future shebait of a private endowment can maintain a declaratory suit on behalf of the idol. 35 C.W.N. 768. *See also* 54 C.L.J. 544. Suit by Hindu reversioner for declaration of his status : 26 A L.J. 449 ; 92 I. C. 982 ; 9 P.L.T. 210 ; 110 I.C. 248=9 L. 467; 1933 R. 157=145 I.C. 372 ; 155 I.C. 244= 1935 P. 256. If a person chooses to seek a declaration only for future maintenance for which the cause of action has not accrued, S. 42 cannot stand in his way. 14 P.L.T. (Supp.) 1 =145 I.C. 1=12 P. 359=1933 P. 306. A suit for a declaration that a will is null and void is not maintainable after the death of the testator ; it must comprise a prayer for consequential relief, such as possession of the property, or if the right to possession is postponed, cancellation of the will. 10 L. 403 =112 I.C. 48=1919 L. 811. As to suit for declaration that the directors of a company were not properly appointed, *see* 32 C.W.N. 1084 ; 55 M.L.J. 385. A Court will not grant a declaration of plaintiff's right to an unknown and uncertain share in joint property. 82 I.C. 392=1924 Cal. 1046; 1940 Pat. 502 (contingent right). A suit for a declaration not with respect to an existing right but with respect to a *spes successionis*, is not maintainable under S. 42. 1940 Rang. L.R. 54; 14 Lah. 306=141 I.C. 409=1933 Lah. 712 (Suit by excluded co-owner from possession of joint family property for mere declaration and injunction not maintainable); 1933 Mad. 503. Co-sharer—Managing co-sharer—Assertion of exclusive title before Revenue authorities by—Suit by other co-sharers for declaration of their title in case of—Maintainability—Prayer for joint possession unnecessary. 1929 Oudh 35 (2) ; 142 I.C. 606=1933 Lah. 412. *See also* 1937 Pat. 250; 1939 A.M.L.J. 120. A mortgagee cannot maintain a suit for declaration of his mortgagor's title to the mortgaged properties so long as his right as mortgagee is not established. 63 I.C. 514=25 C.W.N. 552. *See also* 1942 O.A. 404. Religious office—Suit for mere declaration and injunction without a prayer for possession—Maintainability. 115 I.C. 539 (1)=1929 Lah. 11; 133 I.C. 193=1931 Mad. 505. The right of a *purohit* is no right at all, and is not property but a mere *spes successionis* or contingent right. 67 I.C. 439=3 Lah.L.J. 414; 10 Lah.L.J. 242. As to suit for declaration of exclusive right to lead prayers in a mosque and for injunction, *see* 144 I.C. 298=1933 A.L.J. 513=1933 All. 284. Sale of property by Insolvency Court—Suit for declaration by claimant—Maintainability. 1927 Cal. 934. A suit for declaration of title to use property in respect of which an order under S. 144, Cr. P. Code, is passed is not maintainable. 42 M.L.J. 179=1922 Mad. 123. Before the proviso to S. 42 can come into operation, it must be shown that the defendant was in possession of the property in respect of which the declaration is sought, and that as against him the plaintiff could obtain an order for delivery of possession. If at the time the suit is filed, possession of the property is neither with the plaintiff nor with the defendant, but in *custodia legis*, all that is necessary is a declaration of title. When the property remains in *custodia legis*, the Court must deliver the same to the person who shows a title, and it is therefore not necessary for a plaintiff to ask for anything more than a mere declaration. I.L.R. (1939) Mad. 986=50 L.W. 243=1939 Mad. 853=(1939) 2 M.L.J. 624. Where property is in the custody of a Court, a suit for a bare declaration of title to it is not barred by S. 42. 89 I.C. 424=1926 Oudh 43. *See* I.L.R. (1939) Mad. 986=1939 Mad. 853=(1939) 2 M.L.J. 624. Where neither party is able to prove his title to property in dispute, it is open to the plaintiff in possession for some time short of the statutory period to obtain a declaration of his right to the property. 64 I.C. 400=13 Bur.L.T. 205. *See* 62 I.C. 843=2 P.L.T. 743. Where the plaintiff claims to be a trustee and administrator of certain institution of which neither he nor defendant is in possession or control of the manngement, a suit for mere declaration under S. 42 is maintainable; and where it is not open to the plaintiff to pray for possession also as against the defendant, injunction against the defendant is further relief within the mean-

Illustrations.

(*a*) *A* is lawfully in possession of certain land. The inhabitants of a neighbouring village claim a right of way across the land. *A* may sue for a declaration that they are not entitled to the right so claimed.

(*b*) *A* bequeaths his property to *B*, *C* and *D*, "to be equally divided amongst all and each of them, if living at the time of my death, then amongst their surviving children." No such children are in existence. In a suit against *A's* executor, the Court may declare whether *B*, *C* and *D* took the property absolutely, or only for their lives, and it may also declare the interests of the children before their rights are vested.

(*c*) *A* covenants that, if he should at any time be entitled to property exceeding one lakh of rupees, he will settle it upon certain trusts. Before any such property accrues, or any persons entitled under the trusts are ascertained, he institutes a suit to obtain a declaration that the covenant is void for uncertainty. The Court may make the declaration.

(*d*) *A* alienates to *B* property in which *A* has merely a life interest. The alienation is invalid as against *C*, who is entitled as reversioner. The Court may in a suit by *C* against *A* and *B* declare that *C* is so entitled.

(*e*) The widow of a sonless Hindu alienates part of the property of which she is in possession as such. The person presumptively entitled to possess the property if he survive her may, in a suit against the alienee, obtain a declaration that the alienation was made without legal necessity and was therefore void beyond the widow's lifetime.

(*f*) A Hindu widow in possession of property adopts a son to her deceased husband. The person presumptively entitled to possession of the property on her death without a son may, in a suit against the adopted son, obtain a declaration that the adoption was invalid.

(*g*) *A* is in possession of certain property. *B*, alleging that he is the owner of the property requires *A* to deliver it to him. *A* may obtain a declaration of his right to hold the property.

(*h*) *A* bequeaths property to *B* for his life, with remainder to *B's* wife and her children, if any, by *B* but if *B* die without any wife or children, to *C*. *B* has a putative wife, *D*, and children but *C* denies that *B* and *D* were ever lawfully married. *D* and her children may, in *B's* lifetime institute a suit against *C* and obtain therein a declaration that they are truly the wife and children of *B*.

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ing of the Proviso to S. 42. 66 I. A. 106= I.L.R. (1938) Lah. 63=42 C.W.N. 930 =1938 P.C. 73=(1938) 1 M.L.J. 359 (P.C.). Suit for declaration that plaintiff and defendants as heirs of deceased were entitled to shares in moneys lying to credit of deceased in hands of Provident Trust not party to suit for injunction restraining defendants from receiving it—Maintainability—Amendment of plaint by addition of prayer for administration —Permissibility. I.L.R. (1939) Kar. 432= 1939 Sind 107. A co-sharer professed to grant a lease of the entire interest in a property of which he held a share only, had the draft of the *kabuliyat* made, agreed to give an *amalnama* or authority to the lessee to take possession of the property and received the full *selam* stipulated from the lessee and accepted rent. The other co-sharers refusing to execute the *kabuliyat*, the co-sharer refused possession of his share. Lessee sued for *amalnama* and possession. *Held*, that the suit, was not for specific performance of a contract and thus coming under S. 14, 15 and 16, but was for a declaration and consequential relief to which the plaintiffs were entitled. 33 C.W.N. 314=1929 Cal. 380. Where the defendant obtained a declartion that a certain *wakfnama* was invalid and possession of the properties which he claimed as his own, a suit for a mere declaration that the aforesaid *wakfnama* was valid is not competent without a prayer for consequential relief, *e.g.*, joint possession or restraining the defendant from diverting the properties. That no consequential relief within the terms of S. 92 of the C. P. Code, is appropriate in the case, primarily because the section, in so far as it pre-supposes the existence of a trust, is not applicable to a suit for a declaration that there is a trust and secondly because, reliefs besides those enumerated in S. 92 are not inconceivable. Remedies open to the plaintiff in such a case indicated. 34 C.W.N. 1129=1930 Cal. 787. If a Mahomedan, anxious to protect a *wakf* estate, is prepared, as against third parties, to establish that they have *wakf* property in their hands, a declaration to this effect may certainly be given upon the terms set forth in S. 42. If, however, the plaintiff does not profess to establish that he had any grievance against the defendants, he is not entitled to a declaration that certain trusts for the benefit of the Muhammadan community —in which the transferees may not be in the least interested—were validly created. Still less he is entitled, in a suit for a mere declaration of the validity of the *wakf* to have an issue decided about the validity of the transfers to the defendants. 130 I.C. 369=34 C.W.N. 1=1930 Cal. 787. *See also* 1933 Oudh 555; 1936 Lah. 233. Where in a suit for a declaration that the plaintiff is a gaddanashin of a certain khankah, the allegation by the plaintiff that he is already in possession of the properties attached to the khankah is not disputed by the defendant who merely claims to be in joint possession with him, it is not necessary for the plaintiff to include a prayer for possession but he must however include a prayer for ejectment of the defendant. It is open to him to sue also for an injunction restraining the defendant from interfering with his rights as a manager of the khankah. 40 P.L.R. 516=1938 Lah. 616. *See also* 71 M.L.J. 611=1937 M. 21.

LEGAL CHARACTER.—Suit by dismissed *karnam* for declaration of invalidity of Board's order is maintainable. 56 Mad. 749=1933 Mad. 618= 65 M.L.J. 186. In a suit for a declaration that plaintiff had been validly appointed *karnam* and

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that the Collector's action in appointing the defendant was wrongful, the Government not being impleaded as a party, *Held*, that the Court will refuse to pass a decree which the Government may in its discretion either accept or disregard; that the Government, a proper party, not having been impleaded, the Court will refuse to exercise a sound discretion by refusing to pass a decree. 39 L.W. 510=1934 Mad. 293 Where a right alleged on behalf of the plaintiff as owner of a property is denied on behalf of the defendant, it cannot be said that the plaintiff is not clothed with the legal character or title entitling him to ask for a declaration; and the Court may grant a declaration; and the Court may grant a declaration in its discretion; 63 Cal. 108=63 C.L.J. 210=40 C.W.N. 916. Where the right claimed has never been denied by the defendant, it is improper to grant a declaration. 71 M.L.J. 611. A suit for a declaration that the plaintiff is a director of a certain company and for the protection of his rights *qua* director, is competent. But if such a suit also challenges the appointment of the other directors and seeks to remove them from the directorate, it is wrongly constituted to that extent. I.L.R. (1940) 1 Cal. 560. Where in a suit by the managing director who was removed by the company by a special resolution for a declaration that he is still the managing director it was found that the resolutions removing him from office were *ultra vires*. *Held*, that the managing director was entitled to the declaration and the same could not be refused on the ground that the company might subsequently remove him from office by a valid resolution. 190 I.C. 819=1940 Lah. 243.

TRADE MARK.—Every one has the right to use any kind of trade mark he likes, so long as he does not infringe the right of others already acquired. Hence, where a plaintiff does not make out a case that the right to the use of a certain trade mark is the "exclusive right of property" which he has acquired to the exclusion of every one else, a relief to declare that the plaintiff has got the right to use that trade mark cannot be granted. (6 R. 291, Rel.) 143 I.C. 840=1933 A. 495. Where the effect of negativing a right claimed by the defendant is to directly or indirectly affirm a right claimed by the plaintiff in common with others, a suit for declaration that the defendant does not possess such right is maintainable. However the relief may be worded, the test is always the same, namely, whether the right claimed by the defendant implies a denial of the plaintiff's "right as to any property" or to some legal character. 143 I.C. 840=1933 A. 495.

PROVISO—"FURTHER RELIEF."—The plaintiff cannot sue for a mere declaration when a consequential relief is open to him. 2 P. 391=4 Pat.L.T. 675 (49 I.C. 355; 2 I.A. 169, Ref.); 103 I.C. 29. *See also* 141 I.C. 409; 1933 P. 259; 13 L. 491=1932 L. 636; 1933 M. 503=144 I.C. 602=38 L.W. 194; 68 M.L.J. 229; 14 L.R. 549 (Rev.)=17 R.D. 715; 145 I.C. 1003=1933 O. 517; 1933 A. 958; 1928 R. 134; 1927 L. 788; 1927 L. 128. The word "relief" in the proviso to S. 42 connotes something which is needed by the person seeking the relief; it means more than "right". If the further relief is necessary to the relief which the plaintiff needs and seeks in the Court then he is not entitled to have a mere declaration. A suit for a declaration that certain property is the property of a joint family consisting of the plaintiff and the defendants and that the plaintiff has a certain share in it, the plaintiff alleging that he is in possession of the property and that one of the defendants is holding out that it is not joint family property, is not barred by proviso to S. 42; although no further relief by way of partition is claimed, the relief of partition in the circumstances of the case is not a further relief, but is merely an entirely different right which it may not be necessary for the plaintiff under the circumstances of the case to exercise for the time being. 164 I.C. 133=1936 R. 316. 'Further relief' does not mean every kind of relief that may be prayed for; what is contemplated is a relief arising from the cause of action on which the plaintiff's suit is based. If the plaintiff, by reason of the declaration he seeks and obtains, becomes entitled in some remote way to other reliefs, they are not so related to his cause of action, as to be properly termed 'further reliefs' within the meaning of the section. 1936 M.W.N. 770=1937 Mad. 495. In the case of joint owners the possession of one is the possession of all. The only relief which a plaintiff who alleges that he is a joint owner can ask is, to ask the Court to prevent the other joint owner from interfering with the enjoyment of his right. Where a joint tenancy is alleged it is not necessary to sue for possession. The object of the proviso to S. 42 is only to prevent multiplicity of suits. The real difficulty as regards the proviso to S. 42 is in the interpretation of the phrase 'where the plaintiff being able to sue for further relief.' The phrase only means that where the plaintiff in the opinion of the Court and in the circumstances of a case 'ought' to make a demand for a relief that flows naturally from the declaration and which is not automatically granted to him by the declaration. 1939 A.M.L.J. 120. *See also* 1939 Sind 107. What "further relief" in the proviso to S. 42 means, *see* 33 C.L.J. 592=26 C.W.N. 206. *See also* 47 A. 416=28 A.L.J. 291. Under S. 42, in order to enable the plaintiff to get a declaration it is only necessary for him to show that he has some legal character or some right to property and that his opponent is either denying or is interested in denying such legal character or title. It is not necessary for him to show that he has a right to some other consequential relief which he might have claimed at the same time or which is preparatory to his obtaining relief in other Courts. If there is a cloud cast on his title or legal character, he is entitled to seek the assistance of the Court to dispel it by a declaratory decree, provided he is not in a position at that time to ask for any other relief consequent on the declaration prayed. I.L.R. (1940) 2 Cal. 443=44 C.W.N. 847=1940 Cal. 445. In an action brought by the plaintiffs for a declaration to the effect that they were not the share-holders of a certain company, the Court found that no money was forwarded by

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the plaintiffs with their applications for allotment of shares, that the plaintiffs have substantially asked for all the reliefs to which they were entitled and that a prayer to the effect that the register of the company may be rectified by the removal of the plaintiff's names from the list of shareholders would merely be a prayer for a nominal relief. *Held*, that the objection with respect to the maintainability of the suit in a declaratory form is without any substance. 161 I.C.'952=1936 L. 790. Plaintiff need not always sue for all the relief which could possibly be granted to him. 19 S.L.R. 220. Whether it is incumbent upon the plaintiff to ask for consequential relief must depend upon the circumstances of each case. There may be cases in which a declaration may be sufficient for his protection. In such an event the plaintiff cannot be compelled to seek a consequential relief. 37 C.L.J. 499=1923 C. 362; 37 C.L.J. 482=1924 C. 411; 144 I.C. 753=1933 P. 259; 1935 L. 657; 1937 P. 250. A suit for a declaration that an assessment of the plaintiff's holding by the Municipality is illegal and *ultra vires*, being based on an erroneous valuation, is not bad for the reason that the plaintiff has not asked for any consequential relief in the shape of an injunction restraining the defendant Municipality from realising the tax, when the Municipality has done nothing towards such realisation. (26 I.A. 16, Ref.) 61 C. 276=38 C.W.N. 245=1934 C. 673. Where the plaintiff alleges he is entitled to a religious office and that he is prevented from discharging his duties by the trustees and their nominees, it is not necessary that actual possession should be asked for; a suit for a declaration of his right and injunction will give the plaintiff all that can also be obtained by a prayer for possession. 133 I. C. 193=1931 M. 505. But *see also* 9 R. 459=1931 R. 322 (*contra*). The proviso applies to cases where at the date of the suit the plaintiff is able to obtain consequential relief and not in cases where by taking certain other proceedings the plaintiff will in future be in a position to seek such relief. It may be that the Court should, in the exercise of its discretion, refuse to grant a mere declaration if the plaintiff, though not entitled to claim possession at the date of the suit, can by taking proper proceedings more effectively vindicate his right by obtaining possession. 27 A. L. J. 1201=1929 A. 974. Suit for a mere declaration—Maintainability—Right to consequential relief arising during pendency of suit. *See* 37 P. L. R. 99=1935 L. 332. *see also* I. L. R. (1941) Nag 735. Further relief, effect of not asking, 85 I. C. 629=1925 C. 819. Prayer for general relief is not necessarily a prayer for consequential relief so as to take the suits out of the class of suits for a declaration only. 65 P. W. R. 1921; 44 M. L. J. 515=1923 M. 553. An injunction is a discretionary relief and cannot be claimed by a plaintiff out of possession when he does not ask for possession against defendants who are actually in possession. 75 I.C. 549=1923 S. 17 (33 M. 62, Foll.; 14 S. L. R. 137; 36 M. 364, Dist.); 1926 M. W. N. 167=1926 M. 164, 41 P. L. R. (J. & K.) 55; 1938 Lah 869; 74 C. L. J. 241=46 C. W. N. 20. 45 C. W. N. 795=1941 Cal. 534; 1942 O. W. N. 314=1942 A. W. R. (Rev) 180, Where a person is out of possession of property, a suit for a bare declaration of title is incompetent under S. 42. 6 P. L. T. 191=3 P. 915. *See also* 89 I. C. 424=1926 O. 43; 3 P. 403; 14 L. 306; 2 R. 649. It is not possible to separate the office of a *mahant* or *pandarasannadhi* of a *math* from the properties which form the endowments of the office, and a suit by a person, not in possession of such properties, for a declaration of his title to, and possession of, the office is not maintainable by reason of S. 42. Where the plaintiff has failed to ask for possession of the *math* properties. 54 L. W. 357=1941 Mad. 822=(1941) 2 M. L. J. 463 (F. B.) Alienation by guardian—Mortgage by alienee to another—Suit on mortgage, decree and sale—Suit by minor for declaration as to the invalidity of suit, decree and execution proceedings—Cancellation of sale not prayed for—Possession of property with alienee—Suit barred under this section. 14 Mys. L. J. 256=41 Mys. H. C. R. 30. Possession with third party—Declaratory suit lies to set aside will, when devisee is not in possession, though plaintiff also may not be in possession. 78 I. C. 183=1925 L. 110; 49 M. L. J. 620; 45 A. 169. In a suit for declaration of title where plaintiffs are in possession; it is for the defendants to prove adverse possession. 1923 B. 382; 45 A. 164=1923 A. 54; 1942 O. W. N. 314; 1935 L. 119=16 L. 629 (Suit by donor for declaration of invalidity of gift). A co-sharer in possession of certain portions of the common land either individually or exclusively can sue for declaration of title against another co-sharer, if it was found that possession of the land in dispute had been in a state of flux. 4 Lah. L. J. 504. *See also* 160 I. C. 289=1936 L. 283; 1937 P. 229. Suit for mere declaration that plaintiff has an interest in the property is not maintainable where he can ask for further relief by way of sale of the property and partition of the proceeds. 115 I. C. 911. Where the defendants are in joint possession of the properties in the same manner as plaintiffs are, a suit for a declaration that the plaintiffs are owners and in possession of those properties and that defendants have no proprietary right in them is incompetent, and the plaintiffs are bound to ask for some consequential relief by way of ejectment or injunction. 1930 A. 600. It is not necessary to sue also for possession when a purchaser from an absent co-sharer brings a suit for declaration of his title. 4 Lah. L. J. 462. *See also* 68 I. C. 576=3 L.L.J. 437. In order to hold that the plaintiff's suit is barred by S. 42, it is not enough to say that the plaintiff has failed to prove her possession. It must be further shown that the defendant was in possession. Unless this is done it cannot be said that the plaintiff was able to seek further relief than a mere declaration of title against the defendant. 7 O. W. N. 683=1930 O. 441. The

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true owner is entitled to claim a mere declaration of title without infringing proviso to S. 42, as there is presumption that the true owner is in possession of a vacant site, unless the defendant can prove clear possession by himself. 120 I. C. 531=1930 L. 76. Declaratory suit—User of portion of site by permission of real owners does not make it necessary for real owners to institute suit for possession. 120 I. C. 531=1930 L. 76. Where a Court acting under S. 146, Cr. P. Code, appoints a receiver for the suit properties and refers parties to a civil suit, a suit to establish title is not vitiated by the fact that there is no relief claimed regarding possession. 47 M.L.J. 671=20 L.W. 893; 20 L.W. 754. A person who is not a party to a decree may sue to have it declared void without claiming any consequential relief. 5 L.L.J. 357=1923 L. 373; 1934 L. 235. A suit for a declaration that the defendants have no such tenancy right as recorded in the Settlement Records by order of the Collector is not bad in the absence of a prayer to set aside the order. 63 I.C. 161=33 C. L.J. 317. The distinction between a suit brought for a declaration that an act or order of a statutory body is in excess of its jurisdiction, and a suit brought for the correction of an entry in a settlement record on certain specified grounds is patent and substantial. In the one case it is a suit under the general law based on a common law right. In the other it is a suit under an enabling provision of an enactment. In the first case apart from the question of jurisdiction, the merits do not matter. In the second case the decision must be on the merits. And a suit for the declaration simpliciter contemplated by the first case is always maintainable. 59 M. 825=1936 M. 531=71 M.L.J. 118 (F.B.). Where a person who is admittedly in possession of a mauza, claims land which has been recorded by the survey and settlement authorities, as lying outside the mauza, he is not entitled to mere declaration of his title to the land in dispute without also suing for possession. The position would be different if it is found that the claimant is in actual possession of the disputed land as well. The plaintiff being out of possession in the eye of law, it is open to him to bring a suit to establish his title to recover possession, or in the alternative to show that he had come into possession since the dispossession implicit in the decision of the boundary line dispute under S. 41, Bengal Survey Act. If he takes neither of these courses but merely sues for declaration of title without asking any relief as regards possession his suit is barred under S. 42. 17 Pat.L.T. 405=1936 P. 185. Suit for mere declaration of validity of adoption and of reversionary right may lie. 41 M. L.J. 386=70 I.C. 190; 1933 N. 292. Joint mortgagors—Death of one—Sale by widow of share in equity of redemption—Suit by surviving mortgagor to declare his right of survivorship to share of deceased—Maintainability. 119 I.C. 502=1929 A. 331. Where plaintiffs pray for a mere declaration that two idols are the owners of the property in dispute, while they should in fact ask for the appointment of trustees, the formulation of a scheme for management and recovery of property from people who have committed breach of trust, the suit is barred under S. 42, proviso. All these things cannot be relegated to a second suit. It is exactly for the purpose of avoiding the evils of second suit that the proviso of S. 42 has been enacted. 27 A.L.J. 1201=1929 A. 974. Where the liability of the rent was settled but the dispute was whether the persons were jointly liable, *held*, that the landlord can file a declaratory suit for that purpose. 1931 A.L.J. 214=1930 A. 869. Where the plaintiff sued for a declaration that a deed of a release executed by the judgment-debtor in favour of a third person was void and ineffective as against the creditors and that they were entitled to proceed against the property by way of execution, *held*, that the mere fact that they had not sued for cancellation of the released deed did not bar the suit for declaration. 7 R. 477. Suit for declaration of invalidity of a tax—Injunction for refund, or perpetual injunction not being claimed, suit is not tenable. 46 A. 553 =22 A.L.J. 446. The Court ought to allow the plaintiff an opportunity to amend his plaint so as to include the necessary prayer, consequential relief by injunction or otherwise. 65 P.W.R. 1921. *See also* 44 M.L.J. 515. Although declaratory decrees are asked for, a plaintiff can be given a decree for possession of the land if he pays the Court-fees required for possessory suits. 73 I.C. 818=1923 L. 255. As to suit for bare declaration by defeated claimant, when possession is with auction-purchaser (under C.P.Code, O. 21, R. 63), *see* 103 I.C. 763; 5 R. 699; 21 Pat. 300; 1942 O.A. 404. A suit for a mere declaration without asking for possession is maintainable, where the defendants are not in possession, and consequently the plaintiff could not ask the Court for dispossessing them. (36 M. 62, Foll.) 163 I.C. 924=1936 L. 929. A suit for a declaration that a previous decree declaring certain *wakfnamas* invalid and distributing the properties covered by those deeds among the alleged heirs of the settlor is not binding on the plaintiff is not governed by S. 42. It is not necessary for the plaintiff to pray for the setting aside of the decree. 53 C.L.J. 91=34 C.W.N. 1129=1930 C. 787. *See also* 1936 L. 283; 1937 Pesh. 47. The decision of the Court under Succession Act is a summary one and does not stand in the way of the trial of the same question in any regular suit. The existence of the succession certificate is not such a fact as to make its cancellation a necessary relief which the plaintiff must consequently seek in a suit under S. 42. 1934 Pesh. 40=151 I.C. 689=1934 Pesh. 83. The proviso to S. 42 does not take away the special right conferred by O. 21, R. 100, C.P.Code. Where the auction-purchaser was resisted in taking possession and he made an application under O. 21, R. 97 but the same was dismissed and he thereupon sued to have his right to the property declared, *held*, that the plaintiff was not bound to ask for possesstion. 151 I.C. 59=17 N.L.J. 24=1934 N. 169 (1). *See also* 1938 Pat. 558=19 Pat L.T. 916=1938 P.W.N. 455. A suit by a creditor for a declaration that his

43. A declaration made under this Chapter is binding only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees.

Effect of declaration.

Illustration.

A, a Hindu, in a suit to which *B*, his alleged wife, and her mother, are defendants, seeks a declaration that his marriage was duly solemnized and an order for the restitution of his conjugal rights. The Court makes the declaration and order. *C*, claiming that *B* is his wife, then sues *A* for the recovery of *B*. The declaration made in the former suit is not binding upon *C*.

CHAPTER VII.

OF THE APPOINTMENT OF RECEIVERS.

Appointment of receivers discretionary.

44. The appointment of a receiver pending a suit is a matter resting in the discretion of the Court.

Reference to Code of Civil Procedure.

The mode and effect of his appointment and his rights, powers, duties and liabilities are, regulated by the Code of Civil Procedure.[1]

LEG. REF.

[1]*See* now the Code of Civil Procedure, 1908 (Act V of 1908).

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debtor has transferred his immovable property with a view to defeat or delay his rights and that the transfer is therefore ineffectual against his rights, is not barred by the proviso to S. 42: 150 I.C. 888=35 P.L.R. 402=1934 L. 460. There is nothing in S. 42 which bars a suit for a declaration that a certain sale is void. The question whether a particular sale is void is a mixed question of law and fact, but whether under the given circumstances a sale is void is a question of law only. A plaintiff is entitled to sue for a declaration that certain facts existed and therefore the sale in that case is void. 165 I.C. 749=1936 P. 572. Where a sub-lessee who is liable to pay his lessor commission and royalty, purchases in his son's name but in reality for himself, the lessor's right to realize commission and royalty in a certificate sale, formal delivery to him does not change his position if the sale is void or fraudulent, nor can it be said that the purchaser obtained possession by realizing the royalty from himself and a suit purely for a declaration that the sale is void is maintainable. 1935 Pat 572.

RIGHT TO CONSEQUENTIAL RELIEF ARISING DURING PENDENCY OF SUIT.—Where a plaintiff was not able to seek further relief than he sought at the time of the institution of his suit and it was only during the pendency of the suit that he acquired the right to ask for such relief, it is open to him to apply for leave to amend the plaint so as to claim the further relief and the Court might order him to amend; but in the absence of such order, the plaintiff is not bound to amend and is entitled to sue for the relief to which he was entitled at the time of the institution of this suit. 1939 N.L.J. 577=1940 Nag. 99= I.L.R (1941) N. 735. *See also* 190 I.C. 756.

COURT-FEES.—Claim for injunction—Court-fee. 16 S.L.R. 109=1922 S. 20.

LIMITATION.—Applicability of S. 23, Limitation Act, to suits under the section. *See* 31 Bom.L.R. 240. Where it cannot be said that the plaintiff has slept over her rights, for she obtained possession of the land at the time when the contract of sale was entered into, and since that time has been in possession and enjoyed the usufruct thereof and where real right of action had only accrued a short time before the proceedings were instituted, nine years, lapse of time would not be fatal to any action for sp. performance of an executed contract. 1934 R. 310 (2).

PRACTICE AND PROCEDURE—APPEAL.—Where a declaration is to be refused, it should be refused at a preliminary stage of litigation and not by a Court of appeal after the issues on fact and law have been decided. 137 I.C. 145 =1932 All. 661. Where a declaratory relief has been given by the Courts below, the appellate Court cannot refuse that relief unless it comes to the conclusion that the Courts below have acted in an arbitrary or perverse manner. 153 I.C. 73=1935 All. 174. *See also* 155 I.C. 244=16 Pat.L.T. 236=1935 Pat. 256; 13 Pat. 182=1934 Pat. 498. Suit for mere declaration of right to possession of jewels—Maintainability with prayer for possession—Amendment of plaint—Permissibility in second appeal. 1938 Mad. 331. Where the plaintiff is either in actual or constructive possession of most of the suit properties or when no further relief in respect of them can be asked at the time of filing the suit, a suit for mere declaration in respect of suit properties is maintainable. If, however, the suit includes a small item of property with respect to which further relief of possession is not asked for though such relief could have been prayed for by the plaintiff, the Court may allow amendment of the plaint by allowing plaintiff to add such prayer in respect of the small item. 174 I.C. 356=1937 Lah. 295. *See also* 1940 Nag. 99; 190 I.C. 756. Suit for injunction—Power to grant declaratory decree. *See* 1935 All. 106.

Secs. 42 and 43.—Decree declaring that plaintiff was no longer defendant's wife—If judgment *in rem*. 36 Bom.L.R. 1021.

Sec. 43.—Scope—Declaration of invalidity of adoption—Binding nature—If altered by the filing of subsequent suit for possession in a Court of higher pecuniary jurisdiction due to rise in the value of properties. 71 M.L.J. 619.

CHAPTER VIII.

OF THE ENFORCEMENT OF PUBLIC DUTIES.

Powers to order public servants and others to do certain specific acts.

45. Any of the High Courts of Judicature at [1][Calcutta, Madras and Bombay] may make an order requiring any specific act to be done or forborne, within the local limits of its ordinary original civil jurisdiction, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or inferior Court of Judicature :

LEG. REF.

[1]Substituted for 'Fort William, Madras, Bombay and Rangoon' by A.O., 1937.

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Sec. 45 : SCOPE OF SECTION.—The writ of mandamus, being a high prerogative writ, is of the greatest value in maintaining the laws, but it is discretionary, The precise order asked for and made should in such cases be carefully defined. The form of procedure adopted in any particular case should not become a precedent in any future attempt to decide similar questions. 1931 A.C. 652=1931 P.C. 132=61 M.L.J. 299 (P. C.). An order under S. 45 is only to be made *inter alia* if the plaintiff has no other specific and adequate legal remedy. [47 Bom. 742 (P. C.), Ref.] 10 Rang. 412=1932 Rang. 123 (F.B.); 1934 Mad. 140=66 M.L.J. 233. The *prerogative writ of mandamus* is in form a command issued in the King's name from the King's Bench Division of the High Court of Justice. So far as this country is concerned, S. 45 now empowers the High Courts of Calcutta, Madras, Bombay and Rangoon to make orders which secure the same result as the writ of mandamus issued by the King's Bench Division, and the conditions which are set forth in that section are substantially the same as those under which the writ of mandamus is issued in England. 10 Pat. 218=1930 Pat. 538 (F. B.). *See* 45 M.L.J. 592=47 Bom. 742 =50 I. A. 227=1923 P. C. 138 (P.C.). (On appeal from 23 Bom.L.R. 1132). Writ of mandamus can be issued only by the High Courts at Calcutta, Bombay, and Madras in their original jurisdiction, but not by the other High Courts, *i. e.*, Allahabad, Patna and Lahore. 5 Pat. 595=1926 Pat. 305 ; 4 Pat. 224=86 I.C. 170; 10 Pat. 218=129 I.C. 529=1930 Pat. 538 (F.B.). *See also* 1926 Rang. 135. They have no power to issue the writ of mandamus apart from and except under conditions prescribed by S. 45: 10 Pat. 218=129 I. C. 529=1930 Pat. 538 (F. B.). (Power of High Court to order land acquisition officer to refer the award to High Court.) The section is not to authorise the High Court "to make any order which is otherwise expressly excluded by any law for the time being in force." 5 Pat. 595=7 Pat.L.T. 695=1926 Pat. 305. *See also* 5 Bur.L.J. 26 = 1926 R. 135. The power to make the order under S. 45 is discretionary and it may only be made provided that the doing of a specific act is clearly incumbent upon the particular public officer against whom the order is sought. 1937 Rang.L.R. 414=1938 Rang. 69. Suit to declare electoral lists illegal and restrain elections thereunder—S. 45 applies. 87 I. C. 475=27 Bom. L.R. 368=1925 B. 255. As to enforcement of public duties in matters of election, *see* 50 B. 394=28 Bom.L.R. 264=1926 Bom. 247. *See also* 5 R. 504=1927 R. 324; 1931 R. 326. Where the petitioner prayed that the High Court should issue a writ of *certiorari* to the Election Officer and to direct the said Officer to include his name in the list of nominated candidates and then proceed to hold the election and though relief sought was nominally against the Election Officer, it was in reality against the Government who had cancelled the order of the Election Officer accepting the nomination papers and further directed the exclusion of the petitioner's name from the list of valid nominations, *held*, that the prayer asked for would be suitable in a writ of mandamus but not in a writ of *certiorari*. *Held, further*, that the Court could not issue a writ of mandamus against the Governor acting with ministers. Need for Government being joined as party in such applications pointed out. 142 I.C. 187=1933 M. 319. Reference to High Court under S. 51, Income-tax Act—Application to compel reference refused—Leave to appeal to Privy Council to be granted under Letters Patent, Bombay, cl. 39: *see* 64 I. C. 959=23 Bom. L. R. 1132. High Court cannot invoke its discretionary powers under S. 45 in order to require the Commissioner to state a case which is not otherwise provided for by S. 66 of the Income-tax Act. 7 R. 581. *See also* 113 I. C. 619; 136 I.C. 762=1932 S. 1. An assessee in Sind, unlike an assessee within the jurisdiction of High Courts, has no remedy under S. 45 of this Act where he cannot obtain relief under S. 66 (3) of the Income-tax Act. It is, however, for the legislature to remedy this anomaly by extending the provisions of S. 45 or by amending S. 66 (3) of the Income-tax Act, so as to give him a right of reference where Commissioner refuses to state a case on fanciful and unfounded grounds. 26 S.L.R. 235=136 I. C. 762=1932 S. 1; 1934 M. 140=68 M.L.J. 233; 12 R. 322=1934 R. 132 (S.B.). Where a case, if stated by the Commissioner of Income-tax, would have to be referred to the Court of the Judicial Commissioner in Sind for decision, it would not be right for the Bombay High Court in the exercise of its discretion, to make an order under this section requiring the Commissioner to state a case to it, even if the Bombay Court has jurisdiction to do so by reason that the Commissioner resides in Bombay. 33 Bom.L.R. 36=1931 B. 273; 1934 M. 140=66 M.L.J. 233. *See also* 58 B. 361= 36 Bom.L.R. 23=1934 B. 62. No order can be made at the instance of a third party restrain-

Provided—

(*a*) that an application for such order be made by some person whose property franchise or personal right would be injured by the forbearing or doing (as the case may be) of the said specific act ;

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ing the Municipal Commissioner from granting sanction for a proposed building, when the sanction has already been granted qualified by a condition that the building should not contravene any of the provisions of the Act. 33 Bom. L.R. 31=1931 B. 173. The Corporation owes a legal duty to an adjacent owner and there is, therefore, a corresponding right in his favour, to prevent building plans being passed contrary to the bye-laws. If, therefore, the Building Committee of the Corporation sanctions a building plan in disregard of the bye-laws and an adjacent owner is thereby injured as to light, air, health and amenities by reason of the particular situation of his property, he can apply for mandamus under S. 45. I. L. R. (1941) 1 Cal. 16=45 C. W. N. 401=1941 Cal. 391. Where the amenities and sanitation of a person's property will be substantially prejudiced if a building plan which violates the regulations is sanctioned such person has the right to call upon the Municipal Corporation to see that the provisions of the statute are observed. He can apply for mandamus under S.45. 45 C.W.N. 408. An owner of premises has a clear right to insist that the building rules should be strictly observed by the Corporation in sanctioning plans in respect of buildings proposed to be erected in the neighbourhood, although the owner of the premises which lie immediately next to the proposed building has no objection to building operations being undertaken in accordance with the plans. He has a right to apply for a mandatory order on the Corporation under S. 45 as the Calcutta Municipal Act furnishes no specific and adequate legal remedy to persons in his position. I.L.R. (1941) 1 Cal. 435=45 C.W.N. 413=1941 Cal. 386. Municipal election—Objection on the ground of disqualification of candidate—Injunction restraining officer from holding enquiries : 1931 R. 326 ; 51 C. 279. Refusal of refund of income-tax—Assessee failing to appeal—Application under S. 45. Maintainability. 68 M.L.J. 227. As to refusal of Collector to make reference under S. 18, Land Acquisition Act, *see* 38 C.W.N. 844=1934 C. 758. The Commissioner of Police must issue licence to a rickshaw whether it is old or new if it complies with the conditions as laid down under S. 23 of the Rangoon Hackney Carriage Act and is found fit for public use, and if the Commissioner has not issued the licence up to the maximum number as fixed by him. And therefore where he does not exercise the discretion as vested in him, a writ of mandamus can be issued directing him to issue such a licence. 142 I. C. 832=1933 R. 37. *See also* 142 I. C. 832=1933 R. 39.

APPLICATION UNDER PATENTS AND DESIGNS ACT—WRIT OF CERTIORARI ON CONTROLLER OF PATENTS.—The High Court has jurisdiction to issue a writ of *certiorari* or prohibition or mandatory order under S. 45 against the Controller of Patents and Designs, in proceedings on an application under the Patents and Designs Act. The High Court has right to exercise a controlling jurisdiction similar to that which is exercised by the King's Bench Division in England, over matters arising within the jurisdiction of the High Court and over persons or bodies exercising duties within its jurisdiction. Before, however, these extraordinary remedies are used, the Court must be sure that they will be effective. The mere existence of a right of appeal is not conclusive, because it may not be adequate, and in some circumstances, the remedy given by the issue of such writs may be more speedy and more convenient and less costly. 62 C. 596=39 C.W.N. 573.

QUIA TIMET ACTION.—Proof of imminent danger and consequent irreparable damage is necessary. Discretion is to be liberally used by Court. 85 I.C. 14=1925 C. 373. In disposing of an application for an injunction, powers of the High Court on Original Side are not wholly circumscribed by the rules laid down in S. 45. 85 I.C. 14=1925 C. 373. Jurisdiction to issue writ is discretionary—Right to be enforced must be of public nature—Powers will not be exercised if other remedies are open. 51 C. 874=82 I.C. 374=1925 C. 48. Mandamus—Election—Returning Officer—Functions of—Quasi-judicial—Eligibility of candidate for election. 51 C. 279=39 C.L.J. 58. *See also* 41 Bom.L.R. 911. Municipal Corporation—Right of Councillor to move resolution for reduction of tax—Motion postponed at the request of the President—Subsequent resolution ruled out—Application for mandamus—Madras City Municipal Act, Ss. 99, 155 and 157. 20 L.W. 589=1924 M. 868. *See also* 28 C W.N. 127=1924 C. 454 ; 39 Bom.L.R. 536 (Refusal of Muncipal Commisssioner to issue licence for butcher's-shop). "Specific and adequate remedy" in S. 45 (*d*) refers not to general right of suit which must, unless expressly barred always exist, but to some specific remedy expressly given by a particular act. 66 I.C. 600 =48 C. 916. If the High Court were to express judicial opinion in the course of injunction proceedings that certain land acquisition proceedings were illegal and *ultra vires*, it must be assumed that the Local Government as the Land Acquisition authorities will stay their hands in view of the decision. 66 I.C. 600=48 C. 916. S. 106 (2) of the Government of India Act and S. 52 of the Income-tax Act (old Act VI of 1918) prohibit the High Court from entertaining any application under S. 45 for compelling the Revenue Board to refer the matter to the High Court under S. 5 of the Income-tax Act. 41 M.L.J. 177=44 M. 718; 42 Bom.L.R. 419 (Right to be assessed by a particular Income-tax Officer). Issuing an order under S. 45 is an exercise of original jurisdiction under S. 106 (2) of the Government of India Act. 44 M 718.

Sec. 45 (a) to (e).—The conditions laid down in the provisos (*a*) to (*e*) to sec. 45 are

(*b*) that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person or Court in his or its public character or on such corporation in its corporate character ;

(*c*) that in the opinion of the High Court such doing or forbearing is consonant to right and justice ;

(*d*) that the applicant has no other specific and adequate legal remedy ; and

(*e*) that the remedy given by the order applied for will be complete.

Exemptions from such power. Nothing in this section shall be deemed to authorize any High Court—

(*f*) [1][to make any order binding on the Secretary of State, the Central Government, the Crown Representative or any Provincial Government] ;

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[1] Substituted by LEG. REF. A.O., 1937.

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cumulative, so that all of them must be fulfilled before the order applied for is made. The order is discretionary. The Court's jurisdiction has no doubt to be exercised for the protection of the rights of the public ; but it must nevertheless be exercised with caution, as the remedy is of a summary nature and coercive in character. Further sec. 45 enables the Court to make an order requiring any specific act or acts to be done or forborne from being done, and nothing else. 41 Bom.L.R. 911=1939 Bom. 481.

Sec. 45 (a).—A "personal right" is not a right which every member of a civilized society possesses independently of any Act of his own. An applicant under the section must show that he had some special definite individual right of his own in the matter complained of irrespective of his right as a member of the community at large. Where no special circumstances are shown indicating such a personal right, there is no personal right within the meaning of the proviso or any injury to such right. 41 Bom.L.R. 911=1939 Bom. 481.

Sec. 45 (b).—Clause (*b*) limits the jurisdiction of the Court to cases where there is a clear breach of duty on the part of a corporation, and under that section the Court will not interfere with that class of act which are not expressly forbidden by the constituting instrument, but are on the border-line between authority and no authority as may be reasonably thought incidental to the exercise of powers expressly given (*obiter*). 1930 S. 287.

Sec. 45, Proviso (b).—Under proviso (*b*) to sec. 45, the jurisdiction of the Court is limited to cases where there is a clear breach of duty to do or forbear from doing, as the cases may be. What is or what is not clearly incumbent must be determined with reference to the provisions of the statute or regulation under which the act complained of should have been done or forborne. Where the doing of an act is incumbent upon a public officer by the clear terms of a statute, an applicant under sec. 45 cannot ask for, nor can the Court make, an order restraining the public officer from doing the act which is clearly incumbent upon him. 41 Bom.L.R. 911=1939 Bom. 481.

Sec. 45, Proviso (c).—"Consonant to right and justice"—Meaning—An applicant under sec. 45 must show that the order he prays for is consonant to right and justice. What is consonant to right and justice must depend on the facts and circumstances of each case. In the exercise of its extraordinary jurisdiction the Court generally has regard amongst other things to considerations of the importance of the case, or the principles involved or the delay on the part of the applicant in making the applications or to considerations which involve protection of the rights of other persons. The expression "consonant to right and justice" only emphasises the equitable jurisdiction of the Court in making the order. 41 Bom.L.R. 911=1939 Bom. 481.

Sec. 45 (d).—The provisions of sec. 45 (*d*) are not satisfied when the applicant would have another "specific and adequate legal remedy." The term "legal remedy" would include any remedy given by law including statute law and would not necessarily be confined to legal remedy enforceable in a Court of law. *Held*, that the remedy available under secs. 518 and 520 of the Bombay City Municipal Act would exclude an application under S. 45 of this Act. 32 Bom.L.R. 416=1930 Bom. 232. The mere possibility of a right of action is no bar to an application under S. 45. 42 C.W.N. 789. It is an elementary principle of law that a man should not be allowed to have recourse to an extraordinary remedy of the kind contemplated by S. 45, if it is not really needed; and it is for an applicant to show that he has no other specific or adequate legal remedy. 41 Bom. L.R. 911=1939 Bom. 481.

Sec. 45 (f): "BINDING ON THE GOVERNMENT"—Meaning of. *See* 1926 M.W.N. 842=1927 Mad. 22. Although sec. 50 has abolished the power of High Court to issue writ of mandamus, still in practice such a writ is asked for and issued under sec. 45. 1926 M.W.N. 842=99 I.C. 18=1927 Mad. 22. "Breach of duty"—Meaning of. 1927 Mad. 22. The High Court has no doubt power to issue a mandamus to prevent a Court from doing something which clearly it has no power to do. But where that Court comes to the conclusion after full consideration of arguments that it has jurisdiction to do what it proposes to, and there is ground for the decision, an application for a mandamus will be refused. 13 Rang. 310. Application to direct Commissioner of Income-tax to make reference to High Court—Original Side of the High Court as the forum—Application under S. 66 (3), Income-tax Act, filed in Appellate Side—Same cannot be converted into one under sec. 45 of the Specific Relief Act. 30 Bom.L.R.

(*g*) to make any order on any other servant of the Crown, as such, merely to enforce the satisfaction of a claim upon the Crown ; or

(*h*) to make any order which is otherwise expressly excluded by any law for the time being in force.

Application how made. Procedure thereon.

46. Every application under section 45 must be founded on an affidavit of the person injured, stating his right in the matter in question, his demand of justice and the denial thereof ; and the High Court may, in its discretion, make the order applied for absolute in the first instance, or refuse it, or grant a rule to show cause why the order applied for should not be made.

Order in alternative.

If, in the last case, the person, Court or corporation complained of shows no sufficient cause, the High Court may first make an order in the alternative, either to do or forbear the act mentioned in the order, or to signify some reason to the contrary and make an answer thereto by such day as the High Court fixes in this behalf.

Peremptory order.

47. If the person, Court or corporation to whom or to which such order is directed makes no answer, or makes an insufficient or a false answer, the High Court may then issue a peremptory order to do or forbear the act absolutely.

Execution of, and appeal from, orders.

48. Every order under this Chapter shall be executed, and may be appealed from, as if it were a decree made in the exercise of the ordinary original civil jurisdiction of the High Court.

Costs.

49. The costs of all applications and orders under this Chapter shall be in the discretion of the High Court.

Bar to issue of *mandamus*.

50. Neither the High Court nor any Judge thereof shall hereafter issue any writ of *mandamus*.

Power to frame rules.

51. Each of the said High Courts shall, as soon as conveniently may be, frame rules[1] to regulate the procedure under this Chapter ; and, until such rules are framed, the practice of such Court as to applications for and grants of writs of *mandamus* shall apply, so far as may be practicable, to applications and orders under this Chapter.

PART III.

OF PREVENTIVE RELIEF.

CHAPTER IX.

OF INJUNCTIONS GENERALLY.

Preventive relief how granted.

52. Preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual.

LEG. REF.

[1] For rules made by the High Court of Bombay at Bombay under this section, *see* Bom. R. and O.

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1114. Election Commissioners deciding question of corrupt practices on the part of a candidate—Interference by High Court, when justified. 5 Rang. 504=6 Bur.L.J. 240=1927 Rang. 324.

Sec. 45 (g): PUBLIC SERVANT—POWER OF COURT TO ISSUE MANDAMUS.—The Court cannot claim even in appearance to command the Crown, and where an obligation is cast upon the principal, the Court cannot enforce it against the servant merely as such. Before mandamus can issue to a public servant, it must be shown that a duty towards the applicant has been imposed upon the public servant by statute, so that he can be charged thereon, and independently of any duty which, as servant, he may owe to the Crown, his principal. 63 I.A. 408=1936 P.C. 269=(1937) 1 M.L.J. 200 (P.C.).

PLEADINGS.—In suit for grant of *mandamus*, precision in prayer is necessary. 1931 P.C. 132 (P.C.).

Sec. 46.—It is not necessary to use the word "refuse" or any equivalent to it to denote refusal; refusal may be inferred from conduct. 85 I.C. 14=1925 Cal. 373.

Sec. 50: ELECTION—ORDER OF ELECTION OFFICER—GOVERNMENT'S ORDER IMPEACHED—PROCEDURE.—142 I.C. 187=1933 Mad. 319. *See* S. 45, 'Scope of section' *supra*.

Sec. 52.—It is within the discretion of a Court to grant an injunction or not. 78 I.C.

53. Temporary injunctions are such as are to continue until a specified time, or until the further order of the Court. They may be granted at any period of a suit, and are regulated by the Code of Civil Procedure.[1]

Temporary injunctions.

A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit: the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.

Perpetual injunction.

CHAPTER X.

OF PERPETUAL INJUNCTIONS.

54. Subject to the other provisions contained in, or referred to by, this Chapter, a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant whether expressly or by implication.

Perpetual injunctions when granted.

LEG. REF.

[1] *See* now the Code of Civil Procedure (Act V of 1908).

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844=1924 All. 724. Hence in a suit brought on a contract comprising an affirmative agreement and a negative agreement, the Court is not deprived of its discretion under S. 52 in granting or refusing injunction, merely because a negative agreement has been coupled with an affirmative agreement. 30 S.L.R. 157=164 I.C. 929=1936 Sind 119. Principle of injunction is to avoid multiplicity of legal actions by prevention of threatened injuries and is not limited to past injuries. 80 I.C. 59=1924 Nag. 413. The Court has jurisdiction to issue an injunction upon a defendant residing outside territorial limits where he has property in Court's jurisdiction which could be proceeded against in the event of any contempt of Court. 5 P.L.T. 121=75 I.C. 381. Injunction may be granted restraining partition by Collector though applicant has taken part for several years, in Collector's partition. 84 I.C. 151=1925 Pat. 137.

Sec. 53.—While passing an order of injunction, the Court should look into the balance of convenience caused to the parties. 1928 Cal. 293; 1928 Mad. 810. It should also see whether there is a *prima facie* case for the issue of such an injunction. 120 I.C. 535=1930 Lah. 184. Where defendant constructed a spout leading water in the plaintiff's land, injunction may be granted. 1926 Lah. 681=27 Punj. L.R. 827. Where the marriage of a girl is arranged by her guardian with a person whose father has on medical examination been found to be suffering from leucoderma, but there is no evidence as to whether the proposed bridegroom or his brother betray an indication of the disease of being in incipient state or being actually visible, it is the duty of the Court to step in and pass an injunction restraining the guardian from taking any further steps in connection with the marriage, until the proposed bridegroom is proved to be a fit person. 121 I.C. 690=1930 All. 66. Equity acts *in personam* and an injunction must be addressed to the defendant personally. The Secretary of State as a corporation sole would be an individual; but neither is the N. W. Ry. Administration Lahore an individual, nor is the Agent of the Railway an individual. That would amount only to a suit against the office of agent and not against the person or official himself. 1933 Lah. 203=14 Lah. 330; *see also* 1933 All. 284. Insolvency of party—Suit by unsecured creditor in foreign State—Injunction restraining progress of suit—Jurisdiction to grant; *see also* 92 I.C. 1019=1925 Sind 260; 114 I.C. 689. Suit for injunction—Power to grant declaratory decree. 4 A.W.R. 1392=1935 All. 106.

Sec. 54: SCOPE OF SECTION.—*See* 19 S.L.R. 168; 18 N.L.J. 123. Grounds for granting injunction—Discretion of Court. 73 P.L.R. 1922=1922 Lah. 443 (2). To obtain an injunction to restrain the commission of a prospective nuisance, it is necessary to show a strong case of probability that the apprehended mischief will in fact arise. 89 I.C. 929=1926 Nag. 50; 9 Mys.L.J. 49. Where the crux of the plaintiff's complaint is that the defendants were trying to persuade the members of a community from joining in a celebration by the plaintiff, it is difficult to see how law can intervene, if the persuasion is not accompanied with any threat to use force or violence. I.L.R. (1939) Nag. 429=1939 N.L.J. 184=1939 Nag. 154. An injunction will not issue in the case of contracts which cannot be specifically enforced or where their breach can adequately be compensated in damages. 43 P.L.R. 619=1941 Com. C. 301=1942 Lah. 47. Waste of money is not an irreparable injury and under sec. 54 an injunction is not to be given when the injury, if any, can be compensated by damages. 151 I.C. 862=1934 Sind 136.

PERPETUAL INJUNCTION—GRANT OF—CONSIDERATIONS FOR COURT.—In deciding whether in any particular case, a right has been interfered with and nuisance thereby caused, it is necessary to determine whether the act complained of is an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living but according to plain, sober and simple notions obtaining among the people. It is also necessary to take into account the circumstances and character of the locality in which the

When such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter II of this Act.

When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the Court may grant a perpetual injunction in the following cases (namely) :—

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complainant lives. People living in a locality which is mixed residential and industrial locality cannot except the same amenities as those who live in a locality which is entirely residential. 30 S.L.R. 441=1937 S. 8. *See also* 1939 Mar. L.R. 108 (Civ.). The grant of an absolute injunction restraining a person from enjoying his own land is wholly illegal. The apprehension of the defendants acquiring a right of easement of light and air after the lapse of 20 years, if their doors and windows are allowed to stand and remain open, cannot afford any justification for preventing the defendants by an injunction from enjoying their property by keeping their doors and windows open. 16 Luck. 686=1941 O.W.N. 509=1941 Oudh 442. In matters of issuing injunctions the law cannot make over nice distinctions and refuse the relief merely because there is a bare possibility that the evil against which an injunction is sought may be avoided. Proceeding upon practical views of human affairs, the law will guard against risks which are so imminent that no prudent person would incur them, although they do not amount to absolute certainty of damage. Law will go further, according to the same practical and rational view, and balancing the magnitude of the evil against the chances of its occurrence, it will even provide against a somewhat less imminent probability in cases where the mischief, should it be done, would be vast and overwhelming. 43 L.W. 197; 1936 S. 119; 1936 M. 202. Where in the case of an infringement of an easement of passage, the plaintiff has served a notice to the defendant but has not followed it up by a suit for a temporary injunction, he is not entitled to specific relief by demolition, but only to pecuniary damages, especially when he has another perfectly good passage. 41 P.L.R. 224=1939 Lah. 339.

NATURE OF INJUNCTION—DOES NOT RUN WITH THE LAND—EXCEPTIONS TO THE RULE.—The rule that a decree for injunction does not run with the land has been deviated from in the case of legal representatives on the death of the judgment-debtor on the ground of the express provisions made by S. 50 of the C.P. Code, and in the case of transferees in virtue of S. 52. 33 Bom.L.R. 266=1931 B. 280.

WHEN INJUNCTION CAN BE GRANTED.—Before an injunction can be granted, the applicant must establish a legal right in himself, show an actual or threatened invasion of that right and must prove that the wrongful act complained of or apprehended will be repeated or done. 63 I.C. 727. Where, in a suit for a permanent injunction restraining a corporation from proceeding with an election, the plaintiff claims to be an elected member of the corporation, but does not obtain leave to bring a representative suit, he must prove that he himself has a right enforceable by law requiring the corporation not to proceed with the election. Such a right must be personal to the plaintiff. 151 I.C. 862=1934 S. 136. Before a person who is not the owner of land can prevent another person from using the land to the same extent as himself, he must establish a right by acts of exclusive possession of a very definite nature. A miscellaneous user, such as making only a temporary use of the land for occasional necessities of a house-holder, cannot create any title by adverse possession; a miscellaneous user of this sort is not possession at all. 37 P.L.R. 472=1934 L. 701; 1934 A. 883=153 I.C. 672. Proof of imminent danger must be proved—Filing suit on last day of limitation is against presumption of imminent danger. 89 I.C. 635=1926 Nag. 25; 104 I.C. 563=28 Punj. L.R. 590=1927 Lah. 718. As to effect of laches, *see* 89 I.C. 635=1926 Nag. 85; 108 I.C. 69=1928 Mad. 810; 93 I.C. 1011; 1928 Oudh 510; 12 Rang. 200=151 I.C. 193=1934 Rang. 244; 1937 Lah. 186 (dishonest use of trade mark). It must be proved that damage will be irreparable. 95 I.C. 371=1925 Nag. 251. Grant of injunction is discretionary—Lower appellate Court refusing relief though granted by trial Court—Plaintiff must show strong reasons against the lower appellate Court's decree. 89 I.C. 636=1926 Nag. 25. Court has discretion to grant injunction or not—Different considerations govern Indian Courts and English Courts—Court must have consideration for both parties—Easements Act, S. 35. 3 Rang. 230. *See also* 1939 Lah. 339. A plaintiff who has established that his common law right has been invaded is entitled to an injunction to prevent a recurrence of that violation. 59 I.C. 823=13 Bur. L.T. 62. Breach of obligation in plaintiff's favour or breach of some right of plaintiff must be threatened. 84 I.C. 282=1925 S. 175.

ILLUSTRATIVE CASES.—The grant of an absolute injunction resulting in an invasion of the defendant's legitimate rights to use his own property and restrain him from enjoying his own land is wholly illegal. An act, which is not unlawful in itself, does not become unlawful merely because it interferes with other people's business or because the motive of the act is bad. The holding of a *mela* by the defendant on his land as a rival attraction to that held by the plaintiff on his own on identical days cannot be held to be unlawful, because it may interfere with the plaintiff's *mela* or because it was held with a bad motive. It would be actionable if the defendant in so doing employed illegal means or used force, violence, intimidation or threat. He cannot, however, be restrained by an injunction from holding a *mela* in his own land in a peaceable manner. 61 Cal. 543=1934 Cal. 752. PERMANENT injunction restricting right of public to use public thoroughfare, how far permissible—Scope of licence from the authorities as to taking of proce-

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sions discussed. 144 I.C. 39=1933 Lah. 203. Injunction—When to be granted—Deprivation of property. 17 S.L.R. 63=80 I.C. 994=1924 S. 97. Where the allegation of the plaintiff is that he is in lawful possession of the properties and that his possession is threatened to be interfered with by the defendants, he is entitled to sue for a mere injunction, without adding a prayer for declaration of his rights. 1936 Mad. 936. Every person who has a right of worship in a temple can maintain a suit against those who interfere with or deny his right. 63 I.C. 963=13 Bur. L.T. 182. An owner of 'yajman vrithi' is entitled to maintain a suit for injunction against the caste for undue interference with his right. 45 Bom. 234=59 I.C. 271. Where parties, entitled to "birt jajmani," agree between themselves that the gifts made for certain number of days should be received by one, while those made in the rest of the days of a month should be received by the other, and one of the parties interferes with the right of the other party to receive gifts according to the agreement, a perpetual injunction can be granted under S. 54 (a) against the interfering party. 116 I.C. 879=1929 All. 327. The right of Pragwals at the sacred confluence of the rivers at Allahabad is a right both heritable and enforceable at law and a suit for injunction by one Pragwal to restrain another from using a similar flag in the exercise of the right is maintainable. 18 A.L.J. 679=59 I.C. 873. Encroachment—To refuse injunction to restrain further alteration of property require strong case—But mandatory injunction to restore to original condition is very exceptional. 78 I.C. 599=1925 C. 538. *See also* 35 P.L.R. 729=1934 L. 851. Three houses abutted on a "*haveli*", jointly owned by three persons. Of these, one person purchased another property outside this *haveli*. In the wall overlooking this *haveli*, he opened a door and threatened to put up a step in front of the door. *Held*, that there being reasonable user of common property, construction of steps did not amount to encroachment. 120 I.C. 497=1930 S. 34. Nuisance—Offensive smell—Principles on which injunction is granted set out. 49 C. 1059=1923 C. 271. Injunction to restrain light and air. *See* 67 I.C. 288. Though it is correct to say that a person living in a manufacturing town cannot expect the same freedom from noise as a person living in the country, it does not justify a business which involves a violent hammering on iron in a room separated only by a partition wall from the house of the plaintiff. In the latter case, an injunction would be issued restraining the nuisance. 71 I.C. 620=1923 A. 443 (1). Cause of action —Trade mark—Injunction—Points of similarity and dissimilarity—Trust. 44 A. 608=20 A. L. J. 537. *See also* 1937 Lah. 186. Suit for declaration and injunction—Impending breach of rights proved—Allegation as to past breach not proved—Suit is not maintainable—Eligible reliefs may be affected. 27 Bom.L.R. 198=86 I. C. 867. Though the obtaining of an entirely wrong award from an arbitrator does not inflict a legal wrong upon the person against whom the award is made and would not entitle such person to recover damages and though the general principle is clear that a plaintiff is entitled to ask for an injunction only against a legal wrong, yet where in an action the validity or existence of the contract is challenged on any ground, the Court has jurisdiction to restrain arbitration proceedings under the agreement until that question has been determined. 33 Bom.L.R. 19=1931 B. 151. Where a plaintiff brought a suit for injunction against the defendant for restraining him from interfering with plaintiff's possession and where a prior suit by the defendant under S. 9 had been dismissed, *held*, that the dismissal of the defendant's suit does not necessarily show the actual peaceable possession of the plaintiff at the suit date and, unless that was proved, an injunction restraining the defendant could not be justified. 1929 M. 784=120 I.C. 384. *See also* 1929 L. 11. A perpetual injunction cannot be granted to restrain the execution of a decree for removal of *nim* tree on the ground that it is a sacred one for the reason that there is no breach of any obligation, *i.e.*, of a duty enforceable by law within the meaning of S. 54 of the Act. 60 I.C. 536=34 C.L.J. 315. Suit in foreign Court about same subject-matter—Injunction not to prosecute not to be granted. 59 I.C. 218 (1)=24 C.W.N. 735. A perpetual injunction should not be given against part owners of the disputed plot; the injunction should be granted only for so long as the land remains in the lawful possession of the plaintiff. 88 I.C. 588=1925 L. 333 (2). The grant of an injunction is a discretionary matter and where both the lower Courts have held that the case is a fit one for an injunction, the decision will not be interfered with. 1938 Rang. L.R. 704=1938 Rang. 404. The mere fact of the defendant expressing his readiness to permit the use of the door whenever there was occasion does not entitle the plaintiffs to an injunction to restrain the defendant from preventing them from passing through the door. 1924 L. 488. No injunction where no breach of contract, nor infringement of rights has occurred. 69 I.C. 526=1924 L. 297 (2). Minority *per se* is not a ground for refusing an injunction, but before an injunction can be granted against a minor, it must be shown that the acts were done by him personally or by some one on his behalf or at his instance. 33 Bom.L.R. 590=133 I.C. 839=1931 Bom. 466. Injunction—Obstruction to construction of building—Minor and major defendants—Major defendant acting as guardian of minor defendant and giving up defence—Injunction against minor defendant also—Propriety. 33 Bom.L.R. 590=1931 B. 466.

BUILDING OF MOSQUE IN THE MIDST OF HINDU LOCALITY—INJUNCTION TO RESTRAIN.—The rule that persons are at liberty to build what structures they like on their own land and use them for religious worship as they choose is subject to exceptions: (1) in the performance of their worship they should not cause material annoyance to their neighbours; and (2) no

(*a*) where the defendant is trustee of the property for the plaintiff;

(*b*) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

(*c*) where the invasion is such that pecuniary compensation would not afford adequate relief;

(*d*) where it is probable that pecuniary compensation cannot be got for the invasion;

(*e*) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

Explanation.—For the purpose of this section a trade mark is property.

Illustrations.

(*a*) *A* lets certain lands to *B*, and *B* contracts not to dig sand or gravel thereout. *A* may sue for an injunction to restrain *B* from digging in violation of his contract.

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public nuisance should thereby be cause d. But it is not merely on the ground of nuisance that the Court can impose limitations on the user of a building. Where some Mahomedans construct a building in the midst of a Hindu locality intending to declare it and use it as a mosque such user may not *ipso facto* be a nuisance or amount to an obnoxious user. But if it is found as a fact, on the evidence, from the attitude taken up by the Mahomedans in respect of their rights, that it would be impossible for the communities peaceably to enjoy their respective rights, the Civil Court is entitled to restrain by injunction the owner of the building from declaring it to be a mosque. Considerations of sentiments of parties and damage to public peace are not wholly out of place in the proper application of the maxim "*sic uteri tuo ut alienum non laedas.*" 1937 Mad. 348=(1927) 1 M.L.J. 197.

PRACTICE AND PROCEDURE.—Easements—Obstruction to light and air—Proposed building—Form of order. 25 Bom.L.R. 239=72 I.C. 406 =1923 B. 196; 1933 Rang. 344. As to form of injunction order, *see* 148 I.C. 671=1934 P. 306. In a suit for an injunction to restrain a nuisance caused by the working of a factory at night if the plaintiff succeeds, the decree should direct the defendant to refrain from carrying on the working of the factory in such a manner as to occasion a nuisance to the plaintiff. 64 I.C. 169. A suit for an injunction restraining the defendant from collecting the rent of certain property is not liable to be dismissed, merely because the possession is with tenants. 63 I.C. 776=2 L. 252. Party wall—Threat of invasion of plaintiff's rights—Suit for declaration and injunction to restrain building—Previous attempt of plaintiff to get consent of defendant—Defendant's silence—Inference from. 9 Mys.L.J. 49. In the case of breach of a negative contract, it is a rule of practice that an injunction should be granted to enforce compliance with the contract irrrespective of any question of convenience or damage to the plaintiff, unless speeial eircumstances exist which would make the application of the rule inequitable. 41 C.W.N. 794=I.L.R. (1937) 2 Cal. 367.

Sec. 54 (c): INJUNCTION OR DAMAGES—PRINCIPLES REGULATING EXERCISE OF DISCRETION—DIFFERENCE BETWEEN ENGLISH AND INDIAN LAW.—In a case where the plaintiff's right of light or air has been proved or admitted to have been infringed, the English Courts have proceeded on the principle that the normal and natural relief that ought to be granted is by way of an injunction and not by awarding damages. The burden lies upon the defendant to satisfy the Court as a matter of equity that in the circumstances of any particular case, the Court ought not to issue an injunction and on the principle that "he who seeks equity must do equity" the defendant who has acted with a reckless disregard of the plaintiff's rights has been held to be disentitled from invoking the aid of Court to award damages in lieu of injunction. The law in India is, however, different. In England, the plaintiff whose legal right has been invaded is *prima facie* entitled to an injunction. In India, the Court has jurisdiction to grant an injunction in its discretion only in cases in which (*inter alia*) "invasion is such that pecuniary compensation would not afford adequate relief". In considering the question whether an injunction ought to issue, the Courts in India are not concerned with the question, if the defendant has acted in a high-handed manner or an unneighbourly spirit, but only with the question whether an award of damages would or would not afford adequate relief to the plaintiff for the invasion of his rights. In connection therewith, all the circumstances of the case must be taken into consideration, not only the injury to the plaintiff, but also the amount which has been laid out by the defendant, and the Court ought to be chary of granting an injunction in cases wherean injunction would be oppressive and inflict hardship upon the defendant out of all proportion to the injury to the plaintiff. The defendants erected a five-storeyed building, in spite of warning, and had admittedly infringed the prescriptive right to light and air entering through the windows in the northern wall of the plaintiffs' three-storeyed building. *Held*, that award of damages and not injunction was an appropriate remedy, having regard to the facts (*i*) that notwithstanding the erection, the plaintiffs' building remained substantially useful as business premises; (*ii*) that, though the comfort and convenience in using the rooms facing north have been deleteriously affected, their business had not been in the east affected; (*iii*) the defendants' building was a magnificient structure erected on steel frame-work and any reconstruction will inflict upon the defendants immense expenditure out of all proportion to the extent of the injury suffered by the plaintiffs by reason of the violation of their rights. 12 R. 200=1934 R. 144.

(*b*) A trustee threatens a breach of trust. His co-trustees, if any, should, and the beneficial owners may, sue for an injunction to prevent the breach.

(*c*) The directors of a public company are about to pay a dividend out of capital[1] or borrowed money. Any of the shareholders may sue for an injunction to restrain them.[2]

(*d*) The directors of a fire and life insurance company are about to engage in marine insurances. Any of the shareholders may sue for an injunction to restrain them.

(*e*) *A*, an executor, through misconduct or insolvency, is bringing the property of the deceased into danger. The Court may grant an injunction to restrain him from getting in the assets.

(*f*) *A*, a trustee for *B*, is about to make an imprudent sale of a small part of the trust property. *B* may sue for an injunction to restrain the sale, even though compensation in money would have afforded him adequate relief.

(*g*) *A* makes a settlement (not founded on marriage or other valuable consideration) of an estate on *B* and his children. *A* then contracts to sell the estate to *C*. *B* or any of his children may sue for an injunction to restrain the sale.

(*h*) In the course of *A's* employment as a vakil, certain papers belonging to his client, *B*, come into his possession. *A* threatens to make these papers public, or to communicate their contents to a stranger. *B* may sue for an injunction to restrain *A* from so doing.

(*i*) *A* is *B's* medical adviser. He demands money of *B* which *B* declines to pay. *A* then threatens to make known the effect of *B's* communications to him as a patient. This is contrary to *A's* duty, and *B* may sue for an injunction to restrain him from so doing.

(*j*) *A*, the owner of two adjoining houses, lets one to *B* and afterwards lets the other to *C*. *A* and *C* begin to make such alterations in the house let to *C* as will prevent the comfortable enjoyment of the house let to *B*. *B* may sue for an injunction to restrain them from so doing.

(*k*) *A* lets certain arable lands to *B* for purposes of husbandry, but without any express contract as to the mode of cultivation. Contrary to the mode of cultivation customary in the district, *B* threatens to sow the lands with seed injurious thereto and requiring many years to eradicate. *A* may sue for an injunction to restrain *B* from sowing the lands in contravention of his implied contract to use them in a husbandlike manner.

(*l*) *A*, *B* and *C* are partners, the partnership being determinable at will. *A* threatens to do an act tending to the destruction of the partnership property. *B* and *C* may, without seeking a dissolution of the partnership, sue for an injunction to restrain *A* from doing the act.

(*m*) *A*, a Hindu widow in possession of her deceased husband's property, commits destruction of the property without any cause sufficient to justify her in so doing. The heir-expectant may sue for an injunction to restrain her.

(*n*) *A*, *B* and *C* are members of an undivided Hindu family. *A* cuts timber growing on the family property, and threatens to destroy part of the family house and to sell some of the family utensils. *B* and *C* may sue for an injunction to restrain him.

(*o*) *A*, the owner of certain houses in Calcutta, becomes insolvent. *B* buys them from the Official Assignee and enters into possession. *A* persists in trespassing on and damaging the houses, and *B* is thereby compelled, at considerable expense, to employ men to protect the possession. *B* may sue for an injunction to restrain further acts of trespass.

(*p*) The inhabitants of a village claim a right of way over *A's* land. In a suit against several of them, *A* obtains a declaratory decree that his land is subject to no such right. Afterwards each of the other villagers sues *A* for obstructing his alleged right of way over the land. *A* may sue for an injunction to restrain them.

(*q*) *A*, in an administration suit to which a creditor, *B*, is not a party, obtains a decree for the administration of *C's* assets. *B* proceeds against *C's* estate for his debt. *A* may sue for an injunction to restrain *B*.

(*r*) *A* and *B* are in possession of contiguous lands and of the mines underneath them.[3] *A* works his mine so as to extend under *B's* mine and threatens to remove certain pillars which help to support *B's* mine. *B* may sue for an injunction to restrain him from so doing.

LEG. REF.

[1] As to payment of interest out of capital by Railway Companies during construction, *see* the Indian Railway Companies Act (X of 1895).

[2] But *see* S. 3 of the Indian Railway Companies Act (X of 1895), under which a Railway is permitted to pay interest on its paid-up share capital out of capital upon certain conditions and restrictions.

[3] As to the working of mines under land, the surface of which has been acquired by Government *see* the Land Acquisition (Mines) Act (XVIII of 1885).

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Sec. 54, Ill. (p).—The public generally has the right to use a public thoroughfare and a Court is not justified in restricting that general right by the issue of any permanent injunction to any particular individual. And where religious processions are taken out under license from the authorities, it is for the authorities to impose such conditions as may be deemed necessary for the safeguarding of the public peace and the freedom of every individual to use the public thoroughfares without any improper obstruction. 1933 L. 344. A village graveyard reserved for the use of the inhabitants or a particular community in that village cannot be said to be a trust in favour of anybody. The members of that community are only co-owners in that land and hence one of them can sue other co-owners who pervert the use of the common property. (1925 P.C. 298, Dist.) 138 I.C. 691 = 1932 L. 423.

Sec. 54, Ill. (r).—Every landowner has a

(*s*) *A* rings bells or makes some other unnecessary noise so near a house as to interfere materially and unreasonably with the physical comfort of the occupier, *B*. *B* may sue for an injunction restraining *A* from making the noise.

(*t*) *A* pollutes the air with smoke so as to interfere materially with the physical comfort of *B* and *C*, who carry on business in a neighbouring house. *B* and *C* may sue for an injunction to restrain the pollution.

(*u*) *A* infringes *B's* patent. If the Court is satisfied that the patent is valid and has been infringed, *B* may obtain an injunction to restrain the infringement.

(*v*) *A* pirates *B's* copyright. *B* may obtain an injunction to restrain the piracy, unless the work of which copyright is claimed is libellous or obscene.

(*w*) *A* improperly uses the trade mark of *B*. *B* may obtain an injunction to restrain the user, provided that *B's* use of the trade mark is honest.

(*x*) *A*, a tradesman, holds out *B* as his partner against the wish and without the authority of *B*. *B* may sue for an injunction to restrain *A* from so doing.

(*y*) *A*, a very eminent man, writes letters on family topics to *B*. After the death of *A* and *B*, *C*, who is *B's* residuary legatee, proposes to make money by publishing *A's* letters. *D*, who is *A's* executor, has a property in the letters, and may sue for an injunction to restrain *C* from publishing them.

(*z*) *A* carries on a manufactory and *B* is his assistant. In the course of his business, *A* imparts to *B* a secret process of value. *B* afterwards demands money of *A*, threatening, in case of refusal, to disclose the process to *C*, a rival manufacturer. *A* may sue for an injunction to restrain *B* from disclosing the process.

Mandatory injunctions.

55. When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

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right to the support of his land in its natural state. It is not an easement; it is a right of property. In a suit for injunction restraining the defendant from interfering with plaintiff's right of support, it is not necessary to show that the plaintiff has sustained actual damage. It is sufficient to show that the injury is imminent and certain to result from the defendant's acts. 59 C. 363=1932 C. 542.

Secs. 54, 55 and 56.—Before a suit for a mandatory injunction can be filed, there must be an obligation on the part of the defendant to perform certain acts. 5 R. 404=104 I.C. 139 (1)=1927 R. 257. Where an encroachment has been made by one of the proprietors into the common land, and another proprietor files a suit for mandatory injunction, the plaintiff should prove special damage and should take action within a reasonable time; further he should show that the defendant had appropriated more area than would be allotted to him in case of partition. 1935 Lah. 250. Claim for mandatory injunction for supply of water by a Municipality. *See* 1939 A. 375=I.L.R. 1939 A. 337. When a statute creates a body like the Municipal Committee and confers on it power to levy taxes of a particular kind in a particular manner, there is an implied "obligation" on the part of the Committee not to tax the subject in a manner not covered by the statute, and if a Committee does impose such a tax it commits a breach of this obligation and a suit would lie under sec. 54 of the Specific Relief Act for issue of a perpetual injunction restraining the Committee from imposing and collecting the tax. Such a suit is not barred by sec. 56 (1) of the Act, as there is no "other usual mode of proceeding" available to the plaintiff which can be considered to be "equally efficacious." I.L.R. (1940) Lah. 707=42 P.L.R. 73=1940 Lah. 377 (F.B.). Ss. 54 and 56 are to be read together as supplementing each other; the former defines the circumstances under which a perpetual injunction can be granted and the latter enumerates cases where an injunction must not be granted. 23 Pat.L.T. 270.

Secs. 54 and 56 (i): SUIT FOR AN INJUNCTION TO RESTRAIN ARBITRATION—MAINTAINABILITY.—Where the plaintiff instituted a suit for a declaration that no contract was entered into between the parties and that as the defendants had no right to refer the dispute to arbitration an injunction should issue to the arbitrators not to give an award. *Held*, that while the prayer for injunction could not be brought within the scope of S. 54 the suit was barred under S. 56, cl. (*i*). As there was no contract alleged, the arbitration proceedings could only terminate in an award which was a nullity and the plaintiff would have ample opportunity to protect himself by an appropriate proceeding. 18 Lah. 345=39 P.L.R. 233=1937 Lah. 545.

Secs. 54 and 57.—Grant by Government of license to supply electricity—Start of work to supply electricity by Government within area of license—Licensee, if entitled to injunction. 40 P.L.R. 927=1938 Lah. 585.

Sec. 55: SCOPE AND APPLICATION OF SECTION.—In exercise of its discretion as to the grant of a mandatory injunction under S. 55, the Court would have regard to principles laid down by the Courts in England in this connection. 27 Bom.L.R. 73=86 I.C. 19; 1928 Cal. 584. *See also* 6 Rang. 456. Court should also have regard to the balance of convenience on both sides. 108 I.C. 69=1928 Mad. 810. Injunction not to be granted when applicant has no personal interest in the matter. 14 Lah. 330=1933 Lah. 203. It is a statutory rule that an injunction should

Illustrations.

(*a*) *A*, by new buildings, obstructs lights to the access and use of which *B* has acquired a right under the Indian Limitation Act,[1] Part IV. *B* may obtain an injunction, not only to restrain *A* from going on with the buildings, but also to pull down so much of them as obstructs *B's* lights.

(*b*) *A* builds a house with eaves projecting over *B's* land. *B* may sue for an injunction to pull down so much of the eaves as so project.

(*c*) In the case put as illustration (*i*) to section 54, the Court may also order all written communications made by *B*, as patent, to *A*, as medical adviser, to be destroyed.

(*d*) In the case put as illustration (*y*) to section 54, the Court may also order *A's* letters to be destroyed.

(*e*) *A* threatens to publish statements concerning *B* which would be punishable under Chapter XXI of the Indian Penal Code. The Court may grant an injunction to restrain the publication, even though it may be shown not to be injurious to *B's* property.

(*f*) *A*, being *B's* medical adviser, threatens to publish *B's* written communications with him, showing that *B* has led an immoral life. *B* may obtain an injunction to restrain the publication.

(*g*) In the cases put as illustrations (*v*) and (*w*) to section 54 and in illustrations (*e*) and (*f*) to this section, the Court may also order the copies produced by piracy, and the trade marks, statements and communications, therein respectively mentioned, to be given up or destroyed.

LEG. REF.

[1] *See* now Act IX of 1908.

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only be granted when pecuniary compensation would not afford adequate relief. But it does not necessarily follow therefrom that a Court has always the power to grant pecuniary compensation for a wrong whenever an injunction is asked for. The Courts have recognised that, when the issue of a mandatory injunction would involve the removal of a completed structure which entails no inconvenience and only a slight invasion of the plaintiff's rights, not committed wantonly or after protest, pecuniary compensation is the more appropriate remedy. But it is not proper for a Court to pass a decree which effects a compulsory acquisition of a considerable strip of land under the guise of monetary compensation in lieu of an injunction, when the plaintiff not only sues for possession and injunction but also proves his title. 43 L.W. 512= 1936 Mad. 687; 1936 A.M.L.J. 81. Erection of balcony overhanging adjacent owner's land—Evidence not showing that trespass was committed knowingly—Subsequent conduct of trespasser, if material—Case for compensation and not mandatory injunction. 31 Bom.L.R. 126=1929 Bom. 137. One *G* owned a house in Ludhiana. *P* and *D* erected a house at the back of *G's* house leaving only a space of five and half feet between the two buildings in contravention of specific condition of the sale-deed under which they purchased the site of the house. *G* instituted a suit for injunction claiming demolition on the ground that certain easement, claimed not on the ground of prescription but on an implied grant, had been infringed. *Held*, that it was not a case in which mandatory injunction could be granted. 1929 Lah. 654. *See also* 1939 Mar.L.R. 58. Roots of a tree penetrating neighbour's land—Mandatory injunction can be granted. 66 I.C. 636= 34 C.L.J. 315. To obtain an injunction to restrain the commission of a prospective nuisance, it is necessary to show a strong case of probability that the apprehended mischief will in fact arise. 89 I.C. 929=1929 Nag. 50. When there is a reasonable apprehension of damage to crops by the overhanging of trees on neighbouring land, the owner of the crops is entitled to an injunction to compel the owner of the trees to cut the overhanging branches. 40 L.W. 639=67 M. L.J. 442. High handedness of defendant would be considered in favour of plaintiff in granting an injunction. 95 I.C. 636=1926 N. 416; mere delay not amounting to waiver or abandonment is no bar to grant of injunction. 1926 Nag. 416; 1934 Lah. 847. The grant of a mandatory injunction is an equitable relief which it is discretionary with the Court to grant or to refuse. Ordinarily, a great deal of delay in the institution of the suit would disentitle the plaintiff to the grant of a mandatory injunction. Whether there has been unreasonable delay in the institution of the suit depends on the circumstances of each particular case. 1934 Lah. 847; 1934 Rang. 310. Mandatory injunction cannot be granted where applicant has constructively acquiesced. 1929 P. 349. Where the plaintiff co-sharer sought demolition of structure over a party wall, the relief was refused as the suit was brought eight years after the structure was built. 89 I.C. 746= 1925 Lah. 642; 133 I.C. 872=32 P.L.R. 694. In a suit for injunction against a co-owner, proof of special damage is not necessary. 104 I.C. 563=1927 Lah. 718. Contract for personal service—Injunction when can be granted. 21 S.L.R. 170. Injunction to remove a dam not to be granted if defendant's enjoyment of the flow of water for 30 years be proved. 83 I.C. 538=1923 Lah. 594. In cases of mandatory injunctions for restoration of property to its original condition, demolition is the most exceptional remedy and it is the duty of the Court to weigh the amount of substantial mischief done to the plaintiff and compare it with that which would be inflicted upon the defendant. If the balance of convenience is in favour of the plaintiff, removal of the building would be the proper relief, but not where the balance of convenience lies on the side of the defendant. 1939 Mar. L.R. 207 (Civ.). Before granting a mandatory injunction under S. 55; the Courts should weigh the amount of substantial mischief done or threatened to the plaintiff and compare it with that which the injunction, if granted, would inflict upon the defendant. 1939 Mar. L.R. 150 (Civ.). Manda-

Injunction when refused.

56. An injunction cannot be granted—

(*a*) to stay a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings ;

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tory injunction—Obstruction to plaintiff's *moris*. 78 I.C. 550=1923 Lah. 593. Erection of buildings pending suit—Order for demolition may be made. 79 I.C. 557=1923 Lah. 205. The question of granting injunction, whether under the C.P. Code or this Act, is one of discretion, and in the absence of proof of *prima facie* case and irreparable injury in case the relief is not granted, an injunction will not be granted. 89 I.C. 321=1925 S. 347; 26 A.L.J. 49=1928 A. 201. Mandatory injunction—Execution—Plea in bar of—Disappearance of the subject-matter. 40 P.L.R. 46=1937 Lah. 839. As to defect in frame of suit, *see* 36 P.L.R. 253=1934 Lah. 1009.

Secs. 55 and 45.—S. 55 is independent of S. 45 and an injunction can be issued under that section to a public body like a Municipal Committee even in those cases where S. 45 of the Act does not apply. I.L.R. (1941) Lah. 278=43 P.L.R. 18= 1941 Lah. 200.

Sec. 56.—Injunction is a discretionary form of specific relief and under S. 56 the Court may refuse to grant an injunction if the plaintiff by his conduct has disentitled himself to such relief. 40 P.L.R. 577. The Court, in dealing with suits for injunction, has to consider in each case not merely whether the plaintiffs' legal right has been infringed, but also whether under all the circumstances of the case, he ought to be granted an injunction as the proper and appropriate remedy for such infringement. (67 I.C. 299, Foll.) 40 P.L.R. 160.

It is not open to a Civil Court to prevent a public officer, such as the Deputy Commissioner acting under the Mysore Land Revenue Code from exercising the public duty enjoined on him by S. 37 of that Code. A suit for an injunction to restrain the Government or its officers from doing an act which is done in discharge of such a duty is barred by S. 56 of the Specific Relief Act. 16 Mys. L.J. 87=43 Mys. H.C.R. 14. An interim injunction order was passed in a dispute between two competing cinemas regarding the right to exhibit a certain film first in the city. *Held*, that this was a quarrel between businessmen about a business matter involving question of rupees, annas and pies, and damages and not an injunction would be the ordinary and adequate remedy. 30 S.L.R. 157= 1936 Sind 119. Doing scavenging work is not a trade or a business or a profession involving skill. The right to do scavenging work in certain houses and to exclude others from doing so is in substance a right to prevent a man from pursuing his legitimate calling, and is one which the law cannot recognise. No injunction can therefore be given restraining any one from doing scavenging work in particular houses. Nor can a custom making scavenging rights *res commercium* be recognised by the Courts, as it is contrary to the public good and unreasonable. The custom, if allowed, would turn out to be an oppressive monopoly, and can never be sustained in a Court of Law. 48 L. W. 258=1938 Mad. 881. It is well-established that when it is open to a person to sue for possession, he cannot be granted any relief in the shape of a mere injunction. When a suit for possession has become barred by time, the plaintiff cannot circumvent the law of limitation by merely suing for an injunction. 40 P.L.R. 319=1938 Lah. 369 (F.B.). S. 56 relates to permanent injunction and cannot be made directly to apply to a temporary injunction which is governed by the provisions of O. 39, C. P. Code. 152 I.C. 98=1934 A. 876. A plaintiff can seek relief by means of an injunction within the period of limitation against a party seeking to establish an easement against him. There may be cases where it would be inequitable on account of the plaintiff's acquiescence over a period of less than 20 years to grant the relief. 46 B. 827. Under the law in India, declarations and injunctions are discretionary forms of specific relief and under S. 56, the Court may refuse to grant an injunction if the plaintiff has by acquiescence or other conduct disentitled himself to such relief. 37 C.W.N. 1021=1933 P.C. 193=65 M.L.J. 163 (P.C.). Under S. 56 a superior Court cannot stay proceedings in a Court not subordinate to it. 81 I.C. 2=1925 C. 233. A man is not to be deprived of his legal rights, unless he has acted in such a way as would make it fraudulent for him to set up those rights. As to the elements or requisites necessary to constitute fraud of that description, *see* 73 I.C. 223=1924 C. 438. Under S. 56 (1) no injunction should be granted when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust. 84 I.C. 282=1925 S. 175. Where equally efficacious relief can be obtained by monetary compensation, injunction should not be granted. 27 S.L.R. 41=1933 S. 176. The tendency of modern decisions is that, even if the Court has jurisdiction to restrain criminal proceedings for the recovery of a penalty imposed by statute for breach of its enactments, it will not interfere as a general rule. 50 C. 813=27 C.W.N. 787. Relief in case of a joint wall where one of the parties encroached on the other's right by four inches. 76 I.C. 521=1923 B. 370. Encroachment of *shamilat* land—Suit for mandatory injunction, when maintainable. 132 I.C. 199. Damages and injunction are two remedies alternative in character given in respect of the same wrong, *viz.*, an infraction of the legal right by way of easement ; and such an infraction takes place only when the deprivation is such as to amount to a nuisance. 1935 M. 870.

Sec. 56 (a).—The plaintiff obtained possession of property under a decree and defendant filed an application under O. 21, R. 100, C. P. Code. The plaintiff filed a declaratory suit with the prayer for perpetual injunction of the pro-

(*b*) to stay proceedings in a Court not subordinate to that from which the injunction is sought ;

(*c*) to restrain persons from applying to any legislative body ;

(*d*) to interfere with the public duties of any department of the [1][Central Government, the Crown Representative or any Provincial Government] or with the sovereign acts of a Foreign Government ;

(*e*) to stay proceedings in any criminal matter ;

(*f*) to prevent the breach of a contract the performance of which would not be specifically enforced ;

(*g*) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance ;

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[1]LEG. REF.

[1] Substituted by Government of India (Adaptation of Indian Laws) Order, 1937, for "Government of India or the Local Government."

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ceedings under O. 21, R. 100. *Held*, that S. 56 (*a*) was not a bar, as there was a multiplicity of proceedings. 14 Pat.L.T. 258=1933 P. 250.

Sec. 56 (a) and (i): INJUNCTION TO RESTRAIN EXECUTION SALE—IF CAN BE GRANTED.—Where the plaintiff's property, to which his rights have been established, is attempted to be wrongfully sold in execution, he has a right to restrain it by an injunction, since the result of allowing the sale to go on would be a multiplicity of proceedings in future between him and the would-be purchaser. The principle enunciated in Cl. (*i*) of S. 56 of the Act cannot be applied to such a case, because there is no principle or precedent which compels a person whose interests are not at all affected by a decree and against whom that decree is not binding to satisfy that decree. He cannot be made to stop the sale by depositing the decree amount. 61 C. L.J. 75.

Sec. 56 (b) : SCOPE.—S. 56 (*b*) bars a suit for an injunction seeking to stay proceedings in a Court not subordinate to that from which the injunction is sought. 152 I.C. 798=11 O.W.N. 1376. S. 56 (*b*) contemplates injunctions directed to the Court itself and does not prevent any Court from making an order *in personam* forbidding an individual from prosecuting proceedings in another Court. Also S. 56 refers only to perpetual injunctions. 57 C. 1280=1931 C. 279 ; 152 I.C. 98=1934 A. 876. An injunction to restrain proceedings in a Court, when issued, is issued against an individual prosecuting his case in a Court, and if an injunction was granted, it is an injunction granted against the litigant and not against the Court. There is no method by which an injunction can be directed to a Court in contradistinction to the persons or parties prosecuting their litigation in that Court. Where execution is being taken out in the Court of the Subordinate Judge, no application can lie in that Court for the grant of an injunction to restrain proceedings in such execution, in view of S. 56 (*b*). The proviso added to O. 39, R. 1, C. P. Code, to come into force on 1st January, 1938, adds nothing to the law governed by the Specific Relief Act, and makes no difference in the position which is the same. 1938 P.W.N. 220=1938 Pat. 606. Where two proceedings are pending in the same Court between the same parties, cl. (*b*) of S. 56 has no application and the Court can always regulate its own proceedings, as the prohibition under cl. (*b*) operates only in respect of Courts which are not subordinate in the sense that they are co-ordinate or superior, and not in respect of the Court itself which must always be taken to be competent to regulate its own proceedings. 14 Pat.L.T. 258=1933 P. 250. Where a person files a declaratory suit with a prayer for perpetual injunction, he can be granted a declaration if his case is true, even though he is not entitled to an injunction. 1933 P. 250.

Sec. 56 (e).—32 C.W.N. 576=1928 C. 464. A Civil Court has no power to restrain a person or corporate body from contemplated prosecution, where proceedings are threatened but are not yet pending, although in terms S. 56 (*e*) may not apply. It is a much more serious thing to restrain a person from seeking redress in a Criminal Court than to restrain him from applying to a legislative body which is forbidden by cl. (*c*). Where the Municipal Council launched complaints against the petitioners for working their rice mills without the necessary licenses under S. 249 of the District Municipalities Act and the petitioners thereupon applied for an injunction restraining the criminal proceedings pending disposal of a civil suit, *held*, that the Criminal Court could also decide the question of fact whether licence was necessary and that it was not a fit case for granting an injunction. 119 I.C. 465=1929 M. 345. Proceedings under S. 84, Calcutta Ports Act—Suit by person proceeded against for declaration and injunction—Stay of criminal proceedings likely to cause irreparable injury to navigation—Stay not to be ordered by interlocutory injunction. *See* 112 I.C. 712.

Sec. 56 (f).—Injunction cannot be granted to prevent the breach of contract to employ certain people. 14 L. 330=1933 L. 203.

Sec. 56 (g).—Persons are entitled to enjoy their own property in any way they please, provided they do not create a nuisance or interfere with the rights of others; when there is no evidence to indicate that it would be impossible for one set of persons to enjoy their right without interfering in any way with the right of another set of persons, the latter are not entitled to an injunction to restrain the former enjoying their property as they please. The Hindus of a village, who worshipped at a temple on the village site, sued the Mahomedans of the

(*h*) to prevent a continuing breach in which the applicant has acquiesced ;

(*i*) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust ;

(*j*) when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the Court ;

(*k*) where the applicant has no personal interest in the matter.

Illustrations.

(*a*) *A* seeks an injunction to restrain his partner *B*, from receiving the partnership debts and effects. It appears that *A* had improperly possessed himself of the books of the firm and refused *B* access to them. The Court will refuse the injunction.

(*b*) *A* manufactures and sells crucibles, designating them as "patent plumbago-crucibles," though, in fact, they have never been patented. *B* pirates the designation. *A* cannot obtain an injunction to restrain the piracy.

(*c*) *A* sells an article called "Mexican Balm," stating that it is compounded of divers rare essences, and has sovereign medicinal qualities. *B* commences to sell a similar article to which he gives a name and description such as to lead people into the belief that they are buying *A's* Medican Balm. *A* sues *B* for an injunction to restrain the sale. *B* shows that *A's* Mexican Balm consists of nothing but scented hog's lard. *A's* use of his description is not an honest one and he cannot obtain an injunction.

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place who owned an adjoining site for a declaration that they were entitled to assemble and worship at the site and for an injunction to restrain the Mahomedans from opening out doorways facing the place of worship. The Mahomedans had never denied that the Hindus had such a right; nor was there anything in the evidence to indicate that it was impossible for both sides to enjoy their rights. *Held*, that it would be improper to grant a declaration or an injunction under the circumstances. 71 M.L.J. 611=1937 Mad. 21.

Sec. 56 (h).—By Ss. 21 (*b*) and 56 (*f*), Specific Relief Act, an injunction cannot be granted to prevent the breach of a contract to employ certain people. 1933 L. 203.

Sec. 56 (i).—61 C.L.J. 75. An interim injunction order was passed in a dispute between two competing cinemas regarding the right to exhibit a certain film first in the city. *Held*, that this was a quarrel between businessmen about a business matter involving question of rupees, annas and pies, and damages and not an injunction would be the ordinary and adequate remedy. 30 S.L.R. 157=164 I.C. 929=1936 S. 119. Suit for injunction—Objection to maintainability on ground of plaintiff being out of possession—When to be raised—Maintainability in appeal. 17 Pat.L.T. 217.

Sec. 56 (j).—S. 56 (*j*) rests on the maxim that he who seeks equity must do equity and implies that a plaintiff seeking an injunction must come with clean hands. A plaintiff, who asks for an injunction, must be able to satisfy the Court that his own acts and dealings in the matter have been fair and honest and free from any taint of fraud or illegality, and if, in his dealings with the person against whom he seeks relief or with third parties, he has acted in an unfair or inequitable manner, he cannot have relief. A Municipal Committee had refused to grant permission to a person to build certain structure. The person subsequently induced the Committee to grant permission on condition that he paid certain sum to the Committee. The Committee passed a resolution accepting the offer but when the person failed to pay the sum as agreed served a notice for demolition. The person who had built the structure pleaded that the resolution imposing condition for grant of permission was illegal and brought a suit for injunction against demolition. In other words, he wanted to utilize that portion of permission which benefited him and to repudiate that part of it which went against him. *Held*, that the person could not be granted injunction as his dealings with the Committee were dishonest. 188 I.C. 264=1940 Lah. 69. Plaintiff must show diligence and must not be guilty of laches. 1928 C. 510; 37 P.L.R. 160. Though an injunction against a joint owner to demolish structures built without permission on a joint land can be obtained, the granting of such an injunction is discretionary. Where the applicant bring a suits after an unreasonable delay, which is deliberate, and for improper motive, his conduct is such as to disentitle him to the assistance of the Court. Injunction should be refused, as it is an equitable remedy and plaintiff does not come into Court with clean hands. 1929 A. 877.

Sec. 56 (k): SCOPE.—In a suit for injunction restraining the building of a house it is incumbent on the plaintiff under S. 56 (*k*) to show some special damage or injury. The mere fact that the Municipal Committee acted beyond its powers in granting the sanction for construction of the house is not by itself sufficient to entitle the plaintiff to sue. 1941 Nag. 364. Where a plaintiff asks for an injunction to restrain the building of a house sanctioned by a Municipal Committee, it is incumbent on him under S. 56 (*k*) to show that he has some personal interest in the matter. It is only when the act of any corporation or public company which is in excess of the powers is calculated to be injurious to the rights of the property of an individual that he would have the right to protection of the Court by injunction. The plaintiff can succeed only on proof of some special damage or injury occasioned to him by reason of the permission granted by the Municipal Committee. To determine whether an act which is complained of as being a nuisance is strictly so or not is to be judged by the

57. Notwithstanding section 56, clause (*f*), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstances that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement: provided that the applicant has not failed to perform the contract so far as it is binding on him.

Injunction to perform negative agreement.

Illustrations.

(*a*) *A* contracts to sell to *B* for Rs. 1,000 the good-will of a certain business unconnected with business-premises, and further agrees not to carry on that business in Calcutta. *B* pays *A* the Rs. 1,000 but *A* carries on the business in Calcutta. The Court cannot compel *A* to send his customers to *B*, but *B* may obtain an injunction restraining *A* from carrying on the business in Calcutta.

(*b*) *A* contracts to sell to *B* the good-will of a business. *A* then sets up a similar business close by *B's* shop and solicits his old customers to deal with him. This is contrary to his implied contract, and *B* may obtain an injunction to restrain *A* from soliciting the customers, and from doing any act whereby their good-will may be withdrawn from *B*.

(*c*) *A* contracts with *B* to sing for twelve months at *B's* theatre and not to sing in public elsewhere. *B* cannot obtain specific performance of the contract to sing, but he is entitled to an injunction restraining *A* from singing at any other place of public entertainment.

(*d*) *B* contracts with *A* that he will serve him faithfully for twelve months as a clerk. *A* is not entitled to a decree for specific performance of this contract. But he is entitled to an injunction restraining *B* from serving a rival house as clerk.

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ordinary standards of persons residing in the neighbourhood and the criterion would be the ordinary physical comfort of human existence according to plain, sober and simple notions obtaining amongst people. I.L.R. (1941) Nag. 266=1941 N.L.J. 211. An injunction cannot be granted where the applicant has no personal interest in the matter. 1933 L. 203. Master and servant—Illegal dismissal of servant—Injunction cannot be granted. 1940 Lah. 243.

Secs. 56 and 21.—In pursuance of certain articles of association a member was appointed by the company as its managing director and was subsequently illegally removed. The managing director on the basis of the articles which constitute an implied contract between him and the company brought a suit for injunction to the effect that the company should not prevent him from discharging his duties. *Held*, that the contract on which the managing director relied being dependent on personal services and volition of the parties, the contract could not be specifically enforced under S. 21, nor an injunction could be granted under S. 56. Claim for damages against the company was adequate relief. 190 I.C. 819=1940 Lah. 243.

Secs. 56 and 57.—Scope—Injunction restraining person from letting his portion of property to stranger whether may be granted. 103 I.C. 715. Where a Receiver appointed in an action attempts to take possession of property in possession of a third party and the third party sues for injunction, his going to the Court appointing the Receiver and to ask to be examined *pro inter esse suo* is a remedy open to him but it is not one by which he can obtain "equally efficacious relief" within S. 56. 102 I.C. 797=1927 P. 297.

Sec. 57.—S. 57 does not say that every affirmative contract includes by necessary implication a negative agreement to refrain from doing certain things. It is therefore a question of interpretation in each case whether a particular contract can be said to have a negative covenant express or implied contained within it. The defendant had agreed to serve the plaintiffs exclusively for a period of five years, but subsequently ceased to serve the plaintiffs and set up a rival business. The plaintiffs having sued for a declaration and injunction and to recover damages, held, that the plaintiffs could not put an end to the contract and also claim injunction based on the contract for the full term of five years. They had to waive their rights at all events in order to take advantage of the breaches on the part of the defendant. *Held*, however, that the plaintiffs were entitled to recover damages. Meaning of expression "exclusive service" discussed. 31 Punj.L.R. 154=1930 L. 597. *See also* I.L.R. (1940) 2 Cal. 53. The parties came to an agreement that their property should be managed by a common manager. There was also a negative covenant that there should be no partition of the estate jointly owned for a certain period. But in the meanwhile the defendants tried to break this contract on which the plaintiffs applied in the Courts for an injunction. *Held*, that the effect of the agreement was that the parties had agreed not to do that which they ordinarily had a right to do. The agreement, although affirmative in form, was negative in substance and hence S. 57 applied and injunction could be granted against some of them trying to break it. 17 Pat.L.T. 865=1936 P. 456. Where there is a contract of personal service coupled with a stipulation that the servant is not to seek service elsewhere during the period of the contract, the Court can grant an injunction restraining the servant from seeking employment elsewhere in breach of contract, though it is unable to enforce specific performance of the affirmative covenant. 64 I.C. 794 =11 L.B.R. 26.

(*e*) *A* contracts with *B*, that, in consideration of Rs. 1,000 to be paid to him by *B* on a day fixed he will not set up a certain business within a specified distance. *B* fails to pay the money. *A* cannot be restrained from carrying on the business within the specified distance.

SCHEDULE.

(ENACTMENTS REPEALED].

Repealed by the Amending Act (XII of 1891).

THE INDIAN (SPECIFIED INSTRUMENTS) STAMP ACT (XIII OF 1924).

[13*th June*, 1924.

An Act to provide for the modification of certain provisions of the Indian Stamp Act, 1899, *in their application to certain promissory notes and other instruments.*

WHEREAS it is expedient to provide for the modification of certain provisions of the Indian Stamp Act, 1899; in their application to certain promissory notes and other instruments; It is hereby enacted as follows :—

Short title and extent.

1. (1) This Act may be called THE INDIAN (SPECIFIED INSTRUMENTS) STAMP ACT, 1924.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

Definitions.

2. In this Act,—

(*a*) "instrument to which this Act applies" means—

(*i*) any instrument mentioned in Article No. 19, No. 36, No. 37 or No. 52 in Schedule I to the Indian Stamp Act, 1899, or

(*ii*) any promissory note payable on demand for an amount exceeding two hundred and fifty rupees,

which has been executed in British India at any time after the 30th day of September, 1923, and before the 1st day of April, 1924, and which has been stamped in such a manner that it would have been duly stamped for the purposes of the Indian Stamp Act, 1899, if the Indian Stamp (Amendment) Act, 1923, had not been passed; and

(*b*) "section" means a section of the Indian Stamp Act, 1899.

Application of certain provisions of Act II of 1899.

3. (1) No exception or restriction in respect of promissory notes contained in clause (*a*) of the proviso to section 35 or in sub-section (1) of section 40 or in section 41 shall be deemed to apply in respect of any promissory note which is an instrument to which this Act applies.

(2) For the purpose of the application of clause (*a*) of the proviso to section 35 and of sub-section (1) of section 40 to instruments to which this Act applies, nothing therein contained shall be deemed to require or authorise the imposition of any penalty in respect of any such instrument.

(3) Every instrument to which this Act applies shall be deemed to have been duly stamped for the purposes of section 62.

(4) Where, before the commencement of this Act, any sum has been recovered in respect of any instrument to which this Act applies, by way of fee under sub-section (1) of section 32, or by way of penalty under the proviso to section 35 or under sub-section (1) of section 40, or by way of fine under section 62, the person from whom such sum has been recovered shall be entitled to a refund thereof.

THE STEEL INDUSTRY (PROTECTION) ACTS (XII OF 1930 AND II OF 1931).

N.B.—The Provisions of these two Acts have been carried out in their proper places in the Tariff Act (VIII of 1894).

THE INDIAN STAMP ACT (II OF 1899).

Year.	No.	Short title.	Amendments.
1899	II	The Indian Stamp Act, 1899.	Amended, VI of 1900, S. 47; VI of 1910; I of 1912; IV of 1914; XIII of 1916; XVIII of 1919; XLIII of 1923; XIII of 1924; XV of 1925; XXXVIII of 1926; V of 1927; X of 1927; XVIII of 1928; VIII of 1930; XIV of 1932; XXXV of 1934; Government of India (Adaptation of Indian Laws) Order, 1937. Amended, Madras Acts, VI of 1922 and VI of 1923.

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SCHEDULE I.—STAMP-DUTY ON INSTRUMENTS.
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[27*th January*, 1899.

An Act to consolidate and amend the law relating to Stamps.

WHEREAS it is expedient to consolidate and amend the law relating to stamps; It is hereby enacted as follows:—

CHAPTER I.
PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called THE INDIAN STAMP ACT, 1899.[1]

(2) It extends to the whole of British India, inclusive of [2][* * *] British Baluchistan, the Sonthal Parganas, and the Pargana of Spiti; and

(3) It shall come into force on the first day of July, 1899.

LEF. REF.

[1] For Statement of Objects and Reasons, see *Gazette of India*, 1899, Pt. V, p. 175; for report of the Select Committee, see *ibid.*, 1898, Pt. V, p. 231; and for proceedings in Council, see *ibid.*, 1898, Pt. VI, p. 231; *ibid.*, 1898, Pt. VI, pp. 10 and 278; and *ibid.*, 1899, Pt. VI, p. 5.

[2] The words "Upper Burma" were repealed by Act X of 1914, Sch. II.

NOTES.

Sec. 1.—The Act applies to the Agency tracts of Vizagapatam included in the Scheduled Districts. "British India" includes the said Agency Tracts. 28 L.W. 614. *See also* 52 Mad. 1=1928 Mad. 1181=55 M.L.J. 584 (F.B.); 8 O.W.N. 116=1931 Oudh 99.

STRICT CONSTRUCTION.—The Stamp Act must be strictly construed and the benefit of any doubt given to the public. 8 Lah.L.T. 59. *See also* 8 O.W.N. 116=1931 Oudh 99; 1934 Nag. 273. The stamp duty payable upon an instrument must be determined by referring to the terms of the document and the Court is not entitled to take into consideration evidence *de hors* the instrument itself. 157 I.C. 538

Definitions.

2. In this Act, unless there is something repugnant in the subject or context,—

"Banker."

(1) "banker" includes a bank and any person acting as a banker ;

"Bill of exchange."

(2) "bill of exchange" means a bill of exchange as defined by the Negotiable Instruments Act, 1881, and includes also a hundi, and any other document entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money ;

"Bill of exchange payable on demand."

(3) "bill of exchange payable on demand" includes—

(*a*) an order for the payment of any sum of money by a bill of exchange or promissory note, or for the delivery of any bill of exchange or promissory note in satisfaction of any sum of money, or for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency, which may or may not be performed or happen ;

(*b*) an order for the payment of any sum of money weekly, monthly or at any other stated period ; and

(*c*) a letter of credit, that is to say, any instrument by which one person authorizes another to give credit to the person in whose favour it is drawn ;

"Bill of lading."

(4) "bill of lading" includes a "through bill of lading" but does not include a mate's receipt ;

"Bond."

(5) "bond" includes—

NOTES

=1935 R. 243 (S.B.) The *Stamp Validating Act XI of* 1926 has no reference to a case where a promissory note was not stamped with a stamp of the value required by law in force at the time the promissory note was executed. It was intended to validate cases where the promissory note bore sufficient stamp but adhesive stamp inscribed for postage. The preamble to the Act shows that it became expedient to provide the validation of certain promissory notes stamped with postage stamps of the denomination of two or four annas. The Act did not intend to validate or render admissible documents insufficiently stamped. 110 I.C. 747 (C.). Trial Court receiving document as properly stamped—Reopening of stamp question on appeal not allowed. 57 M. 783=1934 M. 500=66 M.L.J. 703. Reading R. 24 and R. 118 of the Stamp Manual together, it appears that, in order to comply with the condition of R. 24, it would be enough if it could be shown that stamps of smaller denominations were purchased on account of there being no stamp of the required denomination in the stock of the stamp vendor. 1936 A.L.J. 1222 =1936 A. 701.

Secs. 1 and 2.—The Act being a fiscal statute whose primary object is to secure revenue to the State, its object is attained by excluding the unstamped document from evidence and not acting on it. The parties need not be penalised beyond this extent. 65 I.C. 37=15 S.L.R. 135. The enactment is prohibitory. It is not confined to affording a party a protection, of which he may avail himself or not as he pleases. 52 C. 408=52 I.A. 126=49 M.L.J. 136 (P.C.). To determine whether a document is sufficiently stamped for its admissibility in evidence, the Court must look at the document itself as it stands. 27 Bom.L.R. 1122=1925 B. 527. In estimating the stamp duty payable on an instrument, the Court must look to the primary contract and not take into account the stipulation which it may contain for payment of any damages in a case of default, as such a stipulation is by way of penalty in case of breach of the original covenant. 98 I.C. 6 ;1=1927 N. 72.

Sec. 2 (1).—When a banker is a trustee : *see* 32 M. 68 ; 35 M. 712.

Sec. 2 (2).—'Includes ': *see* 8 C. 536. Demand drafts by one branch of a bank upon another branch of the same bank are bills of exchange under this clause and are exempt from stamp duty by Act V of 1927. 1928 C. 566 (S.B.). 32 C.W.N. 1015.

Sec. 2 (5) : BOND.—The definition of bond is not exhaustive. 2 Lah.L.J. 224 ; 6 L. 276 ; 131 I.C. 157 ; 1931 A. 392=1931 A.L.J. 608 (F.B.). Bond and acknowledgment, distinction between. 1933 L. 271=35 P.L.R. 417. *See also* 38 P.L.R. 269. The mere fact that a person chooses to give a certain title to a document does not make it that document. Its terms and nature should be considered. 1931 A.L.J. 230. *See also* 1941 A.L.J. 427=1941 All. 243 (F.B.). In deciding the question whether an instrument does or does not fall within the purview of bond as defined by S. 2 (5) the instrument must be considered as a whole and it is not permissible to divide it into serveral parts and look at it piecemeal and then to assign each one of such parts to some other article of Sch. I of the Act. I.L.R. (1941) All. 471=1941 All. 243 (F.B.). Where an instrument is in the form of an agreement between two parties and among other covenants also contain a covenant to make certain payments and is also attested by witnesses and was not payable to order or bearer, it comes within the definition of a bond under S. 2 (5). I.L.R. (1939) All. 229=1939 A.L.J. 100 =1939

(*a*) any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be ;

(*b*) any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another ; and

(*c*) any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another :

"Chargeable." (6) "chargeable" means, as applied to an instrument executed or first executed after the commencement of this Act, chargeable under this Act, and, as applied to any other instrument, chargeable under the law in force in British India when such instrument was executed or, where several persons executed the instrument at different times, first executed ;

"Cheque." (7) "cheque" means a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand ;

NOTES.

All. 205. Where an instrument in the nature of a promissory-note contained a statement at the end by the pen of *P*, son of *M*, and also 'the money was paid in my presence', it was *held*. that though a scribe could be an attesting witness, the mere statement that money was paid in his presence could not make him an attesting witness and, it could not *per se* amount to 'attestation' and that the instrument was not a'bond'for that reason.15 Luck. 285=1939 O.W.N. 1109=1940 Oudh 83 (F.B.). An instrument attested by witnesses and not payable to order or bearer is a bond and not a promissory note. 100 I.C. 794=1927 N. 195. *See also* 54 C. 445=100 I.C. 630=1927 C. 472 ; 168 I.C. 349=1937 N. 61 ; 38 P.L.R. 269 ; 34 C.W.N. 911=1930 C. 630 ; (instrument described as promissory note but not payable to bearer or order); 43 I.C. 55=33 M.L.J. 603 ; 41 I.C. 693=2 Pat.L.J. 686 ; 32 B. 426 ; 168 I.C. 349=1937 N. 61 ; (S. 2, cl. (5) if controlled by S. 13 (1) of Neg. Ins. Act) ; Agreement and bond, distinction between. *See* 161 I.C. 420=1936 O.W.N. 328. It is no part of the definition of 'bond' that the date of payment should be stated. 1934 N. 261. A cadjan unstamped document duly attested, and not containing any prohibition restricting the promisee from alienating it, nor expressly mentioning that the amount will be paid to the person in whose favour it was executed or to his order is a bond within the meaning of the Act. 118 I.C. 492=1929 M. 599. A *Kabin-nama*, pure and simple, does not require any stamp. 1935 L. 122. *Shahjog* hundi whether a bond or a promissory note, *see* 22 C.L.J. 22=19 C.W.N. 1326. A document under which a person has obliged himself to pay money to another which is neither payable to order or bearer nor attested by a witness is not a bond within S. 2 (5) : 2 Pat.L.J. 686=41 I.C. 693. In order that a document may constitute a bond, there must be an express obligation to pay. No such obligation can be inferred from a mere acknowledgment. The fact that an entry signed by the debtor is attested by two witnesses and contains an implied promise to pay cannot convert an acknowledgment into a bond. 170 I.C. 68=48 P.L.R. 269=1937 Lah. 220. A written promise to pay a barred debt is not required to be stamped ; it is not a bond ; even if it be, when an instrument has been admitted in evidence such admission shall not be questioned at any subsequent stage of the same suit under S. 36. 1923 L. 481 ; 142 I.C. 535=1933 L. 271. *See also* 1936 Lah. 449.

Sec. 2 (5) (b).—Mere *signing of a balance in account books*, even if it is attested does not necessarily make such instrument a bond. Even if the obligation to pay is implied, it does not do so. But where words are added showing an obligation to pay, the matter becomes different. Where a 'ruju' and a 'chitti' were executed on the same day and the ruju was an acknowledgment of debt by signing a balance in creditor's account books and it expressed an obligation to pay principal and interest and was not payable to order or bearer and the chitti was attested : *Held* that the 'ruju' and 'chitti' formed one instrument of bond within S. 2 (5) (*b*) and was charageable as such : 1934 N. 261. Ordinarily, a balance struck by the debtor followed by the words "*baqi rahe*" and signed by the debtor would be a mere "acknowledgment" on which a stamp duty of one anna will be sufficient. In such a case it will be immaterial that the entry is or is not attested by witnesses. If, however, the words used are "*baqi dene*" that would amount to an "agreement" and be liable to be stamped as such. If, further, such an entry is attested by one or more witnesses, it would be a "bond" and must be stamped accordingly. 40 P.L.R. 193=1938 Lah. 503. Attestation—What amounts to—Writer of document—If an attesting witness. 49 C. 729=26 C.W.N. 585. Attested promissory notes not payable "to order" or bearer. 43 I.C. 55=33 M.L.J. 603. *See also* 41 I.C. 693=2 Pat L.J. 686 ; 32 B. 426 ; 4 I.C. 293. An attested agreement to deliver agricultural produce for consideration or in default to compensate the covenantee with a bond : 33 I. C. 920. As to stamp on hundi not made payable to bearer or order, *see* 32 P.L.R. 753.

Sec. 2 (5) and (12).—Proprietor of firm executing deed selling certain property to creditor firm, in part payment of debt and promising to pay balance later—Deed also signed by vendees therein—Stamp duty. *See* 17 L. 223=38 P.L. R. 558=1936 L. 449.

Sec. 2 (7).—An instrument purporting to receive a sum of money of a depositer with

(8) [1][* * * * *]

"Collector." (9) "Collector"—

(*a*) means, within the limits of the towns of Calcutta, Madras and Bombay the Collector of Calcutta, Madras and Bombay, respectively, and, without those limits the Collector of a district; and

(*b*) includes a Deputy Commissioner and any officer whom the [2][Collecting] Government may, by notification[3] in the Official Gazette, appoint in this behalf;

"Conveyance." (10) "conveyance" includes a conveyance on sale and every instrument, by which property, whether moveable or immoveable, is transferred *inter vivos* and which is not otherwise specifically provided for by Schedule I;

"Duly stamped." (11) "duly stamped" as applied to an instrument, means that the instrument bears an adhesive or impressed stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with the law for the time being in force in British India;

"Executed" and "execution." (12) "executed" and "execution" used with reference to instruments, mean "signed" and "signature."

[4](12-A) "Collecting Government' means—

LEG. REF.

[1] Sub-S. (8) to S. 2 omitted by A.O., 1937.

[2] Substituted for "Local" by A.O., 1937.

[3] For notification by the Chief Commissioner of Ajmer Merwara, declaring that "Collector" includes Assistant Commissioners of the Province, see *Gazette of India*, 1902, Pt. II, p. 501.

[4] Sub-s. (12-A) to S. 2 inserted by A O., 1937.

NOTES.

a Bank and specifying the name of the messenger who is to receive payment is only a receipt and not liable to stamp duty as a cheque. 58 P.L.R. 1922=13 I.C. 330.

Sec. 2 (10).—A conveyance is an instrument which transfers property from one person to another. 115 P.R. 1918=44 I.C. 261 (S.B.). On this clause, *see also* 32 A. 171; 44 C. 72. A confirmatory letter with reference to a mortgage by deposit of title-deeds does not amount to a conveyance so as to require stamp or registration. 139 I.C. 95=1932 S. 73. *See also* 43 P. L.R. 294=20 Lah.L.T. 108 (document recording prior oral transaction of sale is not a "conveyance".) If, after entering into a contract to sell, the parties in spite of the risk that either party may resile from the contract, refrain from getting an actual deed of conveyance prepared they can successfully evade the payment of higher duty. 1932 A.L.J. 394=1932 A. 291 (S.B.). An actual transfer of property is an essential feature of a "conveyance." A contract "constituting the title of the allottee" consisting merely of an agreement to transfer property in the future cannot be treated as a "conveyance." 15 L. 501=1934 L. 530 (S.B.). Where the language of a document makes it clear that it was intended to be only an agreement to sell and that a proper deed of sale to complete the transaction was to be executed later on, the document does not amount to a conveyance under S. 2 (10) though possession also is delivered. 1939 N.L.J. 37. "Conveyance"—Company—Allotment of shares—Contract regarding—Statement in form VII filed before Registrar is not transfer of property but only agreement—Stamp duty. *See* 167 I.C. 513 =1937 M. 259=(1937) 1 M.L.J. 108; 15 L. 509=1934 L. 533.

Sec 2 (10) and Sch. 1-A, Art. 23.—DOCUMENT RECORDING PRIOR ORAL TRANSACTION—STAMP DUTY.—A document to be liable to stamp duty as a conveyance must be the document by which property is actually transferred. A document which purports to be a record in writing of an oral transaction carried out some years earlier, is not therefore liable to be stamped as a conveyance. 20 Lah.L.T. 108=43 P.L.R. 294.

Sec. 2 (11) and 12.—Where, in a promissory note, out of four stamps only three were cancelled and one was not cancelled, *held*, the document was inadmissible. 1933 L. 148=145 I.C. 154. It is necessary to interpret the word "is" in S. 35 so as to include "has been." Consequently where a promissory note is duly stamped at the time of the execution, the document is admissible in evidence, if at the time it is tendered in evidence it is no longer "duly stamped" by reason of the loss or removal of the stamp. 1934 A.L.J. 1202=1934 A. 388 =56 A. 781.

Sec. 2 (12).—Under S. 2 (12) "execution," stands for "signature" and an instrument chargeable with stamp duty only on being executed is not liable to duty until it is signed. 22 I.C. 75=7 Bur.L.T. 48. *See also* 17 L. 223= 162 I.C. 774=1936 L. 449 (S. B.). (Signature alone does not in all cases complete execution. But Stamp Act makes instrument chargeable as soon as they are signed by the executant).

(*a*) in relation to stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, proxies and receipts, and in relation to any other stamp duty chargeable under this Act and falling within item 59 in List I in the Seventh Schedule to the Government of India Act, 1935, the Central Government ;

(*b*) save as aforesaid, the Provincial Government ;]

"Impressed stamp." (13) "impressed stamp" includes—

(*a*) labels affixed and impressed by the proper officer, and

(*b*) stamps embossed or engraved on stamped paper ;

"Instrument." (14) "instrument" includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished, or recorded ;

"Instrument of partition." (15) "instrument of partition" means any instrument whereby co-owners of any property divide or agree to divide such property in severalty, and includes also a final order for effecting a partition passed by any revenue authority or any Civil Court and an award by an arbitrator directing a partition ;

NOTES.

Sec. 2 (14).—"Instrument"—Whether an entry in the plaintiff's register signed by the defendant is an instrument within S. 2 (14). 11 A.L.J. 966=36 A. 11. *See also* 35 C. 3.

Secs. 2 (14) and 35.—A promissory note is an instrument as defined in S. 2 (14) as it purports to create a liability and is hence inadmissible under S. 35 unless it can be saved by proviso (*a*). That proviso saves only instruments other than promissory note. 1940 N.L.J. 217=1940 Nag. 214.

Sec. 2 (15).—An "instrument of partition" includes in its definition award by an arbitrator directing a partition. 1922 A. 283; 1928 M. 1181=55 M.L.J. 584 (F. B.); 42 I. C. 365=6 L.W. 448; 52 M. 1=115 I.C. 824. Under S. 2 (15) the parties need not be co-owners in the eye of law. If they purport to be co-owners and if the document is executed in that capacity it would come under the definition of partition. The very fact of the reference to properties as those in which the parties have certain shares indicates that they purport at least to deal with them as co-owners. Even if the description as co-owners is not actually found in a document it is still open to the Court to find on proper construction of the terms thereof whether the parties purport to be co-owners of the property or not. 150 I.C. 119=39 L.W. 157=1934 M. 204. A partition list which does not itself effect any division but is merely an agreement for effecting a future partition on terms agreed, is not an instrument of partition within the meaning of S. 2 (15) and is liable to stamp duty as an agreement under Art. 4, Sch. I (*a*). 1933 M. 162=145 I.C. 529. *See also* 1933 O. 562=146 I.C. 506. A document may be an "instrument of partition" as defined by S. 2 (15) and would be liable to stamp duty under Art. 45 of the Act, though it might also fall under Art. 46-B as an instrument of dissolution of partnership, and liable to be stamped with the higher stamp duty under Art. 45, as required by S. 6 of the Act. I.L.R. (1937) Mad. 553=45 L. W. 123=1937 Mad. 308=(1937) 1 M. L. J. 174 (F. B.). A decree for a partition is an instrument of partition and such has got to be engrossed on stamp paper. 40 P.L.R. 2=1938 Lah. 321. Where in a suit for partition of joint family property to which strangers in possession of certain items of property were also added, a preliminary decree was passed in which directions were given for the division of the immovable property as also for the payment of specific sums as between parties *inter se*. *Held*, that the decree was a final order of a Civil Court for effecting a partition and that it falls strictly within the terms of S. 2 (15). *Held, further*, that the fact that the decree did not finally divide the whole of the joint family property was quite immaterial. 47 L.W. 51=1938 M.W.N. 656=1938 Mad. 307. The decree in a partition suit stating that plaintiff is entitled to a certain fraction is only a preliminary decree and does not divide the property in severalty and therefore is not required to be stamped under S. 2 (15) read with Sch. I, Art. 45. To make the order chargeable with stamp duty, it must effect an actual division by metes and bounds of the property. 139 I. C. 673=1932 R. 120. Where a partition decree is not drawn up on non-judicial stamp paper, there is no decree at all and the executing Court can refuse execution. The fact that in such a case the party has mistakenly furnished court-fee stamp and the Court mistakenly permitted the decree to be drawn up is immaterial. 135 I. C. 685=1932 L. 249. The words "final order" in S. 2 (15) and Art. 45 (3) refer to the final order of the lowest Court of original jurisdiction empowered to give an order for partition. 36 A. 137=12 A.L.J. 113 (P. C.). An award of arbitrators directing a partition executed before the present Stamp Act (II of 1899) came into force will be received on evidence even if it bears a stamp duty of Rs. 5 only. 29 P. R. 1915=27 I. C. 489. *See also* 45 L.W. 123=1937 M. 308=(1937) 1 M.L.J. 174 (F. B.). As to stamp on partition instrument, *see also* 55 I.C. 965=38 M.L.J. 330. To make an order chargeable under S. 2 (15) an award must effect an actual division. 35 M. 26=12 I.C. 775. As to stamp on document of partition reciting partition already effected and embodying its details, *see* 2 Mys.L.J. 69.

"Lease." (16) "lease" means a lease of immovable property, and includes also—

(*a*) a patta ;

(*b*) a kabuliyat or other undertaking in writing, not being a counterpart of a lease, to cultivate, occupy or pay or deliver rent for, immovable property ;

(*c*) any instrument by which tolls of any description are let;

(*d*) any writing on an application for a lease intended to signify that the application is granted ;

"Marketable security." [1][(16-A) "marketable security" means a security of such a description as to be capable of being sold in any stock market in British India or in the United Kingdom ;]

"Mortgage deed." (17) "mortgage-deed" includes every instrument whereby, for the purpose of securing money advanced, or to be advanced, by way of loan, or an existing or future debt, or the performance of an engagement, one person transfers, or creates, to, or in favour of, another, a right over or in respect of specified property ;

"Paper." (18) "paper" includes vellum, parchment or any other material on which an instrument may be written ;

"Policy of insurance." (19) "policy of insurance" includes—

(*a*) any instrument by which one person, in consideration of a premium, engages to indemnify another against loss, damage or liability arising from an unknown or contingent event ;

LEG. REF.

[1]Cl. (16-A) was inserted by S. 7 of the Indian Stamp (Amendment) Act (XV of 1904).

NOTES.

Sec. 2 (15) and Sch. I, Arts. 12 and 46.—Where a document refers to a previous partition and to certain properties being divided later on and is signed by the parties and also refers to an already existing partnership and makes provision for the future conduct of the partnership it is neither a deed of partition nor partnership nor award. 1942 All. 220 (F.B.).

Sec. 2 (15) and Arts. 45 and 46-B.—Applicability—Partnership—Dissolution--Award allotting one business to certain persons as a group and another to others as a group—Is instrument of partition liable to—Stamp duty. 1937 M. 308=(1937) 1 M.L.J. 174.

Sec. 2 (16).—A *marupat* which is a counterpart of a lease executed by a tenant promising certain rent must be stamped as a counterpart. *See* 41 M. 469=33 M.L.J. 693 (F.B.).

LEASE AND LICENSE—DISTINCTION.—The distinction between a lease and license consists in whether the interest in immovable property transferred is exclusive or not. What has to be considered is not merely the intention of the parties or the language used in a document, but the actual position resultant from the covenant made. 19 Lah.L.T. 33.

Sec. 2 (16) (b).—Scope of. *See* 145 I.C. 674 =1933 A.L.J. 749=1933 A. 735 (F.B.). Where a printed tabular form containing particulars as to the name of the lessee, the plot leased, the rent, the nature of the right, etc., signed by the manager of an estate is issued to a new tenant, it contains no agreement or terms regarding the grant of a lease. This does not create a lease, it is only a memorandum of the transaction granting a tenancy which had already been effected in favour of the tenant. It does not come under S.1. (16) of the Stamp Act. 1939 N.L.J. 404.

Sec. 2 (17).—*See* 134 I.C. 1269=1931 C. 732 (S.B.). A consent decree creating a charge on immovable property, which is not the subject-matter of the suit does not require to be stamped under the Stamp Act. 37 Bom. L.R. 346=1935 B. 256. *See also* 40 C.W.N. 1281 (Bond to Court by surety under C.P. Code, O. 41, Rr. 5 and 6.); 40 C.W.N. 1281. A document giving the mortgagee a mortgage by the deposit of title-deeds together with the right to appoint a receiver at any time without first having recourse to the Court and also the right to call upon the mortgagors at any time to execute a mortgage in the English form in favour of the mortgagee, comes within the definition of "mortgage-deed." 41 C.W.N. 961=I.L.R. (1937) 2 Cal. 486. A document transferring the benefit of the interest secured by that deed from the mortgagee to another person falls to be stamped not under Art. 23 of Sch. I-A of the Bengal Stamp Amendment Act, 1922, but under Art. 62 (*c*) of the same schedule. 41 C.W.N. 961. In order to bring an instrument within the definition of mortgage deed it is necessary that the transfer should be effected by the instrument in question. Where an entry is merely a memorandum of payment of certain sum to another on account of the mortgage of certain land and does not purport itself to create the mortgage, the document is not liable to be stamped as a mortgage deed. 40 P.L.R. 749=1938 Lah. 460.

Sec. 2 (19).—The expression of an agreement for sea insurance, otherwise than in a policy is a thing forbidden in the public interest, and the statutory insistence on a policy is no mere collateral requirement or prescription of

(*b*) a life policy, and any policy insuring any person against accident or sickness, and any other personal insurance ;

[1][* * * * * *]

"Policy of sea-insurance" or "sea-policy."

(20) "policy of sea-insurance" or "sea-policy"—

(*a*) means any insurance made upon any ship or vessel (whether for marine or inland navigation), or upon the machinery, tackle or furniture of any ship or vessel, or upon any goods, merchandise or property of any description whatever on board of any ship or vessel, or upon the freight of, or any other interest which may be lawfully insured in, or relating to, any ship or vessel ; and

(*b*) includes any insurance of goods, merchandise or property for any transit which includes, not only a sea risk within the meaning of clause (*a*), but also any other risk incidental to the transit insured from the commencement of the transit to the ultimate destination covered by the insurance ;

where any person, in consideration of any sum of money paid or to be paid for additional freight or otherwise, agrees to take upon himself any risk attending goods, merchandise or property of any description whatever while on board of any ship or vessel, or engages to indemnify the owner of any such goods, merchandise or property from any risk, loss or damage, such agreement or engagement shall be deemed to be a contract for sea-insurance ;

"Power-of attorney."

(21) "power-of-attorney" includes any instrument (not chargeable with a fee under the law relating to court-fees for the time being in force) empowering a specified person to act for and in the name of the person executing it ;

"Promissory note."

(22) "promissory note" means a promissory note as defined by the Negotiable Instruments Act, 1881 ;

LEG. REF.

[1]Sub-cl. (*c*) and the word 'and' prefixed thereto were repealed by S. 2 of the Indian Stamp (Amendment) Act (V of 1906).

NOTES.

the proper way of making such an agreement. 52 C. 408=52 I.A. 126=49 M.L.J. 136 (P.C.).

Sec. 2 (21).—Letter empowering another to sell land is not power-of-attorney. 27 Punj. L.R. 78=1926 L. 229. A vakalatnama executed by a client to his advocate to be used in the Bombay Presidency S.C. Court is a power-of-attorney as defined in S. 2 (21) of the Stamp Act and is chargeable with a stamp duty of Rupee one under Art. 48 (*b*) of Schedule I of the Act, as applied to Bombay. 58 B. 597=36 Bom. L. R. 658=1934 Bom. 299. Power-of-attorney is an authority whereby one is set in the turn, stead or place of another to act for him. Vakalatnama is therefore a power-of-attorney. A power-of-attorney for the purposes of the Stamp Act is defined in a way that excludes a vakalatnama, because it excludes a document which carries a court-fee stamp, but that definition for the purposes of the Stamp Act makes it quite clear that, if it were not for that definition, a vakalatnama, being a power-of-attorney, would require not only a court-fee stamp under the Court-Fees Act, but also a stamp under the Stamp Act, and to avoid that double stamp, it was necessary in the Stamp Act to exclude the vakalatnama. 1937 Nag. 65=19 N.L.J. 207.

Sec. 2 (22).—A document by which the executant undertakes to make certain specified payments towards the sum due under it and agrees that his failure to do so shall render him liable to forfeit any payment already made is not a promissory note payable otherwise than on demand, but only an agreement requiring 8 annas stamp. 28 I.C. 300=8 L.B.R. 155. Sec. 2 (22) extends the definition of "promissory note" as given in the Negotiable Instruments Act in certain ways, but it does not do away with one essential characteristic of a promissory note that it must contain a promise to pay to some person or persons or to their order or to the bearer of the note. 1933 Mad. 306=64 M.L.J. 204. *See also* 1941 A.M.L.J. 117. A document in which there is only an express stipulation to pay interest and there is no undertaking to pay the principal amount, is not a promissory note within the meaning of Sec. 2 (22). The recital in the document of the fact that the executant has taken a loan would be no more than a mere acknowledgment of the debt which falls very far short of an undertaking to pay. 43 C.W.N. 330. Letter of request for a loan is not a promissory note. 71 I.C. 968. An instrument attested by a witness and not made payable to order or bearer is a bond and not a promissory note. 100 I.C. 794=1927 Nag. 195. *See also* the cases cited on the point under cl. (5). *See also* 54 Cal. 445 followed in 1929 Mad. 599 (Effect of amendment of Negotiable Instruments Act discussed). The mere fact that a person chooses to give a certain title to document by no means makes it that document. A document provided as follows: "On June 25, 1925, Rs.....were found due from me to *P*, about February 27,

it also includes a note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen ;

"Receipt." (23) "receipt" includes any note, memorandum or writing—

(*a*) whereby any money, or any bill of exchange, cheque or promissory note is acknowledged to have been received, or

(*b*) whereby any other movable property is acknowledged to have been received in satisfaction of a debt, or

(*c*) whereby any debt or demand, or any part of a debt or demand, is acknowledged to have been satisfied or discharged, or

(*d*) which signifies or imports any such acknowledgment,

and whether the same is or is not signed with the name of any person ; [1][*]

"Settlement." (24) "settlement" means any non-testamentary disposition, in writing, of movable or immovable property made—

(*a*) in consideration of marriage,

(*b*) for the purpose of distributing property of the settler among his family or those for whom he desires to provide, or for the purpose of providing for some person dependent on him, or

(*c*) for any religious or charitable purpose ;

and includes an agreement in writing to make such a disposition [2][and, where any such disposition has not been made in writing, any instrument recording, whether by way of declaration of trust or otherwise, the terms of any such disposition] ; [3][and

"Soldier." (25) "soldier" includes any person below the rank of non-commissioned officer who is enrolled under the Indian Army Act, 1911.]

CHAPTER II.

STAMP-DUTIES.

A.—Of the liability of Instruments to Duty.

3. Subject to the provisions of this Act and the exemptions contained in

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LEG. REF.

[1]The word "and" omitted by Act XVIII of 1928.

[2]These words were added by S. 2 of the Indian Stamp (Amendment) Act (XV of 1904).

[3]Added by Act XVIII of 1928.

NOTES.

1923, and as the money cannot be given at present hence it has been agreed that I would pay interest at 1 per cent. per annum. Therefore this pronote payable on demand has been executed so that it may serve as evidence and may be useful in time." *Held*, that the document was a mere acknowledgment of debt coupled with an agreement to pay debt and not a promissory note. Effect of use of words "on demand" discussed. 131 I.C. 135=1931 A. 302; 34 C.W.N. 911. On this section, *see also* 4 I.C. 293 (L.B.); 28 I.C. 300=8 L.B.R. 155.

Sec. 2 (23).—Each of the entries of over Rs. 20 in a *sarkhat* left in the hands of the debtor must be stamped as a receipt. 11 A. L.J. 309=35 All. 290. The definition of "receipt" in Sec. 2 (23) is applicable only to instruments executed by the payee in favour of the payer and not to acknowldgments of payment made to a third person. A memorandum signed by the witness and showing that he has received the diet money and filed in Court is not a "receipt" and does not require stamp. 140 I.C. 192. On this subsection, *see* 12 Rang. 174=1934 Rang. 49.

Sec. 2 (24) : "SETTLEMENT."— Generally refers to a disposition of successive interests in immovable property and is generally couched in the form of a trust. 63 C 1098=40 C.W.N. 1320=1936 C. 556. Instrument creating power of appointment. 35 B. 444=11 I.C. 982=13 Bom.L.R. 646. *See also* 10 O.W.N. 997=1933 O. 461 (Wakf deed). There is no reason for holding that if an instrument making a settlement includes an agreement by the beneficiary to act in a particular way in consideration of the instrument, the instrument cannot be regarded as a settlement. 39 P.L.R. 357=1937 Lah. 684. A deed by which a certain income from property is vested in a body of trustees to be applied to certain charitable institutions is a deed of settlement as well as a deed of trust, and as such is separately liable to stamp duty. 20 Lah.L.T. 151.

Sec. 3.—A decree of Court in the terms of an award is not an instrument chargeable with stamp duty. 11 L.L.T. 147.

Instruments chargeable with duty.

Schedule I, the following instruments shall be chargeable with duty of the amount indicated in that schedule as the proper duty therefor respectively, that is to say :—

(*a*) every instrument mentioned in that schedule which, not having been previously executed by any person, is executed in British India on or after the first day of July, 1899 ;

(*b*) every bill of exchange [1][payable otherwise than on demand] [2][*] or promissory note drawn or made out of British India on or after that day and accepted or paid, or presented for acceptance or payment, or indorsed, transferred or otherwise negotiated, in British India ; and

(*c*) every instrument (other than a bill of exchange [2][*] or promissory note) mentioned in that schedule, which, not having been previously executed by any person, is executed out of British India on or after that day, relates to any property situate, or to any matter or thing done or to be done, in British India and is received in British India :

Provided that no duty shall be chargeable in respect of—

(1) any instrument executed by, or on behalf of, or in favour of, the [3][Crown] in cases where, but for this exemption, the [3][Crown] would be liable to pay the duty chargeable in respect of such instrument ;

(2) any instrument for the sale, transfer or other disposition, either absolutely or by way of mortgage or otherwise, of any ship or vessel, or any part, interest, share or property of or in any ship or vessel registered under the Merchant Shipping Act, 1894, or under Act XIX of 1838, or the Indian Registration of Ships Act, 1841, as amended by subsequent Acts.

Several instruments used in single transaction of sale, mortgage or settlement.

4. (1) Where, in the case of any sale, mortgage or settlement, several instruments are employed for completing the transaction, the principal instrument only shall be chargeable with the duty prescribed in Schedule I, for the conveyance, mortgage or settlement, and each of the other instruments shall be chargeable with a duty of one rupee instead of the duty (if any) prescribed for it in that schedule.

(2) The parties may determine for themselves which of the instruments so employed shall, for the purposes of sub-section (1), be deemed to be the principal instrument :

Provided that the duty chargeable on the instrument so determined shall be the highest duty which would be chargeable in respect of any of the said instruments employed.

Instruments relating to several distinct matters.

5. Any instrument comprising or relating to several distinct matters shall be chargeable with the aggregate amount of the duties with which separate instruments, each comprising or relating to one of such matters, would be chargeable under this Act.

LEG. REF.

[1] Added by Act V of 1927.

[2] The word "cheque" has been omitted by Act V of 1927.

[3] Substituted for 'Government' by Government of India (Adaptation of Indian Laws) Order, 1937.

NOTES.

Sec. 3 (a).—Applicability of section to document executed at a place other than British India. 7 P. 99=9 P.L.T. 221=1928 P. 134=105 I.C. 502.

Sec. 3 (b).—Alteration in the due date of payment of a bill of exchange—Whether necessitates the instrument to be stamped again as a new instrument. 1927 B. 13=28 Bom.L.R. 1264.

Sec. 3 (c).—An instrument executed outside British India, and not relating to any property or to any matter or thing done or to be done in British India is not chargeable with stamp-duty. 48 I.C. 187=11 Bur.L.T. 126.

Sec 4.—Settlement—Stamp duty required. *See* 37 A. 264=13 A.L.J. 335 (F.B.). Second instrument of partition making minor alterations in the first stamp duty. 37 A. 159=13 A.L.J. 96 (F.B.). On this section, *see also* 4 R. 456.

Sec. 5 : SCOPE AND APPLICABILITY.—Section does not apply if it is not shown that the

6. Subject to the provisions of the last preceding section, an instrument so framed as to come within two or more of the descriptions in Schedule I, shall, where the duties chargeable thereunder are different, be chargeable only with the highest of such duties :

Instruments coming within several descriptions in Schedule I.

Provided that nothing in this Act contained shall render chargeable with duty exceeding one rupee a counterpart or duplicate of any instrument chargeable with duty and in respect of which the proper duty has been paid.

7. (1) No contract for sea-insurance [1](other than such insurance as is referred to in section 506 of the Merchant Shipping Act, 1894), shall be valid unless the same is expressed in a sea-policy.

Policies of sea-insurance.

(2) No sea-policy made for time shall be made for any time exceeding twelve months.

(3) No sea-policy shall be valid unless it specifies the particular risk or adventure, or the time, for which it is made, the names of the subscribers or underwriters, and the amount or amounts insured.

(4) Where any sea-insurance is made for or upon a voyage and also for time, or to extend to or cover any time beyond thirty days after the ship shall have arrived at her destination and been there moored at anchor, the policy shall be charged with duty as a policy for or upon a voyage, and also with duty as a policy for time.

8. (1) Notwithstanding anything in this Act, any local authority raising a loan under the provisions of the Local Authorities Loan Act, 1879, or of any other law for the time being in force, by the issue of bonds, debentures or other securities, shall, in respect of such loan, be chargeable

Bonds, debentures or other securities issued on loans under Act XI of 1879.

LEG. REF.

[1]The Indian Registration of Ships Act (1841). Amendment Act, 1850 (XI of 1850.)

NOTES.

deed in question embodies two separate and distinct matters. 108 I.C. 746=1928 L. 370. Two *matters are considered distinct* if one of them is subsidiary to another contained in the same document, the test being when one is incidental and accessory to the other. 40 C.W.N. 1340=1936 C. 814. The plaintiff purchased 29 bonds from the second defendant for a sum of Rs. 2,425. The sum of the amounts due on the several bonds was Rs. 6,040. The sale-deed in favour of the plaintiff bore a stamp duty of Rs. 5. On a reference relating to the sufficiency of the stamp, *held* (by the Full Bench, *Niamatullah and Bennet, JJ.*, dissenting), that (*i*) S. 5 was inapplicable. "Distinct matters" meant "distinct transactions" and not a transaction comprising several items ; (*ii*) under Art. 62 read with S. 13 of the General Clauses Act, the stamp duty chargeable on the deed was only Rs. 5. 55 A. 468=1933 A.L.J. 427=1933 A. 321 (F.B.). *See also* 1936 Cal. 814. Single instrument relating to distinct matters—Sale-deed with mortgage of other lands as security for due performance—Stamp duty. 43 M. 365 =38 M.L.J. 506. Stipulation for payment of certain fees in vakalatnama with a further provision that the pleader is not bound to appear and act in case fees are not paid in advance—Document not chargeable as agreement as well as vakalatnama—Vakalat not chargeable both under Court-Fees Act and Stamp Act. 40 C. W.N. 1340=1936 C. 814. Acknowledgment of debt—Release—Instrument falling under both heads. 37 I.C. 984=31 M.L.J. 851. Agreement to refer a dispute arising out of contract to arbitration is a part of the contract itself. It is not a distinct matter. The whole contract is exempted under Art. 5 (*a*) and the documents making the contract need not be charged except on broker's note under Art. 43. 16 I.C. 153=39 C. 659. A document which is an agreement of service and a security bond falls under Arts. 5 (*c*) and 57 (*b*) and deficiency in stamp if any can be remedied by payment of the difference and a penalty. 1924 N. 408 ; 40 C. 219=18 I.C. 978=19 C.W.N. 395 ; 19 M.L.J. 35; 5 I.C. 812 ; 6 I.C. 762 ; 1 I.C. 371 ; 31 M.L.J. 851.

SEC. 6.—*See* 1937 Mad. 308=(1937) 1 M.L.J. 174. Document containing characteristics both of a mortgage and a bond—Highest of the duties provided for by the Act is payable. 163 I.C. 614=1936 A.L.J. 1185=1936 A. 481 (S.B.) An attested *shahjog hundi* comes under S. 6, *i.e.*, it is liable to stamp duty under two headings in the Schedule. 33 I.C. 247=22 C.L.J. 22. The right of election given by S. 17 of the Negotiable Instruments Act to the holder of an instrument to treat it as a promissory note or as a bill of exchange is a privilege, which he must have the full advantage of and that benefit should not be taken away by anything contained in this Act. S. 17 should in effect be read as a proviso to S. 6. 1932 M. 765=63 M.L.J. 548. Where a *deed is to be taken both as a lease and as a mortgage*, it must bear a stamp leviable in case of a mortgage, which requires a higher stamp duty. 58 M. 75=1934 M. 458=67 M.L.J. 455. Where an instrument is executed by a lessee whereby he agrees to take a lease of the pro-

with a duty of [1][one per centum] on the total amount of the bonds, debentures or other securities issued by it, and such bonds, debentures or other securities need not be stamped, and shall not be chargeable with any further duty on renewal, consolidation, sub-division or otherwise.

(2) The provisions of sub-section (1) exempting certain bonds, debentures or other securities from being stamped and from being chargeable with certain further duty shall apply to the bonds, debentures or other securities of all outstanding loans of the kind mentioned therein, and all such bonds, debentures or other securities shall be valid, whether the same are stamped or not :

Provided that nothing herein contained shall exempt the local authority which has issued such bonds, debentures or other securities from the duty chargeable in respect thereof prior to the twenty-sixth day of March, 1897, when such duty has not already been paid or remitted by order issued by the Central Government.

(3) In the case of wilful neglect to pay the duty required by this section, the local authority shall be liable to forfeit to the Government a sum equal to ten per centum upon the amount of duty payable, and a like penalty for every month after the first month during which the neglect continues.

Power to reduce, remit or compound duties.

9. The [2][collecting Government] may, by rule or order published in the Official Gazette,—

(*a*) reduce or remit, whether prospectively or retrospectively, in the whole or any part of [3][the territories under its administration], the duties with which any instruments or any particular class of instruments, or any of the instruments belonging to such class, or any instruments when executed by or in favour of any particular class of persons, or by or in favour of any members of such class, are chargeable, and

(*b*) provide for the composition or consolidation of duties in the case of issues by any incorporated company or other body corporate of debentures, bonds or other marketable securities.

B.—Of stamps and the mode of using them.

Duties how to be paid.

10. (1) Except as otherwise expressly provided in this Act, all duties with which any instruments are chargeable shall be paid, and such payment shall be indicated on such instruments, by means of stamps—

(*a*) according to the provisions herein contained ; or

(*b*) when no such provision is applicable thereto—as the [2][collecting Government] may by rule direct.

(2) The rules[4] made under sub-section (1) may, among other matters regulate,—

LEG. REF.

[1]The words "one per centum" were substituted for "8 annas per centum" by Act VI of 1910, S. 2.

[2] Substituted for "Governor-General in Council" by A.O.

[3] Substituted for 'British India' by *ibid.*

Sec. 9 (a).—For the general notification reducing and remitting such duties, see *Gazette of India*, 1909, Pt. I, p. 597, Gen. R. and O., Vol. III, pp. 315-338, and *Gazette of India*, 1908, Pt. I, pp. 203, 522.

For notification remitting the duty on apprenticeship-deeds in the case of distributors or compositors bound apprentices to the Superintendent of Government Printing, India, see *Gazette of India*, 1899, Pt. I, p. 1068.

For notification reducing the dues chargeable on certain kabuliyats in the Bankura District, Lower Bengal, *see* Notification No. 44 S. R. *Gazette of India*, 1900, Pt. I, p. 88 ; *ibid.*, 576.

[4] For rules as to the use of impressed and adhesive stamps, *see* Notifications No. C.-63, Stamps 25, dated 5th May, 1925. General R. and O., Vol. III, p. 33[13]—*Gazette of India*, 1906, Pt. I, p. 439.

NOTES.

perty, make repairs, pay a certain rent and binds himself not to quit the premises for a period, it is a lease as well as an agreement and according to S. 6 of the Stamp Act the higher duty has to be charged in respect of it. 1939 A.L.J. 800=1939 All. 724.

Sec. 9.—Notification of exemption—Cl. 85—Scope—Land acquired by State Railway from trustees of the Port of Bombay in exchange for Government lands—Exemption from stamp duty. 58 B. 437=36 Bom.L.R. 467=1934 B. 231.

(*a*) in the case of each kind of instrument—the description of stamps which may be used ;

(*b*) in the case of instruments stamped with impressed stamps—the number of stamps which may be used ;

(*c*) in the case of bills of exchange or promissory notes written in any Oriental language—the size of the paper on which they are written.

Use of adhesive stamps.

11. The following instruments may be stamped with adhesive stamps, namely :—

(*a*) instruments chargeable with the duty of one anna [1][or half an anna], except parts of bills of exchange payable otherwise than on demand and drawn in sets ;

(*b*) bills of exchange, [2][* *] and promissory notes drawn or made out of British India ;

(*c*) entry as an advocate, vakil or attorney on the roll of a High Court ;

(*d*) notarial acts ; and

(*e*) transfers by endorsement of shares in any incorporated company or other body corporate.

Cancellation of adhesive stamps.

12. (1) (*a*) Whoever affixes any adhesive stamp to any instrument chargeable with duty which has been executed by any person shall, when affixing such stamp, cancel the same so that it cannot be used again ; and

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LEG. REF.

[1] These words were inserted by S. 3 of the Indian Stamp (Amendment) Act, 1906 (V of 1906).

[2] The word "cheques" has been omitted by Act V of 1927.

NOTES.

Sec. 11 (c).—As to the enrolment of legal practitioners in the North-West Frontier Provinces, *see* S. 9 of the North-West Frontier Province Law and Justice Regulation, 1901 (VII of 1901), P. and N.-W. Code.

Sec. 12 : CANCELLATION—WHAT AMOUNTS TO.—Cancellation of stamps—Allegation that stamp was cancelled subsequent to execution of instrument—Burden of proof. 1937 Rang.L.R. 196=1937 Rang. 392. S. 12 (2) cannot be construed to mean that if the concellation of stamps on an instrument, however effective, was effected at some later time than the affixing of the stamps, the document is not receivable in evidence. Such a construction of the section is unsound. The wording of S. 12 (2) makes it clear that that a document is to be deemed unstamped if when the Court looks at the same, it finds that it has not been cancelled so that the stamps cannot be used again, and the criterion of the cancellation is the appearance of the stamps. The sub-section has nothing to do with the penalty for failing to cancel the stamps, for which S. 63 makes provision. If the stamps are in such a condition that they cannot be used again, they have been cancelled and the document cannot be treated as unstampted. There is nothing in the section which prevents the document from being used in evidence if, when it is presented to the Court, the stamps are cancelled; that does not mean that they must have been cancelled at some particular time anterior to its presentment in evidence. It merely refers to the condition of the stamps at the time it is so presented. The object of the legislature is only to protect the revenue. If, when the Court comes to examine the document, the stamps are intact, the danger of a second use of the stamps has not yet occurred, and if cancellation is, before it is presented in evidence, effected, no danger arises of a second use of the stamps in the future. 16 P. 84=17 Pat.L.T. 769=1937 P. 73. *See also* 161 I.C. 150=1936 O.W.N. 245=1936 O. 176. The Legislature has not attempted any exhaustive list of the modes in which cancellation may be done in sub-S. (3) of S. 12. The object of the cancellation obviously is to make the stamp unfit for further use in the ordinary course of business, and whether this has been done in any particular case is a question to be determined on an examination of the instrument in question. The section does not lay down that the cancellation must be such that it would be impossible for a criminally inclined person to use the stamp again. Thus, where the executant of a promissory note clearly initials his signature on the adhesive stamps on it, the mere fact that the date on which the executant initialled does not appear on any of them, does not make it "not effectually cancelled". 40 P.L.R. 801=1938 Lah. 505. *See also* I.L.R. (1942) Kar. 56. Where there are several adhesive Stamps, which together make the required stamp, affixed to a promissory note, then in that case S. 12 requires that all such stamps must be cancelled. If one of them is not duly cancelled, the note is to be deemed unstamped so far as that stamp is concerned, and the note is, therefore, inadmissible in evidence. 1940 O.W.N. 581=1940 Oudh 308. Promissory note stamped with four stamps—Cancellation of stamps—What amounts to. 1937 Rang. L.R. 127=1937 Rang. 408. Cancellation is effected within the meaning of this clause, if it is done in such a manner that a person seeing the stamp so cancelled will realise at once that it had already been used and should not be used

(*b*) whoever executes any instrument on any paper bearing an adhesive stamp shall, at the time of execution, unless such stamp has been already cancelled in manner aforesaid, cancel the same so that it cannot be used again.

(2) Any instrument bearing an adhesive stamp which has not been cancelled so that it cannot be used again, shall, so far as such stamp is concerned, be deemed to be unstamped.

(3) The person required by sub-section (1) to cancel an adhesive stamp may cancel it by writing on or across the stamp his name or initials or the name or initials of his firm with the true date of his so writing, or in any other effectual manner.

Instruments stamped with impressed stamps how to be written.

13. Every instrument written upon paper stamped with an impressed stamp shall be written in such manner that the stamp may appear on the face of the instrument and cannot be used for or applied to any other instrument

Only one instrument to be on same stamp.

14. No second instrument chargeable with duty shall be written upon a piece of stamped paper. upon which an instrument chargeable with duty has already been written :

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again, or in other words if it has been defaced in such a manner that it cannot be used again without some manipulation of words, figures, pen, or ink. I.L.R. (1942) Kar. 56=201 I.C. 711. Crossing a stamp by drawing a line and signing on the second adjacent stamp is not cancellation of the first stamp within the meaning of S. 12. 1934 R. 364. Where it is possible to use stamp a second time, in spite of the one line that is drawn across it, the stamp is not cancelled in the effectual manner required by sub-S. (3), S. 12; (1920 L. 374, Rel. on.) 1935 L. 716. A cross mark on the stamp of a pro-note by an illterate person in token of indication of acknowledgment constitutes an effectual cancellation of the stamp within the meaning of S. 12. 3 R. 39=88 I.C. 933. An illiterate person can direct the scribe of the promissory note or any one else to sign across the adhesive stamp on his own behalf. Such signature will be quite as good as his own signature for the purposes of cancellation. 52 A. 489=1931 A. 57 (1). What amounts to cancellation. Small ink line on one side is not: 14 B. 102; nor blue pencial lines; 16 I.C. 96: nor drawing parallel lines across a stamp: 28 B. 432; drawing of line across whether effective, 41 A. 169; 15 I C. 202; 60 I.C. 559; a date written across a stamp is effective. So also signature across the whole stamp though no date is put in. 161 I.C. 150=1936 O.W.N. 245=1936 O. 176. Where the adhesive stamp was not cancelled at the time of execution, the hundi was held to be unstamped. 90 I.C. 689=27 Bom.L.R. 118 =1925 B. 520; 15 I.C. 202=15 O.C. 58; 14 I.C. 512=18 P.R. 1912. A promissory note was executed in favour of the Nawab of Rampur as such on an unstamped paper, the law in the State not requiring any stamp, *held*, that the promissory note was admissible in evidence in a British Indian Court as a valid instrument according to this Act. 33 A. 571= 8 A.L.J. 566,

Sec. 12 (1-b) and (2).—OBJECT OF SECTION —ONE or SEVERAL STAMPS NOT CANCELLED—EFFECT.—The principle underlying S.12 is that the possibility of a stamp affixed to an instrument being used again should be precluded. Where a promissory note had four one anna adhesive stamps affixed to it and one of them was not in any way cancelled: *Held*, that the note was insufficiently stamped. 1934 L. 606. The w rds "so that it cannot be used again" in S. 12 do not imply such a degree of cancellation as would make it physically impossible for any dishonest person to make hereafter a fraudulent use of the stamp. The expression means merely such cancellation as will prevent the stamp being lawfully or conscientiously used again. The question resolves itself into this, if the stamp became detached from the document to which it has been affixed and came into the possession of a person of ordinary honesty and prudence, could he conscientiously use that stamp again? Applying this criterion, a stamp can be as effectually cancelled by a line deliberately drawn across it with the object of cancelling it, as by writing a name or a date across it. 1937 Rang.L.R. 127=1937 Rang. 408. *See also* 1937 Rang. 413. If one of the two-anna stamps on a promissory note is not duly cancelled and the one anna stamp alone is not sufficient for such note, if cannot be held that the promissory note is sufficiently stamped, for, under S. 12 (2), the note is to be deemed unstamped so far as the uncancelled stamp is concerned. 1929 R. 270; 1933 L. 148. *See also* 60 I.C. 652=2 P.L.T. 184; 16 I.C. 834=169 P.L.R. 1912.

Sec. 13.—*See* 15 M:L.T. 203=23 I.C. 110. A decree which is not drawn up on a non-judicial stamped paper is invalid and incapable of execution; but when, by order of Court which passed the decree, a non-judicial stamped paper is supplied by the decree-holder and annexed to the original decree and defaced, the names of the parties and the cause title being put down on it, the decree is validated with retrospective effect from the date when it was originally drawn up. 38 C.W.N. 1118.

Sec. 14.—*See* 29 I.C. 602=8 S.L.R. 302. Bill of exchange—Period of payment extended

Provided that nothing in this section shall prevent any endorsement which is duly stamped or is not chargeable with duty being made upon any instrument for the purpose of transferring any right created or evidenced thereby, or of acknowledging the receipt of any money or goods the payment or delivery of which is secured thereby.

Instrument written contrary to section 13 or 14 deemed unstamped.

15. Every instrument written in contravention of section 13 or section 14 shall be deemed to be unstamped.

Denoting duty.

16. Where the duty with which an instrument is chargeable, or its exemption from duty, depends in any manner upon the duty actually paid in respect of another instrument, the payment of such last-mentioned duty shall, if application is made in writing to the Collector for that purpose, and on production of both the instruments, be denoted upon such first mentioned instrument, by endorsement under the hand of the Collector or in such other manner (if any) as the [1][collecting Government] may by rule prescribe.

C.—Of the time of stamping instruments.

Instruments executed in British India.

17. All instruments chargeable with duty and executed by any person in British India shall be stamped before or at the time of execution.

Instruments other than bills and notes executed out of British India.

18. (1) Every instrument chargeable with duty executed only out of British India, and not being a bill of exchange, [2][*] or promissory note, may be stamped within three months after it has been first received in British India.

(2) Where any such instrument cannot, with reference to the description of stamp prescribed therefor, be duly stamped by a private person, it may be taken within the said period of three months to the Collector, who shall stamp the same, in such manner as the [1][collecting Government] may by rule prescribe, with a stamp of such value as the person so taking such instrument may require and pay for.

Bills and notes drawn out of British India.

19. The first holder in British India of any bill of exchange, [3][payable otherwise than on demand] [2][*] or promissory note drawn or made out of British India shall, before he presents the same for acceptance or payment, or endorses, transfers or otherwise negotiates the same in British India, affix thereto the proper stamp and cancel the same :

LEG. REF.

[1]Substituted by A.O., 1937.

[2]The word "cheque" has been omitted by Act V of 1927.

[3]Added by Act V of 1927.

NOTES.

by drawer and accepted by drawee—Bills must be charged afresh. 49 B, 351=1925 B. 187. Pro-note for Rs. 50 changed into one for Rs. 200, Effect of. *See* 1928 R. 263=114 I. C. 289. Construction of section—Endorsement on drafts extending duration—If constitutes a second instrument—Endorsement, if a material alteration. *See* 49 C.L.J. 32=113 I.C. 124 (P.C.).

Sec. 17.—26 A.L.J. 277=1928 A. 162 (F.B.).

SARKHAT containing stipulation for interest at the top and unsigned entries of advances at the bottom—Document stamped as one agreement—Sufficien y. *See* 118 I.C. 173.

Sec. 18.—26 A.L.J. 823; 115 I.C. 453.

Sec. 19 (as amended by Finance Act V of 1927): APPLICABILITY OF SECTION—SUIT ON FOREIGN PROMISSORY NOTE—ADMISSIBILITY WITHOUT STAMP.—S. 19 only requires a foreign promissory note to be stamped before it is presented for acceptance for payment, etc. It does not apply when the instrument is not so presented or endorsed or transferred or otherwise negotiated. The section does not make the instrument inadmissible in a suit filed on it by the promisee against the maker. 28 S.L.R. 266. In a case of assignment or transfer of a promissory note drawn or made outside British India the first holder in British India must affix a proper stamp and cancel the same and the affixing of the stamp and its cancellation must be done before the process of transfer began in British India. (8 M.L.J. 182 and 36 M.L.J. 188, Rel. on.) 54 L.W. 768=1941 Mad. 868=(1941) 2 M.L.J. 301. Demand draft—Same person drawer and drawee—Money payable to third party on demand—Negotiable instrument

Provided that,—

(*a*) if, at the time any such bill of exchange, [1][*] or note comes into the hands of any holder thereof in British India, the proper adhesive stamp is affixed thereto and cancelled in manner prescribed by section 12 and such holder has no reason to believe that such stamp was affixed or cancelled otherwise than by the person and at the time required by this Act, such stamp shall, so far as relates to such holder, be deemed to have been duly affixed and cancelled :

(*b*) nothing contained in this proviso shall relieve any person from any penalty incurred by him for omitting to affix or cancel a stamp.

D.—Of valuations for Duty.

Conversion of amount expressed in foreign currencies.

20. (1) Where an instrument is chargeable with *ad valorem* duty in respect of any money expressed in any currency other than that of British India, such duty shall be calculated on the value of such money in the currency of British India according to the current rate of exchange on the day of the date of the instrument.

(2) The Central Government may, from time to time, by notification in the Official Gazette, prescribe[2] a rate of exchange for the conversion of British or any foreign currency into the currency of British India for the purposes of calculating stamp-duty, and such rate shall be deemed to be the current rate for the purpose of sub-section (1).

Stock and marketable securities how to be valued.

21. Where an instrument is chargeable with *ad valorem* duty in respect of any stock or of any marketable or other security, such duty shall be calculated on the value of such stock or security according to the average price or the value thereof on the day of the date of the instrument.

Effect of statement of rate of exchange or average price.

22. Where an instrument contains a statement of current rate of exchange, or average price, as the case may require, and is stamped in accordance with such statement, it shall, so far as regards the subject-matter of such statement, be presumed, until the contrary is proved, to be duly stamped.

Instruments reserving interest.

23. Where interest is expressly made payable by the terms of an instrument, such instrument shall not be chargeable with duty higher than that with which it would have been chargeable had no mention of interest been made therein.

Certain instruments connected with mortgages of marketable securities to be chargeable as agreements.

[3]23-A. (1) Where an instrument (not being a promissory note or bill of exchange)—

(*a*) is given upon the occasion of the deposit of any marketable security by way of security for money advanced or to be advanced by way of loan, or for an existing or future debt, or

(*b*) makes redeemable or qualifies a duly stamped transfer, intended as a security, of any marketable security,

it shall be chargeable with duty as if it were an agreement or memorandum of an agreement chargeable with duty under [4][Article No. 5 (*c*)] of Schedule I.

(2) A release or discharge of any such instrument shall only be chargeable with the like duty.

LEG. REF.

[1] The word "Cheque" omitted by Act V of 1927.

[2] For notification prescribing such rates, *see* C. No. 125, Stamps 25, dated 18th September, 1925—*Gazette of India*, 1925, Pt. I, p. 886.

[3] Sec. 23-A was added by S. 3 of the Indian Stamp (Amendment) Act 1904 (XV of 1904).

[4] The words "Article No. 5 (*c*)" were substituted for "Article 5 No. (*b*)" by Act I of 1912, S. 3.

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and not promissory note—Document whether need be stamped—Onus. *See* 56 Cal. 233; 32 C.W.N. 1015.

Sec. 22.—*See* 34 C.W.N. 911=1930 Cal. 630.

Sec. 23.—S. 23 does not cease to apply by reason merely of the fact that the interest is compound interest. 34 C.W.N. 911=1930 Cal. 630.

How transfer in consideration of debt, or, subject to future payment etc. to be charged.

24. Where any property is transferred to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, such debt, money or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the transfer is chargeable with *ad valorem duty* :

Provided that nothing in this section shall apply to any such certificate of sale as is mentioned in Article No. 18 of Schedule I.

Explanation.—In the case of a sale of property subject to a mortgage or other incumbrance, any unpaid mortgage-money or money charged, together with the interest (if any) due on the same, shall be deemed to be part of the consideration for the sale :

Provided that, where property subject to a mortgage is transferred to the mortgagee, he shall be entitled to deduct from the duty payable on the transfer the amount of any duty already paid in respect of the mortgage.

Illustrations.

(1) A owes B Rs. 1,000. A sells a property to B, the consideration being Rs. 500 and the release of the provious debt of Rs. 1,000. Stamp-duty is payable on Rs. 1,500.

(2) A sells a property to B for Rs. 500 which is subject to a mortgage to C for Rs. 1,000 and unpaid interest Rs. 200. Stamp-duty is payable on Rs. 1,700.

(3) A mortgages a house of the value of Rs. 1,0000 to B for Rs. 5,000. B afterwards buys the house from A. Stamp-duty is payable on Rs. 10,000 less the amount of stamp-duty already paid for the mortgage.

Valuation in case of annuity, etc.

25. Where an instrument is executed to secure the payment of an annuity or other sum payable periodically, or where the consideration for a conveyance is an annuity or other sum payable periodically, the amount secured by such

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NOTES.

Sec. 24.—Sale deed—Purchase-money—Sale of property subject to mortgages—Vendee agreeing to pay off encumbrance—Stamp duty payable on sale-deed. 49 Bom. 73=1924 Bom. 524; 1937 Nag. 57. On this section, *see also* 13 Rang. 613.

Sec. 24, Expl.—The clause "subject to a mortgage or other incumbrance" governs "sale of property" and not 'property' in S. 24. If property is subject to a mortgage but the vendor in return for the purchase money is to give clear title free from all encumbrances, the explanation does not apply. Nor does the 2nd illustration apply, for the case there put is not a sale free from the encumbrances. *Held*, that the unpaid mortgage money is in the case of a sale, subject to a mortgage, to be deemed to be part of the consideration for the sale, not because it is part of such consideration, but because the Legislature is determined to tax it. Consequently, an enquiry into the question whether the mortgage amount in fact proved part of the consideration is entirely irrelevant. 58 Cal. 33=1931 Cal. 193 (F.B.); 19 N.L.J. 259 (cited under S. 27, *infra*).

Sec. 24, Proviso, Expl.—A person having a fractional interest in a mortgage purchasing the equity of redemption of the whole property is not entitled to claim a reduction in the value of the stamp under the proviso in S. 24. 18 Lah.L.T. 45. Under the Explanation to S. 24 the consideration for a sale subject to a mortgage includes the amount of the mortgage-debt. The whole mortgage-debt is charged on every part of the property. Where the equity of redemption is sold in parts the revenue authorities are entitled to charge, on the sale of each party, stamp duty, which includes the amount of the whole mortgage-debt ; that is the effect of S. 24. Certain persons sold one-fourth undivided share which they had in two immovable properties for a sum of Rs. 14,000, one of the properties sold was subject to a mortgage-debt amounting to Rs. 66,633, and that property was sold subject to the mortgage. *Held*, that the stamp duty on the sale-deed must be calculated on a total sum of Rs. 80,633 (Rs. 14,000 plus Rs. 66,633) and not merely on Rs. 14,000 plus one-fourth of the mortgage-debt only. 42 Bom.L.R. 964=1940 Bom. 360= I.L.R. (1941) Bom. 23.

Sec. 24, proviso.—*See* 50 Bom. 640=28 Bom.L.R. 1091=1926 Bom. 542.

Secs. 24 and 27.—Where property is sold subject to a mortgage and the vendee undertakes to discharge the mortgage or encumbrance, the instrument of sale must set forth the mortgage as part of the consideration for the sale, under Ss. 24 and 27. The undertaking on the part of the vendee need not be express; it may be implied. The omission to set forth the encumbrance and to pay stamp duty on the amount of the encumbrance is a fraud on the Stamp Law and amounts to defrauding the Government under S. 64 of the Stamp Act. I.L.R. (1937) Nag. 432=19 N.L.J. 259=1937 Nag. 57.

Sec. 25.—Where lessee sold all his rights and liabilities under a permanent lease to

instrument or the consideration for such conveyance, as the case may be, shall, for the purposes of this Act, be deemed to be,—

(*a*) where the sum is payable for a definite period so that the total amount to be paid can be previously ascertained—such total amount ;

(*b*) where the sum is payable in perpetuity or for an indefinite time not terminable with any life in being at the date of such instrument or conveyance —the total amount which, according to the terms of such instrument or conveyance, will or may be payable during the period of twenty years calculated from the date on which the first payment becomes due ; and

(*c*) where the sum is payable for an indefinite time terminable with any life in being at the date of such instrument or conveyance—the maximum amount which will or may be payable as aforesaid during the period of twelve years calculated from the date on which the first payment becomes due.

Stamp where value of subject-matter is indeterminate.

26. Where the amount or value of the subject-matter of any instrument chargeable with *ad valorem* duty, cannot be, or (in the case of an instrument executed before the commencement of this Act) could not have been, ascertained at the date of its execution or first execution, nothing shall be claimable under such instrument more than the highest amount or value for which, if stated in an instrument of the same description, the stamp actually used would, at the date of such execution, have been sufficient :

[1][Provided that, in the case of the lease of a mine in which royalty or a share of the produce is received as the rent or part of the rent, it shall be sufficient to have estimated such royalty or the value of such share, for the purpose of stamp-duty,—

(*a*) when the lease has been granted by or on behalf of the [2][Crown] , at such amount or value as the Collector may, having regard to all the circumstances of the case, have estimated as likely to be payable by way of royalty or share to the [2][Crown] under the lease, or

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LEG. REF.

[1] This proviso was substituted for the first Proviso by S. 4 of the Indian Stamp (Amendment) Act (XV of 1904).

[2] Substituted for 'Secretary of State in Council' by A. O.. 1937.

NOTES.

another for a fixed sum of money and the liabilities so transferred to the assignee included the payment of an annuity to the landlord, the rent or annuity to which the corpus of sale is subject is not the consideration for the transfer and S. 25 has no application thereto. 32 Bom.L.R. 1447=1931 Bom. 1.

Sec. 25 (a) and (b) and Art. 63: CONSTRUCTION AND SCOPE—LEASE OF MINE AND QUARRY FOR 99 YEARS ON PAYMENT OF ANNUAL ROYALTY.—What S. 25 aims at is the ascertainment of the sum which is payable, and which alone is to be taken into consideration for the purpose of calculating the stamp duty. Where a period is fixed, as in the case of a lease, for the subsistence of the lease, a stamp officer who has to determine the stamp duty when the document is presented to him, can immediately ascertain the total sum payable for the period fixed. Obviously, that is not possible where the lease is in perpetuity or where there is no definite time fixed during which the lease is to subsist. In the first case it would fall under sub-Cl. (*a*) of S. 25: in the second case, it would come under sub-Cl. (*b*). All that the stamp authorities have to see in the case of a deed of transfer or assignment of a lease, is if they can ascertain the total sum payable by the lessee. If they can do so, they must proceed under S. 25 (*a*); if they cannot do so, they must take the total sum to be the capitalised sum for 20 years. The period during which the lessee is to hold the estate or the period when the lease expires or can be determined either by a provision in the lease itself or otherwise in accordance with law, has nothing to do with the section and is not of much importance to the stamp authorities. What is aimed at is the ascertainment of the total amount payable when the document is presented. I.L.R. (1939) Bom. 320=41 Bom.L.R. 297=1939 Bom. 215.

Secs. 26 and 35.—S. 26 is subject to S. 35. 1924 Nag. 408 (2). By the combined operations of Ss. 26 and 35 a lessee under a mining lease is entitled upon payment of the proper penalty, to recover the royalty provided for in the lease, even though the amount thereof should prove to be in excess of that covered by the stamp originally affixed to the lease. 51 I.A. 332=4 Pat. 34=47 M.L.J. 300 (P.C.). Objection under the section taken for first time in appeal. An objection by the defendant appellant that the lease having been stamped under S. 26, the plaintiff was not entitled to recover anything in excess of the amount for which the stamp was paid, was not taken in the Court below or in the memorandum of appeal ; *Held* that it was

(*b*) when the lease has been granted by any other person, at twenty thousand rupees a year ;

and the whole amount of such royalty or share, whatever it may be, shall be claimable under such lease :

Provided also that, where proceedings have been taken in respect of an instrument under section 31 or 41, the amount certified by the Collector shall be deemed to be the stamp actually used at the date of execution.

Facts affecting duty to be set forth in instrument.

27. The consideration (if any) and all other facts and circumstances affecting the chargeability of any instrument with duty, or the amount of the duty with which it is chargeable, shall be fully and truly set forth therein.

Direction as to duty in case of certain conveyances.

28. (1) Where any property has been contracted to be sold for one consideration for the whole, and is conveyed to the purchaser in separate parts by different instruments, the consideration shall be apportioned in such manner as the parties think fit, provided that a distinct consideration for each separate part is set forth in the conveyance relating thereto, and such conveyance shall be chargeable with *ad valorem* duty in respect of such distinct consideration.

(2) Where property contracted to be purchased for one consideration for the whole, by two or more persons jointly, or by any person for himself and others, or wholly for others, is conveyed in parts by separate instruments to the persons by or for whom the same was purchased, for distinct parts of the consideration the conveyance of each separate part shall be chargeable with *ad valorem* duty in respect of the distinct part of the consideration therein specified.

(3) Where a person, having contracted for the purchase of any property but not having obtained a conveyance thereof, contracts to sell the same to any other person and the property is in consequence conveyed immediately to the sub-purchaser, the conveyance shall be chargeable with *ad valorem* duty in respect of the consideration for the sale by the original purchaser to the sub-purchaser.

(4) Where a person, having contracted for the purchase of any property but not having obtained a conveyance thereof, contracts to sell the whole, or any part thereof, to any other person or persons and the property is in consequence conveyed by the original seller to different persons in parts, the conveyance of each part sold to a sub-purchaser shall be chargeable with *ad valorem* duty in respect only of the consideration paid by such sub-purchaser, without regard to the amount or value of the original consideration ; and the conveyance of the residue (if any) of such property to the original purchaser shall be chargeable with *ad valorem* duty in respect only of the excess of the original consideration over the aggregate of the considerations paid by the sub-purchasers :

Provided that the duty on such last-mentioned conveyance shall in no case be less than one rupee.

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not an objection, even though tenable, on which the decree should be set aside. 1930 C. 526. S. 26 only applies to a case where the amount or value of the subject-matter of any instrument chargeable with *ad valorem* duty cannot be ascertained at the date of its execution. It does not apply to the case of an assignment by way of gift in which an estimated value is given of the interest assigned. The parties to an assignment of a debt are under no compulsion to value it at the entire amount due. There is nothing in the Act to limit the right of the parties to value a chose in action at any amount they may think fit or to penalise them for doing so. The fact that a certain value is given in the assignment deed does not preclude the assignee from recovering or claiming more than that amount from the debtor. 18 Pat. 141=1938 P.W.N. 885=19 Pat. L.T. 875=1939 Pat. 49.

Secs. 27 and 24.—Sale of property subject to prior mortgage—Implied undertaking by vendee to discharge mortgage—Omission to mention mortgage as part of the consideration is fraud on stamp law and is an offence under S. 64. *See* 19 N.L.J. 259=1937 N. 57.

Sec. 28 (3).—Scope of section—Sale by Official Assignee in insolvency—Purchaser at—Sale by latter to another—Right to demand conveyance direct in favour of sub-purchaser, 37 Bom.L.R. 440=1935 B. 340.

(5) Where a sub-purchaser takes an actual conveyance of the interest of the person immediately selling to him, which is chargeable with *ad valorem* duty in respect of the consideration paid by him and is duly stamped accordingly, any conveyance to be afterwards made to him of the same property by the original seller shall be chargeable with a duty equal to that which would be chargeable on a conveyance for the consideration obtained by such original seller, or, where such duty would exceed five rupees, with a duty of five rupees.

E.—Duty by whom payable.

Duties by whom payable.

29. In the absence of an agreement to the contrary, the expense of providing the proper stamp shall be borne,—

(*a*) in the case of any instrument described in any of the following articles of Schedule I, namely :—

No. 2 (Administration Bond),
[1][No. 6 (Agreement relating to Deposi of Title-deeds, Pawn or Pledge)],
No. 13 (Bill of Exchange),
No. 15 (Bond),
No. 16 (Bottomry Bond),
No. 26 (Customs Bond),
No. 27 (Debenture),
No. 32 (Further Charge),
No. 34 (Indemnity Bond),
No. 40 (Mortgage Deed),
No. 49 (Promissory Note),
No. 55 (Release),
No. 56 (Respondentia Bond),
No. 57 (Security Bond or Mortgage-Deed),
No. 58 (Settlement),
No. 62 (*a*) (Transfer of shares in an incorporated company or other body corporate),
No. 62 (*b*) (Transfer of debentures, being marketable securities, whether the debenture is liable to duty or not, except debentures provided for by section 8),
No. 62 (*c*) (Transfer of any interest secured by a bond, mortgage-deed or policy of insurance),—

by the person drawing, making or executing such instrument ;

[2][(*b*) in the case of a policy of insurance other than fire-insurance—by the person effecting the insurance ;

(*bb*) in the case of a policy of fire-insurance—by the person issuing the policy ;]

(*c*) in the case of a conveyance (including a re-conveyance of mortgaged

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LEG. REF.

[1] These words in square brackets were substituted for the words and figure "No. 6 (Agreement to mortgage)" by S. 5 of the Indian Stamp (Amendment) Act (XV of 1904).

[2] These clauses were substituted for cl. (*b*) by S. 4 of the Indian Stamp (Amendment) Act, (V of 1906).

NOTES.

Sec. 29.—Where in the case of a sale deed the money for the purchase of the stamp is supplied by and accounted for to the vendee, there is no agreement to the contrary within the meaning of the preamble of S. 29 although the actual purchase of the stamp is made by the vendor. 18 Lah.L.T. 45. S. 29 prescribes that in the absence of an agreement, to the contrary, the expense of providing the proper stamp shall be borne in the case of a bond by the person drawing, making or executing it. Ordinarily therefore it would be reasonable that the person who has failed to discharge the duty required of him under S. 29 of the Act should bear the expense and penalty if the bond remains unstamped, no matter which party produces it. This view is supported by the fact that under S. 44 when duty or penalty is paid by a person in respect of an instrument which under S. 29 is required to be borne by some other person the former is entitled to recover from the latter the amount of the duty on penalty so paid. 1939 N.L.J. 364.

Sec. 29 (c).—On a deed of assignment which is in substance a deed entitling the landlord to whom the property is conveyed to col

property) by the grantee ; in the case of a lease or agreement to lease—by the lessee or intended lessee ;

(*d*) in the case of a counterpart of a lease—by the lessor ;

(*e*) in the case of an instrument of exchange—by the parties in equal shares ;

(*f*) in the case of a certificate of sale—by the purchaser of the property to which such certificate relates ; and

(*g*) in the case of an instrument of partition—by the parties thereto in proportion to their respective shares in the whole property partitioned, or, when the partition is made in execution of an order passed by a Revenue-authority or Civil Court or arbitrator, in such proportion as such authority, Court or arbitrator directs.

Obligation to give receipt in certain cases.

30. Any person receiving any money exceeding twenty rupees in amount, or any bill of exchange, cheque or promissory note for an amount exceeding twenty rupees, or receiving in satisfaction or part satisfaction of a debt any movable property exceeding twenty rupees in value, shall, on demand by the person paying or delivering such money, bill, cheque, note or property, give a duly stamped receipt for the same.

[1][Any person receiving or taking credit for any premium or consideration for any renewal of any contract of fire-insurance, shall, within one month after receiving or taking credit for such premium or consideration, give a duly stamped receipt for the same.]

CHAPTER III.

ADJUDICATION AS TO STAMPS.

Adjudication as to proper stamp.

31. (1) When any instrument, whether executed or not and whether previously stamped or not, is brought to the Collector, and the person bringing it applies to have the opinion of that officer as to the duty (if any) with which it is chargeable, and pays a fee of such amount (not exceeding five rupees and not less than eight annas) as the Collector may in each case direct, the Collector shall determine the duty (if any) with which, in his judgment, the instrument is chargeable.

(2) For this purpose the Collector may require to be furnished with an abstract of the instrument, and also with such affidavit or other evidence as he may deem necessary to prove that all the facts and circumstances affecting the chargeability of the instrument with duty, or the amount of the duty with which it is chargeable, are fully and truly set forth therein, and may refuse to proceed upon any such application until such abstract and evidence have been furnished accordingly :

LEG. REF.

[1] This paragraph was added by S. 5 of the Indian Stamp (Amendment) Act (V of 1906).

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lect the back rents as the agent of the outgoing landlord, the new landlord should not be called upon as agent to pay the duty. 1929 P. 395.

Sec. 29 (f).—It is the duty of the auction-purchaser to bear the expenses of the proper stamp for a certificate of sale which the Court has to issue to him. 32 Bom.L.R. 1084=1930 B. 392 (F.B.).

Sec. 29 (g).—Duty of arbitrator to direct parties to provide him with necessary stamps and not to deliver or publish his award on plain paper. 107 I.C. 668=1928 N. 166.

Secs. 29 and 44.—S. 29 will only be applicable to a case where the document is not produced before the Court; but when once the document has been produced before the Court and tendered in evidence, the right of recovery of the duty or penalty is only by virtue of S. 44, but in order to entitle the plaintiff to recover under that section, the amount must have been included in the costs at the time of the passing of the decree; or else he has no right to institute any proceeding in regard thereto. 46 L.W. 470 =1937 Mad. 763.

Sec. 30.—S. 30 has no application where immovable property exceeding Rs. 20 in value is made over by a debtor to a creditor in satisfaction of a pre-existing liability. 140 I.C. 397=1932 N. 172=1927 N. 202.

Sec. 31.—Original document not produced—Opinion of Collector as to stamp duty on seeing a copy of document, value of—Not final. *See* 20 Lah.L.T. 126.

Secs. 31 and 56 (2).—Order of Collector in revision. *See* 20 Lah.L.T. 126.

Provided that,—

(*a*) no evidence furnished in pursuance of this section shall be used against any person in any civil proceeding, except in an enquiry as to the duty with which the instrument to which it relates is chargeable ; and

(*b*) every person by whom any such evidence is furnished shall, on payment of the full duty with which the instrument to which it relates is chargeable, be relieved from any penalty which he may have incurred under this Act by reason of the omission to state truly in such instrument any of the facts or circumstances aforesaid.

Certificate by Collector.

32. (1) When an instrument brought to the Collector under section 31, is, in his opinion, one of a description chargeable with duty, and—

(*a*) the Collector determines that it is already fully stamped, or

(*b*) the duty determined by the Collector under section 31, or such a sum as, with duty already paid in respect of the instrument, is equal to the duty so determined, has been paid,

the Collector shall certify by endorsement on such instrument that the full duty (stating the amount) with which it is chargeable has been paid.

(2) When such instrument is, in his opinion, not chargeable with duty, the Collector shall certify in manner aforesaid that such instrument is not so chargeable.

(3) Any instrument upon which an endorsement has been made under this section, shall be deemed to be duly stamped or not chargeable with duty, as the case may be; and, if chargeable with duty, shall be receivable in evidence or otherwise, and may be acted upon and registered as if it had been originally duly stamped :

Provided that nothing in this section shall authorize the Collector to endorse—

(*a*) any instrument executed or first executed in British India and brought to him after the expiration of one month from the date of its execution or first execution, as the case may be ;

(*b*) any instrument executed or first executed out of British India and brought to him after the expiration of three months after it has been first received in British India ; or

(*c*) any instrument chargeable with the duty of one anna [1][or half an anna] or any bill of exchange or promissory note, when brought to him, after the drawing or execution thereof, on paper not duly stamped.

LEG. REF.

[1] These words were inserted by S. 3 of the Indian Stamp (Amendment) Act (V of 1906).

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Sec. 32.—*See* 7 N.L.R. 26=10 I.C. 702 ; 21 C.W.N. 246=35 I.C. 415=27 C.L.J. 525. [For modification of provisions, *see* Indian (Specified Instruments) Stamp Act (XIII of 1924)] Certificate of Collector—When open to attack. *See* 94 I.C. 747=1926 S. 211. Though the Collector might erroneously decide that no stamp duty was necessary in regard to an assignment of a promissory note, his decision would be final if he had granted a certificate on the document in question. It would not then be open to a Civil Court to question an endorsement on the document even though the Collector ought not to have granted the certificate, because it was out of time. A letter, however, from the Collector expressing his opinion that no stamp duty was necessary is not a certificate which is contemplated by S. 32 (2) and hence the same is not binding or conclusive on the Civil Court. 1942 M.W.N. 192=55 L.W. 156 =(1942) 1 M.L.J. 325.

CERTIFICATE OF COLLECTOR—FINALITY OF.—Where the Collector, under S. 32 treats a document as being of a particular character, and levies duty on it as such, his decision is final and cannot be challenged in a Court of law, except under S. 57 of the Act on reference by the Chief Controlling Revenue Authority. 28 S.L.R. 266.

Proviso (c) to S. 32.—Expressly forbids the Collector to validate an unstamped or insufficiently stamped promissory note, and an order by the Collector validating such an instrument is illegal. 20 N.L.J. 246.

CHAPTER IV.

INSTRUMENTS NOT DULY STAMPED.

Examination and impounding of instruments.

33. (1) Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument, chargeable in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same.

(2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in British India when such instrument was executed or first executed :

Provided that—

(*a*) nothing herein contained shall be deemed to require any Magistrate or Judge of a Criminal Court to examine or impound, if he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 ;

(*b*) in the case of a Judge of a High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the Court appoints in this behalf.

(3) For the purposes of this section, in cases of doubt,—

(*a*) the [1][collecting Government] may determine what offices shall be deemed to be public offices ; and

(*b*) the [2][collecting Government] may determine who shall be deemed to be persons in charge of public offices.

LEG. REF.

[1] Substituted for ' Governor-General in Council' by Government of India (Adaptation of Indian Laws) Order, 1937.

[2] Substituted for 'Local Government' by *ibid*.

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Scc. 33.—It is not sufficient for the purposes of S. 33 that the document should somehow be produced or come before a public officer. It is essential that it should be produced or come before him "in the performance of his functions" and a mere production in compliance with an illegal demand will not confer authority on him to take action under S. 33. 13 L. 745=1932 L. 495 (F.B.). The word "produced" as used in S. 33 means produced in the ordinary course of law and not produced under compulsion. Further a document is produced by a party only when it is sought to be proved and a witness is examined in respect thereof and not earlier. It is highly improper for a Court to compel a party to produce an original document with a view to impound the document, because the Court has been informed that it is not sufficiently stamped. 44 P.L.R. 188. A document tendered in evidence merely for a collateral purpose can be impounded. S. 33 does not define any particular intention with which a document must be tendered in order that the section may become operative. All that is required is that the document should come before the Court in discharge of its functions. 20 Lah.L.T. 5. Where a copy of an entry not properly stamped was attached to a plaint and the suit was compromised at the first hearing and there was nothing to show that the original entry was ever produced or came before the Court, S. 33 of the Stamp Act had no application. 36 P.L.R. 1 =1934 L. 637 (F.B.); 163 I.C. 560=1936 L. 985 (Transliterations of documents filed with the plaint to be used in case of necessity—Necessity not arising—Court has no power to impound them).

Sccs. 33 and 35.—Promissory note insufficiently stamped—Admissibility—If can be used as acknowledgment of debt. *See* 40 C.W.N. 399.

Secs. 33-38.—Where a Court finds a deficiency of stamp in a document, the procedure laid down in Ss. 33-38 should be followed. The document must first be impounded under S. 33 and, on payment of penalty, it can be admitted in evidence. The final decision whether it is insufficiently stamped rests with the Collector alone. 95 I.C. 960; 1926 A. 478. A sale certificate granted to a purchaser by the Court had only a four anna stamp, though it should have borne a stamp of eight annas. A copy of the certificate was sent to the Sub-Registrar who informed the Judge that it was insufficiently stamped. The Judge got the certificate back from the purchaser and thinking that he had power to accept the document and to impose a penalty asked for the opinion of the High Court: *Held*, that until the Judge signed the sale certificate, there was no instrument and so the sale certificate could not be said to come before the Judge in the performance of his functions when it was submitted to him for his signature and seal on the first occasion; that when the Judge

34. Where any receipt chargeable with a duty of one anna is tendered to or produced before any officer unstamped in the courts of the audit of any public account, such officer may in his discretion, instead of impounding the instrument, require a duly stamped receipt to be substituted therefor.

Special provision as to unstamped receipts.

35. No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped :

Instruments not duly stamped inadmissible in evidence, etc.

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signed the certificate on the first occasion, he was *functus officio* and therefore he was not acting judicially in allowing a second four anna stamp to be attached; that as the Judge when the certificate was presented to him for the second time was *functus officio* he could not impound it under S. 33 (1), nor had he any legal authority in the exercise of his own inherent powers to recover the requisite stamp of additional value. 32 Bom.L.R. 1084=1930 B. 392 (F.B.); 29 I.C. 671=16 Cr.L.J. 543.

Secs. 33 and 40.—The Collector cannot impound a document again under the provisions of S. 33 (1) or proceed to assess further deficiency and penalty under the provisions of S. 40 of the Stamp Act, where the Court has granted a certificate under S. 42 (1) of the Act having admitted the document into evidence under the provisions of proviso (*a*) of S. 35. I. L.R. (1940) Lah. 628=1941 Lah. 65.

Secs. 33 and 61.—When an instrument has been admitted in evidence and judgment delivered, the Court becomes *functus officio* and it is not therefore open to the Court to reopen the matter and impound the document. Its admission may be called in question in a proceeding under S. 61, Stamp Act. 46 L. W. 470=1937 M.W.N. 693=1937 Mad. 763.

Sec. 35: SCOPE OF.—An instrument is a document only when it affects any right or liability. 1936 N. 225. An instrument containing record of a fact *per se* not affecting any right or liability can be used as evidence without stamp duty. 1936 N. 225. An improperly stamped promissory note cannot be admitted in evidence to prove an acknowledgment of liability in order to save limitation in respect of promissory notes previously executed and recited in the insufficiently stamped instrument. The wording of S. 35 is very precise, and if the words of the section are to be given their ordinary and plain meaning, the promissory note cannot be admitted under any circumstances or for any purpose in a civil suit. I.L.R. (1938) Mad. 210=46 L. W. 692=1938 Mad. 75=(1937) 2 M.L.J. 805. *See also* 1938 Nag. 464; 1938 N.L.J. 145=1938 Nag. 294. S. 35 does not merely say that an instrument which is not duly stamped shall not be admitted in evidence, but it also says that the instrument shall not be acted upon for any purpose, and the passing of a decree upon such an instrument is "acting" upon it. Consequently when a suit is brought upon an instrument which is not duly stamped, the admission of the contents of the instrument made by the defendant does not avail the plaintiff and a decree cannot be based on such an instrument. 1935 R. 282. After the suit has been disposed of and the decree signed and sealed, the provisions of S. 35 are wholly inapplicable. 54 C. 445=1927 C. 472. Whether a wrong application of the section is a ground for interference under S. 73 of the Madras Village Courts Act (1889). 1927 M.W.N. 420; 1934 L. 606 and notes under S. 26. 91 I. C. 772=1925 L. 552. Want of necessary stamp affects only admissibility but not validity. 53 C. 515=95 I. C. 483=1926 C. 877. Under the Act, only the original unstamped instrument can be validated by the payment of the deficit stamp duty and penalty and then received in evidence. The section does not apply where the original is lost. 56 I. C. 249=16 N. L. R. 68; 1922 L. 354; 91 I.C. 772=1925 L. 552; 33 P.R. 1913=16 I.C. 950; 4 R. 363. *See also* 1938 Pesh. 32. Failure to stamp a document which has got to be stamped under the provisions of the Stamp Act does not affect the validity of the transaction embodied in the document. 46 C.W.N. 477. Unstamped acknowledgment is inadmissible in evidence. 1933 A. 577. Acknowledgment executed and stamped in Native State—Same produced in British India but not stamped within three months —Documents rendered inadmissible in evidence. *See* 115 I. C. 453. Unconditional acknowledgment unstamped—Admissibility on payment of penalty: *see* 119 I. C. 419. Before holding a surety bond under S. 35 inadmissible in evidence on the sole ground of it being not properly stamped, the Court ought to give an opportunity to the party producing it for payment of stamp duty and penalty under S. 35. 1930 L. 854. *See also* 29 N.L.R. 131=1933 N. 57. Where the maker of an instrument, instead of merely saying that he promises to pay to the promisee a certain sum of money to order or to bearer, also adds that the amount for which it was given was due in settlement of a previous account, the instrument, even though inadmissible as a promissory note for want of stamp, yet is admissible to prove an acknowledgment under Limitation Act, S. 19, for what is shut out by, S. 35, is the instrument and not collateral matters connected with the instrument, which may be mentioned in the same paper or in the same writing. 32 L.W. 691=1930 M. 485; 141 I.C. 169=1933 M. 251. *See also* 40 C. W.N. 399; 1936 N. 225; 16 N. L. J. 241=1933 N. 391. Where an insufficiently stamped promissory note contains an admission of a liability, its admission is not precluded by S. 35, if it is

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merely intended to prove that the debtor made an admission of liability to pay on that date. S. 35 would come into play only if it were used as containing within itself any matter which would extend the creditor's right to recover the money. But if the creditor derives his right not from the document itself but from the Limitation Act in consequence of the admission of liability simpliciter contained in the document then S. 35 has no application. Such a document can be used for the purpose of extending limitation under S. 19 of the Limitation Act. A document relevant for this purpose need not be an instrument under S. 2 (14) of the Stamp Act. 1938 N.L.J. 145=1938 Nag. 294. But *see* 1938 M. 75=(1938) 2 M. L. J. 805. A declaration of trust is not defined by the Stamp Act I of 1879. The term implies a declaration by the executant that he holds a certain property in trust. 2 Pat.L.R. 18 (Cr.).

"ADMITTED IN EVIDENCE," meaning of. 50 I. C. 871. Merely handing a document to a witness for purpose of refreshing his memory does not make the document a piece of evidence in the case. 14 P. 233. Where a document as a whole is insufficiently stamped, it should not be admitted in evidence for any purpose. The words "*for any purpose*" in S. 35 imply "for each and every purpose whatsoever, without any exception." It matters little whether the purpose is the main purpose or is a collateral one. Where the executant of a document bearing one anna stamp states in the earlier portion that a certain amount was found due from him, and in the later portion, promises to pay that amount, the document is intended to be a promissory note and the stamp is affixed to it as such and not as a mere acknowledgment of liability. It is not possible to split it up into two portions, treating the introductory portion as a separate and independent acknowledgment for which one anna stamp is affixed, and treating the rest of it as a promissory note wholly unstamped, so as to make the acknowledgment admissible in evidence. 166 I.C. 919=1936 A. L.J. 1391=1937 A. 101; 1937 Rang.L.R. 127=1937 Rag. 408 (Distinction between collateral purpose and collateral matter pointed out).

WHAT ARE DULY STAMPED DOCUMENTS.—Documents which have been stamped in accordance with the practice which has been recognized by the High Court for a long time, though not strictly legal, will be held to be duly stamped. 40 C. 219=17 C.W.N. 395.

WHAT ARE NOT DULY STAMPED DOCUMENTS.—A demand promissory note stamped with four postal stamps of a quarter anna each, is not duly stamped. 42 I.C. 947=19 Bom.L.R. 862.

PROCEDURE.—Though party withdraws plea against admissibility, Court must deal with the question. 7 Lah.L.J. 343=1925 L. 552. Where the execution of a document which is not duly stamped is admitted by one of the defendants, the document cannot be rejected as against him. 40 P.L.R. 231=1938 Lah. 511. *See also* 1937 Pat. 560. Where a plaintiff sues to set aside an award on the ground of misconduct of the arbitrators, the plaintiff cannot be called upon if it is found that the award is not duly stamped, to make up the deficiency in the stamp and to pay the penalty under S. 35. 39 I.C. 382=11 Bur.L.T. 17. When a Civil Court admits a document in evidence under S. 35, on payment of deficiency in stamp duty and penalty, it must first exact the full amount of the penalty. 13 L.L.T. 32. When the Court overrules the contention of a party that a document does not require any stamp duty, it should afford him an opportunity to pay the stamp duty and penalty before refusing to admit it in evidence. There is no authority for the proposition that the requisite stamp duty and penalty should be tendered at the time of the production of the document. 35 P.L.R. 687=1934 L. 730.

WHO CAN ADMIT DOCUMENTS.—A clerk of the Court cannot admit a document in evidence; that is a duty reserved for the Court. 1922 L. 354.

OBJECTION TO ADMISSIBILITY WHEN TO BE RAISED.—Hundi—Admissibility— Objection to, when to be raised—Document exhibited. 169 P.L.R. 1912=16 I.C. 834; 91 I.C. 494=1925 M. 1215; 154 I.C. 517=1935 A.L.J. 651=1935 A. 410.

THE FOLLOWING DOCUMENTS ARE ADMISSIBLE.—A *shahjog hundi* attested by a witness being a bond. 22 C.L.J. 209=19 C.W.N. 1326. A foreign promissory note which is not stamped as such is not excluded by S. 35 from being admitted in evidence in a suit filed by the promisee against the maker of the note for recovery of the amount due on the instrument. 28 S.L. R. 266. A promissory note executed outside British India is admissible in evidence though unstamped, but is liable to duty before admission. 32 I.C. 582=9 S.L.R. 150. Where a promissory note is inadmissible in evidence as being insufficiently stamped, a decree cannot be passed on the note, even if the defendant admits liability thereunder. 1934 L. 606; 1935 R. 282. A contract containing the submission to arbitration is not invalid in default of eight annas stamp under S. 35. 35 I.C. 449. Where an instrument included a promissory note and in its latter portion an acknowledgment of a prior liability, though as a promissory note insufficiently stamped it may be inadmissible, the latter portion which contains the acknowledgment is admissible to save limitation. 141 I.C. 169 (1)=1933 M. 251 (2). *See also* (1938) 2 M.L.J. 189 (F.B.). Where after the execution of a promissory note certain additional words are written on the same paper with the consent of the parties and such words amount to a written agreement varying its terms, the agreement may be proved, if it is not itself a promissory note, upon payment of the deficit stamp and the penalty imposed, and the agreement is binding upon the parties thereto. If the additional words are merely a memorandum for purposes of record of the terms of an oral agreement which varied the terms of the promissory note they are of no effect, for the oral agreement cannot be proved. In any event, the validity and admissibility of the promissory note is not affected. On the other hand, if the effect of the additional words or any of them is to alter the instrument itself in a material respect the

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result is that the original promissory note will be cancelled, and unless the promissory note as altered has duly been stamped it is inadmissible as such for any purpose, and cannot subsequently be stamped even upon payment of a penalty. It is in each case a question of fact whether the instrument itself has been altered, and a question of law whether the alteration is a material one. Where after the execution of a promissory note it was orally agreed that the maker should be granted 12 months time in which to pay the amount and a memorandum is made to that effect on the note, the instrument itself is not thereby altered in any way, nor is it intended to be a written agreement. 14 Rang. 29. When a Court of Wards, which has power to give acknowledgment of an existing debt, authorises a promissory note to be executed, the note could in any event be used as an acknowledgment of a pre-existing debt. 34 I.C. 205=43 C. 211.

WHAT ARE NOT ADMISSIBLE.—Document not sufficiently stamped is not admissible in evidence for any purpose whatever. 52 P.L.R. 1922=1923 L. 29; 5 O.W.N. 750; 1933 N. 391. Unstamped bond—Secondary evidence of, not admissible. 3 L. 282=1922 L. 401; 1922 L. 354. Where a *hundi* being insufficiently stamped becomes inadmissible in evidence, no secondary evidence of the transaction can be given. 66 I.C. 201=2 L. 330. A copy of an unstamped original cannot be admitted in evidence on payment of the penalties which can be recovered in respect of the original. 33 P.R. 1913 =16 I.C. 950; 56 I.C. 249; 1922 L. 354; 91 I.C. 772=1925 L. 552; 4 R. 363. Where a document which must be stamped bears adhesive stamp, but the stamp is not cancelled, the document is not admissible under S. 35. 60 I. C. 652=2 Pat.L.T. 184; 1929 R. 270; 1933 L. 148; 16 I.C. 834=169 P.L.R. 1912. An unstamped acknowledgment is inadmissible in evidence even to save limitation. 50 I.C. 78. (18 B. 64, Diss.; 21 B. 201, Foll.)

ADMISSIBILITY FOR COLLATERAL PURPOSE.—Although a document is inadmissible for the purpose of proving a claim, it may be admissible for a collateral purpose, that is, a purpose foreign and not subordinate to that for which the document was executed. A promissory note which is not properly stamped is not only inadmissible for the purpose of proving the debt covered by it, but cannot also be used to support the statement of the plaintiff's witnesses who come to prove the debt. 14 P. 233. A promissory note which is insufficiently stamped cannot be used even for the purpose of proving an acknowledgment by the maker of it of his indebtedness. A promissory note which contains a promise to pay at a future date instead of on demand clearly falls under S. 35. 1937 M. 364 =(1937) 1 M.L.J. 163. *See also* (1938) 2 M.L. J. 189 (F.B.); 1939 Mad. 34=(1938) 2 M.L. J. 846. The fact that a promissory note is unstamped does not make the document invalid. The effect of S. 35 is to make such an unstamped document inadmissible in evidence, and unable to be acted upon by persons having authority to receive evidence or by any public officer. It does not affect the validity of the document. I.L.R. (1937) 1 Cal. 257=1937 Cal. 765.

PRO-NOTE DULY EXECUTED — SUBSEQUENT REMOVAL OF STAMP—PROCEDURE.—It is necessary to interpret the word "is" in S. 35 so as to include "has been". Consequently where a promissory note is duly stamped at the time of the execution, the document is admissible in evidence, if, at the time it is tendered in evidence, it is no longer "duly stamped" by reason of the loss, or removal of the stamp. 1934 A.L.J. 1202=1934 A. 388. Promissory note—Subsequent addition of words with consent of parties —Effect of—Admissibility—Stamp, if necessary. 14 R. 29.

DOCUMENT INSUFFICIENTLY STAMPED ATTACHED TO PLAINT—DECREE ON TERMS OF COMPROMISE.—Where a copy of an entry not properly stamped was attached to a plaint and the suit was compromised at the first hearing and a decree was passed in terms of the compromise without the copy or the original entry having been put in evidence, the document could not be held to have been acted upon and the provisions of S. 35 have no application. 36 P.L.R. 1=1934 L. 637 (F.B.).

DOCUMENTS ADMITTED, EFFECT OF.—Where a document alleged to be a promissory note has been admitted in evidence by the trial Court on payment of a penalty, the admission cannot be questioned in the Court of appeal however erroneous that admission might have been. 1924 Lah. 143. Under S. 35, an instrument not duly stamped cannot be admitted in any evidence for any purpose whatever, but, when once it is admitted by a Court, though wrongly, the appellate Court is debarred under S. 36 from interfering in the matter. 141 I.C. 569=1933 Lah. 240. *See also* notes under Sec. 36, *infra*.

REJECTION OF DOCUMENTS—WHETHER SUIT LIES.—Where certain *hundis* sued on were rejected as being insufficiently stamped, *held*, that the plaintiffs were entitled to sue for the consideration. 45 Cal. 538=41 I.C. 503=21 C.W.N. 1043. Arbitration—Award—Submission not stamped—Effect of—Suit to set aside award—Objection. 27 C.W.N. 513. *See also* 1939 A.M.L.J. 125. Where a promissory note is inadmissible in evidence, under the law a claim based on the original consideration may be enforced provided it has not merged in the note. The loan itself implies a promise to repay. 19 I.C. 840=17 C.L.J. 399. Where a promissory note executed in settlement of accounts between the parties is invalid for want of stamp, the plaintiff could get a decree on the previous settlements of accounts and the oral agreement to pay. 23 I.C. 85=15 M.L.T. 243. Where a promissory note is inadmissible in evidence for want of stamp, it is not permissible to grant a decree on the original consideration when there was no independent obligation to pay apart from the note. 38 Mad. 660=26 M.L.J. 10. If a loan and the pro-note are contemporaneous and form part of one transaction, no suit based on the original consideration is maintainable if the pro-note is inadmissible for insufficient stamp. 10 I.C. 669=9 M.L.T. 281. Even where the alleged loan and the promissory note are contem-

Provided that—

(*a*) any such instrument not being an instrument chargeable with a duty of one anna [1][or half an anna] only, or a bill of exchange or promissory note, shall, subject to all just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion ;

(*b*) where any person from whom a stamped receipt could have been demanded, has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, then such receipt shall be admitted in evidence against him on payment of a penalty of one rupee by the person tendering it ;

LEG. REF.

[1] These words were inserted by S. 3 of he Indian Stamp (Amendment) Act (V of 1906).

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poraneous and the promissory note is inadmissible in evidence for want of proper stamp under S. 35, the plaintiff can prove the loan transaction only apart from the defective instrument, there being no intention to deliver the money gratuitously or in satisfaction of any obligation. 1933 Nag. 57 (2). Document unstamped—Inadmissible in evidence—Decree on original consideration maintainable. 65 I.C. 37.

PENALTY—PROCEDURE BY COURT.—Where a document is held to be an insufficiently stamped agreement, the trial Court should record at the earlier stages a finding on that issue and give an opportunity to the party to pay the penalty. Where such opportunity was denied, *held*, that the penalty could be allowed to be paid in second appeal. 13 Lah. 516=1932 Lah. 616.

FOREIGN LAW.—If the law of a foreign country, where a document was executed, simply provides that it shall not be admissible in evidence if not properly stamped, it can be sued upon in a British Court. But if the foreign law provides that the agreement embodied in the document is void for want of proper stamp, then it cannot be sued upon in a British Court. 20 Bom. L.R. 464=46 I.C. 174=42 Bom. 522.

Sec. 35, Proviso (a).—When the previous loans were not time-barred, a *sarkhat* was executed by the debtor for the money lent before; but it was stated that money lent had been paid in cash, and the debtor agreed to pay interest. It was not stamped. *Held*, that though it might have been an acknowledgment, it was the intention of the parties that the *sarkhat* should be a fresh transaction; that the document could be treated as an agreement which was admissible in evidence on payment of the stamp duty and penalty. 54 A. 761=142 I.C. 688=1933 A. 179. *See also* 16 N.L.J. 241 =1933 Nag. 391. S. 35. Proviso (*a*) is mandatory and a document (*e.g.*, a bond) which is not one of the documents excepted in that proviso must be admitted in evidence on payment of duty and penalty. The omission to get a document which is executed out of British India, stamped with a foreign stamp, and stamped in British India is not any "just exception" contemplated by the proviso. The phrase is somewhat vague, and means "some valid objection to the document being stamped other than a mere objection under the Stamp Act, *e.g.*, some fraud or intention on the part of the holder of the document to evade the duty, or again the document itself might be a suspicious one, or a forged one in the opinion of the Court." 1935 Nag. 54. *See also* 1939 A.L.J. 458=1939 All. 515; 1940 N.L.J. 217=1940 Nag. 214. If a document could not be admitted under proviso (*a*) to S. 35, then it would be totally inadmissible in evidence. Where a document is inadmissible in evidence, a plaintiff can sue upon the original claim if in time, but the document cannot be admitted in evidence in support of the claim. 1935 Nag. 54.

Sec. 35, Proviso (b).—Where the document in question was not an "acknowledgment of a debt" within the meaning of Art. 1 of Sch. I, but was an entry purporting to be a 'receipt' of a cash advance made by the plaintiff and an one anna stamp was affixed to the same but the defendant failed to cancel the same. *Held*, that the receipt would be considered to have been unstamped and could be admitted in evidence only on payment of a penalty of one rupee. I.R. 1932 Lah. 624. *See also* 54 All. 761=142 I. C. 688=1933 All. 179.

Secs. 35 and 36.—Arbitrator—Power to act under the section—Jurisdiction of Court—Documents substituting one arbitrator for another—Stamp not necessary. 28 C.W.N. 871 =1924 Cal. 794. There is no bar under any law preventing the Court from using a promissory note which is stamped with an one anna stamp instead of a two anna stamp as a piece of evidence supporting the plaintiff's case as to loan. Where such a document has been received in evidence in the trial Court without objection on the part of the defendant, the appellate Court will not interfere. 53 C.L.J. 254=1931 Cal. 480. *See also* (1938) 2 M.L.J. 189 (F.B.). The appellat Court cannot say that, though it has been marked as an exhibit in the case, it would not look into it or pass a decree on that basis. 1932 Mad. 765=63 M.L.J. 548. *See also* 1933 Lah. 240=34 P.L.R. 501. Where a document like a promissory note, which is insufficiently stamped and which cannot be admitted in evidence under S. 35 even

(*c*) where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped ;

(*d*) nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 ;

(*e*) nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of the [1][Crown], or where it bears the certificate of the Collector as provided by section 32 or any other provision of this Act.

Admission of instrument where not to be questioned.

36. Where an instrument has been admitted in evidence, such admission shall not, except as provided as section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.

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[1] Substituted for 'Government' by Government of India (Adaptation of Indian Laws) Order, 1937.

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on payment of duty and penalty, is admitted in evidence by the lower Court, it cannot be called in question in revision on the ground that it is not duly stamped. S. 61 gives the Court to which appeals lie a jurisdiction to deal with the case of instruments which should not have been admitted in evidence without the payment of duty and penalty under S. 35 or without the payment of a higher duty than those paid. It does not give such Court any jurisdiction to deal with the case of an instrument which should not have been admitted at all. 1935 A.L.J. 651=1935 All. 410. Partition decree not engrossed on non-judicial stamp of proper value—Acting upon —Execution ordered—Objection at subsequent executions, can be taken. 1938 Mad. 307.

Secs. 35 and 48: DOCUMENT ADMITTED IN EVIDENCE AND DECREE PASSED ON IT—POWER OF COURT TO REALISE DEFICIENCY IN STAMP.—The only provision of the Stamp Act by which a Civil Court is authorized to realise deficiency in stamp is S. 35, but that provision is obviously intended to apply before a document is admitted in evidence. Where, however, a document is admitted in evidence and a decree is passed on it through an oversight without the deficiency in stamp and the requisite penalty having been paid, the jurisdiction to realise the deficiency in stamp lies with the Collector under S. 48 and not with the Civil Court. 1936 O.W.N. 1245=1937 Oudh 176.

Sec. 35 and Sch. I, Art. 48: APPLICABILITY —LETTER EMPOWERING LETTING OF LAND.—If a letter written by a zamindar empowers his karinda to let the land to anybody, it would be a power of attorney and would be inadmissible in evidence if unstamped in view of S. 35 read with Art. 48, Sch. I of the Act. 1942 R.D. 365=1942 O.W.N. (B.R.) 276.

Sec. 36.—Section is mandatory and applies both to Court of Appeal as well as of revision, and whether the admissibility was challenged in the lower Court or not. *See* 98 I.C. 75=1926 M. 1148; 63 Cal. 1098=40 C.W.N. 1320 =1936 C. 556; 1928 P. 255; 1927 L. 876. *See also* 45 L.W. 515=1937 Mad. 431. The words of S. 36 are perfectly general and are not restricted in their application *to such documents only* as can be received in evidence on payment of the stamp duty and penalty. It applies also to instruments which form the very basis of the claim made, and since the section lays down that the admission of the instrument cannot be called in question, it necessarily implies that the instrument must also be acted upon. In a suit on an insufficiently stamped pro-note, the note was allowed to be filed in evidence, the Court being of opinion that it could be relied on as an acknowledgment of liability, and on the strength of it, a decree was passed. The decree having been set aside on appeal, *held*, in second appeal, that the pro-note once having been admitted in evidence, the original defect ceased to be a hindrance by reason of S. 36 and that the decree passed on the strength of it was perfectly valid. 1934 Mad. 700=67 M.L.J. 539. *See also* 1936 Rang. 498; 13 Rang. 322=1935 Rang. 160. When an instrument has once been admitted in evidence, it cannot be called in question at any stage of the same suit, in view of the provisions of S. 36. It matters nothing under S. 36 whether the instrument was wrongly admitted or rightly admitted, or admitted without objection or after hearing or without hearing such objection. From the time of admission of the document, it is not open to objection on the ground of not having been duly stamped. 16 P. 84=167 I.C. 152=3 B.R. 272 =17 P.L.T. 769=1937 P. 73; 51 C.L.J. 569=1930 C. 577 (1). S. 36 is not confined to instruments admitted in the course of evidence in support of subsidiary points in the case but applies also to documents forming the foundation for suit. Where the lower Court has definitely found that the suit note is a bond and has admitted it in evidence levying penalty on it, the question whether the suit note is a promissory note or bond does not necessarily arise for decision in appeal. Even assuming that the suit document is a promissory note, it having been admitted in evidence by the payment of a penalty, its

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admission cannot thereafter be called in question. 57 M. 779=1934 M. 383=66 M.L.J. 709. *See also* 1936 Rang. 498; 40 P.L.R. 231=1938 Lah. 511. Where a document has been admitted in evidence by the trial Court, it is not open in appeal, which is a mere continuation of the same proceeding, to question that admission. 1925 M. 1215=49 M.L.J. 306; 101 I. C. 198=1927 R. 109; 1931 A.L.J. 230=1931 A. 302; 1933 L. 240; 1924 L. 143; 53 C.L.J. 254=1931 C. 480; 63 M.L.J. 548=1932 M. 765; 1927 M. 786=53 M.L.J. 131; 53 C. 515 =30 C.W.N. 609=1926 C. 877; 13 Bom. 449; 12 C. 64; 19 C.L.J. 87; 1939 N.L.J. 341=1939 Nag. 220; 1937 M. 431; 71 C.L.J. 190; 1939 O.W.N. 102=1939 Oudh 85; 1936 Pesh. 200; 1931 A.L.J. 230=1931 A. 302; 1933 All. 821 (The trial Court also cannot review its own order). Where a trial Court admits only part of an insufficiently stamped promissory note, as an acknowledgment, the appellate Court would not be precluded from holding that part of the document is not admissible and that the whole of it should be excluded as being inadmissible. But if it had admitted the document in its entirety and relied only on a portion of it, the appellate Court would be precluded from questioning its admissibility even though it had been wrongly admitted by the trial Court. 1938 A.L.J. 907=1938 All. 619. Stamp matters are really no concern of the parties. If the objection was taken at the time when the record was made and rejected, it cannot be raised at any later stage. 51 C.L.J. 569= 1930 C. 577 (1). In a suit on a hundi, a clerk of the Court stamped the usual indorsement of production and admission on the hundi and the Judge's initials were affixed to the same by a rubber stamp. Subsequently the Judge on a consideration of the document held that it was not duly stamped and therefore inadmissible and rejected it. *Held*, that the Judge not having applied his mind to a consideration of its admissibility at the time of the endorsement made by the clerk and the affixing of his initials, it could not be said that the hundi was admitted in evidence within the meaning of S. 36, and therefore it was open to the Judge to reject the hundi as it was not properly stamped. 1929 M. 522=56 M.L.J. 633; 38 L.W. 582=65 M.L.J. 673 (meaning of the words "admitted in evidence"). *See also* 142 I.C. 535=1933 L. 271; I.L.R. (1940) Kar. 195=1940 Sind 194; 1938 O.W.N. 1085=178 I.C. 338. But where an instrument inadmissible in evidence for want of proper stamp was let in and after examining witnesses as to its execution, the Judge gave judgment acting upon it, it must be held to have been admitted in evidence within the meaning of S. 36, and admission cannot be questioned in appeal. 119 I.C. 485=1929 L. 770. If an instrument is let in whether after deciding the objection to its admissibility or not, it must be held to have been admitted in evidence within the meaning of S. 36 and its admissibility cannot thereafter be questioned. Where the Judge endorses on the back of the document that it is insufficiently stamped and that it is allowed to go in, and the same bears a rubber stamp with the initials of the Judge, it must be held to have been admitted in evidence. 48 L.W. 494=1938 Mad. 938=(1938) 2 M.L.J. 478. *See also* 1938 O.W.N. 1085. The provisions of S. 36 are mandatory and absolute and preclude the admission of a document once admitted in evidence from being called in question at any stage of the suit on the ground that the document was not duly stamped. There is nothing in the section to warrant the conclusion that the section has application only to cases in which the Court has admitted the document after 'consciously' applying its mind to the question of admissibility. When a Court admits a document in evidence it does or at least is deemed to act judicially and this judicial act of admitting the document in evidence can at no subsequent stage of the suit be set at naught on the ground that the document was not duly stamped. I.L.R. (1939) All. 846=1939 A.L.J. 552=1939 All. 588. Where the plaintiff sued on a promissory note and the defendant raised the plea that it was not admissible in evidence on the ground that it was not validly stamped, but no issue was framed on its admissibility and the Court of the first instance marked it as exhibit unconditionally, the appellate Court has no jurisdiction to agitate the question of its admissibility. 119 I.C. 472=1929 M. 622. A mortgage was executed on an ordinary impressed revenue stamp, but surcharged with the words: "Court-fee" stamped over it. The amount of the stamp was sufficient to satisfy the revenue requirements. Before the defendants filed a written statement calling attention to the stamp objection, the plaintiffs mortgagees had applied to the Court for return of the mortgage deed in order that they might apply to the Collector for rectification of the error. The document was forwarded to the Collector under S. 38 (2) who on payment of further duty and a penalty certified it to be duly stamped. It was then received in evidence. *Held*, that in accordance with S. 36, its admission could not be called in question at any stage of the suit on a stamp objection. 56 I. A. 379=7 Rang. 624=58 M.L.J. 56 (P.C.). Once a document is admitted in evidence, no further question can arise under the section as to its admissibility on the ground that it was not duly stamped. 11 A.L.J. 506= 19 I.C. 445. [Affirmed on appeal 39 I.C. 11= 38 All. 494 (P.C.).] *See also* 13 Bom. 449; 12 Cal. 64; 19 C.L.J. 87; 60 I.C. 652: 73 I.C. 65; 35 Bom.L.R. 450=1923 Bom. 412 (2), as to whether the admission had been with objection or without objection. 6 Pat. 765=106 I.C. 653. Judge admitting in evidence—Successor cannot reject the document. 93 I. C. 317=24 A.L.J. 389. S. 36 is applicable to documents executed before the Act and the admission of such a document in evidence cannot be subsequently objected to on the ground that it was insufficiently stamped. 59 I.C. 3=32 C.L.J. 73. *See also* 66 M. L. J. 703. Where the Court of first instance admits a letter of hypothecation in evidence, the High Court is precluded from taking exception to it as being insufficiently stamped. 23 C.W.N. 534= 29 C.L.J. 305. *See also* 18 C.W.N. 697=19 C.L.J. 87: 30 C.W.N 609; 1939 O.W.N. 102= 1939 Oudh 85. Similarly no objection can be raised in revision. 1927 Lah. 876=102 I.C.

37. The [1][collecting Government] may make rules providing that, where an instrument bears a stamp of sufficient amount but of improper description, it may, on payment of the duty with which the same is chargeable, be certified to be duly stamped, and any instrument so certified shall then be deemed to have been duly stamped as from the date of its execution.

Admission of improperly stamped instruments.

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[1] Substituted for 'Governor-General in Council' by A. O., 1937.

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884. *See also* 1939 A.M.L.J. 125. Admission must be express. Mere putting in the record is no admission. 7 Lah.L.J. 343=1925 Lah. 552. Where the original of a compromise petition creating a mortgage on the strength of which a decree of Court is made, is lost, and a certified copy of the petition is filed, the presumption arises that the original petition was properly stamped. 38 All. 494=43 I.A. 264 (P.C.) (Affirming 19 I.C. 445=11 A.L.J. 806). Document never produced in Court—Reception of secondary evidence. *See* 94 I.C. 75=27 Punj. L.R. 206=1926 Lah. 415. Promissory note insufficiently stamped—Same admitted by trial Court after levying penalty—Appellate Court holding against admissibility of document—Inference whether justified—Applicability of S. 36. *See* 114 I. C. 294=1929 Rang. 9. Document held admissible by single Judge in High Court not open to question in Letters Patent Appeal. 1923 Lah. 657. Where the trying Court treats an unstamped document as agreement and collects penalty and duty thereon erroneously, the appellate Court cannot correct the error by virtue of S. 36. 62 I. C. 607=40 M.L.J. 479. A pro-note with a stamp not duly cancelled was admitted in evidence in an *ex parte* trial, but the *ex parte* trial was set aside and the proceedings were commenced afresh. *Held*, that the admissibility of the pro-note in evidence could be attacked after the *ex parte* trial was set aside. 16 I.C. 96=23 M.L.J. 273. The word 'admission' in S. 36 includes the giving of decree. The term "acting upon" is wider than the word "admission". 33 I.C. 595=8 Bur.L.T. 290. *See also* 65 M.L.J. 673. Where a document is decided by the trial Court to be admissible in evidence, such admission cannot be questioned in appeal on the ground that the document has not complied with R. 7 of the rules made by the Government of India under S. 75, Stamp Act. 1932 Lah. 582. An appellate Court should not dismiss a suit on the ground that a document which the first Court has admitted in evidence was unstamped or insufficiently stamped; all it could do would be to impound the document and send it on to the Collector to levy duty and penalty. 93 I.C. 595=8 Bur.L.T. 290. In a suit on a promissory note, the defendant admitted execution in his written statement and pleaded discharge, but at the time of argument he discovered a legal objection to the maintainability of the suit on the ground that the stamp affixed to the note had not been cancelled as required by S. 12 and raised the objection that the note was inadmissible in evidence. *Held*, that having regard to S. 36, the admissibility of the document could not be reopened on account of the document not having been duly stamped. 1932 Mad. 693=63 M.L.J. 303. *See also* 57 Mad. 783=66 M.L.J. 703.

"ADMITTED IN EVIDENCE"—MEANING OF.—"Admitted in evidence" means the act of letting the document in as part of the evidence; but it must be let in as a result of the judicial determination of the question whether it can be admitted in evidence or not for want of stamp. (6 I.C. 903, Foll.) An unstamped hundi exhibited before a Commissioner appointed by the Court was given only an identifying mark and no more. The Commissioner had not considered, when exhibited, as to its admissibility in evidence, much less was there any objection raised as to its admissibility. An issue as to its admissibility was pending before the Court. *Held*, that it could not be inferred in law that there was an admission of the hundi in evidence by the Commissioner within the meaning of S. 36, Stamp Act. 42 L. W. 574=1935 Mad. 888. The words of S. 36 do not contemplate admission in evidence except by the Court itself. 42 L.W. 574=1935 Mad. 888.

Sec. 37.—Endorsement on a pro-note by a sub-Collector that the penalty has been levied is not a certificate within S. 37 that the pro-note is duly stamped. 52 I.C. 758. It is not correct that S. 37 has no reference to any stamp, except a revenue stamp pure and simple. A revenue stamp surcharged "court-fee" is within the meaning of S. 37 a stamp of improper description. So far as court-fee stamps in their present form are concerned, too narrow a construction upon a remedial section like S. 37 should not be put. (23 All. 213, Dissented from.) 56 I.A. 379=7 Rang. 624=58 M.L.J. 59 (P.C.). *See also* 1937 Pat. 560. A promissory note stamped with quarter anna postage stamps is a document bearing *stamps of improper description* and can be validated by the Collector under R. 18 of the Government of India Stamp Rules. 55 Mad. 627=1932 Mad. 390=62 M.L.J. 538 (F.B.). Where a partition decree is not drawn up on judicial stamp paper, there is no decree at all and the executing Court can refuse execution. The fact that in such a case, the party has mistakenly furnished court-fee stamp and the Court mistakenly permitted the decree to be drawn up is immaterial. 135 I.C. 685=1932 Lah. 249.

Secs. 37 and 42.—A partition decree was not duly stamped as required by the Stamp Act, but it was nevertheless acted upon and executions also were ordered. On an objection at a later stage as to the absence of stamp, the decree was engrossed on proper stamp. On a question whether the decree and the proceedings in execution thereof became validated retrospectively, thereby. *Held*, that S. 37 had no application and that the case was not one in which an instrument had been written on a

38. (1) When the person impounding an instrument under section 33 has by law or consent of parties authority to receive evidence and admits such instrument in evidence upon payment of a penalty as provided by section 35 or of duty as provided by section 37, he shall send to the Collector an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof, and shall send such amount to the Collector, or to such person as he may appoint in this behalf.

Instruments impounded how dealt with.

(2) In every other case, the person so impounding an instrument shall send it in original to the Collector.

39. (1) When a copy of an instrument is sent to the Collector under section 38, sub-section (1), he may, if he thinks fit, [1][* * * * * *] refund any portion of the penalty in excess of five rupees which has been paid in respect of such instrument.

Collector's power to refund penalty paid under section 38, sub-section (1).

(2) When such instrument has been impounded only because it has been written in contravention of section 13 or section 14, the Collector may refund the whole penalty so paid.

40. (1) When the Collector impounds any instrument under section 33, or receives any instrument sent to him under section 38, sub-section (2), not being an instrument chargeable with a duty of one anna [2][or half an anna] only or a bill of exchange or promissory note, he shall adopt the following procedure :—

Collector's power to stamp instruments impounded.

(*a*) if he is of opinion that such instrument is duly stamped, or is not chargeable with duty, he shall certify by endorsement thereon that it is duly stamped, or that it is not so chargeable, as the case may be ;

(*b*) if he is of opinion that such instrument is chargeable with duty and is not duly stamped, he shall require the payment of the proper duty or the amount

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LEG. REF.

[1] The words "upon application made to him in this behalf or, if no application is made, with the consent of the Chief Controlling Revenue-authority" were repealed by Act IV of 1914, Sch. II.

[2] These words were inserted by S. 3 of the Indian Stamp (Amendment) Act (V of 1906).

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stamp of sufficient amount, but of improper description. 1938 Mad. 307. *Held, further*, that there was no provision of law which could validate a decree of the kind in question, with retrospective effect and that S. 42 (2) of the Act in terms is not retrospective in its operation. 47 L.W. 51=1938 M.W.N. 656=1938 Mad. 307.

Sec. 38.—Where a bond executed outside British India is presented in a British Indian Court nearly 10 months after its execution, it cannot be stamped in British India under the provisions of S. 18, nor can it be endorsed by the Collector under S. 32. But the Court must impound the document under proviso (*a*) to S. 35, and send it to the Collector under S. 38. 1935 Nag. 54. Both under S. 38 (1) and S. 61, the Civil Court is the final authority as to the amount of the stamp duty, while the Revenue authorities have the final decision on the amount of penalty to be levied. 13 Lah. L.T. 32. *See also* 1935 N. 54.

Sec. 38 (2): JURISDICTION OF COLLECTOR.—So far as S. 38 (2) is concerned, the Collector derives his jurisdiction only from the order which has been made within the Act, and if an order is made which is *ultra vires* even the Collector's jurisdiction is not being properly exercised. 44 P.L.R. 188.

Sec. 40 (1) (b).—The Chief Controlling Authority is competent to revise the order of the Collector passed under cl. (*b*) of S. 40 (1). 34 P.L.R. 630. *See also* 1941 Lah. 65 ; I.L.R. (1940) Lah. 637 ; I.L.R. (1940) Lah. 628. Where the vendee of immovable property, being well aware of the existence of incumbrances on that property, fails to inform the Registering officer of all the facts and circumstances pertaining to the sale when questioned about it and recites a patently and an absurdly small sum as consideration, he commits a breach of S. 27 and must be held to have withheld the information with the intent of defrauding the State of the full stamp duty on the transaction. The Collector in such a case is perfectly entitled to levy not merely the sum of Rs. 5 but the full amount of ten times the amount of the proper stamp duty as also the amount of the proper stamp duty. 20 N.L.J. 67. Collector's certificate—Reference to High Court thereafter not competent. *See* 1940 O.W.N. 18 (F.B.). *See also* 1939 O.W.N. 983=1938 Oudh 226 (F.B.). It is true that the Central Co-operative Bank is of a peculiar nature and distinct from those business concerns, which are interested only in making big profits. Nevertheless, if such a Bank is so careless in its business affairs as to misunderstand and break the laws and rules such

required to make up the same, together with a penalty of five rupees; or, if he thinks fit, [1][an amount not exceeding] ten times the amount of the proper duty or of the deficient portion thereof, whether such amount exceeds or falls short of five rupees :

Provided that, when such instrument has been impounded only because it has been written in contravention of section 13 or section 14, the Collector may, if he thinks fit, remit the whole penalty prescribed by this section.

(2) Every certificate under clause (*a*) of sub-section (1) shall, for the purposes of this Act, be conclusive evidence of the matters stated therein.

(3) Where an instrument has been sent to the Collector under section 38, sub-section (2), the Collector shall, when he has dealt with it as provided by this section, return it to the impounding officer.

Instruments unduly stamped by accident.

41. If any instrument chargeable with duty and not duly stamped, not being an instrument chargeable with a duty of one anna [2][or half an anna] only or a bill of exchange or promissory note, is produced by any person of his own motion before the Collector within one year from the date of its execution or first execution, and such person brings to the notice of the Collector the fact that such instrument is not duly stamped and offers to pay to the Collector the amount of the proper duty, or the amount required to make up the same, and the Collector is satisfied that the omission to duly stamp such instrument has been occasioned by accident, mistake or urgent necessity, he may, instead of proceeding under sections 33 and 40, receive such amount and proceed as next hereinafter prescribed.

Endorsement of instruments on which duty has been paid under section 35, 40 or 41.

42. (1) When the duty and penalty (if any) leviable in respect of any instrument have been paid under section 35, section 40 or section 41, the person admitting such instrument in evidence or the Collector, as the case may be, shall certify by endorsement thereon that the proper duty or, as the case may be, the proper duty and penalty (stating the amount of each) have been levied in respect thereof, and the name and residence of the person paying them.

LEG. REF.

[1] These words were inserted by S. 6 of the Indian Stamp (Amendment) Act (XV of 1904).

[2] These words were inserted by S. 3 of the Indian Stamp (Amendment) Act (V of 1906).

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as those contained in the Stamp Act, it must like any other citizen be expected to be called upon not only to refund the money due from it but also the cost, or a proportion of the costs, of the machinery of Government which has had to be set in motion in order to make that recovery possible. 20 Lah.L.T. 46.

Sec. 40 (2).—The conclusive presumption laid down in the section does not arise in a case where the Collector's certificate is without jurisdiction. *See* 93 I.C. 63=1926 A. 359.

Secs. 40 and 35.—There is nothing in S. 35 or S. 40 to enable either the Court or the Collector to compel a person who merely wishes to have an insufficiently stamped document admitted in evidence in Court to pay the duty or penalty, when he is not himself the executant under these sections, the payment of such duty or penalty is left to his choice. If he does not pay, he has to take the consequence of not being able to use the document. But it would be obviously hard and unfair to compel such a person to pay the duty on the document merely because he attempted to produce it in evidence. 42 P.L.R. 413=1940 Lah. 315 (S.B.). *See also* 20 N.L.J. 67.

Secs. 40 and 56 : POWERS OF COLLECTOR.—Where a Court is unable to determine whether the amount of duty to be paid is sufficient or not, or what duty should be paid, the Court should state the same when sending the case to the Collector. The certificate of Collector under S. 40 (1) (*a*) is final and probably an order under S. 40 (1) (*b*) is also final. It is discretionary with the Collector whether the matter should be referred to the Chief Controlling Revenue Authority. 1935 N. 54. *See also* 13 Lah.L.T. 32.

Sec. 41.—*Obiter.*—Where a sale certificate is insufficiently stamped, the purchaser may apply under S. 41 to the Collector asking for the mistake to be rectified. 32 Bom.L.R. 1084=1930 B. 392 (F.B.).

Sec. 42.—Where a document purports to be a deed of adoption but is in reality a deed of gift and is stamped as an authority to adopt, if the Collector validates and certifies it under S. 42, his decision is final and binding and cannot be set aside by a Civil Court. 119 I.C. 680 (1)=1929 N. 272. S. 42 (2) has no application to a case where no duty and penalty have been levied in respect of a document by the lower Court. 1932 M. 765=63 M.L.J. 548. *See also* 1938 Mad. 307 ; 1941 Lah. 65.

(2) Every instrument so endorsed shall thereupon be admissible in evidence, and may be registered and acted upon and authenticated as if it had been duly stamped, and shall be delivered on his application in this behalf to the person from whose possession it came into the hands of the officer impounding it, or as such person may direct :

Provided that—

(*a*) no instrument which has been admitted in evidence upon payment of duty and a penalty under section 35, shall be so delivered before the expiration of one month from the date of such impounding, or if the Collector has certified that its further detention is necessary and has not cancelled such certificate ;

(*b*) nothing in this section shall affect the Code of Civil Procedure, section 144, clause 3.[1]

Prosecution for offence against stamp-law.

43. The taking of proceedings or the payment of a penalty under this Chapter in respect of any instrument shall not bar the prosecution of any person who appears to have committed an offence against the stamp-law in respect of such instrument :

Provided that no such prosecution shall be instituted in the case of any instrument in respect of which such a penalty has been paid, unless it appears to the Collector that the offence was committed with an intention of evading payment of the proper duty.

Persons paying duty or penalty may recover same in certain cases.

44. (1) When any duty or penalty has been paid under section 35, section 37, section 40 or section 41, by any person in respect of an instrument, and, by agreement or under the provisions of section 29 or any other enactment in force at the time such instrument was executed, some other person was bound to bear the expense of providing the proper stamp for such instrument, the first mentioned person shall be entitled to recover from such other person the amount of the duty or penalty so paid.

(2) For the purpose of such recovery any certificate granted in respect of such instrument under this Act shall be conclusive evidence of the matters therein certified.

(3) Such amount may, if the Court thinks fit, be included in any order as to costs in any suit or proceeding to which such persons are parties and in which such instrument has been tendered in evidence. If the Court does not include the amount in such order, no further proceedings for the recovery of the amount shall be maintainable.

45. (1) Where any penalty is paid under section 35 or section 40, the Chief

LEG. REF.

[1] *See* now C.P. Code, Sch. I, Order XIII, Rule 9.

NOTES.

Sec. 43: LAUNCHING OF PROSECUTION—DUTY OF COLLECTOR.—*Prima facie* CASE, IF SUFFICIENT. —The proviso to S. 43 requires that unless the Collector is satisfied that the offence was committed with an intention of evading payment of the proper duty, no prosecution should be launched. The Collector cannot leave this question to the Court that is responsible for trying the case. A *prima facie* case is not sufficient. The section is mandatory in this respect. The Collector must himself record a finding that he is satisfied that such an intention existed. 1911 A.M.L.J. 111.

Sec. 44.—S. 44 is only intended to give a right to an innocent party, to recover the duty and penalty he is obliged to pay from the person or persons guilty of default. A co-executant cannot therefore claim contribution from his co-executants. 31 I.C. 285=2 L.W. 1024. *See also* 46 L. W. 470=1937 Mad. 763 ; 160 I. C. 70=1936 A.L.J. 187=1936 A. 151 ; 1939 N.L. J. 364 ; 1937 Mad. 763.

Sec. 44 (3).—Where a mortgagee in a suit on mortgage paid the deficient stamp duty on mortgage in order to get a decree but did not apply to the trial Court to include the amount so paid in the costs of the suit and brought a separate suit for recovering the sum. *Held*, that the suit was not maintainable. 49 A. 501= 1927 A. 654. *See also* 160 I.C. 70=1936 A.L.J. 187=1936 A. 151.

Power to revenue-authority to refund penalty or excess duty in certain cases.

Controlling Revenue-authority[1] may, upon application in writing made within one year from the date of the payment, refund such penalty wholly or in part.

(2) Where, in the opinion of the Chief Controlling Revenue-authority,[1] stamp-duty in excess of that which is legally chargeable has been charged and paid under section 35 or section 40, such authority may, upon application in writing made within three months of the order charging the same, refund the excess.

Non-liability for loss of instruments sent under section 38.

46. (1) If any instrument sent to the Collector under section 38, sub-section (2), is lost, destroyed or damaged during transmission, the person sending the same shall not be liable for such loss, destruction or damage.

(2) When any instrument is about to be so sent, the person from whose possession it came into the hands of the person impounding the same, may require a copy thereof to be made at the expense of such first-mentioned person and authenticated by the person impounding such instrument.

Power of payer to stamp bills and promissory notes received by him unstamped.

47. When any bill of exchange, [2][or promissory note] chargeable with the duty of one nana is presented for payment unstamped, the person to whom it is so presented may affix thereto the necessary adhesive stamp, and, upon cancelling the same in manner hereinbefore provided, may pay the sum payable upon such bill [3][or note], and may charge the duty against the person who ought to have paid the same, or deduct it from the sum payable as aforesaid, and such bill [3][or note] shall, so far as respects the duty, be deemed good and valid :

Provided that nothing herein contained shall relieve any person from any penalty or proceeding to which he may be liable in relation to such bill [3][or note].

Recovery of duties and penalties.

48. All duties, penalties and other sums required to be paid under this Chapter may be recovered by the Collector by distress and sale of the movable property of the person from whom the same are due, or by any other process for the time being in force for the recovery of arrears of land-revenue.

CHAPTER V.

ALLOWANCES FOR STAMPS IN CERTAIN CASES.

49. Subject to such rules as may be made by the [4][collecting Government]

LEG. REF.

[1] In the North-West Frontier Province for "Chief Controlling Revenue-authority" read "Revenue Commissioner". *See* S. 6 (1) (*d*) of North-West Frontier Province Law and Justice Regulation, 1901 (VII of 1901), P. and N.-W. Code in this section. *See* 52 M. 1=115 I.C. 824.

[2] Substituted for the words "promissory note or cheque" by Act V of 1927.

[3] Substituted for the words "note or cheque" by Act V of 1927.

[4] The words "Local Government" were substituted for "Governor-General in Council" by Act IV of 1914, and word "collecting" was substituted for 'Local' by Government of India (Adaptation of Indian Laws) Order, 1937. In S. 49, cl. (*c*) the word "cheques" has been omitted by Act V of 1927 and the words "payable otherwise than on demand" were added by Act V of 1927.

NOTES.

Sec. 47.—Sec. 47 does not permit a bill of exchange being stamped by an intermediate holder of the bill who is neither the drawer nor the drawee in order to validate such bill and thereby enable himslf or a subsequent holder of the bill to sue the drawer. 86 I.C. 357=1925 S. 241.

Sec. 48.—Where a document which is insuffi ciently stamped has been impounded, Govern ment can pursue its claim against the estate of the deceased executant. 42 P.L.R. 413=1940 Lah. 315 (S.B.).

Secs. 48 and 58.—A deed by which a person settles his property on his sons and arranges for its management is liable to stamp duty under Arts. 48 and 58. 20 Lah. L.T. 5.

Secs. 49 and 50.—A person other than the purchaser of the stamp wasted can apply for refund. 116 I.C. 713=1929 L. 332.

Allowance for spoiled stamps.

as to the evidence to be required, or the enquiry to be made, the Collector may, on application made within the period prescribed in section 50, and if he is satisfied as to the facts, make allowance for impressed stamps spoiled in the cases hereinafter mentioned, namely :—

(*a*) the stamp on any paper inadvertently and undesignedly spoiled, obliterated or by error in writing or any other means rendered unfit for the purpose intended before any instrument written thereon is executed by any person ;

(*b*) the stamp on any document which is written out wholly or in part, but which is not signed or executed by any party thereto ;

(*c*) in the case of bills of exchange [1][payable otherwise than on demand] [1][*] or promissory notes—

(1) the stamp on [2][any such bill of exchange] [2][* *] signed by or on behalf of the drawer which has not been accepted or made use of in any manner whatever or delivered out of his hands for any purpose other than by way of tender for acceptance : provided that the paper on which any such stamp is impressed does not bear any signature intended as or for the acceptance of any bill of exchange [2][* *] to be afterwards written thereon :

(2) the stamp on any promissory note signed by or on behalf of the maker which has not been made use of in any manner whatever or delivered out of his hands :

(3) the stamp used or intended to be used for [2][any such bill of exchange], [2][* *] or promissory note signed by, or on behalf of, the drawer thereof, but which from any omission or error has been spoiled or rendered useless, although the same, being a bill of exchange [2][* *], may have been presented for acceptance or accepted or endorsed, or, being a promissory note, may have been delivered to the payee : provided that another completed and duly stamped bill of exchange, [2][* *] or promissory note is produced identical in every particular, except in the correction of such omission or error as aforesaid, with the spoiled bill, [2][**] or note:

(*d*) the stamp used for an instrument executed by any party thereto which—

(1) has been afterwards found to be absolutely void in law from the beginning:

(2) has been afterwards found unfit, by reason of any error or mistake therein, for the purpose originally intended :

(3) by reason of the death of any person by whom it is necessary that it should be executed, without having executed the same, or of the refusal of any such person to execute the same, cannot be completed so as to effect the intended transaction in the form proposed :

(4) for want of the execution thereof by some material party, and his inability or refusal to sign the same, is in fact incomplete and insufficient for the purpose for which it was intended :

(5) by reason of the refusal of any person to act under the same, or to advance any money intended to be thereby secured, or by the refusal or non-acceptance of any office thereby granted, totally fails of the intended purpose :

(6) becomes useless in consequence of the transaction intended to be thereby effected being effected by some other instrument between the same parties and bearing a stamp of not less value :

(7) is deficient in value and the transaction intended to be thereby effected has been effected by some other instrument between the same parties and bearing a stamp of not less value :

(8) is inadvertently and undesignedly spoiled, and in lieu whereof another

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LEG. REF.

[1] *Vide* note (4), p. 4685.

[2] The words "or cheque" in S. 49, cl. (*c*) (1) in two places and in (*c*) (3) have been omitted by Act V of 1927. The word "cheque" in S. 49, cl. (*c*), and in three places in cl. (*c*) (3) has been omitted by Act V of 1927. The words "any such bill of exchanges" were substituted for the words "any bill of exchange" by Act V of 1927.

instrument made between the same parties and for the same purpose is executed and duly stamped :

Provided that, in the case of an executed instrument, no legal proceeding has been commenced in which the instrument could or would have been given or offered in evidence and that the instrument is given up to be cancelled.

Explanation.—The certificate of the Collector under section 32 that the full duty with which an instrument is chargeable has been paid is an impressed stamp within the meaning of this section.

Application for relief under section 49 when to be made.

50. The application for relief under section 49 shall be made within the following periods, that is to say,—

(1) in the cases mentioned in clause (*d*) (5), within two months of the date of the instrument :

(2) in the case of a stamped paper on which no instrument has been executed by any of the parties thereto, within six months after the stamp has been spoiled :

(3) in the case of a stamped paper in which an instrument has been executed by any of the parties thereto, within six months after the date of the instrument, or, if it is not dated, within six months after the execution thereof by the person by whom it was first or alone executed :

Provided that,—

(*a*) when the spoiled instrument has been for sufficient reasons sent out of British India, the application may be made within six months after it has been received back in British India :

(*b*) when, from unavoidable circumstances, any instrument for which another instrument has been substituted cannot be given up to be cancelled within the aforesaid period, the application may be made within six months after the date of execution of the substituted instrument.

Allowance in case of printed forms no longer required by Corporations.

51. The [1]Chief Controlling Revenue-authority [2][or the Collector if empowered by the Chief Controlling Revenue-authority in this behalf] may, without limit of time, make allowance for stamped papers used for printed forms of instruments [3][by any banker or] by any incorporated company or other body corporate, if for any sufficient reason such forms have ceased to be required by the said [3][banker] company or body corporate: provided that such authority is satisfied that the duty in respect of such stamped papers has been duly paid.

Allowance for misused stamps.

52. (*a*) When any person has inadvertently used, for an instrument chargeable with duty, a stamp of a description other than that prescribed for such instrument by the rules made under this Act, or a stamp of greater value than was necessary, or has inadvertently used any stamp for an instrument not chargeable with any duty ; or

(*b*) when any stamp used for an instrument has been inadvertently rendered useless under section 15, owing to such instrument having been written in contravention of the provisions of section 13 ;

the Collector may, on application made within six months after the date of the instrument, or, if it is not dated, within six months after the execution thereof by the person by whom it was first or alone executed, and upon the instrument, if chargeable with the duty, being restamped with the proper duty, cancel and allow as spoiled the stamp so misused or rendered useless.

LEG. REF.

[1] In the North-West Frontier Province, for "Chief Controlling Revenue-authority" read "Revenue Commissioner"—*see* S. 6 (1) (*d*) of the North-West Frontier Province Law and Justice Regulation, 1901 (VII of 1901), P. and N.W. Code.

[2] The words "or the Collector.....behalf" were inserted by Act IV of 1914, Sch. I.

[3] These words [by any banker or] and [banker] were inserted by S. 6 of the Indian Stamp (Amendment) Act (V of 1906).

Allowance for spoiled or misused stamps how to be made.

53. In any case in which allowance is made for spoiled or misused stamps, the Collector may give in lieu thereof—

(*a*) other stamps of the same description and value ; or

(*b*) if required and he thinks fit, stamps of any other description to the same amount in value ; or

(*c*) at his discretion, the same value in money, deducting one anna for each rupee or fraction of a rupee.

Allowance for stamps not required for use.

54. When any person is possessed of a stamp or stamps which have not been spoiled or rendered unfit or useless for the purpose intended, but for which he has no immediate use, the Collector shall re-pay to such person the value of such stamp or stamps in money, deducting one anna for each rupee or portion of a rupee, upon such person delivering up the same to be cancelled, and proving to the Collector's satisfaction—

(*a*) that such stamp or stamps were purchased by such person with a *bona fide* intention to use them ; and

(*b*) that he has paid the full price thereof ; and

(*c*) that they were so purchased within the period of six months next preceding the date on which they were so delivered :

Provided that, where the person is a licensed vendor of stamps, the Collector may, if he thinks fit, make the repayment of the sum actually paid by the vendor without any such deduction as aforesaid.

Allowance on renewal of certain debentures.

55. When any duly stamped debenture is renewed by the issue of a new debenture in the same terms, the Collector shall, upon application made within one month, repay to the person issuing such debenture, the value of the stamp on the original or on the new debenture, whichever shall be less :

Provided that the original debenture is produced before the Collector and cancelled by him in such manner as the [1][Provincial Government] may direct.

Explanation.—A debenture shall be deemed to be renewed in the same terms within the meaning of this section notwithstanding the following changes :—

(*a*) the issue of two or more debentures in place of one original debenture, the total amount secured being the same ;

(*b*) the issue of one debenture in place of two or more original debentures, the total amount secured being the same ;

(*c*) the substitution of the name of the holder at the time of renewal for the name of the original holder ; and

(*d*) the alteration of the rate of interest or the dates of payment thereof.

CHAPTER VI.

REFERENCE AND REVISION.

Control of and statement of case to, Chief Controlling Revenue authority.

56. (1) The powers exercisable by a Collector under Chapter IV and Chapter V [2][and under clause (*a*) of the first proviso to section 26] shall in all cases be subject to the control of the [3]Chief Controlling Revenue-authority.

LEG. REF.

[1] Substituted for 'Governor-General in Council' by Government of India (Adaptation of Indian Laws) Order, 1937.

[2] These words and figures were inserted by S. 7 of the Indian Stamp (Amendment) Act (XV of 1904).

[3] In the North-West Frontier Province, in Ss. 56 and 57, for "Chief Controlling Revenue-authority" read wherever they appear "Revenue Commissioner"—*see* S. 6 (1) (*d*) of the North-West Frontier Province Law and Justice Regulation (VII of 1901), P. and N.W. Code.

OTES.

Sec. 56.—*See* 1935 N. 54 cited under S. 40. Under S. 56, the High Court can deal only with those instruments which are already in existence and which have been the subject of action by the Collector. 12 A.L.J. 47=37 A. 125 (F.B.).

(2) If any Collector, acting under section 31, section 40 or section 41, feels doubt as to the amount of duty with which any instrument is chargeable, he may draw up a statement of the case, and refer it, with his own opinion thereon, or for the decision of the Chief Controlling Revenue-authority.

(3) Such authority shall consider the case and send a copy of its decision to the Collector, who shall proceed to assess and charge the duty (if any) in conformity with such decision.

Statement of case by Chief Controlling Revenue authority to High Court Chief Court, or Judicial Commissioner's Court.

57. (1) The Chief Controlling Revenue-authority may state any case referred to it under section 56, sub-section (2), or otherwise coming to its notice, and refer such case, with its own opinion thereon;—

[1][(*a*) if the case arises in the Province of Madras or in Coorg, to the High Court at Madras ;

(*b*) if it arises in the Province of Bombay, to the High Court at Bombay ;

(*c*) if it arises in Sind, to the Judicial Commissioner's Court ;

(*d*) if it arises in Agra or in Ajmer-Merwara, to the High Court at Allahabad;

(*e*) if it arises in Oudh, to the Chief Court ;

(*f*) if it arises in Bihar or in Orissa, to the High Court at Patna;

(*g*) if it arises in the Punjab, the North-West Frontier Province, British Baluchistan, or Delhi, to the High Court at Lahore ;

(*h*) if it arises in the Central Provinces and Berar, to the High Court at Nagpur, and

(*i*) if it arises in any other part of British India, to the High Court at Calcutta.]

(2) Every such case shall be decided by not less than three Judges of the High Court, [2][*] Chief Court [2][or Judicial Commissioner's Court] to which it is referred, and in case of difference the opinion of the majority shall prevail.

LEG. REE.

[1] Present cls. (*a*) to (*i*) of S. 57 were substituted for old cls. (*a*) to (*e*) by A.O., 1937.

[2] Omitted and inserted by A.O., 1937.

NOTES.

Sec. 56 (2).—S. 56 (2) confers very wide controlling powers on the Chief Controlling Revenue-authority and the power can be exercised even before the stamp duty is paid. 13 L. 745=1932 L. 495 (F.B.). *See also* 20 Lah. L.T. 126. In revision the Financial Commissioner has to satisfy himself not that the decision of the Collector is exactly that the Financial Commissioner should necessarily have made in the first instance, but that the Collector's decision has been made reasonably and with due consideration. 18 Lah.L.T. 45. No doubt only the Financial Commissioner has authority to pass orders on a petition under S. 56. But the instructions of the Financial Commissioners contained in para. 53 of Chap. 3 of Part 1-B of the Punjab Sramp Manual require Commissioners in the first instance to entertain such petitions and to forward them to the Court of the Financial Commissioner with their opinion thereon. 20 L.L.T. 108=43 P.L.R. 294.

Sec. 57 : SOPE OF SECTION.—S. 57 cannot be used for obtaining an opinion from the High Court on questions of a general nature not arising out of any particular case. If the Government desires legal advice upon a general question, it can obtain it by consulting the law officers of the State or by obtaining such other advice as may be desirable. Where the Board of Revenue made a reference whether a certain type of document called Marine Insurance policy represented by a blank form attached to the statement of affairs should be stamped with duty payable under Art. 47-A (1) (*ii*) of Sch. I to the Stamp Act or duty under Art. 62-C of the said Schedule or with some other or what duty, *held*, that the reference was incompetent. 33 C. W.N. 1174=1929 C. 799. Before the Revenue-authority can refer to the High Court a case 'otherwise coming to its notice the Revenue-authority should be faced with the duty of disposing of the case, as indicated by the concluding words of S. 59. A document was brought to the Collector for his opinion under S. 31. He made an order that it was chargeable under Art. 40, cl. (*b*). The parties applied to the Board of Revenue to override that ruling and the Board made a reference to the High Court. *Held*, that the reference was incompetent. The Collector did not state a case to the Board and so S. 56 (2) did not operate to impose any duty on the Board of Revenue with reference to the instrument, and as the Collector did not exercise his powers under S. 33 to impound the instrument, the Board of Revenue had no controlling power over the Collector at that stage. So the Board was not competent to make the reference. 59 C. 1171=36 C.W.N. 502=1932 C. 736. If a deed does not mention the value of the property it does not require a stamp. 119 I.C. 680 (1)=1929 N. 272. Reference—Certificate by Collector after levy of deficit duty. 40 A. 128=16 A.L.J. 49 (F.B.). Abstract questions cannot be referred by the Chief Reve ue-authority when there is no pending case before it *See* 27 Bom.L.R. 1273=1926 B. 51 (F.B.); 7 N.

Power of High Court, [*] Chief Court [or Judicial Commissioner's Court] to call for further particulars as to case stated.

58. If the High Court, [1][*] Chief Court [1][or Judicial Commissioner's Court] is not satisfied that the statements contained in the case are sufficient to enable it to determine the questions raised thereby, the Court may refer the case back to the Revenue-authority by which it was stated, to make such additions thereto or alterations therein as the Court may direct in that behalf.

Procedure in disposing of case stated.

59. (1) The High Court, [*][2] Chief Court, [2][or Judicial Commissioner's Court], upon the hearing of any such case, shall decide the questions raised thereby, and shall deliver its judgment thereon containing the grounds on which such decision is founded.

(2) The Court shall send to the Revenue-authority by which the case was stated a copy of such judgment under the seal of the Court and the signature of the Registrar; and the Revenue-authority shall, on receiving such copy, dispose of the case conformably to such judgment.

Statement of case by other Courts to High Court, [*] Chief Court [or Judicial Commissioner's Court.]

60. (1) If any Court, other than a Court mentioned in section 57, feels doubt as to the amount of duty to be paid in respect of any instrument under proviso (*a*) to section 35, the Judge may draw up a statement of the case and refer it, with his own opinion thereon, for the decision of the High Court, [1][*] Chief Court [1][or Judicial Commissioner's Court] to which, if he were the [2][Chief Controlling Revenue-authority], he would, under section 57, refer the same.

(2) Such Court shall deal with the case as if it had been referred under section 57, and send a copy of its judgment under the seal of the Court and the signature of the Registrar to the [2][Chief Controlling Revenue-authority] and another like copy to the Judge making the reference, who shall, on receiving such copy, dispose of the case conformably to such judgment.

(3) References made under sub-section (1), when made by a Court subordinate to a District Court, shall be made through the District Court, and, when made by any subordinate Revenue Court, shall be made through the Court immediately superior.

LEG. REF.

[1] Omitted and inserted by A.O., 1937.

[2] In the North-West Frontier Province, the Chief Controlling Reveuue-authority is the Revenue Commissioner—*see* S. 6 (1) (*d*) of the North-West Frontier Province Law and Justice Regulation (VII of 1901), P. and N.W. Code.

NOTES.

L.R. 26; 23 A. 213 (F.B.); 8 O.W.N. 116=1931 O. 99; 15 L. 762=1934 L. 666 (S.B.).

Sec. 58.—*See* 20 Lah.L.T. 5 cited under S. 48 *supra*.

Sec. 59.—*See* 1932 C. 736 cited under S. 57, *supra*.

Sec. 60.—It is only where and when the Judge making the reference has any doubt that the matter can be referred. [11 M. 38 (F.B.), Foll.] 135 I.C. 200 (1)=1932 L. 172 (F.B.). An appellate Court has no power to make a reference. S. 60 applies only to trial Courts which may feel a doubt at the stage of admission of a document as to whether it is or it is not properly stamped, and such Court can refer the matter to the High Court. After the document has been admitted by the trial Court, if the appellate Court has any doubts about the matter and desires to take any action, the proper course is to proceed under S. 61 (2) of the Act. 1935 M. 382=68 M.L.J. 267. A reference made under S. 60 (1), does not abate or become incompetent by reason of the death of the party who has executed the document which has given rise to the reference. 17 Pat. 95=18 Pat.L.T. 933=1937 P.W.N. 962=1938 Pat. 33 (S.B.).

Secs. 60 and 40.—REFERENCE UNDER S. 60—STAGE, WHEN TO BE MADE.—The proper time for making a reference to the High Court under S. 60 is before the Court passes an order impounding the document. But where this is not done and the document is impounded and the Collector's certificate obtained under S. 40 (1) (*a*) of the Act, the Court cannot thereafter make the reference to the High Court. It would amount to reopening a question which had become conclusive. 15 Luck. 318=1940 O.W.N. 18. *See also* 1938 O.W.N. 983=1938 Oudh 226 (F.B.).

Revision of certain decisions of Courts regarding the sufficiency of stamps.

61. (1) When any Court in the exercise of its civil or revenue jurisdiction or any Criminal Court in any proceeding, under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898, makes any order admitting any instrument in evidence as duly stamped or as not requiring a stamp, or upon payment of duty and a penalty under section 35, the Court to which appeals lie from, or references are made by, such first-mentioned Court may, of its own motion or on the application of the Collector, take such order into consideration.

(2) If such Court, after such consideration, is of opinion that such instrument should not have been admitted in evidence without the payment of duty and penalty under section 35, or without the payment of a higher duty and penalty than those paid, it may record a declaration to that effect, and determine the amount of duty with which such instrument is chargeable, and may require any person in whose possession or power such instrument then is, to produce the same, and may impound the same when produced.

(3) When any declaration has been recorded under sub-section (2), the Court recording the same shall send a copy thereof to the Collector, and, where the instrument to which it relates has been impounded or is otherwise in the possession of such Court, shall also send him such instrument.

(4) The Collector may thereupon, notwithstanding anything contained in the order admitting such instrument in evidence, or in any certificate granted under section 42, or in section 43, prosecute any person for any offence against the Stamp-law which the Collector considers him to have committed in respect of such instrument :

Provided that—

(*a*) no such prosecution shall be instituted where the amount (including duty and penalty) which, according to the determination of such Court, was payable in respect of the instrument under section 35, is paid to the Collector, unless he thinks that the offence was committed with an intention of evading payment of the proper duty ;

NOTES.

Sec 61.—Where the duty and penalty paid is sufficient and the document has been properly admitted in evidence under S. 35, no declaration in respect of that document can be made under S. 61. 11 O.W.N. 258=1934 O. 344. A letter from the Chief Inspector of Stamps is sufficient compliance with all that is required by the Legislature in the matter of S. 61 (1). A regular application in the form of a revision by the Collector is not necessary. 1942 A.L.J. 87 =1942 O.W.N. 97. Document not duly stamped—Admitted in evidence—Not to be questioned later. 1923 N. 109 ; 1935 A.L J. 651. As to what amounts to an order admitting a document in evidence, *see* 165 I.C. 95=1936 Pesh. 186. Where a Collector refers a matter to the Court for acting under S. 61, there is nothing in the Act which requires the issue of notice to the person. The question of prosecution is for the Collector to decide upon, irrespective of action by the Court. 93 I.C. 909 (1)=1926 O. 397. When a case is reported under S. 61, the Collector must first insist on the payment of the deficiency reported by the Civil Court, and unless he decides to move the High Court to revise the declaration made by the reporting Court, he must proceed to decide on the penalty. He may also very properly give notice that unless the deficiency is paid in a reasonable time to be fixed by him, the maximum penalty will be assessed. 13 *L.L.T.* 32. Where an order is obtained under S. 61 at the instance of the Collector and no steps are taken to have it set aside, no decision given by the High Court in a reference under S. 57 can have any effect in law as the decision at the instance of the Collector is final. There is no case within the meaning of S. 57 (1), for the term 'case' in S. 57 (1) refers only to a case as yet undecided by a competent authority, and the decision to be given by the High Court under sub-s. (2) must clearly be a decision on which action can be taken if thought fit. 18 L. 762=1934 L. 666 (S.B.) *See also* 1939 A.M.L.J. 125. The Civil Court is the final authority as to stamp duty; the Collector has the final decision as to the penalty to be levied. 13 L.L.T. 32. Admission of document by trial Court—Appellate Court having doubt as to proper stamp duty—Reference under S. 60—Competency. 68 M. L. J. 267. Document produced and admitted—Judgment delivered—Subsequent impounding of document—Power of Court—Proper procedure. *See* 46 L.W. 470= 1937 Mad. 763.

Under this section Court has not only to declare the proper stamp duty, but also determine the amount of penalty. 63 C. 1098= 40 C.W.N. 1320=1936 C. 556.

(*b*) except for the purposes of such prosecution, no declaration made under this section shall affect the validity of any order admitting any instrument in evidence, or of any certificate granted under section 42.

CHAPTER VII.

CRIMINAL OFFENCES AND PROCEDURE.

Penalty for executing, etc., instrument not duly stamped.

62. (1) Any person—

NOTES.

Sec. 62 : CONSTRUCTION OF SECTION.—The Stamp Act is a fiscal enactment, and must be strictly construed; and before any person can be punished, the procedure prescribed by the Act must be strictly followed. On the discovery of a not duly stamped instrument, the procedure laid down in S.37 (old Act) should be followed. For criminal prosecution there must be an intention to evade the stamp law. 8 C. 259; 10 C.L.J. 365. Dishonest intention being the gist of the offence under S. 62, it is not open to a Magistrate to find that there was absence of dishonest intention and at the same time warn the accused not to do the act in future. 25 A.L.J. 401=1927 A. 238. A penal Act must be read as favourably as possible to the subject. 7 A.L J. 180. *See* 140 I.C. 192=9 O.W.N. 852. As to essentials of offence under this section and S. 68, *see* 18 Cr.L.J. 725=40 I. C. 725=21 C.W.N. 758. Signing improperly stamped instrument as a witness, is not punishable. 17 L. 223=162 I.C. 774=1936 L. 449 (S.B.).

PROOF OF INTENTION TO EVADE PAYMENT OF STAMP DUTY.—*See* 54 I.C. 406=21 Cr.L.J, 54; 2 P.L.T. 623=64 I.C. 286. But *see* 24 A.L. J. 358=93 I.C. 694. Where it has been held that the mere signing otherwise as a witness of an instrument chargeable with duty without the same being duly stamped is an offence. No question of intention arises. 24 A.L.J. 358. *See also* 1934 A.L.J. 582=1934 A. 201; 93 I.C. 694=1926 A. 389. Intention to avoid payment of stamp is not an essential ingredient of the offence described in S. 60 of Act I of 1879. But such intention is the essential ingredient of the offence made punishable by S. 63 of that Act. 12 M. 231; 1 Weir 903. Provided that the prosecution be duly instituted, the intention of the party prosecuted to evade the stamp-duty or otherwise is immaterial for the purpose of securing his conviction. L.B.R. (1872-1892) 623; 150 I.C. 672=1934 A. 201. No. fraudulent intent need be proved for a conviction under S. 62. But the section must be read with S. 43, and no prosecution should be started when the duty and penalty have been paid, except in case of fraud. But though the duty and penalty have not been paid, if the document cannot be impounded, a prosecution under S. 62 should be compounded for payment of duty plus a sum which may reasonably be imposed as penalty, when there is no reason to believe a fraudulent mind. 13 L.L.T. 18.

JURISDICTION.—As the Stamp Acts of 1869 and 1879 recognise the Collector as primarily responsible for the institution of prosecutions for offences against them, he should not himself try, in his capacity as a Magistrate, a person charged with an offence under that Act. 2 A. 806. *See also* 2 Cr.L.J. 468.

COMPETENCY OF PROSECUTING MAGISTRATE TO TRY OFFENDERS—PROCEDURE.—A Magistrate, authorised by the Collector of a district to prosecute offenders against the Stamp law, is not competent to try them for the same offence. 3 C. 622; 1884 A.W.N. 37.

PENALTY.—For the purpose of ascertaining whether any and what penalty should be imposed, a Magistrate is bound to consider the question whether a person, prosecuted under this section, had any intention to defraud the Government by evading payment of stamp duty. 2 C. 399 (F.B.); 2 Cr.L.J. 468. Where a person is convicted of the abetment of an offence under S. 61 for not fixing a stamp to an acknowledgment signed by a debtor in his account books, the amount of fine inflicted should not be excessive but proportionate to the fraudulent intent of the offender. 1885 A.W.N. 30.

ACCEPTOR OF UNSTAMPED RECEIPT—LIABILITY.—7 M. 71; 7 B. 82. The mere fact of the acceptance of an insufficiently stamped instrument cannot amount to an abetment of the offence under S. 61. A.W.N. (1883) 145. [R. 20 A. 440.] *See also* A.W.N. (1884) 37. The mere receipt of an unstamped *khata* does not constitute an offence under S. 61. Rat. Un. Cr. C. 882; Cr. Rg. 47 of 93. (7 M. 171, Foll.) As to granting of unstamped receipt without criminal intention, *see* 2 Pat.L.T. 623 =64 I.C. 286. Voucher by one servant to another with respect to money belonging to the master is not receipt that requires stamp. 18 Cr.L.J. 968=42 I.C. 328; 4 O.L.J. 490. As to liability of creditor for instrument not duly stamped, *see* 1934 N. 231.

MEANING OF TERMS.—"Accepting" is a technical term and does not apply to the mere taking of a promissory note in one's favour from the debtor. "Presenting" like "accepting" is a technical term and is so used in S. 62 of the Act. U.B.R. (1892-1896), Vol. I, p. 312. "Accepting" does not mean "receiving" but "executing as acceptor". U.B.R. (1892-1896), Vol. I, p. 311. The term "accepting" in S. 61 does not mean "receiving", but "executing as an acceptor." The mere receiver of a pronote not duly stamped does not render himself liable to the penalities under the section. 20 A. 440=24 W.R. (Cr.) 1. *See also* 12 P.R. 1887 (Cr); 7 M. 71=1 Weir 902; 18 P. R. 1895 (Cr.). *See also* cases under "abetment of offence." The words "signing otherwise than as a witness" in S. 61 includes the writing of a person's name by himself, or by his authority, with the intention of authenticating a document as being that of the person whose name is so written. 27 C. 324 =4 C.W.N. 440. The term "person" used in Ss. 61 and 64 includes the members of a trading partnership. 1903 A.W.N. 173. The execution of a document, which on its face

(*a*) drawing, making, issuing, endorsing or transferring, or signing otherwise than as a witness, or presenting for acceptance or payment, or accepting, paying or receiving payment of, or in any manner negotiating, any bill of exchange [1][payable otherwise than on demand] [2][*] or promissory note without the same being duly stamped ; or

(*b*) executing or signing otherwise than as a witness any other instrument chargeable with duty without the same being duly stamped ; or

(*c*) voting or attempting to vote under any proxy not duly stamped ;

shall for every such offence be punishable with fine which may extend to five hundred rupees :

LEG. REF.

[1]The words "payable otherwise than on demand" added by Act V of 1927.

[2]The word "cheque" has been omitted by Act V of 1927.

NOTES.

requires to be, and is not stamped, cannot be said to be an "act, contrivance, or device not specially provided for" within the meaning of S. 67, because where the document is what on its face purports to be the act of the executant, if punishable at all, is provided for under S. 61 and cannot, therefore, fall under S. 67: 23 M. 155=1 Weir 907. Unstamped receipt issued by an unauthorised gomastha. 8 C.W.N. 378. Where a clerk signs a firm's name under the authority of the firm, it makes little difference that he wrote the letters to the dictation of the Manager and he may be properly convicted under S. 61. 27 Cal. 324=4 C.W.N. 440. No prosecution lies under S. 61 against the holder of an insufficiently stamped pro note. But the Collector, on the bond being impounded and send to him, can levy the penalty under S. 37. 40 P.R. 1886 (Cr.).

ACKNOWLEDGMENT OF RECEIPT OF DEBT DUE BY LETTER—FAILURE TO PROPERLY STAMP IT.—Where a person acknowledges by letter the receipt of money in satisfaction of a debt for more than Rs. 20, the letter is a receipt and it as such chargeable with duty and the person signing it otherwise than as a witness without its being properly stamped is liable to be convicted under S. 61 of the Act. 8 M. 11=1 Weir 902 (F.B.); 1 Weir 903=11 M. 329; 1885 A.W.N. 266.

TERM "RECEIPT" EXPLAINED.—1 Weir 901; 1903 A.W.N. 174 ; *Ibid.*, 173.

OTHER ILLUSTRATIVE CASES.—An agreement to lease by which no rent is reserved and no premium paid or money advanced is not included in the Schedule to this Act and so does not require a stamp. The executant of such a document cannot be convicted under S. 62 (*b*). 1 Pat. L.J. 366=20 C.W.N. 923. There is nothing in the law which renders is obligatcry to execute a charter party in duplicate; but when the parties think proper to execute it in duplicate, they commit an offence punishable under S. 61, if they fail to stamp the counterpart as preseribed in the schedule. L.B.R. (1872-92) 623. The mere fact that they have intended it to be used merely as a private copy cannot alter its nature or make it any the less a duplicate or counterpart if it is duly signed. (1872-1892) L.B.R. 623. Award in partition—Libility to stamp—Signature of arbitrator—Offence. *See* 46 All. 54. Sale of Court-fee stamps without lieence, if offence. *See* 4 All. 216 (F.B.). Compromise petition to Court—Necessity for Court-fee stamp and not general stamp. 42 I.C. 1008=40 All. 19.

ABETMENT OF OFFENCE.—The conviction of a person, who merely received a promissory note executed on plain paper, in his favour, of abetment of the offence under S. 61 is bad in law. I.N.L.R. 163. The mere receipt of an unstamped instrument does not constitute the offence of abetment of the execution of instrument. U.B.R. 1904 and Qr., Stamps, 1 [7 Bom. 82; 20 All. 440 and U.B.R. (1892-1896) 313. Ref.] 8 A. 18=1885 A.W.N. 317. It is not abetment of the execution of an unstamped instrument to receive it, any more than acceptance of stolen property is abetment of theft. 7 Bom. 82. The act of the person receiving the unstamped document may amount to abetement of an offence under S. 61, and would then be an act provided for by any other law for the time being in force, namely the Penal Code, and is, therefore, beyond the scope of S. 67 of the Act. 23 Mad. 155=1 Weir 907.

SANCTION OF COLLECTOR.—The Act does not require intention to be proved as a part of an offence under it, but in order to prevent indiscriminate prosecutions, it confines the power of instituting the prosecutions to the Collector, and instructs him to exercise it only when it appears to him that the offence had been committed with an intention to evade payment of the proper duty. 7 Mad. 537=1 Weir 899. *See also* 24 W.R. (Cr.) 1; 12 Mad. 231=1 Weir 903. Again it is not necessary in proceedings under the Act that the document should be impounded under S. 33. U.B.R. (1892-1896), Vol. I. p. 318.

Secs. 62 and 65.—Passing unstamped receipt—Failure to give proper receipt on demand—Offence. 146 I.C. 807=35 Bom. L.R. 981=1933 Bom. 462.

Sec. 62, (1) (b).—Where there is genuine doubt regarding stamp duty payable, nominal fine should suffice. 146 I.C. 559=10 O.W.N. 997=1933 O. 461.

Secs. 62 (b) and 64 (a)—Offences under the two sections distinct—Complaint under S. 64 (A)—Conviction under S. 62 (B).—Procedure, 146 I.C. 1055=1933 Lah. 959.

Provided that, when any penalty has been paid in respect of any instrument under section 35, section 40 or section 61, the amount of such penalty shall be allowed in reduction of the fine (if any) subsequently imposed under this section in respect of the same instrument upon the person who paid such penalty.

(2) If a share-warrant is issued without being duly stamped, the Company issuing the same, and also every person who, at the time when it is issued, is the managing director or secretary or other principal officer of the Company, shall be punishable with fine which may extend to five hundred rupees.

Penalty for failure to cancel adhesive stamp.

63. Any person required by section 12 to cancel an adhesive stamp and failing to cancel such stamp in manner prescribed by that section, shall be punishable with fine which may extend to one hundred rupees.

Penalty for omission to comply with provisions of section 27.

64. Any person who, with intent to defraud the Government,—

(*a*) executes any instrument in which all the facts and circumstances required by section 27 to be set forth in such instrument are not fully and truly set forth ; or

(*b*) being employed or concerned in or about the preparation of any instrument, neglects or omits fully and truly to set forth therein all such facts and circumstances ; or

(*c*) does any other act calculated to deprive the Government of any duty or penalty under this Act ;

shall be punishable with fine which may extend to five thousand rupees.

Penalty for refusal to give receipt and for devices to evade duty on receipts.

65. Any person who,—

NOTES.

Sec. 64.—SCOPE OF THE SECTION.—Essentials of conviction under the section. 108 I.C. 427=29 Cr.L.J. 397; 1 Weir 905. Mortgage property sold not setting forth mortgage amount as part of the consideration—Non-payment of stamp duty on mortgage amount is an offence. 19 N L.J. 259. Fraudulent intention has necessarily to be established for a conviction under S. 64. There is a strong presumption that a person will not expose himself to the penalty for fraud in a case in which he is not interested. It has also to be presumed that what is done openly is not done fraudulently. 13 L.L.T. 18. *See also* 1933 Lah. 959. Person in whose favour the document is executed is not hit by S. 64 (*a*). 1929 Cr. C. 359=1929 Cal. 723. But *see also* 19 N.L.J. 259 (Person bringing about a sale-deed and arranging for its wording and paying registration charges is a "person concerned in or about its preparation" within cl. (*h*) of S. 64 and will be liable as such). 19 N.L.J. 259. Each of the entries of receipts over Rs. 20 in a *sarkhat* left in the hands of debtor must be stamped as a receipt. 35 All. 290=11 A.L.J. 309. On this section, *see also* 12 Mad. 231=1 Weir 903; 1 Weir 901; 19 Cr.L.J. 515=45 I.C. 275 (Cr.) (proof of fraudulent intent is necessary); 44 Cal. 321=24 C.L.J. 441 ("Any other Act," meaning of.).

Sec. 64 (a).—For conviction under this section a proof of intent to defraud is necessary. 146 I.C. 1055=1933 Lah. 959; 13 L.L.T. 18. In order to maintain a conviction under S. 64, it is necessary to prove intent to defraud. This intent can only be inferred from the circumstances. Where there was no secrecy about the preparation of a document which was described and registered as a will, an intent to defraud cannot be inferred although the document is in reality a deed of settlement. 42 P.L.R. 215=1940 Lah. 274. *See also* 1937 M. W.N. 867. The fact that a man sells his property for less than it is worth cannot be an offence under S. 64 (*a*), unless it is proved that the consideration quoted in the deed of sale is not the real consideration but something else, and that the intention or effect was to defraud Government of stamp revenue. The market value of the property is irrelevant. 1937 M. W.N. 1071.

Sec. 65.—CONDITIONS TO BRING AN INSTRUMENT UNDER S. 64.—1884 A.W.N. 164. *See also* U.B.R. (1892-1896), Vol. I, p. 303 (execution of instrument of gift or settlement); 10 A.L.J. 309=35 All. 390 ; 32 All. 171 ; 44 Cal. 321. The failure of the creditor to affix such stamp is not an offence under S. 64. 1884 A.W.N. 164. Where a person neither refuses nor neglects to give a receipt nor with intent to defraud the revenue gives a receipt for less than Rs. 20 when he has received more, nor with like intent separates or divides the money or property paid or delivered, he cannot be convicted under S. 64 of the (old) Act. 8 M. 11=1 Weir 902 (F.B.). *See also* 1903 A.W.N. 173. The term "receipt" explaiued. 1 Weir 901; 1903 A..NW. 174. *See also* under Ss. 62 and 64. Private persons cannot start prosecutions under this section. 104 I.C. 108=1927 N. 202. Sanction of Collector is indispensable ; subsequent sanction cannot validate previously instituted proceedings. (*Ibid.*) Such a defect is not cured by S. 537 of the Code of Criminal Procedure (*Ibid.*).

(*a*) being required under section 30 to give a receipt, refuses or neglects to give the same ; or

(*b*) with intent to defraud the Government of any duty, upon a payment of money or delivery of property exceeding twenty rupees in amount or value, gives a receipt for an amount or value not exceeding twenty rupees, or separates or divides the money or property paid or delivered ;

shall be punishable with fine which may extend to one hundred rupees.

Penalty for not making out policy or making one not duly stamped.

66. Any person who—

(*a*) receives, or takes credit for, any premium or consideration for any contract of insurance and does not, within one month after receiving, or taking credit for, such premium or consideration, make out and execute a duly stamped policy of such insurance ; or

(*b*) makes, executes or delivers out any policy which is not duly stamped or pays or allows in account, or agrees to pay or allow in account, any money upon, or in respect of, any such policy ;

shall be punishable with fine which may extend to two hundred rupees.

Penalty for not drawing full number of bills or marine policies purporting to be in sets.

67. Any person drawing or executing a bill of exchange [1][payable otherwise than on demand] or a policy of marine insurance purporting to be drawn or executed in a set of two or more, and not at the same time drawing or executing on paper duly stamped the whole number of bills or policies of which such bill or policy purports the set to consist, shall be punishable with fine which may extend to one thousand rupees.

Penalty for post-dating bills and for other devices to defraud the revenue.

68. Any person who—

(*a*) with intent to defraud the Government of duty, draws, makes or issues any bill of exchange or promissory note bearing a date subsequent to that on which such bill or note is actually drawn or made ; or,

(*b*) knowing that such bill or note has been so post-dated, endorses, transfers, presents for acceptance or payment, or accepts, pays or receives payment of, such bill or note, or in any manner negotiates the same ; or

(*c*) with the like intent practises or is concerned in any act, contrivance or device not specially provided for by this Act or any other law for the time being in force ;

shall be punishable with fine which may extend to one thousand rupees.

LEG. REF.

[1]Inserted by Act V of 1927.

NOTES.

REFUSING TO GIVE RECEIPT—U.B.R. (1897-1901), Vol I, p. 378: *See also* 1 Weir 906; 34 A. 192 (refusal to give a second receipt); 9 A.L.J. 97; 13 I.C. 778=13 Cr.L.J. 122 (receipt of money by money order—Necessity for fresh receipt); 27 C. 324 (as to proof of demand of receipt); 23 B. 54 (memo. of receipt of money by third person requires no stamp); 21 P.R. 1915 (Cr.); 16 Cr.L.J. 787=31 I.C. 643=38 P.W.R. 1915 (Cr.). (Collector's sanction is necessary). *See also* 9 B. 27.

Secs. 67 and 68: SCOPE AND APPLICATION OF SECTIONS—ILLUSTRATIVE CASES.—9 M. 138 (F.B.). As to essentials of offence under S. 68, *see* 40 I.C. 725=21 C.W.N. 758; 1 Weir 907. Intention is essential to constitute offence under the section. 16 C. 432; 23 M. 115; 21 C.W.N. 758.

Sec. 68 (c).—The accused, a money lender, was prosecuted under S. 68 (*c*) in respect of certain entries in his account book. They related to loans advanced by him and were signed by the borrower. *Held*, that the Government had failed to prove any intention to defraud the Government duty. Simply because the effect of these entries is to deprive the Government of duty, it cannot be inferred that the accused intended to defraud Government. Where an Act of Parliament, makes an offence dependent on proof of intention, the Court must have proof of facts sufficient to justify it in coming to the conclusion that the intention existed. Inference from conduct though usual is never conclusive. I.L.R. (1938) Bom. 114=39 Bom.L.R. 1184=1938 Bom. 87.

Penalty for breach of rule relating to sale of stamps and for unauthorised sale.

69. (*a*) Any person appointed to sell stamps who disobeys any rule made under section 74; and

(*b*) any person not so appointed who sells or offers for sale any stamp (other than a one -anna [1][or half an anna] adhesive stamp);

shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

Institution and conduct of prosecutions.

70. (1) No prosecution in respect of any offence punishable under this Act or any Act hereby repealed shall be instituted without the sanction of the Collector or such other officer as the [2][collecting Government] generally, or the Collector specially, authorises in that behalf.

(2) The Chief Controlling Revenue-authority, or any officer generally or specially authorised by it in this behalf, may stay any such prosecution or compound any such offence.

(3) The amount of any such composition shall be recoverable in the manner provided by section 48.

Jurisdiction of Magistrates.

71. No Magistrate other than a Presidency Magistrate or a Magistrate whose powers are not less than those of a Magistrate of the second class, shall try any offence under this Act.

Place of trial.

72. Every such offence committed in respect of any instrument may be tried in any district or presidency-town in which such instrument is found as well as in any district or presidency-town in which such offence might be tried under the Code of Criminla Procedure for the time being in force.

CHAPTER VIII.

SUPPLEMENTAL PROVISIONS.

Books etc.,, to be open to inspection.

73. Every public officer having in his custody any registers, books, records, papers, documents or proceedings, the inspection whereof may tend to secure any duty, or to prove or lead to the discovery of any fraud or omission in relation to any duty, shall at all reasonable times, permit any person authorized in writing by the Collector to inspect for such purpose the registers, books, papers, documents and proceedings, and to take such notes and extracts as he may deem necessary, without fee or charge.

Powers to make rules relating to sale of stamps.

74. The [2][collecting Government,] [3][* * *] make may rules for regulating—

LEG. REF.

[1] Inserted by Act V of 1906.

[2] Substituted for 'Local Government' A.O 1937.

[3] The words 'subject to the control of the Governor-General in Council' omitted by A.O.s 1937.

NOTES.

Sec. 69.—SELLING STAMP WITHOUT LICENCE; Cr. Reg. 3 of 1887. The sale of Court-fee stamps without licence was no offence under Act XVIII of 1869, but was specially made so under S. 68, Act I of 1879. 4 A. 216 (F.B.). *See also* 24 Mad. 319 (thief selling stamps stolen by him). Admission of a person, who is not a licensed vendor that he, at the request of licensed vendor, made endorsement on and entries in sale register in respect of stamps sold by the latter is not sufficient evidence to hold that he abetted the offence of a breach of R. 11, framed under S. 74, within the meaning of S. 107, Penal Code. 118 I.C. 206=1929 S. 118.

Sec. 70: SANCTION OF COLLECTOR.—1883 A. W.N. 98. Private persons cannot start the prosecution. 9 A.I.Cr.R. 2. *See also* 104 I.C. 108=28 Cr.L.J. 780=1927 N. 202.

Sec. 74.—RULE 16 made under the Act and promulgated on 5th June, 1925, if retrospective in its effect. *See* 94 I.C. 747=1926 S. 211. *See also* 118 I.C. 206=1929 S. 118.

(*a*) the supply and sale of stamps and stamped papers,

(*b*) the persons by whom alone such sale is to be conducted, and

(*c*) the duties and remuneration of such persons :

Provided that such rules shall not restrict the sale of one-anna [1][or half an anna] adhesive stamps.

Power to make rules generally to carry out Act.

75. The [2][collecting Government] may make rules[3] to carry out generally the purposes of this Act, and may be such rules prescribe the fines, which shall in no case exceed five hundred rupees, to be incurred on breach thereof.

Publication of rules.

76. [4][(1) All rules made under this Act shall be published in the Official Gazette.]

(2) All rules[5] published as required by this section shall, upon such publication, have effect as if enacted by this Act.

Delegation of certain powers.

[6][76-A. [7][The Central Government, subject to the provisions of section 124 (1) of the Government of India Act, 1935, and the Provincial Government, may by notification in the Official Gazette,] delegate—

(*a*) all or any of the powers conferred on it by sections 2 (9), 33 (3) (*b*), 70 (1), 74 and 78 to the Chief Controlling Revenue-authority ; and

(*b*) all or any of the powers conferred on the Chief Controlling Revenue-authority by sections 45 (1) (2), 56 (1) and 70 (2) to such subordinate Revenue-authority as may be specified in the notification.]

Saving as to court-fees.

77. Nothing in this Act contained shall be deemed to affect the duties chargeable under any enactment for the time being in force relating to court-fees.

Act to be translated and sold cheaply.

78. Every Provincial Government shall make provision for the sale of translations of this Act in the principal vernacular languages of the territories administered by it at a price not exceeding four annas per copy.

Repeal.

79. [8][* * * * * *]

LEG. REF.

[1] Inserted by Act V of 1906.

[2] Substituted for 'Governor-General in Council' by Government of India (Adaptation of Indian Laws) Order, 1937.

[3] For instance of rules made under this section in conjunction with S. 10, see *Gazette of India*, 1899, Pt. I, p. 82, Gen. R. and O.

For rules as to payment of allowances in respect of spoiled or misused stamps, or on the renewal of debentures, see *Gazette of India*, 1903, Pt. I, p. 537.

[4] Substituted by Government of India (Adaptation of Indian Laws) Order, 1937.

[5] For such rules by the (1) Government of Bengal, *see* Notification No. 6442 S.R., dated the 2nd December, 1899. *Calcutta Gazette*, 1899, Pt. I,p. 1498; (*ibid*), 1900, Pt. I,p. 897; (*ibid.*), 1903, Pt. I, p. 1380; (*ibid.*), 1906, Pt. I, p. 688; (2) Government of the Punjab, see *Punjab Gazette*, 1900, Pt. I, p. 415; (3) United Provinces of Agra and Oudh, *see* U.B.R. and O., *North-Western Provinces and Oudh Gazette*, 1897, Pt. I, p. 173; (*ibid.*) 1901, Pt. I, p. 601; (*ibid.*), 1902, Pt. I, p. 36; (*ibid.*), 1905, Pt. I, p. 535; (*ibid.*), 1907, Pt. I, p. 277; (4) North-West Frontier Province, see *Gazette of India*, 1902, Pt. II, p. 98; (5) Central Provinces, see *Central Provinces Cazette*, 1902, Pt. III, p. 65; (*ibid.*), 1903, Pt. III, p. 49; (*ibid*), 1904, Pt. III, p. 123; (*ibid.*), 1905 and 1906, Pt. III, pp. 570 and 13, respectively; (6) Burma, see *Burma Gazette*, 1902, Pt. I, p. 82; (7) Ajmer-Merwara, see *Gazette of India*, 1903, Pt. II, p. 1059; (8) Coorg, see *Coorg Gazette*, 1903, Pt. I, p. 66; (*ibid.*), 1906, Pt. I, pp. 66, 80 ; (*ibid.*), 1906, Pt. I, p. 115 ; (9) Madras, *see* Mad. R. and O.

[6] Inserted by Act IV of 1914, Sch. I.

[7] Substituted for 'The Local Government may, by notification in the local official Gazette' by Government of India (Adaptation of Indian Laws) Order, 1937.

[8] Repealed by Act X of 1914, Sch. I

SCHEDULE I.

STAMP-DUTY ON INSTRUMENTS.

(*See Section* 3.)

Description of instrument.	Proper stamp-duty.
1. Acknowledgment of a debt exceeding twenty rupees in amount or value, written or signed by, or on behalf of, a debtor in order to supply evidence of such debt in any book (other than a banker's pass-book) or on a separate piece of paper when such book or paper is left in the creditor's possession: provided that such acknowledgment does not contain any promise to pay the debt or any stipulation to pay interest or to deliver any goods or other property.	One anna.

NOTES.

Sch. I, Art. 1.—Dominant purpose of the document should be looked into in deciding whether a given acknowledgment is one falling within Sch. I, Art. 1. 46 M. 948=45 M.L.J. 399. *See also* 7 M.L.T. 84=5 I.C. 756. Each document has to be looked at by itself. 45 A. 374; 41 A. 169. *See also* 146 I.C. 1009=1933 L. 962; 53 A. 963=1932 A. 199; 1933 A.L.J. 198=1933 A. 256 (F.B.). The question, whether a particular acknowledgment falls within Art. 1, or is excepted from its operation by the proviso, will depend on the wording of the document. It is the document as it stands and not the bargain to which it refers, which has been made chargeable to stamp duty. The duty is on the instrument and not on the transaction. If therefore a document is so worded that it expressly, or by necessary implication, comes within a particular provision of the Act, it must be stamped accordingly. But the implication must arise from the phraseology used in the document, and not be matter of legal inference or presumption. An implication of law does not involve liability to duty, though it may give rise to certain legal obligations. It does not therefore follow that simply because a particular document is a good "acknowledgment" for the purpose of extending time under S. 19, Limitation Act, or may be basis of a suit, that it must necessarily be chargeable to duty as an agreement under the Stamp Act. *Held*, an entry in a *bahi* of the seller which was merely a memorandum of a transaction of purchase of goods on credit was neither an acknowledgment of a debt within the meaning of Art. 1 nor an agreement or memorandum of an agreement within the meaning of Art. 5 (*c*) and as such did not require to be stamped. It is a voucher which a purchaser who buys on credit leaves at the shop of the seller. The fact that the entry was made in *bahi* and not on a separate piece of paper made no difference. 1935 L. 567. *See also* 20 N.L.J. 276 ; 64 C.L.J. 75. Whether particular document is acknowledgment depends upon circumstances of each case—Primary question is whether document is to be evidence of debt—Where document contains entries showing intention to arrive at statement of account, signing such document cannot be held to supply evidence to creditor. 24 S.L.R. 372=121 I.C. 873 =1930 S. 189 ; 168 I.C. 799=1937 O.L.R. 322 =1937 O.W.N. 719=1937 O. 391. *See also* 132 I.C. 881=1931 L. 63 (acknowledgment coupled with a promise to pay must be stamped as an agreement or bond. *See also* 165 I.C. 520=40 C.W.N. 1181=1936 C. 399 ; 132 I.C. 844=32 P.L.R. 767). But *see* 127 I.C. 706=1931 L. 4 ; 1933 A. 577 ; 146 I.C. 882=1933 A.L.J. 897. The wording of the Stamp Act must be strictly construed and, unless the document that purports to be an acknowledgment is saved by the proviso to Art. 1, it cannot be admitted in evidence under the proviso to S. 35. For a document to be covered by the proviso to Art. 1, there must either be an express promise to pay as distinguished from the implied promise to pay, which is contained in any unconditional acknowledgment, or there must be a stipulation to pay interest or to deliver goods or other property. In the absence of any such express promise to pay or agreement to pay interest, the acknowledgment is a bare acknowledgment and, although under the general provisions of law it does imply a promise to pay, it is still an acknowledgment which should be stamped with a one anna stamp under Art. 1 and, therefore, if unstamped is inadmissible in evidence under S. 35. 1934 N. 273. An unstamped acknowledgment is not admissible in evidence. 21 B. 201 (F.B.). The account book entries are not liable to stamp duty and are admissible in evidence. 29 I.C. 943=8 Bur.L.T. 238. *See also* 146 I.C. 943=38 L.W. 846. Acknowledgment of correctness of account does not require stamp. 1936 M. 939. *See also* 174 I.C. 585= 1938 Pat. 139 ; 1940 N.L.J. 635 ; 1941 Nag. 70 ; 1939 Rang. 315. An acknowledgment in writing stating that interest will be paid at a certain per cent. in future must be stamped as an agreement under Art. 5 (*b*). 49 A. 796=1927 All. 677. *See also* 1933 A.L.J. 198=1933 A. 256 ; 1934 A.L.J. 1155=1934 A. 1052 ; 54 A. 761= 1933 A. 179 ; 92 I.C. 1046=24 L.W. 82. Promissory note not sufficiently stamped cannot be treated and used in evidence as acknowledgment. 63 C. 813=40 C.W.N. 399. A balance-shee. prepared and signed by a debtor showing the balance due from him is not valid, unless stamped with one anna stamp, though it may be admissible in evidence. 16 C.W.N. 945=39 C. 789. A letter written in reply to another letter sending a statement of accounts and mentioning that the account sent is correct is not an

Description of instrument.	Proper stamp-duty.
2. Administration-bond, including a bond given under section 256 of the Indian Succession Act, 1865, section 6 of the Government Savings Banks Act, 1873, section 78 of the Probate and Administration Act. 1881, or section 9 or section 10 of the Succession Certificate Act, 1889,—	
(*a*) where the amount does not exceed Rs. 1,000	The same duty as a bond (No. 15) for such amount.
(*b*) in any other case ..	Five rupees.

NOTES.

acknowledgment, and as such does not require a stamp. 1925 M. 1215=49 M.L.J. 306. Account stated—Letter admitting correctness of—Does not require stamp. *See* 91 I.C. 494. Whether a balance signed by a debtor in the books of his creditor amounts to an acknowledgment is a question depending upon the form of entry and the intention of the parties. 85 I.C. 290=1925 L. 119 (1). On this article, *see also* 22 I.C. 858 =18 C.W.N. 697 ; 29 I.C. 943=8 Bur.L.T. 238; 5 I.C. 756=7 M.L.T. 84. A memorandum of agreement to pay interest appended to an acknowledgment of a debt over the debtor's signature is a stipulation to pay interest within the proviso to Art. 5. The question of the cancellation of adhesive stamp is to be considered with reference to the facts of each particular case. 17 A.L.J. 19=41 All. 169. Documents which have been stamped in accordance with parties that has been recognised by the High Court for a long time, though not strictly legal, will be held to be duly stamped. 40 C. 219=17 C.W.N. 395.

ACKNOWLEDGMENT AND BOND— DISTINCTION BETWEEN.—There is a clear distinction between an "acknowledgment" and a "bond" as defined in the Stamp Act, and if a "promise to pay" is imported into an "acknowledgment" the distinction between the two will practically disappear, when the acknowledgment is attested. A promise to pay cannot be deemed to be included in an acknowledgment for the purpose of the Stamp Act. 1933 L. 271=34 P.L.R. 417.

Sch. I, Art. 1, proviso.—Where the balance of account was struck between the parties and above the entry of the balance and the thumb impression of the debtor there was a line which described the rate of interest on the balance struck, *held*, that the entry must be read as a whole, that there was a clear stipulation to pay interest and that the balance fell within the proviso to Art. 1. 127 I.C. 706=1931 L. 4. An acknowledgment of debt in order to incur the duty under Art. 1 must be not only an acknowledgment made to supply evidence of such debt, but must also contain no promise to pay the debt or no stipulation to pay interest or to deliver goods or other property. Where therefore a judgment-debtor in his letter asks the creditors to have full faith in him as he intends to reap his crops shortly and faithfully promises to pay the sum within three weeks, the letter is not liable to the stamp duty of one anna. 152 I.C. 879=1934 P. 629 (2). *See also* 132 I.C. 881 ; 132 I.C. 884 ; 1927 A. 677.

(Burma) Sch. I, Art. 1—Applicability—Test—Running account—Balance struck and signed every month—Stamp, not necessary. 1939 Rang. L.R. 194=1939 Rang. 315.

Even though a document is an acknowledgment of a debt, it does not come within the mischief of Art. 1 of Sch. I, Burma Stamp Act, unless it was created in order to supply evidence of such debt. 1939 Rang. 315; 44 P. L.R. 10 (F.B.).

Sch. I, Arts. 1, 5 and 15.—Entry with respect to balance struck in account book—Construction—Acknowledgment or agreement or bond. The question whether an entry with respect to a balance struck in an account book is to be classed an an acknowledgment agreement or bond for the purpose of duty chargeable under the Stamp Act has to be decided on the basis of the language used. It is the phraseology used and not the legal implications following from it that determines the duty chargeable on such cases. Stamp duty is not based on the legal obligation flowing from a document but is based on the nature of the document itself. What is taxed in other words is not the transaction but the document and therefore whatever implied promise there may be involved in an unconditional acknowledgment, it can never be a bond unless the obligation is contained in the document itself in express terms. In most cases in which balances are struck from time to time, the object is to extend the period of limitation and nothing more. The promise to pay is made at the time when the original loan is advanced and there is no necessity to make any fresh promise to pay so long as the period for limitation has not expired. But when the debt remains unpaid and the period of limitation is about to expire, the creditor generally requires the debtor to make an entry in his account book acknowledging the balance due so that it may serve to extend the period of limitation. Such entries usually fall within the category of "acknowledgments" as given in Art. 1, Sch. I except when they are taken out of the scope of the article by the proviso thereto. The phraseology employed usually is *baqi dene*, *baqi lane*, or *baqi rahe*, but all these expressions appear to mean really the same thing, *viz.*, that such and such balance is payable. When this phraseology is employed and there are no other words expressing any promise to pay the entries should be taken to amount to mere acknowledgment and would be chargeable as such. Of course if the acknowledgment includes any stipulation as to interest or to deliver any goods or other property the entry will be taken out of the scope of the article, by virtue of its proviso. If the phraseology of the entry itself contains a distinct promise to pay, it

Description of instrument.	Proper stamp-duty.
3. Adoption-deed, that is to say, any instrument (other than a will) recording an adoption or conferring or purporting to confer an authority to adopt. **Advocate.** *See* ENTRY AS AN ADVOCATE (No. 30).	Ten rupees.
4. Affidavit, including an affirmation or declaration in the case of persons by law allowed to affirm or declare instead of swearing. *Exemptions.* Affidavit or declaration in writing when made— [1][(*a*) as a condition of enrolment under the Indian Army Act, 1911, [2][or the Indian Air Force Act, 1932];] (*b*) for the immediate purpose of being filed or used in any Court or before the officer of any Court; or (*c*) for the sole purpose of enabling any person to receive any pension or charitable allowance.	One rupee.
5. Agreement or memorandum of an agreement— (*a*) [3][if relating to the sale of a bill of exchange];	Two annas,

LEG. REF.

[1] Cl. (*a*) substituted by Act XVIII of 1928.

[2] Inserted by Act XIV of 1932.

[3] Substituted for "if relating to the sale of Government security or share in an incorporated company or other body corporate or a bill of exchange" by Act VI of 1910, S. 3 (1).

NOTES.

will be classed as an agreement. If the entry is also attested it will be classed as a bond. 44 P.L.R. 10 (F.B.). *See also* 40 P.L.R. 231=1938 Lah. 511.

Art. 3.—Document 'recording' adoption. 13 Lah. 270=1932 Lah. 118 (F.B.).

Art. 4.—A document merely reciting that the executant has changed him name does not fall within the definition of an affidavit when it is not made formally before an attesting officer. A mere declaration, as it is, is not chargeable with stamp duty. 12 L.L.T. 18.

Art. 5.—A document styled as a receipt but declaring that the executant has borrowed a certain sum of money at a certain rate of interest does not amount to a mere acknowledgment but is a memorandum of an agreement. 1934 A.L.J. 1155=1934 All. 1052. *See also* 146 I.C. 943=38 L.W. 846 (entry in creditor's account book that the amount would be paid). Acknowledgment coupled with express promise to pay is an agreement and must be stamped as such. 165 I.C. 520=40 C.W.N. 1181=1936 Cal. 399. Agreement to lend money is not a bond. *See* 2 I.C. 432=33 Bom. 426. After the execution of a mortgage, the parties entered into an agreement which extended the period of the mortgage by a few more years. *Held*, the agreement was one on which stamp duty was leviable under Sch. I, Art. 5. 47 All. 310=1925 All. 501 (F.B.). A memorandum of agreement to pay interest appended to an acknowledgment of a debt over the debtor's signature is a stipulation to pay interest within proviso to Art. 1. 41 All. 169=17 A.L.J. 19. *See also* 49 All. 796=1927 All. 667; 92 I.C. 1046=24 L.W. 82. Interest to be payable in future, when appended to an acknowledgment of a debt over the signature of the debtor for the express purpose of being used thereafter as evidence of an agreement to pay interest at the particular rate specified, must be regarded as a stipulation to pay interest within the meaning of proviso to Art. 5, so as to make the document a memorandum of an agreement. 6 O.W.N. 1012. *See also* 132 I.C. 881=1931 All. 631; 132 I.C. 844=32 P.L.R. 767; 54 All. 761=1933 All. 179. An agreement to pay a certain quantity of grain on demand falls within Art. 5. It is not a promissory note under S. 2 (22), but requires a stamp of 8 annas. 1924 O. 106. A letter settling the terms on which an equitable mortgage is effected and written to the mortgagee by mortgagor at the time of depositing the title-deeds of the mortgaged property does not require registration and if it does not "secure any amount," it need only to be stamped as agreement under Art. 5. 35 I.C. 864=31 M.L.J. 347. A written proposal is not an agreement or a memorandum of agreement and does not become subject to stamp duty by reason of subsequent acceptance not in writing. 38 Mad. 349=25 M.L.J. 119. An agreement to hire machinery with an option to purchase falls under the above article and so requires stamp duty of eight annas. 44 Cal. 72=20 C.W.N. 1252. Agreement of sale deed—Stamp-duty. *See* 131 I.C. 503. A person agreed to purchase standing timber in certain jungle for a certain consideration and executed a document which he called kabuliyat (counter-part of lease), under which he promised to pay the price in a lump sum on a certain date, and in case of default, he agreed that the owner of the timber would have the right to realize the amount from him. He further promised to have the wood of the said jungle cut and removed within a year. *Held*, that the transaction was one of sale of goods or merchandise and the deed was an agreement or memorandum of agreement evidencing such sale, and was exempt from stamp duty under Art. 5,

Description of instrument.	Proper stamp-duty.
Agreement or memorandum of an agreement—(*Contd.*) (*b*) if relating to the sale of a Government security or share in an incorporated Company or other body corporate;	Subject to a maximum of ten rupees, one anna for every rupees 10,000 or part thereof of the value of the security or share.
(*c*) if not otherwise provided for ..	Eight annas.
Exemptions.[1] Agreement or memorandum of agreement— (*a*) for or relating to the sale of goods or merchandise exclusively, not being a NOTE OR MEMORANDUM chargeable under No. 43; (*b*) made in the form of tenders to the [2][Central Government] for or relating to any loan; (*c*) made under the European Vagrancy Act, 1874, section 17.	
Agreement to lease. *See* LEASE (No. 35).	

LEG. REF.

[1] For notification remitting the duty on such instruments for the cultivation of the hemp plant made by cultivators in the Madras Presidency, see *Gazette of India*, 1901, Pt. I, p. 32.

[2] Substituted by A.O., 1937.

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The mere fact that, beyond the stipulation for a sale of goods, there was an agreement that, in case a rival proprietor raised any objection to the cutting of timber and removal of the same the vendor was to have the responsibility, did not in any way alter from character of the agreement. 1931 A.L.J. 608=1931 All. 392 (F.B.). A partition list which does not itself effect any division, but is merely an agreement for effecting a future partition on terms agreed is not an instrument of partition within the meaning of S. 2 (15) and is liable to stamp duty as an agreement under Art. 5. 1933 Mad. 162. *Sarkhat* containing stipulation for interest at the top and unsigned entries of advances at the bottom—Document stamped as one agreement—Sufficiency. *See* 118 I.C. 173.

Art. 5 (c).—Where the instrument referred to the delivery to the Bank of promissory note on the terms that it shall be available as security for cash credit which the Bank had agreed to give to a borrower and the guarantor also executed an agreement as to the enforcement of the note, and the question was raised as to the stamp necessary for the instrument relating to the security of the overdraft. *Held*, that the instrument fell within Art. 5 (*c*) and not under Art. 6 or Art. 40 and was liable to stamp duty under that article as amended by S. 7 of the Burma Act II of 1932. 11 Rang. 145=142 I.C. 761=1933 Rang. 31 (F.B.). Vakalatnama containing stipulations as to amount of fees and as to payment in advance—Liability to be charged as agreement also. 40 C.W.N. 1340. On this section, *see also* 1935 Lah. 567.

Art. 5, Exemp.—Agreement or memorandum evidencing sale of goods or merchandise is exempt from stamp duty. 1931 A.L.J. 608=1931 A. 392 (F.B.). Per *Full Bench* (*Verma and Mulla, JJ.*, contra).—The word 'exclusively' in exemption (*a*) governs the phrase 'the sale of goods or merchandise' and therefore an agreement for the sale of goods or merchandise is exempt from stamp duty even though the instrument embodying the agreement evidences certain other transactions also. 1941 A.L.J. 427=I.L.R. (1941) All. 471=1941 All. 243 (F.B.). "Bond" and agreement to sell goods—Distinction. 163 I.C. 614=1936 A.L.J. 1185=1936 A. 481 (S.B.) (Agreement to sell goods also containing other collateral transactions). *See also* 1936 A.L.J. 368=1937 All. 190. Where a document is nothing more than an ordinary receipt or an acknowledgment containing also a promise to pay, it does not fall under Art. 1, Sch. I, and since it is both an acknowledgment as well as an agreement, it must, under S. 6 (*b*), be charged with the higher duty, *i.e.*, eight-annas under Art. 5 (*c*) and can be validated under S. 35. 1938 Nag. 464. In a suit based on a balance struck in the account book of the plainttff, the phraseology of the account was "baqui rehe lene lekha ker ke char so tees rapia." This was signed by the defendants. *Held*, that the document in suit was an agreement and not a mere acknowledgment as it contained a promise to pay. 40 P.L.R. 231=1938 Lah. 511. When the accused made a purchase of gold ornaments from a client, he got the client to make an entry in the account book giving the client's name and a description of the goods purchased and of the price paid, and got this signed by the client. *Held*, that the documents were merely memoranda of the sale of goods and were exempt from stamp duty under Art. 5, Exemption (*a*), and not conveyance within Art. 23, but as the documents contained a clear acknowledgment that the price had been received by the seller they were receipts as well as memoranda of the sale of goods and should have been stamped as

Description of instrument.	Proper stamp-duty.
[1]**16. Agreement relating to deposit of title-deeds, pawn or pledge,** that is to say, any instrument evidencing an agreement relating to— (1) the deposit of title-deeds or instruments constituting or being evidence of the title to any property whatever (other than a marketable security), or (2) the pawn or pledge of movable property, where such deposit, pawn or pledge has been made by way of security for the repayment of money advanced or to be advanced by way of loan or an existing or future debt— (*a*) if such loan or debt is repayable on demand or more than three months from the date of the instrument evidencing the agreement; (*b*) if such loan or debt is repayable not more than three months from the date of such instrument. *Exemption.* Instrument or pawn of pledge or goods if unattested.	The same duty as a Bill of Exchange [No. 13 (*b*)] for the amount secured. Half the duty payable on a Bill of Exchange [No. 13 (*b*)] for the amount secured.
7. Appointment in execution of a power, whether of trustees or of property, movable or immovable, where made by any writing not being a will.	Fifteen rupees.
8. Appraisement or valuation made otherwise than under an order of the Court in the course of a suit— (*a*) where the amount does not exceed Rs. 1,000 .. (*b*) in any other case ..	The same duty as a Bond (No. 15) for such amount. Five rupees.
Exemptions. (*a*) Appraisement or valuation made for the information of one party only, and not being in any manner obligatory between parties either by agreement or operation of law. (*b*) Appraisement of crops for the purpose of ascertaining the amount to be given to a landlord as rent.	
9. Apprenticeship-deed, including every wirting relating to the service or tuition of any apprentice,[2] clerk or servant placed with any master to learn any profession, trade or employment, not being ARTICLES OF CLERKSHIP (No. 11). *Exemption.* Instruments of appenticeship executed by a Magistrate under the Apprentices Act, 1850, or by which a person is apprenticed by or at the charge of any public charity.	Five rupees.
10. Articles of Associatlon of a company .. *Exemption.* Articles of any Association not formed for profit and registered under section 26 of the Indian Companies Act, 1882 [3] *See also* MEMORANDUM OF ASSOCIATION OF A COMPANY (No. 39).	Twenty-five rnpees.
11. Articles of clerkship or contract whereby any person first becomes bound to serve as a clerk in order to his admission as an attorney in any High Court	Two hundred and fifty rnpees.

LEG. REF.

[1] Substituted for the original article by S. 8 (1) of the Indian Stamp (Amendment) Act (XV of 1904).

[2] For notification remitting the duty on apprenticeship-deeds in the case of distributors or compositors apprenticed to the Superintendent of Government Printing, India, see *Gazette of India*, 1899, Pt. I, p. 1068.

[3] *See* now Act VII of 1913.

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receipts with stamp duty of one anna each. 1934 A. L.J. 582=1934 A. 201. *See also* 131 I.C. 503=1931 Rang. 193.

Art. 6.—*See* 11 R. 145=1933 R. 31.

Art. 7.—A will by the founder of an endowment providing for succession to the office of shebait and giving the panch the power to enquire into the misconduct of shebait and to remove him from the office and appoint a new shebait instead, falls within Art. 7. 51 I.C. 884=23 C.W.N. 401.

Description of instrument.	Proper stamp-duty.
Assignment. *See* CONVEYANCE (No. 23), TRANSFER (No. 62), and TRANSFER OF LEASE (No. 63), as the case may be. **Attorney.** *See* ENTRY AS AN ATTORNEY (No. 30), and POWER OF ATTORNEY (No. 48). **Authority to adopt.** *See* ADOPTION-DEED (No. 3).	
12. Award, that is to say, any decision in writing by an arbitrator or umpire, not being an award directing a partition, on a reference made otherwise than by an order of the Court in the course of a suit—	
(*a*) where the amount or value of the property to which the award relates as set forth in such award does not exceed Rs. 1,000;	The same duty as a Bond (No. 15) for such amount.
(*b*) in any other case ..	Five rupees.
Exemption. Award under the Bombay District Municipal Act, 1873,[1] section 81, or the Bombay Hereditary Offices Act, 1874, section 18.	
13. Bill of Exchange [as defined by section 2 (2)[2]] not being a BOND, bank-note or currency-note—	
(*a*) [3][* * * * *]	
[4][(*b*) where payable otherwise than on demand, but not more than one year after date or sight—	If drawn singly. / If drawn in set of two, for each part of the set. / If drawn in set of 3, for each part of the set.
	Rs. a. p. / Rs. a. p. / Rs. a. p.
if the amount of the bill or note does not exceed Rs. 200	0 3 0 / 0 2 0 / 0 1 0
if it exceeds Rs. 200 and does not exceed 400	0 6 0 / 0 3 0 / 0 2 0
Ditto 400 ditto 600	0 9 0 / 0 5 0 / 0 3 0
Ditto 600 ditto 800	0 12 0 / 0 6 0 / 0 4 0
Ditto 800 ditto 1,000	0 15 0 / 0 8 0 / 0 5 0
Ditto 1,000 ditto 1,200	1 2 0 / 0 9 0 / 0 6 0
Ditto 1,200 ditto 1,600	1 8 0 / 0 12 0 / 0 8 0
Ditto 1,600 ditto 2,500	2 4 0 / 1 2 0 / 0 12 0
Ditto 2,500 ditto 5,000	4 8 0 / 2 4 0 / 1 8 0
Ditto 5,000 ditto 7,500	6 12 0 / 3 6 0 / 2 4 0
Ditto 7,500 ditto 10,000	9 0 0 / 4 8 0 / 3 0 0
Ditto 10,000 ditto 15,000	13 8 0 / 6 12 0 / 4 8 0
Ditto 15,000 ditto 20,000	18 0 0 / 9 0 0 / 6 0 0
Ditto 20,000 ditto 25,000	22 8 0 / 11 4 0 / 7 8 0
Ditto 25,000 ditto 30,000	27 0 0 / 13 8 0 / 9 0 0
and for every additional Rs. 10,000 or part thereof in excess of Rs. 30,000	9 0 0 / 4 8 0 / 3 0 0]

LEG. REF.

[1] *See* now the Bombay District Municipal Act (B. Act III of 1901), B. Code.

[2] The words "and (3)" have been omitted by Act V of 1927.

[3] Clause (*a*) which stood as follows :—[(*a*) where payable on demand one anna]—has been omitted by Act V of 1927.

[4] Substituted by Act I of 1912.

NOTES.

Art. 12.—A decree of Court in the terms of an award is not an instrument chargeable with stamp duty. 11 L.L.T. 147. What has to be considered is not the value which the appellants may place on the property at the time of filing their application for the purpose of invoking the jurisdiction of the Court, but the value of the property at the time of the making of the award. When the value of the property with which the instrument in question is concerned is not stated in the instrument, its value for the purpose of stamp duty must be taken to be the price which could be obtained for it on a sale in open market. Where the property concerned is a Buddhist monastery which has no value, the stamp duty payable is the minimum amount payable under Art. 12, read with Art. 15, as amended by Burma Act (II of 1932), that is, two annas. 1935 R. 204. *See* 1942 All. 220 (F.B.).

Art. 13.—A document, which was in fact a bill of exchange, though it was loosely described as a hundi, was properly stamped under R. 6 of the Rules of the Governor-General in Council, when a portion of it appeared to have

Description of instrument.	Proper stamp-duty.
Bill of exchange—(*Contd.*) (*c*) where payable at more than one year after date or sight.	The same duty as a Bond (No. 15) for the same amount.
[1]**14. Bill of Lading** (including a through bill of lading) ..	Four annas. *N.B.*—If a bill of lading is drawn in parts, the proper stamp therefor must be borne by each one of the set.
Exemptions. (*a*) Bill of lading when the goods therein described are received at a place within the limits of any port as defined under the [2]Indian Ports Act, 1889, and are to be delivered at another place within the limits of the same port. (*b*) Bill of lading when executed out of British India and relating to property to be delivered in British India.	
15. Bond [as defined by section 2 (5)] not being a DEBENTURE (No. 27) and not being otherwise provided for by this Act, or by the Court-Fees Act, 1870,—	
where the amount or value secured does not exceed Rs. 10;	Two annas.
where it exceeds Rs. 10 and does not exceed Rs. 50	Four annas.
Ditto 50 ditto Rs. 100	Eight annas.
Ditto 100 ditto 200	One rupee.
Ditto 200 ditto 300	One rupee eight annas.
Ditto 300 ditto 400	Two rupees.
Ditto 400 ditto 500	Two rupees eight annas.
Ditto 500 ditto 600	Three rupees.

LEG. REF.

[1] Bills of Lading of Inland Steamer Companies have been exempted from the duty payable under this article, see *Gazette of India*, 1904. Pt. I, p. 38.

[2] *See* now the Indian Ports Act, 1908 General Acts, Vol. VI.

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been written on each of three sheets of stamp paper of the aggregate value required by law. 23 C.W.N. 534=29 C.L.J. 305. An order on a firm to pay a specified sum of money to a certain person or bearer is a bill of exchange payable on demand and is chargeable with a duty of one anna. 47 I.C. 561=11 Bur.L.T. 87. On this article, *see also* 8 L.B.R. 155=28 I.C. 300; 44 I.C. 109.

Art. 14 : CONSTRUCTION OF ARTICLE.—*See* 5 O.W.N. 706=1928 P.C. 231. Endorsements on drafts extending duration—Effect of—Not material alterations that would make the instrument void. 5 O.W.N. 706. On this article, *see also* 146 I.C. 943=38 L.W. 846.

Art. 15.— *See* I.L.R. (1941) All. 471=1941 A.L.J. 427=1941 All. 243 (F.B.). Art. 15 applies only when the instrument is not otherwise provided for. Where Art. 5 applies, Art. 15 does not. 163 I.C. 614=1936 A. 481. 1936 A.L.J. 1185 (S.B.) Per *Verma and Mulla JJ.* (*Bajpai and Dar, JJ.* dissenting).—Art. 15 applies to that portion of the instrument which does amount to a "bond" and to which that article would otherwise be applicable, even if any portion of the instrument comes within any article of Sch. I, other than Art. 15 which excludes only such instruments as are covered by any one of the categories of bonds mentioned in the note appended to that article, namely, Administration bond, Bottomry bond, Customs bond, Indemnity bond, Respondentia bond and Security bond. Therefore, Art. 15 cannot be said to be a residuary article in the sense that it cannot apply so long as the instrument to which it is sought to be applied falls under any one of the other articles in Sch. I. I. L.R. (1941) All. 471=1941 A. L. J. 427=1941 All. 243 (F.B.). *See also* 17 L. 74=1936 L. 45 (Security bond for appearance pending insolvency petition). A security bond given at the time of stay of execution for the due performance of the decree making the surety personally liable must bear a court-fee stamp as required by Art. 6, Court-Fees Act. No stamp under Stamp Act is necessary as it falls under the residuary Art. 15, Stamp Act. 117 I.C. 226=1929 L. 205; 1925 L. 552=91 I.C. 772 is not good law. *See also* 43 I.C. 376=21 C.W.N. 1150; 143 I.C. 12=34 P.L.R. 480; 141 I.C. 301. Agreement to deliver a certain quantity of cotton or in default to pay its price at the then prevailing market rate must be stamped as a bond under Art. 15. 98 I.C. 631=1927 N. 72. *See also* 1936 A.L.J. 1185=1936 A. 481 (S.B.). *Exparte* decree by Small Cause Court—Application to set aside—Security bond—Stamp duty—Court-fee stamp of eight annas—Sufficiency. *See* 68 M.L.J. 466 (F.B.) On this article, *see also* 37 M. 17=20 I.C. 775.

Description of Instrument.	Proper Stamp-duty.
Bond—(*Contd*).	
Where it exceeds Rs. 600 and does not exceed Rs. 700	Three rupees eight annas.
Ditto 700 ditto 800	Four rupees,
Ditto 800 ditto 900	Four rupees eight annas.
Ditto 900 ditto 1,000	Five rupees.
and for every Rs. 500 or part thereof in excess of Rs. 1,000.	Two rupees eight annas
See ADMINISTATION BOND (No. 2), BOTTOMRY BONN (No. 16), CUSTOMS BOND (No. 26), INDEMNITY BOND (No. 34), RESPONDENTIA BOND (No. 56), SECURITY BOND (No. 57).	
Exemptions.	
Bond, when executed by—	
(*a*) headmen nominated under rules framed in accordance with the Bengal Irrigation Act, 1876, section 99, for the due performance of their duties under that Act:	
(*b*) any person for the purpose of guaranteeing that the local income derived from private subscriptions to a charitable dispensary or hospital or any other object of public utility shall not be less than a specified sum per mensem.	
16. Bottomry Bond, that is to say, any instrument whereby the master of a sea-going ship borrows money on the security of the ship to enable him to preserve the ship or prosecute her voyage.	The same duty as a Bond (No. 15) for the same amount.
17. Cancellation—Instrument of (including any instrument by which any instrument previously executed is cancelled), if attested and not otherwise provided for.	Five rupees.
See also RELEASE (No. 55), REVOCATION OF SETTLEMENT (No. 58-B), SURRENDER OF LEASE (No. 61), REVOCATION OF TRUST (No. 64-B).	
18. Certifiate of sale (in respect of each property put up as a separate lot and sold) granted to the purchaser of any property sold by public auction, by a Civil or Revenue Court, or Collector or other Revenue Officer—	
(*a*) where the purchase-money does not exceed Rs. 10;	Two annas.
(*b*) where the purchase money exceeds Rs. 10 but does not exceed Rs. 25;	Four annas.
(*c*) in any other case	The same duty as a conveyance (No. 23) for a consideration equal to the amount of the purchase-money only.
19. Certificate or other document evidencing the right or title of the holder thereof, or any other person, either to any shares, scrip or stock in or of any incorporated company or other body corporate, or to become proprietor of shares, scrip, or stock in or of any such company or body.	[1][Two annas,]
See also LETTER OF ALLOTMENT OF SHARES (No. 36).	
20. Charter-party, that is to say, any instrument (except an agreement for the hire of a tug-steamer) whereby a vessel or some specified principal part thereof is let for the specified purposes of the charterer, whether it includes a penalty clause or not.	One rupee.
21. [2][* * * * * *]	
22. **Composition-deed**, that is to say, any instrument execu-	Ten rupees.

LEG. REF.

[1]The words "two annas" were substituted for "one anna" by Act XLIII of 1923.

[2]Art. 21 has been omitted by Act V of 1927. The omitted Art. 21 stood as follows:— "Cheque [as defined by section 2 (7)] ..... one anna."

NOTES.

Art. 22.—*See* 38 B. 576=24 I.C. 730.

Arts. 22 and 23.—Under a composition deed all the property of the debtor must be conveyed. Otherwise the deed becomes a conveyance. 8 L.L.T. 57. Under Art. 23 consideration is essential to prove a conveyance. 8 L.L.T. 59.

Description of instrument.	Proper stamp-duty.
Composition-deed—(*Contd.*) ted by a debtor whereby he conveys his property for the benefit of his creditors, or whereby payment of a composition or dividend on their debts is secured to the creditors, or whereby provision is made for the continuance of the debter's business. under the supervision of inspectors or under letters of licence, for the benefit of his creditors.	
23. Conveyance [as defined by section 2 (10)] not being a TRANSFER charged or exempted under No. 62,— where the amount or value of the consideration for such conveyance as set forth therein does not exeeed Rs. 50; where it exceeds Rs. 50 but does not exceed Rs. 100	Eight annas.
Ditto 100 ditto 200	One rupee.
Ditto 200 ditto 300	Two rupees.
Ditto 300 ditto 400	Three rupees.
Ditto 400 ditto 500	Four ru es.
Ditto 500 ditto 600	Five rupees.
Ditto 600 ditto 700	Six rupees.
Ditto 700 ditto 800	Seven rupees.
Ditto 800 ditto 900	Eight rupees.
Ditto 900 ditto 1,000	Nine rupees.
and for every Rs. 500 or part thereof in excess of Rs. 1,000.	Ten rupees.
Exemption. Assignment of copyright by entry made under the Indian Copyright Act, 1847, section 5. **Co-partnership-deed.** *See* PARTNERSHIP (No. 46).	Five rupees.
24. Copy or Extract certified to be a true copy or extract by or by order of any public officer and not chargeable under the law for the time being in force relating to court-fees— (*i*) if the original was not chargeable with duty or if the duty with which it was chargeable does not exceed one rupee.	Eight annas.
(*ii*) in any other case.	One rupee.
Exemptions. (*a*) Copy of any paper which a public officer is expressly required by law to make or furnish for record in any rublic office or for any public purpose.	

NOTES.

Art. 23.—Where there is nothing in a document to show that title in the property was being conveyed by the vendor to the vendee by it, on the other hand, the document refers to a sale as a completed transaction under which possession had been delivered to the vendee, and the primary object of the execution of the documents appears to be to record the fact that, out of the total purchase price, a portion had been received by the vendor from the vendee and to safeguard the latter against a fresh demand for that sum, rather than to create title in the vendee as owner of the land, which had been done already by an independent transaction altogether. *Held* that the document is a receipt and not conveyance. 14 L. 102=1932 L. 535 (S.B.). The test to determine whether a document is a conveyance is to find out whether the intention of the parties was that the document should be the sole, repository and appropriate evidence of the transaction of sale. If it is so. the Court must hold it to be a conveyance. But if it merely recites a part accomplished fact, it is not a conveyance liable to be stamped or registered as such. A deed which merely acknowledges as a fact that a right is vested in a particular person is not a conveyance; it has to be shown that the right was created by the particular deed in question. 13 L.L.T. 48. *See also* 41 C.W.N. 961; 20 Lah. L.T. 108=43 P.L.R. 294. When the accused made a purchase of gold ornaments from a client, he got the client to make an entry in the account book giving the client's name and description of the goods purchased and of the price paid, and got this signed by the client. *Held*, that the documents were merely memoranda of the sale of goods and were exempt from stamp duty under Art. 5, Exemption (*a*) and not conveyance within Art. 23, but as the documents contained a clear acknowledgment that the price had been received by the seller they were receipts as well as memoranda of the sale of goods and should have been stamped as receipts with stamp duty of one anna each. 56 A. 680=1934 A.L.J. 582=1934 A. 201. Conveyance in consideration of discharge of debt—Mention of less than actual amount due—Balance stated as waived—Stamp duty. 1935 R. 243. *See also* 1935 R. 613.

Description of instrument.	Proper stamp-duty.
Copy or Extract—(*Contd.*) (*b*) [1][Copy of, or extract from, any register relating to births baptisms, namings. dedications, marriages, [1][divorces], deaths or burials.]	
25. Counterpart or Duplicate of any instrument chargeable with duty and in respect of which the proper duty has been paid,— (*a*) if the duty with which the original instrument is chargeable does not exceed one rupee; (*b*) in any other case. *Exemption.* Counterpart of any lease granted to cultivator when such lease is exempted from duty.	The same duty as is payable on the original. One rupee.
26. Customs-Bond— (*a*) where the amount does not exceed Rs. 1,000. (*b*) in any other case.	The same duty as a Bond (No. 15) for such amount. Five rupees.
[2][**27. Debenture** (whether a mortgage debenture or not) being a marketable security transferable— (*a*) by endorsement or by a separate instrument of transfer; (*b*) by delivery. *Explanation.*—The term "debenture" includes any interest coupons attached thereto, but the amount of such coupons shall not be included in estimating the duty. *Exemption.* A debenture issued by an incorporated company or other body corporate in terms of a registered mortgage-deed, duly stamped in respect of the full amount of debentures to be issued thereunder, whereby the company or body borrowing makes over, in whole or in part, their property to trustees for the benefit of the debenture-holders: provided that the debentures so issued are expressed to be issued in terms of the said mortgage-deed. *See also* BOND (No. 15) and sections 8 and 55.] **Declaration of any Trust.** *See* TRUST (No. 64.)	The same duty as a Bond (No, 15) for the same amount. The same duty as a Conveyance (No. 23) for a consideration equal to the face amount of the debenture.
28. Delivery Order in respect of Goods, that is to say, any instrument entitling any person therein named, or his assigns or the holder thereof, to the delivery of any goods lying in any dock or port, or in any warehouse in which goods are stored or deposited on rent or hire, or upon any wharf, such instrument being signed by or on behalf of the owner of such goods, upon the sale or transfer of the property therein, when such goods exceed in value twenty rupees. **Deposit of Title Deeds.** [3][*See* AGREEMENT relating to DEPOSIT OF TITLE-DEEDS, PAWN OR PLEDGE (No. 6.)] **Dissolution of Partnership.** *See* PARTNERSHIP. (No. 46).	One anna.
29. Divorce—Instrument of, that is to say. any instrument by which any person effects the dissolution of his marriage. **Dower**—Instrument of. *See* SETTLEMENT (No. 58.) **Duplicate.** *See* COUNTERPART (No. 25.)	One rupee.

LEG. REF.

[1]This clause was substituted for cls- (*b*) and (*c*) by S. 7 (1) of the Indian Stamp (Amendment Act (V of 1906). After the word "marriages" the word "divorces" were inserted by Act X of 1914, Sch. I.

[2]Substituted by Act VI of 1910, S. 3 (*iii*).

[3]Substituted for the words and figure "*See* Agreement by way or equitable mortgage (No. 6)." by S. 2 of the Indian Stamp (Amendment) Act (XV of 1904).

NOTES.

Art. 27.—Certificate of registered debenture stock should be stamped under this article. 4 R. 456=1927 R. 37 (F.B.).

Description of instrument.	Proper stamp-duty.
30. Entry as an Advocate, Vakil or Attorney on the Roll of any High Court [1][under the Indian Bar Councils Act, 1926, or] in exercise of powers conferred on such Court by Letters Patent or by the Legal Practitioners Act, 1884— (*a*) in the case of an Advocate or Vakil. (*b*) in the case of an attorney. *Exemption.* Entry of an advocate, vakil or attorney on the roll of any High Court when he has previously been enrolled in a High Court.	 Five hundred rupees. Two hundred and fiifty rupees.
[2][* * * *] **31. Exchange of Property**—Instrument of	The same duty as a Conveyance (No. 23) for a consideration equal to the value of the property of greatest value as set forth in such instrument.
Extract. *See* COPY [No. 24).	
32. Further Charge—Instrument of, that is to say, any instrument imposing a further charge on mortgaged property—	
(*a*) when the original mortgage is one of the description referred to in clause (*a*) of Article No. 40 (that is, with possession);	The same daty as a Conveyancc, (No. 23) for a consideration equal to the amount of the further charge secured by such instrument.
(*b*) when such mortgage is one of the description referred to in clause (*b*) of Article No. 40 (that is, without possession)— (i) if at the time of execution of the instrument of further charge possession of the property is given or agreed to be given under such instrument;	The same duty as a conveyance (No. 23) for a consideration equal to the total amount of the charge (including the original mortgage and any further charge already made) less the duty already paid on such original mortgage and further charge.

LEG. REF.

[1]Inserted by Act XXXVIII of 1926.

[2]The entry "Equitable mortgage" was omitted by S. 3 of Indian Stamp (Amendment) Act (XV of 1904); the entry was as follows:—

"EQUITABLE MORTGAGE.—*See* agreement by way of Equitable Mortgage No. 6."

NOTES.

Art. 30.—The Court of the Judical commissioner of Upper Burma is not a High Court within the meaning of Art. 30. 1 R. 142; 1924 R. 1. There is a wide difference between 'pleader' and 'advocate' or 'vakil,' Advocates, vakils and attorneys fall into one category and belong to the legal practitioners practising in a High Court and pleaders and mukhtars belong to another class of legal practitioners, who practise in subordinate Courts. The position of the two classes is different in many ways. An advocate, vakil or attorney is enrolled once and for all and unless struck off the roll or suspended from practice, he has the right to practise without any further payment; a pleader is not enrolled; he receives a sanad or certificate which lasts for one year and which has to be renewed and a new fee paid every year. This class does not fall within Art. 30 of Stamp Act at all and does not fall within the class that may practise in a Chartered High Court according to the scheme of the Legal Practitioners' Act. I.L.R. (1938) Nag. 186=1937 Nag. 318. Advocate enrolled in Rangoon High Court before separation of Burma from India—Application after separation for enrolment as advocate of Madras High Court—Payment of enrolment fee over again—Necessity. *See* (1942) 1 M.L.J. 599 (F.B.) Enrolment as attorney—Subsequent enrolment as advocate—Fee payable. *See* 36 C. 645=2 I. C. 843.

Art. 31—Documents relating to sale of goods—Construction—Memorandum of agreement on exchange. *See* 1936 A.L.J. 368.

Description of instrument.	Proper stamp-duty.
Further Charge—(*Contd.*,) (ii) if possession is not so given.	The same duty as a bond (No. 15) for the amount of the further charge secured by such instrument.
33. Gift—Instrument of, not being a SETTLEMRNT (No. 58 OR WILL OR TRANSFER (No. 62.)	The same duty as a conveyance (No. 23) for a consideration equal to the value of the property as set forth in such instrument.
Hiring Agreement or agreement for service. *See* AGREEMENT (No. 5.)	
34. Indemnity-Bond **Inspectorship-Deed**—*See* COMPOSITION-DEED (No, 22.) **Insurance.** *See* POLICY OF INSURANCE (No. 47.)	The same duty as a Security-Bond (No. 57) for the same amount.
35. Lease, including an under lease or sub-lease and any agreement to let or sub-let—	

NOTES.

Arts. 33 and 55—Deed—gift or Release.—Art. 55 of the Stamp Act governs instruments whereby any person may renounce a claim upon any other person or against any specified property; but a document in which the executant is not renouncing any claim upon property but is transferring possession of it does not fall under Art. 55. A Hindu widow governed by the Dhayabhaga School of Hindu law was allotted by a decree of Court in a partition suit certain properties with rights in the said properties similar to those of a Hindu widow in the estate of her deceased husband and was in possession of the properties in viitue of the decree and was in enjoyment of the usufruct thereof. She desired to surrender her interest in the properties to her sons who would succeed to the property in the ordinary course of her death and for that purpose she executed a deed whereby she transferred the right to possession of the properties to her sons. *Held*, (1) that the deed was an instrument of gift governed by Art. 33 and was not a release under Art. 55; (2) that stamp duty was payable on the value of the properties conveyed as described in the deed, the value to be stated in the deed being not the capital value of the property conveyed, but the present value of the life interest of the widow, whatever that might have been at the time of the execution of the deed. 18 Pat.L. T. 933=17 Pat. 95=1937 P.W.N. 962=1938 Pat. 33 (S.B.).

Art. 35.—An agricultural lease is exempt from stamp duty under Exemption (*a*) to Art. 35. 44 I.C. 109. An agreement to pay shop rent at Rs. 60 per month at Rs. 2 per day creates a monthly tenancy and not a tenancy for an indefinite term under the sub-cl. (*iv*). 46 C. 804= 51 I.C. 221=23 C.W.N. 398; 39 B. 434=28 I. C. 584=17 Bom.L.R. 320. Where a lease is from month to month and does not give the lessee a right to continue in possession for more than six weeks consecutively because on two weeks' notice being given the lessee would have to vacate at the end of the following month, the lease falls under sub-Cl. (*a*) (*i*) of Art. 35 of Sch. 1-A of the Stamp Act and not under sub-Cl. (*a*) (*viii*) of that article. An annual lease is a lease which gives the lessee a definite right to continue in possession for a full year. 19 Lah. L.T. 32. *See also* 1938 All. 304; 1938 Lah. 531. A lease for less than one year means a lease for some specified period which is less than 12 months. It does not follow that because a lease deed is a monthly tenancy under S. 106, T.P. Act, it is a lease for less than one year. A lease which is expressed to be a monthly one but which specifies no period of duration is clearly a lease for an indefinite term and must be stamped under Cl. (*viii*) of Art. 30 (*a*), of Sch. I-A of the Stamp Act as amended in Madras and not under Cl. (*i*) of Art. 30 (*a*). I.L.R. (1939) Mad. 384=49 L.W. 253=1939 Mad. 356=(1939) 1 M.L.J. 350 (F.B.). Where no period is fixed or mentioned in a lease but the tenancy is terminable on a month's notice, it is not a lease purporting to be for a term of less than one year and does not fall under Art. 35 (*a*) (i) of the Stamp Act but falls under Art. 35 (*a*) (iv) (which is Art. 35 (*a*) (viii) as amended for United Provinces) which, relates to cases where the lease does not purport to be for any definite term inasmuch as the lease does not fix a period for its duration. 1941 O.W.N. 45= 1941 Oudh 217. Agreement to lease—What constitutes—No demise of interest *in present.*—Ostensible owner having no title—Advance of money as loan and not as consideration for lease—Simple agreement—Stamp payable. *See* 53 B. 1=112 I.C. 758. On this article, *see also* 39 B. 431=28 I.C. 584=17 Bom.L.R. 320; 8 I.C. 481=19 M.L.J. 35; 55 A. 874=1933 A. L.J. 749=1933 A. 735 (F.B.); 1934 N. 273; (1940) 1 M.L.J. 391 (F.B.). Where a lease of a house only provided that a month's notice was to be given, in case it was required to be vaçated, though it is a monthly tenancy within the meaning of S. 106 of the T. P. Act, it does not follow from that the document is a lease for less than one year. The lease is for an indefinite period and as such is to be stamped as required by Art. 35 (*a*) (*iv*) of the Stamp Act. I.L.R. (1938) All. 481=1938 A.L.J. 324=1938 All.

Description of instrument.	Proper stamp-duty.
Lease—(*Contd.*) (*a*) where by such lease the rent is fixed and no premium is paid or delivered— (i) where the lease purports to be for a term of less than one year;	The some duty as a Bond (No. 15) for the whole amount payable or deliverable under such lease.
(ii) where the lease purports to be for a term of not less than one year but not more than three years;	The same duty as a Bond (No. 15) for the amount or value of the average annual rent reserved.
(iii) where the lease purports to be for a term of in excess of three years;	The same duty as a Conveyance (No. 23) for a consideration equal to the amount or value of the average annual rent reserved.
(iv) where the lease does not purport to be for any definite term;	The same duty as a Comveyance (No. 23) for a consideration equal to the amount or value of the average annual rent which would be paid or delivered for the first ten years if the lease continued so long.
(v) where the lease purports to be in perpetuity;	The same duty as a Conveyance (No. 23) for a consideration equal to one-fifth of the whole amount of rents which would be paid or delivered in respect of the first fifty years of the lease.
(*b*) where the lease is granted for a fine or premium or for money advanced and where no rent is reserved;	The same duty as a Conveyance (No. 23) for a consideration equal to the amount or value of such fine or premium or advance as set forth in the lease.
(*c*) where the lease is granted for a fine or premium or for money advanced in addition to rent reserved:	The same duty as a Conveyance (No. 23) for a consideration equal to the amount or value of such fine or premium or advance as set forth in the lease, in addition to the duty which would have been payable on such lease if no fine or premium or advance had been paid or delivered:

NOTES.

304. *See also* 41 P.L.R. 713=1939 Lah. 531; (1939) 1 M.L.J. 350=1939 Mad. 356; 1941 Oudh 217.

Arts. 35 (a) (vi), 35 (c) and (5) (c).—Lease of land, buildings and appurtenances for 34 years—Covenant by lessee to pay off lessor's debt and annual rent—Property to pass to lessee at the end of period—Stamp payable, *see* 61 C. 556=38 C.W.N. 627=1934 C. 803.

Art. 35 (a) and (b).—'RENT RESERVED'—MEANING OF.—The only meaning that can be given to the word 'reserved' in Art. 35 (*b*) is, that it is rent agreed to be paid and received as such and not a payment which has already been made and received in consideration of which possession of the property is transferred for the term specified. There is nothing to distinguish a sum represented as having been paid in advance for rent from any other money advanced. Hence Art. 35 (*b*) applies to cases of leases in which money is advanced as consideration for the lease and where no rent is reserved or where no provision has been made for the payment of rent for the period of the lease, and not Art. 35 (*a*). 1941 N.L.J. 103. Under Art. 35 (*b*) of Sch. I-A the duty payable in the case of a lease where the whole rent is paid in a lump sum in advance is the same as that payable on a conveyance. If the parties execute a mortgage

Description of instrument.	Proper stamp-duty.
Lease—(*Contd.*)	**Provided that, in any case when an agreement to lease is stamped with the *ad valorem* stamp required for a lease, and a lease in pursuance of such agreement is subsequently executed, the duty on such lease shall not exceed eight annas.**
Exemptions. (*a*) Lease, executed in the case of a cultivator and for the purposes of cultivation (including a lease of trees for the production of food or drink), without the payment or delivery of any fine or premium, when a definite term is expressed and such term does not exceed one year, or when the average annual rent reserved does not exceed one hundred rupees. [1] (*b*) [Omitted.]	
36. Letter of Allotment of Shares in any company or proposed company, or in respect of any loan to be raised by any company or proposed company. *See also* CERTIFICATE OR OTHER DOCUMENT (No. 19).	[2] [Two annas.]
37. Letter of Credit, that is to say, any instrument by which one person authorizes another to give credit to the person in whose favour it is drawn. **Letter of Guarantee.** *See* AGREEMENT (No. 5).	[2] [Two annas.]
38. Letter of Licence, that is to say, any agreement between a debtor and his creditors, that the latter shall, for a specified time, suspend their claims and allow the debtor to carry on business at his own discretion.	Ten rupees.
39. Memorandum of Association of a Company—	
(*a*) if accompanied by articles of association under section 37 of the Indian Companies Act, 1882;[3]	Fifteen rupees.
(*b*) if not so accompanied.	Forty rupees.
Exemption. Memorandum of any association not formed for profit and registered under section 26 of the Indian Companies Act, 1882.[3]	
40. Mortgage-deed, not being [4][AN AGREEMENT RELATING TO DEPOSIT OF TITLE-DEEDS, PAWN OR PLEDGE (No. 6)], BOTTOMRY BOND (No. 16), MORTGAGE OF A CROP (No. 41), RESPONDENTIA BOND (No. 56), OR SECURITY-BOND (No. 57)—	

LEG. REF.

[1] Exemption (*b*) which related to Burma omitted by A.O., 1937.

[2] The words "Two annas" were substituted for "one anna" by Act XLIII of 1923.

[3] *See* now Act VII of 1913.

[4] These words were substituted for the words "AN AGREEMENT TO MORTGAGE (No. 6)" by S. 8 (4) (*a*) of the Indian Stamp (Amendment) Act (XV of 1904).

NOTES.

in the form of a lease for a specified period with the whole rent payable in advance, the proper stamp duty would be that required for a conveyance. 20 Lah.L.T. 193.

Art. 40.—As to applicability of Art. 40, *see* 11 R. 145=1933 R. 11 (F.B.), cited under Art. 5. A trust deed executed by the debtor who had already executed a pro-note to secure advances to be made by a Bank is a mortgage deed for purposes of the Stamp Act and not a letter of hypothecation within Exemption (2) to Art. 40. 38 M. 646=25 M.L.J. 613. Mortgage varying terms of an existing mortgage must be treated for purpose of stamp duty as a fresh mortgage and not a mere agreement. 38 P.L.R. 213. A consent decree creating a charge on immovable property, which is not the subject-matter of suit, does not require to be stamped. 37 Bom. L.R, 346=1935 B. 256. Where, during the pendency of an appeal, the executing Court directed execution to proceed on condition of the decree-holder offering security for the restitution of any property taken and thereupon a third person executed a bond to the Court undertaking to give compensation if the decree-

Description of instrument.	Proper stamp-duty.
Mortgage-deed—(*Contd.*) (*a*) when possession of the property or any part of the property comprised in such deed is given by the mortgagor or agreed to be given;	The same duty as a Conveyance (No. 23) for a consideration equal to the amount secured by such deed.
(*b*) when [1][* * *] possession is not given or agreed to be given as aforesaid;	The same duty as a Bond (No. 15) for the amount secured by such deed.
Explanation.—A mortgagor who gives to the mortgagee a power-of-attorney to collect rents or a lease of the property mortgaged or part thereof, is deemed to give possession within the meaning of this article.	
(*c*) when a collateral or auxiliary or additional or substituted security, or by way of further assurance for the above mentioned purpose where the principal or primary security is duly stamped—	
for every sum secured not exceeding Rs. 1,000;	Eight annas.
and for every Rs. 1,000 or part thereof secured in excess of Rs. 1,000.	Eight annas.
Exemptions. (1) Instruments executed by persons taking advances under the Land Improvement Loans Act, 1883, or the Agriculturists' Loans Act, 1884, or by their sureties as security for the re-payment of such advances. (2) Letter of hypothecation accompanying a bill of exchange. (3) [2][* * * * * *]	
41. Mortgage of a crop, including any instrument evidencing an agreement to secure the re-payment of a loan made upon any mortgage of a crop, whether the crops is or is not in existence at the time of the mortgage—	

LEG. REF.

[1] The words "at the time of execution" in cl. (*b*) of Art. 40 were repealed by S. 8 (4) (*b*) of the Indian Stamp (Amendment) Act (XV of 1904).

[2] The Exemption "(3) Instrument of pledge or pawn of goods unattested" was repealed by S. 8 (4) (*c*) of the Indian Stamp (Amendment) Act (XV of 1904).

NOTES.

holder failed in appeal and he also offered certain immovable properties as security for the due performance of the covenant, *held*, that the document was a security bond and as such liable to stamp duty under Art. 57 and not Art. 40. 8 O.W.N. 116=1931 O. 99. But *see* next case *contra*. A surety bond executed under O. 41, R. 5, C. P. Code, by a surety for the judgment-debtor hypothecating his property in favour of the Court executing the decree for the benefit of the decree-holder as security for the loss that the latter might sustain up to a certain amount owing to any default or misconduct on the part of the judgment-debtor, is chargeable with duty under Art. 40 and not Art. 57, it being not executed to secure the due performance of a contract. 52 A. 844=1931 A. 189 (F.B.) *See also* 40 C.W.N. 1281. A mortgage with a condition that if particular event did or did not occur, or term of it was or was not satisfied, the mortgagee would take possession, is a simple mortgage and the proper stamp for the mortgage-deed is the same for the simple mortgage deed. 1930 A. 175. *See also* cases under Art. 57. Agreement to pawn movables. *See* 11 R. 145 =1933 R. 31 (F.B.); *see also* 108 I.C. 746=1928 L. 370.

Arts. 40 and 57.—A security bond executed by two sureties in favour of the sheristadar of a Court, as required by S. 21 (2) of the Provincial Insolvency Act, should be stamped under Art. 40 and not under Art. 57. The word 'contract' used in Art. 57 means a contract as defined in S. 2 (*h*) of the Contract Act. A security bond cannot amount to a contract, as the Court is not a juridical person and is incapable of contracting. I.L.R. (1938) Mad. 460= 47 L.W. 154=1938 Mad. 262=(1938) 1 M.L. J. 159 (F. B.). Where in compliance with the condition imposed for the stay of execution of a decree the judgment-debtor executes a mortgage bond charging his properties as security for the due performance of any decree that might ultimately be passed against him, the document is chargeable as a mortgage deed under Art. 40 (*b*) of the Stamp Act. It cannot be treated as a security bond under Art. 57 for the words 'executed by surety' in that Article must be given their plain and natural meaning and there is no justification for extending the scope of the word 'surety' to the case of principals who are parties to the proceedings on whose behalf the deed is executed. 1942 O. A. 265=1942 O.W.N. 363 (F.B.).

Art. 41.—*See* I.L.R. (1941) All. 471=1941 A.L.J. 427=1941 All. 243 (F.B.).

Description of instrument.	Proper stamp-duty.
Mortgage of a crop—(*Contd.*)	
(*a*) when the loan is re-payable not more than three months from the date of the instrument—for every sum secured not exceeding Rs 200;	One anna.
and for every Rs. 200 or part thereof secured in excess of Rs. 200;	One anna.
(*b*) when the loan is re-payable more than three months but not more than [1][eighteen months], from the date of the instrument—	
for every sum secured not exceeding Rs. 100: ..	[2][Two annas.]
and for every Rs. 100 or part thereof secured in excess of Rs. 100.	[2][Two annas.]
42. Notarial Act, that is to say, any instrument, endorsement, note, attestation certificate or entry not being a PROTEST (No. 50) made or signed by a Notary Public in the execution of the duties of his office, or by any other person lawfully acting as a Notary Public. *See also* PROTEST OF BILL OR NOTE (No. 50).	One rupee.
[3][**43. Note or Memorandum** sent by a Broker or Agent to his principal intimating the purchase or sale on account of such principal— (*a*) of any goods exceeding in value twenty rupees .. (*b*) of any stock or marketable security exceeding in value twenty rupees.	Two annas. Subject to a maximum of ten rupees, one anna for every Rs. 10,000 or part thereof of the value of the stock or security.]
44. Note of protest by the master of a ship. *See also* PROTEST BY THE MASTER OF A SHIP (No. 51).	Eight annas.
Order for the payment of money. *See* BILL OF EXCHANGE. (No. 13).	
45. Partition—Instrument of [as defined by section 2 (15)].	The same duty as a Bond (No. 15) for the amount of the value of the separated share or shares of the property.
N.B.—The largest share remaining after the property is partitioned (or if there are two or more shares of equal value and not smaller than any of the	

LEG. REF.

[1] These words were substituted for the words "one year" by S. 7 (2) of the Indian Stamp (Amendment) Act (V of 1906).

[2] The words "Two annas" were substituted for "Four annas" by S. 8 (5) of the Act XV of 1904.

[3] Art. 43 was substituted by Act VI of 1910, S. 3 (*iv*).

NOTES.

Art. 43.—*See* 39 C. 669; 18 I.C. 978=40 C. 219.

Art. 45.—Under Art. 45 the duty payable on instrument of partition is for the amount of the value of the separated share or shares which have been separated off from the larger share. That should be a criterion for fixing the stamp duty payable on the instrument. 150 I.C. 119 =39 L.W. 157=1934 M. 204. A final decree effecting a partition of movable or immovable property *in specie* should be treated as an instrument of partition liable to stamp duty under Art. 45. 24 I.C. 643=1 O.L.J. 281. Award directing partition should be stamped under Art. 45. 1928 M. 1181=55 M.L.J. 584 (F.B.); 165 I.C. 82=1936 L. 838. *See also* 1935 L. 364. Dissolution of partnership—Award of arbitrators—Allotment of certain business to certain partners as a group and another to other as a group—Stamp duty—*See* (1937) 1 M.L.J. 174=1937 Mad. 308 (F.B.). A deed merely recording a family arrangement and containing an acknowledgment of the receipt of a share of property need not be stamped or registered. 1928 C. 705. Where a deed of partition purports to divide only some of the shares, the duty should be levied on the amount of the value of the separated share or shares. 34 P.L.R. 630. A decree in a suit for partition stating that the plaintiff is entitled to a certain fraction does not divide the property in severalty and is only a preliminary decree and therefore is not required to be stamped under S. 2 (15) read with Art. 45. 139 I.C. 673=1932 R. 120. Compromise decree in partition suit—Stamp duty payable. 9 Luck. 270 =1933 O. 562 (F. B.). Where, in a partition

Description of instrument.	Proper stamp-duty.
Partition—(*Contd.*) other shares, then one of such equal shares) shall be deemed to be that from which the other shares are separated: Provided always that— (*a*) when an instrument of partition containing an agreement to divide property in severalty is executed and a partition is effected in pursuance of such agreement, the duty chargeable upon the instrument effecting such partition shall be reduced by the amount of duty paid in respect of the first instrument, but shall not be less than (eight annas); (*b*) where land is held on Revenue settlement for a period not exceeding thirty years and paying the full assessment, the value for the purpose of duty shall be calculated at not more than five times the annual revenue; (*c*) where a final order for effecting a partition passed by any Revenue-authority or any Civil Court, or an award by an arbitrator directing a partition, is stamped with the stamp required for an instrument of partition, and an instrument of partition in pursuance of such order or award is subsequently executed, the duty on such instrument shall not exceed (eight annas).	
46. Partnership— A.—INSTRUMENT OF— (*a*) where the capital of the partnership does not exceed Rs. 500; (*b*) in any other case .. B.—DISSOLUTION OF .. [1][**Pawn or Pledge**—*See* AGREEMENT RELATING TO DEPOSIT OF TITLE-DEEDS, PAWN OR PLEDGE (No. 6)].	Two rupees eight annas. Ten rupees. Five rupees.
47. Policy of Insurance—	If drawn singly. / If drawn in duplicate, for each part.
[2][A.—SEA INSURANCE (*see* section 7)— (1) for or upon any voyage— (i) where the premium or consideration does not exceed the rate of two annas or one-eighth per centum of the amount insured by the policy; (ii) in any other case, in respect of every full sum of [3][one thousand five hundred rupees] and also any fractional part of [3][one thousand five hundred rupees] insured by the policy;	One anna. / Half an anna. [One anna.][3] / [Half an anna.][3]

LEG. REF.

[1] This entry was inserted by S. 8 (6) of the Indian Stamp (Amendment) Act (XV of 1904).

[2] These divisions A and B were substituted for the original divisions A and B by S. 7 (3) of the Indian Stamp (Amendment) Act (V of 1906).

[3] Inserted by Act XVIII of 1928.

NOTES.

suit involving several reliefs, a decree is passed in accordance with a compromise, and neither the compromise nor the decree is stamped, the partition decree can be regarded as consisting of a various number of decrees and a part of the decree can be executed on payment of stamp duty as required by Art. 45. 1935 L. 342.

Arts. 45 and 55.—A deed by which co-owners divide property in severalty is a deed of partition and merely because mutual release is an incident of the division, the partition deed does not become a release. Moreover, a deed of release is a one-sided document and binds the executant alone, while a partition is an agreement between two or more persons who are all bound by it. 11 L.L.T. 157.

Arts. 45 and 62 (c).—Instrument of partition—Transfer by trustee to beneficiary—Stamp chargeable under Art. 45 .47 B. 321=25 Bom. L.R. 112=1923 B. 237.

Art. 46-B.—*See* 1935 A.W.R .863=1935 A. 767; (1937) 1 M.L.J. 174=1937 Mad. 308 (F.B.).

Art. 47.—Policy of Sea Insurance—Protection note—Want of stamp—Admissible on payment of penalty. 24 Bom.L.R. 820=1923 B. 142.

Description of instrument.	Proper stamp-duty.	
Policy of Insurance—(*Contd.*) (2) for time— (iii) in respect of every full sum of one thousand rupees and also any fractional part of one thousand rupees insured by the policy— where the insurance shall be made for any time not exceeding six months; where the insurance shall be made for any time exceeding six months and not exceeding twelve months.]	If drawn singly.	If drawn in duplicate, for each part.
	Two annas. Four annas.	One anna. Two annas.
[1][B.—FIRE INSURANCE and other classes of insurance, not elsewhere included in this article, covering goods, merchandise, personal effects, crops and other property against loss or damage]— (1) in respect of an original policy— (i) when the sum insured does not exceed Rs. 5,000 .. (ii) in any other case .. and (2) in respect of each receipt for any payment of a premium on any renewal of an original policy.	Eight annas. One rupee. One-half of the duty payable in respect of the original policy in addition to the amount, if any, chargeable under No. 53.]	
C.—ACCIDENT AND SICKNESS-INSURANCE— (*a*) against railway accident, valid for a single journey only. *Exemption.* When issued to a passenger travelling by the intermediate or the third class in any railway.	One anna.	
(*b*) in any other case—for the maximum amount which may become payable in the case of any single accident or sickness where such amount does not exceed Rs. 1,000 and also where such amount exceeds Rs. 1,000, for every Rs. 1,000, or part thereof.	Two annas. [2][Provided that, in case of a policy of insurance against death by accident when the annual premium payable does not exceed Rs. 2-8-0 per Rs. 1,000, the duty on such instrument shall be one anna for every Rs. 1,000 or part thereof of the maximum amount which may become payable under it.] One anna.]	
[3] [CC.—INSURANCE BY WAY OF INDEMNITY against liability to pay damages on account of accidents to workman employed by or under the insurer or against liability to pay compensation under the Workmen's Compensation Act, 1923, for every Rs. 100 or part thereof payable as premium.	If drawn singly.	If drawn in duplicate for each part.
[4][D.—LIFE INSURANCE OR OTHER INSURANCE NOT SPECIFICALLY PROVIDED FOR, except such a RE-INSURANCE as is described in Division E of this Article— (*i*) for every sum insured not exceeding Rs. 250 .. (*ii*) for every sum insured exceeding Rs. 250 but not exceeding Rs. 500. (*iii*) for every sum insured exceeding Rs. 500 but not exceeding Rs. 1,000 and also for every Rs. 1,000 or part thereof in excess of Rs. 1,000.	Two annas. Four annas. Six annas.	One anna. Two annas Three annas.

LEG. REF.

[1] The words "Fire Insurance. . . . damage" were substituted for "Fire Insurance" by Act XLIII of 1923.

[2] Proviso added by Act XVIII of 1928.

[3] Inserted by Act XV of 1925, S. 2.

[4] Substituted by Act XVIII of 1928.

Description of instrument.	Proper stamp-duty.
Policy of Insurance—(*Contd.*) *Exemption.* Policies of life-insurance granted by the Director-General of Post Offices in accordance with rules for Postal Life Insurance issued under the authority of the (Central Government.]	
E.—REINSURANCE BY AN INSURANCE COMPANY, which has granted a POLICY [1][of the nature specified in Division A or Division B of this Article] with another company by way of indemnity or guarantee against the payment on the original insurance of a certain part of the sum insured thereby.	One quarter of the duty payable in respect of the original insurance, but not less than one anna or more than one rupee.
General Exemption. Letter of cover or engagement to issue a policy of insurance: Provided that, unless such letter or engagement bears the stamp prescribed by this Act for such policy, nothing shall be claimable thereunder, nor shall it be available for any purpose, except to compel the delivery of the policy therein mentioned.	
48. Power-of-attorney [as defined by section 2 (21)], not being a PROXY (No. 52)—	
(*a*) when executed for the sole purpose of procuring the registration of one or more documents in relation to a single transaction or for admitting execution of one or more such documents;	Eight annas.
(*b*) when required in suits or proceedings under the Presidency Small Cause Courts Act, 1882;	Eight annas,
(*c*) when authorizing one person or more to act in a single transaction other than the case mentioned in clause (*a*);	One rupee.
(*d*) when authorizing not more than five persons to act jointly and severally in more than one transaction or generally;	Five rupees.
(*e*) when authorizing more than five but not more than ten persons to act jointly and severally in more than one transaction or generally;	Ten rupees.
(*f*) when giving for consideration and authorizing the attorney to sell any immovable property;	The same duty as a Conveyance (No. 23) for the amount of the consideration.
(*g*) in any other case ..	One rupee for each person authorized. *N.B.*—The term "registration" includes every operation incidental to registration under the Indian Registration Act, 1877.
Explanation.—For the purposes of this Article more persons than one when belonging to the same firm shall be deemed to be one person.	
[2](49. Promissory Note [as defined by section 2 (22)]— (*a*) when payable on demand—	

LEG. REF.

[1] The words "of the nature.....Article" were substituted for "of sea insurance or a policy of fire insurance" by Act XLIII of 1923.

[2] Substituted for the original Article by Act XLIII of 1923. The original article ran as follows:—

49. Promissory note [as defined by section 2 (22)].	The same duty as a Bill of Exchange (No. 13) according as it is payable on demand or payable otherwise than on demand, as the case may be.

NOTES.

Art. 48.—A power-of-attorney executed in favour of a person not a certified mukhtear or pleader should not be stamped according to Art. 48. 33 A. 487=8 A.L.J. 378. A vakalat given by a client to his advocate to be used in the Bombay Presidency Small Cause Court falls under the definition of 'power-of-attorney' in S. 2 (21) of the Stamp Act and must be stamped with a one rupee stamp as required by Art. 48 (*b*) of the First Schedule of the Stamp Act, as applied to Bombay. 58 Bom. 597=36 Bom.L.R. 658=1934 B. 299. A power-of-attorney in favour of a person who is not a certified mukhtear or pleader, must be stamped under Art. 10 of Sch. II of the Court-Fees Act. 15 I. C. 122=202 P.L.R. 1912. Stamp duty payable on a power-of-attorney is determined not by the number of persons executing the power but by the number of agents appointed. 1925 O. 132 (1).

Art. 49.—*See* 145 I.C. 662; 146 I.C. 943=38 L.W. 846.

Description of instrument.	Proper stamp-duty.
Promissory Note—(*Contd.*) (*i*) when the amount or value does not exceed Rs. 250 .. (*ii*) when the amount or value exceeds Rs. 250, but does not exceed Rs. 1,000. (*iii*) in any other case .. (*b*) when payable otherwise than on demand ..	One anna. Two annas. Four annas. The same duty as a Bill of Exchange (No. 13) for the same amount payable otherwise than on demand.]
50. Protest of Bill or Note, that is to say, any declaration in writing made by a Notary Public or other person lawfully acting as such, attesting the dishonour of a Bill of Exchange or promissory note.	One rupee.
51. Protest by the Master of a ship, that is to say, any declaration of the particulars of her voyage drawn up by him with a view to the adjustment of losses or the calculation of averages, and every declaration in writing made by him against the charterers or the consignees for not loading or unloading the ship, when such declaration is attested or certified by a Notary public or other person lawfully acting as such. *See also* NOTE OF PROTEST BY THE MASTER OF A SHIP (No. 44).	One rupee.
52. Proxy empowering any person to vote at any one election of the members of a district or local board, or of a body of municipal commissioners, or at any one meeting of (*a*) members of an incorporated company or other body corporate whose stock or funds is or are divided into shares and transferable, (*b*) a local authority, or (*c*) proprietors, members or contributors to the funds of any institution.	[1][Two annas].
53. Receipt [as defined by section 2 (23)] for any money or other property, the amount or value of which exceeds twenty rupees. *Exemptions.* Receipt— (*a*) endorsed on or contained in any instrument duly stamped, [2][or any instrument exempted] under the proviso to section 3 (instruments executed on behalf of the [3](Crown) [2][or any cheque or bill of exchange payable on demand] acknowledging the receipt of the consideration money therein expressed, or the receipt of any prinipal money, interest or annuity, or other periodical payment thereby secured; (*b*) for any payment of money without consideration; (*c*) for any payment of rent by a cultivator on account of land assessed to Government revenue, or (in the Presidencies of	One anna.

LEG. REF.

[1] The words "Two annas" were substituted for "One anna" by Act XLIII of 1923.

[2] Substituted and inserted by Act XVIII of 1928.

[3] Substituted for 'Government' by Government of India (Adaptation of Indian Laws) Order, 1937.

NOTES.

Art. 53.—Receipts granted for amounts transferred in books by adjustments are exempt from stamp duty. 9 I.C. 342=(1911) 2 M.W.N. 293. Recital of sale of land in receipt does not make it a conveyance. 13 L.L.T. 48. On this article, *see also* 37 C. 634; 5 I.C. 812=15 P.R. 1910; 31 A. 36. Receipt of article—Failure to affix stamp—Conviction, if proper. *See* 46 A. 354=22 A.L.J. 288=1924 A. 578. Although a receipt for rent of an agricultural holding is exempt under Art. 53 (*e*), a receipt for payment out of Court, of money due under a decree for such rent is not so exempt. 1908 A.W.N. 272; 31 A. 36=5 A.L.J. 444=1 I.C. 568. When the accused made a purchase of gold ornaments from a client, he got the client to make an entry in the account book giving the client's name and a description of the goods purchased and of the price paid, and got this signed by the client. *Held*, that the documents were merely memoranda of the *sale of goods* and were exempt from stamp duty under Art. 5, Exemption (*a*), and not conveyance within Art. 23, but as the documents contained a clear acknowledgment that the price had been received by the seller, they were receipts as well

Description of instrument.	Proper stamp-duty.
Receipt—(*Contd.*) Fort St. George and Bombay) of Inam lands; (*d*) for pay or allowances by non-commissioned [1][or petty] officers, [2][soldiers, [1](sailors) or airmen] of [2][His Majesty's military, [1](naval) or air forces] when serving in such capacity, or by mounted police constables; (*e*) given by holders of family-certificates in cases where the person from whose pay or allowances the sum comprised in the receipt has been assigned is a non-commissioned [1][or petty] officer, [2][soldier [1](sailor) or airman] of [2][any of the said forces] and serving in such capacity: (*f*) for pensions or allowances by persons receiving such pensions or allowances in respect of their service as such non-commissioned [1][or perty] officers, [2][soldiers [1](sailors) or airmen], and not serving the [3][Crown] in any other capacity; (*g*) given by a headman or lambardar for land revenue or taxes collected by him; (*h*) given for money or securities for money deposited in the hands of any banker, to be accounted for: Provided that the same is not expressed to be received of, or by the hands of, any other than the person to whom the same is to be accounted for: Provided also that this exemption shall not extend to a receipt or acknowledgment for any sum paid or deposited for, or upon a letter of allotment of a share, or in respect of a call upon any scrip or share of, or in, any incorporated company or other body corporate or such proposed or intended company or body or in respect of a debenture being a marketable security. [4][*See also* POLICY OF INRURANCE No. 47-B (2).]	
54. **Reconveyance of Mortgaged Property**— (*a*) if the consideration for which the property was mortgaged does not exceed Rs. 1.000;	The same duty as a Conveyance (No. 23) for the amount of such consideration as set forth in the Reconveyance.
(*b*) in any other case ..	Ten rupees.
55. **Release**, that is to say, any instrument [5][(not being such a release as is provided for by section 23-A)] whereby a person renounces a claim upon another person, or against any specified property— (*a*) if the amount or value of the claim does not exceed Rs. 1,000;	The same duty as a Bond (No, 15) for such amount or value as set forth in the Release.
(*b*) in any other case ..	Five rupees.
56. **Respondentia Bond**, that is to say, any instrument securing a loan on the cargo laden or to be laden on board a ship and making repayment contingent on the arrival of the cargo at the port of destination.	The same duty as a Bond (No. 15) for the amount of the loan secured.
Revocation of any trust or settlement. *See* SETTLEMENT (No. 58); TRUST (No. 64).	

LEG. REF.

[1] Inserted by Act XXXV of 1934.

[2] Inserted by Act X of 1927 in cls. (*d*), (*e*) and (*f*).

[3] Substituted for 'Government' by Government of India (Adaptation of Indian Laws) Order, 1937.

[4] This note was added by S. 7 (4) of the Indian Stamp (Amendment) Act (V of 1906).

[5] The parenthesis was inserted by S. 8 (7) of the Indian Stamp (Amendment) Act (XV of 1904).

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as memoranda of the sale of goods and should have been stamped as receipts with stamp duty of one anna each. 56 A. 680=1934 A.L.J. 582 =1934 A. 201. *See also* 12 R. 174=1934 R. 49.

Art. 55.—Hindu widow in possession of property allotted to her by decree of Court in partition suit—Rights of widow similar to those of widow having life estate—Deed surrendering interests and transferring possessions to sons having right of succession on her death—Stamp

Description of instrument.	Proper stamp-duty.
57. Security Bond or Mortgage-deed executed by way of security for the due execution of an office, or to account for money or other property received by virtue thereof or executed by a surety to secure the due performance of a contract—	
(*a*) when the amount secured does not exceed Rs. 1,000 ..	The same duty as a Bond (No. 15) for the amount secured.
(*b*) in any other case ..	Five rupees
Exemptions.	
Bond or other instrumetn, when executed— (*a*) by headmen nominated under rules framed in accordance with the Bengal Irrigation Act, 1876, section 99, for the due performance of their duties under that Act; (*b*) by any person for the purpose of guarantceing that the local income derived from private subscriptions to a charitable dispensary or hospital or any other object of public utility shall not be less than a specified sum per mensem; (*c*) under No. 3-A of the rules made by the [1][Provincial Government] under section 70 of the Bombay Irrigation Act, 1879; (*d*) executed by persons taking advances under the Land Improvement Loans Act, 1883, or the Agriculturists' Loans Act, 1884, or by their sureties, as security for the repayment of such advances; (*e*) executed by officers of [2][the Crown] or their sureties to secure the due execution of an office or the due accounting for money or other property received by virtue thereof.	
58. Settlement—	
A.—INSTRUMENT OF (including a deed of dower)	The same duty as a Bond (No. 15) for a sum equal to the amount or value of the property settled as set forth in such settlement: Provided that, where an agreement to settle is stamped with the stamp

LEG. REF.

[1] Substituted by Government of India (Adaptation of Indian Laws) Order, 1937, for 'Governor of Bombay in Council.'

[2] *Ibid*, for 'Government.'

NOTES.

duty—It is not release but gift deed and is to be stamped as such. *See* 18 Pat L T. 933=1938 Pat. 33 (S.B); 38 A. 56=31 I.C. 404; 3 I.C. 772=33 B. 657=11 Bom.L.R. 735.

Art. 57.—*See also* cases under Art. 40, *supra*. [Undertaking given by third person guaranteeing restitution by a party and offering immovable property as security to Court—Bond stamped with five rupees is valid. 5 O.W.N. 15. *See also* 1942 O.W.N. 363. The word "contract" in Art. 57 is used in the sense of contract as defined in S. 2 (*b*) of Contract Act. A surety bond executed for a judgment-debtor under O. 41, R. 5, C. P. Code, is not such a contract. 1931 A.L.J. 41=1931 A. 189 (F.B.); 52 A. 844; 40 C.W.N. 1281. But *see also* 132 I. C. 225=8 O.W.N. 116=1931 O. 99, *contra*. "Security bond" and "mortgage bond," meaning of. *See* 40 C.W.N. 1281=64 C.L.J. 439= I.L.R. (1937) 1 Cal. 375. A surety bond, executed under O. 41, R. 5, C. P. Code, by a surety for the judgment-debtor hypothecating his property in favour of the Court executing the decree for the benefit of the decree-holder, as security for the loss that latter might sustain up to a certain amount owing to any default or misconduct on the part of the judgment-debtor, is chargeable with duty under Art. 40 and not Art. 57, it being not executed to secure the due performance of a contract. 52 A. 844=1931 A. L.J. 41=1931 A. 189 (F.B.). *See also* 40 C.W. N. 1281; 1936 S. 41; 1933 L. 1004=1938 Mad. 262=(1938) 1 M.L.J. 159; 1942 O.W.N. 363. But *see* 1931 O. 99, *contra*. A bond executed by a surety in accordance with S. 55 (4) of the C. P. Code undertaking that the debtor would file a petition within a month to be declared an insolvent and that he would appear in any proceeding whenever called upon, need only be stamped with a court-fee of annas eight under Art. 6 of Sch. II of the Court-Fees Act; as it imposes only a personal obligation and does not hypothecate any movable or immovable property. Art. 57 has no application to it. 14 L. 284=1933 L. 89 (S.B.). *See also* 17 L. 74 =1936 L. 45 (S.B.). A security bond executed in pursuance of an order of Court under the Code of Civil Procedure and imposing only a personal obligation on the surety is not leviable to stamp duty under the Stamp Act. 14 L. 708. The proper stamp on a bond given by the guar-

Description of instrument.	Proper stamp-duty.
Settlement—(*Contd.*) *Exemptions.* (*a*) Deed of dower executed on the occasion of a marriage between Muhammadans. (*b*) [1][* * * *] B.—REVOCATION OF—	required for an instrument of settlement, and an instrument of settlement in pursuance of such agreement is subsequently executed, the duty on such instrument shall not exceed eight annas. The same duty as a Bond (No 15) for a sum equal to the amount or value of the property concerned as set forth in the Instrument of Revocation, but not exceeding ten rupees.
See also TRUST (No. 64). **59. Share Warrants** to bearer issued under the Indian Companies Act, 1882. *Exemption.* Share warrant when issued by a company in pursuance of the Indian Companies Act, 1882, section 30, to have effect only upon payment, as composition for that duty, to the Collector of Stamp-revenue, of— (*a*) [2][one and a half] per centum of the whole subscribed capital of the company, or (*b*) if any company which has paid the said duty or composition in full, subsequently issues an addition to its subscribed capital [2][one and a half] per centum of the additional capital so issued. SCRIP. *See* CERTIFICATE (No. 19).	[2][One and a half times] the duty payable on a Conveyance (No. 23) for a consideration equal to the nominal amount of the shares specified in the warrant.
60. Shipping Order for or relating to the conveyance of goods on board of any vessel.	One anna.
61. Surrender of lease— (*a*) when the duty with which the lease is chargeable does not exceed five rupees; (*b*) In any other case. *Exemption.* Surrender of lease, when such lease is exempted from duty.	The duty with which such lease is chargeable. Five rupees.

LEG. REF.

[1] Exemption (*b*) relating to Burma omitted by Government of India (Adaptation of Indian Laws) Order, 1937.

[2] In the second column for the words "three-quarters" the words "one and a half times" were substituted and in exemptions the words "one and a half times" were substituted for "three-quarters" by Act V of 1910, S. 3 (*v*).

NOTES.

dian of the estate of a minor in accordance with the orders of the Court under the Guardians and Wards Act, is Rs. 10 as prescribed by Art. 57. Such a bond is covered by Art. 57 does not fall under Art. 6 of Sch. II of the Court-Fees Act which refers only to the bail bonds, etc., given under the Civil or Criminal Procedure Code. 42 Bom.L.R. 668=1940 Bom. 275. Where the terms of a document executed by a supurddar were that the supurddar acknowledged having received the attached property from the amin and agreed to produce the same whenever demanded by the Court of the amin, and further agreed that in case of failure the Court would be at liberty to realise the price thereof from his person and property. *Held*, that the document was a security bond as defined in Art. 57 and that it was not liable to duty being covered by Exemption (*e*) to that article. 1935 A.L.J. 489. *See also* 47 L.W. 154=(1938) 1 M. L.J. 159 (F.B.) and cases cited on the point under Art. 40.

Description of instrument.	Proper stamp-duty.
62. Transfer (whether with or without consideration)—	
(*a*) of shares in an incorporated company or other body corporate;	[1][One half] of the duty payable on a conveyance (No. 23) for a consideration equal to the value of the share.
(*b*) of debentures being marketable securities, whether the debenture is liable to duty or not, except debenture provided for by section 8;	[1][One half] of the duty payable on a couveyance (No. 23) for a consideration equal to the face amount of the debenture.
(*c*) of any interest secured by a bond, mortgage-deed or policy of insurance—	
(i) if the duty on such bond, mortgage-deed or policy does not exceed five rupees;	The duty with which such bond, mortgage-deed or policy of insurance is chargeable.
(ii) in any other case	Five rupees.
(*d*) of any property under the Administrator-General's Act, 1874, section 31;	Ten rupees.
(*e*) of any trust property without consideration from one trustee to another trustee or from a trustee to a beneficiary.	Five rupees or such smaller amount as may be chargeable under clauses (*a*) to (*c*) of this article.
Exemptions.	
Transfers by endorsement—	
(*a*) of a bill of exchange, cheque or promissory note;	
(*b*) of a bill of lading, delivery order. warrant for goods, or other mercantile document of title to goods:	
(*c*) of a policy of insurance;	
(*d*) of securities of the Central Government.	
See also section 8.	
63. Transfer of Lease by way of assignment and not by way of under-lease.	The same duty as a conveyance (No. 23) for a consideration equal to the amount of the consideration for the transfer.
Exemption.	
Transfer of any lease exempt from duty.	
64. Trust—	
A.—DECLARATION OF—of, or concerning, any property when made by any writing not being a WILL.	The same duty as a Bond (No. 15) for a sum equal to the amount or value of the property concerned as

LEG. REF.

[1] In the second column of (*a*) and (*b*) the words "One half" were substituted for "One quarter" by Act VI of 1910, S. 3 (*vi*).

NOTES.

Art. 62.—The plaintiff purchased 29 bonds from the second defendant for a lump sum of Rs. 2,425. The sum of the amounts due on the several bonds was Rs. 6,040. The sale-deed in favour of the plaintiff bore a stamp duty of Rs. 5. On a reference relating to the sufficiency of the stamp, *held* (*by the F.B., Niamatullah and Bennet, JJ., dissenting*) that (*i*) S. 5 was inapplicable; distinct matters" meant "distinct transactions" and not a transaction comprising several items; (*ii*) under Art. 62 read with S. 13 of the General Clauses Act, the stamp duty chargeable on the deed was only Rs. 5. 1933 A.L.J. 427= 1933 A. 321=55 A. 468=143 I.C. 486 (F.B.). Document giving mortgagee a mortgage by deposit of title-deeds—Document also giving him right to appoint receiver and to call upon mortgagors to execute English mortgage—If "mortgage-deed"—Document of transfer of mortgagee's interest—Stamp duty. 41 C.W.N. 961=I.L.R. (1937) 2 Cal. 486.

Art. 63.—A document, which after reciting a previous permanent lease executed by the Thakors in favour of the lessee in consideration of an annual sum of Rs. 292, proceeded to state that the rights of the lessee under the lease were assigned to the executant for a lump sum of Rs. 4,229, and the executant was to abide by the terms of the permanent lease, and bound by virtue of one of such terms, to pay the annual sum of Rs. 229 direct to the Thakors. Apart from the sum of Rs. 4,229, the lessee-assignor derived no benefit whatever from the annual payment. The stamp duty payable on the deed of sale was held to be an *ad valorem* duty on Rs. 4,229 and no stamp was neeessary on the annuity. 33 Bom.L.R. 1447=128 I.C. 898= 1931 B. 1.

Description of instrument.	Proper stamp-duty,
Trust—(*Contd*)	
B.—REVOCATION OF—of, or concerning, any property when made by any instrument other than a WILL.	set forth In the instrament but not exceeding fifteen rupees. The same duty as a Bond (No. 15) for a sum equal to the amount or value of the property concerned as set forth in the instrument but not exceeding ten rupees.
See also SETTLEMENT (No. 58). **Valuation**. *See* APPRAISEMENT (No. 8). **Vakil**. *See* ENTRY AS A VAKIL (No. 30).	
65. Warrant for Goods, that is to say. any instrument evidencing the title of any person therein named, or his assigns or the holder thereof,to the property in any goods lying in or upon any dock, warehouse or wharf, such instrument being signed or certified by or on behalf of the person in whose custody such goods may be.	Four annas.

[SCHEDULE. II.—*Repealed by Act X of 1924.*]

THE STANDARDS OF WEIGHT ACT (IX OF 1939).

PREFATORY NOTE:STATEMENT OF OBJECTS AND REASON. "The question of prescribing a scale of standard weights and measures throughout British India has been under the consideration of the Government of India from time to time. In 1871 the Indian Weights and Measures of Capacity Act, XXXI of 1871, was passed, section 8 of which empowered the Governor General in Councll to introduce a system of weights and measures, consistent with the statutory units prescribed by section 3 thereof. This Act however remained inoperative since no notification prescribed thereunder was issued as it was hoped that weights and measures based on the statutory units would be gradually and generally adopted without further intervention on the part of Government.

2. In 1913,the Government of India appointed the Weights and Measures Committee to investigate the feasibility of introducing uniform weights and measures throughout the country. The Committee's recommendation were examined in consultation with the Local Governments and Administrations and in 1922 the Government of India issued a resolution containing the decisions arrived at. As 'weights and measures' became a Provincial transferred subject under the Government of India Act, 1919, subject to legislation by the Indian Legislature as regards standards, it was left to the Provincial Governments to under take the necessary legislation with the previous consultation with the Government of India as to the form which such legislation should take and the previous sanction of the Governor General required under that Act. Accordingly three Provinces, *viz.*, the Central Provinces in 1928, Coorg in 1931 and Bombay in 1932, passed such legislation.

3. The constitutional position now is that according to item 51 in the Federal Legislative List in the Seventh Schedule to the Government of India Act of 1935, the Central Government is responsible for the establishment of standards of weights, while Provincial Governments are concerned with 'weights and measures', *vide* item 30 in the Provincial Legislative List. So far as concerns weights, therefore, it is for the Ceneral Government to prescribe the standards. The enforcement of the use of weights based on these standards is a matter for the Provincial Governments.

4. The desirability of establishing standards of weight has lately been constantly pressed upon the Government of India and some Provinces are reported to have their Weights and Measures Bill ready for introduction as soon as a Central Act establishing standards of weight is passed. A Bill has accordingly been prepared prescribing the units of weight commonly used by the Railways and in commerce, *viz.*, the tola, the seer and the maund and also the pound, the ounce, the hundredweight and the ton."

THE STANDARDS OF WEIGHT ACT (IX OF 1939).

[*28th March, 1939.*

An Act to establish standards of weight throughout British India.

WHEREAS it is expedient to establish standards of weight throughout British India;

It is hereby enacted as follows:—

Short title. extent- and commencement.

1. (1) This Act may be called THE STANDARDS OF WEIGHT ACT, 1939.

(2) It extends to the whole of British India.

(3) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

Unit for weight.

2. (1) The unit for weight shall be the standard grain, that is to say, that weight which when multiplied by 1799·84585 is the weight *in vacuo* of the iridio-platinum cylinder in the custody of the Mint Master, Bombay, certified by the Standards Department of the British Board of Trade as having a weight of 1799·84585 grains *in vacuo*.

(2) The standard grain shall be the only unit from which all other standard weights shall be ascertained.

Standard weights.

3. (1) There shall be the following standard weights, namely:—

(*a*) the standard tola; being a weight of 180 standard grains;

(*b*) the standard seer, being a weight of 18 standard tolas or 14,400 standard grains;

(*c*) the standard maund, being a weight of 40 standard seers;

(*d*) the standard pound, being a weight of 7,000 standard grain;

(*e*) the standard ounce, being one-sixteenth part of the weight of a standard pound;

(*f*) the standard hundred weight, being a weight of 112 standard pounds;

(*g*) the standard ton, being a weight of 2,240 standard pounds.

(2) No weight other than the weights set forth in sub-section (1) and integral multiples or sub-multiples of any such weight shall be used as a standard weight.

Sets of standard weights.

4. (1) The Central Government shall cause to be prepared one set of such of the standard weights specified in sub-section (1) of section 3 or multiples or sub-multiples thereof as the Central Government may consider expedient, and shall cause eaeh weight of such set to be authenticated as having been ascertained from the standard grain, and shall deposit the set in such custody as the Central Government may think fit.

(2) The Central Government shall cause similar sets of weights, similarly authenticated, to be prepared, and shall supply one set to each Provincial Government.

(3) The Central Government shall cause similar sets of weights, similarly authenticated, to be prepared and shall supply one set to the Government of any Indian State or foreign settlement situated in India which applies for it and pays the price fixed by the Central Government.

Rules.

5. (1) The Central Government may, by notification in the official Gazette, make rules for carrying into effect the provisions of this Act.

(2) Without prejudice to the generality of the foregoing power, rules made under this section may regulate—

(*a*) the preparation of the sets of standard weights referred to in section 4;

(*b*) the custody of the set of such weights which is to be maintained by the Central Government and the periodical verification and adjustment thereof;

(*c*) the periodical verification and adjustment of the sets of standard weights supplied to Provincial and other Governments.

6. The Indian Weights and Measures of Capacity Act, 1871, in so far as it relates to the establishment of standards of weight, is hereby repealed.

Repeal.

THE INDIAN SUCCESSION ACT (XXXIX OF 1925).

1925	No.	Short title.	Amendments.
1925	XXXIX	The Indian Succession Act.	Amended XXXVII and XL of 1926; X of 1927; XVIII of 1927; XIV of 1928; XXI of 1928; XVIII of 1929; XXI of 1929; XVII of 1931; XXXV of 1934. Government of India (Adaptation of Indian Laws) Order, 1937.

N. B.—*As this is a new Act, the following table, showing the corresponding sections of the old repealed enactments with the sections of the present Act has been added with a view to facilitate reference to the provisions of the new enactment.*

TABLES SHOWING DISTRIBUTION IN THE ACT OF SECTIONS OF ACTS REPEALED.

I

THE SUCCESSION (PROPERTY PROTECTION) ACT (XIX OF 1841).

Section of Act.	Sections of the present Succession Act No. XXXIX of 1925.
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2	192 (2)
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18	209
19	210
20	Repealed by Act VIII of 1855.

II

SUCCESSION ACT (X OF 1865).

Section of Act.	Sections of the present Succession Act No. XXXIX of 1925.
	PART I.—PRELIMINARY.
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2	23, 99, 51 (2), 217
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	PART II.—OF DOMICILE.
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SUCCESSION ACT (X OF 1865)—*Contd.*

Section of Act.	Sections of the present Succession Act No. XXXIX of 1925.
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	PART III.—OF CONSANGUINITY.
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	PART IV.—OF INTESTACY.
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	PART V.—OF THE DISTRIBUTION OF AN INTESTATE'S PROPERTY.
	(*a*) *Where he has left lineal Descendants.*
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31	38
32	39
33	40
	(*b*) *Where the Intestate has left no lineal Descendants.*
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SUCCESSION ACT (X OF 1865)—*Contd.*

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SUCCESSION ACT (X OF 1865)—*Contd.*

Section of Act.	Sections of the present Succession Act No. XXXIX of 1925.
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103	116
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PART XIV.—OF ONEROUS BEQUESTS.	
109	122
110	123
PART XV.—OF CONTINGENT BEQUESTS.	
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PART XVII.—OF BEQUEST WITH DIRECTIONS AS TO APPLICATION OR ENJOYMENT.	
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SUCCESSION ACT (X OF 1865)—*Contd.*

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PART XXIV.—OF BEQUEST OF THE INTEREST OR PRODUCE OF A FUND.	
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PART XXVI.—OF LEGACIES TO CREDITORS AND PORTIONERS.	
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SUCCESSION ACT (X OF 1865)—*Contd.*)

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SUCCESSION ACT (X OF 1865)—*Contd.*

Section of Act,	Sections of the present Succession Act No. XXXIX of 1925.
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SUCCESSION ACT (X OF 1865)—*Contd*

Section of Act.	Sections of the present Succession Act No. XXXIX of 1925.
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330	Repealed by Act XXIV of 1867.
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333	296
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	III.

PARSI INTESTATE SUCCESSION ACT (XXI OF 1865).

Section of Act.	Sections of the present Succession Act No. XXXIX of 1925.
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P.I. SUC. ACT (XXI OF 1865)—*Contd.*

Section of Act.	Sections of the present Succession Act No. XXXIX of 1925.
Second Schedule	Schedule II, Part II.

IV.

HINDU WILLS ACT (XXI of 1870).

Section of Act.	Sections of the present Succession Act No. XXXIX of 1925.
1	Short title.
2	57 and Schedule III.
3	57 and Schedule III.
4	Spent.
5	
6	Schedule III.

V.

PROBATE AND ADMINISTRATION ACT (V OF 1881).

Section of Act.	Sections of the present Succession Act No. XXXIX of 1925.
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	(b) Grants for the use and benefit of others having rights.
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	(c) For special purposes.
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PROBATE AND ADMINISTRATION ACT (V OF 1881)—*Contd.*

Section of Act.	Sections of the present Succession Act No. XXXIX of 1925.
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PROBATE AND ADMINISTRATION ACT (V OF 1881)—*Contd.*

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PROBATE AND ADMINISTRATION ACT (V OF 1881)—*Concld.*

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THE SUCCESSION ACT (XXXIX OF 1925).

Amended, Act XXXVII and XV of 1926; Act X of 1927; Act XVIII of 1927; Act XIV of 1928; Act XXI of 1928; Act XVIII of 1929; Act XXI of 1929; Act XVII of 1932.

[30*th September,* 1925.

An Act to consolidate the law applicable to intestate and testamentary succession in British India.

WHEREAS it is expedient to consolidate the law applicable to intestate and testamentary succession in British India; It is hereby enacted as follows:—

PART I.

PRELIMINARY.

Short title.

1. This Act may be called THE INDIAN SUCCESSION ACT, 1925.

NOTES.

Sec. 1.—The object of the Act is to consolidate all the Indian Law relating to succession. The separate existence on the Statute book of a number of large and important enactments renders the present law difficult of ascertainment and there is, therefore, every justification for an attempt to consolidate it. The Bill has been prepared by the Statute Law Revision Committee as a purely consolidating measure. No intentional change of the law has therefore been made— [*Notes on clauses.*]

This Act is applicable only to cases of intestate or testamentary succession. 12 Beng.L.R. 358. *See also* 21 W. R. 221. The Act is not applicable to the Crown when it takes the property upon escheat. 54 A. 226=1932 A.L. J. 150=1932 A. 220. This Act does not enlarge the category of heritable property. 31 B. 25. There are no words in the Act as it now stands limiting it to British subjects as opposed to foreigners. 37 P.L.R. 502 =1935 L. 646. Applicability—Chinese Buddhists domiciled in Burma—Law governing succession. *See* 8 R. 57=1930 R. 81 (F. B.). The rules in the Act do not affect rights of co-partnership or survivorship. *See also* 15 C.W.N. 158; 1912 M.W.N. 386. The enactment in this section, operates as a repeal of the previously existing law in respect of matters dealt with by this Act just as completely and effectually as if it had been expressly repealed. 12 Beng.L. R. 427. The provisions of this Code, in so far as they apply to Muhammadans, override any rules of Muhammadan Law that are inconsistent with them. 34 I.C. 128. A Hindu convert to Christianity, who dies a Christian, is governed by this Act in matters of succession and cannot elect to be governed by the Hindu Law of Inheritance. 8 O.W.N. 1198=1932 O. 85. Hindu—Meaning—European or other non-Hindu if can become a Hindu—Proof of European

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "administrator" means a person appointed by competent authority to administer the estate of a deceased person when there is no executor;

(*b*) "codicil" means an instrument made in relation to a will, and explaining, altering or adding to its dispositions, and shall be deemed to form part of the will;

[1][(*bb*) "District Judge" means the Judge of a principal Civil Court of original jurisdiction];

(*c*) "executor" means a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided;

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[1] After Cl. (*b*) the new Cl. (*bb*) has been inserted by Succession (Amendment) Act XVIII of 1929.

NOTES.

becoming a Hindu and being a Hindu at time of his or her death—Quantum—Law governing succession to such person—Hindu Law—European lady converted to Hinduism—Marriage with Vaisya according to Vedic rites—Validity of—Caste—Membership of—Necessity of, for a Hindu. 52 M. 160=55 M.L.J. 478=1928 M. 1279.

RETROSPECTIVE EFFECT.—The Act has no retrospective effect and does not apply to a will executed in 1890. Therefore a bequest under the will to unborn persons, who were not in existence at the time of the testator's death, is void. 18 N.L.J. 1.

CONSTRUCTION.—Where there is a positive enactment of the Indian Legislature, the proper course is to examine the language of that statute and to ascertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law or of the English law upon which it may be founded. These observations apply with peculiar force to testamentary cases which are governed by the Indian Succession Act of 1865 or the Probate and Administration Act of 1881 (both now repealed by the Succession Act of 1925). [33 C. 116 (P.C.), Ref.] 55 I.A. 18=7 P. 221=32 C.W.N. 402=54 M.L.J. 281 (P.C.).

A bequest in a will which is void under S. 100, Succession Act (1865), is not validated by Act VIII of 1921. This Act does not cure or prevent the invalidity. 58 M. 15=67 M.L.J. 525.

JURISDICTION.—It is not the province of a Court of Probate to determine questions of title to a property which a testator purports to dispose of by his will. 54 M. 24 =59 M.L.J. 529. A succession certificate can be granted by the High Court on its Original Side under the provisions of this as amended by Act XVIII of 1929. 53 M. 237=1930 M. 779=59 M.L.J. 17. *See also* 58 C. 801. The re-distribution of territories would not by itself make an Act inapplicable to a place in which it was already in force. Where a will was executed in Sylhet in 1883 and it was argued that the place having become part of Assam, the Hindu Wills Act, 1870, could not apply, *held*, that the Act applied in spite of the redistribution of provinces. S. 58 of the Government of India Act relied on. 48 C.L.J. 523=114 I.C. 666=1929 C. 145. *See also* 35 C.W.N. 122.

Sec. 2.—As the General Clauses Act, 1897 (X of 1897), will apply to this Act, the definitions of "persons", "year", "monthly", "immovable property", "movable property", "Local Government" and "High Court" are unnecessary and are omitted. The definitions of "British India" and "District Judge" have also been omitted as the definitions in the General Clauses Act appear more suitable and do not change he substance of the law. The definition of "minor" and "minority" is adopted from S. 3 of the Probate and Administration Act, 1881 (V of 1881), and seems appropriate to the consolidated Bill. 21 W.R. 221. No change has been made in the other definitions which are taken from Act X of 1865, though one or two could perhaps have been more suitably worded. The definition of "Indian Christian" is taken from the Native Christian Administration of Estates Act (VII of 1901), except that the phrase "'Indian Christian" has been used instead of "Native Christian" following the modern practice in this receipt.—[*Notes on clauses.*]

Sec. 2 (a) and (c).—"Derivative executor"—Executor of an executor if. 12 B. L.R. 423.

Sec. 2 (b): CODICIL.—The codicil always follows a will. When there is anything ambiguous in the will, the codicil can be used to control it. 20 C. 904; or to interpret its language. (1904) 2 Ch. 52; (1898) 1 Ch. 95.

Sec. 2 (bb).—S. 2 of the present Act empowers a High Court to grant succession certificates. The term "District Judge" in the sections relating to succession certificates includes a Judge of the High Court. 58 C. 801=35 C.W.N. 122=1931 C. 580. The term "District Judge" in the Succession Act has been construed to include a High Court Judge within the Presidency-towns. The Succession Act and the earlier Acts which that Act replaced have always been treated by the High Courts in India as

(*d*) "Indian Christian" means a native of India who is, or in good faith claims to be, of unmixed Asiatic descent and who professes any form of the Christian religion;

(*e*) "minor" means any person subject to the Indian Majority Act, 1875, who has not attained his majority within the meaning of that Act, and any other person who has not completed the age of eighteen years; and "minority" means the status of any such person;

(*f*) "probate" means the copy of a will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the testator;

(*g*) "province" includes any division of British India having a Court of the last resort; and

(*h*) "will" means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.

3. (1) The Provincial Government may, by notification in the Official

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extending to them. 60 Bom. 1027=38 Bom. L.R. 632=1936 Bom. 363. By defining District Judge as the "Judge of the principal Court of civil jurisdiction" the High Court is now enabled to issue succession certificates. 9 R. 205=1931 R. 281 (1): 38 Bom.L.R. 632=165 I.C. 672=1936 B. 363.

Sec. 2 (d): APPLICABILITY—CHRISTIAN —WHO IS.—In considering whether the rules of succession laid down in the Act are to be applied in administering the estate of an alleged Christian, the Court must have regard to the outward and formal recognition of his religious belief, and not to what may be the real though undisclosed convictions of the deceased. [21 Cal. 666 (P.C.), Ref.] 12 R. 184=1934 R. 72.

Sec. 2 (e).—These definitions of minor and minority do not apply in cases where a person enters into a contract on his own behalf and not in any representative character under this Act. 12 B.L.R. 358: 1 B.L.R. O.C. 10. As to age of majority being extended to 21 in cases where there has been an appointment of guardian by Court, or the Court of Wards has taken charge of the estate, *see* 8 C.L.R. 419; 17 C. 347; 17 C. 944; 8 C. 714; 9 C. 901.

Sec. 2 (h).—"Will" differs from a "deed" in that it operates not *eo instanti* but from the date of the death of the maker; it cannot be rectified by any Court of law, while in cases of mistake, a Court has power to rectify a deed. Courts always put a benevolent construction on the terms of wills. It is not possible to lay down categorically what the tests of a will are; it must indicate an intention to take effect after death, must be revocable, and must dispose of property. 8 C.W.N. 614; 14 C.W.N. 174; 13 C.L.J. 579; 12 M. 490. *See also* 1 Pat. L.T. 457. No particular form is necessary. 30 C. 149. There is no reason why the provisions of a will should not follow the rules applicable on intestacy. 1933 R. 393 =149 I.C. 654. Validity of bequest is to be determined from testator's lawful disposing power at his death. 56 I.A. 156= 4 Luck. 122=57 M.L.J. 496 (P.C.). A will may be written, or partly written, in pencil. 3 Moo. P. C. 223. The form of a paper does not affect its title to probate as a will, provided that it is the intention of the deceased that it should operate after his death. 4 C. 721; 12 C. 10. Testamentary instruments not drawn by a professional man must be liberally construed. 12 C. 942. If one part of a document is clearly testamentary in the character, the remainder of the language, if capable of that construction, may be presumed to have been intended also to be testamentary. 4 C.L.R. 401. A document is not a will merely because it is styled a will. 1913 M.W.N. 159=18 I.C. 1006. An authority to adopt is not a will. 18 I.C. 1006. *See also* 49 M.L.J. 227 (P. C.). A document inoperative as a will may be valid as an authority to adopt. 48 M. 614=52 I.A. 305=49 M.L.J. 247. *See also* 48 I.A. 482. A document which is in form a deed of gift may operate as a will. 46 M.L.J. 288. As to wills by mahants, shebaits, or managers of religious institutions, *see* 27 I.C. 24=20 C.L.J. 307; 51 I.C. 884=23 C.W.N. 401. Trust deed mentioned as part of the grant of letters of administration—Provision made for appointment of future trustee—Will, if constituted: *see* 46 C.L.J. 145. "Will"—Deed by Hindu styled *vyavasthapatra* in contemplation of death—Recital of agreement to partition between testator and coparcener—Provision for management by *vyavasthapaks* —Prohibition against adoption by widow—Legacies granted out of testator's half-share in the properties—Effect—Deed—If will or only family arrangement. 39 Bom.L.R. 165=1937 Bom 341. Hindu will need not be signed by the testator nor does it require registration—Such a will, if proved to be the last will of the testator is sufficient to revoke a previous registered will. 50 A. 314.

Sec. 3.—This is based on S. 332 of the Indian Succession Act (X of 1865); but in the consolidated Bill it is necessary to confine its operation to those provisions which

Power of Provincial Government to exempt any race, sect or tribe in the Province from operation of Act.

Gazette, either retrospectively from the sixteenth day of March, 1865, or prospectively, exempt from the operation of any of the following provisions of this Act, namely, sections 5 to 49, 58 to 191, 212, 213 and 215 to 369, the members of any race, sect or tribe in the province, or of any part of such race, sect or tribe, to whom the Provincial Government considers it impossible or inexpedient to apply such provisions or any of them mentioned in the order.

(2) The Provincial Government may, by a like notification, revoke any such order, but not so that the revocation shall have retrospective effect.

(3) Persons exempted under this section or exempted from the operation of any of the provisions of the Indian Succession Act, 1865, under section 332 of that Act are in this Act referred to as "exempted persons."

PART II.

OF DOMICILE.

Application of Part.

4. This Part shall not apply if the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina.

NOTES.

are derived from that Act. The use of the term "exempted person" is a drafting device which enables the language of the Bill to be shortened.—[*Statement of Objects and Reasons.*] Notification under the section does not apply retrospectively. 1 Pat.L.J. 225=20 C.W.N. 1082.

Sec. 4.—It is well settled that the word "Hindu" in the Act, includes Jainas and Sikhs (*cf.* 31 C. 11, etc.) and also Brahmos (*see* 26 C.W.N. 799=49 C. 1069=1923 C. 265); also one professing the Hindu religion although of mixed parentage (*see* 7 Bur.L.T. 138=21 I.C. 638), and as the Hindu Wills Act, 1870, which the Bill consolidates makes special mention of Sikhs and Jainas, they are separately mentioned throughout the Bill.

HINDU BY CONVERSION.—European or other non-Hindu can become a Hindu by conversion. 111 I.C. 364=55 M.L.J. 478. A European does not become a Hindu merely because he proposes theological allegiance to the Hindu faith, or is an ardent admirer and advocate of Hinduism and its practices; but if he resides long in India, abdicates his religion by a clear act of renunciation and adopts Hinduism by undergoing formal conversion, gives up along with Christianity his Christian name and deliberately assumes a Hindu name, marries in accordance with Hindu religious rites a person who is a Hindu by race and religion, and cuts himself off from his old environment and takes to the Hindu mode of life, in such a case the Court may justly come to the conclusion that he has become a Hindu within the meaning of the Succession Act. A European who becomes a Hindu becomes also subject to the Hindu Law, the test in such a case being not one of domicile but of religion. 55 M.L.J. 478, *supra*. But *see* 43 A. 525. This Part II would apply to the following classes of persons: (1) European by birth or descent domiciled in British India; (2) East Indians or persons of mixed European and native blood; (3) Jews; 1 C. 148; 1 Boul. 234; Fult 420, except in Aden, where they have been exempted by notification under S. 332 [*Gazette of India*, 1886, p. 717]; (4) Armenians; (5) Parsees, in regard to testamentary succession; (6) Native Christians and their Christian descendants. 43 A. 525=64 I.C. 559; 2 M. 209; 7 M.H.C.R. 121; 9 M.I.A. 239; 9 M. 466; 10 M. 69; 19 B. 783; (7) A native Christian convert from any sect of Hinduism. 43 A. 525. He cannot afterwards elect to be governed by Hindu Law in matters of succession. 43 A. 525. But *see* 55 M.L.J. 478=111 I.C. 364; (8) Natives of India other than those comprised in the terms "Hindu, Muhammadan or Buddhist"; (9) All Europeans in India not having an Indian domicile. (7 Cl. and Fin. 895.) It would not apply to (1) a Chinese Buddhist: 8 L.B.R. 222=24 I.C. 367; (2) one who professes the Hindu religion though of mixed parentage: 7 Bur.L.T. 133=24 I.C. 638; (3) a Brahmo: 26 C.W.N. 79=49 C. 1069=1923 C. 265. (A Brahmo is a Hindu, even when he makes a declaration under Act III of 1872. 49 C. 1069).

PERSONS MARRIED UNDER SPECIAL MARRIAGE ACT.—Applicability of Act to such persons. *See* 30 Bom.L.R. 139.

HINDU WILL need not be signed by the testator nor does it need attestation; such a will if proved to be the last will is sufficient to revoke a previous registered will. 25 A. L.J. 1073=50 A. 314.

Secs. 4 and 5: ADOPTION BY BUDDHIST WOMAN—SUBSEQUENT CONVERSION TO CHRISTIANITY—RIGHT OF ADOPTED CHILD.—According to the rules of succession laid down under this Act, an adopted child is not an heir entitled upon an intestacy to inherit the estate of his deceased adoptive parent. A Buddhist woman adopted a girl as a daughter in Keittima form with a view to inherit; but

Law regulating succession to deceased person's immovable and movable property, respectively.

5. (1) Succession to the immovable property in British India of a person deceased shall be regulated by the law of British India, wherever such person may have had his domicile at the time of his death.

(2) Succession to the movable property of a person deceased is regulated by the law of the country in which such person had his domicile at the time of his death.

Illustrations.

(*i*) *A*, having his domicile in British India, dies in France, leaving movable property in France, movable property in England, and property, both movable and immovable, in British India. The succession to the whole is regulated by the law of British India.

(*ii*) *A*, an Englishman, having his domicile in France, dies in British India, and leaves property, both movable and immovable, in British India. The succession to the movable property is regulated by the rules which govern, in France, the succession to the movable property of an Englishman dying domiciled in France, and the succession to the immovable property is regulated by the law of British India.

One domicile only affects succession to movables.

6. A person can have only one domicile for the purpose of the succession to his movable property.

NOTES.

she subsequently became a Christian and died as a Christian intestate. *Held*, that the adopted girl could not inherit. 12 R. 184=1934 R. 72.

Secs. 5-19: ADOPTION—PLACE IN THE SUCCESSION ACT—SUCCESSION TO ESTATE OF SIKH CONVERT TO CHRISTIANITY.—On a consideration of the provisions contained in Part IV of the Succession Act which deals with consanguinity, it would be noticed that there is absolutely no mention of adoption as creating any kind of relationship whatsoever. The rule of law applicable in regard to the succession to the estate of a Sikh cinvert to Christianity, is not any practice or custom of adoption which might have prevailed, in the locality in the Punjab or the community to which the convert belonged before his conversion, but is as provided for in the Succession Act. Further in the absence of anything to show that the convert after his conversion desired or did something indicating an intention to retain any custom of adoption that might have prevailed in the community or the locality to which he belonged before his conversion, any such custom cannot apply. I.L.R. (1940) All. 100=1940 A.L.J. 1=1940 All. 134.

Sections 5-19 deal with domicile and are excluded in their application in the case of Hindus, Muhammadans, Buddhists, Sikhs and Jainas. The section applies to testamentary as well as intestate succession. Where a will relating to movables is invalid according to Indian Law, but valid under the law of the domicile of testator, probate will be granted in India. 1 Hagg. 498; 3 Hagg. 373; L.R. 8 App.Cas. 177; 1 Vern. 85. Thus if a man domiciled in England makes a will respecting immovable property in this country, both its construction and the ceremonial of its execution must be in accordance with this Act. 20 B. 607. In applying the rules of Hindu, Muhammadan, or English Law, to the wills of Hindus, Muhammadans or East Indian Christians, their particular habits and modes of life may be looked to as a guide to the interpretation. 5 B.L.R. 1; 13 W.R.P.C. 41. Generally speaking, the law of domicile governs under this Act the validity of wills of movables, their construction, and succession to the same. 13 M.I.A. 277; 5 B.L.R.P.C. 1: 20 B. 607; but it does not apply to immovables. In the case of immovable property belonging to a foreigner or Feudatory State, the section does not apply. 10 C. 136; 11 C. 17; 35 C. 777. The law of domicile is branch of private International Law. Two factors are essential to constitute domicile, *i.e.*, residence and the intention to make a home. The usual classification is domicile by birth, by choice and by operation of law, *e.g.*, marriage. For the English case-law bearing on Ss. 5 to 19, *see* Dicey's Conflict of Laws, 3rd Edn., Chap. II, pp. 83-207; Story's Conflict of Laws, Ch. III; Williams on Executors, 10th Edn., pp. 1261, 1270; Jarman on Wills, 5th Edn., p. 14.

Sec. 5.—The question of status of parties is of course one to be decided according to the law of domicile of the parties; but succession to immovable property in British India of a person deceased is, as provided by S. 5 of the Act, regulated by law of British India, wherever such person may have had his domicile at the time of his death. The custom prevailing among Parsis resident in Baroda for a husband to divorce his wife by mutual *furgats* or releases, assuming it to be a valid custom, cannot be recognised as valid in British India for the purpose of determining right or succession to land in British India, and such a divorce is not a valid divorce under the British Indian law for the purpose of deciding questions of succession to immovable property. 40 Bom.L.R. 141=1938 Bom. 238.

Domicile of origin of person of legitimate birth.

7. The domicile of origin of every person of legitimate birth is in the country in which at the time of his birth, his father was domiciled; or, if he is a posthumous child, in the country in which his father was domiciled at the time of the father's death.

Illustration.

At the time of the birth of *A*, his father was domiciled in England. *A's* domicile of origin is in England, whatever may be the country in which he was born.

Domicile of origin of illegitimate child.

8. The domicile of origin of an illegitimate child is in the country in which, at the time of his birth, his mother was domiciled.

Continuance of domicile of origin.

9. The domicile of origin prevails until a new domicile has been acquired.

Acquisition of new domicile.

10. A man acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin.

Explanation.—A man is not to be deemed to have taken up his fixed habitation in British India merely by reason of his residing there in His Majesty's civil [1][military [2](naval) or air force] service, or in the exercise of any profession or calling.

Illustrations.

(*i*) *A*, whose domicile of origin is in England, proceeds to British India, where he settles as a barrister or a merchant, intending to reside there during the remainder of his life. His domicile is now in British India.

(*ii*) *A*, whose domicile is in England, goes to Austria, and enters the Austrian service, intending to remain in that service. *A* has acquired a domicile in Austria.

(*iii*) *A*, whose domicile of origin is in France, comes to reside in British India under an engagement with the Central Government for a certain number of years. It is his intention to return to France at the end of that period. He does not acquire a domicile in British India.

(*iv*) *A*, whose domicile is in England, goes to reside in British India for the purpose of winding up the affairs of a partnership which has been dissolved, and with the intention of returning to England as soon as that purpose is accomplished. He does not by such residence acquire a domicile in British India, however long the residence may last.

(*v*) *A*, having gone to reside in British India in the circumstances mentioned in the last preceding illustration, afterwards alters his intention, and takes up his fixed habitation in British India. *A* has acquired a domicile in British India.

(*vi*) *A*, whose domicile is in the French Settlement of Chandernagore, is compelled by political events to take refuge in Calcutta, and resides in Calcutta for many years in the hope of such political changes as may enable him to return with safety to Chandernagore. He does not by such residence acquire a domicile in British India.

LEG. REF.

[1] Portion within brackets inserted by Act X of 1927.

[2] Inserted by Act XXXV of 1934.

NOTES.

Secs. 7 to 10.—*Beaman, J.*, in 41 B. 687 =36 I.C. 227=18 Bom.L.R. 715, discusses the terms domicile of origin and domicile of choice, and shows how strongly law leans in favour of the retention of the domicile of origin. As to the circumstances which may be relied on to prove evidence of intention, *see* 12 Moore P.C. 285; 17 Jur. N.S. 717. Even one day's residence in a new place with the requisite *animus* is sufficient to confer a new domicile. 43 B. 647. The explanation to S. 10 simply lays down the law as settled in other countries. 2 C.L.R. 497; 4 C. 106: 5 M. 379.

Sec. 7.—It is always material in determining what is a man's domicile, to consider where his wife and children live and have their permanent place of residence, and where the establishment is kept up. L.R. 3 App. Cas. 243; as an indication of intention, acts are more important than declarations. 10 Jur.N.S. 717. Officers of the Crown, coming to India at the time of the East India Company, did not lose their domicile of origin; but officers of the East India Company did. 5 M. 379; 2 C.L.R. 497 (Note); 4 C. 106; 2 C.L.R. 496.

Sec. 8.—Minors are generally incapable *proprio motu* of changing their domicile during their minority—Story's Conflict of Laws, 47. Their domicile follows that of the parent from whom it was derived.

(*vii*) *A*, having come to Calcutta in the circumstances stated in the last preceding illustration, continues to reside there after such political changes have occurred as would enable him to return with safety to Chandernagore, and he intends that his residence in Calcutta shall be permanent. *A* has acquired a domicile in British India.

Special mode of acquiring domicile in British India.

11. Any person may acquire a domicile in British India by making and depositing in some office in British India, appointed in this behalf by the Provincial Government, a declaration in writing under his hand of his desire to acquire such domicile: provided that he has been resident in British India for one year immediately preceding the time of his making such declaration.

Domicile not acquired by residence as representative of foreign Government, or as part of his family.

12. A person who is appointed by the Government of one country to be its ambassador, consul or other representative in another country does not acquire a domicile in the latter country by reason only of residing there in pursuance of his appointment; nor does any other person acquire such domicile by reason only of residing with such first-mentioned person as part of his family, or as a servant.

Continuance of new domicile.

13. A new domicile continues until the former domicile has been resumed or another has been acquired.

Minor's domicile.

14. The domicile of a minor follows the domicile of the parent from whom he derived his domicile of origin.

Exception.—The domicile of a minor does not change with that of his parent, if the minor is married, or holds any office or employment in the service of His Majesty, or has set up, with the consent of the parent, in any distinct business.

Domicile acquired by woman on marriage.

15. By marriage a woman acquires the domicile of her husband, if she had not the same domicile before.

Wife's domicile during marriage.

16. A wife's domicile during her marriage follows the domicile of her husband.

Exception.—The wife's domicile no longer follows that of her husband if they are separated by the sentence of a competent Court, or if the husband is undergoing a sentence of transportation.

Minor's acquisition of new domicile.

17. Save as hereinbefore otherwise provided in this part, a person cannot, during minority, acquire a new domicile.

NOTES.

Sec. 11.—In the Province of Oudh, the Office of the Judicial Commissioner at Lucknow should, until further orders, be the office in which declarations made under this section should be deposited. (*Gazette of India*, July 10th, 1865, p. 803.) In British Burma, the Office of the Chief Commissioner, British Burma at Rangoon is the office in which such declarations are to be deposited. (*Gazette of India*, 29th July, 1865.)

Sec. 13: SCOPE—SUIT BY EXECUTOR—PROBATE, IF A CONDITION PRECEDENT.—The grant of a probate is not a condition precedent to the institution of a suit by an executor. He has the right to sue as executor even before he obtains probate, and he will be entitled to get a decree if he produces the probate before the passing of the decree. 61 C. 1081=1935 C. 158.

Sec. 14.—*See* 4 C. 140; 1 C. 412.

Sec. 15.—Widow retains husband's domicile until she acquires another as by remarriage. 19 B. 697. A husband with an English domicile marrying a wife with an Indian domicile is on her death entitled to inherit the whole of her movable property to the exclusion of the next of kin. 23 C. 506. A Hindu widow of French India by migrating to British India and acquiring a new domicile does not change the character of the estate held by her. 24 M. 650.

Lunatic's acquisition of new domicile.

18. An insane person cannot acquire a new domicile in any other way than by his domicile following the domicile of another person.

Succession to movable property in British India in absence of proof of domicile elsewhere.

19. If a person dies leaving movable property in British India, in the absence of proof of any domicile elsewhere, succession to the property is regulated by the law of British India.

PART III.

MARRIAGE.

Interests and powers not acquired nor lost by marriage.

20. (1) No person shall, by marriage, acquire any interest in the property of the person whom he or she marries or become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried.

(2) This section—

(*a*) shall not apply to any marriage contracted before the first day of January, 1866;

(*b*) shall not apply, and shall be deemed never to have applied, to any marriage one or both of the parties to which professed at the time of the marriage the Hindu, Muhammadan, Buddhist, Sikh or Jain religion.

Effect of marriage between person domiciled and one not domiciled in British India.

21. If a person whose domicile is not in British India marries in British India a person whose domicile is in British India, neither party acquires by the marriage any rights in respect of any property of the other party not comprised in a settlement made previous to the marriage, which he or she would not acquire thereby if both were domiciled in British India at the time of the marriage.

Settlement of minor's property in contemplation of marriage.

22. (1) The property of a minor may be settled in contemplation of marriage, provided the settlement is made by the minor with the approbation of the minor's father, or, if the father is dead or absent from British India, with the approbation of the High Court.

(2) Nothing in this section or in section 21 shall apply to any will made or intestacy occurring before the first day of January, 1866, or to intestate or testamentary succession to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jaina.

NOTES.

Sec. 19.—The presumption is against a change of domicile. 12 Moo.P.C. 255. *See* as to domicile of choice and proof of intention, 41 B. 687=36 I.C. 227=18 Bom. L.R. 715; and as to burden of proof generally, 32 C. 631.

Secs. 20 and 21.—The sections deal with different subjects. The former declares the general *lex loci* of India; the second lays down a special rule in a particular case. (Per *Markby, J.*, 1 C. 412). It is to be observed, however as pointed out by *Sale, J.*, in 23 C. 506, that in 1 C. 412, the question whether Ss. 20 and 21 did in any way affect the rights of succession was not dealt with as necessarily arising in the case.

Sec. 20.—The effect of the section is to say that the rights and liabilities of husband and wife are not governed by the English Common Law, but to keep their proprietary rights kept intact as if they were unmarried. Thus, in a suit for judicial separation, the husband cannot be ordered to give security for costs. 5 C. 357; 7 C.W.N. 505, unless the wife is without property of her own. 9 M. 12. But the section cannot operate to prevent effect being given to a marriage settlement. 13 Beng.L.R. 383. *See also* 30 B. 500.

Sec. 21.—Part III deals with intestate succession and the section prevents the anomaly of movable and immovable properties being governed by two different systems of law, but does not lay down a rule intended to affect the law of succession. 1 C. 412; 23 C. 536.

PART IV.

OF CONSANGUINITY.

Application of part.

23. Nothing in this part shall apply to any will made or intestacy occurring before the first day of January, 1866, or to intestate or testamentary succession to the property of any Hindu, Muhammadan, Buddhist, Sikh, Jaina or Parsi.

Kindred or consanguinity.

24. Kindred or consanguinity is the connection or relation of persons descended from the same stock or common ancestor.

Lineal consanguinity.

25. (1) Lineal consanguinity is that which subsists between two persons, one of whom is descended in a direct line from the other, as between a man and his father, grandfather and great-grandfather, and so upwards in the direct ascending line; or between a man and his son, grandson, great-grandson and so downwards in the direct descending line.

(2) Every generation constitutes a degree, either ascending or descending.

(3) A person's father is related to him in the first degree, and so likewise is his son; his grandfather and grandson in the second degree; his great-grandfather and great-grandson in the third degree, and so on.

Collateral consanguinity.

26. (1) Collateral consanguinity is that which subsists between two persons who are descended from the same stock or ancestor, but neither of whom is descended in a direct line from the other.

(2) For the purpose of ascertaining in what degree of kindred any collateral relative stands to a person deceased, it is necessary to reckon upwards from the person deceased to the common stock and then downwards to the collateral relative, a degree being allowed for each person, both ascending and descending.

Persons held for purpose of succession to be similarly related to deceased.

27. For the purpose of succession, there is no distinction—

(*a*) between those who are related to a person deceased through his father, and those who are related to him through his mother; or

(*b*) between those who are related to a person deceased by the full blood, and those who are related to him by the half blood; or

(*c*) between those who were actually born in the lifetime of a person deceased and those who at the date of his death were only conceived in the womb, but who have been subsequently born alive.

Mode of computing of degrees of kindred.

28. Degrees of kindred are computed in the manner set forth in the table of kindred set out in Schedule I.

Illustrations.

(*i*) The person whose relatives are to be reckoned and his cousin-german, or first cousin, are, as shown in the table, related in the fourth degree; there being one degree of ascent to the father, and another to the common ancestor, the grandfather; and from him one of descent to the uncle and another to the cousin-german, making in all four degrees.

NOTES.

Sec. 24.—The definition is based on the English Statute 23 Charles II, c. 10, and is to be distinguished from affinity which is relationship through marriage. But in the case of Hindus, "kindred" includes relationship by marriage also. 15 C.W.N. 945.

Secs. 25 to 28.—Illegitimate children seem to be excluded from the operation of sections 25-28. *See* 11 Beng.L.R. App. 6; 30 B. 500. *See also* 58 C. 761=1931 C. 560.

(*ii*) A grandson of the brother and a son of the uncle, *i.e.*, a great-nephew and a cousin-german, are in equal degree being each four degrees removed.

(*iii*) A grandson of a cousin-german is in the same degree as the grandson of a great-uncle for they are both in the sixth degree of kindred.

PART V.

INTESTATE SUCCESSION.

CHAPTER I.

PRELIMINARY.

Application of part.

29. (1) This part shall not apply to any intestacy occurring before the first day of January, 1866, or to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jaina.

(2) Save as provided in sub-section (1) or by any other law for the time being in force, the provisions of this part shall constitute the law of British India in all cases of intestacy.

As to what property deceased considered to have died intestate.

30. A person is deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect.

Illustrations.

(*i*) *A* has left no will. He has died intestate in respect of the whole of his property.

(*ii*) *A* has left a will, whereby he has appointed *B* his executor; but the will contains no other provisions. *A* has died intestate in respect of the distribution of the property.

(*iii*) *A* has bequeathed his whole property for an illegal purpose. *A* has died intestate in respect of the distribution of his property.

(*iv*) *A* has bequeathed 1,000 rupees to *B* and 1,000 rupees to the eldest son of *C*, and has made no other bequest; and has died leaving the sum of 2,000 rupees and no other property. *C* died before *A* without having ever had a son. *A* has died intestate in respect of distribution of 1,000 rupes.

CHAPTER II.

RULES IN CASES OF INTESTATES OTHER THAN PARSIS.

Chapter not to apply to Parsis.

31. Nothing in this Chapter shall apply to Parsis.

Devolution of such property.

32. The property of an intestate devolves upon the wife or husband, or upon those who are of the kindred of the deceased, in the order and according to the rules hereinafter contained in this Chapter.

Explanation.—A widow is not entitled to the provision hereby made for her if, by a valid contract made before her marriage, she has been excluded from her distributive share of her husband's estate.

NOTES.

Sec. 29.—To show that the English Law on its introduction by the Charter of 1726 was inapplicable to a particular community, it is not enough to prove that the community, had prior to that been governed by a law differing from English Law. It must be shown that the English Law is based on social or political conditions peculiar to the country of its origin. Part V of the Succession Act applies to the members of the Jewish community in Calcutta. 58 C. 761 =1931 C. 560.

Secs. 29 and 30.—*See* 54 A. 293=1932 A. 262.

Sec. 30.—Before the consolidation there was conflict as to its effect on the rule of survivorship: *see* 31 B. 25; 10 M. 69. As to effect of informal execution of will and partial intestacy, *see* 9 B.L.R. 377; 4 B. 537; 31 M. 517. Intestacy may be total or only partial. The former occurs when no will is left, or the will left becomes inoperative. (1902) 1 Ch. 218; (1902) 2 Ch. 500; the latter when part only of the beneficial interest is disposed of. 21 Ch. D. 10; (1900) 2 Ch. 541.

Sec. 32.—These sections relate to devolution as distinguished from distribution and are based on the English Law relating to personal property. The explanation does not apply to post-nuptial settlements. 3 Ves. 332; 10 Ves. 17. The section does not defeat the widow's right to dower. 6 C. 794. As regards the wife's share, the section corresponds mostly with the English

Where intestate has left widow and lineal descendants, or widow and kindred only, or widow and no kindred.

33. Where the intestate has left a widow—

(*a*) if he has also left any lineal descendants, one-third of his property shall belong to his widow, and the remaining two-thirds shall go to his lineal descendants according to the rules hereinafter contained;

(*b*) [1][Save as provided by section 33-A] if he has left no lineal descendants, but has left persons who are of kindred to him, one-half of his property shall belong to his widow, and the other half shall go to those who are of kindred to him, in the order and according to the rules hereinafter contained;

(*c*) if he has left none who are of kindred to him, the whole of his property shall belong to his widow.

Special provision where intestate has left widow and no lineal descendants.

[2][33-A. (1) Where the intestate has left a widow but no lineal descendants and the nett value of his property does not exceed five thousand rupees, the whole of his property shall belong to the widow.

(2) Where the nett value of the property exceeds the sum of five thousand rupees, the widow shall be entitled to five thousand rupees thereof and shall have a charge upon the whole of such property for such sum of five thousand rupees, with interest thereon from the date of the death of the intestate at 4 per cent. per annum until payment.

(3) The provision for the widow made by this section shall be in addition and without prejudice to her interest and share in the residue of the estate of such intestate remaining after payment of the said sum of five thousand rupees, with interest as aforesaid, and such residue shall be distributed in accordance with the provisions of section 33 as if it were the whole of such intestate's property.

(4) The nett value of the property shall be ascertained by deducting from the gross value thereof all debts, and all funeral and administration expenses of the intestate, and all other lawful liabilities and charges to which the property shall be subject.

(5) This section shall not apply—

(*a*) to the property of :—

(i) any Indian Christian,

(ii) any child or grandchild of any male person who is or was at the time of his death an Indian Christian, or

(iii) any person professing the Hindu, Buddhist, Sikh or Jaina religion the succession to whose property is, under section 24 of the Special Marriage Act, 1872, regulated by the provisions of this Act;

(*b*) unless the deceased dies intestate in respect of all his property.]

Where intestate has left no widow, and where he has left no kindred.

34. Where the intestate has left no widow, his property shall go to his lineal descendants or to those who are of kindred to him, not being lineal descendants, according to the rules hereinafter contained; and, if he has left none who are of kindred to him, it shall go to the Crown.

35. A husband surviving his wife has the same rights in respect of her

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LEG. REF.

[1] Inserted by Act XL of 1926, S. 2.

[2] *Ibid.*, S. 3.

NOTES.

Law, except that in England where no next-of-kin or kindred is left, the Crown takes one half. The section applies even to a case where the intestate is a bastard. 8 Sim. 214.

Sec. 33.—The phrase "lineal descendants" means descendants born in lawful wedlock: 12 Bur.L.T. 48=51 I.C. 542.

Sec. 35.—The proviso to this clause gives succession. The separate existence on the effect to one of the provisions of S. 8 of

Rights of widower.

property, if she dies intestate, as a widow has in respect of her husband's property, if he dies intestate.

Distribution where there are lineal descendants.

Rules of distribution.

36. The rules for the distribution of the intestate's property (after deducting the widow's share, if he has left a widow) amongst his lineal descendants shall be those contained in sections 37 to 40.

Where intestate has left child or children only.

37. Where the intestate has left surviving him any child or children, but no more remote lineal descendant through a deceased child, the property shall belong to his surviving child, if there is only one, or shall be equally divided among all his surviving children.

Where intestate has left no child but grandchild or grandchildren.

38. Where the intestate has not left surviving him any child, but has left a grandchild or grandchildren and no more remote descendant through a deceased grandchild, the property shall belong to his surviving grandchild if there is only one, or shall be equally divided among all his surviving grandchildren.

Illustrations.

(*i*) *A* has three children, and no more, John, Mary and Henry. They all die before the father, John leaving two children, Mary three, and Henry four. Afterwards *A* dies intestate, leaving those nine grandchildren and no descendant of any deceased grandchild. Each of his grandchildren will have one-ninth.

(*ii*) But if Henry had died, leaving no child, then the whole is equally divided between the intestate's five grandchildren, the children of John and Mary.

Where intestate has left only great-grandchildren or remoter lineal descendants.

39. In like manner the property shall go to the surviving lineal descendants who are nearest in degree to the intestate, where they are all in the degree of great-grandchildren to him, or are all in a more remote degree.

Where intestate leaves lineal descendants, not all in same degree of kindred to him, and those through whom the more remote are descended are dead.

40. (1) If the intestate has left lineal descendants who do not all stand in the same degree of kindred to him, and the persons through whom the more remote are descended from him are dead, the property shall be divided into such a number of equal shares as may correspond with the number of the lineal descendants of the intestate who either stood in the nearest degree of kindred to him at his decease, or, having been of the like degree of kindred to him, died before him, leaving lineal descendants who survived him.

NOTES.

the Parsi Succession Act and taken together with the preceding clauses reproduces the whole of that Act which it is therefore proposed to repeal. In England the husband succeeds to the whole of the wife's personal property. All rights are at an end when the marriage is dissolved by divorce. 4 Eq. 162; 3 Ch. 220. As to husband's share in wife's property, *see* 87 I.C. 354=1925 M. 1110.

Sec. 37.—"Child" in S. 37 possibly includes an illegitimate child. 58 C. 761. *See also* 1940 Rang.L.R. 654. The child or children in the section refers to legitimate children. In the case of personal estate, the question of legitimacy is governed by the law of domicile, and hence a child legitimate by such law, though not according to English Law, gets a share. 17 Ch.D. 266; 5 B. and C. 451; 10 H.L. Cases 1; but *see* 58 C. 761; so also in the case of *legitimatio per subsequens matrimonium*, it must be allowed by the law of the place of domicile. 10 Ch. D. 216; 17 Ch.D. 266. As to adopted children *see* 1940 Rang.L.R. 654; 1940 All. 134.

Secs. 37 and 48: ADOPTED CHILD—RIGHT TO INHERIT.—According to the rules of succession laid down under the Succession Act, an adopted child is not an heir entitled upon an intestacy to inherit the estate of his deceased adoptive parent. A Buddhist woman adopted a girl as a daughter in Keittima form with a view to inherit, but he subsequently became a Christian and died as a Christian intestate. *Held*, that the adopted girl could not inherit 12 R. 184=1934 R. 72. *See also* 43 A. 255; 9 M.I.A. 195; 15 W.R. 33 (P.C.) and 57 I.A. 313 (P.C.).

(2) One of such shares shall be allotted to each of the lineal descendants who stood in the nearest degree of kindred to the intestate at his decease; and one of such shares shall be allotted in respect of each of such deceased lineal descendants; and the share allotted in respect of each of such deceased lineal descendants shall belong to his surviving child or children or more remote lineal descendants, as the case may be; such surviving child or children or more remote lineal descendants always taking the share which his or their parent or parents would have been entitled to respectively if such parent or parents had survived the intestate.

Illustrations.

(*i*) A had three children, John, Mary and Henry; John died, leaving four children, and Mary died, leaving one, and Henry alone survived the father. On the death of *A*, intestate, one-third is allotted to Henry, one-third to John's four children, and the remaining third to Mary's one child.

(*ii*) *A* left no child, but left eight grandchildren, and two children of a deceased grandchild. The property is divided into nine parts, one of which is allotted to each grandchild, and the remaining one-ninth is equally divided between the two great-grandchildren.

(*iii*) *A* has three children, John, Mary and Henry; John dies leaving four children; and one of John's children dies leaving two children. Mary dies leaving one child; *A* afterwards dies intestate. One-third of his property is allotted to Henry, one-third to Mary's child, and one-third is divided into four parts one of which is allotted to each of John's three surviving children and the remaining part is equally divided between John's two grandchildren.

(*iv*) *A* has two children, and no more; John and Mary. John dies before his father, leaving his wife pregnant. Then *A* dies leaving Mary surviving him, and in due time a child of John is born. *A's* property is to be equally divided between Mary and the posthumous child.

Distribution where there are no lineal descendants.

Rules of distribution where intestate has left no lineal descendants.

41. Where an intestate has left no lineal descendants, the rules for the distribution of his property (after deducting the widow's share, if he has left a widow) shall be those contained in sections 42 to 48.

Where intestate's father living.

42. If the intestate's father is living, he shall succeed to the property.

Where intestate's father dead but his mother, brothers and sisters living.

43. If the intestate's father is dead, but the intestate's mother is living and there are also brothers or sisters of the intestate living, and there is no child living of any deceased brother or sister, the mother and each living brother or sister shall succeed to the property in equal shares.

Illustration.

A dies intestate, survived by his mother and two brothers of the full blood, John and Henry and a sister Mary, who is the daughter of his mother but not of his father. The mother takes one-fourth, each brother takes one-fourth, and Mary, the sister of half-blood, takes one-fourth.

Where intestate's father dead and his mother, a brother or sister, and children of any deceased brother or sister, living.

44. If the intestate's father is dead, but the intestate's mother is living and if any brother or sister and the child or children of any brother or sister who may have died in the intestate's lifetime are also living, then the mother and each living brother or sister, and the living child or children of each deceased brother or sister, shall be entitled to the property in equal shares, such children (if more than one) taking in equal shares, only the shares which their respective parents would have taken if living at the intestate's death.

NOTES.

Sec. 42.—*See* 9 M. 466 as to a Hindu father's right to succeed to his Christian son.

Illustration.

A, the intestate, leaves his mother, his brothers John and Henry, and also one child of a deceased sister, Mary, and two children of George, a deceased brother of the half blood who was the son of his father but not of his mother. The mother takes one-fifth, John and Henry each takes one-fifth, the child of Mary takes one-fifth, and the two children of George divide the remaining one-fifth equally between them.

Where intestate's father dead and his mother and children of any deceased brother or sister living.

45. If the intestate's father is dead, but the intestate's mother is living, and the brothers and sisters are all dead, but all or any of them have left children who survived the intestate, the mother and the child or children of each deceased brother or sister shall be entitled to the property in equal shares, such children (if more than one) taking in equal shares, only the shares which their respective parents would have taken if living at the intestate's death.

Illustration.

A, the intestate, leaves no brother or sister, but leaves his mother and one child of a deceased sister, Mary, and two children of a deceased brother, George. The mother takes one-third, the child of Mary, takes one-third and the children of George divide the remaining one-third, equally between them.

Where intestate's father dead, but his mother living and no brother, sister, nephew or niece.

46. If the intestate's father is dead, but the intestate's mother is living, and there is neither brother, nor sister, nor child of any brother or sister of the intestate, the property shall belong to the mother.

Where intestate has left neither lineal descendant, nor father, nor mother.

47. Where the intestate has left neither lineal descendant, nor father, nor mother, the property shall be divided equally between his brothers and sisters and the child or children of such of them as may have died before him, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death.

Where intestate has left neither lineal descendant, nor parent, nor brother, nor sister.

48. Where the intestate has left neither lineal descendant, nor parent, nor brother, nor sister, his property shall be divided equally among those of his relatives who are in the nearest degree of kindred to him.

Illustrations.

(*i*) *A*, the intestate, has left a grandfather, and grandmother and no other relative standing in the same or a nearer degree of kindred to him. They, being in the second degree, will be entitled to the property in equal shares, exclusive of any uncle or aunt, of the intestate, uncles and aunts being only in the third degree.

(*ii*) *A*, the intestate, has left a great-grandfather, or a great-grandmother, and uncles and aunts, and no other relative standing in the same or a nearer degree of kindred to him. All of these being in the third degree will take equal shares.

(*iii*) *A*, the intestate, left a great-grandfather, an uncle and a nephew, but no relative standing in a nearer degree of kindred to him. All of these being in the third degree will take equal shares.

(*iv*) Ten children of one brother or sister of the intestate, and one child of another brother or sister of the intestate, constitute the class of relatives of the nearest degree of kindred to him. They will each take one-eleventh of the property.

Children's advancements not brought into botchpot.

49. Where a distributive share in the property of a person who has died intestate is claimed by a child, or any descendant of a child, of such person, no money or other property which the intestate may, during his life, have paid,

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NOTES.

Sec. 47.—Brothers and sisters who rank in the second degree of kindred like grandfather and grandmother still exclude the latter: 3 Atk. 762; 1 Vern. 403, probably based on the ground of convenience and need.

Sec. 48.—*See* 12 R. 184=1934 R. 72, cited under S. 37.

Sec. 49.—This section is to make inappli-

given or settled to, or for the advancement of, the child by whom or by whose descendant the claim is made shall be taken into account in estimating such distributive share.

CHAPTER III.

SPECIAL RULES FOR PARSI INTESTATES.

General principles relating to intestate succession.

[1][50. For the purpose of intestate succession among Parsis—

(*a*) there is no distinction between those who were actually born in the lifetime of a person deceased and those who at the date of his death were only conceived in the womb, but who have been subsequently born alive;

(*b*) a lineal descendant of an intestate who has died in the lifetime of the intestate without leaving a widow or widower or any lineal descendant or a widow of any lineal descendant shall not be taken into account in determining the manner in which the property of which the intestate has died intestate shall be divided; and

(*c*) where a widow of any relative of an intestate has married again in the lifetime of the intestate, she shall not be entitled to receive any share of the property of which the intestate has died intestate, and she shall be deemed not to be existing at the intestate's death.

Division of a male intestate's property among his widow, children and parents.

51. (1) Subject to the provisions of sub-section (2), the property of which a male Parsi dies intestate shall be divided—

(*a*) where he dies leaving a widow and children, among the widow and children, so that the share of each son and of the widow shall be double the share of each daughter, or

(*b*) where he dies leaving children but no widow, among the children, so that the share of each son shall be double the share of each daughter.

(2) Where a male Parsi dies leaving one or both parents in addition to children or a widow and children, the property of which he dies intestate shall be divided so that the father shall receive a share equal to half the share of a son and the mother shall receive a share equal to half the share of a daughter.

Division of a female intestate's property among her widower and children.

52. The property of which a female Parsi dies intestate shall be divided—

LEG. REF.

[1] Sections 50 to 56 have been substituted by Act XVII of 1939.

NOTES.

cable the principle of English Law that anything received by way of advancement or settlement should be brought into the hotchpot so as to make the shares of all children equal. As to what is and what is not advancement, *see* 20 Eq. 155; 8 Ch. D. 136; (1903) 1 Ch. 1. Prior to Act XXI of 1865 the law governing Parsis in the mufassil was the ascertained usage of the community modified by the rules of equity and good conscience. 30 B. 359.

Secs. 50 to 56 and Sch. II.—Contain special rules as to intestate succession among Parsis; and correspond to Ss. 1 to 7 of the Parsi Intestate Succession Act (XXI of 1867). Although as early as 1877, it was pointed out by the Judges of the Bombay High Court that there were defects in the drafting of the Act and that in order to make this Act harmonious with other enactments, amendments are necessary in several respects (*see* 1 B. 506), still the legislature has not though fit to make those amendments in the present Act (*vide* Speech of Law Member in introducing the Bill in the Council and Joint Committee Report). As to the construction of this chapter and whether the form in which the Act was placed before the Legislative Council can be considered in construing the Act, *see* 11 B. 1 (4). As to construction of Parsi Will, *see* 4 B. 537; 7 Bom.L.R. 207. Where there are no special statutes relating to them, the law applicable to Parsis in the island and town of Bombay is the English common law and the statute law in England so far as they are reasonably applicable to them. 51 B. 167=98 I.C. 949=1927 B. 22.

Sec. 51.—As to the meaning of "widower," *see* 11 B. 1 (4). A widower on a second marriage is still a widower relatively to deceased wife. 11 B. 1. As to succession of a Parsi female, *see* 5 Bom.L.R. 252.

Secs. 52 to 56.—As to the validity of a direction in the will of a Parsi excluding particular heir, *see* 28 I.C. 481.

(*a*) where she dies leaving a widower and children, among the widower and children so that the widower and each child receive equal shares, or

(*b*) where she dies leaving children but no widower, among the children in equal shares.

Division of share of pre-deceased child of intestate leaving lineal descendants.

53. In all cases where a Parsi dies leaving any lineal descendant, if any child of such intestate has died in the lifetime of the intestate, the division of the share of the property of which the intestate has died intestate which such child would have taken if living at the intestate's death shall be in accordance with the following rules, namely:—

(*a*) If such deceased child was a son, his widow and children shall take shares in accordance with the provisions of this Chapter as if he had died immediately after the intestate's death:

Provided that where such deceased son has left a widow or a widow of a lineal descendant but no lineal descendant, the residue of his share after such distribution has been made shall be divided in accordance with the provisions of this Chapter as property of which the intestate has died intestate, and in making the division of such residue the said deceased son of the intestate shall not be taken into account.

(*b*) If such deceased child was a daughter, her share shall be divided equally among her children.

(*c*) If any child of such deceased child has also died during the lifetime of the intestate, the share which he or she would have taken if living at the intestate's death shall be divided in like manner in accordance with clause (*a*) or clause (*b*) as the case may be.

(*d*) Where a remoter lineal descendant of the intestate has died during the lifetime of the intestate, the provisions of clause (*c*) shall apply *mutatis mutandis* to the division of any share to which he or she would have been entitled if living at the intestate's death by reason of the predecease of all the intestate's lineal descendants directly between him or her and the intestate.

Division of property where intestate leaves no lineal descendant but leaves a widow or widower or a widow of any lineal descendant.

54. Where a Parsi dies without leaving any lineal descendant but leaving a widow or widower or a widow of a lineal descendant, the property of which the intestate dies intestate shall be divided in accordance with the following rules, namely:—

(*a*) If the intestate leaves a widow or widower but no widow of a lineal descendant, the widow or widower shall take half the said property.

(*b*) If the intestate leaves a widow or widower and also a widow of any lineal descendant, his widow or her widower shall receive one-third of the said property, and the widow of any lineal descendant shall receive another one-third, or if there is more than one such widow, the last mentioned one-third shall be divided equally among them.

(*c*) If the intestate leaves no widow or widower but one widow of a lineal descendant, she shall receive one-third of the said property or, if the intestate leaves no widow or widower but more than one widow of a lineal descendant, two-thirds of the said property shall be divided among such widows in equal shares.

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Sec. 54.—As to position of widower of a pre-deceased son or daughter before and after the Act, *see* 1 B. 506. It is not a condition precedent to the application of S. 5 that the pre-deceased son of an intestate Parsi shall have left a widow and issue. 1 B. 506.

Secs. 55 and 56.—In both these sections the words "next-of-kin" and "relatives" are synonymous. 22 B. 909.

Sec. 56.—Only in cases where the deceased left neither lineal descendants nor widow nor widower, as the case may be, would this section and Sch. II, Art. 2 apply. 4 B. 537. As to meaning of "next-of-kin," *see* 22 B. 903.

(*d*) The residue after the division specified in clause (*a*), (*b*) or (*c*) has been made shall be distributed among the relatives of the intestate in the order specified in Part I of Schedule II. The next-of-kin standing first in Part I of that Schedule shall be preferred to those standing second, the second to the third, and so on in succession, provided that the property shall be so distributed that each male shall take double the share of each female standing in the same degree of propinquity.

(*e*) If there are no relatives entitled to the residue under clause (*d*), the whole of the residue shall be distributed in proportion to the shares specified among the persons entitled to receive shares under this section.

Division of property where intestate leaves neither lineal descendants nor a widow or widower nor a widow of any lineal descendant.

55. When a Parsi dies leaving neither lineal descendants nor a widow or widower nor a widow of any lineal descendant, his or her next-of-kin, in the order set forth in Part II of Schedule II, shall be entitled to succeed to the whole of the property of which he or she dies intestate. The next-of-kin standing first in Part II of that Schedule shall be preferred to those standing second, the second to the third, and so on in succession, provided that the property shall be so distributed that each male shall take double the share of each female standing in the same degree of propinquity.

Division of property where there is no relative entitled to succeed under the other provisions of this Chapter.

56. Where there is no relative entitled to succeed under the other provisions of this Chapter to the property of which a Parsi has died intestate, the said property shall be divided equally among those of the intestate's relatives who are in the nearest degree of kindred to him.]

PART VI.

TESTAMENTARY SUCCESSION.

CHAPTER I.

INTRODUCTORY.

Application of certain provisions of Part to a class of wills made by Hindus, etc.

[1]57. The provisions of this Part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply—

(*a*) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina, on or after the first day of September, 1870, within the territories which at the said date were subject to the Provincial Government of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(*b*) to all such wills and codicils made outside those territories and limits so far as relates to immovable property situate within those territories or limits; [and]

LEG. REF.

[1] S. 57.—Sub-S. (1) of S. 57 has been renumbered as S. 57, and after Cl. (*b*) and before the proviso the word "and" and Cl. (*c*) have been added; and sub-S. (2) of S. 57 has been omitted by Act XVIII of

NOTES.

Sec. 57.—Part VI deals with testamentary succession. Read with Schedule III it reproduces those provisions of the Hindu Wills Act (XXI of 1870), which relate to testamentary succession. S. 187 of the Indian Succession Act (X of 1865), as applied by the Hindu Wills Act, has been dealt with in another part of the Bill and will be dealt with under the appropriate section. (*Statement of Objects and Reasons.*)

Will executed by a Hindu in the mofussil —Estate, when vests in the executor—Probate not obtained, effect of. 49 M. 261=1926 M. 434=50 M.L.J. 308 (F.B.). In the case of wills executed outside Madras, probate need be taken of them only in so far as they relate to immovable properties

[(*c*) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina, on or after the first day of January, 1927, to which those provisions are not applied by clauses (*a*) and (*b*):]

Provided that marriage shall not revoke any such will or codicil.

[* * * * * * *]

General application of Part.

58. (1) The provisions of this Part shall not apply to testamentary succession to the property of any Muhammadan nor, save as provided by section 57, to testamentary succession to the property of any Hindu, Buddhist, Sikh or Jaina; nor shall they apply to any will made before the first day of January, 1866.

(2) Save as provided in sub-section (1) or by any other law for the time being in force, the provisions of this Part shall constitute the law of British India applicable to all cases of testamentary succession.

CHAPTER II.

OF WILLS AND CODICILS.

Person capable of making wills.

59. Every person of sound mind not being a minor may dispose of his property by will.

LEG. REF.

1929. The necessity for the amendment has been explained as follows:—Under sub-section (2) of S. 57 of the Act of 1925, which was inserted by Act XXXVII of 1926, all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the 1st January, 1927, in areas outside those where sub-section (1) of that section is in force, are required to be reduced to writing signed and attested under S. 63 of the Act. It is considered that the provisions of the other sections of the Indian Succession Act set out in Schedule III should be made applicable to the class of wills dealt with in S. 57 (2), since the failure to apply these provisions to those wills may lead to the inference that different principles govern them, and once it is decided that this class of wills should be in writing, signed and attested, there is no reason for differentiating it from the wills falling under Cls. (*a*) and (*b*) of S. 57 (1). The necessary amendments are provided in clauses (3) and (4) of the Bill.

NOTES.

within Madras. A suit for a pecuniary legacy, unconnected with any such property that may be dealt with by the will is maintainable without probate. 1930 M. 956=59 M.L.J. 596.

HINDU WILLS ACT (XXI OF 1870), Ss. 2 AND 3—SCOPE AND EFFECT OF.—The combined effect of Ss. 2 and 3 of the Hindu Wills Act is that a disposition permitted by the Succession Act may be invalidated, but a disposition invalid under this Act cannot be validated by any rule of Hindu Law. 1934 M. 705=67 M.L.J. 525.

Secs. 57 (c) and 63: ORAL WILL BY HINDU—VALIDITY.—In view of Ss. 57 (*c*) and 63 of the Succession Act, no oral will could legally be made by a Hindu after the 1st January, 1927. 42 P.L.R. 326.

Secs. 57 and 213.—Where the will of Hindu in Ajmer deals with property in Calcutta, the legatee cannot establish his right thereunder without first obtaining probate or letters of administration. 1941 A.M.L.J. 132.

Secs. 57 (c), 213 and 383.—Where a person claims under a will falling under S. 57 (*c*), he can apply under S. 383 and get the succession certificate granted to another, revoked, without obtaining a probate of the will, for S. 213, which requires it, does not apply to a will falling under S. 57 (*c*). 1938 A.L.J. 939=1938 All. 640.

Sec. 59.—Sound mind is not the same as perfectly balanced mind; it need only be of natural capacity, and not unduly impaired by old age, illness or influence. L.R. 1 P. & D. 398; 3 P. D. 64; 19 C.W.N. 826; 8 Moo.P.C. 493; (1899) A.C. 1. A testator must comprehend what he is doing. 3 Moo. P.C. 136, 282; 25 C. 824; 22 M. 345; 19 C.W.N. 747; giving instructions is sufficient. 23 M.L.J. 54; 1927 P. 256; as to how far paralytic attack and physical weakness affect his capacity, *see* 23 I.A. 171; there must be volition and intelligent comprehension. 24 I.A. 148; 25 I.A. 109. Mere weakness of mind or understanding does not affect. 4 C.L.J. 115. Onus of proving testamentary capacity is on him who propounds the will. 15 C.W.N. 177; 24 C.W.N. 860; 5 Q.B. 549; 14 Ch.D. 674. Any assent by the legatee to abide by the will would not clothe the testator with authority to deal with property over which he had no disposing power. 114 I.C. 105 =1929 S. 19. Hindu minor cannot make a will: 38 M. 166; 36 B. 622; 19 C.W.N. 526; mere existence of delusions does not deprive a man of his testamentary capacity. 15 Ch.D. 674; L.R. 3 P. & D. 64. *Re* the will of a deaf and dumb man, *see* 7 C. W.N. ccii. Illness incapacitating a man

Explanation I.—A married woman may dispose by will of any property which she could alienate by her own act during her life.

Explanation II.—Persons who are deaf or dumb or blind are not thereby incapacitated for making a will if they are able to know what they do by it.

Explanation III.—A person who is ordinarily insane may make a will during an interval in which he is of sound mind.

Explanation IV.—No person can make a will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing.

Illustrations.

(*i*) *A* can perceive what is going on in his immediate neighbourhood, and can answer familiar questions, but has not a competent understanding as to the nature of his property, or the persons who are of kindred to him, or in whose favour it would be proper that he should make his will. *A* cannot make a valid will.

(*ii*) *A* executes an instrument purporting to be his will, but he does not understand the nature of the instrument, nor the effect of its provisions. This instrument is not a valid will.

(*iii*) *A*, being very feeble and debilitated, but capable of exercising a judgment as to the proper mode of disposing of his property, makes a will. This is a valid will.

Testamentary guardian.

60. A father, whatever his age may be, may by will appoint a guardian or guardians for his child during minority.

Will obtained by fraud, coercion, or importunity.

61. A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void.

Illustrations.

(*i*) *A* falsely and knowingly represents to the testator that the testator's only child is dead, or that he has done some undutiful act and thereby induces the testator to make a will in his, *A's* favour; such will has been obtained by fraud, and is invalid.

(*ii*) *A*, by fraud and deception, prevails upon the testator to bequeath a legacy to him. The bequest is void.

(*iii*) *A*, being a prisoner by lawful authority, makes his will. The will is not invalid by reason of the imprisonment.

(*iv*) *A* threatens to shoot *B*, or to burn his house or to cause him to be arrested on a criminal charge, unless he makes a bequest in favour of *C*. *B*, in consequence, makes a bequest in favour of *C*. The bequest is void, the making of it having been caused by coercion.

(*v*) *A*, being of sufficient intellect, if undisturbed by the influence of others, to make a will, yet being so much under the control of *B* that he is not a free agent, makes a will, dictated by *B*. It appears that he would not have executed the will but for fear of *B*. The will is invalid.

(*vi*) *A*, being in so feeble a state of health as to be unable to resist importunity, is pressed by *B* to make a will of a certain purport and does so merely to purchase peace and in submission to *B*. The will is invalid.

(*vii*) *A* being in such a state of health as to be capable of exercising his own judgment and volition, *B* uses urgent intercession and persuasion with him to induce him

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from making will. 38 C. 855: 24 I.A. 148; 24 M.L.J. 271; 1 L. 773. Old age alone does not incapacitate. 2 Hagg. 142, 211; 10 Moo.P.C. 247, 278.

Sec. 60.—This does not apply to illegitimate children. 13 Eq. 36; a Hindu mother cannot make a will. 8 M.L.J. 112.

Sec. 61.—Will—Probate—Proof of will—Amount of proof necessary. 32 Bom.L.R. 1289=1930 B. 539. *See* 5 P.D. 151 (157). For the definition of fraud, undue influence and coercion, *see* Indian Contract Act, Ss. 15 to 18. 14 M.I.A. 53; 6 H.L.C. 2; 40 C. 598; 41 M. 33; 42 I.A. 135. To amount to undue influence the acts must amount to coercion. 22 B. 17; and it is only when it takes away the free agency of the testator. 45 M. 546; 23 C.W.N. 690; 5 C.L.J. 484; 1924 P.C. 28. When the donee stands in a fiduciary position, undue influence is presumed. 20 Bom.L.R. 911; (1903) 1 Ch. 27: 6 C.W.N. 809; 14 Ves. 273; 32 I.A. 142. *See* as to *purdanashin* ladies, 39 I.A. 156; 41 I.A. 23; 11 M.I.A. 551. The *onus* lies on the person who sets up a will and not on the person who impeaches it. 23 A. 405; 20 C.L.J. 501; 25 C.W.N. 779; (1920) A. C. 349; 38 C. 355. Words or clauses introduced by mistake can be struck out. L.R. 7 H.L. 448; 7 P. Div. 68.

to make a will of a certain purport. *A*, in consequence of the intercession and persuasion, but in the free exercise of his judgment and volition, makes his will in the manner recommended by *B*. The will is not rendered invalid by the intercession and persuasion of *B*.

(*viii*) *A*, with a view to obtaining a legacy from *B*, pays him attention and flatters him and thereby produces in him a capricious partiality to *A*. *B*, in consequence of such attention and flattery, makes his will, by which he leaves a legacy to *A*. The bequest is not rendered invalid by the attention and flattery of *A*.

Will may be revoked or altered.

62. A will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by will.

CHAPTER III.

OF THE EXECUTION OF UNPRIVILEGED WILLS.

Execution of unprivileged wills.

63. Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [1][or an airman so employed or engaged,] or a mariner at sea, shall execute his will according to the following rules:—

(*a*) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

(*b*) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

LEG. REF.

[1] Inserted by Act X of 1927.

NOTES.

Sec. 62.—Liability to revocation is one of the tests. 33 M. 304; 12 C.W.N. 942. A declaration of its irrevocability is void. 14 C.W.N. 174. A suit for cancellation of will does not lie in the testator's lifetime. 27 A. 15. But *see* 15 B. 697.

Sec. 63.—As to the construction of section and rules for the execution of will, *see* 28 O.C. 8=85 I.C. 509. The signature need not bear testator's name but may be under an assumed name. 2 Rob. 339. The impression of a *facsimile* is enough. 25 C. 911; initials are sufficient. 58 I.C. 134. If it runs over several pages, signature in the last page is sufficient. (1908) P. 1; 14 C. W.N. 174. *See also* 29 I.C. 743=19 C.W. N. 1270. The words "some other person" in Cl. (*a*) exclude the testator as well as the testators. 11 Bom.H.C.R. 87; 9 C. 226. The practice of touching the pen and handing it to some other person amounts to direction. 6 M.L.J. 209. *See* 40 M. 540; but thumb mark is sufficient. 45 B. 989. *See also* 1941 Pat. 368=193 I.C. 463. A will executed by a marks-woman was attested by four witnesses one of whom was dead and the others were examined. After the attestation there was the customary memorandum by the writer that the will was in the handwriting of one of them. It appeared that the scratch mark was put by the writer and not by the executant. *Held* (on a difference of opinion) that the will was properly executed in accordance with S. 63 (*a*) of the Succession Act. 57 M. 972= 1934 M. 436=67 M. L. J. 721. Even a testator who can sign his name can execute a will by making his mark. 28 Bom.L.R. 529=1926 B. 365; 61 I.C. 587=23 Bom.L. R. 399; though he is assisted by some other person in making his mark: 22 I.C. 677; 42 C.W.N. 649; 10 C.W.N. 1295; the signature must be *animo testandi* and the attestation *animo attestandi*. 29 I.C. 7=19 C. W.N. 1279. Where the testator was roused from unconsciousness in order to sign the will and the attestation took place immediately after his signature and the attesting witnesses were in close proximity to the testator in the same room. *Held*, that it was not an excessive presumption to say that as the testator had been roused from unconsciousness and was sufficiently conscious to realise that he was making his mark on his will, he was equally conscious at the time immediately afterwards that the attestation was taking place and that, therefore, there had been sufficient compliance with the provisions of S. 63 (*c*). 42 C.W.N. 649. Want of attestation is fatal. 30 I.C. 263 =2 O.L.J. 193. Attestation at the time of Registration is sufficient. 6 C. 17; 27 C. 169. When a Registering Officer endorses that execution was admitted before him he can be considered an attestor. 1 P. 300= 1923 P. 402. A will executed by a Hindu living within the territory over which the Lieutenant-Governor of Bengal had jurisdiction requires attestation by two witnesses as a condition to its validity. Where a will was presented before the Sub-Registrar in a sealed cover and the cover contained the endorsement "I do execute the last will" and the signature of the pleader was taken to the endorsement of presentation made on the cover by the Sub-Registrar: *Held*, that assuming that the endorsement on the cover containing the will was a sufficient acknowledgment of his signature upon the will, it was not signed by the pleader as a witness

(*c*) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

Incorporation of papers by reference.

64. If a testator, in a will or codicil duly attested, refers to any other document then actually written as expressing any part of his intentions, such document shall be deemed to form a part of the will or codicil in which it is referred to.

CHAPTER IV.
OF PRIVILEGED WILLS.

Privileged wills.

65. Any soldier being employed in an expedition or engaged in actual warfare, [1][or an airman so employed or engaged] or any mariner being at sea, may, if he has completed the age of eighteen years, dispose of his property by a will made in the manner provided in section 66. Such wills are called privileged wills.

Illustrations.

(*i*) *A*, a medical officer attached to a regiment, is actually employed in an expedition. He is a soldier actually employed in an expedition, and can make a privileged will.

LEG. REF.

[1] Inserted by Act X of 1927.

NOTES.

but only as an identifier and that the attestation was invalid; that the Sub-Registrar signing not on the will but in his own Register could not be deemed to be an attesting witness. 8 P. 419=1929 P. 101. Apart from seeing the testator sign, the attestor need not see anything else. (1901) P. 44; 58 I.C. 134; 58 I.C. 945. Unlike the English law, the attestor need not be present at the same time. 19 C.W.N. 1295=27 I.C. 677. Witnesses need not sign in the presence of each other. 87 I.C. 621=1925 M. 861. Where the testator and the witnesses signed the will otherwise than in the presence of one another, *held*, the will could not be given effect to. 5 O.W.N. 260=1928 O. 258. Personal acknowledgment is only of signature and need not be in express words, but may be constructive. 4 Moo. P.C. 419. *See also* 19 I.C. 401=15 Bom. L.R. 209. As to will executed without attesting witnesses and deposited in Registrar's Office and taken out at that office ten years afterwards in the presence of witnesses who attest it being good and valid attestation, *see* 26 I.C. 547=1 O.L.J. 591. *Quaere*: if attestors should sign and not merely mark. 11 C. 429; 12 B.L.R. 392; 27 C. 169; 15 M. 261.

Sec. 63 (c).—By virtue of the provisions of S. 19 of the Oudh Estates Act (1862), an unattested will by a talukdar whose name has been included in the lists prepared under the Act is invalid, though at the time of the will, the lists had not been in fact approved or published. 130 I.C. 306=1931 P.C. 24 (P.C.). A will is validly attested, if either of the two necessary attesting witnesses has merely affixed his mark to the will. 1936 A.L.J. 782=1936 A. 576 (F. B.). The word "sign" in S. 63 (*c*) must be interpreted as including also making a mark or thumb impression. For the attestation to be valid, it is not consequently necessary that the attesting witnesses should put down their names in their handwriting. It is sufficient if they affix their marks or thumb impressions. 39 Bom.L.R. 606=1937 Bom. 389. *See also* 1936 A.L.J. 782=1936 All. 576=58 All. 1064 (F. B.). Persons who have signed a document in token of their consent to the disposition evidenced by a will can be held to be attesting witnesses if all the conditions laid down in S. 63 are otherwise fulfilled. 162 I.C. 333=1936 L. 367. A scribe may no doubt be an attesting witness to a will, but it must be shown that the signature of the scribe was put down for the purpose of attesting the document. 69 C.L.J. 347=1939 Cal. 595. Persons who have signed a document in token of their consent to the disposition evidenced by a will can be held to be attesting witnesses if all the conditions laid down in S. 63, are otherwise fulfilled. 162 I.C. 333=1936 Lah. 367.

Sec. 64.—The reference must be for making it part of will. 32 I.A. 142. The document must be in existence then and must be described as existing. 3 App. Cas. 404; its identity must be clearly established. 11 Moo.P.C. 427; 1907 P. 228.

(*ii*) *A* is at sea in a merchant-ship, of which he is the purser. He is a mariner, and, being at sea, can make a privileged will.

(*iii*) *A*, a soldier serving in the field against insurgents, is a soldier engaged in actual warfare, and as such can make a privileged will.

(*iv*) *A*, a mariner of a ship, in the course of a voyage, is temporarily on shore while she is lying in harbour. He is, for the purposes of this section, a mariner at sea, and can make a privileged will.

(*v*) *A*, an admiral who commands a naval force, but who lives on shore, and only occasionally goes on board his ship, is not considered as at sea, and cannot make a privileged will.

(*vi*) *A*, a mariner serving on a military expedition, but not being at sea, is considered as a soldier, and can make a privileged will.

Mode of making, and rules for executing, privileged wills.

66. (1) Privileged wills may be in writing, or may be made by word of mouth.

(2) The execution of privileged wills shall be governed by the following rules:—

(*a*) The will may be written wholly by the testator, with his own hand. In such case it need not be signed or attested.

(*b*) It may be written wholly or in part by another person, and signed by the testator. In such case it need not be attested.

(*c*) If the instrument purporting to be a will is written wholly or in part by another person and is not signed by the testator, it shall be deemed to be his will, if it is shown that it was written by the testator's directions or that he recognized it as his will.

(*d*) If it appears on the face of the instrument that the execution of it in the manner intended by the testator was not completed, the instrument shall not, by reason of that circumstance, be invalid, provided that his non-execution of it can be reasonably ascribed to some cause other than the abandonment of the testamentary intentions expressed in the instrument.

(*e*) If the soldier, [1][airman] or mariner has written instructions for the preparation of his will, but has died before it could be prepared and executed, such instructions shall be considered to constitute his will.

(*f*) If the soldier, [1][airman] or mariner has, in the presence of two witnesses, given verbal instructions for the preparation of his will, and they have been reduced into writing in his lifetime, but he has died before the instrument could be prepared and executed, such instructions shall be considered to constitute his will, although they may not have been reduced into writing in his presence, nor read over to him.

(*g*) The soldier, [1][airman] or mariner may make a will by word of mouth by declaring his intentions before two witnesses present at the same time.

(*h*) A will made by word of mouth shall be null at the expiration of one month after the testator, being still alive, has ceased to be entitled to make a privileged will.

CHAPTER V.

OF THE ATTESTATION, REVOCATION, ALTERATION AND REVIVAL OF WILLS.

Effect of gift to attesting witness.

67. A will shall not be deemed to be insufficiently attested by reason of any benefit thereby given either by way of bequest or by way of appointment to any person attesting it, or to his or her wife or husband; but the bequest or appointment shall be void so far as concerns the person so attesting, or the wife or husband of such person, or any person claiming under either of them.

LEG. REF.

[1] Inserted by Act X of 1927.

NOTES.

Sec. 67.—Person purporting to sign as witness may be proved not to have signed as such. 85 I.C. 558=1925 O. 465. Father making will and calling upon sons to sign as token of consent and to avoid quarrel among themselves—Sons so signing do not sign as

Explanation.—A legatee under a will does not lose his legacy by attesting a codicil which confirms the will.

Witness not disqualified by interest or by being executor.

68. No person, by reason of interest in, or of his being an executor of, a will, shall be disqualified as a witness to prove the execution of the will or to prove the validity or invalidity thereof.

Revocation of will by testator's marriage.

69. Every will shall be revoked by the marriage of the maker, except a will made in exercise of a power of appointment, when the property over which the power of appointment is exercised would not, in default of such appointment, pass to his or her executor or administrator, or to the person entitled in case of intestacy.

Explanation.—Where a man is invested with power to determine the disposition of property of which he is not the owner, he is said to have power to appoint such property.

Revocation of unprivileged will or codicil.

70. No unprivileged will or codicil, nor any part thereof, shall be revoked otherwise than by marriage, or by another will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged will is hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same.

NOTES.

attesting witnesses. 1927 P.C. 248=54 M. L.J. 43 (P.C.) (1925 O. 465, Affirm.). In 4 M. 244 the reason of the prohibition was stated to be "the suspicion or chance of possible collusion which is favoured by the prospect of benefit". If what is given by way of bequest is by way of trust, it is not void. 6 Eq. 69. Even if there are two other attesting witnesses, the bequest is void. 4 M. 244. The marriage of legatee after attestation does not affect validity of legacy. 6 Q.B.D. 311. A bequest to a son of an attesting witness made independently and not as a person claiming under the attesting witness is not void and S. 67 does not apply. 1937 L. 292=174 I.C. 687.

Sec. 68.—A person who signs the testator's name at his request is not a competent attesting witness. 9 C. 226; 11 B.H.C.R. 87. A person who is described therein as writer is competent to prove execution and need not be termed therein as witness. 5 C. W.N. 454.

Sec. 69.—To have the effect of revocation the marriage must be valid. 15 P.D. 152. But if at the time of marriage, the testator is domiciled in a country where marriage does not revoke wills, it has not that effect. 1 P.D. 74; L.R. 1900 P. 211; L.R. 1904 P. 269. Where the maker of a will disposes of his own property and also exercises a power of appointment, marriage revokes only the former part and not the latter. (1921) 2 Ch. 1. In the case of mutual wills, the marriage of one testator does not revoke the other. 5 A.C. 123; L. R. 4 P.C. 236.

Sec 70.—The section is exhaustive. 30 M. 359; 35 C.L.J. 488. Revocation is a question of intention followed by a positive act of destruction. 20 C.W.N. 304=34 I.C. 707=23 C.L.J. 314; 35 C.L.J. 488= 1922 C. 182. The physical act must destroy the entirety of the will. 6 A. and E 209; 3 H. and N. 341; and the instrument should no longer be as it was before. 2 P.D. 251. *See also* 20 C.W.N. 304. If while drunk a man tore off his will, but pasted it when sober, there is no revocation. 1902 P. 1. Cutting is the same as tearing. 20 C.W.N. 304. A will is not destroyed merely by being struck through with a pen. The destruction must be by some method *ejusdem generis* with those described in S. 70. Cancellation is not one of the means of revocation either under the English or under the Indian Law. Where a testatrix who had executed a will and a codicil destroyed the outer cover of the will and drew two crossed ink lines on the first page and wrote at its top the words "the will is cancelled" and signed the same, but otherwise the will and codicil were left intact, the will and codicil were not effectually revoked in law and that the conduct of the testatrix did not fall under the words "otherwise destroyed" in S. 70 of the Act. 30 Bom.L.R. 473=1928 B. 194. The power of revocation cannot be delegated, nor can he ratify unauthorized destruction. 1909 P. 157. *See also* 35 C.L.J. 488. Conduct of sons will not be evidence of intention of testator to revoke. In the case of revocation by later will, it must indicate an actual and present intention. 1917 M.W.N. 645. In the case of inconsistent wills the later one must prevail. 39 M. 107; if there is no inconsistency, effect to be given to all dispositions. 15 I.A. 37. The destruction of a will does not revoke a

Illustrations.

(*i*) *A* has made an unprivileged will. Afterwards, *A* makes another unprivileged will which purports to revoke the first. This is a revocation.

(*ii*) *A* has made an unprivileged will. Afterwards, *A*, being entitled to make a privileged will, makes a privileged will, which purports to revoke his unprivileged will. This is a revocation.

Effect of obliteration, interlineation or alteration in unprivileged will.

71. No obliteration, interlineation or other alteration made in any unprivileged will after the execution thereof shall have any effect, except so far as the words or meaning of the will have been thereby rendered illegible or undiscernible, unless such alteration has been executed in like manner as hereinbefore is required for the execution of the will:

Provided that the will, as so altered, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses is made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

Revocation of privileged will or codicil.

72. A privileged will or codicil may be revoked by the testator by an unprivileged will or codicil, or by any act expressing an intention to revoke it and accompanied by such formalities as would be sufficient to give validity to a privileged will, or by the burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

Explanation.—In order to the revocation of a privileged will or codicil by an act accompanied by such formalities as would be sufficient to give validity to a privileged will, it is not necessary that the testator should at the time of doing that act be in a situation which entitles him to make a privileged will.

Revival of unprivileged will.

73. (1) No unprivileged will or codicil, nor any part thereof, which has been revoked in any manner, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same.

(2) When any will or codicil, which has been partly revoked and afterwards wholly revoked, is revived, such revival shall not extend to so much thereof as has been revoked before the revocation of the whole thereof, unless an intention to the contrary is shown by the will or codicil.

NOTES.

codicil. 16 Eq. 19; 2 P. and D. 78; 8 P. D. 169; 35 C.L.J. 488. The birth or adoption of a son in a Mitakshara family does not revoke a will. 38 M. 389. Revocation cannot be presumed but has to be proved. 2 P. and D. 172; 18 C.W.N. 527. As to the presumption of destruction when will is not forthcoming, *see* 1 Moo.P.C. 299; 22 C. L.J. 172; *see* the judgment of Lord Penzance in *Powell* v. *Powell*, L.R. 1 P. and D. 232 as to the doctrine of dependant relative revocation.

Sec. 71.—The section has nothing to do with alterations prior to execution. 29 C. 311. This section applies only to alterations made after the execution of the will. 38 M. 356=25 M.L.J. 393. The presumption is alterations are made subsequent to execution. 4 Moo.P.C. 419; 16 B. 652; it is not rebutted merely by showing they are dated by the testator prior to execution of will. 47 C. 1043. If a person makes an alteration in a will without the knowledge of the testator, it has no effect except that he cannot claim under the will. 7 M. 302.

Sec. 73.—Revival restores a revoked will or codicil, and has to be distinguished from republication which is tantamount to making a new will. (1904) 1 Ch. 726. To effect a revival, there must be an express intention. 1 P .and D. 575; 3 Ves. 402. Where a codicil merely refers to a revoked will, there is no revival. 1891 P. 326. As to republication of will, *see* 21 I.C. 183=40 C. 192. The effect of confirming a will by codicil is to bring the will down to the date of codicil. [(1893) 1 Ch. 101, Ref.] 1931 P.C. 307=61 M.L.J. 340 (P.C.).

CHAPTER VI.

OF THE CONSTRUCTION OF WILLS.

Wording of will.

74. It is not necessary that any technical words or terms of art be used in a will, but only that the wording be such that the intentions of the testator can be known therefrom.

Inquiries to determine questions as to object or subject of will.

75. For the purpose of determining questions as to what person or what property is denoted by any words used in a will, a Court shall inquire into every material fact relating to the persons who claim to be interested under such will, the property which is claimed as the subject of disposition, the circumstances of the testator and of his family, and into every fact a knowledge of which may conduce to the right application of the words which the testator has used.

Illustrations.

(*i*) *A*, by his will, bequeaths 1,000 rupees to his eldest son or to his youngest grandchild or to his cousin, Mary. A Court may make inquiry in order to ascertain to what person the description in the will applies.

(*ii*) *A*, by his will, leaves to *B* "my estate called Black Acre". It may be necessary to take evidence in order to ascertain what is the subject-matter of the bequest; that is to say, what estate of the testator's is called Black Acre.

(*iii*) *A*, by his will, leaves to *B* "the estate which I purchased of *C*". It may be necessary to take evidence in order to ascertain what estate the testator purchased of *C*.

Misnomer or misdescription of object.

76. (1) Where the words used in a will to designate or describe a legatee or a class of legatees sufficiently show what is meant, an error in the name or description shall not prevent the legacy from taking effect.

(2) A mistake in the name of a legatee may be corrected by a description of him, and a mistake in the description of a legatee may be corrected by the name.

Illustrations.

(*i*) *A* bequeaths a legacy "to Thomas, the second son of my brother John". The testator has an only brother, named John, who has no son named Thomas, but has a second son whose name is William. William will have the legacy.

(*ii*) *A* bequeaths a legacy "to Thomas, the second son of my brother John". The testator has an only brother, named John, whose first son is named Thomas, and whose second son is named William. Thomas will have the legacy.

(*iii*) The testator bequeaths his property "to *A* and *B*, the legitimate children of *C*". *C* has no legitimate child, but has two illegitimate children, *A* and *B*. The bequest to *A* and *B* takes effect although they are illegitimate.

(*iv*) The testator gives his residuary estate to be divided among "my seven children" and, proceeding to enumerate them, mentions six names only. This omission will not prevent the seventh child from taking a share with the others.

NOTES.

Sec. 74.—If technical words are used, they must be construed in their legal technical sense. (1913) 1 Ch. 552; (1894) A.C. 310; 24 I.A. 76. If attributing the technical meaning leads to an inconsistency with what the testator intended, it should not prevail. 31 M. 283. The expressed intention is what has to be ascertained. 2 Raym. 1149; 18 Ch.D. 531; (1894) 2 Ch. 83; 18 W.R. 359; 10 M.I.A. 279; 29 B. 375; 11 C.L.J. 461. Where the language is clear and consistent, it must receive a liberal construction. 22 I.A. 119. In construing Hindu wills the ordinary motives and wishes of Hindus can be considered. 2 I.A. 7; 35 I.A. 118. *See also* 39 C.W.N. 237.

Sec. 75.—The effect of evidence is not to vary or add to the language. (1902) A.C. 2. *See* the discussion in (1900) 2 Ch. 756. Surrounding circumstances can be looked into. 2 I.A. 256; 36 A. 101; 24 M.L.J. 418; 37 M. 199. Parol evidence is admissible only to show which of the persons or things is intended, not that they were used in a sense to include more than one of them. 15 I.A. 127; 1917 M.W.N. 645. *See also* 40 B. 1=17 Bom.L.R. 115 (Bequest to unnamed person—Secret instructions).

Secs. 76.—*See* (1908) 1 Ch. 185; (1908) 2 Ch. 111; 22 M. 383; 27 I.A. 162. Where both name and description are erroneous, the same rule applies. 10 Beav. 537. On the question of *persona designata*, see 24 M. 214; 31 A. 5; 37 B. 116; 12 I.A. 72. As to when parol evidence is admissible, *see* (1912) 1 Ch. 135; (1916) 1 Ch. 461.

(*v*) The testator, having six grandchildren, makes a bequest to "my six grandchildren" and, proceeding to mention them by their Christian names, mentions one twice over omitting another altogether. The one whose name is not mentioned will take a share with the others.

(*vi*) The testator bequeaths "1,000 rupees to each of the three children of *A*". At the date of the will *A* has four children. Each of these four children will, if he survives the testator, receive a legacy of 1,000 rupees.

When words may be supplied.

77. Where any word material to the full expression of the meaning has been omitted, it may be supplied by the context.

Illustration.

The testator gives a legacy of "five hundred" to his daughter *A* and a legacy of "five hundred rupees" to his daughter *B*. *A* will take a legacy of five hundred rupees.

Rejection of erroneous particulars in description of subject.

78. If the thing which the testator intended to bequeath can be sufficiently identified from the description of it given in the will, but some parts of the description do not apply, such parts of the description shall be rejected as erroneous, and the bequest shall take effect.

Illustrations.

(*i*) *A* bequeaths to *B* "my marsh-lands lying in *L* and in the occupation of *X*". The testator had marsh-lands lying in *L* but had no marsh-lands in the occupation of *X*. The words "in the occupation of *X*" shall be rejected as erroneous, and the marsh-lands of the testator lying in *L* will pass by the bequest.

(*ii*) The testator bequeaths to *A* "my zamindari of Rampur". He had an estate at Rampur but it was a taluq and not a zamindari. The taluq passes by this bequest.

When part of description may not be rejected as erroneous.

79. If a will mentions several circumstances as descriptive of the thing which the testator intends to bequeath, and there is any property of his in respect of which all those circumstances exist, the bequest shall be considered as limited to such property, and it shall not be lawful to reject any part of the description as erroneous, because the testator had other property to which such part of the description does not apply.

Explanation.—In judging whether a case falls within the meaning of this section, any words which would be liable to rejection under section 78 shall be deemed to have been struck out of the will.

Illustrations.

(*i*) *A* bequeaths to *B* "my marsh-lands lying in *L* and in the occupation of *X*." The testator had marsh-lands lying in *L*, some of which were in the occupation of *X*, and some not in the occupation of *X*. The bequest will be considered as limited to such of the testator's marsh-lands lying in *L* as were in the occupation of *X*.

(*ii*) *A* bequeaths to *B* "my marsh-lands lying in *L* and in the occupation of *X* comprising 1,000 bighas of lands." The testator had marsh-lands lying in *L* some of which were in the occupation of *X* and some not in the occupation of *X*. The measurement is wholly inapplicable to the marsh-lands of either class, or to the whole taken together. The measurement will be considered as struck out of the will, and such of the testator's marsh-lands lying in *L* as were in the occupation of *X* shall alone pass by the bequest.

80. Where the words of a will are unambiguous, but it is found by ex-

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Sec. 77.—Power to be exercised with great caution. 7 H.L.C. 68; 5 Bom.L.R. 719. The supplying of words is to effectuate intention as apparent from whole will. 4 Ves. 57; 13 Ves. 476; 1 C. 104; 16 I.A. 166; 33 Ch.D. 198. On this section, *see also* 39 C.W.N. 237.

Sec. 78.—*See* 18 B. 283; 33 A. 66; 8 Bom.L.R. 471; 6 Ch.D. 436.

Sec. 80.—Compare with Ss. 95-97, Indian Evidence Act, dealing with latent and patent ambiguities. Where there is no ambiguity no extrinsic evidence is admissible. 7 H.L. 364; 1894 P. 98; 15 I.A. 126. Where no person properly answers the description, evidence is, in general, inadmissible. 5 H. L.C. 168; 8 H.L.C. 172.

Secs. 80 and 81: SCOPE—IF EXHAUSTIVE—ORAL EVIDENCE—ADMISSIBILITY.—Where the intention of the testator is proved by the terms of the will, although the case is not covered by the terms of Ss. 80 and 81 oral evidence may be allowed to show circumstances, habits and the state of the testator's family on principles

Extrinsic evidence admissible in cases of patent ambiguity.

trinsic evidence that they admit of applications, one only of which can have been intended by the testator, extrinsic evidence may be taken to show which of these applications was intended.

Illustrations.

(*i*) *A* man, having two cousins of the name of Mary, bequeaths a sum of money to "my cousin Mary". It appears that there are two persons, each answering the description in the will. That description, therefore, admits of two applications, only one of which can have been intended by the testator. Evidence is admissible to show which of the two applications was intended.

(*ii*) *A*, by his will, leaves to *B*, "my estate called Sultanpur Khurd." It turns out that he had two estates called Sultanpur Khurd. Evidence is admissible to show which estate was intended.

Extrinsic evidence inadmissible in case of patent ambiguity or deficiency.

81. Where there is an ambiguity or deficiency on the face of a will, no extrinsic evidence as to the intentions of the testator shall be admitted.

Illustrations.

(*i*) A man has an aunt, Caroline, and a cousin, Mary, and has no aunt of the name of Mary. By his will he bequeaths 1,000 rupees to "my aunt, Caroline" and 1,000 rupees to "my cousin, Mary" and afterwards bequeaths 2,000 rupees to "my before mentioned aunt, Mary." There is no person to whom the description given in the will can apply, and evidence is not admissible to show who was meant by "my before mentioned aunt, Mary." The bequest is therefore void for uncertainly under section 89.

(*ii*) *A* bequeaths 1,000 rupees to . . . . leaving a blank for the name of the legatee. Evidence is not admissible to show what name the testator intended to insert.

(*iii*) *A* bequeaths to *B* ..... rupees, or "my estate of .....". Evidence is not admissible to show what sum or what estate the testator intended to insert.

Meaning of clause to be collected from entire will.

82. The meaning of any clause in a will is to be collected from the entire instrument, and all its parts are to be construed with reference to each other.

Illustrations.

(*i*) The testator gives to *B* a specific fund or property at the death of *A*, and by a subsequent clause gives the whole of his property to *A*. The effect of the several clauses taken together is to vest the specific fund or property in *A* for life, and after his decease in *B*; it appearing from the bequest to *B* that the testator meant to use in a restricted sense the words in which he describes what he gives to A.

(*ii*) Where a testator having an estate, one part of which is called Black Acre, bequeaths the whole of his estate to *A*, and in another part of his will bequeaths Black Acre to *B*, the latter bequest is to be read as an exception out of the first as if he had said "I give Black Acre to *B*, and all the rest of my estate to *A*."

When words may be understood in restricted sense, and when in sense wider than usual.

83. General words may be understood in a restricted sense where it may be collected from the will that the testator meant to use them in a restricted sense; and words may be understood in a wider sense than that which they usually bear, where it may be collected from the other words of the will that the testator meant to use them in such wider sense.

NOTES.

of justice, equity and good conscience. That would include the names of the testator's friends. 39 Bom.L.R. 1151=1937 Bom. 496.

Sec. 81.—*See* 15 M. 448; 40 B. 1; 2 P. and D. 66; where blanks are left, *see* 31 Ch.D. 460; 16 B. 652; 1905 P. 129.

Sec. 82.—The whole will should be construed together. 31 M. 283; 46 B. 1; 25 I.A. 126; 18 W.R. 359; 14 M. 65; 12 C. L.J. 301; 28 M. 386. The codicil gives the true interpretation of the will. 24 C. 834; 1907 A.C. 494. On this section, *see also* 27 Bom.L.R. 380=49 B. 478=1925 B. 282 (2).

Secs. 82 to 87: APPLICABILITY—WILL BY TALUKDAR.—The rules of construction contained in Ss. 82 to 87 of the Indian Succession Act, 1925, are applicable to bequests made by talukdars, and in interpreting wills made by talukdars, the Court must be guided by those rules. 153 I.C. 878=1935 O.W.N. 68=1935 O. 198.

Sec. 83.—As to the rule of *ejusdem generis*, see 3 Beav. 521; 13 Ves. 39; 11 Eq. 232.

Illustrations.

(*i*) A testator gives to *A* "my farm in the occupation of *B*," and to *C* "all my marsh-lands in *L*." Part of the farm in the occupation of B consists of marsh-lands in *L*., and the testator also has other marsh-lands in *L*. The general words, "all my marsh-lands in *L*," are restricted by the gift to *A*. *A* takes the whole of the farm in the occupation of *B*, including that portion of the farm which consists of marsh-lands in *L*.

(*ii*) The testator (a sailor on ship board) bequeathed to his mother his gold ring, buttons and chest of clothes, and to his friend, *A* (a shipmate), his red box, clasp-knife and all things not before bequeathed. The testator's share in a house does not pass to *A* under this bequest.

(*iii*) *A*, by his will, bequeathed to *B* all his household furniture, plate, linen, china, books, pictures and all other goods of whatever kind; and afterwards bequeathed to *B* a specified part of his property. Under the first bequest, *B* is entitled only to such articles of the testator's as are of the same nature with the articles therein enumerated.

Which of two possible constructions preferred.

84. Where a clause is susceptible of two meanings according to one of which it has some effect, and according to the other of which it can have none, the former shall be preferred.

No part rejected, if it can be reasonably construed.

85. No part of a will shall be rejected as destitute of meaning if it is possible to put a reasonable construction upon it.

Interpretation of words repeated in different parts of will.

86. If the same words occur in different parts of the same will, they shall be taken to have been used everywhere in the same sense, unless a contrary intention appears.

Testator's intention to be effectuated as far as possible.

87. The intention of the testator shall not be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible.

Illustration.

The testator by a will made on his death-bed bequeathed all his property to *C D* for life and after his decease to a certain hospital. The intention of the testator cannot take effect to its full extent, because the gift to the hospital is void under section 118, but it will take effect so far as regards the gift to *C D*.

The last of two inconsistent clauses prevails.

88. Where two clauses or gifts in a will are irreconcilable, so that they cannot possibly stand together, the last shall prevail.

Illustrations.

(*i*) The testator by the first clause of his will, leaves his estate of Ramnagar "to *A*," and by the last clause of his will leaves it "to *B* and not to *A*." *B* will have it.

NOTES.

Sec. 84.—The more reasonable of the interpretation should be adopted. 2 Ch.D. 639; 16 I.A. 127; 1 H.L.C. 89; 14 M. 65. A construction which though not illegal is unusual is not to be followed. 39 C. 582; 17 C.W.N. 319; 13 B. 160. On this section, *see also* 39 C.W.N. 237.

Sec. 85.—*See* 3 M. 349; 28 I.C. 481; 12 B. 202; 17 Bom.L.R. 182; 9 H.L. 420. No part of a will is to be rejected as meaningless, if it is capable of being reasonably construed. 28 I.C. 481.

Sec. 86.—The intention to the contrary must be strong and appear on the face of the will. 1905 A.C. 379; 11 C.L.J. 461; (1900) 1 Ch. 417.

Sec. 87.—Rule not applicable where there is an attempt to create perpetuity or establish line of succession unknown to law. 5 M.L.T. 103. The will must be so read as to lead to a testacy and not intestacy. 30 Ch.D. 390; 29 M.L.J. 711. In construing a will, effect must be given, as far as is legally possible, to the wishes and intentions of the testator. 39 C.W.N. 46=1935 C. 284.

Sec. 88.—The two inconsistent clauses must refer to the same subject-matter. 29 I.A. 826; 2 C.W.N. 417. When there is a general intention and a particular intention, the general should prevail over the particular. 7 C. 269. Where the language used in the earlier part of the will has the effect of constituting the testator's widow absolute owner of his entire estate, and a later clause on the same will gives a part of that estate to another legatee, the later clause must be given effect to. 1931 N. 69 =131 I.C. 259.

(*ii*) If a man at the commencement of his will gives his house to *A*, and at the close of it directs that his house shall be sold and the proceeds invested for the benefit of *B*, the latter disposition will prevail.

Will or bequest void for uncertainty.

89. A will or bequest not expressive of any definite intention is void for uncertainty.

Illustration.

If a testator says "I bequeath goods to *A*," or "I bequeath to *A*," or "I leave to *A* all the goods mentioned in the Schedule" and no Schedule is found, or "I bequeath 'money', 'wheat', 'oil,'" or the like, without saying how much, this is void.

Words describing subject refer to property answering description at testator's death.

90. The description contained in a will of property, the subject of gift, shall, unless a contrary intention appears by the will, be deemed to refer to and comprise the property answering that description at the death of the testator.

Power of appointment executed by general bequest.

91. Unless a contrary intention appears by the will, a bequest of the estate of the testator shall be construed to include any property which he may have power to appoint by will to any object he may think proper, and shall operate as an execution of such power; and a bequest of property described in a general manner shall be construed to include any property to which such description may extend, which he may have power to appoint by will to any object he may think proper, and shall operate as an execution of such power.

Implied gift to objects of power in default of appointment.

92. Where property is bequeathed to or for the benefit of certain objects as a specified person may appoint or for the benefit of certain objects in such proportions as a specified person may appoint, and the will does not provide for the event of no appointment being made; if the power given by the will is not exercised, the property belongs to all the objects of the power in equal shares.

NOTES.

Sec. 89.—The gift of an uncertain amount is void. 14 C. 222; 26 B. 632. Where the bequest is for maintenance and education, the Court will determine the sum necessary. 2 Beav. 436. The will is to be construed most favourably to the legatee. 18 W.R. 359 (P.C.); as to when legatee is entitled to elect, *see* 18 M. 460; (1899) 2 Ch. 620; (1894) 3 Ch. 260. Gift for charitable purposes not void for uncertainty. 9 Ves. 399; 32 C. 166; 30 A. 111; 1905 A.C. 124; 8 A.L.J. 944. Even a void clause can be used for construing other parts of will. 13 M. 448; 25 I.A. 77. As to the validity of a gift for *dharmam*, see 30 M. 340; 26 I.A. 71; 3 C.W.N. 621. A bequest of a sum of money for the purpose of a "building for Hindus exclusively for general purposes to be erected on land which is bought" is void for uncertainty. 34 Bom.L.R. 609=1932 B. 451.

Sec. 90.—Under S. 90, there is a presumption of intestacy in respect of property acquired by the testator subsequent to the execution of the will, unless a contrary intention appears from the will. 99 I.C. 775 =1927 M. 383. Rights of easement, etc., incident to the property pass. 38 Ch.D. 295; (1898) 1 Ch. 659; (1919) 1 Ch. 29. The object of the section is to provide for after-acquired property. (1909) 1 Ch. 345, 784; (1911) 2 Ch. 650; 39 Ch.D. 53. The contrary intention need not be expressed in so many words. Lands contracted to be purchased fall within the section. 18 B. 7; (1895) 1 Ch. 724. Unless there are expressions in the will to indicate a contrary intention, it must be presumed that the testator intended to dispose of all his property at his death. A description of the property as that which the testator "now" owns or occupies according to circumstances does not exclude after acquired property. 28 N.L.R. 255=1932 N. 163. Where the object of the legacy is a class, *see* (1891) 3 Ch. 197.

Sec. 91.—The section does not apply to special powers. 12 Beav. 604; 31 B. 473. Surrounding circumstances are not to be looked to, in order to see if there is a contrary intention. (1900) 2 Ch. 322; (1901) 2 Ch. 529. As to what is evidence of contrary intention, *see* 1 Eq. 510.

Sec. 92.—The leading case is *Brown* v. *Higgs*, 8 Ves. 561. The section is applicable only where there is a clear intention to benefit a class, and the discretion or power is not exercised and then the members take *per capita* and as tenants in common. 24 Ch.D. 244. *See* on the principle of the section, 2 Eq. 155; 1913 Ch. 510; 5 M. 371; 19 B. 647.

Illustration.

A, by his will, bequeaths a fund to his wife, for her life, and directs that at her death it shall be divided among his children in such proportions as she shall appoint. The widow dies without having made any appointment. The fund will be divided equally among the children.

Bequest to "heirs," etc., of particular person without qualifying terms.

93. Where a bequest is made to the "heirs" or "right heirs" or "relations" or "nearest relations" or "family" or "kindred" or "nearest of kin" or "next-of-kin" of a particular person without any qualifying terms, and the class so designated forms the direct and independent object of the bequest, the property bequeathed shall be distributed as if it had belonged to such person and he had died intestate in respect of it, leaving assets for the payment of his debts independently of such property.

Illustrations.

(*i*) *A* leaves his property "to my own nearest relations." The property goes to those who would be entitled to it if *A* had died intestate, leaving assets for the payment of his debts independently of such property.

(*ii*) A *bequeaths* 10,000 rupees "to *B* for his life and, after the death of *B*, to my own right heirs." The legacy after *B's* death belongs to those who would be entitled to it if it had formed part of *A's* unbequeathed property.

(*iii*) *A* leaves his property to *B;* but if *B* dies before him, to *B's* next-of-kin; *B* dies before *A;* the property devolves as if it had belonged to *B*, and he had died intestate, leaving assets for the payment of his debts independently of such property.

(*iv*) *A* leaves 10,000 rupees "to *B* for his life, and after his decease to the heirs of *C*." The legacy goes as if it had belonged to *C*, and he had died intestate, leaving assets for the payment of his debts independently of the legacy.

Bequest to "representatives," etc., of particular person.

94. Where a bequest is made to the "representatives" or "legal representatives" or "personal representatives" or "executors or administrators" of a particular person, and the class so designated forms the direct and independent object of the bequest, the property bequeathed shall be distributed as if it had belonged to such person and he had died intestate in respect of it.

Illustration.

A bequest is made to the "legal representatives" of *A*. *A* has died intestate and insolvent. *B* is his administrator. *B* is entitled to receive the legacy, and will apply it in the first place to the discharge of such part of *A's* debts as may remain unpaid; if there be any surplus, *B* will pay it to those persons who at *A's* death would have been entitled to receive any property of *A's* which might remain after payment of his debts, or to the representatives of such persons.

Bequest without words of limitation.

95. Where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him.

NOTES.

Sec. 93.—As to the meaning of the word "heirs", *see* 3 H.L.C. 524; 25 Ch.D. 212. The term "relations", though it imports legitimacy and blood relations, may in the context include relatives by marriage or of illegitimate blood. 1891 A.C. 304; (1906) 2 Ch. 316. *See* 7 Bom.L.R. 207 on the scope of the section. As to meaning of the word "family", *see* (1876) 3 Ch.D. 672; 9 Eq. 622; 4 C.W.N. 671; 24 C.W.N. 1026. The widow is not one of the "next-of-kin". 10 B. 362. It may in the context include illegitimate children. (1902) 2 Ch. 542. The words "without any qualifying terms" refer to the heirs and not to the bequest. 28 I.C. 481. But *see contra* 7 Bom.L.R. 207.

Sec. 95.—The words, "whole interest" do not include accretions made subsequent to the death of the testator. 13 I.A. 277. In 22 C.L.J. 61, an absolute interest was conferred with a restriction that the devisee should have no interest so long as he resided in the house of the testator and the condition was held valid. A gift, though expressed to be for maintenance, yet if it confers powers of alienation, is not for limited purpose. 19 M. L. J. 384; 23 I.A. 37; 31 M. 283. So also, if there is an express prohibition of alienation, it is only a restricted interest that passes. 21 M. 425; 26 C. 707. As to construction of a gift to female, in cases governed by Hindu Law and so to

Bequest in alternative.

96. Where property is bequeathed to a person with a bequest in the alternative to another person or to a class of persons, then, if a contrary intention does not appear by the will, the legatee first named shall be entitled to the legacy if he is alive at the time when it takes effect; but if he is then dead, the person or class of persons named in the second branch of the alternative shall take the legacy.

Illustrations.

(*i*) A bequest is made to *A* or to *B*. *A* survives the testator. *B* takes nothing.

(*ii*) A bequest is made to *A* or to *B*. *A* dies after the date of the will, and before the testator. The legacy goes to *B*.

(*iii*) A bequest is made to *A* or to *B*. *A* is dead at the date of the will. The legacy goes to *B*.

(*iv*) Property is bequeathed to *A* or his heirs. *A* survives the testator. *A* takes the property absolutely.

(*v*) Property is bequeathed to *A* or his nearest of kin. *A* dies in the lifetime of the testator. Upon the death of the testator, the bequest to *A's* nearest-of-kin takes effect.

(*vi*) Property is bequeathed to *A* for life, and after his death to *B* or his heirs. *A* and *B* survive the testator. *B* dies in *A's* lifetime. Upon *A's* death the bequest to the heirs of *B* takes effect.

(*vii*) Property is bequeathed to *A* for life, and after his death to *B* or his heirs. *B* dies in the testator's lifetime. *A* survives the testator. Upon *A's* death the bequest to the heirs of *B* takes effect.

Effect of words describing a class added to bequest to person.

97. Where property is bequeathed to a person, and words are added which describe a class of persons but do not denote them as direct objects of a distinct and independent gift, such person is entitled to the whole interest of the testator therein, unless a contrary intention appears by the will.

Illustrations.

(*i*) A bequest is made—
to *A* and his children,
to *A* and his children by his present wife,
to *A* and his heirs,
to *A* and the heirs of his body,
to *A* and the heirs male of his body,
to *A* and the heirs female of his body,
to *A* and his issue,
to *A* and his family,
to *A* and his descendants,

NOTES.

the applicability or otherwise of section to such a case, *see* 56 I.C. 287. *See also* 24 M.L.J. 418; 15 I.C. 355.

Sec. 96.—*See* 16 B. 492; 28 M. 386; 1907 A.C. 225; (1909) 1 Ch. 424. If the alternative gift is subject to a power of selection or appointment, and no selection or appointment is made, the whole class is entitled. 24 Ch.D. 244; 15 B. 326. Will—Bequest to daughter's son for life and afterwards to her sons or sons' sons—Daughter dying leaving son and sons' sons—Right of latter to succeed when their father is alive. 52 L.W, 279=(1940) 2 M.L.J. 376=1941 Mad. 245.

Sec. 97.—S. 97 embodies an artificial rule of construction taken from the English law, and that rule of construction does not apply to wills made by Hindus. But S. 105 which is one of general application has been made applicable to Hindu wills. I.L.R. (1937) Bom. 679=38 Bom.L.R. 829=1936 B. 459. In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. Although ordinarily a daughter does not come in a Hindu's conception of an heir still she being entitled to certain rights of maintenance and residence, if a Hindu testator mentions the daughter along with the sons of a legatee, the Court can infer an intention that the daughter along with the sons shall take the benefit given under the will. I.L.R. (1937) Bom. 679=38 Bom.L.R. 829=1936 Bom. 459. As to construction of a devise to eldest son and the lawful male sons of such son, *see* 35 A. 211=40 I.A. 105=25 M. L.J. 111 (P.C.). In case of a bequest to his daughter and children by a native Christian, the daughter takes an absolute estate under this section. 1925 O. 24; 79 I.C. I.C. 1026. The words "male heirs" in a will do not import any limitation. 1925 P. C. 306=94 I.C. 535.

to *A* and his representatives,
to *A* and his personal representatives,
to *A*, his executors and administrators.

In each of these cases, *A* takes the whole interest which the testator had in the property.

(*ii*) A bequest is made to *A* and his brothers. *A* and his brothers are jointly entitled to the legacy.

(*iii*) A bequest is made to *A* for life and after his death to his issue. At the death of *A* the property belongs in equal shares to all persons who then answer the description of issue of *A*.

Bequest to class of persons under general description only.

98. Where a bequest is made to a class of persons under a general description only, no one to whom the words of the description are not in their ordinary sense applicable shall take the legacy.

Construction of terms.

99. In a will—

(*a*) the word "children" applies only to lineal descendants in the first degree of the person whose "children" are spoken of;

(*b*) the word "grandchildren" applies only to lineal descendants in the second degree of the person whose "grandchildren" are spoken of;

(*c*) the words "nephews" and "nieces" apply only to children of brothers or sisters,

(*d*) the words "cousins," or "first cousin," or "cousins-german," apply only to children of brothers or of sisters of the father or mother of the person whose "cousins," or "first cousins," or "cousins-german" are spoken of;

(*e*) the words "first cousins once removed" apply only to children of cousins-german, or to cousins-german of a parent of the person whose "first cousins once removed" are spoken of;

(*f*) the words "second cousins" apply only to grandchildren of brothers or of sisters of the grandfather or grandmother of the person whose "second cousins" are spoken of;

(*g*) the words "issue" and "descendants" apply to all lineal descendants whatever of the person whose "issue" or "descendants" are spoken of;

(*h*) words expressive of collateral relationship apply alike to relatives of full and of half blood; and

(*i*) all words expressive of relationship apply to a child in the womb who is afterwards born alive.

Words expressing relationship denote only legitimate relatives or failing such relatives reputed legitimate.

100. In the absence of any intimation to the contrary in a will, the word "child," the word "son," the word "daughter," or any word which expresses relationship, is to be understood as denoting only a legitimate relative, or, where there is no such legitimate relative, a person who has acquired, at the date of the will, the reputation of being such relative.

Illustrations.

(*i*) *A* having three children, *B*, *C* and *D*, of whom *B* and *C* are legitimate and *D* is illegitimate, leaves his property to be equally divided among "my children." The property belongs to *B* and *C* in equal shares, to the exclusion of *D*.

NOTES.

Sec. 98.—If there is gift to a class, all the interests of members of the class should vest in interest at the same time. 1901 A. C. 187. As to the distinction between gift to a class and to an individual, *see* 3 My. & C. 688.

Sec. 99 (g).—S. 99 (*g*) is not applicable to wills executed by Hindus. 1939 Cal. 637.

Sec. 100.—*See* 30 B. 500; 35 Ch.D. 728. Where it is impossible under the circumstances that any legitimate children should take, *e.g.*, there being only illegitimate children, the latter take. 31 Ch.D 511; (1894) 3 Ch. 665; (1909) 1 Ch. 796. Under the doctrine of reputation, a child *en ventre sa mere* cannot take. (1894) 2 Ch. 573; 31 Ch.D. 542. As to future illegitimate children, *see* 35 Ch. D. 728; (1905) P. 137. In a gift by an unmarried person to his mistress and her sons, there must be an intimation that the illegitimate sons are meant. 23 I.C. 348.

(*ii*) *A*, having a niece of illegitimate birth, who has acquired the reputation of being his niece, and having no legitimate niece, bequeaths a sum of money to his niece. The illegitimate niece is entitled to the legacy.

(*iii*) *A*, having in his will enumerated his children, and named as one of them *B*, who is illegitimate, leaves a legacy to "my said children." *B* will take a share in the legacy along with the legitimate children.

(*iv*) *A* leaves a legacy to "the children of *B*." *B* is dead and has left none but illegitimate children. All those who had at the date of the will acquired the reputation of being the children of *B* are objects of the gift.

(*v*) *A* bequeaths a legacy to "the children of *B*." *B* never had any legitimate child. *C* and *D* had, at the date of the will, acquired the reputation of being children of *B*. After the date of the will and before the death of the testator, *E* and *F* were born, and acquired the reputation of being children of *B*. Only *C* and *D* are objects of the bequest.

(*vi*) *A* makes a bequest in favour of his child by a certain woman, not his wife. *B* had acquired at the date of the will the reputation of being the child of *A* by the woman designated. *B* takes the legacy.

(*vii*) *A* makes a bequest in favour of his child to be born of a woman who never becomes his wife. The bequest is void.

(*viii*) *A* makes a bequest in favour of the child of which a certain woman, not married to him, is pregnant. The bequest is valid.

Rules of construction where will purports to make two bequests to same person.

101. Where a will purports to make two bequests to the same person, and a question arises whether the testator intended to make the second bequest instead of or in addition to the first; if there is nothing in the will to show what he intended, the following rules shall have effect in determining the construction to be put upon the will:—

(*a*) If the same specific thing is bequeathed twice to the same legatee in the same will or in the will and again in the codicil, he is entitled to receive that specific thing only.

(*b*) Where one and the same will or one and the same codicil purports to make, in two places, a bequest to the same person of the same quantity or amount of anything, he shall be entitled to one such legacy only.

(*c*) Where two legacies of unequal amount are given to the same person in the same will, or in the same codicil, the legatee is entitled to both.

(*d*) Where two legacies, whether equal or unequal in amount, are given to the same legatee, one by a will and the other by a codicil, or each by a different codicil, the legatee is entitled to both legacies.

Explanation.—In clauses (*a*) to (*d*) of this section, the word "will" does not include a codicil.

Illustrations.

(*i*) *A*, having ten shares, and no more, in the Imperial Bank of India, made his will, which contains near its commencement the words "I bequeath my ten shares in the Imperial Bank of India to *B*". After other bequests, the will concludes with the words "and I bequeath my ten shares in the Imperial Bank of India to *B*". *B* is entitled simply to receive *A's* ten shares in the Imperial Bank of India.

(*ii*) *A*, having one diamond ring, which was given him by *B*, bequeaths to *C* the diamond ring which was given by *B*. *A* afterwards made a codicil to his will, and thereby, after giving other legacies, he bequeathed to *C* the diamond ring which was given him by *B*. *C* can claim nothing except the diamond ring which was given to *A* by *B*.

(*iii*) *A*, by his will, bequeaths to *B* the sum of 5,000 rupees and afterwards in the same will repeats the bequest in the same words. *B* is entitled to one legacy of 5,000 rupees only.

(*iv*) *A* by his will, bequeaths to *B* the sum of 5,000 rupees and afterwards in the same will bequeaths to *B* the sum of 6,000 rupees. *B* is entitled to receive 11,000 rupees.

NOTES.

Sec. 101.—The leading case is *Hooley* v. *Hatton*, 1 Bro.C.C. 390. The meaning of the explanation is that for the purpose of making a cumulative legacy, a will and a codicil are to be regarded as distinct instruments.

(*v*) *A*, by his will, bequeaths to *B* 5,000 rupees and by a codicil to the will he bequeaths to him 5,000 rupees. *B* is entitled to receive 10,000 rupees.

(*vi*) *A*, by one codicil to his will, bequeaths to *B* 5,000 rupees and by another codicil bequeaths to him 6,000 rupees. *B* is entitled to receive 11,000 rupees.

(*vii*) *A*, by his will, bequeaths "500 rupees to *B* because she was my nurse", and in another part of the will bequeaths 500 rupees to *B* "because she went to England with my children". *B* is entitled to receive 1,000 rupees.

(*viii*) *A*, by his will, bequeaths to *B* the sum of 5,000 rupees and also, in another part of the will, an annuity of 400 rupees. *B* is entitled to both legacies.

(*ix*) *A*, by his will, bequeaths to *B* the sum of 5,000 rupees and also bequeaths to him the sum of 5,000 rupees if he shall attain the age of 18. *B* is entitled absolutely to one sum of 5,000 rupees, and takes a contingent interest in another sum of 5,000 rupees.

Constitution of residuary legatee.

102. A residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property.

Illustrations.

(*i*) *A* makes her will, consisting of several testamentary papers, in one of which are contained the following words:—"I think there will be something left, after all funeral expenses, etc., to give to *B*, now at school, towards equipping him to any profession he may hereafter be appointed to". *B* is constituted residuary legatee.

(*ii*) *A* makes his will, with the following passage at the end of it:—"I believe there will be found sufficient in my banker's hands to defray and discharge my debts, which I hereby desire *B* to do, and keep the residue for her own use and pleasure". *B* is constituted the residuary legatee.

(*iii*) *A* bequeaths all his property to *B*, except certain stocks and funds, which he bequeaths to *C*. *B* is the residuary legatee.

Property to which residuary legatee entitled.

103. Under a residuary bequest, the legatee is entitled to all property belonging to the testator at the time of his death, of which he has not made any other testamentary disposition which is capable of taking effect.

Illustration.

A by his will bequeaths certain legacies, of which one is void under section 118, and another lapses by the death of the legatee. He bequeaths the residue of his property to *B*. After the date of his will *A* purchases a zemindari, which belongs to him at the time of his death. *B* is entitled to the two legacies and the zemindari as part of the residue.

Time of vesting legacy in general terms.

104. If a legacy is given in general terms, without specifying the time when it is to be paid, the legatee has a vested interest in it from the day of the death of the testator, and, if he dies without having received it, it shall pass to his representatives.

NOTES.

Sec. 102.—No particular form of words necessary. 6 C.W.N. 321; 31 C. 166; (1909) 1 Ch. 791.

Secs. 102 and 103: RESIDUARY BEQUEST OF PERSONAL ESTATE—PRIOR BEQUEST VOID—RIGHTS OF RESIDUARY LEGATEE.—A general residuary gift of personalty in a will sweeps up, and is intended to sweep up, all personal property of which the testator may die possessed which from any cause may happen not to be otherwise effectually disposed of; and all such property falls into the general residue unless an intention is apparent in the will that it is not under any circumstances to do so. Where a testatrix, after devising certain immovable property and certain personal property to a Bishop, bequeathed to her niece certain plots of land and added: "I also give to my niece all my personal property and effects" and the bequest to the Bishop was void under S. 118. *Held*, that the words in the will were wide enough to constitute a residuary gift of the personalty in favour of the niece and that the personalty which formed the subject-matter of the legacy to the Bishop fell into the residue. 12 R. 705=1935 R. 71.

Sec. 103.—The term "all property" includes a reversion. 31 C. 166. Under the Indian Law, a residuary clause does not apply to property unknown to the testator. The law in this respect differs from the English Law. (38 M. 1096, Foll.) 60 C. 1406=1934 C. 356. Interest on moneys set apart for charity even if the charity fails to be carried out for some years does not fall into residue. 36 C. 261. In the absence of residuary bequest, heir is entitled to all. 8 M.I.A. 66; 21 B. 1, 646; 22 B. 835.

Sec. 104.—A legacy even if vested can be divested by disclaimer. 32 Ch. 408; 38 M. 474=25 M.L.J. 556; 6 A. 583. Such vested interest is attachable and saleable in execu-

105. (1) If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appears by the will that the testator intended that it should go to some other person.

In what case legacy lapses.

(2) In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator.

Illustrations.

(*i*) The testator bequeaths to *B* "500 rupees which *B* owes me". *B* dies before the testator; the legacy lapses.

(*ii*) *A* bequest is made to *A* and his children. *A* dies before the testator, or happens to be dead when the will is made. The legacy to *A* and his children lapses.

(*iii*) *A* legacy is given to *A*, and, in case of his dying before the testator, to *B*. *A* dies before the testator. The legacy goes to *B*.

(*iv*) *A* sum of money is bequeathed to *A* for life, and after his death to *B*. *A* dies in the lifetime of the testator; *B* survives the testator. The bequest to *B* takes effect.

(*v*) A sum of money is bequeathed to *A* on his completing his eighteenth year, and in case he should die before he completes his eighteenth year to *B*. *A* completes his eighteenth year, and dies in the lifetime of the testator. The legacy to *A* lapses, and the bequest to *B* does not take effect.

(*vi*) The testator and the legatee perished in the same ship-wreck. There is no evidence to show which died first. The legacy lapses.

Legacy does not lapse if one of two joint legatees die before testator.

106. If a legacy is given to two persons jointly and one of them dies before the testator, the other legatee takes the whole.

NOTES.

tion. 22 M.L.J. 228. The estate vested is not full and absolute, and until the executor's assent is given, the legatee's rights are only inchoate. 38 M. 474; 25 M.L.J. 556. Where the Administrator-General was appointed executor under a will, and the widow of the testator filed a caveat but the same was withdrawn subsequently in pursuance of an agreement for apportionment of the estate and the widow subsequently inherited an unascertained share of the residuary estate from her son, and applied to the Court for directions being issued to the Administrator-General for handing over the property: *Held*, that the applicant could invoke in her aid S. 104. 37 C.W.N. 76'=60 C. 1135=1933 C. 841.

Sec. 105.—Where a testator makes gift of an annuity but the legatee dies before the testator, the legacy lapses. An annuity is a perpetual one only if there is a charge on specific property; in such cases the law assumes that it is not an annuity alone but the property itself that has been bequeathed. From the fact that the annuity is directed to be paid out of an estate, it cannot be said that there is a charge created when there is no charge on any specific property. 1941 Pat. 458=22 Pat.L.T. 396. *See also* 21 Pat.L.T. 37=1940 Pat. 257. Doctrine of lapse applies to gift for charitable purposes. (1891) 2 Ch. 236; (1895) 1 Ch. 19. It does not apply where testator gives a legacy in payment of a barred debt or for discharging a moral obligation. (1904) 2 Ch. 30. A testator may prevent a legacy from lapsing. But in order to do so he must clearly exclude lapse and must clearly indicate who is to take in case the legatee should die in his lifetime. Therefore where the testator makes a bequest in favour of his wife and daughters, of his property in four equal shares, in the absence of any clear exclusion and indication as to who is to take in case a legatee should die in his lifetime, the bequest to the wife on her death during the lifetime of the testator lapses and passes to the son whom the testator had tried to exclude. I.L.R. (1940) Lah. 583=1940 Lah. 318. *See also* I.L.R. (1937) Bom. 679=38 Bom.L.R. 829=1936 Bom. 459. As to the effect of disclaimer, *see* (1913) 1 Ch. 272. If a gift in favour of persons named is made to them as tenants-in-common, and one of them dies before the testator, the share bequeathed to him lapses and forms part of the residue of the testator's estate, unless it appears from the will that the testator intended that it should go to some other person, as laid down by S. 105. 29 S.L.R. 374=164 I.C. 889=1935 S. 158.

Secs. 105, Ill. (iv) and 173: APPLICABILITY AND SCOPE.—Generally speaking an annuity is a perpetual annuity only in those cases where it is a charge on specific property, in which circumstances the law assumes that it is not annuity alone, but the property itself, that has been bequeathed. 1940 Pat. 257=21 Pat.L.T. 37.

Sec. 106.—The rule applies to gifts to a class. (1915) 2 Ch. 216; (1920) 1 Ch. 334. The section will apply even if the legacy fails from some cause other than death. 34 M. 88; 16 I.A. 44. As to its applicability in cases of joint maintenance grants, *see* (1920) 1 Ch. 334; 17 C.L.J. 87; 25 C.W.N. 262. In construing the will of a Hindu, it is not improper to take into consideration the ordinary notions and wishes of Hindus with respect to the devolution of property.

Illustration.

The legacy is simply to *A* and *B*, *A* dies before the testator. *B* takes the legacy.

Effect of words showing testator's intention to give distinct shares.

107. If a legacy is given to legatees in words which show that the testator intended to give them distinct shares of it, then, if any legatee dies before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property.

Illustration.

A sum of money is bequeathed to *A*, *B* and *C*, to be equally divided among them. *A* dies before the testator. *B* and *C* will only take so much as they would have had if *A* had survived the testator.

When lapsed share goes as undisposed of.

108. Where a share which lapses is a part of the general residue bequeathed by the will, that share shall go as undisposed of.

Illustration.

The testator bequeaths the residue of his estate to *A*, *B* and *C*, to be equally divided between them. *A* dies before the testator. His one-third of the residue goes as undisposed of.

When bequest to testator's child or lineal descendant does not lapse on his death in testator's lifetime.

109. Where a bequest has been made to any child or other lineal descendant of the testator, and the legatee dies in the lifetime of the testator, but any lineal descendant of his survives the testator, the bequest shall not lapse, but shall take effect as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention appears by the will.

Illustration.

A makes his will, by which he bequeaths a sum of money to his son, *B*, for his own absolute use and benefit. *B* dies before *A*, leaving a son, *C*, who survives *A*, and having made his will whereby he bequeaths all his property to his widow, *D*. The money goes to *D*.

NOTES.

Although ordinarily a daughter does not come in a Hindu's conception of an heir, still she being entitled to certain rights of maintenance and residence, if a Hindu testator mentions the daughter along with the sons of a legatee, the Court can infer an intention that the daughter along with the sons shall take the benefit given under the will. 38 Bom.L.R. 829=1936 B. 459=I.L.R. (1937) Bom. 679. Where a Hindu testator bequeathes a legacy to "*A* and his sons and daughter," but *A* and his daughter die during the testator's lifetime, the will must be construed in such a way as to benefit not only *A*, but his sons and daughter as well and as conferring a benefit on them jointly. It must therefore be held that the sons and daughters of *A*, take beneficially with him and that the legacy is meant for parent and issue concurrently. The sons, who survive, are therefore entitled to the whole legacy under S. 106. I.L.R. 1937 B. 679.

Sec. 107.—As to the words creating a tenancy-in-common, *see* 15 M. 448; 28 M. 363. Courts in India are in favour of tenancy-in-common. 24 C. 646; 27 M. 498; 22 B. 833; 33 A. 41; 23 I.A. 37. The failure of the legacy need not be by death alone. 26 M. 433; 4 Ch.D. 165. A gift to a class is *prima facie* a gift to a class consisting of persons who are included and comprehended under some general description and bear a certain relation to the testator. But when all persons, who are to benefit under the will are mentioned by name the bequest is not to them as a class, but to each of them individually, and is not taken out of the purview of S. 107. 29 S.L.R. 374=1936 S. 158.

Sec. 109.—S. 109 of the Act only provides that, in case of the legatee's death before the testator, the bequest shall take effect as if the legatee's death had happened after the death of the testator. To prevent a lapse it has to be assumed that the legatee survived the testator. But the section does not provide that on such assumption being made, only the lineal descendants are to have the benefit of the bequest and not other heirs. The bequest will take effect in favour of all the heirs of the legatee. 155 I.C. 1076. The legacy vests not in the issue but in the deceased legatee. 16 C. 549; 25 M. 299. Child includes one in embryo. 18 W.R. 359. The words "child or other lineal descendant" in S. 109 do not include any illegitimate children. It is well established that illegitimate children are not included in the term "child" in a will, or deed unless some repugnancy or inconsistency would result from their exclusion. An illegitimate child would come under the word "child" only when there is a *designatio personae*. 22 Pat.L.T. 396=1941 Pat. 548. The section applies to a gift to a child, even if it were dead at the time of will. 27 C. 521, 627; but not to gifts to children as a class or as joint-tenants. (1890) 1 Ch. 567.

Bequest to *A* for benefit of *B* does not lapse by *A's* death.

110. Where a bequest is made to one person for the benefit of another, the legacy does not lapse by the death, in the testator's lifetime, of the person to whom the bequest is made.

Survivorship in case of bequest to described class.

111. Where a bequest is made simply to a described class of persons, the thing bequeathed shall go only to such as are alive at the testator's death.

Exception.—If property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual, but their possession of it is deferred until a time later than the death of the testator by reason of a prior bequest or otherwise, the property shall at that time go to such of them as are then alive, and to the representatives of any of them who have died since the death of the testator.

Illustrations.

(*i*) *A* bequeaths 1,000 rupees to "the children of *B*" without saying when it is to be distributed among them. *B* had died previous to the date of the will, leaving three children, *C*, *D* and *E*. *E* died after the date of the will, but before the death of *A*. *C* and *D* survive *A*. The legacy will belong to *C* and *D*, to the exclusion of the representatives of *E*.

(*ii*) A lease for years of a house was bequeathed to *A* for his life, and after his decease to the children of *B*. At the death of the testator, *B* had two children living, *C* and *D*, and he never had any other child. Afterwards, during the lifetime of *A*, *C* died, leaving *E*, his executor. *D* has survived *A*. *D* and *E* are jointly entitled to so much of the leasehold term as remains unexpired.

(*iii*) *A* sum of money was bequeathed to *A* for her life, and after her decease, to the children of *B*. At the death of the testator, *B* had two children living, *C* and *D*, and after that event, two children, *E* and *F*, were born to *B*. *C* and *E* died in the lifetime of *A*, *C* having made a will, *E* having made no will. *A* has died, leaving *D* and *F* surviving her. The legacy is to be divided into four equal parts, one of which is to be paid to the executor of *C*, one to *D*, one to the administrator of *E* and one to *F*.

(*iv*) *A* bequeaths one-third of his lands to *B* for his life, and after his decease to the sisters of *B*. At the death of the testator, *B* had two sisters living, *C* and *D*, and after that event another sister *E* was born. *C* died during the life of *B*, *D* and *E* have survived *B*. One-third of *A's* lands belong to *D*, *E* and the representatives of *C*, in equal shares.

(*v*) *A* bequeaths 1,000 rupees to *B* for life and after his death equally among the children of *C*. Up to the death of *B*, *C* had not had any child. The bequest after the death of *B* is void.

(*vi*) *A* bequeaths 1,000 rupees to "all the children born or to be born" of *B* to be divided among them at the death of *C*. At the death of the testator, *B* has two children living, *D* and *E*. After the death of the testator, but in the lifetime of *C*, two other children, *F* and *G* are born to *B*. After the death of *C*, another child is born to *B*. The legacy belongs to *D*, *E*, *F* and *G* to the exclusion of the after-born child of *B*.

(*vii*) *A* bequeaths a fund to the children of *B*, to be divided among them when the eldest shall attain majority. At the testator's death, *B* had one child living, named *C*. He afterwards had two other children, named *D* and *E*. *E* died, but *C* and *D* were living, when *C* attained majority. The fund belongs to *C*, *D* and the representatives of *E*, to the exclusion of any child who may be born to *B* after *C's* attaining majority.

NOTES.

Sec. 111.—As to scope of section, *see* 8 C. 157, 637; 38 L.W. 860=1933 M. 885. As to when the class is to be ascertained, it depends on a fair result of the language of the will. (1920) A.C. 794. The rule applies equally to gifts by way of appointment. 8 Ves. 375; 16 B. 492. This section is not to be applied to Hindu vernacular wills. 99 I.C. 705=1925 M. 494. The rule of law embodied in S. 111 is not directly applicable to the case of a Hindu will. But the principle of law recognised in the section is entitled to acceptance as a rule of general application, where there is no special rule to the contrary. 42 L.W. 746=1935 M. 865. Prior to the Hindu Transfers and Bequests Act of 1914 and the Hindu Disposition of the Property Act of 1916, a Hindu cannot by his will make a bequest covered by S. 111 of the Succession Act in favour of a person who is not, either in fact or in contemplation of law, in existence at the time of his death. 44 C.W.N. 214.

CHAPTER VII.

OF VOID BEQUESTS.

Bequest to person by particular description, who is not in existence at testator's death.

112. Where a bequest is made to a person by a particular description, and there is no person in existence at the testator's death who answers the description, the bequest is void.

Exception.—If property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual, but his possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest or otherwise; and if a person answering the description is alive at the death of the testator, or comes into existence between that event and such latter time, the property shall, at such later time, go to that person, or, if he is dead, to his representatives.

Illustrations.

(*i*) *A* bequeaths 1,000 rupees to the eldest son of *B*. At the death of the testator, *B* has no son. The bequest is void.

(*ii*) *A* bequeaths 1,000 rupees to *B* for life, and after his death to the eldest son of *C*. At the death of the testator, *C* had no son. Afterwards, during the life of *B*, a son is born to *C*. Upon *B's* death, the legacy goes to *C's* son.

(*iii*) *A* bequeaths 1,000 rupees to *B* for life, and after his death to the eldest son of *C*. At the death of the testator, *C* had no son. Afterwards, during the life of *B*, a son, named *D*, is born to *C*. *D* dies, then *B* dies. The legacy goes to the representative of *D*.

(*iv*) *A* bequeaths his estate of Green Acre to *B* for life, and at his decease, to the eldest son of *C*. Up to the death of *B*, *C* has had no son. The bequest to *C's* eldest son is void.

(*v*) *A* bequeaths 1,000 rupees to the eldest son of *C*, to be paid to him after the death of *B*. At the death of the testator *C* has no son, but a son is afterwards born to him during the life of *B* and is alive at *B's* death. *C's* son is entitled to the 1,000 rupees.

Bequest to person not in existence at testator's death subject to prior bequest.

113. Where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.

Illustrations.

(*i*) Property is bequeathed to *A* for his life, and after his death to his eldest son for life, and after the death of the latter to his eldest son. At the time of the testator's death, *A* has no son. Here the bequest to *A's* eldest son is a bequest to a person not in existence at the testator's death. It is not a bequest of the whole interest that remains to the testator. The bequest to *A's* eldest son for his life is void.

(*ii*) A fund is bequeathed to *A* for his life, and after his death to his daughters. *A* survives the testator. *A* has daughters some of whom were not in existence at the testator's death. The bequest to *A's* daughters comprises the whole interest that remains to the testator in the thing bequeathed. The bequest to *A's* daughters is valid.

(*iii*) A fund is bequeathed to *A* for his life, and after his death to his daughters, with a direction that, if any of them marries under the age of eighteen, her portions shall be settled so that it may belong to herself for life and may be divisible among her children after her death. *A* has no daughters living at the time of the testator's death, but has daughters born afterwards who survive him. Here the direction for a settlement has the effect in the case of each daughter who marries under eighteen of substituting for the absolute bequest to her a bequest to her merely for her life; that is to say, a bequest to a person not in existence at the time of the testator's death of something which is less than

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NOTES.

Sec. 112.—*See* 8 C. 157; (1918) 1 Ch. 368. S. 112 is subject to the restriction (1) in Sch. III of the Act. 12 P. 708=1933 P. 647. "Kindred" as applied to Hindu should not be limited to blood relations. *See* 15 C.W.N. 945=39 C. 7; 13 M.I.A. 373. Regarding gifts to idols, *see* 37 C. 128; 14 C.W.N. 18; 24 I.A. 93. Where a bequest was made to son's wife and the son married only after the testator's death but the wife was in existence at the testator's death, the bequest is valid. 39 C. 87=15 C.W.N. 945.

Sec. 112, Exception.—*See* 12 P. 708=1933 P. 647.

Sec. 113.—Applicability of section to Parsi will. *See* 25 Bom.L.R. 1099=45 M.L.J. 780. On this section, *see also* 1934 M. 705=67 M.L.J. 525.

the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund is void.

(*iv*) *A* bequeaths a sum of money to *B* for life, and directs that upon the death of *B* the fund shall be settled upon his daughters, so that the portion of each daughter may belong to herself for life, and may be divided among her children after her death. *B* has no daughter living at the time of the testator's death. In this case the only bequest to the daughters of *B* is contained in the direction to settle the fund, and this direction amounts to a bequest to persons not yet born, of a life interest in the fund, that is to say, of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund upon the daughters of *B* is void.

Rule against perpetuity

114. No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

Illustrations.

(*i*) A fund is bequeathed to *A* for his life and after his death to *B* for his life; and after *B's* death to such of the sons of *B* as shall first attain the age of 25. *A* and *B* survive the testator. Here the son of *B* who shall first attain the age of 25 may be a son born after the death of the testator; such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of *A* and *B*; and the vesting of the fund may thus be delayed beyond the lifetime of *A* and *B* and the minority of the sons of *B*. The bequest after *B's* death is void.

(*ii*) A fund is bequeathed to *A* for his life, and after his death to *B* for his life, and after *B's* death to such of *B's* sons as shall first attain the age of 25. *B* dies in the lifetime of the testator, leaving one or more sons. In this case the sons of *B* are persons living at the time of the testator's decease, and the time when either of them will attain 25 necessarily falls within his own lifetime. The bequest is valid.

(*iii*) A fund is bequeathed to *A* for his life, and after his death to *B* for his life, with a direction that after *B's* death it shall be divided amongst such of *B's* children as shall attain the age of 18, but that, if no child of *B* shall attain that age, the fund shall go to *C*. Here the time for the division of the fund must arrive at the latest at the expiration of 18 years from the death of *B*, a person living at the testator's decease. All the bequests are valid.

(*iv*) A fund is bequeathed to trustees for the benefit of the testator's daughters, with a direction that, if any of them marry under age, her share of the fund shall be settled so as to devolve after her death upon such of her children as shall attain the age of 18. Any daughter of the testator to whom the direction applies must be in existence at his decease, and any portion of the fund which may eventually be settled as directed must vest not later than 18 years from the death of the daughters whose share it was. All these provisions are valid.

Sec. 114.—*Cf.* S. 14 (*a*), Transfer of Property Act. *See* on the rule generally. 23 C.W.N. 826; 53 I.C. 203; 44 M. 446; 45 M.L.J. 780. The rule applies to movables as well as immovables. 20 B. 511; to all bequests whether charitable or not. 46 C. 485=47 I.C. 383. It does not apply to vested interests. (1899) 2 Ch. 739. In deciding the validity of the gift, possible events and not actual events to be looked to. (1916) 1 Ch. 91; (1915) 1 Ch. 493, 897; 39 Ch.D. 155. The rule is as much applicable to Hindus as others. 9 B.L.R. 377; 15 M. 424; 15 I.A. 159; 24 C. 834; 31 C. 111; 17 C.W.N. 488=21 I.C. 282 (P.C.). But *see contra* 53 I.C. 779=23 C.W.N. 826. *See also* the recent decisions of the Judicial Committee in 1925 P.C. 244. Estate given to testator's daughters for their lives with remainder to their children on attaining 21 —There being no certainty as to age of minority being so postponed from 18 to 21 in every case, whole bequest in favour of children is invalid. *See* 48 M. 906=52 I.A. 310=49 M.L.J. 836 (P.C.); 1923 P.C. 122=25 Bom.L.R. 1099=45 M.L.J. 780 (P.C.). *Roberts, C.J.*—Charitable trusts though made in perpetuity are not within the mischief of S. 114 provided the vesting is not delayed beyond the statutory period and there is no remainder over. 1941 Rang. 305. *Dunkley, J.*—S. 114 deals only with interests arising *in future*. It makes no difference between charitable and non-charitable objects. Gift to trustees for a religious or charitable object, if created or existing *in praesenti*, is not objectionable on any ground of perpetuity. 1941 Rang.L.R. 410 =1941 Rang. 305. Direction in will for repairs of graveyard of testator and his wife and child is not a charity, but a perpetuity and therefore void. 21 I.C. 183=40 C. 192.

Secs. 114 and 115.—*See* 48 M. 906=52 I.A. 310=49 M.L.J. 836 (P.C.).

115. If a bequest is made to a class of persons with regard to some of whom it is inoperative by reason of the provisions of section 113 or section 114, such bequest shall be [1][void in regard to those persons only and not in regard to the whole class].

Bequest to a class some of whom may come under rules in Ss. 113 and 114.

Illustrations.

(*i*) A fund is bequeathed to *A* for life, and after his death to all his children who shall attain the age of 25. *A* survives the testator, and has some children living at the testator's death. Each child of *A's* living at the testator's death must attain the age of 25 (if at all) within the limits allowed for a bequest. But *A* may have children after the testator's decease, some of whom may not attain the age of 25 until more than 18 years have elapsed after the decease of *A*. The bequest to *A's* children, therefore, is inoperative as to any child born after the testator's death, [1][*and in regard to those who do not attain the age of* 25 *within* 18 *years after* A's *death, but is operative in regard to the other children of* A.]

(*ii*) A fund is bequeathed to *A* for his life, and after his death to *B, C, D,* and all other children of *A* who shall attain the age of 25. *B, C, D* are children of *A* living at the testator's decease. In all other respects the case is the same as that supposed in *Illustration* (*i*). [1][*Although the mention of* B, C *and* D *does not prevent the bequest from being regarded as a bequest to a class, it is not wholly void. It is operative as regards any of the children* B, C *or* D, *who attains the age of* 25 *within* 18 *years after* A's *death.*]

[2][116. Where by reason of any of the rules contained in sections 113 and 114, any bequest in favour of a person or of a class of persons is void in regard to such person or the whole of such class, any bequest contained in the same will and intended to take effect after or upon failure of such prior bequest is also void.].

Bequest to take effect on failure of prior bequest.

Illustrations.

(*i*) A fund is bequeathed to *A* for his life, and after his death to such of his sons as shall first attain the age of 25, for his life, and after the decease of such son to *B*. *A* and *B* survive the testator. The bequest to *B* is intended to take effect after the bequest to such of sons of *A* as shall first attain the age of 25, which bequest is void under section 114. The bequest to *B* is void.

(*ii*) A fund is bequeathed to *A* for his life, and after his death to such of his sons as shall first attain the age of 25, and, if no son of *A* shall attain that age, to *B*. *A* and *B* survive the testator. The bequest to *B* is intended to take effect upon failure of the bequest to such of *A's* sons as shall first attain the age of 25, which bequest is void under section 114. The bequest to *B* is void.

[2][117. (1) Where the terms of a will direct that the income arising from any property shall be accumulated either wholly or in part during any period longer than a period of eighteen years from the death of the testator, such direction shall, save as hereinafter provided, be void to the extent to which the period during which the accumulation is directed exceeds the aforesaid period, and at the end of such period of eighteen years, the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

Effect of direction for accumulation.

(2) This section shall not affect any direction for accumulation for the purpose of—

LEG. REF.

[1] Substituted by Act XXI of 1929.

[2] New Ss. 116 and 117 substituted for old S. 116 by Act XXI of 1929.

NOTES.

Sec. 115.—The section is based on *Leake* v. *Robinson,* 2 Mer. 363. As to applicability of rule, *see* 29 C. 260; 11 I.A. 164; 12 M. 393; 15 C.W.N. 113; 21 I.C. 282=17 C.W.N. 488 (P.C.) (Dispositions to grandsons on attaining majority, valid).

Sec. 116.—Who can question validity of bequest, *see* 16 L.W. 455=1923 M. 131.

Sec. 117.—*Cf.* S. 18, Transfer of Property Act. Accumulation for payment of debts or legacies, valid. 12 M.I.A. 41. Regarding accumulation for charitable purposes, *see* (1894) 2 Ch. 184; 34 M. 19. *See* generally 6 M.I.A. 526; 34 C. 5; 47 C. 76.

(*i*) the payment of the debts of the testator or any other person taking any interest under the will, or

(*ii*) the provision of portions for children or remoter issue of the testator or of any other person taking any interest under the will, or

(*iii*) the preservation or maintenance of any property bequeathed;

and such direction may be made accordingly.]

Illustrations. (Omitted by Act XXI of 1929.)

Bequest to religious or charitable uses.

118. No man having a nephew or niece or any nearer relative shall have power to bequeath any property to religious or charitable uses, except by a will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the wills of living persons.

Illustrations.

A having a nephew makes a bequest by a will not executed and deposited as required—
for the relief of poor people;
for the maintenance of sick soldiers;
for the erection or support of a hospital;
for the education and preferment of orphans;
for the support of scholars;
for the erection or support of a school;
for the building and repairs of a bridge;
for the making of roads;
for the erection or support of a church;
for the repairs of a church;
for the benefit of ministers of religion;
for the formation or support of a public garden.
All these bequests are void.

CHAPTER VIII.

OF THE VESTING OF LEGACIES.

Date of vesting of legacy when payment or possession postponed.

119. Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received

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NOTES.

Sec. 118.—Applicability of section. *See* 130 I.C. 217. Two successive wills—Bequest to charity but not put an end to by later will—Second will does not offend against S. 118. 130 I.C. 217=52 C.L.J. 475=1931 C. 138. As to meaning of words "religious or charitable uses" and their classifications, *see* (1891) A.C. 531 and 9 Ves. 405; 3 Bom.L.R. 902; Gifts for the relief of poverty are. (1918) 1 Ch. 228; 4 C. 443; 9 C.W.N. 528; (1912) 1 Ch. 106. Even if trust is uncertain, the Court must be able to execute and control. (1902) A. C. 37; 1 B. H.C.R. 71. The law does not prevent a testator with near relatives from making a charitable bequest, but it has enacted, in S. 118 a safeguard against his doing so by a disposition made when death is imminent. Under S. 118 and S. 42 *et seq* of the Registration Act three conditions have to be satisfied, first, the will must be executed; secondly the will must be deposited within 6 months of execution with the Registrar of deeds; thirdly the testator must survive for a period of 12 months after the execution of the will. The Legislature has not contemplated the withdrawal of a will from the custody of the Registrar except upon the terms that the charitable bequests in it are rendered void. The true construction of S. 118 in regard to the requirement of deposit of the will is that the will shall be deposited within six months from its execution and shall remain in deposit until the death of the testator. If there is a withdrawal there can be a redeposit but the requirements of S. 118 as to duration of deposit and time of execution should be once again complied with. 1941 Rang.L.R. 410=1941 Rang. 305. As to the effect of failure of charitable object, *see* (1909) 2 Ch. 1; (1913) 1 Ch. 314. Instances of the application of *cy pres* doctrine are. (1902) 1 Ch. 176; (1901) 2 Ch. 640; 36 C. 261; 36 B. 29; 111; 48 C. 124. As to application of the section to a will by a Parsi, *see* 52 I.A. 95=49 B. 167=47 M. L.J. 850 (P.C.).

Sec. 119.—"Proper time"—Meaning. *See* 1937 Mad. 835. Vested interest—Enjoyment postponed till the termination of life-

the legacy, and in such cases the legacy is from the testator's death said to be vested in interest.

Explanation.—An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed, or whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives, or from a provision that, if a particular event shall happen, the legacy shall go over to another person.

Illustrations.

(*i*) *A* bequeaths to *B* 100 rupees, to be paid to him at the death of *C*. On *A's* death the legacy becomes vested in interest in *B*, and if he dies before *C*, his representatives are entitled to the legacy.

(*ii*) *A* bequeaths to *B* 100 rupees, to be paid to him upon his attaining the age of 18. On *A's* death the legacy becomes vested in interest in *B*.

(*iii*) *A* fund is bequeathed to *A* for life, and after his death to *B*. On the testator's death the legacy to *B* becomes vested in interest in *B*.

(*iv*) A fund is bequeathed to *A* until *B* attains the age of 18 and then to *B*. The legacy to *B* is vested in interest from the testator's death.

(*v*) *A* bequeaths the whole of his property to *B* upon trust to pay certain debts out of the income, and then to make over the fund to *C*. At *A's* death the gift to *C* becomes vested in interest in him.

(*vi*) A fund is bequeathed to *A*, *B* and *C* in equal shares to be paid to them on their attaining the age of 18, respectively, with a proviso that, if all of them die under the age of 18, the legacy shall devolve upon *D*. On the death of the testator, the shares vested in interest in *A*, *B* and *C*, subject to be divested in case *A*, *B* and *C* shall all die under 18, and, upon the death of any of them (except the last survivor) under the age of 18, his vested interest passes, so subject, to his representatives.

Date of vesting when legacy contingent upon specified uncertain event.

120. (1) A legacy bequeathed in case a specified uncertain event shall happen does not vest until that event happens.

NOTES.

estates. 36 C.W.N. 758=55 C.L.J. 420. *See also* 38 L.W. 860=1933 M. 885. Property bequeathed to wife for life and after her death to vest in sons or their heirs then in existence—Nature of interest of sons. *See* 43 C.W.N. 490. The existence of a power of appointment would not prevent the vesting of a remainder; in the case of estates subject to a general power of appointment in the first taker with remainder over in default of such appointment, the power does not suspend the remainder from vesting. 17 Pat.L.T. 876=1937 P. 163.

Secs. 119 and 120.—Vesting may be in possession or in interest and may be contingent or conditional. *See* 27 A. 406; 33 A. 558; 38 C. 468; 17 C.W.N. 39; (1905) 2 Ch. 295 "Shall become vested," meaning of. 57 I.C. 747; 47 M.L.J. 850. Where gift is clear, direction to accumulate income will not postpone vesting and make the gift contingent. (1919) 1 Ch. 132; 22 Bom.L.R. 71. As to application of section to construction of Parsi wills, *see* 43 B. 88=23 C.W.N. 419 (P.C.); 24 Bom.L.R. 1124 =1923 B. 96.

Sec. 120.—*Cf.* S. 21, T. P. Act. Gifts may be apparently vested but really contingent as in 4 Eq. 372; 2 Mer. 363; 1921 A. C. 594; 4 M. 124; 12 B. 137; or apparently contingent but really vested. (1903) 1 Ch. 448; 19 Eq. 286; 34 Ch.D. 716; 41 C. 642; 47 M.L.J. 850. An estate on a future contingency is within the section. 43 C. 432= 43 I.A. 12=20 C.W.N. 669 (P.C.), confirming, 41 C. 642=18 C.W.N. 360. As regards exception, *see* 52 I.A. 95; 24 Bom. L.R. 1124=1923 B. 96; it goes beyond the English law. 70 I.C. 178. If a bequest is made in favour of one person and after his death, the property is directed to go to another, the second legatee gets a vested interest in the estate, because the death of a living person is not an uncertain contingency. 27 A.L.J. 274=1929 A. 102. A testator by his will bequeathed a two annas share of his property to his daughter *S. K.* A later clause in the will *inter alia* provided: "After the death of *S.K.*, my said daughter aforesaid in the event of there being in existence issue male or female of her body, their issue will have the right of possession in the capacity of absolute owners with full rights. And in case of her dying issueless this 2 annas and also the share which according to para. 4 he might acquire will devolve upon *R.S.* who will be in possession as absolute owner with full rights." *R.S.* was the son of another daughter of the testator. *R.S.* predeceased *S.K.* who died issueless. The plaintiff claimed as a transferee from the heir of *R.S.*, while the defendants were transferees from the daughter *S.K.* *Held*,

(2) A legacy bequeathed in case a specified uncertain event shall not happen does not vest until the happening of that event becomes impossible.

(3) In either case, until the condition has been fulfilled, the interest of the legatee is called contingent.

Exception.—Where a fund is bequeathed to any person upon his attaining a particular age, and the will also gives to him absolutely the income to arise from the fund before he reaches that age, or directs the income, or so much of it as may be necessary, to be applied for his benefit, the bequest of the fund is not contingent.

Illustrations.

(*i*) A legacy is bequeathed to *D* in case *A, B* and *C* shall all die under the age of 18. *D* has a contingent interest in the legacy until *A, B* and *C* all die under 18, or one of them attains that age.

(*ii*) A sum of money is bequeathed to *A* "in case he shall attain the age of 18" or "when he shall attain the age of 18." *A's* interest in the legacy is contingent until the condition is fulfilled by his attaining that age.

(*iii*) An estate is bequeathed to *A* for life, and after his death to *B* if *B* shall then be living; but if *B* shall not be then living to *C*. *A, B* and *C* survive the testator. *B* and *C* each take a contingent interest in the estate until the event which is to vest it in one or in the other has happened.

(*iv*) An estate is bequeathed as in the case last supposed. *B* dies in the lifetime of *A* and *C*. Upon the death of *B, C* acquires a vested right to obtain possession of the estate upon *A's* death.

(*v*) A legacy is bequeathed to *A* when she shall attain the age of 18, or shall marry under that age with the consent of *B*, with a proviso that, if she neither, attains 18 nor marries under that age with *B's* consent, the legacy shall go to *C*. *A* and *C* each take a contingent interest in the legacy. *A* attains the age of 18. *A* becomes absolutely entitled to the legacy although she may have married under 18 without the consent of *B*.

(*vi*) An estate is bequeathed to *A* until he shall marry and after that event to *B*. *B's* interest in the bequest is contingent until the condition is fulfilled by *A's* marrying.

(*vii*) An estate is bequeathed to *A* until he shall take advantage of any law for the relief of insolvent debtors, and after that event to *B*. *B's* interest in the bequest is contingent until *A* takes advantage of such a law.

(*viii*) An estate is bequeathed to *A* if he shall pay 500 rupees to *B*. *A's* interest in the bequest is contingent until he has paid 500 rupees to *B*.

(*ix*) *A* leaves his farm of Sultanpur Khurd to *B*, if *B* shall convey his own farm of Sultanpur Buzurg to *C*. *B's* interest in the bequest is contingent until he has conveyed the latter farm to *C*.

(*x*) A fund is bequeathed to *A* if *B* shall not marry *C* within five years after the testator's death. *A's* interest in the legacy is contingent until the condition is fulfilled by the expiration of the five years without *B's* having married *C*, or by the occurrence within that period of an event which makes the fulfilment of the condition impossible.

(*xi*) A fund is bequeathed to *A* if *B* shall not make any provision for him by will. The legacy is contingent until *B's* death.

(*xii*) *A* bequeaths to *B* 500 rupees a year upon his attaining the age of 18, and directs that the interest, or a competent part thereof, shall be applied for his benefit until he reaches that age. The legacy is vested.

(*xiii*) *A* bequeaths to *B* 500 rupees when he shall attain the age of 18, and directs that a certain sum, out of another fund, shall be applied for his maintenance until he arrives at that age. The legacy is contingent.

Vesting of interest in bequest to such members of a class as shall have attained particular age.

121. Where a bequest is made only to such members of a class as shall have attained a particular age, a person who has not attained that age cannot have a vested interest in the legacy.

Illustration.

A fund is bequeathed to such of the children of *A* as shall attain the age of 18, with a direction that, while any child of *A* shall be under age of 18, the income of the share to

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NOTES.

(1) what the will provided was that in the case of *S.K.* dying without issue surviving her, the property was to devolve upon *R.S.*, who was to get the legacy in case a specified uncertain event happened, and the case therefore fell under Cl. (1) of S. 120 of the Succession Act and not under S. 120 (2); (2) that therefore *R.S.* had no vested interest, and the plaintiff therefore had no right or interest. 20 Pat.L.T. 90=1939 P. W.N. 349.

which it may be presumed he will be eventually entitled, shall be applied for his maintenance and education. No child of *A* who is under the age of 18, has a vested interest in the bequest.

CHAPTER IX.

OF ONEROUS BEQUESTS.

Onerous bequests.

122. Where a bequest imposes an obligation on the legatee, he can take nothing by it unless he accepts it fully.

Illustration.

A, having shares in (*X*), a prosperous joint stock company and also shares in (*Y*), a joint stock company in difficulties, in respect of which shares heavy calls are expected to be made, bequeaths to *B* all his shares in joint stock companies; *B* refuses to accept the shares in (*Y*). He forfeits the shares in (*X*).

One of two separate and independent bequests to same person may be accepted, and other refused.

123. Where a will contains two separate and independent bequests to the same person, the legatee is at liberty to accept one of them and refuse the other, although the former may be beneficial and the latter onerous.

Illustration.

A, having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is higher than the house can be let for, bequeaths to *B* the lease and a sum of money. *B* refuses to accept the lease. He will not by this refusal forfeit the money.

CHAPTER X.

OF CONTINGENT BEQUESTS.

Bequest contingent upon specified uncertain event, no time being mentioned for its occurrence.

124. Where a legacy is given if a specified uncertain event shall happen and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect, unless such event happens before the period when the fund bequeathed is payable or distributable.

NOTES.

Sec. 123.—The section reverses the rule in *Talbot* v. *Radnor*, 3 My. & K. 252. The legatee is at liberty to accept beneficial part and reject onerous gift. (1915) Ch. 390; 398. The question is one of intention. 23 Ch.D. 573; (1896) 2 Ch. 511.

Sec. 124.—The section does not apply to Punjab. 1923 L. 649. The hard and fast rule in the section must be applied without speculating on the intention of the testator. 3 C.W.N. 478=23 I.A. 18. *See also* 27 I.C. 239=19 C.W.N. 52. The section applies only when the time of occurrence of the contingency is uncertain. 58 I.C. 996. Section applies when the prior bequest is capable of taking effect and is not void *ab initio*. 33 C. 947; 38 C. 327=21 M.L.J. 116=9 I.C. 122 (P.C.). S. 124 does not apply if a period is specified in the will within which the contingent event is to happen. If the terms of the will make that construction of his words impossible, the section then does not apply. 59 I.A. 419=1932 P.C. 269=64 M.L.J. 48 (P.C.). The 'period' referred to in S. 124 does not mean an indefinite period after the testator's death during which the contingency of the death issueless may occur, but the lawful period for distribution by the executors and 'before the period' means 'before the commencement of such period'. 144 I.C. 179 =12 P. 18=1933 P. 126. Gift made absolutely as owner—Subsequent clause in will creating gift over in favour of others—Repugnancy—Vaildity of disposition. 48 C.L.J. 523. It does not contain a provision as to "contrary intention" and hence it cannot be implied. 23 C. 563. Under illus. (*ii*) the point of time for the occurrence of the contingency is to be determined with reference to the period of payment or distribution and not as in English law with reference to the period of its happening. 24 C. 406. The section depends on a natural meaning as opposed to a forced interpretation of the words. 54 I.C. 897. Where a testator left a will by which he devised an absolute estate to a female with a proviso that, in the event of the death of the female, his nephew was to be the heir but the female survived the testator: *Held*, that the gift over to the nephew did not take effect and that the female took an absolute estate. 13 Pat. 550=15 P.L.T. 715=1935 Pat. 398. *See* generally 44 M. 446; 45 B. 1038; 43 C. 432=43 I.A. 12=30 M.L.J. 116 (P.C.); 39 B. 296=42 I.A. 71=28 M.L.J. 167 (P.C.).

Secs. 124 and 125.—The principle underlying S. 124 was based on *Edwards* v. *Edwards*. 15 Beav. 357, which has been in part overruled by *O'Mahoneo* v. *Burdett*, 7 H. L. 388. So the rule cannot be applied as a

Illustrations.

(*i*) A legacy is bequeathed to *A*, and, in case of his death, to *B*. If *A* survives the testator, the legacy to *B* does not take effect.

(*ii*) A legacy is bequeathel to *A*, and, in case of his death without children, to *B*. If *A* survives the testator or dies in his lifetime leaving a child, the legacy to *B* does not take effect.

(*iii*) A legacy is bequeathed to *A* when and if he attains the age of 18, and, in case of his death, to *B*. *A* attains the age of 18. The legacy to *B* does not take effect.

(*iv*) A legacy is bequeathed to *A* for life, and after his death, to *B* and, "in case of *B's* death without children," to *C*. The words "in case of *B's* death without children," are to be understood as meaning 'in case *B* dies without children during the lifetime of *A*.'

(*v*) A legacy is bequeathed to *A* for life, and after his death to *B*, and, "in case of *B's* death," to *C*. The words "in case of *B's* death" are to be considered as meaning "in case *B* dies in the lifetime of *A*."

Bequest to such of certain persons as shall be surviving at some period not specified.

125. Where a bequest is made to such of certain persons as shall be surviving at some period, but the exact period is not specified, the legacy shall go to such of them as are alive at the time of payment or distribution, unless a contrary intention appears by the will.

Illustrations.

(*i*) Property is bequeathed to *A* and *B* to be equally divided between them, or to the survivor of them. If both *A* and *B* survive the testator, the legacy is equally divided between them. If *A* dies before the testator, and *B* survives the testator, it goes to *B*.

(*ii*) Property is bequeathed to *A* for life, and after his death, to *B* and *C*, to be equally divided between them, or to the survivor of them. *B* dies during the life of *A*; *C* survives *A*. At *A's* death the legacy goes to *C*.

(*iii*) Property is bequeathed to *A* for life and after his death to *B* and *C*, or the survivor, with a direction that, if *B* should not survive the testator, his children are to stand in his place. *C* dies during the life of the testator; *B* survives the testator, but dies in the lifetime of *A*. The legacy goes to the representative of *B*.

(*iv*) Property is bequeathed to *A* for life, and, after his death to *B* and *C*, with a direction that, in case either of them dies in the lifetime of *A*, the whole shall go to the survivor. *B* dies in the lifetime of *A*. Afterwards *C* dies in the lifetime of *A*. The legacy goes to the representative of *C*.

CHAPTER XI.

OF CONDITIONAL BEQUESTS.

Bequest upon impossible condition.

126. A bequest upon an impossible condition is void.

Illustrations.

(*i*) An estate is bequeathed to *A* on condition that he shall walk 100 miles in an hour. The bequest is void.

(*ii*) A bequeaths 500 rupees to *B* on condition that he shall marry *A's* daughter. *A's* daughter was dead at the date of the will. The bequest is void.

Bequest upon illegal or immoral condition.

127. A bequest upon a condition, the fulfilment of which would be contrary to law or to morality, is void.

NOTES.

rule of justice, equity and good conscience to a will not governed by the Act. 34 Bom. L.R. 1506=1933 B. 34.

Sec. 125.—*Cf.* S. 24, T.P. Act. As to the meaning of the word "surviving" *see* (1906) 1 Ch. 47; (1919) 1 Ch. 138; there is no presumption as to survivorship. 6 Ch. 356; 37 C. 103; 10 W.R. 484. *See* as to the application of the section. 6 A. 583; 18 C.W.N. 844; 20 C.W.N. 169.

Sec. 126.—*Cf.* S. 25, T.P. Act. The impossibility should not arise from the subsequent act of the testator. 3 Bro.C.C. 359. Ascertainment of intention cannot be varied by subsequent events. 33 C.L.J. 418. If the condition subsequent is impossible, the condition is void and not the legacy. (1903) 1 Ch. 749; (1904) 1 Ch. 252.

Sec. 127.—A bequest made conditional on the continuation of immoral relations is void. 23 M. 613; but *see* 2 A. 433; 6 A. 313. So too a condition that a wife should cease to reside with her husband. 13 Eq. 604; 39 Ch.D. 116; a gift in the event of separation is good. (1904) 1 Ch. 470. A condition restraining a donee from entering the military or naval services is void. (1908) 1 Ch. 383. Condition restraining marriage in the lifetime of the life tenant if contrary to law and morality. 59 C. 102 =1932 C. 350. On this section, *see also* 59 I.A. 419=1932 P.C. 327=64 M.L.J. 48 (P.C.), noted under S. 131, *infra*.

Illustrations.

(*i*) *A* bequeaths 500 rupees to *B* on condition that he shall murder *C*. The bequest is void.

(*ii*) *A* bequeaths 5,000 rupees to his niece if she will desert her husband. The bequest is void.

Fulfilment of condition precedent to vesting of legacy.

128. Where a will imposes a condition to be fulfilled before the legatee can take a vested interest in the thing bequeathed, the condition shall be considered to have been fulfilled if it has been substantially complied with.

Illustrations.

(*i*) A legacy is bequeathed to *A* on condition that he shall marry with the consent of *B*, *C*, *D* and *E*. *A* marries with the written consent of *B*. *C* is present at the marriage. *D* sends a present to *A* previous to the marriage. *E* has been personally informed by *A* of his intentions, and has made no objection. *A* has fulfilled the condition.

(*ii*) A legacy is bequeathed to *A* on condition that he shall marry with the consent of *B*, *C* and *D*. *D* dies. *A* marries with the consent of *B* and *C*. *A* has fulfilled the condition.

(*iii*) *A* legacy is bequeathed to *A* on condition that he shall marry with the consent of *B*, *C* and *D*. *A* marries in the lifetime of *B*, *C* and *D*, with the consent of *B* and *C* only. *A* has not fulfilled the condition.

(*iv*) *A* legacy is bequeathed to *A* on condition that he shall marry with the consent of *B*, *C* and *D*. *A* obtains the unconditional assent of *B*, *C* and *D* to his marriage with *E*. Afterwards *B*, *C* and *D* capriciously retract their consent. *A* marries *E*. *A* has fulfilled the condition.

(*v*) A legacy is bequeathed to *A* on condition that he shall marry with the consent of *B*, *C* and *D*. *A* marries without the consent of *B*, *C* and *D*, but obtains their consent after the marriage. *A* has not fulfilled the condition.

(*vi*) *A* makes his will whereby he bequeaths a sum of money to *B*, if *B* shall marry with the consent of *A's* executors. *B* marries during the lifetime of *A*, and *A* afterwards expresses his approbation of the marriage. *A* dies. The bequest to *B* takes effect.

(*vii*) A legacy is bequeathed to *A* if he executes a certain document within a time specified in the will. The document is executed by *A* within a reasonable time, but not within the time specified in the will. *A* has not performed the condition, and is not entitled to receive the legacy.

Bequest to *A* and on failure of prior bequest to *B*.

129. Where there is a bequest to one person and a bequest of the same thing to another, if the prior bequest shall fail, the second bequest shall take effect upon the failure of the prior bequest although the failure may not have occurred in the manner contemplated by the testator.

Illustrations.

(*i*) *A* bequeaths a sum of money to his own children surviving him, and, if they all die under 18, to *B*. *A* dies without having ever had a child. The bequest to *B* takes effect.

(*ii*) *A* bequeaths a sum of money to *B*, on condition that he shall execute a certain document within three months after *A's* death, and, if he should neglect to do so, to *C*. *B* dies in the testator's lifetime. The bequest to *C* takes effect.

When second bequest not to take effect on failure of first.

130. Where the will shows an intention that the second bequest shall take effect only in the event of the first bequest failing in a particular manner, the second bequest shall not take effect, unless the prior bequest fails in that particular manner.

Illustration.

A makes a bequest to his wife, but in case she should die in his lifetime, bequeaths to *B* that which he had bequeathed to her. *A* and his wife perish together, under circumstances which make it impossible to prove that she died before him; the bequest to *B* does not take effect.

NOTES.

Sec. 128.—Conditions in absolute restraint of marriage are not allowable. 1 Dick. 721. Where consent of guardians is required, guardian must be appointed if there are none. 18 Ch. D. 61.

Sec. 129.—*See* 33 C. 947; 15 C. 282; 9 C.W.N. 1033; 19 C.W.N. 439; 23 I.C. 597 (failure of prior bequest not as contemplated—Validity of gift over). *See also* 44 Bom.L.R. 256.

Secs. 129 and 130.—*See* 154 I.C. 85=40 L.W. 869=1935 M. 119.

Sec. 130.—*See* 24 L.W. 195=1926 M. 907=51 M.L.J. 182.

131. (1) A bequest may be made to any person with the condition superadded that, in case a specified uncertain event shall happen, the thing bequeathed shall go to another person, or that in case a specified uncertain event shall not happen, the thing bequeathed shall go over to another person.

Bequest over, conditional upon happening or not happening of specified uncertain event.

(2) In each case the ulterior bequest is subject to the rules contained in sections 120, 121, 122, 123, 124, 125, 126, 127, 129 and 130.

Illustrations.

(*i*) A sum of money is bequeathed to *A*, to be paid to him at the age of 18, and if he shall die before he attains that age, to *B*. *A* takes a vested interest in the legacy, subject to be divested and to go to *B* in case *A* dies under 18.

(*ii*) An estate is bequeathed to *A* with a proviso that, if *A* shall dispute the competency of the testator to make a will, the estate shall go to *B*. *A* disputes the competency of the testator to make a will. The estate goes to *B*.

(*iii*) A sum of money is bequeathed to *A* for life, and, after his death, to *B*; but if *B* shall then be dead, leaving a son, such son is to stand in the place of *B*. *B* takes a vested interest in the legacy, subject to be divested if he dies leaving a son in *A's* lifetime.

(*iv*) A sum of money is bequeathed to *A* and *B*, and if either should die during the life of *C*, then to the survivor, living at the death of *C*. *A* and *B* die before *C*. The gift over cannot take effect, but the representative of *A* takes one-half of the money, and the representative of *B* takes the other half.

(*v*) *A* bequeaths to *B* the interest of a fund for life, and directs the fund to be divided at her death equally among her three children, or such of them as shall be living at her death. All the children of *B* die in *B's* lifetime. The bequest over cannot take effect but the interest of the children pass to their representatives.

132. An ulterior bequest of the kind contemplated by section 131 cannot take effect, unless the condition is strictly fulfilled.

Condition must be strictly fulfilled.

Illustrations.

(*i*) A legacy is bequeathed to *A*, with a proviso that, if he marries without the consent of *B*, *C* and *D*, the legacy shall go to *E*. *D* dies. Even if *A* marries without the consent of *B* and *C*, the gift to *E* does not take effect.

(*ii*) A legacy is bequeathed to *A*, with a proviso that, if he marries without the consent of *B*, the legacy shall go to *C*. *A* marries with the consent of *B*. He afterwards becomes a widower and marries again without the consent of *B*. The bequest to *C* does not take effect.

(*iii*) A legacy is bequeathed to *A*, to be paid at 18, or marriage, with a proviso that, if *A* dies under 18 or marries without the consent of *B*, the legacy shall go to *C*. *A* marries under 18 without the consent of *B*. The bequest to *C* takes effect.

NOTES.

Sec. 131.—*Cf.* S. 28 (*a*), T.P. Act, English Law always construes with rigid strictness all restrictions which go to divest estate once vested. 4 M. 411; 8 H.L. 183; 22 Ch.D. 263. Too rigid a construction of the English language should not be applied to the will of an Indian testator. 59 I.A. 419=64 M.L.J. 48 (P.C.). Gift over to charity—Validity of. *See* 21 I.C. 183=40 C. 192. S. 124 applies only if without doing violence to the terms of the will, it can be held as a matter of words that the happening of the uncertain event before the period of payment or distribution was alone within the contemplation of the testator. 59 I.A. 419=37 C.W.N. 153=64 M.L.J. 48 (P.C.). Gift of absolute estate with a provision that it should go to third person if the legatee should die without male issue is valid and is not opposed to Hindu Law. 45 B. 1038=23 Bom.L.R. 433. As to the rule of Hindu Law on the subject, *see* 16 I.A. 29; 9 M.I.A. 123; 24 C. 834 (850); 22 Bom.L.R. 1005; 85 I.C. 564=1925 L. 594. A clause of defeasance in order to be operative must contain express words or words of necessary implication. 32 C. 861. *See also* 1931 C. 499.

Sec. 132.—*Cf.* S. 29, T.P. Act. There can be no question of the validity of condition requiring residence at any place. 24 C. 646; 14 I.C. 708; 25 Ch. D. 605; (1907) 1 Ch. 231. The breach in order to deprive a legatee of his vested interest must be wilful and intentional. 17 C.W.N. 39. As to whether Hindu widow's right to maintenance is affected by breach of condition as to residence, *see* 13 B. 218; 12 C.W.N. 808; 15 B. 263.

Original bequest not affected by invalidity of second.

133. If the ulterior bequest be not valid, the original bequest is not affected by it.

Illustrations.

(*i*) An estate is bequeathed to A for his life with a condition superadded that, if he shall not on a given day walk 100 miles in an hour, the estate shall go to *B*. The condition being void, *A* retains his estate as if no condition had been inserted in the will.

(*ii*) An estate is bequeathed to *A* for her life and, if she do not desert her husband, to *D*. *A* is entitled to the estate during her life as if no condition had been inserted in the will.

(*iii*) An estate is bequeathed to *A* for life, and, if he marries, to the eldest son of *B* for life. *B*, at the date of the testator's death, had not had a son. The bequest over is void under section 105, and *A* is entitled to the estate during his life.

Bequest conditioned that it shall cease to have effect in case a specified uncertain event shall happen, or not happen.

134. A bequest may be made with the condition superadded that it shall cease to have effect in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Illustrations.

(*i*) An estate is bequeathed to *A* for his life, with a proviso that, in case he shall cut down a certain wood, the bequest shall cease to have any effect. *A* cuts down the wood. He loses his life interest in the estate.

(*ii*) An estate is bequeathed to *A*, provided that, if he marries under the age of 25 without the consent of the executors named in the will, the estate shall cease to belong to him. *A* marries under 25 without the consent of the executors. The estate ceases to belong to him.

(*iii*) An estate is bequeathed to *A*, provided that, if he shall not go to England within three years after the testator's death, his interest in the estate shall cease. *A* does not go to England within the time prescribed. His interest in the estate ceases.

(*iv*) An estate is bequeathed to *A*, with a proviso that if she becomes a nun, she shall cease to have any interest in the estate. *A* becomes a nun. She loses her interest under the will.

(*v*) A fund is bequeathed to *A* for life, and, after his death, to *B*, if *B* shall be then living, with a proviso that, if *B* shall become a nun, the bequest to her shall cease to have any effect. *B* becomes a nun in the lifetime of *A*. She thereby loses her contingent interest in the fund.

Such condition must not be invalid under S. 120.

135. In order that a condition that a bequest shall cease to have effect may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of a bequest as contemplated by section 120.

Result of legatee rendering impossible or indefinitely postponing act for which no time specified, and on non-performance of which subject-matter to go over.

136. Where a bequest is made with a condition superadded that, unless the legatee shall perform a certain act, the subject-matter of the bequest shall go to another person, or the bequest shall cease to have effect, but no time is specified for the performance of the act; if the legatee takes any step which renders impossible or indefinitely postpones the performance of the act required, the legacy shall go as if the legatee had died without performing such act.

Illustrations.

(*i*) A bequest is made to *A*, with a proviso that, unless he enters the Army, the legacy shall go over to *B*. *A* takes Holy Orders, and thereby renders it impossible that he should fulfil the condition. *B* is entitled to receive the legacy.

NOTES.

Sec. 133.—*Cf.* S. 30, T.P. Act. *See* 24 C. 834; 20 B. 450; 4 C.W.N. 671; 11 Ch.D. 959. As to repugnant and inconsistent conditions, *see* 9 B.L.R. 377. If the condition is too vague for a Court to enforce it, it is void. 7 H.L.C. 707; 20 C. 15; 21 Ch.D. 278.

Sec. 134.—*Cf.* S. 31, T.P. Act. The object is to get rid of the English rule under which conditions subsequent were held in certain cases void as being *in terrorem*. *See* 6 P.C. 11; 7 M.I.A. 169; 17 C.W.N. 39; 22 C.L.J. 61.

Sec. 135.—*Cf.* S. 32, T.P. Act. If the condition is invalid, the gift is unaffected by the divesting clause, *e.e.*, indefinite failure of male issue or general failure of heirs. 24 I.A. 76.

Sec. 136.—*Cf.* S. 33, T.P. Act, and S. 34, Indian Contract Act. *See also* 17 C.W.N. 39; 24 C. 834.

(*ii*) A bequest is made to *A*, with a proviso that it shall cease to have any effect if he does not marry *B's* daughter. *A* marries a stranger and thereby indefinitely postpones the fulfilment of the conditions. The bequest ceases to have effect.

Performance of condition, precedent or subsequent, within specified time. Further time in case of fraud.

137. Where the will requires an act to be performed by the legatee within a specified time, either as a condition to be fulfilled before the legacy is enjoyed, or as a condition upon the non-fulfilment of which the subject-matter of the bequest is to go over to another person or the bequest is to cease to have effect, the act must be performed within the time specified, unless the performance of it be prevented by fraud, in which case such further time shall be allowed as shall be requisite to make up for the delay caused by such fraud.

CHAPTER XII.

OF BEQUESTS WITH DIRECTIONS AS TO APPLICATION OR ENJOYMENT.

Direction that fund be employed in particular manner following absolute bequest of same to or for benefit of any person.

138. Where a fund is bequeathed absolutely to or for the benefit of any person, but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the will had contained no such direction.

Illustration.

A sum of money is bequeathed towards purchasing a country residence for *A*, or to purchase an annuity for *A*, or to place *A* in any business. *A* chooses to receive the legacy in money. He is entitled to do so.

Direction that mode of enjoyment of absolute bequest is to be restricted, to secure specified benefit for legatee.

139. Where a testator absolutely bequeaths a fund, so as to sever it from his own estate, but directs that the mode of enjoyment of it by the legatee shall be restricted so as to secure a specified benefit for the legatee; if that benefit cannot be obtained for the legatee, the fund belongs to him as if the will had contained no such direction.

Illustrations.

(*i*) *A* bequeaths the residue of his property to be divided equally among his daughters, and directs that the shares of the daughters shall be settled upon themselves respec-

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NOTES.

Sec. 137.—*Cf.* S. 34, T.P. Act. This section enunciates a rule of law and not a rule of construction: 94 I.C. 750=1926 P. 356; except the omission of the proviso which was intentional. 20 C. 15. The Court has no power to relieve legatee from the terms. 2 Ch. 143; 14 Ves. 341. Ignorance or illness is no excuse. 16 Eq. 92; 18 Eq. 243 290.

Sec. 138.—*Cf.* Ss. 10 and 11, T.P. Act. S. 138 does not apply to a case where the bequest is of the life-interest. The word "absolutely" in the section qualified not only the first part, namely, the word "bequeathed" but also the latter part consisting of the words "for the benefit of the person". 52 C.L.J. 165=1930 C. 731. If an absolute estate is given to the donee and then further interests, are given merely after or, on termination of that donee's interest, his absolute estate is not cut down. 14 L. 485=1933 L. 365. Where an absolute estate of inheritance is created, any subsequent clause purporting to restrict it is invalid. The rule is the same if the restriction is for a limited period only. 14 L. 353=1933 L. 201. Where the application of the fund is to be regulated by discretion of others, such clause is void. 15 B. 443. A gift absolutely to wife, followed by directions to be spent "on good works" is an absolute gift. 22 B. 774. Words of inheritance do not necessarily confer an absolute interest. 35 C. 1069. Conditions in absolute restraint of alienation are void. 26 Ch.D. 801; (1896) 2 Ch. 353; 15 I.A. 37; 24 C. 406; 13 Bom. L.R. 141. So also clause prohibiting or postponing partition. 6 C. 106; the term "fund" is comprehensive and includes all class of legacies, movable or immovable. 1 C. 104; 4 M. 200.

Secs. 138 and 139.—Applicability—Absolute gift—Gift of residue upon trust. *See* 42 Bom.L.R. 89.

Sec. 139.—*See* 1 M. and G. 551; (1915) 1 Ch. 167; 2 Ch. 33; 44 A. 44; 19 B. 221; 770; 21 C. 488; 21 M. 425 and recent ruling of the Judicial Committee in 1925 P.C. 244 =48 M. 906=52 I.A. 180=49 M.L.J. 836 (P.C.).

tively for life and be paid to their children after their death. All the daughters die unmarried. The representatives of each daughter are entitled to her share of the residue.

(*ii*) *A* directs his trustees to raise a sum of money for his daughter, and he then directs that they shall invest the fund and pay the income arising from it to her during her life, and divide the principal among her children after her death. The daughter dies without having ever had a child. Her representatives are entitled to the fund.

Bequest of fund for certain purposes, some of which cannot be fulfilled.

140. Where a testator does not absolutely bequeath a fund, so as to sever it from his own estate, but gives it for certain purposes, and part of those purposes cannot be fulfilled, the fund, or so much of it as has not been exhausted upon the objects contemplated by the will, remains a part of the estate of the testator.

Illustrations.

(*i*) *A* directs that his trustees shall invest a sum of money in a particular way, and shall pay the interest to his son for life, and at his death shall divide the principal among his children. The son dies without having ever had a child. The fund, after the son's death, belongs to the estate of the testator.

(*ii*) *A* bequeaths the residue of his estate, to be divided equally among his daughters with a direction that they are to have the interest only during their lives, and that at their decease the fund shall go to their children. The daughters have no children. The fund belongs to the estate of the testator.

CHAPTER XIII.

OF BEQUESTS TO AN EXECUTOR.

Legatee named as executor cannot take unless he shows intention to act as executor.

141. If a legacy is bequeathed to a person who is named an executor of the will, he shall not take the legacy, unless he proves the will or otherwise manifests an intention to act as executor.

Illustration.

A legacy is given to *A*, who is named an executor. *A* orders the funeral according to the directions contained in the will, and dies a few days after the testator, without having proved the will. *A* has manifested an intention to act as executor.

CHAPTER XIV.

OF SPECIFIC LEGACIES.

Specific legacy defined.

142. Where a testator bequeaths to any person a specified part of his property, which is distinguished from all other parts of his property, the legacy is said to be specific.

NOTES.

Sec. 140.—The section deals with precatory trusts. As to principle of such trusts, *see* 3 Beav. 148; 4 M. 244; 9 I.A. 70; (1895) 2 Ch. 370; (1897) 1 Q.B. 483. Words expressing mere wish are not sufficient. 8 M. 325; 23 B. 1; 4 A. 500; 8 I.A. 117. The subject and object of the gift should be certain and well defined; 9 M. 325; 14 C. 322; the intention to impose the obligation should be in terms and definitely shown. (1905) A.C. 84.

Sec. 141.—The section is peremptory and it is not open to Courts to decide if the legacy was left to him *qua* executor. 15 C. 83; 13 M.L.J. 357. The intention must be manifested unequivocally. 4 Ves. 202; 8 Eq. 277. The section does not apply to a bequest of the residue. 11 Sim. 202; (1914) 2 Ch. 173.

Sec. 142.—Legacies are general or specific. *See* the definition by *Jessel*, M.R., in 20 Eq. 304. English Courts do not construe a legacy as specific, unless the intention is clear. 4 Ves. 748. Generally speaking, legacies of money are general legacies unless a particular fund is indicated. (1921) 2 Ch. 327; 8 C. 1. Every bequest of immovable property is specific. 3 Ch. 420; 10 Ch. 136. As to true test of specific legacy, *see* (1919) 1 Ch. 297. The distinction between the two lies in the fact that, in case of deficiency of assets, specific legacies do not abate; and they are liable to ademption, and if they fail, no recompense can be had out of the general assets. Where testator directed by his will that, "after the amount due in respect of lands sold under oral agreements has been received", a sum of Rs. 10,000 to his wife and a sum of Rs. 4,000 to his daughter should be paid, the legacies were held to be demonstrative and nt specific. 34 Bom.L.R. 1124=1932 B. 506.

Illustrations.

(*i*) *A* bequeaths to *B*—
"the diamond ring presented to me by *C*":
"my gold chain'':
"a certain bale of wool":
"a certain piece of cloth":
"all my household goods which shall be in or about my dwelling house in *M* street in Calcutta at time of my death":
"the sum of 1,000 rupees in a certain chest'':
"the debt which *B* owes me":
"all my bills, bonds and securities belonging to me lying in my lodgings in Calcutta'':
"all my furniture in my house in Calcutta":
"all my goods on board a certain ship now lying in the river Hughli":
"2,000 rupees which I have in the hands of *C*'':
"the money due to me on the bond of *D*":
"my mortgage on the Rampur factory'':
"one-half of the money owing to me on my mortgage of Rampur factory":
"1,000 rupees being part of a debt due to me from *C*":
"my capital stock of 1,000*l*. in East India Stock'':
"my promissory notes of the Central Government for 10,000 rupees in their 4 per cent. loan":
"all such sums of money as my executors may, after my death, receive in respect of the debt due to me from the insolvent firm of *D* and Company'':
"all the wine which I may have in my cellar at the time of my death":
"such of my horses as *B* may select":
"all my shares in the Imperial Bank of India'':
"all my shares in the Imperial Bank of India which I may possess at the time of my death":
"all the money which I have in the 5½ per cent. loan of the Central Government":
"all the Government securities I shall be entitled to at the time of my decease."
Each of these legacies is specific.

(*ii*) *A*, having Government promissory notes for 10,000 rupees, bequeaths to his executors "Government promissory notes for 10,000 rupees in trust to sell" for the benefit of *B*. The legacy is specific.

(*iii*) *A* having property at Benares, and also in other places, bequeaths to *B* all his property at Benares. The legacy is specific.

(*iv*) *A* bequeaths to *B*—
his house in Calcutta:
his zamindari of Rampur:
his taluk of Ramnagar:
his lease of the indigo factory of Salkya:
an annuity of 500 rupees out of the rents of his zamindari of *W*.
A directs his zamindari of *X* to be sold, and the proceeds to be invested for the benefit of *B*. Each of these bequests is specific.

(*v*) *A* by his will charges his zamindari of *Y* with an annuity of 1,000 rupees to *C* during his life, and subject to this charge he bequeaths the zamindari to *D*. Each of these bequests is specific.

(*vi*) *A* bequeaths a sum of money—
to buy a house in Calcutta for *B*:
to buy an estate in zilla Faridpur for *B*:
to buy a diamond ring for *B*:
to buy a horse for *B*:
to be invested in shares in the Imperial Bank of India for *B*:

NOTES.

Secs. 142 and 150.—Applicability—Testator having funds in Bank—Gift of sum to son for purchase of money and direction for payment of sum out of amount in bank—If specific or demonstrative. *See* 1942 Mad. 17=(1941) 2 M.L.J. 677.

The true test to determine, whether a particular bequest is specific or demonstrative, so far as the law in India is concerned, is mentioned in the explanation to S. 150, Succession Act. For that the only guiding factor can be the exact words used in the will and no other. 39 Bom.L.R. 497=1937 Bom. 384.

to be invested in Government securities for *B*.

A bequeaths to *B*—

"a diamond ring":

"a horse":

"10,000 rupees worth of Government securities":

"an annuity of 500 rupees":

"2,000 rupees to be paid in cash":

"so much money as will produce 5,000 rupees four per cent. Government securities".

These bequests are not specific.

(*vii*) *A*, having property in England and property in India, bequeaths a legacy to *B*, and directs that it shall be paid out of the property which he may leave in India. He also bequeaths a legacy to *C* and directs that it shall be paid out of property which he may leave in England. No one of these legacies is specific.

Bequest of certain sum where stocks, etc., in which invested are described.

143. Where a certain sum is bequeathed, the legacy is not specific merely because the stock, funds or securities in which it is invested are described in the will.

Illustrations.

A bequeaths to *B*—

"10,000 rupees of my funded property":

"10,000 rupees of my property now invested in shares of the East Indian Railway Company":

"10,000 rupees, at present secured by mortgage of Rampur factory."

No one of these legacies is specific.

Bequest of stock where testator had, at date of will, equal or greater amount of stock of same kind.

144. Where a bequest is made in general terms of a certain amount of any kind of stock, the legacy is not specific merely because the testator was, at the date of his will, possessed of stock of the specified kind, to an equal or greater amount than the amount bequeathed.

Illustration.

A bequeaths to *B* 5,000 rupees five per cent. Government securities. *A* had at the date of the will five per cent. Government securities for 5,000 rupees. The legacy is not specific.

Bequest of money where not payable until part of testator's property disposed of in certain way.

145. A money legacy is not specific merely because the will directs its payment to be postponed until some part of the property of the testator has been reduced to a certain form, or remitted to a certain place.

Illustration.

A bequeaths to *B* 10,000 rupees and directs that this legacy shall be paid as soon as *A's* property in India shall be realised in England. The legacy is not specific.

When enumerated articles not deemed specifically bequeathed.

146. Where a will contains a bequest of the residue of the testator's property along with an enumeration of some items of property not previously bequeathed, the articles enumerated shall not be deemed to be specifically bequeathed.

Retention, in form, of specific bequest to several persons in succession.

147. Where property is specifically bequeathed to two or more persons in succession, it shall be retained in the form in which the testator left it, although it may be of such a nature that its value is continually decreasing.

NOTES.

Sec. 146.—The word "articles" does not cover items of immovable property. 84 I. C. 1029; 1925 M. 418. To construe the word "as referring to movables and immovables" is opposed to all rules of construction. 20 L.W. 748. The rule is not excluded even if remuneration is particularized by the word "my". 1 Deg. and J. 438. When a general gift of personalty is followed by enumeration of particular articles, still it is only a general legacy. 3 Ch. D. 309; 4 Ch. D. 435.

Illustrations.

(*i*) *A*, having lease of a house for a term of years, fifteen of which were unexpired at the time of his death, has bequeathed the lease to *B* for his life, and after *B's* death to *C*. *B* is to enjoy the property as *A* left it, although, if *B* lives for fifteen years, *C* can take nothing under the bequest.

(*ii*) A, having an annuity during the life of *B*, bequeaths it to *C*, for his life, and, after *C's* death, to *D*. *C* is to enjoy the annuity as *A* left it, although, if *B* dies before *D*, *D* can take nothing under the bequest.

Sale and investment of proceeds of property bequeathed to two or more persons in succession.

148. Where property comprised in a bequest to two or more persons in succession is not specifically bequeathed, it shall, in the absence of any direction to the contrary, be sold, and the proceeds of the sale shall be invested in such securities as the High Court may by any general rule authorise or direct, and the fund thus constituted shall be enjoyed by the successive legatees according to the terms of the will.

Illustration.

A, having a lease for a term of years, bequeaths all his property to *B* for life, and, after *B's* death, to *C*. The lease must be sold, the proceeds invested as stated in this section and the annual income arising from the fund is to be paid to *B* for life. At *B's* death the capital of the fund is to be paid to *C*.

Where deficiency of assets to pay legacies, specific legacy not to abate with general legacies.

149. If there is a deficiency of assets to pay legacies, a specific legacy is not liable to abate with the general legacies.

CHAPTER XV.

OF DEMONSTRATIVE LEGACIES.

Demonstrative legacy defined.

150. Where a testator bequeaths a certain sum of money, or a certain quantity of any other commodity, and refers to a particular fund or stock so as to constitute the same the primary fund or stock out of which payment is to be made, the legacy is said to be demonstrative.

Explanation.—The distinction between a specific legacy and a demonstrative legacy consists in this, that—

where specified property is given to the legatee, the legacy is specific;

where the legacy is directed to be paid out of specified property, it is demonstrative.

Illustrations.

(*i*) *A* bequeaths to *B* 1,000 rupees, being part of a debt due to him from *W*. He also bequeaths to *C* 1,000 rupees to be paid out of the debt due to him from *W*. The legacy to *B* is specific, the legacy to *C* is demonstrative.

(*ii*) *A* bequeaths to *B*—

"ten bushes of the corn which shall grow in my field of Green Acre":

"80 chests of the indigo which shall be made at my factory of Rampur":

"10,000 rupees out of my five per cent. promissory notes of the Central Government":

"an annuity of 500 rupees 'from my funded property'":

"1,000 rupees out of the sum of 2,000 rupees due to me by *C*":

"an annuity, and directs it to be paid 'out of the rents arising from my taluk of Ramnagar'".

(*iii*) *A* bequeaths to *B*—

"10,000 rupees out of my estate at Ramnagar," or charges it on his estate at Ramnagar:

"10,000 rupees, being my share of the capital embarked in a certain business."

Each of these bequestts is demonstrative.

NOTES.

Sec. 148.—According to English decisions, a slight indication of intention is enough to prevent the applicability of rule. 14 Beav. 82; 19 Eq. 395; 26 Ch. D. 42; 8 Ch.D. 101.

Sec. 150.—As to what is demonstrative legacies, *see* 29 M. 155; (1912) 1 Ch. 219; 19 I.A. 83; 34 Bom.L.R. 1124=1932 B. 506; (1941) 2 M.L.J. 677.

151. Where a portion of a fund is specifically bequeathed and a legacy is directed to be paid out of the same fund, the portion specifically bequeathed shall first be paid to the legatee, and the demonstrative legacy shall be paid out of the residue of the fund, and, so far as the residue shall be deficient, out of the general assets of the testator.

Order of payment when legacy directed to be paid out of fund the subject of specific legacy.

Illustration.

A bequeaths to *B*, 1,000 rupees, being part of a debt due to him from *W*. He also bequeaths to *C* 1,000 rupees to be paid out of the debt due to him from *W*. The debt due to *A* from *W* is only 1,500 rupees; of these 1,500 rupees, 1,000 rupees belong to *B*, and 500 rupees are to be paid to *C*. *C* is also to receive 500 rupees out of the general assets of the testator.

CHAPTER XVI.

OF ADEMPTION OF LEGACIES.

152. If anything which has been specifically bequeathed does not belong to the testator at the time of his death, or has been converted into property of a different kind, the legacy is adeemed: that is, it cannot take effect, by reason of the subject-matter having been withdrawn from the operation of the will.

Ademption explained.

Illustrations.

(*i*) *A* bequeaths to *B*—

"the diamond ring presented to me by *C*":
"my gold chain":
"a certain bale of wool":
"a certain piece of cloth":
"all my household goods which shall be in or about my dwelling house in M Street in Calcutta, at the time of my death":

in his lifetime,—

sells or gives away the ring:
converts the chain into a cup:
converts the wool into cloth:
makes the cloth into a garment:
takes another house into which he removes all his goods.

Each of these legacies is adeemed.

(*ii*) A bequeaths to *B*—

"the sum of 1,000 rupees in a certain chest":
"all the horses in my stable."

At the death of *A*, no money is found in the chest, and no horses in the stable. The legacies are adeemed.

(*iii*) *A* bequeaths to *B* certain bales of goods. *A* takes the goods with him on a voyage. The ship and goods are lost at sea, and *A* is drowned. The legacy is adeemed.

153. A demonstrative legacy is not adeemed by reason that the property on which it is charged by the will does not exist at the time of the death of the testator, or has been converted into property of a different kind, but it shall in such case be paid out of the general assets of the testator.

Non-ademption of demonstrative legacy.

NOTES.

Sec. 152.—The rule of ademption applies to specific legacies only and not to demonstrative legacies. 19 C. 444. The conversion must have been complete in the testator's lifetime; a direction to sell not carried out will not have the effect. 2 De. G. & Sm. 436. Conversion effected by a duly authorized agent will do. 5 Eq. 555= 22 Ch.D. 622; even if done without authority, it will do. 2 Eq. 323. The doctrine applies to gifts under power of appointment. (1901) 1 Ch. 398; (1902) 1 Ch. 100. A mortgage decree is a piece of movable property, where a testator holding a mortgage decree, disposes all his movable and immovable properties to his wife, and during his life takes a mortgage bond from the judgment-debtor in satisfaction of the decree, the wife, on the death of testator, becomes entitled to enforce the mortgage bond. No question of ademption arises under S. 152 of the Succession Act. 190 I.C. 36=1941 Pat. 18.

Ademption of specific bequest of right to receive something from third party.

154. Where the thing specifically bequeathed is the right to receive something of value from a third party, and the testator himself receives it, the bequest is adeemed.

Illustrations.

(*i*) *A* bequeaths to *B*—
"the debt which *C* owes me":
"2,000 rupees which I have in the hands of *D*":
"the money due to me on the bond of *E*":
"my mortgage on the Rampur factory."
All these debts are extinguished in *A's* lifetime, some with and some without his consent. All the legacies are adeemed.

(*ii*) *A* bequeaths to *B* his interest in certain policies of life assurance. *A* in his lifetime receives the amount of the policies. The legacy is adeemed.

Ademption *pro tanto* by testator's receipt of part of entire thing specifically bequeathed.

155. The receipt by the testator of a part of an entire thing specifically bequeathed shall operate as an ademption of the legacy to the extent of the sum so received.

Illustration.

A bequeaths to *B* "the debt due to me by *C*". The debt amounts to 10,000 rupees. *C* pays to *A* 5,000 rupees, the one-half of the debt. The legacy is revoked by ademption, so far as regards the 5,000 rupees received by *A*.

Ademption *pro tanto* by testator's receipt of portion of entire fund of which portion has been specifically bequeathed.

156. If a portion of an entire fund or stock is specifically bequeathed, the receipt by the testator of a portion of the fund or stock shall operate as an ademption only to the extent of the amount so received: and the residue of the fund or stock shall be applicable to the discharge of the specific legacy.

Illustration.

A bequeaths to *B* one-half of the sum of 10,000 rupees due to him from *W*. *A* in his lifetime receives 6,000 rupees, part of the 10,000 rupees. The 4,000 rupees which are due from *W* to *A* at the time of his death belong to *B* under the specific bequest.

Order of payment where portion of fund specifically bequeathed to one legatee, and legacy charged on same fund to another, and, testator having received portion of that fund, remainder insufficient to pay both legacies.

157. Where a portion of a fund is specifically bequeathed to one legatee, and a legacy charged on the same fund is bequeathed to another legatee, then, if the testator receives a portion of that fund, and the remainder of the fund is insufficient to pay both the specific and the demonstrative legacy, the specific legacy shall be paid first, and the residue (if any) of the fund shall be applied so far as it will extend in payment of the demonstrative legacy, and the rest of the demonstrative legacy shall be paid out of the general assets of the testator.

Illustration.

A bequeaths to *B* 1,000 rupees, part of the debt of 2,000 rupees due to him from *W*. He also bequeaths to *C* 1,000 rupees to be paid out of the debt due to him from *W*. *A* afterwards receives [500][1] rupees, part of that debt, and dies leaving only 1,500 rupees due to him from *W*. Of these 1,500 rupees, 1,000 rupees belong to *B*, and 500 rupees are to be paid to *C*. *C* is also to receive 500 rupees out of the general assets of the testator.

Ademption where stock specifically bequeathed does not exist at testator's death.

158. Where stock which has been specifically bequeathed does not exist at the testator's death, the legacy is adeemed.

LEG. REF.

[1] In S. 157, the figures "500" were substituted for the figures "5,000" by S. 2 and Sch. I of Act X of 1927.

NOTES.

Sec. 158.—*Re*: question of a substantial charge, *see* 14 Ch.D. 856; (1907) 1 Ch. 665. A conversion by lawful authority will cause ademption. 22 Ch.D. 622; 37 Ch.D. 310.

Illustration.

A bequeaths to *B*—

"my capital stock of 1,000*l.* in East India Stock":

"my promissory notes of the Central Government for 10,000 rupees in their 4 per cent. loan."

A sells the stock and the notes. The legacies are adeemed.

Ademption *pro tanto* where stock, specifically bequeathed, exists in part only at testator's death.

159. Where stock which has been specifically bequeathed exists only in part at the testator's death, the legacy is adeemed so far as regards that part of the stock which has ceased to exist.

Illustration.

A bequeaths to *B* his 10,000 rupees in the 5½ per cent. loan of the Central Government. *A* sells one-half of his 10,000 rupees in the loan in question. One-half of the legacy is adeemed.

Non-ademption of specific bequest of goods described as connected with certain place, by reason of removal.

160. A specific bequest of goods under a description connecting them with a certain place is not adeemed by reason that they have been removed from such place from any temporary cause, or by fraud, or without the knowledge or sanction of the testator.

Illustrations.

(*i*) *A* bequeaths to *B* "all my household goods which shall be in or about my dwelling-house in Calcutta at the time of my death." The goods are removed from the house to save them from fire. *A* dies before they are brought back.

(*ii*) *A* bequeaths to *B* "all my household goods which shall be in or about my dwelling-house in Calcutta at the time of my death." During *A's* absence upon a journey, the whole of the goods are removed from the house. *A* dies without having sanctioned their removal.

Neither of these legacies is adeemed.

When removal of thing bequeathed does not constitute ademption.

161. The removal of the thing bequeathed from the place in which it is stated in the will to be situated does not constitute an ademption, where the place is only referred to in order to complete the description of what the testator meant to bequeath.

Illustrations.

(*i*) *A* bequeaths to *B* "all the bills, bonds and other securities for money belonging to me now lying in my lodgings in Calcutta." At the time of his death, these effects had been removed from his lodgings in Calcutta.

(*ii*) *A* bequeaths to *B* all his furniture then in his house in Calcutta. The testator has a house at Calcutta and another at Chinsurah, in which he lives alternately, being possessed of one set of furniture only which he removes with himself to each house. At the time of his death the furniture is in the house at Chinsurah.

(*iii*) *A* bequeaths to *B* all his goods on board a certain ship then lying in the river Hugli. The goods are removed by *A's* directions to a warehouse in which they remain at the time of *A's* death.

No one of these legacies is revoked by ademption.

When thing bequeathed is a valuable to be received by testator from third person; and testator himself, or his representative, receives it.

162. Where the thing bequeathed is not the right to receive something of value from a third person, but the money or other commodity which may be received from the third person by the testator himself or by his representatives, the receipt of such sum of money or other comodity by the testator shall not constitute an ademption; but if he mixes it up with the general mass of his property, the legacy is adeemed.

Illustration.

A bequeaths to *B* whatever sum may be received from his claim on *C*. *A* receives the whole of his claim on *C*, and sets it apart from the general mass of his property. The legacy is not adeemed.

NOTES.

Sec. 161.—No ademption where goods are removed for their preservation: 1 Ves. Sen. 273; or without the testator's knowledge or authority: 2 Vern. 747.

Change by operation of law of subject of specific bequest between date of will and testator's death.

163. Where a thing specifically bequeathed undergoes a change between the date of the will and the testator's death, and the change takes place by operation of law, or in the course of execution of the provisions of any legal instrument under which the thing bequeathed was held, the legacy is not adeemed by reason of such change.

Illustrations.

(*i*) *A* bequeaths to *B* "all the money which I have in the 5½ per cent. loan of the Central Government." The securities for the 5½ per cent. loan are converted during *A's* lifetime into 5 per cent. stock.

(*ii*) *A* bequeaths to *B* the sum of 2,000*l.* invested in Consols in the names of trustees for *A*. The sum of 2,000*l.* is transferred by the trustees into *A's* own name.

(*iii*) *A* bequeaths to *B* the sum of 10,000 rupees in promissory-notes of the Central Government which he has power under his marriage settlement to dispose of by will. Afterwards, in *A's* lifetime, the fund is converted into Consols by virtue of an authority contained in the settlement.

No one of these legacies has been adeemed.

Change of subject without testator's knowledge.

164. Where a thing specifically bequeathed undergoes a change between the date of the will and the testator's death and the change takes place without the knowledge or sanction of the testator, the legacy is not adeemed.

Illustration.

A bequeaths to *B* "all my 3 per cent. Consols." The Consols are, without *A's* knowledge, sold by his agent, and the proceeds converted into East India Stock. This legacy is not adeemed.

Stock specifically bequeathed lent to third party on condition that it be replaced.

165. Where stock which has been specifically bequeathed is lent to a third party on condition that it shall be replaced, and it is replaced accordingly, the legacy is not adeemed.

Stock specifically bequeathed sold but replaced, and belonging to testator at his death.

166. Where stock specifically bequeathed is sold, and an equal quantity of the same stock is afterwards purchased and belongs to the testator at his death, the legacy is not adeemed.

CHAPTER XVII.

OF THE PAYMENT OF LIABILITIES IN RESPECT OF THE SUBJECT OF A BEQUEST.

Non-liability of executor to exonerate specific legatees.

167. (1) Where property specifically bequeathed is subject at the death of the testator to any pledge, lien or incumbrance created by the testator himself or by any person under whom he claims, then, unless a contrary intention appears by the will, the legatee, if he accepts the bequest, shall accept it subject to such pledge or incumbrance, and shall (as between himself and the testator's estate) be liable to make good the amount of such pledge or incumbrance.

NOTES.

Sec. 163.—Alteration in the character of shares, *e.g.*, from preference into ordinary, does not cause an ademption. (191?) 1 Ch. 828. Where however subsequent to the will stock is exchanged under the provisions of an Act, a specific legacy of the stock is adeemed. (1907) 1 Ch. 665.

Sec. 166.—Re-publication of a will or its confirmation by a codicil does not revive a legacy which has been adeemed. 2 Ves. Sen. 626; 6 H.L. 728. But the acquisition of new property between ademption and re-publication answering the description of the adeemed legacy gives the legatee the newly acquired thing. 2 Vern. 209; 2 Atk. 509.

Sec. 167.—This is based on the principle laid down in *Locke King's Act*. As to what constitutes contrary intention, *see* 31 Bev. 207; 7 Eq. 371; 33 Ch.D. 195; 15 C. 66. It must be ascertained by referring to the will, mortgage and other deeds connected with it. (1893) 2 Ch. 206. If a testator devises an estate by name when he has only an interest in the proceeds of the sale, that interest passes. (1919) 2 Ch. 304.

(2) A contrary intention shall not be inferred from any direction which the will may contain for the payment of the testator's debts generally.

Explanation.—A periodical payment in the nature of land revenue or in the nature of rent is not such an incumbrance as is contemplated by this section.

Illustrations.

(*i*) *A* bequeaths to *B* the diamond ring given him by *C*. At *A's* death the ring is held in pawn by *D*, to whom it has been pledged by *A*. It is the duty of *A's* executors, if the state of the testator's assets will allow them, to allow *B* to redeem the ring.

(*ii*) *A* bequeaths to *B* a zamindari which at *A's* death is subject to a mortgage for 10,000 rupees; and the whole of the principal sum, together with interest to the amount of 1,000 rupees, is due at *A's* death. *B*, if he accepts the bequest, accepts it subject to this charge, and is liable, as between himself and *A's* estate, to pay the sum of 11,000 rupees thus due.

Completion of testator's title to things bequeathed to be at cost of his estate.

168. Where anything is to be done to complete the testator's title to the thing bequeathed, it is to be done at the cost of the testator's estate.

Illustrations.

(*i*) *A*, having contracted in general terms for the purchase of a piece of land at a certain price, bequeaths to *B*, and dies before he has paid the purchase-money. The purchase-money must be made good out of *A's* assets.

(*ii*) *A*, having contracted for the purchase of a piece of land for a certain sum of money, one-half of which is to be paid down and the other half secured by mortgage of the land, bequeaths it to *B*, and dies before he has paid or secured any part of the purchase-money. One-half of the purchase-money must be paid out of *A's* assets.

Exoneration of legatee's immovable property for which land-revenue or rent payable periodically.

169. Where there is a bequest of any interest in immovable property in respect of which payment in the nature of land-revenue or in the nature of rent has to be made periodically, the estate of the testator shall (as between such estate and the legatee), make good such payments or a proportion of them, as the case may be, up to the day of his death.

Illustration.

A bequeaths to *B* a house, in respect of which 365 rupees are payable annually by way of rent. *A* pays his rent at the usual time, and dies 25 days after. *A's* estate will make good 25 rupees in respect of the rent.

Exoneration of specific legatee's stock in joint stock company.

170. In the absence of any direction in the will, where there is a specific bequest of stock in a joint stock company, if any call or other payment is due from the testator at the time of his death in respect of the stock, such call or payment shall, as between the testator's estate and the legatee, be borne by the estate; but, if any call or other payment becomes due in respect of such stock after the testator's death, the same shall, as between the testator's estate and the legatee, be borne by the legatee, if he accepts the bequest.

Illustrations.

(*i*) *A* bequeaths to *B* his shares in a certain railway. At *A's* death there was due from him the sum of 100 rupees in respect of each share, being the amount of a call which had been duly made, and the sum of five rupees in respect of each share, being the amount of interest which had accrued due in respect of the call. These payments must be borne by *A's* estate.

(*ii*) *A* has agreed to take fifty shares in an intended joint stock company, and has contracted to pay up 100 rupees in respect of each share, which sum must be paid before his title to the shares can be completed. *A* bequeaths these shares to *B*. The estate of *A* must make good the payments which were necessary to complete *A's* title.

(*iii*) *A* bequeaths to *B* his shares in a certain railway. *B* accepts the legacy. After *A's* death, a call is made in respect of the shares. *B* must pay the call.

(*iv*) *A* bequeaths to *B* his shares in a joint stock company. *B* accepts the bequest. Afterwards the affairs of the company are wound up, and each shareholder is called upon for contribution. The amount of the contribution must be borne by the legatee.

(*v*) *A* is the owner of ten shares in a railway company. At a meeting held during his lifetime a call is made of fifty rupees per share, payable by three instalments. *A*

bequeaths his shares to *B*, and dies between the day fixed for the payment of the first and the day fixed for the payment of the second instalment, and without having paid the first instalment. *A's* estate must pay the first instalment, and *B*, if he accepts the legacy, must pay the remaining instalments.

CHAPTER XVIII.

OF BEQUEST OF THINGS DESCRIBED IN GENERAL TERMS.

Bequest of thing described in general terms.

171. If there is a bequest of something described in general terms, the executor must purchase for the legatee what may reasonably be considered to answer the description.

Illustrations.

(*i*) *A* bequeaths to *B* a pair of carriage-horses or a diamond ring. The executor must provide the legatee with such articles if the state of the assets will allow it.

(*ii*) *A* bequeaths to *B* "my pair of carriage-horses". *A* had no carriage-horses at the time of his death. The legacy fails.

CHAPTER XIX.

OF BEQUESTS OF THE INTEREST OR PRODUCE OF A FUND.

Bequest of interest or produce of fund.

172. Where the interest or produce of a fund is bequeathed to any person, and the will affords no indication of an intention that the enjoyment of the bequest should be of limited duration, the principal, as well as the interest, shall belong to the legatee.

Illustrations.

(*i*) *A* bequeaths to *B* the interest of his 5 per cent. promissory-notes of the Central Government. There is no other clause in the will affecting those securities. *B* is entitled to *A's* 5 per cent. promissory notes of the Central Government.

(*ii*) *A* bequeaths the interest of his 5½ per cent. promissory-notes of the Central Government to *B* for his life, and after his death to *C*. *B* is entitled to the interest of the notes during his life, and *C* is entitled to the notes upon *B's* death.

(*iii*) *A* bequeaths to *B* the rents of his lands at *X*. *B* is entitled to the lands.

CHAPTER XX.

OF BEQUESTS OF ANNUITIES.

Annuity created by will payable for life only unless contrary intention appears by will.

173. Where an annuity is created by will, the legatee is entitled to receive it for his life only, unless a contrary intention appears by the will, notwithstanding that the annuity is directed to be paid out of the property generally, or that a sum of money is bequeathed to be invested in the purchase of it.

Illustrations.

(*i*) *A* bequeaths to *B* 500 rupees a year. *B* is entitled during his life to receive the annual sum of 500 rupees.

(*ii*) *A* bequeaths to *B* the sum of 500 rupees monthly. *B* is entitled during his life to receive the sum of 500 rupees every month.

(*iii*) *A* bequeaths an annuity of 500 rupees to *B* for life and on *B's* death to *C*. *B* is entitled to an annuity of 500 rupees during his life. *C*, if he survives *B*, is entitled to an annuity of 500 rupees from *B's* death until his own death.

NOTES.

Sec. 172.—The gift of the dividends of a fund to a legatee is a gift of the fund itself. 12 B. 137; gift of rents and profits, 14 Eq. 456; 8 C. 788; 12 I.A. 103; 14 C.L.J. 618. Gift of income without more is gift of the corpus, though the gift is to the separate use or through the medium of trust. 21 I.C. 183=40 C. 192. As to duration, *see* 20 B. 450; 15 M. 448 (467); 21 M. 425; 5 C.W.N. 309; 31 M. 349. Bequest with condition as to good character—Absolute property conveyed—Restriction as to power of alienation—Effect. 1932 A. L. J. 564=1932 A. 476.

Sec. 173.—The presumption is that annuity is for life only. 5 Bom.L.R. 729; 13 Beav. 373; 21 C. 683. The section does not apply if there is a contrary intention. 56 I.C. 803. *See also* 62 I.C. 681. Section applies to Hindus governed by Hindu Wills Act. 56 I.C. 803. The second part is different from the English Law. Annuity to person "*putra poutradi krame*"—Nature of—If limited to legatee's life or perpetual. *See* 21 Pat.L.T. 37.

174. Where the will directs that an annuity shall be provided for any person out of the proceeds of property, or out of property generally, or where money is bequeathed to be invested in the purchase of any annuity for any person, on the testator's death the legacy vests in interest in the legatee, and he is entitled at his option to have an annuity purchased for him or to receive the money appropriated for that purpose by the will.

Period of vesting where will directs that annuity be provided out of proceeds of property, or out of property generally, or where money bequeathed to be invested in purchase of annuity.

Illustrations.

(*i*) *A* by his will directs that his executors shall, out of his property, purchase an annuity of 1,000 rupees for *B*. *B* is entitled at his option to have an annuity of 1,000 rupees for his life purchased for him, or to receive such a sum as will be sufficient for the purchase of such an annuity.

(*ii*) *A* bequeaths a fund to *B* for his life, and directs that after *B's* death, it shall be laid out in the purchase of an annuity for *C*. *B* and *C* survive the testator. *C* dies in *B's* lifetime. On *B's* death the fund belongs to the representative of *C*.

175. Where an annuity is bequeathed, but the assets of the testator are not sufficient to pay all the legacies given by the will, the annuity shall abate in the same proportion as the other pecuniary legacies given by the will.

Abatement of annuity.

176. Where there is a gift of an annuity and a residuary gift, the whole of the annuity is to be satisfied before any part of the residue is paid to the residuary legatee, and, if necessary, the capital of the testator's estate shall be applied for that purpose.

When testator's represen- and residuary gift, whole annuity to be first satisfied.

CHAPTER XXI.

OF LEGACIES TO CREDITORS AND PORTIONERS.

177. Where a debtor bequeaths a legacy to his creditor, and it does not appear from the will that the legacy is meant as a satisfaction of the debt, the creditor shall be entitled to the legacy as well as to the amount of the debt.

Creditor *prima facie* entitled to legacy as well as debt.

178. Where a parent, who is under obligation by contract to provide a portion for a child, fails to do so, and afterwards bequeaths a legacy to the child, and does not intimate by his will that the legacy is meant as a satisfaction of the portion, the child shall be entitled to receive the legacy as well as the portion.

Child *prima facie* entitled to legacy as well as portion.

Illustration.

A, by articles entered into in contemplation of his marriage with *B*, covenanted that he would pay to each of the daughters of the intended marriage a portion of 20,000 rupees on her marriage. This covenant having been broken, *A* bequeaths 20,000 rupees to each of the married daughters of himself and *B*. The legatees are entitled to the benefit of this bequest in addition to their portions.

NOTES.

Sec. 174.—Even if testator expressly declares, that the legatee shall not be permitted to receive money, rule operates. (1891) 1 Ch. 707; (1906) 2 Ch. 648; (1904) 2 Ch. 8.

Sec. 175.—As to the mode of calculating the capitalized value of an annuity, *see* 3 C. 736. *See* as to the English practice of valuing 1 De G. & Sm. 357; 362; 364.

Sec. 177.—This section is a departure from the English rule of equity and there is no presumption of satisfaction in India where a debtor bequeaths to his creditor a legacy equal or exceeding his debt. 37 B. 211=14 Bom.L.R. 782; 12 Bom.L.R. 863.

Secs. 177 and 179.—Ademption and satisfaction—Applicability. The general principles underlying Ss. 177 and 179 regarding ademption and satisfaction are applicable even to wills not governed by the Act. 1930 M. 956=59 M.L.J. 596.

Sec. 178.—A grandfather making provision for his son's daughter, the son being alive is not *in loco parentis*. (1919) 1 Ch. 102; 7 Bom.L.R. 299.

No ademption by subsequent provision for legatee.

179. No bequest shall be wholly or partially adeemed by a subsequent provision made by settlement or otherwise for the legatee.

Illustrations.

(*i*) *A* bequeaths 20,000 rupees to his son *B*. He afterwards gives to *B* the sum of 20,000 rupees. The legacy is not thereby adeemed.

(*ii*) *A* bequeaths 40,000 rupees to *B*, his orphan niece, whom he had brought up from her infancy. Afterwards, on the occasion of *B's* marriage, *A* settles upon her the sum of 30,000 rupees. The legacy is not thereby diminished.

CHAPTER XXII.

OF ELECTION.

Circumstances in which election takes place.

180. Where a person, by his will, professes to dispose of something which he has no right to dispose of, the person to whom the thing belongs shall elect either to confirm such disposition or to dissent from it, and, in the latter case, he shall give up any benefits which may have been provided for him by the will.

Devolution of interest relinquished by owner.

181. An interest relinquished in the circumstances stated in section 180 shall devolve as if it had not been disposed of by the will in favour of the legatee, subject, nevertheless, to the charge of making good to the disappointed legatee the amount or value of the gift attempted to be given to him by the will.

Testators belief as to his ownership immaterial.

182. The provisions of sections 180 and 181 apply whether the testator does or does not believe that which he professes to dispose of by his will to be his own.

Illustrations.

(*i*) The farm of Sultanpur was the property of *C*. *A* bequeathed it to *B*, giving a legacy of 1,000 rupees to *C*. *C* has elected to retain his farm of Sultanpur, which is worth 800 rupees. *C* forfeits his legacy of 1,000 rupees, of which 800 rupees goes to *B*, and the remaining 200 rupees falls into the residuary bequest, or devolves according to the rules of intestate succession, as the case may be.

NOTES.

Sec. 179.—As to the difference between ademption and satisfaction, *see* 2 H.L. 71 (90). The rule was applied to a Hindu will in 7 Bom.L.R. 299. *See also* 59 M. L.J. 596, cited under S. 177, *supra*.

Sec. 180: DOCTRINE OF ELECTION—LIMITS OF.—Any one taking possession under a will cannot set up an adverse title. But this doctrine is subject to the qualification that the election must be made with full knowledge of the circumstances. The doctrine is again inapplicable to a person who was in possession from before the execution of the will. 60 C. 1406=1934 C. 356; 1939 Mad. 485. Principle underlying the doctrine of election as contained in Part 6 of Succession Act, is an equitable principle and is applicable to all wills executed on any date, whether provisions of Part 6 are applicable to it or not. 44 L.W. 247 (2)=1936 Mad. 497.

Secs. 180 and 181: "ELECTION"—WHAT CONSTITUTES.—Before there can be an election there must be knowledge of the right to elect and of the circumstances which would influence an election. A simultaneous approbation and reprobation cannot be an election either to approbate or to reprobate. 1939 M.W.N. 280=1939 Mad. 485. Ss. 180 and 181—Scope of—If cut down by Provident Funds Act, S. 5. *See* 1939 M. W.N. 280=1939 Mad. 485.

Secs. 180 to 190.—*Cf*. S. 35, Transfer of Property Act. Consult on the scope of the doctrine, 3 Ch.D. 668; 10 M.I.A. 347; 14 B. 438; 14 L.W. 33. The doctrine of election as contained in Part VI of this Act, is an equitable principle and is applicable to all wills executed on any date whether provisions of Part VI are applicable to it or not. 163 I.C. 752=44 L.W. 247 (2)=1936 M. 497. The question of intention is of utmost importance. 18 Ves. 41. Personal competency necessary. 7 H.L. 67; 16 Beav. 106; 14 B. 438. The doctrine does not apply to creditors: 15 Eq. 389; nor can it be made use of to evade a rule of law based on public policy. (1906) 2 Ch. 288. After election, retraction is not allowed. 7 A.C. 360; (1908) A.C. 224. The doctrine applies to appointments under a power. 22 Ch.D. 555; 27 Ch.D. 606.

Sec. 182.—Court cannot speculate on what testator would have done. 6 Ch.D. 15; 9 Eq. 519. *See* as to Ill. (*iv*). Ch. D. 606; 14 B. 438.

(*ii*) *A* bequeaths an estate to *B* in case *B's* elder brother (who is married and has children) shall leave no issue living at his death. *A* also bequeaths to *C* a jewel, which belongs to *B*. *B* must elect to give up the jewel or to lose the estate.

(*iii*) *A* bequeaths to *B* 1,000 rupees, and to *C*, an estate which will, under a settlement, belong to *B* if his elder brother (who is married and has children) shall leave no issue living at his death. *B* must elect to give up the estate or to lose the legacy.

(*iv*) *A*, a person of the age of 18, domiciled in British India but owning real property in England, to which *C* is heir-at-law, bequeaths a legacy to *C* and, subject thereto, devises and bequeaths to *B* "all my property whatsoever and wheresoever," and dies under 21. The real property in England does not pass by the will. *C* may claim his legacy without giving up the real property in England.

Bequest for man's benefit how regarded for purpose of election.

183. A bequest for a person's benefit is, for the purpose of election, the same thing as a bequest made to himself.

Illustration.

The farm of Sultanpur Khurd being the property of *B*, *A* bequeathed it to *C*; and bequeathed another farm called Sultanpur Buzurg to his own executors with a direction that it should be sold and the proceeds applied in payment of *B's* debts. *B* must elect whether he will abide by the will, or keep his farm of Sultanpur Khurd in opposition to it.

Person deriving benefit indirectly not put to election.

184. A person taking no benefit directly under a will, but deriving a benefit under it indirectly, is not put to his election.

Illustration.

The lands of Sultanpur are settled upon *C* for life, and after his death upon *D*; his only child. *A* bequeaths the lands of Sultanpur to *B*, and 1,000 rupees to *C*. *C* dies intestate shortly after the testator, and without having made any election. *D* takes out administration to *C*, and as administrator elects on behalf of *C's* estate to take under the will. In that capacity he receives the legacy of 1,000 rupees and accounts to *B* for the rents of the lands of Sultanpur which accrued after the death of the testator and before the death of *C*. In his individual character he retains the lands of Sultanpur in opposition to the will.

Person taking in individual capacity under will may in other character elect to take in opposition.

185. A person who in his individual capacity takes a benefit under a will may, in another character, elect to take in opposition to the will.

Illustration.

The estate of Sultanpur is settled upon *A* for life, and after his death, upon *B*. *A* leaves the estate of Sultanpur to *D*, and 2,000 rupees to *B*, and 1,000 rupees to *C*, who is *B's* only child. *B* dies intestate, shortly after the testator, without having made an election. *C* takes out administration to *B*, and as administrator elects to keep the estate of Sultanpur in opposition to the will, and to relinquish the legacy of 2,000 rupees. *C* may do this, and yet claim his legacy of 1,000 rupees under the will.

Exception to provisions of last six sections.

186. Notwithstanding anything contained in sections 180 to 185, where a particular gift is expressed in the will to be in lieu of something belonging to the legatee which is also in terms disposed of by the will, then, if the legatee claims that thing, he must relinquish the particular gift, but he is not bound to relinquish any other benefit given to him by the will.

Illustration.

Under *A's* marriage settlement his wife is entitled, if she survives him, to the enjoyment of the estate of Sultanpur during her life. *A* by his will bequeaths to his wife an annuity of 200 rupees during her life, in lieu of her interest in the estate of Sultanpur, which estate he bequeaths to his son. He also gives his wife a legacy of 1,000 rupees. The widow elects to take what she is entitled to under the settlement. She is bound to relinquish the annuity but not the legacy of 1,000 rupees.

NOTES.

Sec. 185.—*See* 12 C. 60; 25 M. 361; 8 L.W. 252.

Sec. 186.—Where there is full knowledge, acquiescence may be presumed. 20 Beav. 67; 7 Eq. 494. Election under misconception is not conclusive. 12 Ves. 136. Where the person who has to elect is in possession of both estates no presumption arises from possession alone. 11 H.L.C. 588.

Secs. 186-188.—*See* 41 C.L.J. 258=1925 C. 724.

187. Acceptance of a benefit given by a will constitutes an election by the legatee to take under the will, if he had knowledge of his right to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives inquiry into the circumstances.

When acceptance of benefit given by will constitutes election to take under will.

Illustrations.

(*i*) *A* is owner of an estate called Sultanpur Khurd, and has a life interest in another estate called Sultanpur Buzurg to which upon his death his son *B* will be absolutely entitled. The will of *A* gives the estate of Sultanpur Khurd to *B*, and the estate of Sultanpur Buzurg to *C*. *B*, in ignorance of his own right to the estate of Sultanpur Buzurg, allows *C* to take possession of it, and enters into possession of the estate of Sultanpur Khurd. *B* has not confirmed the bequest of Sultanpur Buzurg to *C*.

(*ii*) *B*, the eldest son of *A*, is the possessor of an estate called Sultanpur. *A* bequeaths Sultanpur to *C*, and to *B* the residue of *A's* property. *B* having been informed by *A's* executors that the residue will amount to 5,000 rupees allows *C* to take possession of Sultanpur. He afterwards discovers that the residue does not amount to more than 500 rupees. *B* has not confirmed the bequest of the estate of Sultanpur to *C*.

188. (1) Such knowledge or waiver of inquiry shall, in the absence of evidence to the contrary, be presumed if the legatee has enjoyed for two years the benefits provided for him by the will without doing any act to express dissent.

Circumstances in which knowledge or waiver is presumed or inferred.

(2) Such knowledge or waiver of inquiry may be inferred from any act of the legatee which renders it impossible to place the persons interested in the subject-matter of the bequest in the same condition as if such act had not been done.

Illustration.

A bequeaths to *B* an estate to which *C* is entitled, and to *C* a coal mine. *C* takes possession of the mine and exhausts it. He has thereby confirmed the bequest of the estate to *B*.

189. If the legatee does not, within one year after the death of the testator, signify to the testator's representatives his intention to confirm or to dissent from the will the representatives shall, upon the expiration of that period, require him to make his election; and, if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the will.

When testators representatives may call upon legatee to elect.

190. In case of disability the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

Postponement of election in case of disability.

CHAPTER XXIII.

OF GIFTS IN CONTEMPLATION OF DEATH.

191. (1) A man may dispose, by gift made in contemplation of death, of any movable property which he could dispose of by will.

Property transferable by gift made in contemplation of death.

(2) A gift said to be made in contemplation of death where a man,

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NOTES.

Sec. 187.—No person is bound by the principle of election unless he has the knowledge of his right to elect and of the circumstances which would influence the judgment of a reasonable man in making the election. 101 I.C. 339=1927 C. 494. Presumption is rebuttable. 2 Eq. 834: 12 C. 60. As to difference between Ss. 187 and 188, *see* 41 C.L.J. 258.

Sec. 191.—Acceptance is necessary for a *donatio mortis causa*. 39 C. 120; 6 M.H. C.R. 270. Though title passes only on death, gift becomes operative from date of delivery. (1900) 2 Ch. 812. Under the Hindu Law also, such gifts are valid. 6 M.H.C.R. 270; 12 W.R. 4. As to *marzul-maut* (death illness under Mahomedan Law), *see* 35 C. 271; 31 B. 264; 33 A. 233. Even an inchoate or imperfect delivery is sufficient. (1915) 1 Ch. 195.

who is ill and expects to die shortly of his illness, delivers to another the possession of any movable property to keep as a gift in case the donor shall die of that illness.

(3) Such a gift may be resumed by the giver; and shall not take effect if he recovers from the illness during which it was made; nor if he survives the person to whom it was made.

Illustrations.

(*i*) *A*, being ill, and in expectation of death, delivers to *B*, to be retained by him in case of *A's* death,—

a watch;
a bond granted by *C* to *A*;
a bank-note;
a promissory note of the Central Government endorsed in blank;
a bill of exchange endorsed in blank;
certain mortgage-deeds.

A dies of the illness during which he delivered these articles.

B is entitled to—

the watch;
the debt secured by *C's* bond;
the bank-note;
the promissory note of the Central Government;
the bill of exchange;
the money secured by the mortgage-deeds.

(*ii*) *A*, being ill, and in expectation of death, delivers to *B* the key of a trunk or the key of a warehouse in which goods of bulk belonging to *A* are deposited, with the intention of giving him the control over the contents of the trunk, or over the deposited goods, and desires him to keep them in case of *A's* death. *A* dies of the illness during which he delivered these articles. *B* is entitled to the trunk and its contents or to *A's* goods of bulk in the warehouse.

(*iii*) *A*, being ill, and in expectation of death, puts aside certain articles in separate parcels and marks upon the parcels respectively the names of *B* and *C*. The parcels are not delivered during the life of *A*. *A* dies of the illness during which he set aside the parcels. *B* and *C* are not entitled to the contents of the parcels.

PART VII.

PROTECTION OF PROPERTY OF DECEASED.

Person claiming right by succession to property of deceased may apply for relief against wrongful possession.

192. (1) If any person dies leaving property, movable or immovable, any person claiming a right by succession thereto, or to any portion thereof, may make application to the District Judge of the district where any part of the property is found or situate for relief, either after actual possession has been taken by another person, or when forcible means of seizing possession are apprehended.

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Secs. 192 to 194: APPLICABILITY—JOINT HINDU FAMILY.—Ss. 192 to 194 will not apply to a case where joint Hindu family property passed by survivorship. And although parties may be governed by the "chundavand" rule which is a rule of division of property, mere mention of that rule will not bring the case under Ss. 192 to 194, because the "chundavand" rule will operate only when the property is to be divided and not when it is undivided. I.L.R. (1939) Lah. 196=1938 Lah. 753. Part VII incorporates the provisions of the Succession Property Protection Act (XIX of 1841) otherwise known as the Curator's Act. In some respects the procedure resembles S. 145, Cr.P. Code, but is wider in scope, applying both to movables and immovables. *See* observations of Jwala Prasad, J., in 1922 P. 372. The Senior Subordinate Judge of Delhi has power to entertain an application under Part VII of this Act by virtue of the notification issued by the Lahore High Court on September, 19, 1932. 161 I.C. 219 (2)=38 P.L.R. 398. As to scope and applicability, *see* 11 M.I.A. 487; 26 Bom.L.R. 145. Court can act on affidavits. 12 C.L.J. 8. The word "succession" in this Part VII includes both intestate and testamentary succession. 30 C.W.N. 500=94 I.C. 588=53 C. 637. *See also* 1934 L. 930. Sections not applicable where property passes by survivorship. 23 M.L.J. 537. Enquiry under section—Scope of. 140 I.C. 376=36 C.W.N. 871. Section 192 would apply to *muth* property held by a *mahant*. S. 192 and the following sections comprising Part VII of the Succession Act are intended to provide for speedy relief against wrongful possession in cases of succession, by summary pro-

(2) Any agent, relative or near friend, or the Court of Wards in cases within their cognizance, may, in the event of any minor, or any disqualified or absent person being entitled by succession to such property as aforesaid, make the like application for relief.

Inquiry made by Judge.

193. The District Judge to whom such application is made shall, in the first place, examine the applicant on oath, and may make such further inquiry, if any, as he thinks necessary as to whether there is sufficient ground for believing that the party in possession or taking forcible means for seizing possession has no lawful title, and that the applicant, or the person on whose behalf he applies, is really entitled and is likely to be materially prejudiced if left to the ordinary remedy of a suit, and that the application is made *bona fide*.

Procedure.

194. If the District Judge is satisfied that there is sufficient ground for believing as aforesaid but not otherwise, he shall summon the party complained of, and give notice of vacant or disturbed possession by publication, and, after the expiration of a reasonable time, shall determine summarily the right to possession (subject to a suit as hereinafter provided) and shall deliver possession accordingly:

Provided that the Judge shall have the power to appoint an officer who shall take an inventory of effects, and seal or otherwise secure the same, upon being applied to for the purpose, without delay, whether he shall have concluded the inquiry necessary for summoning the party complained of or not.

Appointment of curator pending determination of proceeding.

195. If it further appears upon such inquiry as aforesaid that danger is to be apprehended of the misappropriation or waste of the property before the summary proceeding can be determined, and that the delay in obtaining security from the party in possession or the insufficiency thereof is likely to expose the party out of possession to considerable risk, provided

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ceedings. There is no reason why Part VII should not apply to property held by a deceased *mahant* of a *muth* or *asthal*. 1941 P.W.N. 755. Where in proceedings under S. 192 property is ordered to be left with a supratdar and on letters of administration being granted the supratdar fails to deliver the property entrusted to him, the Court has inherent jurisdiction to direct the supratdar to restore possession and enforce it in the same proceedings and avoid multiplicity of proceedings. 1942 N.L.J. 325. Although no appeal or review is allowed from an order in summary proceedings by a District Judge under S. 192, yet there is nothing in the section or the Act which takes away the right of revision by High Court. I.L.R. (1939) Lah. 196=1938 Lah. 753.

Sec. 193.—Section is mandatory and its provisions must be strictly fulfilled. 15 I.C. 504; 46 I.C. 589; 23 M.L.J. 537; 28 I.C. 248. The Judge must find there is likelihood of prejudice if left to ordinary remedy and the application must be *bona fide*. 71 I.C. 32. Although the omission to observe strictly all the requirements of S. 193, may constitute a material irregularity in the exercise of jurisdiction, the High Court will not interfere in revision if the petitioner has availed himself of another remedy open to him by instituting a regular suit. 44 P.L.R. 109. As to statements, *see* 11 Bom.L.R. 1308. As to nature and scope of enquiry, *see* 11 C.L.J. 522; 12 C. L.J. 8.

Sec. 194.—An order under S. 194 can be passed only after the conditions embodied in S. 193 have been fulfilled. 1934 L. 930 =154 I.C. 686. The order directing the taking of inventory under the section must conform to requirements of the cognate section. 13 M. 68. Judge cannot throw out application before taking the deposition of petitioner. 1883 A.W.N. 184. The substantive provisions of the law as contained in S. 194 are not in any way controlled by O. 32, R. 6, C.P. Code, relating to the receipt of property by a guardian. An order for delivery of possession of movables to a person under S. 194 without demanding security from him is not illegal. 140 I.C. 376=36 C.W.N. 871.

Sec. 195.—Before passing order, Court to be satisfied by inquiry of the likelihood of prejudice. 12 M. 341; inquiry under S. 3 (present S. 193) is necessary. 24 M. 364. *See also* 16 L.W. 924; 28 I.C. 248. In an application to appoint a curator, disposal of the petition should not be postponed until the disposal of connected proceedings. 102 I.C. 622=1927 N. 253. In

he is the lawful owner, the District Judge may appoint one or more curators whose authority shall continue according to the terms of his or their respective appointments, and in no case beyond the determination of the summary proceeding and the confirmation or delivery of possession in consequence thereof:

Provided that, in the case of land, the Judge may delegate to the Collector, or to any officer subordinate to the Collector, the powers of a curator:

Provided, further, that every appointment of a curator in respect of any property shall be duly published.

Powers conferable on curator.

196. The District Judge may authorize the curator to take possession of the property either generally, or until security is given by the party in possession, or until inventories of the property have been made, or for any other purpose necessary for securing the property from misappropriation or waste by the party in possession:

Provided that it shall be in the discretion of the Judge to allow the party in possession to continue in such possession on giving security or not, and any continuance in possession shall be subject to such orders as the Judge may issue touching inventories, or the securing of deeds or other effects.

Prohibition of exercise of certain powers by curators. Payment of debts, etc., to curator.

197. (1) Where a certificate has been granted under Part X or under the Succession Certificate Act, 1889, or a grant of probate or letters of administration has been made, a curator appointed under this part shall not exercise any authority lawfully belonging to the holder of the certificate or to the executor or administrator.

(2) All persons who have paid debts or rents to a curator authorized by a Court to receive them shall be indemnified, and the curator shall be responsible for the payment thereof to the person who has obtained the certificate, probate or letters of administration, as the case may be.

Curator to give security and may receive remuneration.

198. (1) The District Judge shall take from the curator security for the faithful discharge of his trust, and for rendering satisfactory accounts of the same as hereinafter provided, and may authorise him to receive out of the property such remuneration, in no case exceeding five per centum on the movable property and on the annual profits of the immovable property, as the District Judge thinks reasonable.

(2) All surplus money realized by the curator shall be paid into Court and invested in public securities for the benefit of the persons entitled thereto upon adjudication of the summary proceeding.

(3) Security shall be required from the curator with all reasonable despatch, and, where it is practicable, shall be taken generally to answer all cases for which the person may be afterwards appointed curator; but no delay in the taking of security shall prevent the Judge from immediately investing the curator with the powers of his office.

NOTES.

an application under this section High Court will not interfere with the discretion of District Judge. 102 I.C. 622. Delay is a ground for refusing appointment of curator. (*Ibid.*) Ordinarily it is expected that the District Judge would clearly state that he is satisfied as regards the requisites for appointing a curator, but an omission to do so would not make the order of appointment illegal. 1931 A.L.J. 974=1931 A. 632 (F.B.). The appointment of a curator does not come to an end when he had not handed over possession of the property, although the summary proceedings have terminated. 133 I.C. 414=1931 A. 423.

Sec. 197.—This clause is taken from S. 23 of the Succession Certificate Act (VII of 1889) but which as it limits the power of the curator appropriately falls in this part of the consolidated Bill.—(*Statement of Objects and Reasons.*)

Report from Collector where estate includes revenue paying land.

199. (1) Where the estate of the deceased person consists wholly or in part of land paying revenue to Government, in all matters regarding the propriety of summoning the party in possession, of appointing a curator, or of nominating individuals to that appointment, the District Judge shall demand a report from the Collector, and the Collector shall thereupon furnish the same:

Provided that in cases of urgency the Judge may proceed, in the first instance, without such report.

(2) The Judge shall not be obliged to act in conformity with any such report, but, in case of his acting otherwise than according to such report, he shall immediately forward a statement of his reasons to the High Court, and the High Court, if it is dissatisfied with such reasons, shall direct the Judge to proceed conformably to the report of the Collector.

Institution and defence of suits.

200. The curator shall be subject to all orders of the District Judge regarding the institution or the defence of suits, and all suits may be instituted or defended in the name of the curator on behalf of the estate:

Provided than an express authority shall be requisite in the order of the curator's appointment for the collection of debts or rents; but such express authority shall enable the curator to give a full acquittance for any sums of money received by virtue thereof.

Allowances to apparent owners pending custody by curator.

201. Pending the custody of the property by the curator, the District Judge may make such allowances to parties having a *prima facie* right thereto as upon a summary investigation of the rights and circumstances of the parties interested he considers necessary, and may, at his discretion, take security for the repayment thereof with interest, in the event of the party being found, upon the adjudication of the summary proceeding, not to be entitled thereto.

Accounts to be filed by curator.

202. The curator shall file monthly accounts in abstract, and shall, on the expiry of each period of three months, if his administration lasts so long, and, upon giving up the possession of the property, file a detailed account of his administration to the satisfaction of the District Judge.

Inspection of accounts and right of interested party to keep duplicate.

203. (1) The accounts of the curator shall be open to the inspection of all parties interested; and it shall be competent for any such interested party to appoint a separate person to keep a duplicate account of all receipts and payments by the curator.

(2) If it is found that the accounts of the curator, are in arrear or that they are erroneous or incomplete, or if the curator does not produce them whenever he is ordered to do so by the District Judge, he shall be punishable with fine not exceeding one thousand rupees for every such default.

Bar to appointment of second curator for same property.

204. If the Judge of any district has appointed a curator, in respect of the whole of the property of a deceased person, such appointment shall preclude the Judge of any other district within the same province from appointing any other curator, but the appointment of a curator in respect

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Sec. 199.—The words "High Court" have been substituted here and in other places in this Part, where they occur for the words "Court of Sadar Diwani Adalat."—(*Statement of Objects and Reasons.*)

Sec. 200.—*See* 23 B. 437. Proviso to S. 200 does not relate to the institution or defence of suits, but merely relates to what it specifically states, that is, collection of debts or rents. 132 I.C. 414=1931 A. 423.

of a portion of the property of the deceased shall not preclude the appointment within the same province of another curator in respect of the residue or any portion thereof:

Provided that no Judge shall appoint a curator or entertain a summary proceeding in respect of property which is the subject of a summary proceeding previously instituted under this part before another Judge:

Provided, further, that if two or more curators are appointed by different Judges for several parts of an estate, the High Court may make such order as it thinks fit for the appointment of one curator of the whole property.

Limitation of time for application for curator.

205. An application under this Part to the District Judge must be made within six months of the death of the proprietor whose property is claimed by right in succession.

Bar to enforcement of Part against public settlement or legal directions by deceased.

206. Nothing in this Part shall be deemed to authorize the contravention of any public act of settlement or of any legal directions given by a deceased proprietor of any property for the possession of his property after his decease in the event of minority or otherwise, and, in every such case, as soon as the Judge having jurisdiction over the property of a deceased person is satisfied of the existence of such directions, he shall give effect thereto.

Court of Wards to be made curator in case of minors having property subject to its jurisdiction.

207. Nothing in this Part shall be deemed to authorize any disturbance of the possession of a Court of Wards of any property; and in case a minor, or other disqualified person whose property is subject to the Court of Wards, is the party on whose behalf application is made under this Part, the District Judge, if he determines to summon the party in possession and to appoint a curator, shall invest the Court of Wards with the curatorship of the estate pending the proceeding without taking security as aforesaid; and if the minor or other disqualified person, upon the adjudication of the summary proceeding, appears to be entitled to the property, possession shall be delivered to the Court of Wards.

Saving of right to bring suit.

208. Nothing contained in this Part shall be any impediment to the bringing of a suit either by the party whose application may have been rejected before or after the summoning of the party in possession, or by the party who may have been evicted from the possession under this Part.

Effect of decision of summary procceding.

209. The decision of a District Judge in a summary proceeding under this Part shall have no other effect than that of settling the actual possession; but for this purpose it shall be final, and shall not be subject to any appeal or review.

210. The Provincial Government may appoint public curators for any

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Secs. 205, 206 and 207.—The words "by right in succession" are chosen to describe the point of view of the Judge and not of the interested parties. 11 Bom.L.R. 1308. It is not necessary under S. 205 that the succession should be claimed from the last deceased proprietor. Consequently an application made within 6 months from the death of the testator's widow is within time. 94 I.C. 588=30 C.W.N. 500.

Sec. 208.—Where a person has a remedy by way of suit under S. 208, it is not necessary for the High Court to exercise its power of revision. 1929 N. 317.

Sec. 209.—There is no right of appeal: 44 A. 546; or review: 102 I.C. 622=1927 N. 253 (34 C. 929, Rel. on); but such an order is subject to revision. 1927 N. 253. But *see* 1929 N. 317. A person aggrieved by an order passed in a summary proceeding under Part VII should seek his remedy by a suit and not by an application by revision. 1929 N. 317.

Appointment of public curators.

district or number of districts; and the District Judge having jurisdiction shall nominate such public curators in all cases where the choice of a curator is left discretionary with him under this Part.

PART VIII.

REPRESENTATIVE TITLE TO PROPERTY OF DECEASED ON SUCCESSION.

Character and property of executor or administrator as such.

211. (1) The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such.

(2) When the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, nothing herein contained shall vest in an executor or administrator any property of the deceased person which would otherwise have passed by survivorship to some other person.

NOTES.

Sec. 211.—Reproduces S. 179 of Act X of 1865 subject to the proviso in the case of survivorship for those classes of persons who are provided for by S. 4 of Act V of 1881—(*Statement of Objects and Reasons.*) "All the property of the deceased," meaning of. *See* 7 Pat.L.T. 188=5 P. 80. *See also* 37 Bom.L.R. 300. So far as vesting and representation are concerned, there is no difference between executor and administrator. 10 C.W.N. 422. Executor represents estate even before probate is taken out. 31 B. 418. *See also* 1942 O. W. N. 480. In an application for letters of administration the Court has only to see that the person properly entitled to represent the estate of the deceased according to the Succession Act has come to Court, and is given the grant. It is no part of the duty of the Testamentary Judge to consider the question of title to property or to determine whether the property for which letters of administration are asked for was the property of the deceased or not or was the joint property belonging to the deceased and some one else during his lifetime. A caveat cannot be sustained on the mere ground that the property in respect of which letters of administration are asked for is joint family estate. The eaveator is in no way prejudiced, because he has the right to file a suit to establish his title to the property and, if proper grounds are made out, to obtain the appointment of a receiver or an injunction against the administrator. 42 Bom.L.R. 1063=1941 Bom. 60. A decree obtained against a person, who is not the legal representative, is invalid. 5 R. 742=1928 R. 83. An executor of a deceased lessee is liable to the lessor to the extent of any assets of the testator which may have come into his hands, although he may not ever have entered into possession of the leasehold premises. But an executor who enters into possession is liable not only to the extent of the assets, but also personally liable for the rent. 165 I.C. 121=40 C. W.N. 390. The validity of a decree against an executor is not affected by the subsequent revocation of the probate. It is binding on the estate and on all subsequent representatives of the State. 9 R. 360=133 I.C. 494=1931 R. 283. The position of the executor of a Hindu is now the same as that of an English executor. 29 B. 96. What passes by survivorship cannot vest in executor. 27 B. 140; 54 I.C. 807; 38 M. 369=25 M.L.J. 363. As regards nature of an executor's estate, *see* 2 B. 388; 8 B.L.R. 208; 22 I.A. 114; 30 C. 839; (1908) 1 Ch. 123; 1933 L. 740. The preambles of the Succession Certificate Act (1889) and the Succession Act (1925) both talk of "legal representatives" and "successors," terms which are not strictly applicable to the case of the survivors of a joint Hindu family. Accordingly, when a creditor, who holds a debt, as a member of a joint Hindu family, dies, and the debt passes by survivorship to the remaining members, the survivors cannot be compelled to take out a succession certificate in order to obtain a decree in a suit for recovery of the debt. The claimants may very well say, that they represent the deceased person's estate and on that right they should be allowed to collect the debts with the help of a certificate. 1930 A.L.J. 280=1930 A. 99. Property of joint Hindu family does not vest in executor or administrator. 1930 A 82. As to effect of vesting, *see* 4 C. 455; 21 B. 646; 27 B. 281; 33 M.L.J. 195; 38 M. 500. As to time of vesting, *see* 46 M. 190=43 M.L.J. 486; 24 I.C. 852=37 M. 175. As to effect of adoption by Hindu widow on executor's powers, *see* 1927 M. 782; 1933 O. 555. In a suit by executor plea of payment to a third person is not valid. 55 I.C. 418. Administratrix—Power to agree to pay time-barred debts of the deceased—Liability limited to the assets of the deceased: *see* 112 I.C. 740.

MAHOMEDAN LAW.—Under S. 211 the executor of a Mahomedan will is placed in possession of the entire property belonging to the deceased testator and not merely of a third of the properties over which alone he had a power of disposition; (2) while the properties are vested in the executor, even though it may afterwards be found to have been wrongly vested, all acts of the

212. (1) No right to any part of the property of a person who has died intestate can be established in any Court of Justice, unless letters of administration have first been granted by a Court of competent jurisdiction.

Right to intestate's property.

(2) This section shall not apply in the case of the intestacy of a Hindu, Muhammadan, Buddhist, Sikh, Jaina or Indian Christian.

NOTES.

executor in respect of such property where *bona fide* purchasers are concerned must be regarded as valid. 29 Bom.L.R. 434=1927 B. 387. Position of administrator—Comparison with English Law. 30 Punj. L.R. 503=1929 L. 753.

Secs. 211 and 213.—Executor obtaining probate—If becomes legal representative of testator from time of his death. *See* 196 I.C. 837=1942 Pat. 120.

Secs. 211 and 216: INTESTATE SUCCESSION —GRANT OF ADMINISTRATION—EFFECT OF.— S. 211 merely provides that the estate of a deceased person vests in his executor or administrator *as such*: these words "as such" are important, and show that the vesting is not of the beneficial interest in the property, but only for purposes of representation. In a case of intestate succession it does not admit of any doubt that the beneficial interest vests in the heir-at-law, and there is nothing in the Succession Act which limits the power of disposal of the heir-at-law over such estate, merely because a grant of administration has been made. Nor does the Transfer of Property Act make the interest of the heir-at-law in the estate property which may not be transferred. S. 216 and other provisions of the Succession Act only provide for representation of the deceased's estate for purposes of administration, and are not intended to cut down the rights of the beneficiaries. I.L.R. (1939) 1 Cal. 21=68 C.L.J. 8=43 C.W.N. 4=1938 Cal. 714.

Secs. 211 and 307.—1933 L. 740=146 I.C. 515. An administrator has no authority in law to mortgage the estate under his administration even for what is called legal necessity. It is clear that to validate a mortgage by an administrator it must be proved that the mortgage was executed in the due course of administration; it must also be shown that he was entitled to mortgage the general estate as distinct from the business for which legal necessity is alleged. Further an executor (unless expressly authorised by the will) or an administrator is not entitled to continue the business of the deceased at all except for the purposes of winding it up. If he does continue it for any other purpose than winding up, it is deemed to be continued at his own risk. 43 Bom.L.R. 981.=1942 Bom. 54.

Sec. 212: PART VI.—This is an important portion which deals with title of the property of the deceased. It is only by separating these provisions of the law that a clear view can be obtained of the requirements of the Indian Law as to grants by the Court in the case of the estate of a deceased person. By separating the law in this matter, the consolidation of those provisions of the law relating to probate and grant of administration which are now contained in the Indian Succession Act (IX of 1865), and the Probate and Administration Act (V of 1881), are rendered possible. This reproduces the important S. 190 of Act X of 1865 which requires that no right to any part of the property of a person who has died intestate can be established in any Court without letters of administration. The very important qualification which excludes the operation of this section in the case of the intestacy of Hindus, Muhammadans, Buddhists, Sikhs, Jainas and Indian Christians is based on S. 331 of Act X of 1865 and S. 3 of Act VII of 1901. —(*Statement of Objects and Reasons.*) *See also* 1940 Rang. 178. Karen Christians are governed by the Succession Act (1865). But Act VII of 1901 exempts them from the operation of this section (old S. 190). 88 I.C. 609=1925 R. 233. *See* 13 C.W.N. 1190; 4 A. 192; 19 B. 828; 10 C. 554; 22 C. 788. As regards the effect of sub-S. (1), *see also* 45 I.C. 862=20 Bom.L.R. 175; 36 B. 515=16 I.C. 684=14 Bom.L.R. 644. Where the judgment-debtor applied to have a sale of his property in execution set aside and on his death his son and wife wanted to continue the proceeding, it cannot be said that they wanted to establish their right to any part of the property of the deceased and S. 212 has no application. 11 P. 424=13 Pat.L.T. 457=1932 P. 234. *See also* 1940 Rang.L.R. 485=1940 Rang. 178. Applicability of section—Mortgage suit for sale—Mortgagor dead at the time of suit—Letters of administration not taken out, effect of. 29 Bom.L.R. 900. There is no justification for reading the word "administrators" in a policy of Life Insurance as including those who are relieved of the necessity of taking out letters of administration by reason of the provisions of S. 212 (2). 40 C.W.N. 1247=I.L.R. (1937) 1 Cal. 433. Where the money under a policy of insurance on the life of a Hindu is made payable to the assured or his "executors, administrators, or assigns," and the assured dies intestate, the Insurance Company will be acting within its rights in insisting on the production of a letter of administration or a succession certificate before paying the money. 40 C.W.N. 1247=I.L.R. (1937) 1 Cal. 433.

Secs. 212 and 213.—Suit on mortgage—Mortgagee's representative—Necessity for probate or letters of administration. 33

213. (1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in British India has granted probate of the will under which the right is claimed, or has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed.

Right as executor or legatee when established.

NOTES.

Bom.L.R. 1222=1931 B. 547. The section lays down the English Law. 15 B. 657 (669). S. 213 does not apply to wills made by Hindus of the Punjab and relating to immovable property situate in the Punjab. 35 P.L.R. 441=1934 Lah. 599. Will—Person claiming under, should obtain probate. The practice in Bombay High Court: 33 Bom. L.R. 1372. *See also* 134 I.C. 849=1931 N. 181; 8 O.W.N. 1198=134 I.C. 872. The words "this section" in sub-S. (2) of S. 213 should be read as the preceding subsection". 168 I.C. 55=1937 S. 84=31 S.L.R. 11. S. 213 does not appear in Sch. III, and a reference to S. 213 makes it clear that S. 57 does not bring within the operation of S. 213 of the Act those classes of Hindus not covered by Cls. (*a*) and (*b*) of S. 57. 31 S. L. R. 11=1937 Sind 84. Where, therefore, a will by a Hindu has been made at Hyderabad relating to property at Hyderabad, it is not necessary for the person claiming under the will to obtain probate of the will for suing as a legatee. 1937 S. 84. Unless the estate is completely administered and no action is necessary on the part of the Court, probate should be granted. 1928 C. 277. A legatee can apply to propound a will only when the executor fails to do it. 10 C.W.N. 864. Probate includes letter of administration. 22 W.R. 174; 38 C. 427. Probate is necessary when the executor or legatee asserts his right in any Court or wants to transfer property, 20 C.L.J. 148; 38 M. 988=31 I.C. 431=21 M.L.J. 680; 45 M.L.J. 171. Compliance with the section need only be before decree and not necessarily before institution of suit. 50 C. 49=1923 C. 1; grant of probate before decree and after suit is good and sufficient. 38 C. 327=38 I.A. 7 (P.C.). The section does not bar defendant from putting forward will. 87 I.C. 534=1925 M. 1110. *See also* 30 I.C. 272=18 M.L.T. 129. Defendant can rely on unprobated will provided that he does not do so in order to establish a right under the will. 50 M. 917=53 M.L.J. 709 (F. B.). The legal heir of a testator in possession of his general estate can maintain a suit for the benefit of the estate, so long as any other claimant does not establish his right to the same under the will. 59 C. 911. Unprobated will can be admitted in evidence for purposes other than to establish right as executor or legatee. 21 C.L.J. 96 =20 C.W.N. 112. *See also* 1924 M. 67= =45 M.L.J. 175 (Executor without getting probate can pass possessory title). *See also* 42 C.L.J. 280 at 407. Right of management as co-trustee—Probate of will not necessary to support such claim. 105 I.C. 194=1927 M. 948. As to power of sale, *see* 24 Bom.L.R. 753=47 B. 21=1922 B. 392. Where title to certain property as debutter is founded on the will in which it is so mentioned, it can only be established by probate or letters of administration of the will obtained from a Court of competent jurisdiction. Such title cannot be established by merely relying on recitals in an unprobated will. 1937 C. 252. The principle equally applies to the case where the grant of probate is revoked on application of the person applying for probate, for withdrawal of his application for granting probate. The will remains an unprobated will. 1937 C. 252. Although the necessary letters of administration have not been obtained before the commencement of a suit, the Court may grant a conditional decree and the defect may be remedied by suspending the operation of the decree which would be passed until letters have been obtained. 1930 R. 218. If an executor institutes a suit in anticipation of probate and subsequentiy obtains probate, the requirements of S. 187 (now S. 213) are satisfied for the purposes of a decree to be obtained. 59 C. 911. Will dealing with immovable property in Madras—No probate taken—Pecuniary legacy—Claim to maintainability. 128 I.C. 689=1930 M. 956=59 M.L.J. 596.

Sec. 213.—S. 213 is not limited in its operation only to cases where the plaintiff brings a suit as executor or legatee or even to cases where the defendant claims as executor or legatee, extends to all cases where it becomes necessary in the suit to decide that under the will the right as an executor or legatee accrued. It equally debars a person who is required to establish the legatee's right merely as a *jus tertii* for the purposes of his defence. The prohibition, however, does not extend beyond the question of establishment of the right as executor or legatee. The will can be looked into for all other purposes. 46 C.W.N. 317. A claim or title of a plaintiff to any property by inheritance cannot be defeated by an unprobated will left by the person from whom the plaintiff claims to have inherited. In this country intestacy is the general rule and unless a valid disposition of the property in suit is proved, the plaintiff is entitled to succeed by inheritance. The defendant, therefore, should prove the will in order to defeat the plaintiff's claim; this he cannot do under the terms of S. 213. 46 C.W.N. 317. S. 213 does not permit

(2) This section shall not apply in the case of wills made by Muhammadans, and shall only apply in the case of wills made by any Hindu, Buddhist, Sikh or Jaina where such wills are of the [1][classes] specified in [1][clauses (*a*) and (*b*) of section 57].

Proof of representative title a condition precedent to recovery through the Courts of debts from debtors of deceased persons.

214. (1) No Court shall—

LEG. REF.

[1] In sub-S. (2) of S. 213 of the said Act, for the word "class" the word "classes" and for the words and figures "sub-S. (1) of S. 57" the words, letters and figures "Cls. (*a*) and (*b*) of S. 57" have been substituted by Act XVIII of 1929. Reproduces the corresponding important provision in the case of testate succession contained in S. 187 of Act V of 1865 with the important qualification provided for by S. 331 of Act X of 1865 read with the application of S. 187 of Act X of 1865 read with S. 2 of the Hindu Wills Act (XXI of 1870). (*Statement of Objects and Reasons.*)

NOTES.

a will to be proved unless probate is taken out where the will is made by a Hindu in territories which in 1870 were under Lieutenant-Governor of Bengal. As in 1870 Ajmer-Merwara was in the North-West Provinces and was under the administration of the Lieutenant-Governor of Bengal, a will cannot be proved in the province unless probate is taken out. 1941 A. M.L.J. 105.

Secs. 213 and 214.—The probate of a will is operative only as the authenticated evidence of the executor's title and not as the foundation thereof, for he derives his title from the will itself and the property of the deceased vests in him from the moment the testator dies. The executor before he proves the will can do all acts which are incidental to his office, except those relating to suits in connection with the estate. 35 Bom.L.R. 700=146 I.C. 621.

Sec. 214.—The provisions of Ss. 214 and 381 are not applicable when the property vests in the Crown by reason of escheat. 54 A. 226=136 I.C. 565=1932 A. 220, nor to cases of survivorship in a joint Hindu family. *See* 63 Cal. 15. The effect of the Succession Act is to make it obligatory on the Court to receive certain evidence in the form of a succession certificate before a decree has been granted; but failure to produce the necessary evidence does not make the decree void. And the execution Court has no right to reopen the decree and see if it had been passed after taking the necessary evidence, though the decree may have been passed *ex parte*, and though a succession certificate should have been produced. 16 Pat.L.T. 99. S. 214 in effect requires the Judge to insist upon certain evidence in support of the plaintiff's claim before passing a decree, but the omission to obtain such evidence (succession certificate) cannot affect the jurisdiction of the Court to try the suit. The omission to obtain a succession certificate is a good ground of appeal, but if a decree has been passed and is not appealed from, it remains a valid decree and cannot be regarded as a nullity for want of a succession certificate. I.L.R. (1940) Bom. 514=42 Bom.L.R. 521=1940 Bom. 285. S. 214 (1) (*b*) of the Act applies only if the application for execution against the debtor of the deceased is for obtaining an order for the payment of his debt. If the personal remedy under the mortgage-deed has become barred by time and the mortgagee is simply entitled to a decree for sale of the mortgaged property, it is difficult to hold that the application for the execution of the mortgage decree for realisation of the amount by sale of the mortgaged property is an application to obtain an order for the "payment" of his debt. No succession certificate is, therefore, necessary in such a case. 158 I.C. 885=1935 A. 897. S. 214 applies not only to a suit brought by the legal representative of a creditor after the latter's death, but also to a suit originally instituted by a creditor and continued after his death by his legal representative who is substituted in the deceased creditor's place. I.L.R. (1940) Bom. 514=42 Bom.L.R. 521=1940 Bom. 285. By virtue of S. 211 of the Succession Act a holder of letters of administration is legal representative of the deceased person for all purposes, except in relation to property of the deceased which has passed by survivorship. He is, therefore, competent to maintain a suit for the recovery of a debt due to the deceased's estate. The mere fact that he is not an heir of the deceased does not make the grant invalid, even assuming that the Court before which the claim for the debt is made can investigate the question of the validity of the grant. 43 C.W.N. 1218=1940 Cal. 24. Per *Rankin, C.J.*—"S. 214 of the Succession Act is a restrictive section and must be carefully and accurately construed. I demur strongly to a contention that arrears of rent accruing due in respect of premises comprised in the deceased's estate in respect of a period subsequent to his death cannot be recovered without a succession certificate". 33 C.W.N. 1177=1929 C. 661 (F.B.). No certificate is necessary when decree-holder dies during execution proceedings.

(*a*) pass a decree against a debtor of a deceased person for payment of his debt to a person claiming on succession to be entitled to the effects of the deceased person or to any part thereof, or

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57 I.C. 902=164 I.C. 204=1936 Pesh. 17. Where a decree-holder dies during the pendency of his execution application, and his heir or legal representative applies for substitution of his name for that of the deceased decree-holder, the Court cannot, on that application, proceed with the execution unless a succession certificate is produced, for such an application falls within the words of S. 214 (1) (*b*). I.L.R. (1940) Nag. 198=1938 Nag. 528. But see 1936 Pesh. 17. Where a person succeeding as heirs to a deceased person applies to execute a decree obtained by the deceased, he has to produce a succession certificate as required by S. 214 (*b*) of the Succession Act. If he has not obtained and produced a succession certificate as required by S. 214 (*b*), the Court cannot proceed upon his application and the same has to be dismissed. 22 P.L.T. 945. An application on the part of the successful party in appeal in the appellate Court for restitution from the unsuccessful party, if that is expressed in terms of runees, is one for the recovery of a debt. Hence the heir of an original party cannot obtain such restitution without providing himself with the necessary succession certificate. (1942) 1 M.L.J. 467. Whether section applies in the case of assignment of decree; *see* 7 Pat.L.T. 27=1925 P. 591. The legatee of a share in the residuary estate has no interest in any of the property of testator until the residue has been ascertained, and in seeking to recover the same a succession certificate is not necessary. 37 C.W.N. 769. A decree obtained by a firm consisting of one partner only cannot be executed by the son of the decree-holder without the production of a succession certificate under S. 214 (1) (*b*). 140 I.C. 519=34 Bom.L.R. 1112. Suit for pecuniary legacy unconnected with any such property is maintainable without probate. 128 I.C. 689=59 M.L.J. 596. There is nothing in law to prevent a company from entering into a contract with a proposer for life insurance that the company would pay the money only to him or his assign or to his executor or his administrator. Where a Hindu took a whole life policy, and before his death he adopted a boy and also executed a will in his favour and after him the minor's estate was taken over by the Court of Wards: *Held*, that the Insurance Company was justified in calling for probate or letters of administration or a succession certificate before payment of the amount. 1932 A.L.J. 1015. A policy of insurance especially where the policy is for a definite sum comes within the definition of "debt" and a succession certificate can be granted with respect to it. 1942 Pesh. 42. An executor appointed by a will, for which probate need not be and has not been obtained, is not exempted from the requirement of S. 214 to produce a succession certificate before he can get a decree for a debt due to the testator's estate. 138 I.C. 494=1933 M. 301. A suit should not be dismissed for non-production of probate or succession certificate, as the case may be, but the Court should grant reasonable time to enable the party to produce it. 134 I.C. 849 (1)=1931 N. 181. Amount deposited in Court under S. 31, Land Acquisition Act—Whether amounts to a debt due to deceased—Application for succession certificate regarding same—Maintainability: *see* 33 C.W.N. 1177 (F.B.). In 21 M. 115, the section was held to apply to suits in a Village Munsif's Court. A minor (15 I.C. 408=36 M. 214) and a legatee (31 I. C. 446) can apply. Suit should not be dismissed, but opportunity given to produce certificate. 17 M. 14; 24 A. 138; 71 I.C. 840. Courts must grant time for production of certificate. 29 I.C. 234: 56 I.C. 641=18 A.L.J. 514: 27 I.C. 822: 1923 L. 597; 63 I.C. 807: 175 I.C. 58=1938 Pesh. 1. A suit should not be dismissed for non-production of probate or succession certificate, as the case may be, but the Court should grant reasonable time to enable the party to produce it. 27 N.L.R. 162. The effect of S. 214 is merely that the Court cannot pass a final decree in the absence of a certificate. The mere fact of the institution of the suit without the certificate will not debar the plaintiff from producing it before the decree is passed. The Court can give time to the plaintiff to produce the certificate and defer passing a decree pending the production of the certificate. I. L. R. (1939) Bom. 232=41 Bom.L.R. 249=1939 Bom. 188. Production before decree insufficient. 38 C. 327=38 I.A. 7 (P.C.); 99 I.C. 219; 1926 M.W.N. 627. Certificate not obtained within the time granted by trial Court and hence suit dismissed—Certificate obtained at appellate stage cannot have retrospective effect. 96 I.C. 478. But *see* 19 C.W.N. 794 *infra*. There is little difference between an Appellate Court giving a provisional decree and an Appellate Court suspending its decree until the succession certificate has been obtained. There is no doubt that the latter course is within its powers, but the former course is also within its powers and in accordance with the intention of S. 214. Therefore a provisional decree can be passed by an Appellate Court allowing the production of a succession certificate within a reasonable time. 1937 Rang.L.R. 396=1937 Rang. 470. When the suit is dismissed for its non-production, certificate may be admitted in appeal on payment of costs. 30 I.C. 510=19 C.W.N. 794 n; 28 I.C. 383=19 C.W.N. 794. A

(*b*) proceed, upon an application of a person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt, except on the production, by the person so claiming, of—

(i) a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased, or

(ii) a certificate granted under section 31 or section 32 of the Administrator-General's Act, 1913, and having the debt mentioned therein, or

(iii) a succession certificate granted under Part X and having the debt specified therein, or

(iv) a certificate granted under the Succession Certificate Act, 1889, or

(v) a certificate granted under Bombay Regulation No. VIII of 1827, and, if granted after the first day of May, 1889, having the debt specified therein.

(2) The word "debt" in sub-section (1) includes any debt except rent, revenue or profits payable in respect of land used for agricultural purposes.

NOTES.

conditional decree that no execution can be taken before its production is bad. 24 I.C. 143; 57 C. 650.

MEANING OF DEBT.—"Debt", meaning of. *See* 60 C. 1135=37 C.W.N. 769=1933 C. 841 (Right of legatee of share of residue not debt—No certificate necessary). Debt is what is due from debtor and does not cover a claim against a person who has wrongfully collected a debt. 43 A. 440=60 I.C. 744; means the whole of the debt due from debtor and not a part. 33 A. 327=9 I.C. 127. Arrears of rent due is debt. 41 I.C. 84. But *see* 75 I.C. 237=1924 R. 139. *See also* 172 I.C. 166=1937 Pat. 617. As to what are debts; *see* 36 C. 966; 16 M. 454; 42 C. 10; 11 Q.B.D. 518. *See contra* 31 I.C. 904; where in a mortgage suit a personal decree is obtained, succession certificate will be necessary, 28 B. 630; 29 M. 77; 35 C. 767; 96 I.C. 478; but as regards whether money lent on a mortgage is a debt within the meaning of the section, there is a conflict of authority, the Allahabad High Court holding it is, while the other Courts that it is not. The plaintiff who sues for redemption of a mortgage is trying to pay a debt and not to recover it and therefore it is not necessary for him to produce a succession certificate. 119 I.C. 96=1929 A. 896. S. 214 has reference only to suits to enforce payment of simple debts. Suits to bring mortgaged property to sale are not within its purview, because a mortgage suit is really a suit to realize an interest in immovable property. Therefore the heirs of a deceased Chinese Buddhist, who dies intestate, cannot be compelled to obtain a grant of letters of administration or a succession certificate before asking the Court to grant them a mortgage-decree. 12 R. 690=1934 R. 369. As regards the rights of assignee from certificate holder, *see* 36 A. 21=22 I. C. 349; 36 A. 474; 42 A. 540=57 I.C. 55; 35 M.L.J. 666=42 M. 130=48 I.C. 735; 44 M. 499; 35 A. 74=17 I.C. 486. A certificate can be granted in respect of part of debt: 42 C. 10; 12 I.C. 593; 24 I.C. 593. But *see contra* 43 A. 341=61 I.C. 6. Money payable by an insurance company is not a debt before it is ascertained. 33 I.C. 157; 3 L.W. 466. But *see* 35 M. 162=10 I.C. 263; 50 M. 412=1927 M. 359=52 M.L.J. 171. The parties to a proceeding in respect of claims to a Provident Fund of a deceased Government servant are under no liability to obtain any succession certificate, the amount vests in them upon the death of the depositor. 51 L.W. 575=1940 Mad. 590=(1940) 1 M.L.J. 715. Applicability of section to dividends to creditor out of insolvents' estate: 49 M. 952; 39 M. 192. Paddy rent is not debt. 75 I.C. 237=1924 R. 139. But *see* 41 I.C. 84. Insurance—Person named in policy not obtaining administration or succession certificate—Money in hands of Insurance Company not attachable for his debt. 1935 R. 271. Money deposited by employee with employer as security for good conduct—Suit for recovery by heir of employee after his death—Succession certificate is necessary—"Debt". 20 Pat.L.T. 777=1939 Pat. 688.

JOINT HINDU FAMILY.—The words "on succession" occurring in S. 214 did not occur in the old Act. Their addition in the present section has a restrictive and not a widening effect and the old decisions are still apposite. 63 C. 15. Succession certificate is imperative in a divided family, 13 I.C. 363; not necessary in case of a claim by survivors in a joint family: 24 I.C. 93; 1922 C. 149; 13 I.C. 148; 31 I.C. 904; 28 I.C. 688=28 M.L.J. 372; 47 I.C. 649; 63 C. 15. It does not apply to a Hindu son in a joint family suing for a debt due to his undivided father, as there is no case of succession, but only survivorship. 26 C.W.N. 488; 36 A. 380; 28 M.L.J. 323 (372); 44 M. 499; 62 I.C. 944=40 M.L.J. 481; 63 Cal. 15; 1940 Cal. 24. The word "succession" in S. 214 is inserted to except the case where the claim to be entitled to the effects of a deceased is based on survivorship; it can have nothing to do with the question whether the person claiming and holding one of the catalogue of documents set forth in

215. (1) A grant of probate or letters of administration in respect of an estate shall be deemed to supersede any certificate previously granted under Part X or under the Succession Certificate Act, 1889, or Bombay Regulation No. VIII of 1827, in respect of any debts or securities included in the estate.

Effect on certificate of subsequent probate or letters of administration.

(2) When at the time of the grant of the probate or letters any suit or other proceeding instituted by the holder of any such certificate regarding any such debt or security is pending, the person to whom the grant is made shall, on applying to the Court in which the suit or proceeding is pending, be entitled to take the place of the holder of the certificate in the suit or proceeding:

Provided that, when any certificate is superseded under this section, all payments made to the holder of such certificate in ignorance of such supersession shall be held good against claims under the probate or letters of administration.

216. After any grant of probate or letters of administration, no other than the person to whom the same may have been granted shall have power to sue or prosecute any suit, or otherwise act as representative of the deceased, throughout the province in which the same may have been granted, until such probate or letters of administration has or have been recalled or revoked.

Grantee of probate or administration alone to sue, etc., until same revoked.

NOTES.

the section is an heir of the deceased or not. The status and qualifications of the persons so entitled are not to be found in an interpretation of the word 'succession", but in the other provisions of the Succession Act itself, or the other Acts referred to in S. 214 under which the grants are made. The purpose of S. 214 is merely to make clear that no debt to a deceased person can be recovered through Court except by a holder of one of the documents specified, the only exceptions being either where the claim is made on survivorship, or where it relates to rent, revenue or profits payable in respect of land used for agricultural purposes. 43 C.W.N. 1218=1940 Cal. 24. Mortgage debt—Hindu mortgagee dying intestate—Payment of interest to heir—Succession certificate—Payment, of interest to heir—Succession certificate not obligatory—Mortgagor refusing to pay interest without certificate—Clause accelerating period of redemption—Operates—T. P. Act, S. 59-A. 45 C.W.N. 628. Succession to impartible raj governed by the rule of primogeniture is decided by the rule of survivorship, and a successor to an impartible estate takes it on the death of the previous holder by survivorship and not by succession. The succeeding holder can therefore execute a decree for costs obtained by the deceased holder in a suit for possession without producing a succession certificate. The decree for costs is only a part of the estate. 19 Pat.L.T. 342=1938 Pat. 390. Succession to an impartible estate is dependent and is to be determined upon the footing of survivorship, and no succession certificate need be produced when a decree for costs obtained by a previous holder of an impartible estate is sought to be executed by the succeeding holder, the decree for costs forming part of the impartible estate. 19 Pat.L.T. 424=1938 P.W.N. 449=1938 Pat. 401. *Quaere.*—If it is necessary in the case of an impartible estate holder: 30 M. 454; 38 C. 182; a surviving partner need not produce. 17 M. 108; 20 A. 365; 13 C.W.N. 509.

Sec. 216.—Executor can maintain suit even after death of sole legatee. 2 Pat.L.T. 305. As to the scope and operation, *see* 39 M. 365=28 M.L.J. 285=28 I.C. 22; 27 C. 683; 33 C. 710; 55 I.C. 504. Suit for share of legatee: *see* 15 I.C. 542. The administrator is the only person who by his acts could bind the shares of the other heirs. 34 I.C. 128=9 Bur. L. T. 236. It is doubtful if S. 216 of the Succession Act may be regarded as lending any countenance to the proposition—Once an administrator, always an administrator. The moment administration is completed, the purpose of the grant will have been fulfilled, and the administrator would virtually become *functus officio.* It seems only reasonable to hold that thereupon the grant would stand revoked in effect, if not by a formal order of Court. I.L.R. (1939) 1 Cal. 21=68 C. L.J. 8=43 C.W.N. 4=1938 Cal. 714. A person who has obtained letters of administration can maintain a suit for accounts against one of the heirs of the deceased who had originally obtained possession of the property with a view to collect the rents and profits on behalf of himself and his coheirs and who had subsequently set up an adverse title in himself. 30 P.L.R. 503=1929 L. 753.

Secs. 216 and 332.—A legatee bringing a suit with permission of executor on a pronote to which he was entitled, must produce a certificate to realise the money. 1933 L. 805=146 I.C. 633.

PART IX.

PROBATE, LETTERS OF ADMINISTRATION AND ADMINISTRATION OF ASSETS OF DECEASED.

Application of Part.

217. Save as otherwise provided by this Act or by any other law for the time being in force, all grants of probate and letters of administration with the will annexed and the administration of the assets of the deceased in cases of intestate succession shall be made or carried out, as the case may be, in accordance with the provisions of this Part.

CHAPTER I.

OF GRANT OF PROBATE AND LETTERS OF ADMINISTRATION.

To whom administration may be granted, where deceased is a Hindu, Muhammadan, Buddhist, Sikh, Jaina or exempted person.

218. (1) If the deceased has died intestate and was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, administration of his estate may be granted to any person who, according to the rules for the distribution of the estate, applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate.

(2) When several such persons apply for such administration, it shall be in the discretion of the Court to grant it to any one or more of them.

(3) When no such person applies, it may be granted to a creditor of the deceased.

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Sec. 217.—*See* 36 M. 575=23 M.L.J. 306. Applications for probate or for Letters of Administration with the will annexed are not governed by the law of limitation. Long delay in making such applications is, no doubt, a circumstance which may be properly taken into account in determining the question of the genuineness of the will, but that is about the only purpose for which it is relevant in such a proceeding. I.L.R. (1938) 1 Cal. 75=41 C.W.N. 1204 =1937 Cal. 595. Although in the case of intestate succession, it is the duty of the Court in granting letters of administration to consider whether there is any estate left to administer, the principle does not apply to an application for probate or Letters of Administration with a copy of the will annexed. Even if it were assumed that the principle would apply in the case of testamentary succession, it would have to be shown that the administration of the estate had been in accordance with the provisions of the will. The question of a family arrangement superseding the will would be wholly irrelevant in a proceeding for grant of administration. Further, an application cannot be rejected on the ground that it is a devise to secure from the Probate Court a decision upon a contested question of title which might be of use to the parties in some other litigation, or on the ground that rights had been in the meantime created in the estate in whole or in part in favour of third parties. I.L.R. (1938) 1 Cal. 75= 41 C.W.N. 1204=1937 Cal. 595.

Sec. 218.—It is discretionary with the judge to grant letters of administration. 42 I.C. 737=96 P.L.R. 1917. Although it is within the discretion of the Court to refuse to grant an application for letters of administration, no such discretion is given in regard to an application for probate. (20 A. 189, Foll.) 121 I.C. 173=1930 S. 91. Where in an application for grant of letters of administration, the applicant's own case carries certain elements of suspicion, the Court should in such circumstances insist on a very strict standard of proof and ought not to make a grant unless it is satisfied that the suspicion has been removed. 69 C.L.J. 347=1939 Cal. 595. In Bombay, letters of administration are always granted in respect of undivided property of a coparcener of a joint Hindu family. 163 I. C. 129=38 Bom.L.R. 257=1936 B. 191. Joint grant of letters. 31 Bom.L.R. 999= 1929 B. 397. A member of a joint undivided Hindu family therefore is not as such a person entitled under S. 218 to an administration of the estate of a deceased member of the family. 7 R. 39=115 I.C. 905=1929 R. 99. Where there are rival applicants for letters and the status of one of them is disputed, while the other is entitled to a portion of the estate, the proper procedure is to ignore the question of status and grant letters to the other, who is entitled to a part of the estate. 56 I.C. 764. *See also* 54 I.C. 807=5 Pat.L.J. 107; 9 L. B.R. 174=45 I.C. 935; 163 I.C. 677 (2)= 1936 R. 239. A Mahomedan will can be admitted to probate although it purports to deal with more than the share over which the testator has disposing power. If however more than that share is disposed of by the will, the position of the executor with

219. If the deceased has died intestate and was not a person belonging to any of the classes referred to in section 218, those who are connected with him, either by marriage or by consanguinity, are entitled to obtain letters of administration of his estate and effects in the order and according to the rules hereinafter stated, namely:—

Where deceased is not a Hindu, Muhammadan, Buddhist, Sikh, Jaina, or exempted person.

(*a*) If the deceased has left a widow, administration shall be granted to the widow, unless the Court sees cause to exclude her, either on the ground of some personal disqualification, or because she has no interest in the estate of the deceased.

Illustrations.

(*i*) The widow is a lunatic or has committed adultery or has been barred by her

NOTES.

regard to the excess will be different in kind from what it would be if the testator had power to dispose of the whole. The Court of probate has no jurisdiction to determine any such question or any other question of title. 175 I. C. 987=1938 Nag. 173. Questions whether the testator is Mahomedan or Christian, his relationship and his disposing power over the subject-matter of the will are irrelevant in probate proceedings. If in fact on such a contest, the Court proceeds on the assumption that the testator was either Mahomedan or Christian, or that he was in a particular relationship to one of the parties, such assumption do not in any slight degree raise any presumption thereafter that the assumptions are correct. 175 I.C. 897=1938 Nag. 173. A contest between the full sister and an adopted daughter whose adoption is in dispute in applying for letters of administration would justify the Court in enquiring into the factum and validity of the adoption. 9 L.B.R. 163=45 I.C. 737. If on the status of the respondents in proceedings for letters of administration being proved they would be the only people entitled to inherit the estate of the deceased, the Court is perfectly justified in going into the question of adoption of the respondents. (5 R. 159 and 9 L.B.R. 163, Rel. on.) 1934 R. 205. The Court may not enter into questions of adoption in such proceedings if the decisions would not be final or operate as *res judicata* in a subsequent suit. 44 I.C. 138=10 Bur.L.T. 184. *See also* 33 I.C. 659=U.B.R. (1915) II, 101; 9 L.B.R. 163 =45 I.C. 737; 163 I.C. 677 (2)=1936 R. 239. Application by the deceased's wife's brother's daughter for letters of administration to the estate of the deceased—Who can oppose right of person not legal heir. 1931 C. 470=133 I.C. 212. Christian widow of a reconverted Hindu, and Hindu brothers' preferential right to letters of administration. 44 L.W. 854=167 I.C. 488=1937 M. 172. A limited grant of letters should not be awarded to the attorney of an absent sharer if a sharer entitled to as much as the absent sharer is within the province and willing to act. 26 I.C. 743=8 Bur.L. T. 103; S. 254 allows the grant of letters of administration to persons other than heirs in special cases. 24 I.C. 638=7 L.B.R. 362; 12 I.C. 883=4 Bur.L.T. 129. The section deals exclusively with intestacy. 9 C.L.J. 576. Court cannot join person having no interest. 21 C. 164. *Re*: succession to prostitute's estate, *see* 40 C. 651. Questions of title should not be raised. 50 I.C. 964; 23 I.C. 296=17 C.W.N. 613. Letters to the estate of insolvent deceased debtor may be granted to his creditor: *see* 9 I.C. 916=15 C.W.N. 350. On this section, *see also* 17 C.L.J. 65=16 I.C. 588; 16 I.C. 453=16 C.W.N. 798. Where there are a number of rival claimants for the grant of letters of administration, and the claim of one of the rivals is admitted by the other claimants, and the applicant whose claim is admitted is a fit and proper person to be granted letters, letters of administration, would, in the normal course, be granted to him, and it is then unnecessary to consider the status of the other rival claimants. But where, as between the rival claimants *inter se*, the claim of none of them is admitted by the others, it is incumbent on the Court to determine the status of the applicant before letters are issued to him. The husband of the deceased is *prima facie* entitled to the grant of letters of administration to the estate of his wife. But when his status as husband and his fitness to administer the estate are disputed, the Court is bound to determine both his status and his fitness. 12 R. 629.

Sec. 219.—The term "estate" is more comprehensive than "effects". 6 Moo. P. C. 76; (1892) 1 Ch. 361; (1903) 1 Ch. 483 The widow will be excluded if she has misconducted herself. 1898 P. 126; 1905 P. 140. She is entitled to citation. 14 P.D. 23. Special circumstances have to be pointed out before joint letters of administration are issued. 2 P. 508. Where there are two persons standing in equal degree of kindred to the deceased and equally entitled to administration, the Court has a discretion under S. 219, to grant letters of administration to any one of them. The Court is not bound to grant joint letters of administration to both. 43 Bom.L.R. 770 =1941 Bom. 356.

Illus. (i).—The word "adultery" in this

marriage settlement of all interest in her husband's estates. There is cause for excluding her from the administration.

(*ii*) The widow has married again since the decease of her husband. This is not good cause for her exclusion.

(*b*) If the Judge thinks proper, he may associate any person or persons with the widow in the administration who would be entitled solely to the adminstration if there were no widow.

(*c*) If there is no widow, or if the Court sees cause to exclude the widow, it shall commit the administration to the person or persons who would be beneficially entitled to the estate according to the rules for the distribution of an intestate's estate:

Provided that, when the mother of the deceased is one of the class of persons so entitled, she shall be solely entitled to administration.

(*d*) Those who stand in equal degree of kindred to the deceased are equally entitled to administration.

(*e*) The husband surviving his wife has the same right of administration of her estate as the widow has in respect of the estate of her husband.

(*f*) When there is no person connected with the deceased by marriage or consanguinity who is entitled to letters of administration and willing to act, they may be granted to a creditor.

(*g*) Where the deceased has left property in British India, letters of administration shall be granted according to the foregoing rules, notwithstanding that he had his domicile in a country in which the law relating to testate and intestate succession differs from the law of British India.

Effect of letters of administration.

220. Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death.

Acts not validated by administration.

221. Letters of administration do not render valid any intermediate acts of the administrator tending to the diminution or damage of the intestate's estate.

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illustration has not the same limited meaning given to the offence in the Penal Code. 1928 M. 797.

SEC. 219 (*d*).—Clause (*d*) does not say that those who stand in equal degree of kindred are all entitled to be appointed jointly as administrators. *See* 2 P. 508=4 Pat.L.T. 251=1923 P. 348 (2).

SEC. 219 (*f*). APPLICATION UNDER, BY Creditor-Allegations and proof-Evidence. —Under S. 219 (*f*) it is not enough for a creditor-applicant for letters of administration to merely allege that the deceased left no relatives or persons connected with him by marriage or consanguinity who were entitled to letters of administration and willing to act, but it is also necessary, as in the case of a civil suit to adduce evidence in support of the allegation in the application. Evidence merely to the effect that the deceased had no wife or children and was not married would not be enough. The applicant must produce evidence that enquiries have been made in the place where the deceased's parents originally lived which would show whether the deceased had any relative still living. 150 I.C. 748 (1)=1934 A. 885.

SECS. 220 AND 221.—Property vests only from the time of the grant. 34 M. 395. If the acts done benefit the estate, there is a relating back. 31 M. 187; 10 C.L.J. 537. A mortgage executed by an administrator after an order for grant to him of letters of administration but before their issue is not binding on the estate. But where the money was advanced by the mortgagee for the payment of the Court-fee payable on the letters of administration, he is entitled to get back the money, not only the principal but also interest at a reasonable rate and the cost of realisation. 159 I.C. 342=1936 P. 41. As to scope of section, *see* 50 C. 49=36 C.L.J. 35=1923 C. 1. *See also* 20 C.W.N. 833=1916 (1) M.W.N. 455=18 Bom.L.R. 642=43 I.A. 113 (P.C.); 31 M.L.J. 227.

Probate only to appointed executor.

222. (1) Probate shall be granted only to an executor appointed by the will.

(2) The appointment may be expressed or by necessary implication.

Illustrations.

(*i*) *A* wills that *C* be his executor if *B* will not. *B* is appointed executor by implication.

(*ii*) *A* gives a legacy to *B* and several legacies to other persons, among the rest to his daughter-in-law *C*, and adds "but should the within named *C* be not living, I do constitute and appoint *B* my whole and sole executrix." *C* is appointed executrix by implication.

(*iii*) *A* appoints several persons executors of his will and codicils and his nephew residuary legatee, and in another codicil are these words: "I appoint my nephew my residuary legatee to discharge all lawful demands against my will and codicils signed of different dates." The nephew is appointed an executor by implication.

Persons to whom probate cannot be granted.

223. Probate cannot be granted to any person who is a minor or is of unsound mind, [1][* * * *]

LEG. REF.

1 The words "nor unless the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, to a married woman without the previous consent of her husband" were omitted by Act XVIII of 1927.

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SEC. 222.—Under S. 222 no person who has not been named in the will either expressly or by necessary implication can be granted probate of the will. 152 I.C. 124=1934 A.L.J. 1089=1934 A. 1053. A person who has been directed by the will to perform one or more of the duties involving the functions of an executor, is an executor appointed by necessary implication under s. 222. Such a person though not expressly appointed is an executor according to the tenor, and can apply for probate. But a person who is given the right to manage the property or to appoint a manager is not an executor. Such appointment may not even make him an executor according to the tenor. But the latter person has sufficient interest in the estate of the deceased for him to sustain a caveat. A caveat can be entered by any person having or asserting an interest in the estate of the deceased person; but he must show that he has that interest by inheritance or otherwise. A title adverse to that of the testator or to his estate or any portion thereof is not sufficient to sustain the interest. If in a petition for probate by the executor according to the tenor, the grant of probate will displace any interest to which the caveator is otherwise entitled, the latter has an interest; otherwise, he has not. 39 Bom.L.R. 490=1937 Bom. 397. The distinction between the right to obtain a probate of the will and the right to apply for letters of administration, is, that the former is a personal right confined to the executor and cannot devolve upon the heir of the executor. But s. 233 makes it clear that in certain cases at least the heir of a residuary legatee had the same right to administer after the death of the legatee as the legatee himself. 9 P. 698=128 I.C. 128=1930 P. 618. As to appointment of executor by implication, see 54 M. 266=1931 M. 343=60 M.L.J. 264. A will may be in part admitted to probate. 1 C.L.J. 109; 3 C.W.N. 617; 11 A.C. 469. Probate granted to universal legatee by mistake is *ab initio* invalid. 6 C.W.N. 787. "Member of a firm" appointed executor—Probate, to whom granted. 29 C.W.N. 373=1925 C. 605. Court has no discretion. 20 A. 189; 21 C. 195; 18 B. 749. It is not necessary the testator should himself appoint executor. 5 Bom.L.R. 639. The appointment of executors by necessary implication is not favoured by Court: 6 C. L.J. 453; 22 M. 345. *See also* 25 I.C. 820=7 L.B.R. 266. As to proof of will in proceedings other than probate, *see* 26 I.C. 21 =18 C.W.N. 1136. A non-testamentary instrument cannot be admitted to probate. 11 I.C. 152=15 C.W.N. 1014. Decision of Probate Court is judgment *in rem* as regards question of due execution of the will. 145 P.L.R. 1915=29 I.C. 687; 34 B. 59. Application for probate cannot be converted into one for letters of administration. 41 I. C. 279.

SEC. 222 (2).—As to executor by implication, *see* 105 I.C. 626=1928 C. 164; 102 I. C. 194=1928 L. 770.

SECS. 222 AND 224.—Appointment of executor by implication—Executor appointed by person nominated to so appoint in will. —Where a certain person has been appointed by the will of the testator to nominate an executor and he has done so, it must be taken that the person so appointed executor has been appointed under the will by necessary implication. 1934 A.L.J. 596=1934 A. 804.

SEC. 223.—As to conditional appointment of executor, *see* 56 I.C. 841. As to grant of probate to some of several executors and the remedy of others, *see* 45 I.C. 336. No letters to be issued to Administrator-General except on application by that officer or any of the parties. 34 I.C. 99=8 L.B.R. 404. A minor

[2][nor to any association of individuals unless it is a company which satisfies the conditions prescribed by rules to be made by the [3][Provincial Government] in this behalf.]

Grant of probate to several executors simultaneously or at different times.

224. When several executors are appointed, probate may be granted to them all simultaneously or at different times.

Illustration.

A is an executor of *B's* will by express appointment and *C* an executor of it by implication. Probate may be granted to *A* and *C* at the same time or to *A* first and then to *C* or to *C* first and then to *A*.

Separate probate of codicil discovered after grant of probate.

225. (1) If a codicil is discovered after the grant of probate, a separate probate of that codicil may be granted to the executor, if it in no way repeals the appointment of executors made by the will.

(2) If different executors are appointed by the codicil, the probate of the will shall be revoked, and a new probate granted of the will and the codicil together.

Accrual of representation to surviving executor.

226. When probate has been granted to several executors, and one of them dies, the entire representation of the testator accrues to the surviving executor or executors.

Effect of probate.

227. Probate of a will when granted establishes the will from the death of the testator, and renders valid all intermediate acts of the executor as such.

Administration, with copy annexed, of authenticated copy of will proved abroad.

228. When a will has been proved and deposited in a Court of competent jurisdiction situated beyond the limits of the Province, whether within or beyond the limits of His Majesty's dominions, and a properly authenticated copy of the will is produced, letters of administration may be granted with a copy of such copy annexed.

LEG. REF.

2 Added by Act XVII of 1931.

3 Substituted for "Governor-General in Council" A.O., 1937.

NOTES.

can be appointed executor, but no probate can be granted. 18 I.C. 187; 5 Bur.L.T. 235 =6 L.B.R. 118. As to the effect of such grant, *see* 6 C.W.N. 581; 13 C.W.N. 537; 50 I.C. 324=9 L.B.R. 186.

SEC. 224.—*See* 27 B. 281; 45 I.C. 281; 20 A. 189; 32 C.W.N. 729. Words contained in a will that "the above five trustees unanimously or by a majority" can do certain acts, do not affect the right of one or two executors to apply for a probate, which can be done under the law, even if the other executors do not join in the application. 121 I.C. 173=1930 s. 91.

SEC. 225 (2).—If probate of a will has been granted, probate of a codicil which in effect revokes that will cannot be granted until probate of the will has been revoked. 45 C. W.N. 757.

SEC. 226.—Unlike in England there is no derivative executorship in India. 12 Bom. L.R. 423. But if there is the express authority of executor, *see* 12 C. 375; 26 I.A. 71.

SEC. 227.—As to the effect of probate, *see* 16 I.C. 48=17 C.W.N. 445; 9 C.W.N. 938; 15 C.W.N. 1021; 24 C. 861; 29 C.L.J. 58. The grant of probate is a judgment *in rem*. 16 M. 380; 11 A.C. 641; 34 B. 589; 145 P. L.R. 1915=29 I.C. 687=66 P.W.R. 1915. As to title of executor, *see* 20 C.W.N. 833= 43 I.A. 113=35 I.C. 323 (P.C.); 49 I.C. 532 =29 C.L.J. 58. As to effect of obtaining probate, *see* 16 I.C. 48=17 C.W.N. 445. As to when estate vests in executor, *see* 25 C. 103; 12 B. 621; 27 B. 281; 34 M. 395; 33 C. 316. The view adopted by the Calcutta High Court in respect of wills after 1870 is that, on the executors obtaining probate, they immediately become vested by force of statute with the whole of the estate which belonged to the testator at the time of his death, or in other words, that the vesting takes place on the taking of probate, but relates back to the time of the testator's death and to the estate which then belonged to him. 59 C. 911.

SEC. 228.—The real object of S. 228 is to dispense with the production of the original

Grant of administration where executor has not renounced.

229. When a person appointed an executor has not renounced the executorship, letters of administration shall not be granted to any other person until a citation has been issued, calling upon the executor to accept or renounce his executorship:

Provided that, when one or more of several executors have proved a will, the Court may, on the death of the survivor of those who have proved, grant letters of administration without citing those who have not proved.

Form and effect of renunciation of executorship.

230. The renunciation may be made orally in the presence of the Judge, or by a writing signed by the person renouncing, and when made shall preclude him from ever thereafter applying for probate of the will appointing him executor.

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will owing to its having been deposited in some other Court. The section is merely an enabling section and if the Court considers that there is a question to be decided relating to the validity of the will, such as the power of the testator to make a will, etc. the Court is bound to try that question before enabling the executor to act under the will. I.L.R. (1938) Lah. 562=40 P.L.R. 1064=1938 Lah. 349. The judgment of the Court of domicile is binding on foreign Courts. (1896) P. 148; (1908) P. 108. Copy authenticated by notarial seal is enough. 22 C.W.N. 713; 20 B. 607. As to form of application, *see* 61 I.C .513=6 P.L.J. 411. As to what is authenticated copy of will, *see* 44 I.C. 166=22 C.W.N. 713. A creditor who acquires an interest in the estate of the deceased after the latter's death by purchasing or taking a mortgage of a part of the estate is only entitled to a general citation under s. 283 and not to any special citation as provided for in ss. 228 and 235. 41 C.W.N. 120. The word "proved" used in s. 228 was not necessarily intended to be the equivalent of "admitted to probate," but to mean authoritatively established as being valid according to the law of the place where it was made. I.L.R. (1938) 2 Cal. 507=1939 Cal. 237.

SECS. 228 AND 241.—Where probate of a will of an English testator has been obtained in England and the executor who is unable to come to India to take out letters of administration grants a power-of-attorney to another to enable him to apply as his agent, letters of administration ought to be issued to the applicant under s. 241 without security and not under s. 228. It could not have been the intention of the legislator to compel an executor living abroad to come to this country to take out letters of administration personally when he has obtained probate of the will in his own country. S. 241 has been read as covering an application for letters of administration with a copy of the will annexed when the original cannot be produced because it is held abroad as the result of that Court having granted probate. S. 241 cannot be read as applying only to the case of an executor temporarily absent from the province. To read S. 241 as applying to an application for letters of administration with the original will annexed is to disregard the scheme of the Act. I.L.R. (1940) Mad. 820=1940 Mad. 680=(1940) 1 M.L.J. 264.

SEC. 229.—S. 229 refers to the grant of letters of administration and not the grant of probate. 121 I.C. 173=1930 s. 91. Citation to executor is compulsory. 13 Bom.L.R. 58; 47 C. 838=60 I.C. 974. He is compellable to accept or renounce. 40 B. 666. Mere failure of an executor to appear in Court in pursuance of citation issued to him does not amount to his renunciation of the executorship. If he fails to appear his conduct may amount to renunciation in England, but not in India. 1928 L. 470. But *see also* 18 B. 123. A renunciation made by an executor by a writing in the absence of the Judge need not be addressed to the Court. All that is required by s. 230 is that the writing containing the renunciation must bear the signature of the renouncing executor. A statement expressly declaring refusal to accept the responsibility of executor, which is recorded by the Court and signed by the executor is valid to effect a renunciation. 133 I.C. 286=1931 L. 746.

SS. 229 AND 230.—EFFECT OF—It is implied by ss. 229 and 230 that an executor who disputes the validity of a will appointing him as such, must accept or renounce the executorship under s. 229 before the validity of the will is adjudicated upon on an application for letters of administration by another person. 16 Luck. 454=1941 O.W.N. 653=1941 Oudh 293 (F.B.). Where in an application by one of the executors the chief executors mentioned in the will is not cited, Ss. 229 and 230 are likely to make the application infructuous. When such chief executor is not prepared to renounce his or her duties, the application without such a person is not in order. 1942 A.M.L.J. 27.

SEC. 230.—"Judge" referred to in the

231. If an executor renounces, or fails to accept an executorship within the time limited for the acceptance or refusal thereof, the will may be proved and letters of administration, with a copy of the will annexed, may be granted to the person who would be entitled to administration in case of intestacy.

Procedure where executor renounces or fails to accept within time limited.

Grant of administration to universal or residuary legatees.

232. When—

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section is the Judge of the Probate Court. 1928 L. 470. Administrator whether can renounce administration — Renouncement when can be retracted—English Law—Bombay High Court Original Side Rules, r. 609. 53 B. 172=113 I.C. 402=1929 B.33. Written renunciation need not be made in Court. 1928 M. 797. Intermeddling with the estate by an executor does not amount to acceptance of office. 1928 L. 470. Non-appearance is equivalent to renunciation if process has been served; so also declining to take out probate. 18 B. 123. *See also* 1928 L. 470. The renunciation must be in the presence of Judge. 35 C. 156. As to effect of intermeddling, *see* 51 C. 745. See also 27 C. W. N. 285=1923 C. 444. Renunciaton can be made without issue of citation and it cannot be retracted. 51 C. 745. After grant is made, renunciation cannot be withdrawn. 27 C.W. N. 285. Under s. 230 once the renunciation is validly made, it cannot be retracted and the renouncing executor is thereby prevented from applying for probate of the will appointing him executor. 133 I.C. 286=1931 L. 746. One of two executors challenging genuineness of will does not amount to renunciation of office. 94 I.C. 73=1926 M. 605. On this section, *see also* 32 C. W. N. 729.

SEC. 231.—See 40 B. 666=36 I.C. 373=18 Bom.L.R. 766.

Sec. 232.—The words "so much thereof as may be unadministered" in the final part of s. 232 apply only to cl. (*c*) of the section and not to the preceding cls. (*a*) and (*b*); and "administration" under the section means administration under the authority of a Court. 30 S.L.R. 201=165 I.C. 202=1936 s. 150. An application for grant of letters of administration under s. 232 should be of the whole estate. A petitioner has no right to apply for the administration of a part only or of just so much of the property as suits his purpose. Limited grants should be only those which fall within the special provisions contained in Chapter II of Part IX of the Act. S. 232, like all the relevant sections of the Act, is governed by s. 19-I and other relevant provisions of the Court-Fees Act. The application must be in respect of the whole estate and Court-fee must be paid on all the property. 1936 s. 150. The term "will" refers to the disposition and not to the original document. 18 C. W. N. 527. Universal legatee entitled only to letters of administration: 19 C. 582; 6 C. W. N. 787. Where an universal legacy is left to more than one person, there will be shares in that legacy and their shares in the legacy might well be specified in the will. Where the share of one is confined to the movable property and a life interest in all the immovable property except two houses in which that person has full estate and the interest of the other legatee is the reversionary interest in all the rest which will vest in him after the death of the former, these do not amount to particular legacies or to one particular legacy with a residuary. It is an universal legacy of all the property to two persons and any one of them would be a universal legatee. 1942 O.W.N. 452. Heir of residuary legatee is not entitled to letters. 51 I.C. 76=45 C. 862. Administrator of the executor is not a derivative executor. 27 I.C. 849=17 M.L.T. 61. Where a will is in favour of a religious institution and the property is to be managed by the Mahant in charge, on the death of such Mahant his successor is entitled to claim letters of administration with respect to the will. 146 I. C. 547=1933 L. 265. *See also* 1941 A.M.L. J. 42. On this section, *see also* 39 C.W.N. 390=1935 C. 154.

SECS 232 AND 233.—The probate Court is competent to construe the will and to consider on the construction whether an applicant for letters of administration is entitled to the letters as the residuary legatee or universal legatee. 39 C.W.N. 390=1935 C. 154. An application for letters of administration by the sole legatee under the will was rejected by the District Court. She filed an appeal but immediately afterwards died. Her daughter applied to be substituted in the place of the appellant. *Held*, the heir could be permitted to continue the proceedings. 9 P. 698=128 I.C. 128=1930 P. 618. The right to obtain a probate of the will and the right to apply for letters of administration are distinct. The former is a personal right to the executour and cannot devolve upon his heir. But s. 233 makes it clear that in certain cases at least the heir of a residuary legatee had the same right to administer after the death of the legatee as the legatee himself. 9 P. 698=128 I. C. 128=1930 P. 618.

Ss. 232-234.—The sole beneficiaries under a will might very well be regarded as residuary legatees, though not named as such,

(*a*) the deceased has made a will, but has not appointed an executor, or

(*b*) the deceased has appointed an executor who is legally incapable or refuses to act, or who has died before the testator or before he has proved the will, or

(*c*) the executor dies after having proved the will, but before he has administered all the estate of the deceased,

an universal or a residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered.

Right to administration of representative of deceased residuary legatee.

233. When a residuary legatee who has a beneficial interest survives the testator but dies before the estate has been fully administered, his representative has the same right to administration with the will annexed as such residuary legatee.

Grant of administration where no executor, nor residuary legatee nor representative of such legatee.

234. When there is no executor and no residuary legatee or representative of a residuary legatee, or he declines or is incapable to act, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the will, and letters of administration may be granted to him or them accordingly.

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and a representative of one of them is, therefore, entitled to apply for letters of administration. I.L.R. (1938) 1 Cal. 75=41 C.W.N. 1204=1937 Cal. 595.

SEC. 233.—Probate cannot be granted to a minor under this section where minor is sole executor; proper course is to grant not probate, but letters of administration with copy of will annexed according to s. 244 to his legal guardian until the minor attains majority when probate can be granted to him. 131 I.C. 339=1931 L. 229. *See* 51 I. C. 76=45 C. 862.

SECS. 233 AND 234.—The word "representative" appearing in ss. 233 and 234 should not at least in the case of a Hindu be restricted to a "legal representative". The only heir of a residuary legatee, who died after obtaining probate but without having fully administered the estate of the testator, is entitled to obtain a grant of administration with a copy of the will annexed (without obtaining representation according to the law of residuary legatee.) (45 C. 862, Foll.) 138 I.C. 712=34 Bom.L.R. 606=1932 B. 270.

SEC. 234.—In an application for the grant of letters of administration with a copy of the will annexed, the mere fact that in the pleas taken by an objector there is no categorical denial of the execution of the will by the alleged testator is no sufficient ground for dispensing with the formal proof of the will as required by law; nor is the fact that the document is a registered one. A will is a formal document and before a Court of justice can take notice of it, it must be duly and formally proved. 164 I.C. 778=38 P.L. R. 930=1937 Lah. 69. Where a will is put forward to defraud creditors, one of them can intervene in probate proceedings. 15 C. W.N. 350; 30 I.C. 538. Grant is discretionary. 1 B.L.R. 3 (19). Residuary legatee does not include universal legatee. 94 I.C. 750= 1926 P. 356. As to rights of stranger, *see* 1901 P. 42; (1908) 1 K.B. 151. In the case of a gift to a priest and the residue to the idol, the shebait must apply. 50 C. 233. A minor legatee cannot be granted letters of administration. 5 Bur.L.T. 235=18 I.C. 187. Where there are also others than minor legatees, the mother of the minor cannot be granted letters on behalf of the minor legatee. (*Ibid.*) S. 234 only deals with cases where no executor has been appointed or if an executor has been appointed, he declines to act. The section is not applicable when the executor appointed by the will is a minor. The appropriate procedure in such a case is that prescribed by s. 244. 54 M. 266=1931 M. 343 =60 M.L.J. 254. Under s. 234 if a person declines to accept letters of administration and any other person is admitted to prove the will, the former cannot thereafter turn round and contend that after the will is proved that he would accept letters of administration. 1942 O.W.N. 452. On this section *see also* 17 C.L.J. 66; 40 C. 74; 27 C.W.N. 411=50 C. 233=1925 C. 160.

235. Letters of administration with the will annexed shall not be granted to any legatee other than an universal or a residuary legatee, until a citation has been issued and published in the manner hereinafter mentioned, calling on the next-of-kin to accept or refuse letters of administration.

Citation before grant of administration to legatee other than universal or residuary.

To whom administration may not be granted.

236. Letters of administration cannot be granted to any person who is a minor or is of unsound mind, [1][* * *] [2][nor to any association of individuals unless it is a company which satisfies the conditions prescribed by rules to be made by the [3](Provincial Government) in this behalf.]

CHAPTER II.

OF LIMITED GRANTS.

Grants limited in duration.

237. When a will has been lost or mislaid since the testator's death, or has been destroyed by wrong or accident and not by any act of the testator, and a copy or the draft of the will has been preserved, probate may be granted of such copy or draft, limited until the original or a properly authenticated copy of it is produced.

Probate of copy or draft of lost will.

Probate of contents of lost or destroyed will.

238. When a will has been lost or destroyed and no copy has been made nor the draft preserved, probate may be granted of its contents if they can be established by evidence.

LEG.REF.

1 Omitted by Act XVIII of 1927.

2 Added by Act XVII of 1931.

3 Substituted for "Governor-General in Council" by Government of India (Adaptation of Indian Laws) Order, 1937.

NOTES.

Sec. 235.—*See* 41 C.W.N. 120 noted under s. 228, *supra*, "Next-of-kin" in s. 235 means a person, or set of persons, standing nearest in blood relationship to another person. It means, in fact, the natural heir or heirs. 1942 O.W.N. 452. The issue of notices to the next of kin to show cause why letters of administration should not be granted to an applicant is a sufficient compliance with the requirements of s. 235. Where the next-of-kin deny the validity of the will it amounts to refusal to accept letters of administration. 1942 O.W.N. 452.

SEC. 236.—This section is merely intended to protect the possible right of the next-of-kin to effect the administration of the estate where no executor has been appointed and where the application is made by a mere specific legatee, and it does not relieve an applicant for letters of administration, even though he be a universal or residuary legatee from the obligation to call upon reversioners and to give them an opportunity of protecting their vested interests in the reversion. 1929 P. 385. The Court of Wards is not a person and cannot be appointed administrator. 25 C. 795; 10 C.W.N. 241; 5 Pat.L.J. 347=57 I.C. 583. Minors and lunatics are excluded. 50 I.C. 324; 21 C. 211; 1908 A.W.N. 257; 57 I.C. 383; 86 I.C. 92=6 P.L.T. 584; 44 I.C. 138=10 Bur.L.T. 184. Where there is a conflict of unequal interest between the applicants for letters of administration it should be granted to the applicants having the greatest interest. 46 I.C. 875.

SEC. 237.—The words "since the testator's death" qualify "mislaid" and have no reference to "lost". 18 C.W.N. 527. Probate may be granted of nuncupative will. 24 B. 8; 1 P. and D. 154. A person who asks for probate of the draft of a will must prove that the will has been lost or mislaid since the testator's death. 55 C. 482=1928 C. 307.

SECS. 237 AND 238.—The sections lay down the rule of proof for cases where the original will may have been lost. 26 I.C. 980=20 C. L.J. 148.

SEC. 238.—Presumption of revocation. (1900) A.C. 604; 3 C.W.N. 617; 13 M.L.J. 135. As to proving the contents of a lost will, see *Sugden* v. *Lord St. Leonards*, 1 P. and D. 154; (1903) P. 131; probate can be granted of portion of will, when the rest is lost or destroyed. 1 C.L.J. 109. Probate may be granted if a part of a will is lost but

239. When the will is in the possession of a person residing out of the province in which application for probate is made, who has refused or neglected to deliver it up, but a copy has been transmitted to the executor, and it is necessary for the interests of the estate that probate should be granted without waiting for the arrival of the original, probate may be granted of the copy so transmitted, limited until the will or an authenticated copy of it is produced.

Probate of copy where original exists.

240. Where no will of the deceased is forthcoming, but there is reason to believe that there is a will in existence, letters of administration may be granted, limited until the will or an authenticated copy of it is produced.

Administration until will produced.

Grants for the use and benefit of others having right.

241. When any executor is absent from the province in which application is made, and there is no executor within the province willing to act, letters of administration, with the will annexed, may be granted to the attorney or agent of the absent executor, for the use and benefit of his principal, limited until he shall obtain probate or letters of administration granted to himself.

Administration, with will annexed, to attorney of absent executor.

242. When any person to whom, if present, letters of administration, with the will annexed, might be granted, is absent from the province, letters of administration, with the will annexed, may be granted to his attorney or agent, limited as mentioned in section 241.

Administration, with will annexed, to attorney of absent person who, if present, would be entitled to administer.

243. When a person entitled to administration in case of intestacy is absent from the province and no person equally entitled is willing to act, letters of administration may be granted to the attorney or agent of the absent person, limited as mentioned in section 241.

Administration to attorney of absent person entitled to administer in case of intestacy.

244. When a minor is sole executor or sole residuary legatee, letters of administration, with the will annexed, may be granted to the legal guardian of such minor or to such other person as the Court may think fit until the minor has attained his majority at which period, and not before, probate of the will shall be granted to him.

Administration during minority of sole executor or residuary legatee.

NOTES.

the contents are proved. Where, therefore, all but the first page of a will are found to be genuine, and as to the first page the evidence is sufficient to show the contents, probate may be granted of the will. 69 C. L.J. 394=1939 Cal. 674.

SEC. 240.—A Court can order probate of the draft of a will in case where the will itself is not proved, only if it is proved that the draft was prepared under instructions from the testator. 106 I.C. 531=1928 N. 114.

SEC. 241.—Section does not apply where will has been proved beyond the limits of the Province. 1905 A.W.N. 251. Court cannot grant letters to an attorney who is only authorised for a limited purpose. 1893 A.C. 170; 5 M.I.A. 27; 40 C. 74. The authentication of the notary amounts to an affidavit of identity of the executant. 33 C. 625. Applicability and contsruction of section—Executor obtaining probate in England and living there —Application in India for letters of administration with the copy of will by agent is maintainable — Security — Necessity. *See* (1940) 1 M.L.J. 264=1940 Mad. 860 under S. 218, *supra*.

SEC. 244.—This and the next two sections do not allow a grant to the guardian of a minor who is not executor or residuary legatee. 36 I.C. 266. When a minor executor is appointed then it is open to his legal guardian, or such other person as may seem to the Court fit, to have the letters of admi-

245. When there are two or more minor executors and no executor who has attained majority, or two or more residuary legatees and no residuary legatee who has attained majority, the grant shall be limited until one of them shall have attained his majority.

Administration during minority of several executors or residuary legatees.

246. If a sole executor or a sole universal or residuary legatee, or a person who would be solely entitled to the estate of the intestate according to the rule for the distribution of intestate's estates applicable in the case of the deceased is a minor or lunatic, letters of administration, with or without the will annexed, as the case may be, shall be granted to the person to whom the care of his estate has been committed by competent authority, or if there is no such person, to such other person as the Court may think fit to appoint, for the use and benefit of the minor or lunatic until he attains majority or becomes of sound mind, as the case may be.

Administration for use and benefit of lunatic or minor.

247. Pending any suit touching the validity of the will of a deceased person or for obtaining or revoking any probate or any grant of letters of administration, the Court may appoint an administrator of the estate of such deceas-

Administration *pendente lite*.

NOTES.

nistration issued to him. And before letters of administration can be granted to a legal guardian of a minor, the legal guardian must apply to be appointed the minor's guardian for the purpose of enabling him or her to obtain those letters of administration for the use and benefit of the minor. 54 M. 266=60 M.L.J. 264. Where a minor is the sole person who can claim to be an executor to a will and his legal guardian applies for grant of probate, letters of administration with the will annexed con be granted to him. The application for probate by the minor which is unsustainable in law can be allowed to be amended into one for letters of administration even on appeal. 131 I.C. 339 =1931 L. 229. The Court of Wards is not a legal guardian: 25 C. 795; but a nominee of the Court of Wards may be. 10 C.W.N. 241; 1 Pat.L.T. 304. When the administration determines, *the administratio durente minori aetote* may be called to account. 13 C.W.N. 537. The period of minority applies to all persons whether domiciled or not. 21 C. 911; 34 C. 706.

SECS. 244 TO 246.—None of Ss. 244 to 246 allows a grant of letters to the guardian of a minor when he is neither an executor nor a residuary legatee. If the estate is mainly movable, letters of administration need not be obtained. Proceedings for letters of administration should not be lengthened by entering into questions difficult to determine in such proceedings. 36 I.C. 266=10 Bur.L. T. 107.

SEC. 246.—(*See als*, notes under Ss. 233 and 244, *supra*, S. 217 of the Act of 1865) does not deal with the case of minors. S. 33 of the Act of 1881 does. As it appears to be merely *causus omissus* and the provision is in accordance with actual practice, the language of s. 33 of the Act of 1881 has been adopted.—(*Statement of Objects and Reasons.*) Under the Act a person who is a minor is not entitled to a grant of administration. An application for *administration durente minore aetate* by a person as guardian of the minors until the elder of them attains majority can only be made under s. 246. Under that section before a grant can be made, it must be shown that the minor or minors are solely entitled to the estate of the intestate. 31 Bom.L.R. 999=1929 B. 397. The application is to be made in the name of the guardian. 34 C. 706; 5 A.L.J. 736; 1908 A.W.N. 257. Where no such guardian is appointed, a grant to "such other person" does not extend the period of minority to 21 Years. 24 M.L.J. 450. A natural mother is the proper person to administer estate on behalf of her son who has been adopted and is lunatic in the absence of any one else better qualified to do this. 1933 R. 128. Where the curator of a lunatic applied on behalf of the lunatic for letters of administration in respect of joint family property got by the lunatic as the sole surviving member in the joint Hindu family by survivorship, *held* that the letters of administration can be granted to the applicant. 163 I.C. 129=38 Bom.L.R. 257=1936 B. 191.

PRACTICE AND PROCEDURE.—The correct procedure under S. 246 is that there should be two applications. (i) to be appointed as the proper person to represent the lunatic; and (*ii*) for the grant of letters. But where a person applies only for grant of letters, the defect is only of the procedure and does not affect the merit. 1933 R. 128=144 I.C. 821.

SEC. 247.—The Court must be satisfied of the necessity and will appoint one only if it is just and proper to do so. 13 C.L. J. 34, 47; 2 Bom. L. R. 797. The special ground for such a grant may be that there is no one to hold assets or give discharges. 10 C.L.J. 263; 2 P. and D. 85; the functions

ed person, who shall have all the rights and powers of a general administrator. other than the right of distributing such estate, and every such administrator shall be subject to the immediate control of the Court and shall act under its direction.

Grants for special purposes.

Probate limited to purpose specified in will.

248. If an executor is appointed for any limited purpose specified in the will, the probate shall be limited to that purpose, and if he should appoint an attorney or agent to take administration on his behalf, the letters of administration, with the will annexed, shall be limited accordingly.

Administration, with will annexed, limited to particular purpose.

249. If an executor appointed generally gives an authority to an attorney or agent to prove a will on his behalf, and the authority is limited to a particular purpose, the letters of administration, with the will annexed, shall be limited accordingly.

Administration limited to property in which person has beneficial interest.

250. Where a person dies, leaving property of which he was the sole or surviving trustee, or in which he had no beneficial interest on his own account, and leaves no general representative, or one who is unable or unwilling to act as such, letters of administration, limited to such property, may be granted to the beneficiary, or to some other person on his behalf.

Administration limited to suit.

251. When it is necessary that the representative of a person deceased be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted

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NOTES.

of such an administrator terminate on the date of final decree, (1894) P. 262; 10 C. W.N. 566; 28 C.W.N. 576; thereafter he can be sued as *quasi*-executor *de son tort* if he continues in possession. 3 M. 359; 35 C. 576; 31 C. 628; 15 C.W.N. 832. Position analogous to that of a Receiver. 44 I.C. 657. Where an injunction is necessary, the aggrieved party should ask for the appointment of administrator *pendente lite* to take charge of the entire estate of the deceased. 27 I.C. 617=19 C.W.N. 205; *position of an administrator* pendente lite. 35 Bom.L.R. 700 =1933 B. 342. (Appointment, Rules governing.) On this section, *see also* 1935 R. 280.

SEC. 248.—The same remarks apply as in the case of Ss. 242 and 243.—(*Statement of Objects and Reasons.*)

SEC. 250.—*See* 37 Bom.L.R. 300. The section applies to cases of dedication to idols. 12 C. 375; 9 I.A. 86. For the case of mutt properties, *see* 16 C.W.N. 198. As to the effect of such grant, *see* 5 Bom.L.R. 484; (1894) 1 Ch. 707. The section is not concerned with the subsequent or ultimate devolution of property of which the deceased was a trustee. After the death of the trustee, his heirs may derive benefit from the property of which he was a trustee, but that is no bar to the applicability of the section because so long as the trustee is there, "he has" no beneficial interest on his own account." 33 Bom.L.R. 576=55 B. 795=1931 B. 428. A mohunt is not the owner of mutt property. Hence on his death, his successor cannot apply for letters of administration. Letters should not be granted when the object of the applicant is only to fortify his position in a suit which is likely to be instituted. 16 I.C. 588=17 C.L.J. 65. The word "estate" invariably denotes the property and credit of a deceased person. 16 I.C. 453=16 C.W.N. 798. To administer the estate of the mutt in succession to a deceased mohunt, an application for letters of administration is outside the scope of the Act. 16 C. W. N. 798. Section applies only to property in which person had ownership so as to constitute it a portion of his estate, although he held in trust. 16 C.W.N. 798. Where certain policies effected on the lives of individual partners out of the partnership funds and for the benefit of the partnership have been found to be partnership property and one partner died leaving no general representative of his estate, the remaining partner can apply for a grant limited to the policies of the deceased. 33 Bom.L.R. 576=55 B. 795=1931 B. 428.

SEC. 251.—A grantee *ad idem* is appointed to represent the deceased in the litigation and is a party to the suit. A District Judge cannot act under this section if the deceased had no fixed place of abode in his district. 17 B. 689.

to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other Court between the parties, or any other parties, touching the matters at issue in the said cause or suit, and until a final decree shall be made therein and carried into complete execution.

Administration limited to purpose of becoming party to suit to be brought against administrator.

252. If, at the expiration of twelve months from the date of any probate or letters of administration, the executor or administrator to whom the same has been granted is absent from the province within which the Court which has granted the probate or letters of administration exercises jurisdiction, the Court may grant, to any person whom it may think fit, letters of administration limited to the purpose of becoming and being made a party to a suit to be brought against the executor or administrator, and carrying the decree which may be made therein into effect.

Administration limited to collection and preservation of deceased's property.

253. In any case in which it appears necessary for preserving the property of a deceased person, the Court within whose jurisdiction any of the property is situate may grant to any person, whom such Court may think fit, letters of administration limited to the collection and preservation of the property of the deceased and to the giving of discharges for debts due to his estate, subject to the directions of the Court.

Appointment, as administrator, of person other than one who, in ordinary circumstances, would be entitled.

254. (1) When a person has died intestate, or leaving a will of which there is no executor willing and competent to act or where the executor is, at the time of the death of such person, resident out of the province, and it appears to the Court to be necessary or convenient to appoint some person to administer the estate or any part thereof, other than the person who, in ordinary circumstances, would be entitled to a grant of administration, the Court may, in its discretion, having regard to consanguinity, amount of interest, the safety of the estate and probability that it will be properly administered, appoint such person as it thinks fit to be administrator.

(2) In every such case letters of administration may be limited or not as the Court thinks fit.

NOTES.

SEC. 254.—Very extensive powers conferred. 21 C. 163. *See also* 2 P. 508=1923 P. 348 (2). The perishable nature of the estate is one such circumstance. 57 I.C. 583=5 Pat. L.J. 347. A person entitled to a grant in some other character cannot come under the section of his nominee. 3 P. & D. 207. Court cannot associate stranger with person who is entitled. 12 Bur.L.T. 39; 21 C. 164. The mere bad character of the executor is no ground to exercise powers under the section. 3 P. & D. 48. Competency and willingness of executor is to be determined with reference to the time when the Court is to decide the question. 1928 M. 797. Application must be *bona fide*, 18 M.L.J. 158; 12 C. W. N. 747. Letters of administration cannot be granted to a minor. His legal guardian can get them if the minor is the sole residuary legatee or if the minor is a universal residuary legatee claiming the whole estate. An application for such grant must be made on behalf of the guardian and not on behalf of the minor through the guardian. 57 I.C. 583=5 Pat.L.J. 347. The term "legal guardian" means a guardian appointed under the Guardians and Wards Act. A grant of probate, though discretionary, would be improper if refused to a person having the largest interin the estate, except where the estate is likely to suffer irredeemable loss at his hands. 55 I.C. 583. Ss. 244 to 246 do not authorise the grant of letters to the guardian of minor who is neither an executor nor a residuary legatee. 36 I.C. 266. Consideration governing appointment. 40 C. L. J. 24. Consanguinity of the administrator as well as the safety of the estate should be looked to. 1925 C. 178. Administrator *pendente lite* must pay court-fees on the grant. In such a case rightful party is entitled to grant free of payment on termination of proceedings. 1926 R. 89.

Grants with exception.

Probate or administration, with will annexed, subject to exception.

255. Whenever the nature of the case requires that an exception be made, probate of a will, or letters of administration with the will annexed, shall be granted subject to such exception.

Administration with exception.

256. Whenever the nature of the case requires that an exception be made, letters of administration shall be granted subject to such exception.

Grants of the rest.

Probate or administration of rest.

257. Whenever a grant with exception of probate, or of letters of administration, with or without the will annexed, has been made, the person entitled to probate or administration of the remainder of the deceased's estate may take a grant of probate or letters of administration, as the case may be, of the rest of the deceased's estate.

Grant of effects unadministered.

Grant of effects unadministrated.

258. If an executor to whom probate has been granted has died, leaving a part of the testator's estate unadministered, a new representative may be appointed for the purpose of administering such part of the estate.

NOTES.

SEC. 255.—The probate Court is concerned only with the proof of the due execution of the will. The Judge has no jurisdiction to go into the question of validity of the provisions of the will with reference to Hindu Law under s. 255. S. 255 deals with those cases only wherein certain properties have to be excepted from the letters of administration for special reasons. 163 I.C. 656=38 P. L. R. 803=1936 L. 378. Where words or clauses are introduced into the will by mistake, the Court can omit them. 4 P.D. 68; 1 C. L. J. 109. *See also* 15 C. W. N. 1014. So also offensive matter. 2 P. & D. 251. No exception can be made when the whole estate vests in the executor under s. 211. 6 B. 460; 5 C. 2; 31 C.W.N. 174=103 I. C. 692=1927 C. 654.

SECS. 255 AND 211.—Where the applicants for probate along with others are made the sole executors under a will and the entire estate vests in them under the statutory provisions of s. 211, probate limited to part of the estate could not be granted to the applicants by the exercise of powers under s. 255. 1942 O.W.N. 480.

SECS. 255 TO 257.—The case of a person who obtains property by survivorship is not expressly provided under the Succession Act (1925), and by reason of the express words of s. 211, as the title in executor or administrator ordinarily appointed under the Succession Act would not cover the property which has passed to a third person by survivorship, it is open to the person to whom such property has so passed to come to Court and to apply for letters of administration with exception as mentioned in ss. 255 to 257 of the Act; and just as a beneficiary is entitled to apply for limited grant under s. 250, whether there is a will or not, a person to whom coparcenary property has passed by survivorship has the right to apply for representation under s. 255 or 256, as the case may be. 37 Bom.L.R. 300.

SEC. 256.—In the case of Hindus, exceptions are not allowed save under circumstances of special nature. 6 C. 483; 6 B. 460; 5 C. 2. *See also* 2 P. 508.

SEC .257.—The grant under this section is called "*grant oeterorum.*" Where a limited grant has been made the next-of-kin are entitled to take out administration of the rest. 4 Pat.L.T. 251; 2 P. 508=1923 P. 130. Partial grant of letters of administration—Fresh application should relate in the entire estate—Need for issuing citation to next-of-kin. 31 C.W.N. 874=1927 C. 654.

SEC .258.—This deals with *de bonis non-administratus* and is to prevent the estate being unrepresented. 12 B.L.R. 423. As to when and to whom the grant is to be made, *see* 1923 B. 216; 23 C. 576; 15 B. 396. 6 C. W.N. 581. In 10 C.W.N. 432 a presumption that the estate must have been fully administered was raised from the fact of 20 years elapsing from the death of the testator. The word "may" is not merely permissive, but directory. 12 B.L.R. 423. As to such a person's rights and liabilities, *see* 20 B. 96; 25 C.W.N. 332; 9 C.L.J. 383.

259. In granting letters of administration of an estate not fully administered, the Court shall be guided by the same rules as apply to original grants, and shall grant letters of administration to those persons only to whom original grants might have been made.

Rules as to grants of effects unadministered.

260. When a limited grant has expired by efflux of time, or the happening of the event or contingency on which it was limited, and there is still some part of the deceased's estate unadministered, letters of administration shall be granted to those persons to whom original grants might have been made.

Administration when limited grant expired and still some part of estate unadministered.

CHAPTER III.

ALTERATION AND REVOCATION OF GRANTS.

261. Errors in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the Court, and the grant of probate or letters of administration may be altered and amended accordingly.

What errors may be rectified by Court.

262. If, after the grant of letters of administration with the will annexed, a codicil is discovered, it may be added to the grant on due proof and identification, and the grant may be altered and amended accordingly.

Procedure where codicil discovered after grant of administration with will annexed.

263. The grant of probate or letters of administration may be revoked or annulled for just cause.

Revocation or annulment for just cause.

NOTES.

SEC. 259.—*See* 42 I.C. 68=11 Bur. L. T. 229.

SEC. 260.—*See* 32 I.C. 556.

SEC. 261.—*See* 4 C. 582; 27 C. 5; 20 C.L. J. 148; 1901 Prob. 191; 1902 Prob. 234.

SEC. 263.—Section is exhaustive and not merely illustrative. *See* 94 I.C. 329=7 L. 270; 1926 L. 352. *See also* 1941 Rang.L.R. 376=1941 Rang. 259; 109 I.C. 243; 30 C. W.N. 567. But Court has inherent powers to withdraw order for grant to prevent abuse of process of Court. 7 Lah. 270=94 I. C. 329. The rule followed in England is that if a party is cognisant of the proceedings for probate or letters of administration and chooses to stand by and allow the proceedings to be concluded in his absence, he will not be allowed to come in afterwards and have the grant revoked or the proceedings reopened. The law in India is substantially the same on this point as in England when the situation is not complicated by the existence of an infant or of a *pardanashin* beneficiary. I.L.R. (1941) 2 Cal. 1=45 C.W.N. 739=1942 Cal. 283. Where letters of administration have been wrongly granted the proper course is to apply to the Court which granted the letters to revoke the same. The grant of letters so long as it subsists is conclusive evidence as regards the proper execution of the will and the legal character conferred on the administrator. 116 I.C. 452=1929 L. 483. Grant continues till revocation. 34 C.L.J. 457=66 I.C. 822. Court not *functus officio* after making the grant. 37 A. 338. Where all proceedings are legal, probate not revokable. 1895 P. 87; 12 C.L.J. 91; 14 C.W. N. 1068. The explanation of "just cause" is exhaustive. 40 C. 50; 37 C. 387; 7 L. 270. An application for revocation of a grant of letters of administration or probate by a party, who contested the order at the time at which it was made is on an entirely different footing from such an application made by a party, who was a stranger to the proceedings, which led to the making of the order and had no notice of them. In the former case, the matter is *prima facie res judicata* as between the parties. It is an elementary principle that where a party had an opportunity to put forward a particular just cause and had not chosen to put it forward, he cannot be heard to agitate the same cause later. The real question is whether the party applying for revocation had an opportunity, before the grant was made, of urging the very grounds he now puts forward or whether he urges any new grounds that have arisen since he had that opportunity, which he refused to utilize. The phrase "new ground" does not mean additional evidence on old grounds. It is meant to cover contingencies quite different in character

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from the mere discovery of evidence, which if it had been available before, might have induced the Court to take a different view. Where there is an allegation of fraud as a ground for vacating the rder, the fraud; proved must be extraneous to eveything which has been already adjudicated upon by the Court. Subject to the rule relating to new grounds, the only other way in which the grant can be attacked by a party who contested the order at the time it was made and who relies on fresh evidence merely, is by bringing his application within the comparatively narrow limits of an application for review. 1939 Rang.L.R. 601=1939 Rang. 215. *See also* 1939 Cal. 718=43 C.W.N. 1193. A defendant in a mortgage suit died pending that suit. Although the plaintiff in that suit asked the executors of the will of the deceased to get themselves substituted in the suit, they took no steps. Thereafter an application was made in that suit for the appointment of an administrator *ad litem* and citations were issued on all the executors. They did not appear and an administrator *ad litem,* was appointed. The executors, then applied for a revocation of this grant of Letters of Administration and also for a grant of probate to them. Held, that no just cause was shown to exist within the meaning of s. 263 for the revocation of the grant of Letters of Administration but that the executors could be given a supplementary grant of probate keeping the grant to the Administrator ad litem in tact in accordance with the English practice. 43 C.W.N. 1193=1939 Cal. 718. *See also* 45 C.W.N. 739=(1942) C. 283. As to *locus standi* to apply, *see* 6 C. 460; 17 C.W.N. 1141; 17 M. 373; 29 I.C. 682; 30 C. W.N. 547. *Re* the right of the Crown, on period of limitation for applying; 6 C. 707; 23 C.L.J. 82; 46 M.L.J. 383; but acquiescence and delay will stand in the way of the Court allowing matters to be opened. 42 C. 480; 24 C.W.N. 354; 51 I.C. 593; 19 C.W.N. 882; 21 C.L.J. 555; 1900 P. 56. Though there is no fixed time during which an application for revocation of a probate might be made, even if there may be no acquiescence, a person may be debarred by long delay in making such application. 35 C. W. N. 387. Mere delay in applying for revocation of probate is immaterial if it does not lead to an inference of waiver. 35 C.W.N. 568=1931 C. 717. Under s. 263 the power to revoke a grant is discretionary and "just cause" as defined in the section is discretionary. 35 Bom.L.R. 708= 1933 B. 370; 78 C.L.J. 383=1942 Cal. 236; 36 Bom.L.R. 938=1933 B. 469. The validity of a decree against an executor is not affected by the subsequent revocation of the probate. It is binding on the estate and on all subsequent representatives of the State. 9 R. 360=133 I.C. 494 (2)=1931 R. 283. Power to revoke is discretionary. 88 I.C. 614=1925 r. 236. A mis-statement as to the date of the death of the testator is no ground for revocation. (*Ibid.*) When a just cause is made out, it is not left to the discretion of the Court to revoke or not to revoke the letters of administration. 1929 P. 385. Concealment of material fact would be a good ground. 6 L. 180=1925 L. 428. Where minor partie s are effectively represented by mother as guardian, mere omission to bring the guardian *ad litem* on record is not a "just cause" for revocation of probate. 31 C.W.N. 160=100 I.C. 177=1927 C. 207; 29 Bom.L.R. 434=102 I.C. 129=1927 B. 387. Revocation of grant—Grounds—Minor not represented. 35 C.W.N. 387=1931 C. 713. As to whether the powers of review can be used, *see* 5 B. 638; 38 A. 383. No appeal lies against an order denying the locus standi to a creditor. 16 C.W.N. 1099. Objection as to *locus standi* to be taken at an early stage. 6 L. 180=88 I.C. 896. Purchaser, when could apply to revoke probate; 31 I.C. 702=19 C.W.N. 1108. The person entitled to intervene in a proceeding for revocation of probate need not prove that he had an interest in the estate at the time of the testator's death. An interest acquired subsequently by purchase or mortgage of a part of the estate of the deceased is sufficient. 41 C.W.N. 120. An application for revocation of probate a will made by a mahant of a mutt is not maintainable at the instance of a person claiming to be his spiritual descendant and alleging that the properties disposed of by the deceased mohant belonged to him in his official and not personal capacity and as such could not be disposed of by him. 10 P. 817=1932 P. 95. Non-citation is not by itself sufficient ground for revoking probate. 30 I.C. 12=21 C.L.J. 555. Though s. 276 (unlike s. 278) does not mention that "the family or other relatives of the deceased" should be stated in a petition for probate, s. 263 (Ill. (*ii*) shows that a grant made without citing parties who ought to have been cited, *e.g.,* the daughters of the testator, is liable to be revoked. 36 C. W. N. 1010. Per *Mitter, J.*—Illustration (*ii*) to S. 263 is not confined to compulsory citations which have to be issued under s. 229, 235 or 285 . It extends at least to special citations that may be issued by the Court in its discretion under s. 283 (1) (*c*). Absence or non-service of special citation on a person who ought to be cited is itself a good ground for revocation at his instance in the absence of other circumstances on which the Court may refuse revocation on account of the discretion vested in it by s. 263. It would be a defect, but the defect would not be of substance, if the non-cited party had knowledge of the probate proceedings. If those special circumstances do not exist, the grant must be revoked. It is not possible or desirable to enumerate exhaustively what those special circumstances may be. Delay in applying for revocation which amounts to waiver or acquiescence, would be one. In the cases where such special circumstances exist, and especially if the will had been proved in solemn form before, revocation would not be made. There is no difference in principle between a special and a general citation issued under s. 283 (3). The object of both is to

Explanation.—Just cause shall be deemed to exist where—

(*a*) the proceedings to obtain the grant were defective in substance, or

(*b*) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case, or

(*c*) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently, or

(*d*) the grant has become useless and inoperative through circumstances, or

(*e*) the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with

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give notice to persons interested in the estate of the deceased of the proceedings for grant. When the discretion is exercised and a general citation is issued, it is necessary that it should be published as required by s. 283 (3). But the omission to publish the general citation, though a defect, is not a substantial one when there is nothing to show that any one is prejudicially affected thereby. I.L.R. (1940) 1 Cal. 33=71 C. L. J. 25 =44 C.W.N. 149=1940 Cal. 296. The onus, under the circumstances, is upon the persons propounding the will. It is for them to prove that the will is a genuine one and not for the other party to prove that the will is a forgery. 14 R. 146=161 I.C. 629=1936 R. 105. An applicat for revocation of a grant of probate takes upon himself the burden of displacing the evidence which there is regarding the execution and attestation of the will could have been executed. In order to give testimony of all the attesting witnesses of a will as to its execution and attestation, the Court should not, instead of applying its mind to a dispassionate consideration of that evidence, start off making all kinds of speculations as to the "circumstances of suspicion" which make it improbable that the will could have been executed. In order to repeal the effect of such positive testimony regarding execution, an improbability must be clear and cogent. It must approach very nearly to, if it does not altogether constitute an impossibility. If a person who takes it upon himself to dispute the genuineness of a will rests his case on suspicion, the suspicion must be a suspicion inherent in the transaction itself which is challenged, and cannot be a suspicion arising out of a mere conflict of testimony. This is the correct method of approach for Courts called upon to deal with testamentary cases. It can never be a safe or sound rule to start speculating as to what might have been the motive which impelled the testator to make an alleged will, provided there is evidence and the Court has every right to call for such evidence and must, in fact, call for it—that the will was in point of fact executed as required by law. The mere fact that a will is not registered is not such a circumstance as must *ipso facto* tell against the genuineness of the will. Where all the attesting witnesses have been examined, the mere non-examination of the writer by itself is not such a circumstance that one must hold from this alone that the story told by the attesting witnesses is unworthy of credit. I. L. R. (1938) 2 Cal. 173=1939 Cal. 87. *See also* 1936 Rang. 105. A person having a reversionary interest although such interest be inalienable and dependent upon remote contingencies, is nevertheless substantially interested in the protection or devolution of the estate and as such he is entitled to appear and be heard in probate proceeding. Want of necessary citation make proceedings defective and the letters of administration can be revoked. 1929 P. 385. Notice served not sufficient to give person served opportunity to contest—Proceedings are defective. 114 I.C. 794. Where on the death of a Hindu testator, a legatee under the will applied for letters of administration, citation must be issued to the person who would have succeeded to the estate of the deceased if he had died intestate. 125 I.C. 774=1930 P. 488; 102 I.C. 129=1927 B. 387; 41 C. 819. No civil suit lies to revoke a probate on any ground, for, it is the intention of the legislature that the exclusive remedy in every case should be an application under S. 263 of this Act. I.L.R. (1940) 1 Cal. 14=1940 Cal. 236. *See also* 1933 Bom. 370.

VALUATION—APPEAL.—The value for purpurposes of jurisdiction of an application to revoke the probate under S. 263 of the Succession Act extends to the whole property covered by the probate and is not limited to the interest of the applicant therein. 34 Bom.L.R. 1677=1933 B. 77=57 B. 143.

SEC. 263, EXPL. CL. (*a*).—Where no schedule in the prescribed form is attached to an application for grant of probate or letters of administration, the proceedings to obtain the grant are "defective in substance" within the meaning cl. (a) of the Explanation. 30 S.L.R. 201=165 I.C. 202=1936 S. 150. The Court on a consideration of all the facts will have to consider whether the proceedings are substantially defective. 78 C.L.J. 383=1942 Cal. 236.

SEC. 263, CL. (d).—"Useless and inoperative" meaning of. 32 C.W.N. 993=1928 Cal. 695.

the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect.

Illustrations.

(*i*) The Court by which the grant was made had no jurisdiction.

(*ii*) The grant was made without citing parties who ought to have been cited.

(*iii*) The will of which probate was obtained was forged or revoked.

(*iv*) *A* obtained letters of administration to the estate of *B*, as his widow, but it has since transpired that she was never married to him.

(*v*) *A* has taken administration to the estate of *B* as if he had died intestate, but a will has since been discovered.

(*vi*) Since probate was granted, a later will has been discovered.

(*vii*) Since probate was granted, a codicil has been discovered which revokes or adds to the appointment of executors under the will,

(*viii*) The person to whom probate was, or letters of administration were, granted has subsequently become of unsound mind.

CHAPTER IV.

OF THE PRACTICE IN GRANTING AND REVOKING PROBATES AND LETTERS OF ADMINISTRATION.

Jurisdiction of District Judge in granting and revoking probates, etc.

264. (1) The District Judge shall have jurisdiction in granting and revoking probates and letters of administration in all cases within his dstrict.

(2) Except in cases to which section 57 applies, no Court in any local area, beyond the limits of the towns of Calcutta, Madras and Bombay, [1][* * * * * * * *] shall, where the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, receive applications for probate or letters of administration until the Provincial Government has, by a notification in the Official Gazette, authorised it so to do.

LEG. REF.

1 Words "and the province of Burma" omitted by A.O., 1937.

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SEC. 263, ILLS. (II).—*See* 1 P. 221=1928 P. C. 2=54 M.L.J. 281 (P.C.).

SS. 263 AND 268.—An application for revocation of a grant of letters of administration made in favour of opposite party, by a party who contested the order when it was made, which is in substance an application for review and falls under O. 47, r. 1, C. P. Code, when it is not accompanied by a copy of the order or a decree appealed from, is defective and is not maintainable. By S. 268 Succession Act, the proceedings relating to the matter are to be regulated by the Code of Civil Procedure. 1939 Rang. L. R. 601= 1939 Rang. 215.

SS. 263 AND 283.—Revocation of probate —Grounds—Absence of citation. The absence of citations in a case in which they are ordered but did not issue does not by itself constitute just cause for revocation of probate, though it may do so, if the party, claiming that citation should have been ordered and served upon him, can show a *prima facie* case for revocation which the executor is unable to rebut. In cases where citations have been ordered but not served, the burden of proof is then shifted to the executor to show that there was no defect of substance in the proceedings in which probate was granted. In cases where citations have not been ordered, the party impugning the will on the ground of his non-citation must first show that he ought to have been cited, before the burden of proof is shifted to the executor to show that the defect in the proceedings was not one of such substance and that no just cause for revocation exists. 1938 Rang.L.R. 360=1938 Rang. 261 (F.B.). *See also* 1940 Cal. 296=44 C.W.N. 149; 17 B. 686. In a probate Court the genuineness of a will proved in a certificate Court can be questioned. 16 M. 380. *See* 3 P. 609 as to powers of additional District Judge citation to guardian of infants, failure to issue, effect of—Right of minor to set aside probate on attaining majority. *See* 29 Bom.L.R. 434= 1927 B. 387.

SS. 264 AND 279.—An application for revocation of probate should be made to the Court from which the grant has already been made. Although some other Court has equal jurisdiction, it will not exercise it, but will refer the applicant to the Court by which the original grant was made in order to observe a comity be-

Power to appoint Delegate of District Judge to deal with non-contentious cases.

265. (1) The High Court may appoint such judicial officers within any district as it thinks fit to act for the District Judge as Delegates to grant probate and letters of administration in non-contentious cases, within such local limits as it may prescribe:

Provided that, in the case of High Courts not established by Royal Charter, such appointment shall not be without the previous sanction of the Provincial Government.

(2) Persons so appointed shall be called "District Delegates".

District Judge's powers as to grant of probate and administration.

266. The District Judge shall have the like powers and authority in relation to the granting of probate and letters of administration, and all matters connected therewith, as are by law vested in him, in relation to any civil suit or proceeding pending in his Court.

District Judge may order person to produce testamentary papers.

267. (1) The District Judge may order any person to produce and bring into Court any paper or writing, being or purporting to be testamentary which may be shown to be in the possession or under the control of such person.

(2) If it is not shown that any such paper or writing is in the possession or under the control of such person, but there is reason to believe that he has the knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined respecting the same.

(3) Such person shall be bound to answer truly such questions as may be put to him by the Court, and, if so ordered, to produce and bring in such paper or writing, and shall be subject to the like punishment under the Indian Penal Code, in case of default in not attending, or in not answering such questions or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit and had made such default.

(4) The costs of the proceeding shall be in the discretion of the Judge.

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tween jurisdictions the disregard of which would lead to most unfortunate friction. 45 C.W.N. 757. *See also* 45 C. W. N. 739=1942 Cal. 283.

SEC. 265.—District Judge can transfer case to District Delegate for inquiry and report. 14 C.W.N. 1068. An additional District Judge cannot grant probate, unless he is appointed a District Delegate by the High Court or exercises powers as a District Judge. 1923 N. 41.

SECS. 265 AND 286.—A transfer of proceedings under S. 31 of the Oudh Courts Act by a District Judge to a Suboridnate Judge is made to the Subordinate Judge as such and not to the District Delegate. There is nothing in the Succession Act which renders a Subordinate Judge as such, incompetent to dispose of contentious proceedings. The fact that the Subordinate Judge also happens to be a District Delegate will not deprive him of jurisdiction, if the proceeding is transferred to him by order of the District Judge, although as a District Delegate he cannot dispose of a contentious proceedings. 10 Luck. 316=11 O.W.N. 1481=1935 O. 38. Under r. 239 of the Oudh Civil Rules; 1935 O. 415 Subordinate Judges in Oudh have been appointed District Delegates to grant probates and letters of administration in non-contentious case only. When the respondents appear and file objections against the application, the proceedings cease to be non-contentious. Therefore a Subordinate Judge, who proceeds with the case after it becomes contentious, exceeds his jurisdiction. 151 I.C. 843=11 O.W.N. 1301.

SEC. 266.—Court of probate can appoint Receiver. 17 B. 388; 19 B. 83; executor may be allowed to petition in *forma pauperis*, 18 B. 237. The District Judge can transfer to a Subordinate Judge. 25 C. 340.

SEC. 267.—Probote Court cannot enquire into title of testator in property covered by the will. 35 I.C. 416. Petitioner for letters of administration with the will annexed need not produce it from his own custody and with the petition. 1931 L. 130=132 I.C. 527.

Proceedings of District Judge's Court in relation to probate and administration.

268. The proceedings of the Court of the District Judge in relation to the granting of probate and letters of administration shall, save as hereinafter otherwise provided, be regulated, so far as the circumstances of the case permit, by the Code of Civil Procedure, 1908.

When and how District Judge to interfere for protection of property.

269. (1) Until probate is granted of the will of a deceased person, or an administrator of his estate is constituted, the District Judge, within whose jurisdiction any part of the property of the deceased person is situate, is authorized and required to interfere for the protection of such property at the instance of any person claiming to be interested therein, and in all other cases where the Judge considers that the property incurs any risk of loss or damage; and for that purpose, if he thinks fit, to appoint an officer, to take and keep possession of the property.

(2) This section shall not apply when the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, nor shall it apply to any part of the property of an Indian Christian who has died intestate.

When probate or administration may be granted by District Judge.

270. Probate of the will or letters of administration to the estate of a deceased person may be granted by a District Judge under the seal of this Court, if it appears by a petition, verified as hereinafter provided, of the person applying for the same that the testator or intestate, as the case may be, at the time of his decease had a fixed place of abode, or any property, movable or immovable, within the jurisdiction of the Judge.

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SEC. 268.—Various provisions of the Code have been held to apply, *e.g.*, O. 1, rr. 8 and 10 (17 C. 48); O. 9, r. 13 (8 C. 880); O. 32 (27 C. 350); O. 39 (19 C.W.N. 205); but O. 16, r. 20 does not apply (9 B. 241) or O. 26, r. 1 (2 Pat.L.J. 535); O. 47, r. 1 (1939 Rang. 215). The only judgment that can be pleaded under S. 11, C.P. Code, in a probate Court is that of a probate Court. 16 M. 380. Limitation Act does not apply. 8 M. 207; 9 M. L.J. 382; 19 C. 48; 17 M. 379; 7 B. 213. Reference to arbitration not allowed. 21 B. 335. A probate Court has the same power in ordering an inventory as the ordinary Civil Court has under O. 39, r. 7, C.P. Code. 49 C. L.J. 484=1929 C. 498.

SEC. 269.—After granting letters of administration, District Judge cannot give any direction with reference to the property. 44 B. 682=22 Bom.L.R. 396. Letters of administration not granted under S. 268. Independent power for protection of property. 1933 N. 173=16 N.L.J. 86=144 I.C. 322. Application for letters of administration dismissed—District Judge has still powers to pass orders for protection of property—Jurisdiction as to property outside the province.

SEC. 270.—Jurisdiction is conferred by fixed place of abode or property within the district. 8 C. 570; 17 B. 689. It cannot be taken away because the properties dealt with are within the jurisdiction of another Court by reason of a bifurcation of district. 31 I. C. 499. See also 1929 L. 72. Court cannot refuse probate merely on the ground that part of the property is situate outside jurisdiction. 110 I.C. 391. As to what amounts to place of abode, *see* 2 Bom.L.R. 605; 25 B. 176; 71 I.C. 816. Where the deceased was admittedly living at a certain place for about ten months prior to his death, *held*, that the place can be described as a fixed place of abode within the meaning of S. 270 so as to give jurisdiction to Court of that place. 116 I.C. 305=1929 L. 282. Any property will suffice. 4 C.L.R. 498; 5 C.W.N. 377; 20 B. 607; 37 C. 244. Debts payable to the estate of the deceased within the jurisdiction of a Court are assets situated within the jurisdiction of that Court, and an application for letters of administration in respect of the estate of the deceased may be made to and entertained by that Court. 39 S.L.R. 201=1936 S. 150. Security may be demanded. 31 I.C. 499. Bank deposit constitutes movable property within the meaning of S. 270; 116 I.C. 305=1929 L. 282.

SECS. 270 AND 271.—A District Judge has jurisdiction to grant letters of administration under Ss. 270 and 271 of the Succession Act if there is any property within the area of his judgeship. Where only a small portion of the property exists in the area of his judgship and the bulk of the property is in the area of the judgeship of another District Judge the former in a case where the deceased had no fixed abode within his jurisdiction has technically power to entertain an appli-

271. When the application is made to the Judge of a district in which the deceased had no fixed abode at the time of his death, it shall be in the discretion of the Judge to refuse the application, if in his judgment, it could be disposed of more justly or conveniently in another district, or, where the application is for letters of administration, to grant them absolutely, or limited to the property within his own jurisdiction.

Disposal of application made to Judge of district in which deceased had no fixed abode.

272. Probate and letters of administration may, upon application for that purpose to any District Delegate, be granted by him in any case in which there is no contention, if it appears by petition, verified as hereinafter provided, that the testator or intestate, as the case may be, at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

Probate and letters of administration may be granted by Delegate.

273. Probate or letters of administration shall have effect over all the propery and estate, movable or immovable, of the deceased, throughout the province in which the same is or are granted, and shall be conclusive, as to the representative title, against all debtors of the deceased, and all persons holding property which belongs to him, and shall afford full indemnity to all debtors, paying their debts and all persons delivering up such property to the person to whom such probate or letters of administration have been granted:

Conclusiveness of probate or letters of administration.

Provided that probates and letters of administration granted—

(*a*) by the High Court, or

(*b*) by a District Judge, where the deceased at the time of his death had a fixed place of abode situate within the jurisdiction of such Judge, and such Judge certifies that the value of the property and estate affected beyond the limits of the province does not exceed ten thousand rupees,

shall, unless otherwise directed by the grant, have like effect throughout the whole of British India.

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cation for the grant of letters of administration to the estate of the deceased; and the Judge need not necessarily dismiss the application for want of jurisdiction. 1937 A.L.J. 859=1937 All. 670.

SEC. 271.—*See* 20 B. 607; 1 Bom.L.R. 666. *Quaere*; if the word "District" applies to High Court. 63 I.C. 523=33 C.L.J. 386. Decision under S. 271 to proceed with application for probate is not an appealable order. *See* 44 Bom.L.R. 603. The High Court on its original side has at least the discretion given by S. 271 to the Judge of a District to refuse an application for grant of probate of a will when the deceased testator was not living within its jurisdiction. It has a right to observe the comity of Courts and avoid any real and even any apparent conflict of jurisdiction between two equally competent tribunals. The Court is not deprived of its discretion under the section because it exercised it on an earlier occasion so as to permit the proceedings to go on. The discretion is exercisable by the Court whenever the Court is placed in the position of having to decide what order is to be made upon the application for probate. Certainly no Judge would exercise it to the contrary effect while the facts remained the same. I. L. R. (1941) 2 Cal. 1=45 C.W.N. 739=1942 Cal. 283; 45 C.W.N. 757.

Sec. 272.—Government if has *locus standi* to oppose grant of letters of administration —Confidential proceedings, legality of. *See* 29 I.C. 682. District Delegate—Subordinate Judge—Transfer of contentious proceedings by District Judge—Jurisdiction. *See* 11 O. W.N. 1481=1935 O. 38.

SEC. 273.—The grant of probate does no more than establish the *factum* of the will and the appointment of the executors (if any) named in the will. It does not establish that the properties dealt with by the deceased were his or subject to his power of disposition. 54 M. 24=1931 M. 37=59 M. L. J. 529. Where money in fixed Deposit is bequeathed to a minor, and guardians are directed to receive only interest and the bank has

[1][The proviso to this section shall apply in British India after the separation of Burma and Aden from India to probates and letters of administration granted in Burma and Aden before the date of the separation, or after that date in proceedings which were pending at that date.]

Transmission to High Courts of certificate of grants under proviso to section 273.

274. (1) Where probate or letters of administration has or have been granted by a High Court or District Judge with the effect referred to in the proviso to section 273, the High Court or District Judge shall send a certificate thereof to the following Courts, namely:—

(*a*) when the grant has been made by a High Court, to each of the other High Courts;

(*b*) when the grant has been made by a District Judge, to the High Court to which such District Judge is subordinate and to each of the other High Courts.

(2) Every certificate referred to in sub-section (1) shall be made as nearly as circumstances admit in the form set forth in Schedule IV, and such certificate shall be filed by the High Court receiving the same.

(3) Where any portion of the assets has been stated by the petitioner, as hereinafter provided in sections 276 and 278, to be situate within the jurisdiction of a District Judge in another province, the Court required to send the certificate referred to in sub-section (1) shall send a copy thereof to such District Judge, and such copy shall be filed by the District Judge receiving the same.

Conclusiveness of application for probate or administration if properly made and verified.

275. The application for probate or letters of administration, if made and verified in the manner hereinafter provided, shall be conclusive for the purpose of authorizing the grant of probate or administration; and no such grant shall be impeached by reason only that the testator or intestate had no fixed place of abode or no property within the district at the time of his death, unless by a proceeding to revoke the grant if obtained by a fraud upon the Court.

LEG. REF.

[1] Inserted by A.O., 1937.

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knowledge of this, bank is liable for misapplication of money by administrators. 65 M.L.J. 471=1933 M. 628. Compromise Objector added as co-administrator—Reversioners with notice are bound by it. 1929 P. 385. The conclusiveness is only as regards representative title. 32 I.A. 244; 15 C.W.N. 1021; not as to contents of will. 8 B. L.R. 208; 1 B.H.C.R. 561; nor is it strictly even *prima facie* evidence of death; 161 I.C. 649 =1936 R. 103. As to relationship, *see* 41 C. 655. The effect of probate depends on the jurisdiction of Court granting. 8 Bom. L. R. 725. Section gives jurisdiction under certain limitations to a District Judge to grant probate having effect throughout British India. 21 P.R. 1913=19 I.C. 692. The word "province" in S. 273 must be given the same meaning as the definition in S. 2 (*g*). The Provinces of Agra and Oudh though, under one Government, are not one province, but separate provinces for purposes of S. 273. A District Judge Benares in Agra has consequently no jurisdiction to grant letters of administration in respect of property situate in the Province of Oudh. 1937 A.L.J. 859= 1937 All. 670.

Per *Derbyshire. C.J.*—The Oudh Chief Court is a High Court within the meaning of S. 273 and has jurisdiction to grant probate of a will "with effect throughout British India." 45 C.W.N. 739.

Per *Panckridge, J.*—Even if the Chief Court of Oudh be not a High Court, the grant of probate made by it is, until revoked or annulled conclusive proof, certainly as against those cited if not against all the world that the grantee has established his title as executor of the deceased's last will and testament. Where the Court granting the probate is not a High Court, the grant is not effective with respect to assets beyond the limits of the Province in which the Court is situated; but this only means that with regard to other assets the grantee must apply to the appropriate Court for a grant of letters of

276. (1) Application for probate or for letters of administration, with the will annexed, shall be made by a petition distinctly written in English or in the language in ordinary use in proceedings before the Court in which the application is made, with the will or, in the cases mentioned in sections 237, 238 and 239, a copy, draft, or statement of the contents thereof annexed, and stating—

Petition for probate.

(*a*) the time of the testator's death,

(*b*) that the writing annexed is his last will and testament,

(*c*) that it was duly executed,

(*d*) the amount of assets which are likely to come to the petitioner's hands, and

(*e*) when the application is for probate, that the petitioner is the executor named in the will.

(2) In addition to these particulars, the petition shall further state,—

(*a*) when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge; and

(*b*) when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

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administration with the will annexed, to which he has an indisputable right. I.L.R. (1941) 2 Cal. 1=45 C.W.N. 739=1942 Cal. 283.

ADMINISTRATOR — POWER TO TERMINATE LEAVE AND LICENCE GIVEN BY DECEASED.—A person who has got letters of administration to the estate of the deceased must be regarded as taking the place of that deceased. Therefore any person who on his own admission has entered upon the premises originally with leave and licence of the deceased must vacate the premises if the administrator so desires. For this purpose, it is enough that the administrator has given some kind of notice. 151 I.C. 971=1934 r. 291.

SEC. 276.—S. 276 cannot read alone. It has to be read with S. 19-I of the Court-Fees Act; and under S. 19-I of the Court-Fees Act, the appellant must file in Court a valuation of the property in the form set forth in Schedule III, and the Court has to be satisfied that the fee mentioned in Art. 11 of Schedule I of that Act has been paid on such valuation. When the provisions of S. 19-I of the Court-Fees Act are not satisfied, the application under S. 276 is defective and not in proper form. 30 S.L.R. 201=165 I. C. 202=1936 S. 150. An application for the grant of probate of an oral will can be entertained under S. 276; 1931 A.L.J. 711=1931 A. 489 (F.B.). All assets and not merely such as the applicant chooses to mention should be given. 22 M. 345; 8 C.L.R. 169; 25 C. 54, 65. Probate duty is payable before the order for grant is made. 26 C. 407. The object of requiring the amount of assets to be stated is to assess proper Court-fees. 6 P.L.J. 411. It is not the province of the Court to go into questions of title to the property to which the letters of administration refer. 123 I.C. 220=1930 O. 272. In deciding the question as to whether a will is valid and genuine, the Court should rest its decision on legal grounds established by legal testimony and not on suspicion. 123 I. C. 220=1930 O. 272. It is the practice of English Courts to require that codicils must be proved in the Court from which the probate of the will has been obtained. 45 C. W. N. 739=1942 Cal. 283=I. L. R. (1941) 2 Cal. 1. The order granting or refusing probate is a decree within s. 2 (2) of the C. P. Code. 35 A. 148. Where it appeared that the testatrix had lost her right to the property, a will in respect of that property is a nullity. And when there is no will in the eye of the law, there can be no probate in respect of it. *Semble*.—The case would be different if some of the property bequeathed had belonged to the testatrix and some had not. 9 O. W. N. 1078. Though S. 276 (unlike S. 278) does not mention that "the family or other relatives of the deceased" should be stated in a petition for probate, S. 263, Ill. (*ii*) shows that a grant made without citing parties who ought to have been cited, *e.g.*, the daughters of the testator, is liable to be revoked. 36 C. W.N. 1010. The burden of proving the existence of disposing mind is on the applicant who applies for a probate of the will. 1934 L. 682 (2)=154 I.C. 1014.

SECS. 276 AND 57.—An application for probate according to S. 276 of the Succession Act, must contain a list of all the assets sought to be devised by the will. Where a

(3) Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another province, the petition shall further state the amount of such assets in each province and the District Judges within whose jurisdiction such assets are situate.

In what cases translation of will to be annexed to petition. Verification of translation by person other than Court translator.

277. In cases wherein the will, copy or draft, is written in any language other than English or than that in ordinary use in proceedings before the Court, there shall be a translation thereof annexed to the petition by a translator of the Court, if the language be one for which a translator is appointed; or, if the will, copy or draft, is in any other language, then by any person competent to translate the same, in which case such translation shall be verified by that person in the following manner, namely:—

"I, *A.B.*, do declare that I read and perfectly understand the language and character of the original, and that the above is a true and accurate translation thereof".

Petition for letters of administration.

278. (1) Application for letters of administration shall be made by petition distinctly written as aforesaid and stating

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will registered to certain property in Calcutta, a probate cannot be asked for or obtained in respect of such asset alone. 1942 A.M.L.J. 27.

SS. 276 AND 22.—Where an application for probate has been made under S. 276 of a will of which a copy has been obtained, the true one being deposited in a foreign Court, and from the petition it is found that the application should have been for letters of administration under S. 228. *Held*, that the Court could grant letters of administration with a copy of the will annexed or at least could allow the petition to be amended. I.L.R. (1938) Lah. 562=1938 Lah. 349.

SECS. 276, 284, 286 AND 295.—Proceedings for probate when become a suit—According to the provisions of the Succession Act until a caveat is entered and supported by an affidavit, there is no suit and no defendant within the meaning of the C. P. Code. Hence a person who has not entered a caveat has no *locus standi* to appear and oppose an application for the appointment of a receiver that may be made by an applicant for probate. Nor can such a person apply under S. 10, C. P. Code, for the stay of probate proceedings. 15 Luck. 107=1940 Oudh 16=1939 O.W.N. 932.

Sec. 278.—Letters must be taken out for movables as well as immovable property. 5 C. 2; 6 C. 483. Court cannot determine question of paramount title set up in caveat. 5 Pat.L.J. 107; 17 C.W.N. 615. Court must decide if there is any estate to be administered. 14 C.W.N. 463. Where there is no estate which stands in need of administration, no suggestion that any creditors have to be paid or any debts due to the estate have to be collected and an application for letters of administration is a transparent device to secure from the Probate Court a decision upon a contested question of title to the estate, there is no occasion for the grant of letters of administration. 1941 Oudh 474=1941 O. W. N. 780=17 Luck. 78. Application for letters—Will, mode of production—Power of Court to decide validity of will. 132 I. C. 527=1931 L. 130. If the application is with reference to only one property, no inventory is necessary and Court fees cannot be levied on whole property. 7 L.L.J. 288. Finding in a proceeding to obtain a succession certificate is not conclusive in a proceeding to obtain letters of administration. 88 I.C. 612=1925 O. 670. A minor neither cited nor properly represented in a probate proceeding by which her interests have been affected can come in even after great lapse of time and have the will proved in solemn form in her presence. 33 I.C. 14=23 C.L.J. 79. A member of a joint Hindu family with the deceased is not competent to apply for letters of administration. 51 I. C. 651=56 P. R. 1919. The essential features of a joint Hindu family governed by the Mitakshara are (1) unity of ownership of joint property and (2) unity of juristic existence in dealing with third parties. The family is a sort of corporation having a continued existence. Its constitution might change by birth, adoption, marriage or death, but as regards strangers it is deemed to be a single individual, a separate legal entity. While this is so as regards out-siders, as between the coparceners there is compllete community of ownership and unity of possession. No individual member of the family, while it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. He has an interest in the coparcenary and on his death this interest lapses to the coparcenary;

(*a*) the time and place of the deceased's death;

(*b*) the family or other relatives of the deceased, and their respective residence;

(*c*) the right in which the petitioner claims;

(*d*) the amount of assets which are likely to come to the petitioner's hands;

(*e*) when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge; and

(*f*) when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

(2) Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another province, the petition shall further state the amount of such assets in each province and the District Judges within whose jurisdiction such assets are situate.

Addition to statement in petition, etc., for probate or letters of administration in certain cases.

279. (1) Every person applying to any of the Courts mentioned in the proviso to section 273 for probate of a will or letters of administration of an estate intended to have effect throughout British India, shall state in his petition, in addition to the matters respectively required by section 276 and section 278, that to the best of his belief no application has been made to any other Court for a probate of the same will or for letters of administration of the same estate, intended to have such effect as last aforesaid,

or, where any such application has been made, the Court to which it was made, the person or persons by whom it was made and the proceedings (if any) had thereon.

(2) The Court to which any such application is made under the proviso to section 273, may, if it thinks fit, reject the same.

Petition for probate, etc., to be signed and verified.

280. The petition for probate or letters of administration shall in all cases be subscribed by the petitioner and his pleader, if any, and shall be certified by the petitioner in the following manner, namely:—

"I, *A.B.*, the petitioner in the above petition, declare that what is stated therein is true to the best of my information and belief."

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it passes by survivorship to the other coparceners. He, therefore, has no power to devise it by will, nor is there any question of succession to it. In no part of the coparcenary property has he left an "estate" of his own, in respect of which letters of administration could be granted. This is the general rule. But the position is different where property purchased with the funds of the joint family and belonging to it, stands in the name of the *karta* or another member of the family in his individual name, so that while the legal estate vests in him, the beneficial interest is in the family. On the death of such person no change takes place so far as the beneficial interest is concerned. It continues to be as it has always been, in the family. The legal estate, however, does not pass by survivorship to the other coparceners and, therefore, letters of administration may be granted to the surviving coparceners as his "heirs" to the legal estate in such property and limited to it alone. 44 P.L.R. 330 = 1942 Lah. 173 (F.B.).

Verification of petition for probate, by one witness to will.

281. Where the application is for probate, the petition shall also be verified by at least one of the witnesses to the will (when procurable) in the manner or to the effect following, namely:—

"I, *C.D.*, one of the witnesses to the last will and testament of the testator mentioned in the above petition, declare that I was present and saw the said testator affix his signature (*or* mark) thereto (*or* that the said testator acknowledged the writing annexed to the above petition to be his last will and testament in my presence).

Punishment for false averment in petition or declaration.

282. If any petition or declaration which is hereby required to be verified contains any averment which the person making the verification knows or believes to be false, such person shall be deemed to have committed an offence under section 193 of the Indian Penal Code.

Powers of District Judge.

283. (1) In all cases the District Judge or District Delegate may, if he thinks proper,—

(*a*) examine the petitioner in person, upon oath;

(*b*) require further evidence of the due execution of the will or the right of the petitioner to the letters of administration, as the case may be;

(*c*) issue citations calling upon all persons, claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration.

(2) The citation shall be fixed up in some conspicuous part of the courthouse, and also in the office of the Collector of the district, and otherwise published or made known in such manner as the Judge or District Delegate issuing the same may direct.

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SEC. 281.—Provisions as to verification are directory not mandatory and hence the omission can be cured. 1923 N. 41.

SEC. 283.—As to the distinction between proving in common form and in solemn form, *see* 1894 A.C. 437; 4 C. 360; 23 C. 1001. What is meant by due execution, *see* 22 M. 345; 31 C. 357; 14 C.W.N. 1088. In all cases it is safer to produce all evidence. 19 C. 65; 21 C. 279; 39 C. 24; 10 M.L.T. 304; 13 Bom. L.R. 38. Long continued acts of acquiescence raise presumption in favour of the will. 14 M.I.A. 67; 33 I.A. 60; 16 M.L.J. 178; 33 A. 344. Probate cannot be granted by consent of parties; 31 C. 357; or as the result of arbitration. 21 B. 335. The presumption of genuineness can be raised under S. 90, Evidence Act. 16 M.L.J. 178; 6 C.L.R. 199. As to the effect of delay in propounding will, *see* 17 M. 349. Citation is general or special and as to distinction, *see* 8 C. 570. Even the possibility of an interest is sufficient to entitle a person to become a party to a probate proceeding. 3 Pat. L.J. 409. Maintenance holder, whether has an interest in the estate of the deceased so as to enable him to enter a caveat. 49 M. 960=1926 M. 1193 =51 M.L.J. 563. The interest which entitles a person to lodge a caveat must be an interest in the estate of the deceased, that is to say, there must be no dispute as to the title of the deceased to the estate. 54 M. 24= 1931 M. 37=59 M.L.J. 529. Citation is to be issued to all persons claiming to have any interest in the estate of the deceased and a person disclaiming interest of the deceased in the property disposed of by him is not entitled to citation and has no *locus standi* in the probate Court. 10 P. 817 =1932 P. 95. A person who alleges that he and the testator were living joint and that the property which the testator purported to dispose of joint family property has no *locus standi* to object to the grant of letters of administration even though citations had been served on him and he appeared before the Court. 10 P. 812. Alienees since the probate are not necessary parties to proceedings for revocation of the grant of probate on the ground of proceedings being defective in substance. But after revocation, the alienees may, if they choose, be allowed to intervene and opportunities given to them of being heard when the propounder is called upon to prove the will in solemn form. 35 C. W.N. 387=1931 C. 713. Whether or not a person can oppose the grant of probate depends entirely upon whether he has or has not an interest in the estate of the deceased. A creditor who has attached a portion of the estate might possibly be a person who has

(3) Where any portion of the assets has been stated by the petitioner to be situate within the jurisdiction of a District Judge in another province, the District Judge issuing the same shall cause a copy of the citation to be sent to such other District Judge, who shall publish the same in the same manner as if it were a citation issued by himself, and shall certify such publication to the District Judge who issued the citation.

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an interest in the estate, but a mere creditor who has not even obtained a decree can hardly be said to have an interest in the estate and such a creditor has no right to object to the grant of probate in common form. 1941 P.W.N. 221; 1940 Cal. 296.

Fazl Ali, J.—The interest which entitles a person to object to the grant of probate must be an interest in the estate and not merely an interest in the result of the probate proceedings or "interest" in any remote sense of the term. 1941 P.W.N. 221; 1940 Cal. 296. Any interest, however slight, and even the possibility of an interest, is sufficient to entitle a party to oppose the grant of probate. 59 C. 1308=36 C.W.N. 635=1932 C. 734. A person who claims outside and independently of a will or claims adversely to the testator and disputes his right to deal with the property can in no sense be deemed to claim an interest in the estate of the deceased within the meaning of S. 283 so as to entitle him to oppose the grant of a probate or letters of administration. 193 I.C. 856=1941 Pat. 475=1941 P.W.N. 334.

CITATION—MINOR—APPOINTMENT OF GUARDIAN *ad litem*.—It is only where the applicant for the probate is himself a guardian of a minor on whom citation should issue or where the natural guardian of such minor lives under the influence, care and protection of the propounder of the will, that a guardian *ad litem* should be appointed for the purpose of receiving the citation and on such guardian service of citation should be effected. The fact that the citation was issued on the guardian and he did not appear and contest the proceedings does necessitate the appointment of a guardian *ad litem*. 35 C.W.N. 387=1931 C. 713. In a probate proceeding, the Court has no concern with the devolution of the property, but only with the point whether the will has been proved to be genuine and duly executed. 46 I.C. 117=3 Pat.L.J. 415. Different considerations arise when the testator is a Hindu and when he is Christian. And hence the law allows a discretion under S. 283 and that which the law expressly allows the Courts ought not by implication to take away. Therefore even where the will alters a devolution of property, it is not in every case that a special citation need be issued. 1933 S. 262. When the citation is discretionary, mere absence of such citation does not invalidate the grant, but is sufficient cause for enquiring into the genuineness of the will. 9 I.C. 354=13 Bom. L.R. 38. Where general citations have been issued, it is not necessary that citation should issue specifically to one of the executors to enable him to join in the application for probate. 121 I.C. 173=1930 S. 91. Disputed will—Duty to examine all attestors and witnesses required by parties. 51 I.C. 1007. Probate—Refusal of, on points not raised by parties—Legality. 51 I.C. 335. Long delay in propounding a will, will give room to much suspicion, and the Courts are in such cases bound to scrutinize the evidence very carefully. 45 I.C. 187 =22 C.W.N. 424. In a testamentary suit where the immediate reversioner challenging the will enters into a compromise with the propounders of the will and gives up his contention, the next immediate reversioners have a *locus standi* to enter caveat. 45 I.C. 59=27 C. L. J. 320. The word "interest" cannot cover the case of a mere reversioner; so the sisters of the deceased cannot object to the grant of a probate to the widow and the daughters of the deceased. 20 I.C. 342; 30 I.C. 161=19 C.W.N. 882. A debtor of a deceased person cannt by merely contracting a loan become interested in the estate of the deceased and he has no *locus standi* to object to the grant of letters of administration under S. 283 (I) (*c*). 190 I.C. 36=1941 Pat. 18. A simple creditor of a testator's estate is not a person having an interest in that estate which entitles a person to object the interest which entitles a person to object the the granting of probate of the will. The grant of probate must be an interest in the estate and not merely an interest in the result of the probate proceedings or "interest" in any remote sense of the term. 190 I.C. 362=1941 Pat. 151=22 Pat L.T. 649. A District Judge in probate proceedings cannot question the testator's disposing power and so he cannot go into the question whether bequests in the will are illegal and void. 21 I.C. 599; 5 Pat.L.J. 170; 43 I.C. 195; 35 I.C. 416. Person claiming independently of or adversely to will does not come under section. 20 I.C. 342=140 I.C. 722=1932 P. 343; 10 P. 812. A creditor of a heir-at-law has, no doubt, no right to oppose a testamentary grant on the bare ground that he is a creditor. But where the heir-at-law is substantially deprived of his inheritance by an alleged will, and the case of the creditor who advanced money to him either before or during the pendency of the probate proceedings is that the will is set up or probate has been obtained in fraud of creditors, the creditor has the right to oppose the grant of probate and has, therefore, the right to apply for revocation of the grant. *The circumstance* that the creditor is *an ordinary creditor* and not an attaching creditor cannot make any difference in principle. I.L.R. (1940) 1 Cal. 33=44 C.W.N. 149=1940 Cal. 286. On this

Caveats against grant of probate or administration.

284. (1) Caveats against the grant of probate or administration may be lodged with the District Judge or a District Delegate.

(2) Immediately on any caveat being lodged with any District Delegate, he shall send a copy thereof to the District Judge.

(3) Immediately on a caveat being entered with the District Judge, a copy thereof shall be given to the District Delegate, if any, within whose jurisdiction it is alleged the deceased had a fixed place of abode at the time of his death, and to any other Judge or District Delegate to whom it may appear to the District Judge expedient to transmit the same.

Form of caveat.

(4) The caveat shall be made as nearly as circumstances admit in the form set forth in Schedule V.

After entry of caveat, no proceeding taken on petition until after notice to caveator.

285. No proceeding shall be taken on a petition for probate or letters of administration after a caveat against the grant thereof has been entered with the Judge or District Delegate to whom the application has been made or notice has been given of its entry with some other Delegate, until after such notice to the person by whom the same has been entered as the Court may think reasonable.

District Delegate when not to grant probate or administration.

286. A District Delegate shall not grant probate or letters of administration in any case in which there is contention as to the grant, or in which it otherwise appears to him that probate or letters of administration ought not to be granted in his Court.

Explanation.—"Contention" means the appearance of any one in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf, to oppose the proceeding.

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section, *see also* 31 C. W. N. 160=1927 C. 207.

REVOCATION OF GRANT.—The grant of probate or letters of administration is a decree of a Court, and where it has been wrongly granted, an application can be made to the same Court which granted it to set it aside and a regular suit is not always necessary unless the grant is sought to be revoked on ground of the invalidity of the will or on the ground of any dispute as to its genuineness. There may therefore be either an application to revoke the grant or a substantive suit, but when the grant is revoked fresh proceedings have to be instituted in order to obtain proper representation to the estate of the deceased and that must be done by a petition under the Act. 35 Bom.L.R. 708=1933 B. 370. *See also* 1940 Cal. 236; 1938 Rang. 261 (F.B.).

SEC. 284.—Mere entry of caveat does not make case contentious. 22 B. 261. When a caveat is filed, questions of title, power of disposition and of legality of bequests cannot be gone into. 19 A. 458; 18 B. 749; 17 C.W.N. 1141; 34 B. 459. As to when caveat has to be filed, *see* 38 C. 53; 39 C. 245. Execution purchasers of interest of testator's son can object to grant of letters. 1928 C. 277 (6 C. 460; 10 C. 413, Foll.). Attesting witness and scribe supporting will—Caveator's case resting on suspicion—Caveat should be cautiously considered and great discrimination is necessary. 86 I.C. 642=1925 P. 3. As to notice to caveator, *see* 36 I.C. 31 (1)= 20 C. W. N. 787. Only where a will is put forward to defraud creditor, a creditor would have a *locus standi* to come in probate proceedings. 30 I. C. 538. (17 C. L. J. 230, Ref.) Proceedings in — Nature of— Scope of inquiry. 27 I.C. 617=19 C. W. N. 205; 40 C. 82; 22 P.R. 1912=109 I.C. 130. *See also* 1940 Oudh 16=1939 O.W.N. 932.

SEC. 286.—As to the meaning of "contention," *see* 29 M. 426; 31 C. 745; 5 Pat. L. J. 107. The words "appearance ..... to oppose the proceeding" ir the explanation refer also to filing statement or affidavit in support of the caveat. 19 M. 456; 22 B. 261; 34 I.A. 102. As to effect of pleader's withdrawal, see 39 C.L.J. 569. *See also* 84 I. C. 65=1925 C. 75. S. 286 debars a *District Delegate* from granting probate or letters of administration in any case in which there is contention. It does not apply to a District Judge. Thus the fact that a suit as to the validity of a will has been instituted in the

Power to transmit statement to District Judge in doubtful cases where no contention.

287. In every case in which there is no contention, but it appears to the District Delegate doubtful whether the probate or letters of administration should or should not be granted, or when any question arises in relation to the grant, or application for the grant, of any probate or letters of administration, the District Delegate may, if he thinks proper, transmit a statement of the matter in question to the District Judge, who may direct the District Delegate to proceed in the matter of the application, according to such instructions as to the Judge may seem necessary, or may forbid any further proceeding by the District Delegate in relation to the matter of such application, leaving the party applying for the grant in question to make application to the Judge.

Procedure where there is contention or District Delegate thinks probate or letters of administration should be refused in his Court.

288. In every case in which there is contention, or the District Delegate is of opinion that the probate or letters of administration should be refused in his Court, the petition, with any documents which may have been filed therewith, shall be returned to the person by whom the application was made, in order that the same may be presented to the District Judge, unless the District Delegate thinks it necessary, for the purposes of justice, to impound the same, which he is hereby authorized to do; and, in that case, the same shall be sent by him to the District Judge.

Grant of probate to be under seal of Court.

289. When it appears to the District Judge or District Delegate that probate of a will should be granted, he shall grant the same under the seal of his Court in the form set forth in Schedule VI.

Grant of letters of administration to be under seal of Court.

290. When it appears to the District Judge or District Delegate that letters of administration to the estate of a person deceased, with or without a copy of the will annexed, should be granted, he shall grant the same under the seal of his Court in the form set forth in Schedule VII.

Administration-bond.

291. (1) Every person to whom any grant of letters of administration, other than a grant under section 241, is committed, shall give a bond to the District Judge with one or

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Court of the senior Subordinate Judge is no bar to the District Judge granting a probate, if he is satisfied as to the genuiness of a will. In such a case S. 295 applies. 133 I.C. 896. On this section, *see also* 151 I.C. 843=11 O. W.N. 1301=1934 O. 442; 11 O.W.N. 1481=1935 O. 38; 1939 Oudh 16.

SEC. 289.—Where the applicant is competent to apply and the genuineness of the will is proved or is not disputed, the Court has no discretion to refuse. 21 C. 295; 20 A. 189. As to when duty is payable, etc., *see* 26 C. 407; 40 I.C. 576; 18 C.W.N. 121; 30 I.C. 394; 33 M. 39. As to effect of general grant, *see* 34 C.L.J. 457. As to order for exhibiting accounts, *see* 47 I.C. 750. Date of probate is the day on which order granting it is passed and not the date of the order that probate should issue. 27 C. W. N. 285 =1923 C. 444. A probate proceeding will result in a judgment *in rem* and therefore the Court cannot act merely on the consent of the parties before it, so as to shut out an enquiry into the genuineness and due execution of the will itself. But if the defendant at any stage withdraws his objection, whether under a compromise or otherwise, the proceeding may become a non-contentious one in which case the probate will be granted in common form. The agreement however cannot be incorporated in the probate. 1931 A. 745.

SEC. 290.—Where no executor is appointed under the will only letters of administration with the will annexed can be granted. 1923 N. 41. Practice outside India as to grant of letters, *see* 18 I.C. 907=40 C. 74.

SEC. 291.—The rule in the section is rigid and the Court has no discretion. 26 C. 408; 47 C. 115. But where in the will the testator mentions that the executors should obtain

more surety or sureties, engaging for the due collection, getting in, and administering the estate of the deceased, which bond shall be in such form as the Judge may, by general or special order, direct.

(2) When the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person—

(*a*) the exception made by sub-section (1) in respect of a grant under section 241 shall not operate;

(*b*) the District Judge may demand a like bond from any person to whom probate is granted.

Assignment of administration bond.

292. The Court may, on application made by petition and on being satisfied that the engagement of any such bond has not been kept, and upon such terms as to security or providing that the money received be paid into Court, or otherwise, as the Court may think fit, assign the same to some person, his executors or administrators, who shall thereupon be entitled to sue on the said bond in his or their own name or names as if the same had been originally given to him or them instead of to the Judge of the Court, and shall be entitled to recover thereon, as trustees for all persons interested, the full amount recoverable in respect of any breach thereof.

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probate of the will without security, it is not the function of the Judge to distrust the executor and ask for security quite contrary to testator's desire. 1929 C. 733. The ordering of security to be furnished in a probate or administration matter is purely a discretionary affair. When the discretion has been exercised in a judicial and reasonable manner an appellate Court should not interfere with the way in which it is exercised unless the Court is satisfied that the result is incorrect. 174 I.C. 421=1938 Rang. 67.

SECURITY SHOULD BE NOMINAL SUM.—Where the executor is the sole legatee, if the District Judge thinks it necessary to take any bond, the security fixed must be a nominal sum. 1929 C. 733. Under S. 291 the District Judge can demand a bond from a person to whom probate is granted only when the deceased belonged to one of the classes enumerated therein. A Christian is not within any of the categories referred to in S. 291, and so a bond cannot be demanded for granting probate of the estate of a Christian. 40 P.L.R. 22=1938 Lah. 151. Liability of Hindu widow on administration bond. 27 I.C. 849=17 M.L.T. 61. As to when a surety can be discharged, *see* 29 C. 68; 28 M. 161: 33 M. 373. Surety cannot get discharge by merely alleging misconduct on the part of the administrator. 1925 C. 158. *See also* I.L.R. (1939) 2 Cal. 1. A surety for the due administration of an estate by an executor, is entitled to be discharged from his liability as regards the future transactions of the latter on showing good cause, as (*e.g.*), when the executor is adjudged insolvent. I.L.R. (1939) Lah. 424=1940 Lah. 38. As to the nature and object of surety bond, *see* 33 C. 713; 35 I.A. 109; 6 C. L. J. 453. An appeal does not lie from an order as to security. 20 C. 645. Court can call for fresh security. 47 C. 115=23 C.W.N. 763. Grant not to be revoked on failure to furnish security. 86 I.C. 563=1925 L. 354. In case of a mere technical breach, *see* 64 I.C. 366. As to procedure on death or discharge of surety, *see* 66 I.C. 367=2 P.W.R. 1922.

SEC. 292.—The words "the full amount recoverable in respect of any breach thereof" mean the loss for which the obligors under the bond are liable, and do not mean the amount recoverable in law at the date of the assignment. 165 I.C. 672=38 Bom. L R. 632=1936 B. 363=60 Bom. 1027; *seel aso* (1941) 1 M. L. J. 88 (P.C.). Under S. 292, the assignee of a bond acquires by virtue of the assignment a fresh and independent cause of action. The section deals not merely with procedure, but it confers substantive rights and it provides a new starting point for purposes of limitation. 60 Bom. 1027=38 Bom. L. R. 632=1936 Bom. 363. An application under S. 292 is really made in proceedings in the nature of execution and is no bar to a fresh application being entertain d in the exercise of inherent jurisdiction when the first application had been dismissed in default and not on merits. 1935 Lah. 145. Failure to exhibit inventory is a breach. 10 A. 29. A creditor is a proper person, so also the Administrator-General and the section is not confined to private persons only. 3 C.L. J. 422; 33 C. 73. As to who can *sue*, see 5 A. 348; 21 I.C. 297; 39 C. 563. Procedure as to assignment of bond, see 21 I.C. 297=(1923) 1 U.B.R. 174. Distric Judge cannot assign administration bond again while the first assignment is in force. 39 C. 563=15 C. L. J. 332=16 C.W.N. 662. Order under the section is appealable. 118 I.C. 401=1929 R. 109.

293. No probate of a will shall be granted until after the expiration of seven clear days, and no letters of administration shall be granted until after the expiration of fourteen clear days from the day of the testator or intestate's death.

Time for grant of probate and administration.

294. (1) Every District Judge, or District Delegate, shall file and preserve all original wills, of which probate or letters of administration with the will annexed may be granted by him, among the records of his Court, until some public registry for wills is established.

Filing of original wills of which probate or administration with will annexed granted.

(2) The Provincial Government shall make regulations for the preservation and inspection of the wills so filed.

295. In any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, 1908, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant.

Procedure in contentious cases.

296. (1) When a grant of probate or letters of administration is revoked or annulled under this Act, the person to whom the grant was made shall forthwith deliver up the probate or letters to the Court which made the grant.

Surrender of revoked probate or letters of administration.

(2) If such person wilfully and without reasonable cause omits so to deliver up the probate or letters, he shall be punishable with fine which may extend to one thousand rupees, or with imprisonment for a term which may extend to three months, or with both.

297. When a grant of probate or letters of administration is revoked, all

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SEC. 293—*See* 35 CW.N. 387.

SEC. 295.—It is not the entry of caveat, but the filing of written statement or affidavit that makes the proceedings contentious. 22 B. 261. *See also* 1938 Sind 36; 1939 Oudh 16=1939 O. W. N. 932. The right to cross-examination. 11 C. L. J. 124. As to procedure in the suit, *see* 9 B. 241; 22 B. 261. Contentious proceedings must take the form of suit. 38 B. 309=23 I.C. 325. *See also* 133 I.C. 896 cited under S. 286, *supra*. Under S. 295 where there is a contention between the parties, the proceedings should take the form of a suit according to C.P. Code. It is not open to the Court in such a case to proceed to decide the matter in a summary fashion leaving the decision subject to modification in a suit to be filed afterwards. 47 L.W. 485=1938 Mad. 502=(1938) 1 M. L. J. 443. In a probate suit, the only issue before the Court is whether the will propounded or in respect of which a grant is asked for is the last will and testament of the deceased. A caveator appearing in such a proceeding cannot have another will filed by him to be proved by way of counter-claim. His remedy is to file a separate petition. 31 Bom.L.R. 1014. O. 9, R. 9, C.P. Code applies to dismissal of application for probate. 52 I.C. 639. As to the nature of revocation proceedings, *see* 4 C. W. N. 600; 8 C.W.N. 748; 4 C.L.J. 492; 5 C.W.N. 377 (383). Compromise cannot be made rule of Court. 3 Pat.L.J. 415; 14 C.W.N. 1088; 28 M.L.J. 285. As to right of appeal and Court-fees payable in such appeal, *see* 22 I. C. 98=35 A. 448. On this section, *see also* 21 L.W. 415=1925 M. 861; 41 C. 637=17 C. L.J. 643; 41 C. 819. Court has got power to award costs in probate proceedings. 57 I. C. 739. Surety to administration bond—Discretion of Court to discharge. 54 A. 293=1932 A. 262. Contentious proceedings under S. 295. Nature of—Form of decree—Appeal against order in such proceedings—Production of decree—Necessity. 1938 Sind 36 (F.B.). Proceedings under S. 295—S. 10, C.P. Code, if applies to—Date, when proceedings become contentious.. 1940 O.W.N. 1.

SEC. 296.—Enquiry into applicant's title by District Judge—Scope of. *See* 16 N. L. J. 36=144 I.C. 322=1933 N. 173.

Sec. 297.—There is nothing in the Act to suggest that the revocation of probate, or letters has retrospective effect and invalidat-

Payment to executor or administrator before probate or administration revoked.

payments *bona fide* made to any executor or administrator under such grant before the revocation thereof shall, notwithstanding such revocation, be a legal discharge to the person making the same; and the executor or administrator who has acted under any such revoked grant may retain and reimburse himself in respect of any payments made by him which the person to whom probate or letters of administration may afterwards be granted might have lawfully made.

Power to refuse letters of administration.

298. Notwithstanding anything hereinbefore contained, it shall, where the deceased was a Muhammadan, Buddhist or exempted person, or a Hindu, Sikh or Jaina to whom section 57 does not apply, be in the discretion of the Court to make an order refusing, for reasons to be recorded by it in writing, to grant any application for letters of administration made under this Act.

Appeals from orders of District Judge.

299. Every order made by a District Judge by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court in accordance with the provisions of the Code of Civil Procedure, 1908, applicable to appeals.

NOTES.

es all acts done under them which are not expressly declared to be valid. Thus the proceedings instituted by an executor will be binding on the estate. 8 R. 463=128 I. C. 359=1931 R. 15. There is nothing in the Probate and Administration Act (now Succession Act) to suggest that a grant either of probate or letters of administration becomes, on revocation, void *ab initio*. A mortgage therefore by the administrator on the grant of such probate does not become invalid merely on account of the subsequent revocation of the probate by the Court. 174 I.C. 186=1938 Rang. 43. The section does not apply to purchasers. 35 I.A. 139; 12 C. W.N. 820; 3 C.L.J. 422. In 6 C.W.N. 787 a Hindu widow was held entitled to reimburse herself in respect of payments made while acting under a probate which was later revoked. As to *bona fide* payment to administrator, *see* 10 C.W.N. 442.

SEC. 298.—No discretion to refuse application for probate by person selected by testator. 20 A. 189; 25 C. 195.

SEC. 299.—Section is to be read with C.P. Code. 21 C. 539; 20 C. W. N. 472. S. 299 should be read as meaning that every order made by a District Judge by virtue of the powers conferred upon him by the Act is subject to appeal and that the rules of procedure under which the appeal must be brought are those contained in the C.P. Code applicable to appeals. The section cannot be read as limiting the right of appeal to such orders as are made appealable by the C.P. Code. Every order made by a District Judge by virtue of the powers conferred upon him by the Act is subject to an appeal to the High Court. 44 Bom.L.R. 603. Order under the section is appealable. *See* 33 I. C. 143=20 C.W.N. 28; 14 Pat. L. T. 285. There is no appeal from order assigning administration bond. 39 C. 563=16 C. W. N. 662. An order refusing to implead a person as defendant is not appealable. 2 A. 904; 13 C. 100; 18 C.L.J. 612; 24 C.W.N. 316. When a District Judge exercises his discretion under S. 271 he cannot be said to be making an order under the Act so as to give a right of appeal under S. 299. He is merely deciding to proceed with the application for probate and no formal order is really made by him. In such a case under S. 271, therefore no right of appeal is granted by S. 299. 44 Bom.L.R. 603. What to accompany memorandum of appeal, *see* 17 I. C. 99=16 C. L. J. 116. Order refusing permission to oppose not appealable. 22 I.C. 276=18 C.L.J. 612; 59 C. 1308=36 C. W. N. 635=1932 C. 734; 35 A. 448. Where an order is passed granting probate conditional on security being furnished under S. 291 it is appealable. 40 P.L.R. 22=1938 Lah. 151. Orders passed by the District Judge under Section 292 are appealable. 118 I. C. 401 (1)=1929 R. 109. An order by a Senior Sub-Judge invested with powers of a District Judge for the grant of letters of administration is covered by S. 299. 38 P. L. R. 803=1936 L. 378. An appeal lies from an order refusing to set aside a dismissal for default of an application for grant of probate. 38 P. L. R. 263=1936 L. 712. *See also* 1936 Lah. 863. An appeal lies under S. 299 of the Succession Act irrespective of whether the order of the District Judge was passed in the course of interlocutory proceedings or whether it is a final order. 1930 O. 424. The order of a District Judge under S. 299 refusing to assign a bond should not be considered to be of a purely formal or interlocutory nature and as such not open to appeal. The order must be considered to be in some respects similar to one under S. 145, C.P. Code, and an order under that section is appealable; also order under S. 299 is appealable. 1936 L. 684. Under S. 299 an appeal lies from an order directing an executor to furnish fresh security for

Concurrent jurisdiction of High Court.

300. (1) The High Court shall have concurrent jurisdiction with the District Judge in the exercise of all the powers hereby conferred upon the District Judge.

(2) Except in cases to which section 57 applies, no High Court, in exercise of the concurrent jurisdiction hereby conferred over any local area beyond the limits of the towns of Calcutta, Madras and Bombay [1][* * * * * * * * * * *] shall, where the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, receive applications for probate or letters of administration until the Provincial Government has, by a notification in the Official Gazette, authorized it so to do.

Removal of executor or administrator and provision for successor.

301. The High Court may, on application made to it, suspend, remove or discharge any private executor or administrator and provide for the succession of another person to the office of any such executor or administrator who may cease to hold office, and the vesting in such successor of any property belonging to the estate.

302. Where probate or letters of administration in respect of any estate

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LEG. REF.

[1] Words "and the Province of Burma" omitted by O.A., 1937.

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the administration of the estate, as the order is passed by the Court in the ordinary course of the case under the Act. I. L. R. (1939) Lah. 424=41 P. L. R. 768=1940 Lah. 38. *See also* 1938 Lah. 151. Where the widow of the deceased applied for the grant of probate and the brother of the deceased, alleging that they had been joint, objected on the ground of jointness and also on the ground that the will was forged and the lower Court rejected the objection on the ground that the objector had no *locus standi; Held*, (1) that the order was appealable and that no revision lay; (2) that the objector had no *locus standi* because he had no interest in the estate of the deceased; and (3) that the objector was not bound by the order passed in his absence in the probate proceeding. 11 P. L. T. 219=1930 P. 354; 139 I.C. 156=1932 A. 379. No appeal lies against an order asking for security from the petitioner for probate as it is not a final order. 1929 C. 733. Application for probate dismissed for default—Order dismissing application for its restoration — Appeal. 1936 L. 863. *See* as to appeal to His Majesty in Council. 24 C. 30. As to whether interlocutory orders are appealable, *see* 20 C.W.N. 28; 90 I. C. 729=1926 C. 180; 14 Pat.L.T. 285=1933 P. 276. As to Court-fees, *see* 35 A. 448=22 I. C. 98.

SEC. 300.—The proviso embodies the provisions in that behalf in S. 2 of Act V of 1881. (*Statement of Objects and Reasons*).

SEC. 301.—*See* 7 Cut. L. T. 77; 29 B. 188. S. 301 deals with the power of a High Court to suspend, remove or discharge any private executor or administrator. Where an application is made by the manager of a temple for the removal of a person who is in the position of a trustee of a permanent trust created for the temple by a will, though styled an executor, it certainly is not a matter which could be agitated by means of a petition under S. 301 of the Act. The proper procedure would be by proceedings under S. 92, C. P. Code. 1938 A.L.J. 124=1938 All. 197. If the removal of an executor is sought and not an indirect restraint on him by merely getting the appointment of a receiver—the only remedy that is open is an application under S. 301 and not a suit. In an application under the section, the Court ought to enquire into the allegations made by the petitioner; it is not open for the Court to dismiss the application without any kind of enquiry. 50 M. 950 =1927 M. 994=53 M.L.J. 644. The power to remove an executor and to provide for a successor to his office is one conferred upon the High Court alone by S. 301, and such relief cannot be sought by regular suit. 37 P.L.R. 77. The expression "High Court" as used in S. 301 is not confined to the appellate side alone but also includes the High Court exercising original jurisdiction. An application for removing or discharging an executor under that section should be presented to the Judge in the original side who exercises testamentary jurisdiction. I. L. R. (1940) 1 Cal. 79=44 C.W.N. 258=1940 Cal. 264.

SEC. 302.—This clause is necessary as the provisions of the Act of 1865 relating to "executors of their own wrong" were not included in the Act of 1881. (*Statement of Objects and Reasons.*) See 7 B. 381; 12 B. 638; 18 M. 443. The section gives ample power to the Court to settle questions arising between the executor and the legatees and between the legatees themselves, and

Directions to executor or administrator.

has or have been granted under this Act, the High Court may, on application made to it, give to the executor or administrator any general or special directions in regard to the estate or in regard to the administration thereof.

CHAPTER V.

OF EXECUTORS OF THEIR OWN WRONG.

Executor of his own wrong.

303. A person who intermeddles with the estate of the deceased, or does any other act which belongs to the office of executor while there is no rightful executor or administrator in existence, thereby makes himself an executor of his own wrong.

Exceptions.—(1) Intermeddling with the goods of the deceased for the purpose of preserving them or providing for his funeral or for the immediate necessities of his family or property, does not make an executor of his own wrong.

(2) Dealing in the ordinary course of business with goods of the deceased received from another does not make an executor of his own wrong.

NOTES.

also power to construe a will whenever the Court is asked to do so. This is in accordance with the well-known English practice prevailing in the Court of Chancery. 1928 M. 356. District Court cannot give directions. 44 B. 682=57 I.C. 116=22 Bom.L.R. 396. The Court in exercising jurisdiction under S. 302 is acting in pursuance of the testamentary and intestate jurisdiction with which it is vested under cl. 34 of the Letters Patent. 56 C. 979. The Court would not be competent on an application under S. 302 to determine any disputed question of title, the jurisdiction of the Court under that section being confined to the issue of directions to the executor or administrator relating to the management and administration of the estate. 56 C. 979. The power of giving directions for the summary disposal of certain disputes, which could be the subject of a suit is vested in the High Court, but the exercise of that power is discretionary. Where the matter is complicated and many questions of law and fact will arise in giving any directions to the executor as to the legacy in favour of a legatee, the proper remedy is to bring a suit and not the petition under S. 302. 35 P.L.R. 307= 1934. L. 120. It is doubtful whether the High Court is competent, in an application under S. 302 to determine any disputed question of title inasmuch as the jurisdiction of the Court under the section is confined merely to the issue of directions to the executor or administrator relating to the management and administration of the estate. But assuming that the High Cour is competent to decide even disputed questions of title, it would be exercising its discretion wisely if it refuses to give a direction in favour of a party who does not come before it with a clear title and where the title set up by him can be more appropriately decided in a civil suit. A question whether a deed of surrender executed by a Hindu widow, a *pardanashin* lady, is valid and should be given effect to, cannot be properly dealt with in a proceeding under S. 302; where the application is in effect a suit for recovery of an estate of which the applicant alleges to have lost possession, in other words, virtually a suit in ejectment, it cannot be decided under S. 302 of the Act. 1940 Pat. 194.

Manohar Lall, J.—In a case where the parties are at variance as poles as under the Court should not embark upon deciding questions of title and fact in such a complicated dispute which can only be settled to the satisfaction of all parties in a properly constituted title suit. 20 Pat. L. T. 871=1940 Pat. 194. Where the administrator of the estate is alive it is open to the heir of the legatee to apply for directions to the executor being issued by the Court in the matter of the legacy being ascertained. The applicant need not be driven to a fresh suit for that purpose. 37 C.W.N. 769=60 C. 1135=1933 C. 841. An application to recover an annuity payable under a will is maintainable under S. 302. The rule of limitation governing such an application is Art. 123 and not Art. 120 of the Limitation Act. 185 I.C. 626=1940 Pat. 254.

SEC. 303.—A person remains executor *de son tort* only so long as he intermeddles with the estate. 11 Bom.L.R. 1184. As to what acts will make a man such, *see* 3 M. 359; 32 B. 364; 17 C. 620; 7 M. 586; 28 M. 359; 10 C.W.N. 566. If he took goods of the deceased by mistake he does not become one. (1899) A.C. 62. As to his rights and liabilities, *see* 16 Eq., 534, 28 M. 351; 35 C. 276. Executor *de son tort*—Who is—Administration—Proceedings for account—Originating summons—Leave of Court—Necessity—Limitation. 1935 C. 511.

Illustrations.

(*i*) *A* uses or gives away or sells some of the goods of the deceased, or takes them to satisfy his own debt or legacy or receives payment of the debts of the deceased. He is an executor of his own wrong.

(*ii*) *A*, having been appointed agent by the deceased in his lifetime to collect his debts and sell his goods, continues to do so after he has become aware of his death. He is an executor of his own wrong in respect of acts done after he has become aware of the death of the deceased.

(*iii*) *A* sues as executor of the deceased, not being such. He is an executor of his own wrong.

304. When a person has so acted as to become an executor of his own wrong, he is answerable to the rightful executor or administrator, or to any creditor or legatee of the deceased, to the extent of the assets which may have come to his hands after deducting payments made to the rightful executor or administrator, and payments made in due course of administration.

Liability of executor of his own wrong.

CHAPTER VI.

OF THE POWERS OF AN EXECUTOR OR ADMINISTRATOR.

305. An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and may exercise the same power for the recovery of debts as the deceased had when living.

In respect of causes of action surviving deceased

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SECS. 303 AND 304.—Principle of these two sections is applicable also to cases not governed by this Act; 42 C. L. J. 280 (465). A legatee who is in possession of the property of the deceased or at any rate a major portion of it and is holding it adversely to the widow and the other legatee is liable to be sued as an executor *de son tort*. Ss. 303 and 304 now apply to Hindus as well. 114 I.C. 105=1929 S. 19.

SEC. 304.—Section is not exhaustive; 42 C.L.J. 280 (465). Where one of the heirs of the deceased entered into possession and collected the rents and profits and, when the person who obtained letters of administration sued him for an account, the former admittted having been executor *de son tort held*, that the suit was maintainable under S. 304; 30 Punj. L. R. 503=1929 L. 753. There is no rule of law that when an executor *de son tort* has paid his own debts, a creditor who has not been paid is entitled to claim out of the assets which were originally in the hands of executor *de son tort* a disproportionate payment towards his own debt. To the extent to which an executor *de son tort* pays lawful or valid debts of the deceased proportionately to the assets available, those payments are made "in due course of administration." To the extent to which he has paid certain creditors including himself more than the rateable share due to them, the payments having regard to the claims of other creditors who have not been paid at all, are clearly not made "in due course of administration", and he can be required to refund the excess. He cannot, however, be required to refund any amount which he has paid towards his own debt which is not in excess of the rateable amount to which he would be entitled. 1939 Mad. 662 =(1939) 1 M.L.J. 742. Mortgage suit for sale—Mortgagor dead at the time of suit—Letters of administration not taken out—Heirs intermeddling with the estate are liable as executors *de son tort*. 51 B. 771=29 Bom.L.R. 900.

SECS. 304 AND 212.—Relative scope of—S. 304 must qualify S. 212 of the Succession Act and the two provisions of law must be read together. S. 304 is a special provision allowing suits by a creditor against an executor of his own wrong to the extent of the assets which may have come to his hands. S. 212 hits suits to establish a right to a part of the property of intestate person. It begins. "No right to any part..... can be established." It does not say, "No remedy against any part of the property, etc." An unsecured creditor, of course, does not seek to establish any right to the property of the deceased but merely to have his debt paid out of it. The holder of mortgage security stands on the same footing. Therefore a suit by a mortgagee to recover his debt by sale of the mortgaged property in possession of the executor *de son tort* falls well within the purview of S. 304 and is not barred by S. 212. 1940 Rang.L.R. 485=1940 Rang. 178.

SEC. 305.—*See* the judgment in 3 M.H.C. R. 384 as to meaning of "cause of action."

306. All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault, as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory.

Demands and rights of action of or against deceased survive to and against executor or administrator.

Illustrations.

(*i*) *A* collision takes place on a railway in consequence of some neglect or default of an official, and a passenger is severely hurt, but not so as to cause death. He afterwards dies without having brought any action. The cause of action does not survive.

NOTES.

22 Q. B. D. 128; 15 I. A. 156; 18 A. 131. As to executor's right to maintain suit, *see* 37 B. 158; 38 I.A. 7; *See also* 4 Pat.L.J. 676.

SEC. 306.—The general rule is that a right to prosecute an action survives and it is for the person claiming exemption from this rule to show that his case falls within the exception. An action against directors for loss caused by breach of their obligation survives. 160 I.C. 759=1936 L. 271. As to what rights and liabilities survive, *see* 2 B. 67; 36 B. 144. Personal contracts involving personal skill, ability, etc., do not make the executor liable. 17 C. 115; 30 C. 265. The right of a person to sue to set aside a compromise decree passed during his minority on the ground of fraud survives to his executors under the first part of S. 306. 46 C.W.N. 345. The heirs of a deceased party are not included in the expression "executors and administrators" as used (in S. 306. Therefore, under that section a cause of action does not survive to or against his heirs as such. 13 R. 385. *See also* I.L.R. (1939) All. 6=1938 All. 1=1938 A. L. J. 1002. *Re.* action in tort, *see* 37 I.A. 7; 2 L. 27; 44 M. 417; 40 M.L.J. 351; 4 Pat.L.J. 676; 36 A. 217=23 I.C. 143; 52 I.C. 348; 47 B. 716. The expression "personal injuries . . . . death" must be read along with Acts XII and XIII of 1855. 44 M. 357. A suit in tort for personal injury does not survive after the death of the person injured. According to S. 306, an action for personal injury not causing the death of the party does not survive. The word "personal" in S. 306 means all pesonal injuries in the commonly accepted use of the word "personal," and cannot be restricted merely to physical injuries to the person, and on this view the fact that the plaintiff had incurred some pecuniary loss will not cause the right to sue to survive. 130 I.C. 86=1931 N. 9. It does not include injuries of all descriptions caused by tortious acts; but it is used in the sence of bodily injury. 1935 L. 705; The expression means bodily or physical injuries as opposed to injuries to property or reputation and are plainly *ejusdem generis* with an "assault" and not with "defamation". Accordingly, a cause of action which is in respect of injury to the credit and reputation of the plaintiffs caused by the wrongful acts of the deceased defendant does not fall within the exceptions set out in S. 306, but under that section survives against the executors and administrators of his estate. 13 R. 385. A remedy for a wrongful act, which is not a mere tort but a breach of a *quasi*-contract, done by a deceased person, can be pursued against his legal representatives where property belonging to another person has been appropriated by the deceased and added to his estate. Such an action is not one excluded by S. 306. (17 C.W.N. 5, Rel. on.) 17 Lah. 262=1936 L. 268. In a suit for malicious prosecution, the plaintiff's right which is a mere right to sue for damages for a personal injury changes its character once it is merged in a decree. It then becomes a matter of record which is a right of higher nature. The rights and liabilities arising under a decree awarding damages for malicious prosecution therefore continue when the plaintiff dies during the pendency of an appeal against the decree, so far as the appeal is concerned, but as regards the cross-objections they abate. 30 N.L.R. 186=1934 N. 119. Where at the time of the death of the defendant, there is an action pending against him for damages for his negligence which resulted in the death of the husband of the plaintiff and it is an action allowed by the Fatal Accidents Act (XIII of 1855), according to the words of S. 306, the action survives against his executors and administrators, and hence the action can be continued against the legal representatives of the defendant. 57 M. 951= 67 M.L.J. 146. *See also* 53 C. 987=100 I.C. 286=1927 C. 277. The phrase *"special proceeding"* in S. 306 is an extremely wide one and there is nothing in the section to suggest that it must be a proceeding anologous to a suit. In any way "special proceedings" is wide enough to cover summary proceeding under S. 235 of the Companies Act. LL.R. (1939) A. 6=1938 A. L. J. 1002=1939 A. 1. As to applicability of S. 306 to criminal proceedings, *see* 1941 Rang.L.R. 224.

(*ii*) *A* sues for divorce. *A* dies. The cause of action does not survive to his representative.

Power of executor or administrator to dispose of property.

307. (1) Subject to the provisions of sub-section (2), an executor or administrator has power to dispose of the property of the deceased, vested in him under section 211, either wholly or in part, in such manner as he may think fit.

NOTES.

Ss. 307 TO 315.—Scope and effect of.—S. 307 and the succeeding sections of the Succession Act make provisions for the powers of an administrator, and deal with the powers of the administrator as such, and in no way govern the powers of persons with life or absolute estates. It is not correct to hold that a widow having a life-estate under a will has no power to alienate the property but that a daughter having an absolute estate has such powers as given her by the Succession Act. The daughter as an administrator is limited to the powers granted to her under the Act, but her powers as having an absolute estate would be different. The same has to be said of a widow. 19 Pat. L. T. 234=1938 Pat. 301.

Sec. 307.—Sub-section (2) reproduces the provisions of S. 90 of the Act of 1881 which was inserted in that Act by S. 14 of Act VI of 1890. (*Statement of Objects and Reasons.*) "All the property of the deceased," meaning of. *See* 5 P. 80. As to the powers of the executor, *see* 91 I.C. 663=3 R. 443. S. 307 gives the executor powers at least as extensive as those of an executor in England before 1926. But the transferee who deals with a transferor, who happens to be an executor, not as executor but as owner is not entitled to the protection which the law affords to the transferees from executors acting *qua* executor. 60 C. 394=1933 C. 429. Duties and powers of executors. 1932 B. 191=34 Bom.L.R. 113; 1932 B. 604=34 Bom.L.R. 1365. It is obviously improper for an executor to utilise the general assets of the estate for the purposes of carrying on a business of the testator. Where a will left by a Mahomedan trader gives the executor power to pledge "the credit" of the business for the purpose of carrying it on, there is express limitation of the power to charge for the purposes of the business to the trade assets. The general assets of the estate cannot form part of the credit of the business unless there is an express power to charge them for the purposes of the business. I. L. R. (1940) Mad. 211=50 L.W. 550=1939 Mad. 922 =(1940) 1 M.L.J. 655 (2). There is no duty on the part of an intending tender to an executor to enquire into facts outside the will as they existed immediately prior to the testator's death. Much of the usefulness of the statutory power conferred by S. 307, on executors in India would be nullified, if such a duty of enquiry was imposed on parties dealing with executors. 67 I.A. 102=44 C.W.N. 289=1940 P.C. 30=(1940) 1 M.L.J. 795 (P.C.).

SCOPE OF SECTION.—He who relies upon a permission necessary under law for the validity of any transaction in his favour must discharge the burden strictly by proving that his case comes within the protection of law and complies with the requirements prescribed by law. An alienation with permission under the section does not operate as an absolute alienation, so as to exclude all enquiries into the question whether the permission was obtained through fraud or misrepresentation, although, no doubt, such enquiry would not be permissible in the absence of distinct allegations of fraud. 98 I.C. 6=1927 N. 57. The previous permission referred to in the section which enables an administrator to mortgage the estate implies that there should be a sanction by the Court of all the essential elements of the mortgage transaction; it follows that a mere bald sanction to mortgage is not sufficient. 98 I.C. 6=1927 N. 57. An alienation with permission of Court obtained by fraud or misrepresentation being voidable only, its avoidance could be done even by setting up a defence to a suit to enforce it, and not necessarily by bringing a suit to have it set aside. 1927 Nag. 57. Where a person who had obtained probate of a will applied for permission for sale of certain immovable property covered by the will and his application was not specifically headed as one under S. 307, the Court should not confine its attention to a consideration of the applicability of that section alone, but it should find out whether it had jurisdiction under any other provision of law to grant the permission sought for. 1935 A. 360.

Sec. 307 (1).—*Re*: executor's power to borrow money, *see* 31 C. 253; 11 Bom.L.R. 250; 7 C.W.N. 104; 18 Ch.D. 93. He can ask for construction of the will. 18 B. 1. As to his power to carry on trade or business, *see* 13 Ch.D. 48; 2 M.I.A. 487; 34 B. 209; 26 Ch. D. 248. As to power to mortgage, *see* 54 I.C. 321=6 O. L. J. 526. As to powers of compromise, *see* (1904) 1 Ch. 622. Discretion if properly and honestly exercised cannot be fettered by Court. 4 Bom.L.R. 199; 12 A. C. 722. After an executor has given his assent to the legacy, he is not competent to deal further with the property. 47 I.C. 289=28 C.L.J. 141. As to powers of administrator acting under the Hindu Wills Act, before the passing of the Probate and Administration Act, *see* 47 C.L.J. 569=1928 C. 412.

Illustrations.

(*i*) The deceased has made a specific bequest of part of his property. The executor, not having assented to the bequest, sells the subject of it. The sale is valid.

(*ii*) The executor in the exercise of his discretion mortgages a part of the immovable estate of the deceased. The mortgage is valid.

(2) If the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, the general power conferred by sub-section (1) shall be subject to the following restrictions and conditions, namely:—

(*i*) The power of an executor to dispose of immovable property so vested in him is subject to any restriction which may be imposed in this behalf by the will appointing him, unless probate has been granted to him and the Court which granted the probate permits him by an order in writing, notwithstanding the restriction, to dispose of any immovable property specified in the order in a manner permitted by the order.

(*ii*) An administrator may not, without the previous permission of the Court by which the letters of administration were granted,—

(*a*) mortgage, charge or transfer by sale, gift, exchange or otherwise any immovable property for the time being vested in him under section 211, or

(*b*) lease any such property for a term exceeding five years.

(*iii*) A disposal of property by an executor or administrator in contravention of clause (*i*) or clause (*ii*), as the case may be, is voidable at the instance of any other person interested in the property.

NOTES.

Sec. 307 (2).—The object of S. 307 (2) (*ii*) is to enable the District Judge as the Court of testamentary jurisdiction to see that the transfer applied for is necessary in the interest of the administration of the estate. If it is in the interests of the administrator that the property should be converted into money and invested in the Government promissory notes, it may institute a suit under S. 92 (C.P. Code) or take such other steps as they might be advised. But an application to the District Judge in his testamentary jurisdiction for permission to sell the property bequeathed is entirely a wrong method, as the judge has no jurisdiction to pass orders for sale. 53 A. 422 =1931 A. 212. Under S. 307, a Hindu executor is entitled to deal with the property of the testator in the same manner as the owner himself could have dealt with it, unless his powers are restricted or limited by the terms of the will. If his powers are so restricted, he cannot dispose of immovable property unless he obtains permission of the Court; the restriction upon the powers of an executor to deal with immovable property may be either express or implied. 39 Bom.L.R. 1094=1938 Bom. 71. Where there is a specific direction as regards the investment of the money in the testator's will, the administrators are not entitled to invest the money otherwise than as directed by the testator without the sanction of the Court. 1933 M. 628=65 M. L. J. 471. Power to dispose includes gift also, 3 C.L. J. 260 (266); this sub-section (2) does not afford protection to unwarrantable and fraudulent dispositions. 10 C.W.N. 673; 18 M.L.J. 367; 35 I.A. 109. *See also* 60 C. 394=1933 C. 471. His powers of mortgaging, *see* 16 Ch.D. 151; 1 A. 753; 3 C. W.N. 515; 26 I.A. 97. The mere fact that the testator intended that the property should not be divided till the minor sons of the testator attained the age of twenty-one years does not give rise to the inference that the testator intended to impose any restriction on the power of alienation of the executor. 33 Bom.L.R. 1056=1931 B. 533. Disposal in contravention of sub-section is not void but only voidable. 8 C.W.N. 54; 14 C.W.N. 451; 10 I.C. 209; 23 C.W.N. 401; 49 C. 626; 28 C.W.N. 444. Lease by administrator without permission of Court, whether void or voidable—Setting aside of lease. 83 I.C. 319=1924 C. 636. Title of purchase from legatee. *See* 29 C. W. N. 529=1925 C. 703. Under S. 307 an executor has, no doubt, the power to dispose of the property for all purposes binding on the estate and even where the executor deals with the property for purposes not strictly binding on the estate, the alienation cannot be questioned so as to defeat the *bona fide* alienee who has no notice of the fact that the executor was using his powers for purposes not binding upon the estate. But where the alienation is made for purposes not binding upon the estate and the alienee has notice of the fact, the principle does not apply. 128 I.C. 689=1930 M. 956=59 M. L.J. 596. Administration suit in Rangoon High Court—Preliminary decree passed—Administrator appointed by another Court can be permitted by it to sell property. 1925

(3) Before any probate or letters of administration is or are granted in such a case, there shall be endorsed thereon or annexed thereto a copy of sub-section (1) and clauses (*i*) and (*iii*) of sub-section (2) or of sub-section (1) and clauses (*ii*) and (*iii*) of sub-section (2), as the case may be.

(4) A probate or letters of administration shall not be rendered invalid by reason of the endorsement or annexure required by sub-section (3) not having been made thereon or attached thereto, nor shall the absence of such an endorsement or annexure authorise an executor or administrator to act otherwise than in accordance with the provisions of this section.

General powers of administration.

308. An executor or administrator may, in addition to, and not in derogation of, any other powers of expenditure lawfully exercisable by him, incur expenditure—

(*a*) on such acts as may be necessary for the proper care or management of any property belonging to any estate administered by him, and

(*b*) with the sanction of the High Court, on such religious, charitable and other objects, and on such improvements, as may be reasonable and proper in the case of such property.

NOTES.

P.C. 261=50 M.L.J. 644 (P.C.). Even after the estate has been completely administered, the Probate Court has jurisdiction to grant permission to the administratrix to sell the property. The order may be improper but it is not a nullity and the purchaser at the sale in pursuance of the order is not defeated unless fraud is proved. 36 C.W.N. 744=55 C.L.J. 535=1932 C. 828. Though according to the *Mahomedan Law*, a Mahomedan cannot dispose of by will more than one-third of the property after payment of his debts and funeral expenses and the remaining two-thirds must go to his heirs; unless the heirs consent to the provisions of the will, the matter is now governed by S. 211 of the Succession Act, under which the property of the testator vests in the executor and can be sold and conveyed by him under S. 307 if there is no restriction by the will on his power of alienation. 33 Bom.L.R. 1056=1931 B. 533. It is a well settled principle that where an unauthorised sale by an executor or administrator is set aside, a *bona fide* purchaser who is deprived of the property purchased by him is entitled in equity to be reimbursed for any expenditure incurred by him which has the effect of improving the permanent value of the property. If the transferee incurs expenditure out of caprice or mere whim or for luxurious purposes, the ultimate owner is not bound. But if the result of the improvement is to add to the paramount value of the property, then a right arises in equity for restitution or re-imbursement in favour of the transferee in respect of the expenditure incurred by him in that behalf. But the ultimate owner is entitled, in calculating the amount of compensation to be paid to the transferee, to credit against the latter the rents and profits of the property realised by the transferee. 39 Bom. L. R. 1094=1938 Bom. 71. Hindu widow, holding husband's estate as executrix under will—Powers of alienation—Mortgage for raising funds to advance to relation for latter's trade—Decree on and sale in execution—Validity as against ultimate owner of the property. 39 Bom.L.R. 1094=1938 Bom. 71.

Sec. 307 (3).—*See* 5 P. 80=7 Pat.L.T. 188; 51 B. 16=28 Bom.L.R. 1360. A mortgage executed by the administrator without leave of Court is not void but only voidable at the instance of any person interested in the property. The holder of two money decrees against the estate in the hands of the administrator is not entitled, however, to set aside the mortgage, except by making restitution to the mortgagees to the extent to which the mortgagees had *bona fide* advanced money to the mortgagor. If the party is unable to make such restitution, the only other course for the Court is to allow the mortgagee to enforce his mortgage against the estate. 9 R. 34=1931 R. 277.

Sec. 307 (4).—*See* 22 I.C. 925=7 L. B.R. 93; 99 I.C. 482=1927 B. 16.

Sec. 308.—*See* 36 A. 217=23 I.C. 143. Where an executrix executed promissory notes as such executrix and it appeared that the loans were taken for the benefit of the estate and the creditor impleaded all the parties and applied for a decree binding the estate: *Held*, that the only right which the creditor could claim was the right to be subrogated to the right of the executrix to be indemnified out of the estate to the necessary extent. It is consequently necessary that the right of the executrix to the indemnity is established before the creditor can be subrogated to such a right. 35 C.W.N. 850=53 C.L.J. 589.

309. An executor or administrator shall not be entitled to receive or retain any commission or agency charges at a higher rate than that for the time being fixed in respect of the Administrator-General by or under the Administrator General's Act, 1913.

Commission or agency charges.

310. If any executor or administrator purchases, either directly or indirectly, any part of the property of the deceased, the sale is voidable at the instance of any other person interested in the property sold.

Purchase by executor or administrator of deceased's property.

311. When there are several executors or administrators, the powers of all may, in the absence of any direction to the contrary, be exercised by any one of them who has proved the will or taken out administration.

Powers of several executors or administrators exercisable by one.

Illustrations.

(*i*) One of several executors has power to release a debt due to the deceased.

(*ii*) One has power to surrender a lease.

(*iii*) One has power to sell the property of the deceased whether movable or immovable.

(*iv*) One has power to assent to a legacy.

(*v*) One has power to endorse a promissory note payable to the deceased.

(*vi*) The will appoints *A*, *B*, *C*, and *D* to be executors, and directs that two of them shall be a quorum. No act can be done by a single executor.

312. Upon the death of one or more of several executors or administrators, in the absence of any direction to the contrary in the will or grant of letters of administration, all the powers of the office become vested in the survivors or survivor.

Survival of powers on death of one of several executors or administrators.

313. The administrator of effects unadministered has, with respect to such effects, the same powers as the original executor or administrator.

Powers of administrator of effects unadministered.

314. An administrator during minority has all the powers of an ordinary administrator.

Powers of administrator during minority.

315. When a grant of probate or letters of administration has been made to a married woman, she has all the powers of an ordinary executor or administrator.

Powers of married executrix or administratrix.

NOTES.

Sec. 310.—When executor has renounced or has not acted in any manner or proved the will, he can purchase if it is made in good faith. 9 A.C. 733; 13 C.W.N. 557. He can purchase interest of legatee. (1897) 2 A.C. 216; 9 C.L.J. 383; 1902 A.C. 197.

Sec. 311.—Section does not apply if will provides the action of majority to be binding. 29 I.C. 505; 34 M. 406. Release of debt by one of several executors is valid. 26 A. 318; 29 I.C. 139. As to who can bring suits, *see* 2 C.L.J. 484; 54 I.C. 755; 30 B. 173; 1 L.W. 1033. Grant of probate of letters is a condition precedent to one of them acting singly. 27 C. 683. The word "several" does not mean possessing powers to act severally. 42 M.L.J. 559. On this section, *see also* 39 M. 365=28 M. L.J. 285; 34 C.L.J. 557. The will of deceased declared that the trustees were to act by majority and also laid down that trustees were to act by resolution passed at the meeting of the Board or by circulation of resolutions signed by them. The majority of trustees were in favour of compromising a claim and opposed to the filing of a suit, and no fraud or collusion on the part of the majority was established. *Held*, that the minority of trustees or executors had no right against the wish of the majority to file a suit and involve the estate in a risk of heavy loss for costs. 1933 S. 232.

Sec. 312.—*See* 24 C. 589; 13 C.W.N. 554.

CHAPTER VII.

OF THE DUTIES OF AN EXECUTOR OR ADMINISTRATOR.

316. It is the duty of an executor to provide funds for the performance of the necessary funeral ceremonies of the deceased in a manner suitable to his condition, if he has left property sufficient for the purpose.

As to deceased's funeral.

317. (1) An executor or administrator shall, within six months from the grant of probate or letters of administration, or within such further time as the Court which granted the probate or letters may appoint, exhibit in that Court an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character; and shall in like manner, within one year from the grant or within such further time as the said Court may appoint, exhibit an account of the estate, showing the assets which have come to his hands and the manner in which they have been applied or disposed of.

Inventory and account.

(2) The High Court may prescribe the form in which an inventory or account under this section is to be exhibited.

(3) If an executor or administrator, on being required by the Court to exhibit an inventory or account under this section, intentionally omits to comply with the requisition, he shall be deemed to have committed an offence under section 176 of the Indian Penal Code.

NOTES.

Sec. 316.—As to the suitableness of expenditure, *see* 1 Knapp. 245. On this section, *see also* 48 I.C. 295=28 C.L.J. 271.

Sec. 317.—The appointment of an auditor for the checking and examination of the accounts and for local inquiries about income and expenditure is beyond the scope of the authority of Court under S. 317. The Court has, however, the right to see that the accounts and inventories filed *prima facie* comply with the requirements of the section. 7 O.W.N. 616=1930 O. 424. As to what an inventory should contain, *see* 43 I.A. 236=41 C. 556=26 M.L.J. 56 (P.C.). The term "assets" includes all the property of the deceased. 38 Ch. D. 609; 31 C. 572; 7 M.L.J. 123. The omission to exhibit accounts renders him liable to prosecution. 2 C.W.N. 597; 33 C.L.J. 252. As to duty to render accounts, *see also* 45 I. C. 333; 31 I.C. 499; 32 I.C. 554; 44 I.C. 58; 35 I.C. 950=9 Bur.L.T. 148. The practice of the Bombay High Court has been to require the executor taking out probate to file an inventory and accounts with the Testamentary Registrar and not with the Commissioner for taking accounts. Such inventory and accounts filed under S. 317 should, so far as the proceedings on the testamentary side are concerned, are final. The protection afforded to parties interested in the will is that if the inventory and the accounts are intentionally false in any particular, the executor or administrator makes himself liable to punishment under the Penal Code, the other remedy open to the interested parties is to file an action against the executor or administrator questioning the correctness of the accounts. 29 Bom.L.R. 683=1927 B. 438. There is no warrant for saying that in every case the account which the executor is to file under S. 317 must be the account *for one* year. Where the executor did not file accounts within one year from the grant of the probate and did not obtain from Court any extension of time, the probate Court has jurisdiction to direct him to file an account of the estate not for one year only but for the whole period extending from the date of the grant of the probate till the date when it is filed in Court. 43 C.W.N. 754. The Court which is seized of the proceedings under Ss. 301 and 302 in relation to administration has every right to take cognizance of and scrutinize the accounts filed under S. 317 *suo motu* and particularly so when it is moved by an application under Ss. 301 and 302 in which it is essentially necessary for it to do so in order to see whether the executor has so misconducted himself as to make it necessary for him to be removed. 41 P. L. R. 872=1939 Lah. 463. Under S. 317 an executor paid statutory duties to perform and until he has done that he would not divest himself of the character of executor. Burden of proving whether he had done everything necessary in the administration of the estate is on the executor and he has no excuse for neglecting the elementary precaution of

(4) The exhibition of an intentionally false inventory or account under this section shall be deemed to be an offence under section 193 of that Code.

Inventory to include property in any part of British India in certain cases.

318. In all cases where a grant has been made of probate or letters of administration intended to have effect throughout the whole of British India, the executor or administrator shall include in the inventory of the effects of the deceased all his movable and immovable property situate in British India, and the value of such property situate in each province shall be separately stated in such inventory, and the probate or letters of administration shall be chargeable with a fee corresponding to the entire amount or value of the property affected thereby wheresoever situate within British India.

As to property of, and debts owing to, deceased.

319. The executor or administrator shall collect, with reasonable diligence, the property of the deceased and the debts that were due to him at the time of his death.

Expenses to be paid before all debts.

320. Funeral expenses to a reasonable amount, according to the degree and quality of the deceased, and death-bed charges, including fees for medical attendance, and board and lodging for one month previous to his death, shall be paid before all debts.

Expenses to be paid next after such expenses.

321. The expenses of obtaining probate or letters of administration including the costs incurred for or in respect of any judicial proceedings that may be necessary for administering the estate, shall be paid next after the funeral expenses and death-bed charges.

Wages for certain services to be next paid, and then other debts.

322. Wages due for services rendered to the deceased within three months next preceding his death by any labourer, artisan or domestic servant shall next be paid, and then the other debts of the deceased according to their respective priorities (if any).

NOTES.

opening an account in the name of the minor for whose estate he is guardian, or even his own name as guardian, instead of merely paying the money into his pre-existing accounts and dealing with it as if it were his own. 41 P.L.R. 872=1939 Lah. 463.

Sec. 319.—As to meaning of property, *see* 25 C. 65; 1 M.H.C.R. 171. In appointing agents, he must exercise the care of a man of ordinary prudence. 29 B. 170. *See* for the meaning of "reasonable diligence". 6 H.L.C. 217. Where the executor himself is debtor, *see* 31 C. 519; 10 Bom.L.R. 346.

Sec. 321.—As to testamentary expenses, *see* 10 Ch.D. 468; 20 Eq. 271; (1900) 2 Ch. 182. A creditor who advances money to an executrix under a will for a necessary purpose, *viz.*, for obtaining probate of the will, is not entitled to any charge against the estate, but in a proper case the creditor is entitled to stand in the shoes of the executrix for the purpose of recovering the money from the estate, and to be given the benefit of the indemnity which the executrix has against the estate. I.L.R. (1940) Mad. 45=1939 Mad. 817=(1939) 2 M.L.J. 316. [On appeal from (1937) 1 M.L.J. 447=1937 Mad. 484=45 L.W. 375.] Costs are always in the discretion of Court. 13 C.W.N. 557; and the Judge may fix reasonable pleader's fee. 6 C.L.J. 453; 18 C.L.J. 643. The judicial proceedings refer to administration suits. 17 B. 637; 29 B. 96. The costs incurred by a party who, though necessary party, was not cited in prior probate proceedings, in connection with his application to recall the probate and have the will proved in solemn form can be treated as "expenses of obtaining probate" within the meaning of S. 321 and may be made a first charge on the estate. 37 C.W.N. 113.

Secs. 322 and 323: CROWN DEBTS—PRIORITY.—The Crown is not bound by Ss. 322 and 323 of the Act. It enjoys a prerogative right of preference in payment to all its subjects of debts of equal degree and except in so far as the Legislature has

323. Save as aforesaid, no creditor shall have a right of priority over another; but the executor or administrator shall pay all such debts as he knows of, including his own equally and rateably as far as the assets of the deceased will extend.

Save as aforesaid, all debts to be paid equally and rateably.

Application of movable property to payment of debts where domicile not in British India.

324. (1) If the domicile of the deceased was not in British India, the application of his movable property to the payment of his debts is to be regulated by the law of British India.

(2) No creditor who has received payment of a part of his debt by virtue of sub-section (1) shall be entitled to share in the proceeds of the immovable estate of the deceased unless he brings such payment into account for the benefit of the other creditors.

(3) This section shall not apply where the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person.

Illustration.

A dies, having his domicile in a country where instruments under seal have priority over instruments not under seal leaving movable property to the value of 5,000 rupees, and immovable property to the value of 10,000 rupees, debts on instruments under seal to the amount of 10,000 rupees, and debts on instruments not under seal to the same amount. The creditors holding instruments under seal receive half of their debts out of the proceeds of the movable estate. The proceeds of the immovable estate are to be applied in payment of the debts on instruments not under seal until one-half of such debts has been discharged. This will leave 5,000 rupees which are to be distributed rateably amongst all the creditors without distinction, in proportion to the amount which may remain due to them.

Debts to be paid before legacies.

325. Debts of every description must be paid before any legacy.

NOTES.

thought fit to interfere, this rule is of universal application. The Succession Act does not anywhere touch the prerogative of the Crown, and the scope of the Crown prerogative falls under the definition of "any other law for the time being in force" in S. 217 of the Act. Debts, not trading debts but taxes, due to the Crown fall outside the scope of the Act. An administrator should approach his task with the knowledge that the primary task is laid upon him of discharging the obligations of the deceased in respect to his payment of taxation before he turns to see who are the ordinary creditors and in what order they should be paid. 1939 Rang.L.R. 701=1940 Rang. 36.

Sec. 323.—S. 323 merely lays down a rule of procedure that must be followed by an executor or administrator. It is clearly not applicable when a creditor who has obtained a judgment and decree against the estate of a deceased person applies to execute the decree against the estate in the hands of the legal representative of the deceased. Rateable distribution under S. 323 is allowed only among creditors of whose existence the executor is aware; his liability to distribute the assets *pari passu* is limited to the debts which he knows of. 38 Bom.L.R. 864=1936 B. 423. Under S. 323 the executor is bound, when the assets are insufficient to pay the debts of the deceased in full, to pay all the creditors equally and rateably and to pay neither more nor less. He has no power to prefer one creditor to another or to mortgage the estate or any part of the assets for making any payment in excess of the rateable and equal payment due to the creditor. A mortgage executed by the executor to one creditor in preference to the rest, will not bind the latter. 37 Bom.L.R. 642=1935 B. 385. As to rights of judgment-creditor, *see* 12 B.L.R. 287; 22 M. 194; 29 B. 96; 11 Bom. L.R. 250; 18 I.C. 510=6 L.B.R. 158. He is personally liable if he makes improper distribution. 8 B.H.C.R. 20 (O.C.J.) The equal and rateable distribution is to be made out of assets and not income. 25 C. 54; 10 C. 929. Whether he can pay even barred debts, *see* 1 M. 267; 6 C. 340. As to his right of indemnity, *see* 37 I.A. 27; 7 Ch.D. 504. Crown debts, *e.g.*, Court-fees, have priority. 34 C. 1040; 42 C. 151. In the case of maladministration, creditor can sue for administration. 35 C. 1100.

Sec. 324.—As to scope of section, *see* 1 C. 412; 23 C. 506. As to the rule in England, *see* 28 Ch.D. 175.

Sec. 325: SCOPE OF SECTION.—S. 325 which lays down a rule of priority does not, however, stand in the way, in an admittedly solvent estate, of the executor paying a le-

Executor or administrator not bound to pay legacies without indemnity.

326. If the estate of the deceased is subject to any contingent liabilities, an executor or administrator is not bound to pay any legacy without a sufficient indemnity to meet the liabilities whenever they may become due.

Abatement of general legacies.

327. If the assets, after payment of debts, necessary expenses and specific legacies, are not sufficient to pay all the general legacies in full, the latter shall abate or be diminished in equal proportions, and, in the absence of any direction to the contrary in the will, the executor has no right to pay one legatee in preference to another, or to retain any money on account of a legacy to himself or to any person for whom he is a trustee.

Non-abatement of specific legacy when assets sufficient to pay debts.

328. Where there is a specific legacy, and the assets are sufficient for the payment of debts and necessary expenses, the thing specified must be delivered to the legatee without any abatement.

Right under demonstrative legacy when assets sufficient to pay debts and necessary expenses.

329. Where there is a demonstrative legacy, and the assets are sufficient for the payment of debts and necessary expenses, the legatee has a preferential claim for payment of his legacy out of the fund from which the legacy is directed to be paid until such fund is exhausted, and if, after the fund is exhausted, part of the legacy still remains unpaid, he is entitled to rank for the remainder against the general assets as for a legacy of the amount of such unpaid remainder.

Rateable abatement of specific legacies.

330. If the assets are not sufficient to answer the debts and the specific legacies, an abatement shall be made from the latter rateably in proportion to their respective amounts.

Illustration.

A has bequeathed to *B* a diamond ring valued at 500 rupees, and to *C* a horse, valued at 1,000 rupees. It is found necessary to sell all the effects of the testator; and his assets, after payment of debts, are only 1,000 rupees. Of this sum rupees 333-5-4 are to be paid to *B*, and rupees 666-10-8 to *C*.

NOTES.

gatee before he has discharged the debts of the deceased. The question has to be considered from the standpoint of the solvency or the insolvency of the estate. As a matter of general principle, it is the duty no doubt of an executor first to ascertain the position of the estate and unless it is clear to him the estate is solvent and there is no risk of creditors being prejudiced, not to pay the legacies before the debts have been discharged. The same principle applies where there has been an administration decree. This rule should not be departed from even were the legatees to furnish security before drawing the amount. 38 C.W.N. 457 =1934 C. 609. Under S. 325, the debts of the deceased take priority over all the legacies. The only persons that are protected are *bona fide* purchasers for value without notice. 42 P.L.R. 379. Debts even if they ripen into decrees do not create charge. 10 C.W.N. 38. If testator's intention as to legacies is not clear, he can ask for construction of the will. 12 B. 185; 18 B. 1.

Secs. 325 and 361.—Under S. 325 the payment of the debts of the deceased takes precedence over the legacies. A person who has obtained a decree against the deceased can, therefore, proceed against the properties disposed of by the will of the deceased irrespective of the fact whether the other assets of the deceased are or are not sufficient for the payment of the decretal amount. 42 P.L.R. 427=1940 Lah. 348.

Sec. 326.—He can ask for indemnity. 45 Ch. D. 320; 2 M.L.J. 182; 10 Eq. 477. Under S. 328 apart from deductions necessary for debts and expenses, a specific legacy must be delivered to the legatee without any abatement. If the will indicates that another legacy is to be paid out of the funds included in a specific legacy, this may create a charge thereon. It is dubious whether the mere absence of a general fund out of which a general legacy can be paid would be sufficient to warrant the inference that that legacy is to be paid out of the funds earmarked as a specific legacy to others. 52 L. W. 71=1940 Mad. 785= (1940) 1 M.L.J. 913.

Sec. 329.—*See* 29 M. 155; 19 C. 444; 9 B. 491; 13 Bom.L.R. 319=11 I.C. 350.

331. For the purpose of abatement, a legacy for life, a sum appropriated by the will to produce an annuity, and the value of an annuity when no sum has been appropriated to produce it, shall be treated as general legacies.

Legacies treated as general for purpose of abatement.

CHAPTER VIII.

OF ASSENT TO A LEGACY BY EXECUTOR OR ADMINISTRATOR.

332. The assent of the executor or administrator is necessary to complete a legatee's title to his legacy.

Assent necessary to complete legatee's title.

Illustrations.

(*i*) *A* by his will bequeaths to *B* his Government paper which is in deposit with the Imperial Bank of India. The Bank has no authority to deliver the securities, nor *B* a right to take possession of them, without the assent of the executor.

(*ii*) *A* by his will has bequeathed to *C* his house in Calcutta in the tenancy of *B*. *C* is not entitled to receive the rents without the assent of the executor or administrator.

333. (1) The assent of the executor or administrator to a specific bequest shall be sufficient to divest his interest as executor or administrator therein, and to transfer the subject of the bequest of the legatee, unless the nature or the circumstances of the property require that it shall be transferred in a particular way.

Effect of executor's assent to specific legacy.

NOTES.

Sec. 331.—*See* 11 I.C. 350=13 Bom.L.R. 319.

Sec. 332.—Strict interpretation of section would lead to the absurdity that suit by legatee is unsustainable unless executor gives consent. 37 B. 211. Executor is not bound to pay legacy before he has taken an account of assets and liabilities. 2 M.L.J. 182. In a suit for legacy assent of executor must appear in the face of the plaint. 17 C. 387. As to effect of assent, *see* 50 C. 171=36 C.L.J. 21=1923 C. 21. After assent, the executor cannot deal further with the property. *See* 47 I.C. 289=28 C.L.J. 141; 54 I.C. 321=6 O.L.J. 526. Although the assent of the executor is necessary to complete a legatee's title to his legacy, the executor is not entitled to withhold his consent arbitrarily, and if he does so, the legatee is competent to bring a suit to recover the property bequeathed to him by joining the executor with the transferee to whom the property may have been transferred by the executor. 1931 N. 69=134 I.C. 259. No doubt as a protection to the executor, the law ordains that every legatee, whether general or specific, and whether of chattels real or personal, must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect; before such assent, however, the legatee has an inchoate right to the legacy such as is transmissible to his own personal representatives in case of his death before it is paid or delivered. 114 I.C. 105=1929 S. 19. On this section, *see also* 146 I.C. 633=1933 L. 805, cited under S. 216, *supra*.

Secs. 332 and 335.—It is well settled that where a legatee under a will mortgages an immovable property devised to him by the testator before obtaining the assent of the executor to the legacy, the property can form the subject-matter of a valid mortgage, and the mortgagee is entitled to cut off the equity of redemption. Although the legatee has no property in the legacy by the devise until the assent of the executor is obtained, he has an interest in it which is capable of being transferred. Whether the executor has assented to the legacy must be decided on the facts and circumstances of each case. Where it is proved that all the outgoings as provided by the testator in his will have been paid off, and there is no proof that any of the specific legacies remains to be paid out, and the executor who is also a residuary legatee under the will mortgages in his individual capacity as a legatee the properties bequeathed to him applying the mortgage-money to his own use, it must be inferred that the executor has assented to the legacy in his own favour on the date of the mortgage by him. The fact that no probate was ever obtained by the executor is no ground for holding that the assent given by him to himself as a residuary legatee is no assent in the eye of the law. The estate of the testator vests in the executor, if he accepts office, from the date of the testator's death, and he has the powers of an executor even though probate has not been obtained; and he is therefore competent to assent to the legacy without obtaining probate. 18 Pat. 828=20 Pat.L.T. 757=1940 Pat. 40.

Sec. 333.—After assent, executor cannot deal with it. 28 C.L.J. 141. *See also* (1909) 2 Ch. 180. The executor and specific legatee died after fully administering the estate. His assent to his legacy being presumed, his heirs mortgaged the legacy to the plaintiff. Subsequently, in proceedings for revocation, a decree for costs was passed against the estate and, in execution of that decree, the right, title and interest of

(2) This assent may be verbal, and it may be either express or implied from the conduct of the executor or administrator.

Illustrations.

(*i*) A horse is bequeathed. The executor requests the legatee to dispose of it, or a third party proposes to purchase the horse from the executor, and he directs him to apply to the legatee. Assent to the legacy is implied.

(*ii*) The interest of a fund is directed by the will to be applied for the maintenance of the legatee during his minority. The executor commences so to apply it. This is an assent to the whole of the bequest.

(*iii*) A request is made of a fund to *A* and after him to *B*. The executor pays the interest of the fund to *A*. This is an implied assent to the bequest to *B*.

(*iv*) Executors die after paying all the debts of the testator, but before satisfaction of specific legacies. Assent to the legacies may be presumed.

(*v*) A person to whom a specific article has been bequeathed takes possession of it and retains it without any objection on the part of the executor. His assent may be presumed.

Conditional assent.

334. The assent of an executor or administrator to a legacy may be conditional, and if the condition is one which he has a right to enforce, and it is not performed, there is no assent.

Illustrations.

(*i*) *A* bequeaths to *B* his lands of Sultanpur, which at the date of the will, and at the death of *A*, were subject to a mortgage for 10,000 rupees. The executor assents to the bequest on condition that *B* shall within a limited time pay the amount due on the mortgage at the testator's death. The amount is not paid. There is no assent.

(*ii*) The executor assents to a bequest on condition that the legatee shall pay him a sum of money. The payment is not made. The assent is nevertheless valid.

Assent of executor to his own legacy.

335. (1) When the executor or administrator is a legatee, his assent to his own legacy is necessary to complete his title to it, in the same way as it is required when the bequest is to another person, and his assent may, in like manner, be expressed or implied.

(2) Assent shall be implied if in his manner of administering the property, he does any act which is referable to his character of legatee and is not referable to his character of executor or administrator.

Illustration.

An executor takes the rent of a house or the interest of Government securities bequeathed to him and applies it to his own use. This is assent.

Effect of executor's assent.

336. The assent of the executor or administrator to a legacy gives effect to it from the death of the testator.

Illustrations.

(*i*) A legatee sells his legacy before it is assented to by the executor. The executor's subsequent assent operates for the benefit of the purchaser and completes his title to the legacy.

(*ii*) *A* bequeaths 1,000 rupees to *B* with interest from his death. The executor does not assent to his legacy until the expiration of a year from *A's* death. *B* is entitled to interest from the death of *A*.

Executor when to deliver legacies.

337. An executor or administrator is not bound to pay or deliver any legacy until the expiration of one year from the testator's death.

NOTES.

the heirs of the specific legatee was purchased by the defendant. *Held*, that the title of the specific legatee became complete as soon as his assent could be implied; the defendant only purchased the equity of redemption; and that the plaintiff was entitled to a decree on his mortgagee, subject to his discharging the decree for costs in favour of the defendants. (32 I.A. 1, Dist.) 37 C.W.N. 113.

Sec. 333 (2): SPECIFIC LEGATEE—ASSENT TO LEGACY.—Where the executor was also a specific legatee, and, after having fully administered the estate, he died, he may be presumed to have assented to his legacy. 37 C.W.N. 113.

Sec. 337.—It is a rule of convenience. 10 Ves. 13; 7 Bom.L.R. 755; 12 C.W.N. 1065.

Illustration.

A by his will directs his legacies to be paid within six months after his death. The executor is not bound to pay them before the expiration of a year.

CHAPTER IX.

OF THE PAYMENT AND APPORTIONMENT OF ANNUITIES.

Commencement of annuity when no time fixed by will.

338. Where an annuity is given by a will, and no time is fixed for its commencement, it shall commence from the testator's death, and the first payment shall be made at the expiration of a year next after that event.

When annuity, to be paid quarterly or monthly, first falls due.

339. Where there is a direction that the annuity shall be paid quarterly or monthly, the first payment shall be due at the end of the first quarter or first month, as the case may be, after the testator's death; and shall, if the executor or administrator thinks fit, be paid when due, but the executor or administrator shall not be bound to pay it till the end of the year.

Dates of successive payments when first payment directed to be made within a given time or on day certain; death of annuitant before date of payment.

340. (1) Where there is a direction that the first payment of an annuity shall be made within one month or any other division of time from the death of the testator, or on a day certain, the successive payments are to be made on the anniversary of the earliest day on which the will authorizes the first payment to be made.

(2) If the annuitant dies in the interval between the times of payment, an apportioned share of the annuity shall be paid to his representative.

CHAPTER X.

OF THE INVESTMENT OF FUNDS TO PROVIDE FOR LEGACIES.

Investment of sum bequeathed where legacy, not specific, given for life.

341. Where a legacy, not being a specific legacy, is given for life, the sum bequeathed shall at the end of the year be invested in such securities as the High Court may, by any general rule, authorize or direct, and the proceeds thereof shall be paid to the legatee as the same shall accrue due.

Investment of general legacy, to be paid at future time; disposal of intermediate interest.

342. (1) Where a general legacy is given to be paid at a future time, the executor or administrator shall invest a sum sufficient to meet it in securities of the kind mentioned in section 341.

(2) The intermediate interest shall form part of the residue of the testator's estate.

Procedure when no fund charged with, or appropriated to, annuity.

343. Where an annuity is given and no fund is charged with its payment or appropriated by the will to answer it, a Government annuity of the specified amount shall be purchased, or, if no such annuity can be obtained, then a sum sufficient to produce the annuity shall be invested for that purpose in securities of the kind mentioned in section 341.

Transfer to residuary legatee of contingent bequest.

344. Where a bequest is contingent, the executor or administrator is not bound to invest the amount of the legacy, but may transfer the whole residue of the estate to the residuary legatee, if any, on his giving sufficient security for the payment of the legacy if it shall become due.

NOTES.

Sec. 340.—*See* 45 I.C. 664=7 L. W. 513.

Sec. 343.—As to the principle of section, *see* (1907) 2 Ch. 8; (1909) 1 Ch. 276.

Investment of residue bequeathed for life without direction to invest in particular securities.

345. (1) Where the testator has bequeathed the residue of his estate to a person for life without any direction to invest it in any particular securities, so much thereof as is not at the time of the testator's decease invested in securities of the kind mentioned in section 341 shall be converted into money and invested in such securities.

(2) This section shall not apply if the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person.

Investment of residue bequeathed for life with direction to invest in specified securities.

346. Where the testator has bequeathed the residue of his estate to a person for life with a direction that it shall be invested in certain specified securities, so much of the estate as is not at the time of his death invested in securities of the specified kind shall be converted into money and invested in such securities.

Time and manner of conversion and investment.

347. Such conversion and investment as are contemplated by Ss. 345 and 346 shall be made at such times and in such manner as the executor or administrator thinks fit, and, until such conversion and investment are completed, the person who would be for the time being entitled to the income of the fund when so invested shall receive interest at the rate of four per cent. per annum upon the market-value (to be computed as at the date of the testator's death) of such part of the fund as has not been so invested:

Provided that the rate of interest prior to completion of investment shall be six per cent. per annum when the testator was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person.

Procedure where minor entitled to immediate payment or possession of bequest, and no direction to pay to person on his behalf.

348. (1) Where, by the terms of a bequest, the legatee is entitled to the immediate payment or possession of the money or thing bequeathed, but is a minor, and there is no direction in the will to pay it to any person on his behalf, the executor or administrator shall pay or deliver the same into the Court of the District Judge, by whom or by whose District Delegate the probate was, or letters of administration with the will annexed were, granted, to the account of the legatee, unless the legatee is a ward of the Court of Wards.

(2) If the legatee is a ward of the Court of Wards, the legacy shall be paid to the Court of Wards to his account.

(3) Such payment into the Court of the District Judge, or to the Court of Wards, as the case may be, shall be a sufficient discharge for the money so paid.

(4) Money when paid in under this section shall be invested in the purchase of Government securities, which, with the interest thereon, shall be transferred or paid to the person entitled thereto, or otherwise applied for his benefit, as the Judge of the Court of Wards, as the case may be, may direct.

CHAPTER XI.

OF THE PRODUCE AND INTEREST OF LEGACIES.

Legatee's title to produce of specific legacy.

349. The legatee of a specific legacy is entitled to the clear produce thereof, if any, from the testator's death.

NOTES.

Sec. 345.—The section is based on *Howe* v. *Lord Dartmouth*, 7 Ves. 137 and is to benefit the legatees. (1907) 1 Ch. 22. Rule does not apply if there is an indication that it is to be enjoyed *in specie*. 8 Ch.D. 101; (1899) 2 Ch. 336; (1909) 2 Ch. 111.

Sec. 347.—Postponement of conversion is allowed for a reasonable time. (1914) 1 Ch. 192; 36 Ch.D. 42.

Sec. 349.—Interest runs from one year after testator's death or legacies to be

Exception.—A specific bequest, contingent in its terms, does not comprise the produce of the legacy between the death of the testator and the vesting of the legacy. The clear produce of it forms part of the residue of the testator's estate.

Illustrations.

(*i*) *A* bequeaths his flock of sheep to *B*. Between the death of *A* and delivery by his executor the sheep are shorn or some of the ewes produce lambs. The wool and lambs are the property of *B*.

(*ii*) *A* bequeaths his Government securities to *B*, but postpones the delivery of them till the death of *C*. The interest which falls due between the death of *A* and the death of *C* belongs to *B*, and must, unless he is a minor, be paid to him as it is received.

(*iii*) The testator bequeaths all his four per cent. Government promissory notes to *A* when he shall complete the age of 18. *A*, if he completes that age, is entitled to receive the notes, but the interest which accrues in respect of them between the testator's death and *A's* completing 18, form part of the residue.

Residuary legatee's title to produce of residuary fund.

350. The legatee under a general residuary bequest is entitled to the produce of the residuary fund from the testator's death.

Exception.—A general residuary bequest contingent in its terms does not comprise the income which may accrue upon the fund bequeathed between the death of the testator and the vesting of the legacy. Such income goes as undisposed of.

Illustrations.

(*i*) The testator bequeaths the residue of his property to *A*, a minor, to be paid to him when he shall complete the age of 18. The income from the testator's death belongs to *A*.

(*ii*) The testator bequeaths the residue of his property to *A* when he shall complete the age of 18. *A*, if he completes that age, is entitled to receive the residue. The income which has accrued in respect of it since the testator's death goes as undisposed of.

Interest when no time fixed for payment of general legacy.

351. Where no time has been fixed for the payment of a general legacy, interest begins to run from expiration of one year from the testator's death.

Exception.—(1) Where the legacy is bequeathed in satisfaction of a debt, interest runs from the death of the testator.

(2) Where the testator was a parent or a more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee, the legacy shall bear interest from the death of the testator.

(3) Where a sum is bequeathed to a minor with a direction to pay for his maintenance out of it, interest is payable from the death of the testator.

Interest when time fixed.

352. Where a time has been fixed for the payment of a general legacy, interest begins to run from the time so fixed. The interest up to such time forms part of the residue of the testator's estate.

Exception.—Where the testator was a parent or a more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee and the legatee is a minor, the legacy shall bear interest from the death of the testator, unless a specific sum is given by the will for maintenance or unless the will contains a direction to the contrary.

NOTES.

paid out of specific property where demonstrative legacy is partly general and partly specific. 1925 M. 164.

Sec. 351.—As to the reason of the rule, *see* 13 Ves. 313. As to Exception (1), *see* 3 Atk. 99; 25 M. 361. Interest is allowed on demonstrative legacies. 43 C. 201; 29 M. 155; 78 I.C. 274; 7 L.W. 513; 1925 M. 164. As to construction of will, *see* 46 M. 190=43 M.L.J. 486.

Cl. (2).—*See* 34 Bom.L.R. 1124=1932 B. 506.

Secs. 351-355: SCOPE OF.—*See* 54 I.C. 149.

Sec. 352.—*See* 34 I.C. 157=43 C. 201.

Rate of interest.

353. The rate of interest shall be four per cent. per annum in all cases except when the testator was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, in which case it shall be six per cent. per annum.

No interest on arrears of annuity within first year after testator's death.

354. No interest is payable on the arrears of an annuity within the first year from the death of the testator, although a period earlier than the expiration of that year may have been fixed by the will for making the first payment of the annuity.

Interest on sum to be invested to produce annuity.

355. Where a sum of money is directed to be invested to produce an annuity, interest is payable on it from the death of the testator.

CHAPTER XII.

OF THE REFUNDING OF LEGACIES.

Refund of legacy paid under Court's orders.

356. When an executor or administrator has paid a legacy under the order of a Court, he is entitled to call upon the legatee to refund in the event of the assets proving insufficient to pay all the legacies.

No refund if paid voluntarily.

357. When an executor or administrator has voluntarily paid a legacy, he cannot call upon a legatee to refund in the event of the assets proving insufficient to pay all the legacies.

Refund when legacy has become due on performance of condition within further time allowed under section 137.

358. When the time prescribed by the will for the performance of a condition has elapsed, without the condition having been performed, and the executor or administrator has thereupon, without fraud, distributed the assets; in such case, if further time has been allowed under section 137 for the performance of the condition, and the condition has been performed accordingly, the legacy cannot be claimed from the executor or administrator, but those to whom he has paid it are liable to refund the amount.

When each legtaee compellable to refund in proportion.

359. When the executor or administrator has paid away the assets in legacies, and he is afterwards obliged to discharge a debt of which he had no previous notice, he is entitled to call upon each legatee to refund in proportion.

Distribution of assets.

360. Where an executor or administrator has given such notices as the High Court may, by any general rule, prescribe or, if no such rule has been made, as the High Court would give in an administration suit, for creditors and others to send in to him their claims against the estate of the deceased, he shall, at the expiration of the time

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Sec. 353.—There is a statutory right to recover interest under S. 353, and the fact that a claimant waits for several years before he comes to Court is no ground for refusing interest, if his claim is within time. But the question of interest *pendente lite* and future interest is entirely within the discretion of the Court, and an appellate Court will not interfere with the discretion exercised by the trial Court, on the mere ground that that Court has not given any reason for the award of such interest or the refusal to award the same. 17 Pat. 350=19 Pat.L.T. 202=1938 Pat. 600.

Sec. 355.—*See* 16 C. 549; 24 C.W.N. 592.

SEC. 360, PROVISO.—The proviso to S. 360 does not create a right, but it saves one if the statute has given it. The expression "follow the assets" is one which is commonly used in cases of trust property. A creditor has got the right to follow the assets in the hands of legatees. But a creditor who has been vigilant and comes forward in an administration and takes dividends under the order of Court cannot be made to suffer in favour of another creditor who has not been vigilant and has not come forward in time to nistration issued to him. And before letters

therein named for sending in claims, be at liberty to distribute the assets, or any part thereof, in discharge of such lawful claims as he knows of, and shall not be liable for the assets so distributed to any person of whose claim he shall not have had notice at the time of such distribution:

Provided that nothing herein contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, in the hands of the persons who may have received the same respectively.

Creditor may call upon legatee to refund.

361. A creditor who has not received payment of his debt may call upon a legatee who has received payment of his legacy to refund, whether the assets of the testator's estate were or were not sufficient at the time of his death to pay both debts and legacies; and whether the payment of the legacy by the executor or administrator was voluntary or not.

When legatee, not satisfied or compelled to refund under section 361, cannot oblige one paid in full to refund.

362. If the assets were sufficient to satisfy all the legacies at the time of the testator's death, a legatee who has not received payment of his legacy, or who has been compelled to refund under section 361, cannot oblige one who has received payment in full to refund, whether the legacy were paid to him with or without suit, although the assets have subsequently become deficient by the wasting of the executor.

When unsatisfied legatee must first proceed against executor, if solvent.

363. If the assets were not sufficient to satisfy all the legacies at the time of the testator's death, a legatee who has not received payment of his legacy must, before he can call on a satisfied legatee to refund, first proceed against the executor or administrator if he is solvent; but if the executor or administrator is insolvent or not liable to pay, the unsatisfied legatee can oblige each satisfied legatee to refund in proportion.

NOTES.

claim his debt. A creditor who has not got his dividend has a remedy to come in under the administration decree itself and claim a rateable distribution at any time, unless he is guilty of gross delay or laches. But he has no right to keep silent and after the distribution of assets sue the other creditors for refund of part of the dividends received by them. The proviso to S. 360 only saves a right, which the legislature gives to the creditor when he finds that the estate has been distributed by the administrator properly and enables the creditor to proceed against the legatees. 38 Bom. L. R. 864= 1936 B. 423. When an executor of an estate, whose assets are not sufficient to pay all the creditors in full, executes a mortgage to one creditor, in discharge of the whole debt due to him, it is a breach of the duty cast on the executor by S. 323. It is open to the other creditors in such a case, even after the mortgagee creditor has obtained a decree on the mortgage, to sue for a declaration that the mortgage and the decree passed thereon are not binding on them and would give the mortgagee no priority over their claims against the estate, and to claim rateable distribution of the proceeds of the estate along with the creditor who has obtained the decree on his mortgage. The executor is not a necessary party to such an action. "Distribution" in S. 360 is not restricted to payment of legacies only; it covers also payments in discharge of the claims of creditors also. The proviso to S. 360 only restricts the effect of the notices to the liability of the executor alone; it leaves the other rights untouched. The right of a creditor to follow or claimant to follow the assets is not prejudiced. 37 Bom.L.R. 642=1935 B. 385.

SEC. 361.—If one executor, who is also a residuary legatee, sells or mortgages one item to a *bona fide* purchaser for value, it is valid against any unsatisfied creditor. (1896) 1 Ch. 968; 35 I.A. 130. But it is not valid against an unsatisfied legatee. 12 C.W. N. 993. A claim for refund by an unpaid creditor based upon S. 361 cannot be resisted by a specific legatee on the ground that there is property not specifically bequeathed available to satisfy the creditor's claim. The right of a creditor to follow the assets in the hands of a legatee is a right which has to be exercised by a separate suit. But where the executor is himself the specific legatee, the administration decree is in the nature of a decree passed against a legal representative of a deceased person within the meaning of S. 52 (1), C.P. Code, and it can be executed directly by attachment and sale of the property in the hands of the executor specific legatee. The creditor need not be relegated to separate suit. 42 C.W.N. 65.

Limit to refunding of one legatee to another.

364. The refunding of one legatee to another shall not exceed the sum by which the satisfied legacy ought to have been reduced if the estate had been properly administered.

Illustration.

A has bequeathed 240 rupees to *B*, 480 rupees to *C*, and 720 rupees to *D*. The assets are only 1,200 rupees and, if properly administered, would give 200 rupees to *B*, 400 rupees to *C*, and 600 rupees to *D*. *C* and *D* have been paid their legacies in full, leaving nothing to *B*. *B* can oblige *C* to refund 80 rupees, and *D* to refund 120 rupees.

Refunding to be without interest.

365. The refunding shall in all cases be without interest.

Residue after usual payments to be paid to residuary legatee.

366. The surplus or residue of the deceased's property, after payment of debts and legacies, shall be paid to the residuary legatee when any has been appointed by the will.

Transfer of assets from British India to executor or administrator in country of domicile for distribution.

367. Where a person not having his domicile in British India has died leaving assets both in British India, and in the country, in which he had his domicile at the time of his death, and there has been a grant of probate or letters of administration in British India with respect to the assets there and a grant of administration in the country of domicile with respect to the assets in that country, the executor or administrator, as the case may be, in British India, after having given such notices as are mentioned in section 360, and after having discharged, at the expiration of the time therein named, such lawful claims as he knows of, may, instead of himself distributing any surplus or residue of the deceased's property to persons residing out of British India who are entitled thereto, transfer, with the consent of the executor or administrator, as the case may be, in the country of domicile, the surplus or residue to him for distribution to those persons.

CHAPTER XIII.

OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR FOR DEVASTATION.

Liability of executor or administrator for devastation.

368. When an executor or administrator misapplies the estate of the deceased, or subjects it to loss or damage, he is liable to make good the loss or damage so occasioned.

NOTES.

SEC. 366.—Residuary legatee is not a proprietor until administration is complete. 36 C .28; 7 Bom. L. R. 755. As to his rights, *see* 1897 A.C. 11; 6 H.L. 217.

SEC. 368.—He is liable if he applies assets to staisfy his own debts to third parties: 7 M.L.J. 123; or sells collusively at an undervalue; 11 Beav. 265: or mixes with his own funds and employs them. 6 C. 70. The son of a deceased executor is not liable for claims against his father. 7 I.C. 805. There is liability for co-executor's devastavit. 10 C.L.J. 503; 29 B. 170; see as to estpopel. 12 Bom.L.R. 53. As to liability of succeeding executor and for a full exposition of the law on this section, *see* 32 I.C. 267=21 C.W.N. 280. Where pending actual proceedings in the suit for administration, the executors who were also residuary legatees were shown to have helped themselves to the money of the estate and they did not cease doing so even after exhibition had been made of the risky condition of the estate. *Held*, that the executors were guilty of a breach of trust and that the Court could in interlocutory proceedings order them to bring back into Court the money in their hands or order them to furnish security for that amount. 60 C. 30=1933 C. 268.

SEC. 369.—*See* 33 Ch.D. 552; 17 B. 637. No action lies for neglect to take out probate. (1898) 1 Ch. 162; 6 C. 687. As to whether legal advice protects him, *see* 29 Beav. 49; 12 Bom. L. R. 53. Court can remove executor for misconduct. 19 B. 83. On this section, *see also* 32 I.C. 267=21 C. W. N. 280; 33 I.C. 60. No one is bound to become an executor, but if he does accept the position, he must act with the ordinary care and the prudence of a diligent businessman. He must make the fund productive, and in order to do this, he must invest the money in some form of security. If he fails to do so, he will be liable for the consequent loss. 54 A. 605=1932 A. 384,

Illustrations.

(*i*) The executor pays out of the estate an unfounded claim. He is liable to make good the loss.

(*ii*) The deceased had a valuable lease renewable by notice which the executor neglects to give at the proper time. The executor is liable to make good the loss.

(*iii*) The deceased had a lease of less value than the rent payable for it, but terminable on notice at a particular time. The executor neglects to give the notice. He is liable to make good the loss.

Liability of executor or administrator for neglect to get in any part of property.

369. When an executor or administrator occasions a loss to the estate by neglecting to get in any part of the property of the deceased, he is liable to make good the amount.

Illustrations.

(*i*) The executor absolutely releases a debt due to the deceased from a solvent person or compounds with a debtor who is liable to pay in full. The executor is liable to make good the amount.

(*ii*) The executor neglects to sue for a debt till the debtor is able to plead that the claim is barred by limitation and the debt is thereby lost to the estate. The executor is liable to make good the amount.

PART X.

SUCCESSION CERTIFICATES.

Restriction on grant of certificates under this part.

370. (1) A succession certificate (hereinafter in this part referred to as a certificate) shall not be granted under this part with respect to any debt or security to which a right is required by section 212 or section 213 to be established by letters of administration or probate:

Provided that nothing contained in this section shall be deemed to prevent the grant of a certificate to any person claiming to be entitled to the effects of a deceased Indian Christian, or to any part thereof, with respect to any debt or security, by reason that a right thereto can be established by letters of administration under this Act.

NOTES.

SECS. 370 TO 390; Scope—Application for certificate--Inquiry into titles of deceased persons property.—An application for the grant of a succession certificate was made by *K* claiming to be entitled to a certain deposit through her deceased daughter. *B* and *D* filed objections to the grant of a certificate to *K* and claimed the deposit for themselves, *B* through another person deceased and *D* through the deceased husband of *K's* daughter. *Held*, that it was never contemplated by Part 10 that there could be an inquiry in one proceeding as to which of the three deceased persons was entitled to the deposit. 1935 P. 478.

Part X—Application for certificate under —Court-fee. *See* 1940 N.L.J. 495.

SEC. 370.—The effect of the section is apparently that succession certificate cannot be granted in a case where the law requires probate or letters of administration to establish a representative title before the Court. In cases where letters of administration or probate are not essential, *i.e.*, cases falling within the Act of 1881, a certificate can apparently be granted. The clause is based on this view of the law. (*Statement of Objects and Reasons.*)

SCOPE OF.—The Succession Certificate Act of 1925 read with the Amending Act of 1929 gives a High Court power to grant succession certificates. 58 C. 801=35 C.W.N. 122=1931 C. 580. The Succession Certificate Act is partially a fiscal enactment, and it is to be administered as far as possible leniently and must be construed in favour of the subject. 1934 A.L.J. 579=1934 A. 296. Succession certificate can be given only in respect of an estate of a deceased person which goes to the heirs of the deceased person; it cannot be given in respect of the property of the deceased person which is to go out to particular persons who are not necessarily the heirs of the deceased. 23 S.L.R. 359=1929 S. 177. It is sufficient if the heir of a Buddhist gets a succession certificate to sue as representative of a deceased mortgagee. No letters of administration are necessary. 1923 R. 74 (1). Where the deceased person has left a validly executed will, all the estate of that person vests in the executor of the will and no succession certificate can be granted in respect of any part of that estate. The grant of a succession certificate in such a case is barred by S. 370. 20 N.L.J. 272=1938 Nag. 47.

DEBT.—Money due under a policy of life assurance is not debt due to the deceased. 33 I.C. 157. Mortgage, if a security and not debt. 1938 Pat. 68=19 Pat.L.T. 558 cited under S. 38 *infra*.

(2) For the purposes of this part, "security" means—

(*a*) any promissory note, debenture, stock or other security of the Central Government or of a Provincial Government;

(*b*) any bond, debenture, or annuity charged by Act of Parliament on the revenues of India;

(*c*) any stock or debenture of, or share in, a company or other incorporated institution;

(*d*) any debenure or other security for money issued by, or on behalf of, a local authority;

(*e*) any other security which the [1][Provincial Government] may, by notification in the Official Gazette, declare to be a security for the purposes of this Part.

Court having jurisdiction to grant certificate.

371. The District Judge within whose jurisdiction the deceased ordinarily resided at the time of his death, or, if at that time he had no fixed place of residence, the District Judge, within whose jurisdiction any part of the property of the deceased may be found, may grant a certificate under this Part.

Application for certificate.

372. (1) Application for such a certificate shall be made to the District Judge by a petition signed and verified by or on behalf of the applicant in the manner prescribed by the Code of Civil Procedure, 1908, for the signing and verification of a plaint by or on behalf of a plaintiff, and setting forth the following particulars namely:—

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1 Substituted by the A.O., 1937.

NOTES.

AMENDMENT.—Court can amend succession certificate if all that is required is, in reality, merely a correction of a misdescription. 110 I.C. 479=1928 L. 892.

COSTS, TAXATION OF.—*See* 29 Bom. L. R. 1081.

SEC. 370 (2).—The amount in deposit in a Bank is not security within the meaning of this sub-section. 28 A. 477. Assignment of decree—Non-applicability of section. *See* 7 Pat.L.T. 27=1925 P. 591. *See also* 89 I. C. 811. Suit by surviving members of joint Hindu family on pro-note standing in the name of the managing member can be maintained without succession certificate. 22 L. W. 230=90 I.C. 743. *See also* 40 Bom. L. R. 94. So also by an assignee of a debt. 38 A. 474=34 I.C. 364.

SEC. 371.—By defining a "District Judge" as 'the Judge of the principal Civil Court of original jurisdiction," the Amending Act of 1929 now enables the High Court also to issue succession certificates. 9 R. 205. *See also* 58 C. 801. The District Court has no jurisdiction to grant a succession certificate where the deceased has not ordinarily resided within its jurisdiction, except when at the time of his death the deceased had no fixed place of residence, when the provision in the latter part of the section may be applied. 1923 R. 238. *See also* 33 I.C. 603.

GRANT OF SUCCESSION CERTIFICATE—JURISDICTION OF ALLAHABAD HIGH COURT—Although "District Judge" is defined as meaning the Judge of the principal Civil Court of original jurisdiction, an application for grant of a succession certificate cannot in all cases be made to a High Court. A High Court Judge cannot grant a succession certificate unless he is the Judge of a principal Civil Court of original jurisdiction. A Judge of the Allahabad High Court is not such a Judge, but a District Judge is. An application for grant of the succession certificate cannot therefore be made to that High Court. 1934 A.L.J. 800=1934 A. 958. The words *"has no fixed place of residence"* in S. 371 mean "has no fixed place of residence in British India." Accordingly, if the deceased has no fixed place of residence in British India but had some property in British India, then an application for succession certificate should be made to the District Judge where the property is situated. 37 P. L.R. 502=1935 L. 646.

SEC. 372: SCOPE OF ENQUIRY.—The enquiry in proceedings for grant of succession certificate are to be summary, and the Court, without determining questions of law or fact, which seem to it to be too intricate and difficult for determination, should grant the certificate to the person who appears to have *prima facie* the best title thereto. In such cases the Court has not to determine definitely and finally as to who has the best right to the estate. All that it is required to do is to hold a summary enquiry into the right to the certificate, with a view, on the one hand, to facilitate the collection of debts due to the deceased and prevent their being time-barred, owing (for instance) to dispute between the heirs *inter se* as to their preferen-

(*a*) the time of the death of the deceased;

(*b*) the ordinary residence of the deceased at the time of his death and, if such residence was not within the local limits of the jurisdiction of the Judge to whom the application is made, then the property of the deceased within those limits;

(*c*) the family or other near relatives of the deceased and their respective residences;

(*d*) the right in which the petitioner claims;

(*e*) the absence of any impediment under section 370 or under any other provision of this Act or any other enactment, to the granf of the certificate or to the validity thereof if it were granted; and

(*f*) the debts and securities in respect of which the certificate is applied for.

(2) If the petition contains any averment which the person verifying it knows or believes to be false, or does not believe to be true, that person shall be deemed to have committed an offence under section 198 of the Indian Penal Code.

[1][(3) Application for such a certificate may be made in respect of any debt or debts due to the deceased creditor or in respect of portions thereof.]

373. (1) If the District Judge is satisfied that there is ground for enter-

LEG. REF.

[1] Added by Act XIV of 1928.

NOTES.

tial right of succession, and, on the other hand, to afford protection to the debtors by appointing a representative of the deceased and authorizing him to give a valid discharge for the debt. The grant of a certificate to a person does not give him an absolute right to the debt nor does it bar a regular suit for adjustment of the claims of the heirs *inter se*. If necessary the Court can grant certificate conditional on the grantee furnishing security for indemnifying the person who may be ultimately held entitled to the whole or any part of the debt. 1937 L. 196=39 P. L.R. 448. As the certificate that is to be granted must be in accordance with the petition made under S. 372, it is only proper that the application for certificate should conform strictly to the requirements of that section. I.L.R. (1941) 2 Cal. 311=1941 Cal. 663. No doubt where an application is substantially defective no succession certificate should be granted on such an application. But where the petition is defective in that the name of the person whose estate is claimed is not correctly given but the petitioner takes up the correct position by putting in another petition before hearing, the petition should be allowed to be amended and not dismissed by reason of such defect. I. L. R. (1941)- 2 Cal. 311=1941 Cal. 663. Question whether debts specified are due to the deceased or not is irrelevant. 22 I.C. 424=26 M. L.J .365. A successor to the estate can apply for certificate: 2 A.L.J. 226; executor or administrator; 2 B.H.C.R. 375; 21 M.L. J. 116; assignee of debt; 42 A. 549; an assignee of the representative of the deceased; 40 I.C. 96=2 Pat.L.J. 350; 15 M. 419; devisee: 4 C. 645; purchaser at auction-sale; 18 B. 315. A minor cannot apply through next friend. Only his legal guardian can. 10 I.C. 98. *See* contra 16 I.C. 797. Form of certificate granted to guardian of minor *See* 35 Bom.L.R. 950=1933 B. 436. As to whether a guardian has to be appointed under the Guardians and Wards Act before he applies, *see* 28 B. 344; but *see* contra. 36 M. 214; 5 C.L.J. 517; 20 A. 351. The existence of a will is an impediment. 11 I.C. 261. Applications may be made in respect of any one debt or debts. 18 A. 45; 5 M.L.J. 36; 14 A.L.J. 654. As to portion of a debt, *see* 21 A.L.J. 122; 43 A. 341; 42 C. 10; 16 C.W. N. 231; 17 M.L.J. 37. In an application for a succession certificate, the Judge has jurisdiction to decide who are the persons to be granted the certificate, to whom the grant of probate or letters of administration should be issued. In determining that point, he may have to consider who are the persons best entilted to call for the administration and who are the heirs. 31 Bom.L.R. 1093=1929 B. 456. A debt is a sum of money which is now payable or will become payable in future by reason of a present obligation. A sum of money which is due on the life assurance policy of the husband and payable to him if he were living on the date of maturity of the policy or to his heirs on his death if earlier, is a debt as described above and the wife is entitled to the succession certificate on her husband's death with respect to that sum. 36 Cal. 936, Rel. on. 41 C.W.N. 985=1937 Cal. 423. The interest on a debt forms part of the debt and a person succeeding to the deceased is bound to take a succession certificate for the interest accrued after the death of the deceased. 1938 Pesh. 1. *See also* 1937 A.M.L.J. 40.

ISSUE OF NOTICE TO DEBTORS OF DECEASED—PRACTICE.—It is no doubt unusal to issue notices to the debtors of the deceased or implead them as parties to proceedings for grant of a succession certificate. But there is no legal bar to the Court doing so, and the decision in such proceedings cannot be set aside on this ground alone. 1937 L. 196 (2).

SEC. 373.—Mere lapse of time is no ground

taining the application, he shall fix a day for the hearing thereof and cause notice of the application and of the day fixed for the hearing—

Procedure on application.

NOTES.

to refuse application. 15 C. W. N. 1018. An order of rejection is appealable. 40 I.C. 124; 35 I.C. 718. In 3 C. 616, it was presumed there could be no debts when an application was put in more than 40 years after the death. The debtor himself can apply when he succeeds to creditor, *e.g.*, Karnavan. 5 M. 4. Creditors cannot oppose; 2 C. 308; 28 Bom. 119; (but *see* 34 M. 605); or strangers. 10 I.A. 80; or legatees; 17 M. 373. An enquiry is necessary though facts are admitted by both sides. 21 I.C. 867. The inquiry is to be summary and rapid; 8 I.C. 730; 33 I.C. 603; 2 L.L.J. 578; but the decision is to be based on legal and *prima facie* evidence. 27 A. 452; 31 C. 133; 1914 M.W.N. 24; 24 M.L.J. 198. The Court in granting a succession certificate has only to make a *prima facie* enquiry as to whether the debts mentioned in the schedule did or did not belong to the deceased. The petitioner certainly can demand an enquiry of that sort and the Court will be bound in that case to investigate the point and take such evidence as it considers proper for the purposes of satisfying itself as to whether the debts and securities *prima facie* belonged to the deceased or not. I. L. R. (1941) 2 Cal. 311= 1941 Cal. 663. District Judge cannot delegate his duty. 16 B. 277. The scope of inquiry relates only to the right to the certificate and not the existence of the debt. 17 M.L.J. 257; 24 M.L.J. 198=18 I.C. 733; 26 M.L.J. 365; 28 B. 111; 24 A.L.J. 122; 38 A. 438; 474; but see *contra* 25 C. 320. Money deposited in Court under S. 31 (2), Land Acquisition Act—Application for succession certificate regarding same—Maintainability—Rights of rival claimants whether can be gone into. 33 C. W. N. 1177=1929 Cal. 661 (F.B.). In proceedings under S. 373, it is not open to the Judge to allow the exact character of the applicant's claim to be litigated. He has only to see if there is ground for entertaining the application. He has to decide in a summary manner the question of right to certificate. (*Ibid.*) Intricate questions of law or fact need not be decided, but certificate can be granted to one who has *prima facie* the best title. 7 M. 452; 5 M.L.J. 36; 1917 Pat. H.C.C. 264; 25 B. 523; 1937 L. 136. *Joint certificate* should not ordinarily be granted, but if all parties consent, it can be done. 35 A. 470; 19 M. 497. 1937 Rang. 366=1937 Rang.L.R. 403. The Court should view with disfavour the granting of separate *certificates* to one man as regards property *A* and to another as regards proprerty *B*. Speaking generally, the main idea of probate or administration is that the grant shall be of all the property to one individual or two or more jointly. Where, however, a separate order was passed and the same was acted upon, *held*, that the appellate Court need not go to the length of setting aside that order at that stage. 31 Bom.L.R. 1093=1929 B. 456.

SEC. 373 AND 375.—The Court is entitled to grant a succession certificate to a minor on the application by that minor through his mother as next friend. The Court has however no power to require the next friend of the minor to execute a bond required by S. 375; 1936 R. 466.

Sec. 373 (3).—An order to the effect that succession certificate would be granted on the applicant furnishing security is not an order refusing or granting one and is therefore not appealable. 63 I.C. 846=4 N.L.J. 144.

PRODUCTION IN APPEAL. The suit was decreed by the Court of first instance. There was no plea in the Court of first instance that a succession certificate was not produced. The objection was taken for the first time in appeal; the appellate Court accepted the certificate and remanded tht case. *Held*, that the appellate Court was right in accepting the certificate. 1934 A.L.J. 579=1934 A. 296.

Section 373 (4) is confined to cases where there are more applicants than one for a certificate and it appears to the Judge that more than one of such applicants are interested in the estate of the deceased. The daughter and another claimant both applied for succession certificate. The other claimant was the wife of the deceased. *Held*, the daughter was not interested in the property at all, as the widow took the estate exclusively for the time being. The case therefore did not fall within sub-S. (4) of S. 373. 163 I.C. 861=1936 P. 430. No doubt the practice of granting joint certificate has been condemned as it is fraught with obvious inconveniences. But there may be cases when the several applicants have the same degree of interest in the estate of the deceased and there are no circumstances present which would enable the Judge to say that one is better qualified *than the other*. Under such circumstances the granting of joint certificate is not illegal, particularly if the persons to whom the certificate is granted agree to take it in that form. I.L.R. (1941) 2 Cal. 311=1941 Cal. 663.

SECS. 373 AND 375: Rival claimants to CERTIFICATE—PROCEDURE.—Where the trial Judge considering that the questions in the case were not too intricate or difficult for his determination in a summary proceeding has not demanded security, it is a matter within his discretion to require or not to require security and hence his discretion will not be interfered with. 1942 Pesh. 42. Where there are rival claimants to a certificate, the Judge should select or appoint the fittest person to whom a single certificate could be granted to collect the whole of the debt on behalf all the persons entitled to receive it and should take security from such person that he would give their dues to all the other persons entitled to share in the distribution of the money. 15 P.L.T. 266=1934 P. 304. The only right which entitles a person to a

(*a*) to be served on any person to whom, in the opinion of the Judge, special notice of the application should be given, and

(*b*) to be posted on some conspicuous part of the court-house and published in such other manner, if any, as the Judge, subject to any rules made by the High Court in this behalf, thinks fit,

and upon the day fixed, or as soon thereafter as may be practicable, shall proceed to decide in a summary manner the right to the certificate.

(2) When the Judge decides the right thereto to belong to the applicant, the Judge shall make an order for the grant of the certificate to him.

(3) If the Judge cannot decide the right to the certificate without determining questions of law or fact which seem to be too intricate and difficult for determination in a summary proceeding, he may nevertheless grant a certificate to the applicant if he appears to be the person having *prima facie* the best title thereto.

(4) When there are more applicants than one for a certificate, and it appears to the Judge that more than one of such applicants are interested in the estate of the deceased, the Judge may, in deciding to whom the certificate is to be granted, have regard to the extent of interest and the fitness in other respects of the applicants.

Contents of certificate.

374. When the District Judge grants a certificate, he shall therein specify the debts and securities set forth in the application for the certificate, and may thereby empower the person to whom the certificate is granted—

(*a*) to receive interest or dividends on, or

(*b*) to negotiate or transfer, or

(*c*) both to receive interest or dividends on, and to negotiate or transfer, the securities or any of them.

Requisition of security from grantee of certificate.

375. (1) The District Judge shall in any case in which he proposes to proceed under sub-section (3) or sub-section (4) of section 373, and may, in any other case, require, as a condition precedent to the granting of a certificate, that the person to whom he proposes to make the grant shall give to the Judge a bond with one or more surety or sureties, or other sufficient security, for rendering an account of debts and securities received by him and for indemnity of persons who may be entitled to the whole or any part of those debts and securities.

NOTES.

succession certificate is a beneficial interest in the debt or security to be collected. It is open to any one who has a beneficial interest to apply for it. 1936 R. 466.

SEC. 374.—Order authorising holder to collect interest only and not disturb capital is bad. 9 I.C. 571: 35 A. 249. The debt and certificate can be transferred and thereupon the transferee can sue without fresh certificate. 36 A. 21; 42 M. 130. But the right being personal cannot be inherited. 7 A.W.N. 248.

SEC. 375.—Object of the section is to appoint some one to give a legal discharge to debtor. 57 I.C. 641. Where there are more than one claimant and conflicting claims have not been determined, Court is bound to take security. 5 M.L.J. 36; 1912 M. W. N. 535. So also in the case of minor petitioner. 36 M. 214; 25 Bom. 523. The mere fact the petitioner is a widow is not sufficient to make her give security. 40 A. 81; 9 I. C. 571; 2 L.W. 352; 21 A.L.J. 452. Object of the security is not to protect contingent interest of reversioners. 5 Bom. L.R. 929; 21 A.L.J. 452=1923 A. 579. Certificate granted to widow to realise interest only is *ultra vires*. 19 I.C. 447=35 A. 249. Duty of Court to grant certificate to Hindu widow unconditionally. 152 I.C. 803=1935 P. 10. *See also* 1941 Cal. 663. Where the petitioners applying for certificate have only a limited interest, *e.g.*, that of a Hindu widow, in the estate, it is proper that in the interest of the reversioners, some security should be taken from them, although they are heirs to the deceased. I. L. R. (1941) 2 Cal. 311= 1941 Cal. 663. *See also* 1935 Pat. 10.

REVISION.—Where a Court rejects an application for assignment of a security bond given by a person to whom succession certificate has been granted, without perusing the security bond, it commits a material irregularity in the exercise of its jurisdiction and its order is liable to be set aside in revision by the High Court. 154 I.C. 816=1935 A.W. R. 361. Where no order actually granting or refusing a certificate has been made, no

(2) The Judge may, on application made by petition and on cause shown to his satisfaction, and upon such terms as to security, or providing that the money received be paid into Court, or otherwise, as he thinks fit, assign the bond or other security to some proper person, and that person shall thereupon be entitled to sue thereon in his own name as if it had been originally given to him instead of to the Judge of the Court, and to recover, as trustee for all persons interested, such amount as may be recoverable thereunder.

Extension of certificate.

376. (1) A District Judge may, on the application of the holder of a certificate under this Part, extend the certificate to any debt or security not originally specified therein, and every such extension shall have the same effect as if the debt or security to which the certificate is extended had been originally specified therein.

(2) Upon the extension of a certificate, powers with respect to the receiving of interest or dividends on, or the negotiation or transfer of, any security to which the certificate has been extended may be conferred, and a bond or further bond or other security for the purposes mentioned in section 375 may, be required, in the same manner as upon the original grant of a certificate.

Forms of certificate and extended certificate.

377. Certificates shall be granted and extensions of certificates shall be made, as nearly as circumstances admit, in the forms set forth in Schedule VIII.

Amendment of certificate in respect of powers as to securities.

378. Where a District Judge has not conferred on the holder of a certificate any power with respect to a security specified in the certificate, or has only empowered him to receive interest or dividends on, or to negotiate or transfer, the security, the Judge may, on application made by petition and on cause shown to his satisfaction, amend the certificate by conferring any of the powers mentioned in section 374 or by substituting any one for any other of those powers.

Mode of collecting court-fees on certificates.

379. (1) Every application for a certificate or for the extension of a certificate shall be accompanied by a deposit of a sum equal to the fee payable under the Court-Fees Act, 1870, in respect of the certificate or extension applied for.

(2) If the application is allowed, the sum deposited by the applicant shall be expended, under the direction of the Judge, in the purchase of the stamp to be used for denoting the fee payable as aforesaid.

(3) Any sum received under sub-section (1) and not expended under sub-section (2) shall be refunded to the person who deposited it.

NOTES.

appeal lies. 63 I.C. 846=4 N. L. J. 144. If there is no intricate question to be decided, an Appellate Court will not interfere in revision with the exercise of the discretion. 21 M. L. J. 824=11 I.C. 835. *Application in name of minor*, represented by next friend —Procedure to be followed. *See* 101 I.C. 166=1927 S. 187.

SEC. 376.—Only the holder can apply for extension and not assignee. 19 M.L.J. 456. An appeal lies from an order refusing to extend a certificate to some of the debts due to the deceased. 27 C.W.N. 947 (1)=1924 C. 208.

Sec. 379.—Full Court-fee must be paid even though debts for which the application is made are covered in a prior certificate granted: 36 I.C. 125=20 C.W.N. 1125; refund of deposit can be made if applicant is unable to give security or the necessity for a certificate has ceased: 21 M. 241. An applicant is entitled to a refund of the deposit made by him under S. 379 (1) with his application for a succession certificate when his application is dismissed for his failure to furnish the security subject to which his application was allowed and the deposit has not been expended under S. 379 (2). 43 P. L.R. 624=1941 Lah. 399. Where an applicant for a succession certificate was unable to furnish the security as directed by the order granting the application, and applied for a refund of the un-expended deposit made by him and it was refused, it was *held*, that S. 379 (3) has laid down that it should be refunded provided that it was received under Sub-S.(1) and not expended under sub-S. (2). It was further held that the lower Court had disregarded the clear provision of law contained in S. 379 (3) and that inter-

Local extent of certificate.

380. A certificate under this Part shall have effect throughout the whole of British India.

[1][This section shall apply in British India after the separation of Burma and Aden from India to certificates granted in Burma and Aden before the date of the separation, or after that date in proceedings which were pending at that date.]

Effect of certificate.

381. Subject to the provisions of this Part, the certificate of the District Judge shall, with respect to the debts and securities specified therein, be conclusive as against the persons owing such debts or liable on such securities, and shall, notwithstanding any contravention of section 370, or other defect, afford full indemnity to all such persons as regards all payments made, or dealings had in good faith in respect of such debts or securities to or with the person to whom the certificate was granted.

382. Where a certificate in the form, as nearly as circumstances admit, of

LEG. REF.

[1] Inserted by Government of India (Adaptation of Indian Laws) Order, 1937.

NOTES.

ference in revision was justified. 1939 N.L.J. 563=1940 Nag. 65=I.L.R. (1939) Nag. 576.

SEC. 381.—The provisions of Ss. 214 and 381 are not applicable when the property vests in the Crown by reason of escheat. 54 A. 226=1932 A. 220. Certificate conclusive as against debtor and gives full indemnity to him. 28 C.L.J. 299; 49 I.C. 958; 7 L.W. 330; 107 I.C. 431=1928 M. 213. If the debtor still refuses to make payment, he is liable for interest and costs of suit. 35 M. 162; (1911) 1 M.W.N. 276; 17 C.L.J. 87; 1928 M. 56. Even if another person turns out to be the real heir, it does not follow that the certificate is invalid. 107 I.C. 43=1928 M. 213. Judgment-debtor cannot resist execution by certificate-holder on the plea of the latter not being the decree-holder's heir. 1925 A. 66. It is evidence of heirship but does not determine questions of title. 30 M. 454; 33 A. 327. The holder collecting debts is a trustee for the persons entitled. 8 C. 868. Payment to the person really entitled before issue of certificate is good defence to subsequent suit by certificate-holder. 1926 M. 407=50 M.L.J. 432. The grant of a certificate does not confer any title upon the grantee as an heir to the deceased; it only invests him or her with the requisite authority to collect debts due to the deceased and allows the debtors to make payments without any risk. If a certificate is granted to two or more persons jointly, the authority vested in them can be exercised by all of them together and if one of them dies, the remaining certificate holders cannot exercise the powers which could only be exercised by them along with the deceased, and as there is no estate vested in any of the grantees no question of survivorship at all arises. That is, on the death of one of them the certificate becomes wholly inoperative. And before a fresh certificate is granted the existing certificate should be formally revoked. I.L.R. (1941) 2 Cal. 311=1941 Cal. 663. Where the plaintiff brought a suit for the recovery of a sum of money deposited by the deceased with the defendant, alleging a will on the strength of which he had obtained a certificate and the defendant set up an oral will in his favour, but it was found that both the wills were not proved: *Held*, as the defendant had failed to establish the oral will set up by him, he was bound to pay the amount to the holder of the certificate, whatever rights the heirs of the deceased might have against the plaintiff. All that the defendant was entitled to retain was the amount properly expended by him on the funeral expenses of the deceased. 131 I.C. 192=1931 S. 81. Section 381 has no application to the payment of provident fund money, as such payment is not in respect of a debt or security. 41 C.W.N. 524=65 C.L.J. 259=1937 Cal. 314. A certificate which is valid so long as it is not revoked is a conclusive proof of the right of the holder thereof to recover the amount in respect of which the same has been granted. Hence on a suit brought on the certificate, the question of the rights of other parties to recover the amount from the debtor, in other words, the question of title to the amount concerned, cannot be raised. That matter must be left to be determined in proper proceedings by those who claim a title to the amount in dispute. 148 I.C. 240 =1934 L. 79 (1).

Secs. 381, 370 and 214: MORTGAGE—IF A 'DEBT' OR A 'SECURITY'.—A mortgage is not a debt within the meaning of S. 381, and it is not a security within the provisions of s. 370. Where therefore a person brought a suit on a mortgage executed in favour of his deceased brother and produced a succession certificate. *Held*, that the production of a succession certificate was not a sufficient title on which to sue on the mortgage. *Held, further*, that as the succession certificate was a reason for coming to the conclusion that at least there was the possibility of the plaintiff establishing the fact of his heirship to his brother, the plaintiff should have been allowed to amend his plaint to prove that he was the heir of the brother. 19 Pat.L.T. 558=1938 Pat. 68.

Sec. 382.—As to procedure, *see* 16 M. 405; 17 M. 14; 19 B. 145.

Effect of certificate granted or extended by British representative in Foreign State.

Schedule VIII has been granted to a resident within a Foreign State by the British representative accredited to the State, or where a certificate so granted has been extended in such form by such representative, the certificate shall, when stamped in accordance with the provisions of the Court-Fees Act, 1870, with respect to certificates under this Part, have the same effect in British India as a certificate granted or extended under this part.

Revocation of certificate.

383. A certificate granted under this Part may be revoked for any of the following causes, namely:—

(*a*) that the proceedings to obtain the certificate were defective in substance;

(*b*) that the certificate was obtained fraudulently by the making of a false suggestion, or by the concealment from the Court of something material to the case;

(*c*) that the certificate was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant thereof, though such allegation was made in ignorance or inadvertently;

(*d*) that the certificate has become useless and inoperative through circumstances;

(*e*) that a decree or order made by a competent Court in a suit or other proceeding with respect to effects comprising debts or securities specified in the certificate renders it proper that the certificate should be revoked.

Appeal.

384. (1) Subject to the other provisions of this Part, an appeal shall lie to the High Court from an order of a District Judge granting, refusing or revoking a certificate under this Part, and the High Court may, if it thinks fit, by its order on the appeal, declare the person to whom the certificate should be granted and direct the District Judge, on application being made therefor, to grant it accordingly, in supersession of the certificate, if any, already granted.

(2) An appeal under sub-section (1) must be preferred within the time allowed for an appeal under the Code of Civil Procedure, 1908.

(3) Subject to the provisions of sub-section (1) and to the provisions as

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NOTES.

Sec. 383.—No suit lies to set aside grant of certificate. 5 M.H.C.R. 283; 16 M. 405; 36 A. 423=25 I.C. 320. If the order is in improper form (16 B. 404) or was obtained through mistake, fraud, etc. (19 B. 821; 42 A. 347; 78 I.C. 639); or there has been change of circumstances (15 M.L.J. 339; 42 A. 347); the grant can be revoked. Notice must be given to opposite party. 37 A. 380; 14 W.R. 464. Where a succession certificate is obtained on behalf of a minor by his next friend on allegations which were false as to the deceased's property and on allegations which in law would not justify the grant and by fraudulent concealment of material facts from Court, the grant can be revoked. 177 I.C. 416=1938 Sind 160. Partial revocation, *see* 42 A. 347=58 I.C. 380; the fact that there is remedy by way of appeal does not matter. 19 C.W.N. 551. As to who can apply for revocation, *see* 1938 A.L.J. 939=1938 All. 640.

Sec. 384.—An appeal lies from an order granting a certificate. 56 I.C. 181; for forum of appeal, *see* 12 I.C. 926; 21 I.C. 388; 2 L.L.J. 312. No appeal against an order extending a certificate: 25 M. 634; but if extension is refused it is appealable: 27 C.W.N. 947. *Re*: whether a grant conditional on furnishing security is appealable. *See* 26 A. 173; 2 A.L.J. 606; 36 B. 272; 63 I.C. 846; *contra* 20 M. 442; 5 A.L.J. 28; 1910 M.W.N. 265; 25 C. 320. An order granting or refusing certificate is appealable at the instance of a party aggrieved thereby, but an order requiring security to be furnished as a condition to the granting of the certificate is not appealable. 10 P. 835=1932 P. 117. An order requiring fresh security or relating to its sufficiency is not appealable: 5 M.L.J. 36; 20 C. 245 (641). Orders refusing to revoke a grant are appealable. 42 A. 347; 19 B. 821. While the order is one refusing to cancel a certificate, an appeal does not lie under S. 384. 130 I.C. 3=1931 A. 242 (2). *See also* 1933 L. 56. Right of appeal not barred by an application for revocation. 42 A. 512. There is no provision for second appeal: 17 M. 167; or memorandum of objections; 5 M.L.J. 36. As to interference in revision, *see* 19 B. 121; 23 C. 436; 21 M.L.J. 821. Receiver cannot be appointed. 46 A. 372=79 I.C. 363.

Secs. 384 (1) and 388 (2), Proviso:

to reference to and revision by the High Court and as to review of judgment of the Code of Civil Procedure, 1908, as applied by section 141 of that Code, an order of a District Judge under this Part shall be final.

Effect on certificate of previous certificate, probate or letters of administration.

385. Save as provided by this Act, a certificate granted thereunder in respect of any of the effects of a deceased person shall be invalid if there has been a previous grant of such a certificate or of probate or letters of administration in respect of the estate of the deceased person and if such previous grant is in force.

Validation of certain payments made in good faith to holder of invalid certificate.

386. Where a certificate under this Part has been superseded or is invalid by reason of the certificate having been revoked under section 383, or by reason of the grant of a certificate to a person named in an appellate order under section 384, or by reason of a certificate having been previously granted, or for any other cause, all payments made, or dealings had, as regards debts and securities specified in the superseded or invalid certificate, to or with the holder of that certificate in ignorance of its supersession or invalidity, shall be held good against claims under any other certificate.

Effect of decisions under this Act, and liability of holder of certificate thereunder.

387. No decision under this Part upon any question of right between any parties shall be held to bar the trial of the same question in any suit or in any other proceeding between the same parties, and nothing in this Part shall be construed to affect the liability of any person who may receive the whole or any part of any debt or security, or any interest or dividend on any security, to account therefor to the person lawfully entitled thereto.

Investiture of inferior Courts with jurisdiction of District Court for purposes of this Act.

388. (1) The Provincial Government may, by notification in the Official Gazette, invest any Court inferior in grade to a District Judge with power to exercise the functions of a District Judge under this Part.

(2) Any inferior Court so invested shall, within the local limits of its jurisdiction, have concurrent jurisdiction with the District Judge in the exercise of all the powers conferred by this Part upon the District Judge, and the provisions of this Part relating to the District Judge shall apply to such an inferior

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NOTES.

APPEAL—FORUM.—Where an order granting a succession certificate is passed by a Sub-Judge who had been invested with the powers of a District Judge and who also happened to be an Additional District Judge, and the order is signed by him as Sub-Judge I class, the appeal against such an order lies only to the District Court by virtue of the proviso to S. 388 (2) and not to the High Court under S. 384 (1) of the Act. 1940 N.L.J. 106=1940 Nag. 162.

Sec. 387.—Decision is not *res judicata*. 5 L. 105=92 I.C. 138; 88 I.C. 612=1925 Oudh 67.

Sec. 388.—The latest G.O. in Madras is G.O. 24, Law Department, dated 7—1—25, published at p. 60, *Fort St. George Gazette*, dated 13—1—25 empowering all District Munsiffs except those at the Headquarters of Districts to exercise the function of District Court within their jurisdiction. An appeal filed against the order cannot be transferred. 34 A. 148. It is a principle of construction of statutes that a Proviso merely detracts from the section to which it applies. Where therefore there has been no notification by the Local Government, Proviso to sub-S. (2) of S. 388 does not apply. 183 I.C. 657=1939 Pesh. 30. Only an order granting or refusing a certificate or revoking a certificate is made appealable by S. 384 or S. 388 and an order refusing to revoke a certificate has not been made appealable, specially when the application for revocation does not contain a prayer for a certificate. 1933 L. 56=34 P.L.R. 535. Where the Senior Sub-Judges have been invested with powers to hear applications under the Succession Act, but they have not been so empowered by a Notification of the Local Government published in the local Official Gazette as required by S. 388, the normal course of appeal laid down in the N.-W.F.P. Courts Regulation is therefore not affected, and the appeal from an order made by the Senior Sub-Judge on an application under the Succession Act lies to the Judicial Commissioner's Court and not to the Court of the District Judge. 177 I.C. 705=1938

Court as if it were a District Judge:

Provided that an appeal from any such order of an inferior Court as is mentioned in sub-section (1) of section 384 shall lie to the District Judge, and not to the High Court, and that the District Judge may, if he thinks fit, by his order on the appeal, make any such declaration and direction as that sub-section authorizes the High Court to make by its order on an appeal from an order of a District Judge.

(3) An order of a District Judge on an appeal from an order of an inferior Court under the last foregoing sub-section shall, subject to the provisions as to reference to and revision by the High Court and as to review of judgment of the Code of Civil Procedure, 1908, as applied by section 141 of that Code, be final.

(4) The District Judge may withdraw any proceedings under this Part from an inferior Court and may either himself dispose of them or transfer them to another such Court established within the local limits of the jurisdiction of the District Judge and having authority to dispose of the proceedings.

(5) A notification under sub-section (1) may specify any inferior Court specially or any class of such Courts in any local area.

(6) Any Civil Court which for any of the purposes of any enactment is subordinate to, or subject to the control of, a District Judge shall, for the purposes of this section, be deemed to be a Court inferior in grade to a District Judge.

389. (1) When a certificate under this Part has been superseded or is invalid from any of the causes mentioned in section 386, the holder thereof shall, on the requisition of the Court which granted it, deliver it up to that Court.

Surrender of superseded and invalid certificates.

(2) If he wilfully and without reasonable cause omits so to deliver it up, he shall be punishable with fine which may extend to one thousand rupees, or with imprisonment for a term which may extend to three months, or with both.

390. Notwithstanding anything in Bombay Regulation No. VIII of 1827, the provisions of section 370, sub-section (2), section 372, sub-section (1), clause (*f*), and sections 374, 375, 376, 377, 378, 379, 381, 383, 384, 387, 388 and 389 with respect to certificates under this Part and applications therefor, and of section 317 with respect to the exhibition of inventories and accounts by executors and administrators, shall so far as they can be made applicable, apply, respectively, to certificates granted under that Regulation, and applications made for certificates thereunder, after the 1st day of May, 1889, and to the exhibition of inventories and accounts by the holders of such certificates so granted.

Provisions with respect to certificates under Bombay Regulation VIII of 1827.

PART XI.

MISCELLANEOUS..

391. Nothing in Part VIII, Part IX or Part X shall—

Saving.

(*i*) validate any testamentary disposition which would otherwise have been invalid;

(*ii*) invalidate any such disposition which would otherwise have been valid:

(*iii*) deprive any person of any right of maintenance to which he would otherwise have been entitled; or

(*iv*) affect the Administrator-General's Act, 1913.

392. [*Repeals.*] *Repealed by the Repealing Act*, 1927 (*XII of* 1927).

NOTES.

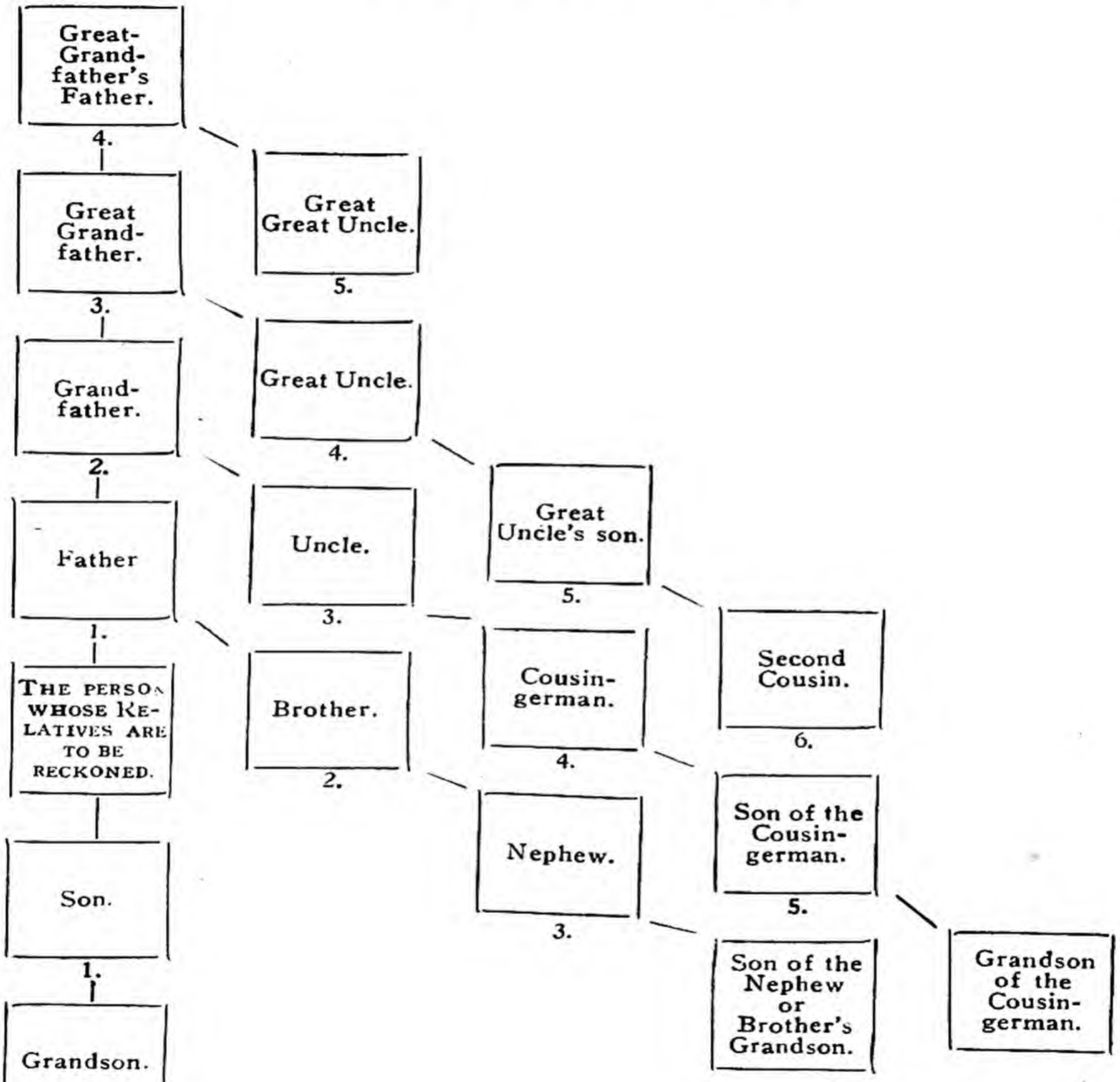
Pesh. 62. *See also* 1940 N.L.J. 106. Appeals do not lie to High Court. 2 L.L.J. 312; 34 A. 148; 41 I.C. 640.

Sec. 388 Proviso.—*See* 1940 N.L.J. 106 =1940 Nag. 162; 1939 Pesh. 30.

SCHEDULE I.

(See *section* 28.)

TABLE OF CONSANGUINITY.



[1][SCHEDULE II.

PART I.

(*See* section 54.)

(1) Father and mother.

(2) Brothers and sisters (other than uterine brothers and sisters) and lineal descendants of such of them as have predeceased the intestate.

(3) Paternal grandfather and paternal grandmother.

(4) Children of the paternal grandfather and the lineal descendants of such of them as have predeceased the intestate.

(5) Paternal grandfather's father and mother.

(6) Paternal grandfather's father's children and the lineal descendants of such of them as have predeceased the intestate.

PART II.

(*See* section 55.)

(1) Father and mother.

(2) Brothers and sisters (other than uterine brothers and sisters) and lineal descendants of such of them as shall have predeceased the intestate.

(3) Paternal grandfather and paternal grandmother.

(4) Children of the paternal grandfather and the lineal descendants of such of them as have predeceased the intestate.

(5) Paternal grandfather's father and mother

(6) Paternal grandfather's father's children and the lineal descendants of such of them as have predeceased the intestate.

(7) Uterine brothers and sisters and the lineal descendants of such of them as have predeceased the intestate.

(8) Maternal grandfather and maternal grandmother.

(9) Children of the maternal grandfather and the lineal descendants of such of them as have predeceased the intestate.

(10) Widows of brothers or half-brothers.

(11) Paternal grandfather's son's widow.

(12) Maternal grandfather's son's widow.

(13) Widowers of deceased lineal descendants of the intestate who have not married again before the death of the intestate.

(14) Maternal grandfather's father and mother.

(15) Children of the maternal grandfather's father and lineal descendants of such of them as have predeceased the intestate.

(16) Children of the paternal grandmother and the lineal descendants of such of them as have predeceased the intestate.

(17) Paternal grandmother's father and mother.

(18) Children of the paternal grandmother's father and the lineal descendants of such of them as have predeceased the intestate.]

SCHEDULE III.

(*See* section 57.)

PROVISIONS OF PART VI APPLICABLE TO CERTAIN WILLS AND CODICILS DESCRIBED IN SECTION 57.

Sections 59, 61, 62, 63, 64, 68, 70, 71, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 95, 96, 98, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113 114, 115, 116, [2][117], 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, and 190.

Restrictions and modifications in application of foregoing sections.

1. Nothing therein contained shall authorize a testator to bequeath property which he could not have alienated *inter vivos*, or to deprive any persons of any right of maintenance of which, but for the application of these sections, he could not deprive them by will.

2. Nothing therein contained shall authorize any Hindu, Buddhist, Sikh or Jaina, to create in property any interest which he could not have created before the first day of September, 1870.

3. Nothing therein contained shall affect any law of adoption or intestate succession.

4. In applying section 70 the words "than by marriage or" shall be omitted.

5. In applying any of the following sections, namely, sections seventy-five, seventy-six, one hundred and five, one hundred and nine, one hundred and eleven, one hundred and twelve, one hundred and thirteen, one hundred and fourteen, one hundred and fifteen,

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LEG. REF.

[1] Schedule II substituted by Act XVII of 1939.

[2] Inserted by Act XXI of 1929.

and one hundred and sixteen to such wills and codicils the words "son," "sons," "child," and "children" shall be deemed to include an adopted child; and the word "grandchildren" shall be deemed to include the children, whether adopted or natural-born, of a child whether adopted or natural-born; and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son.

SCHEDULE IV.

[*See* section 274 (2).]

FORM OF CERTIFICATE.

I, A.B., Registrar (*or* as the case may be) of the High Court of Judicature at (*or* as the case may be) hereby certify that on the day of , the High Court of Judicature at (*or* as the case may be) granted probate of the will (*or* letters of administration of the estate) of C.D., late of , deceased, to E.F. of and G.H. of , and that such probate (*or* letters) has (*or* have) effect over all the property of the deceased throughout the whole of British India.

SCHEDULE V.

[*See* section 284 (4).]

FORM OF CAVEAT.

Let nothing be done in the matter of the estate of A.B., late of , deceased, who died on the day of at , without notice to C.D. of .

SCHEDULE VI.

(*See* section 289.)

FORM OF PROBATE.

I, , Judge of the District of [*or* Delegate appointed for granting probate or letters of administration in (*here insert the limits of the Delegate's jurisdiction*], hereunto make known that on the day of in the year , the last will of , late of , a copy whereof is hereunto annexed, was proved and registered before me, and that administration of the property and credits of the said deceased, and in any way concerning his will was granted to , the executor in the said will named, he having undertaken to administer the same, and to make a full and true inventory of the said property and credits and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may, from time to time, appoint, and also to render to this Court a true account of the said property and credits within one year from the same date, or within such further time as the Court may, from time to time, appoint.

SCHEDULE VII.

(*See* section 290.)

FORM OF LETTERS OF ADMINISTRATION.

I, , Judge of the District of [*or* Delegate appointed for granting probate or letters of administration in (*here insert the limits of the Delegate's jurisdiction*)], hereby make known that on the day of letters of administration (with or without the will annexed as the case may be), of the property and credits of , late of , deceased, were granted to , the father (*or* as the case may be) of the deceased, he having undertaken to administer the same and to make a full and true inventory of the said property and credits and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may, from time to time, appoint, and also to render to this Court a true account of the said property and credits within one year from the same date, or within such further time as the Court may, from time to time, appoint.

SCHEDULE VIII.

(*See* section 377.)

FORMS OF CERTIFICATE AND EXTENDED CERTIFICATE.

IN THE COURT OF .

To *A. B.*

Whereas you applied on the day of for a certificate under Part X of the Indian Succession Act, 1925, in respect of the following debts and securities, namely:—

Debts.

Serial number.	Number of debtor.	Amount of debt, including interest, on date of application for certificate.	Description and date of instrument, if any, by which the debt is secured.

Securities.

Serial number.	DESCRIPTION.			Market-value of security on date of application for certificate.
	Distingulshing number or letter of security.	Name, title or class of security.	Amount or par value of security.	

This certificate is accordingly granted to you and empowers you to collect those debts [*and*] [*to receive*] [*interest*] [*dividends*] [*on*] [*to negotiate*] [*to transfer*] [*those securities*]

Dated this day of

District Judge.

in the Court of

On the application of *A. B.* made to me on the day of , I hereby extend this certificate to the following debts and securities, namely:—

Debts.

Serial number.	Name of debtor.	Amount of debt, including interest, on date of application for extension.	Description and date of instrument, if any, by which the debt is secured.

Securities.

This extension empowers *A. B.* to collect those debts [*and*] [*to receive*] [*interest*] [*dividends*] [*on*] [*to negotiate*] [*to transfer*] [*those securities*].

Dated this day of

District Judge.

Serial number.	DESCRIPTION.			Market-value of security on date of application for extension.
	Distinguishing number or letter of security.	Name, title or class of security.	Amount or par value of security.	

THE SUITS VALUATION ACT (VII OF 1887).[1]

Declared in force in British Baluchistan, Reg. 2 of 1913, S. 3; in Upper Burma (except the Shan States), Act XII of 1898, S. 4.

Year.	No.	Short title.	Amendment.
1887	VII	The Suits Valuation Act.	Repealed in part, XII of 1891. Amended XXXVIII of 1920. Government of India (Adaptation of Indian Laws) Order, 1937.

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11. Procedure where objection is taken on appeal or revision that a suit or appeal was not properly valued for jurisdictional purposes.
12. Proceedings pending at commencement of Part I or Part II.

[11*th February*, 1887.

An Act to prescribe the mode of valuing certain suits for the purpose of determining the jurisdiction of Courts with respect thereto.

WHEREAS it is expedient to prescribe the mode of valuing certain suits for the purpose of determining the jurisdiction of Courts with respect thereto; It is hereby enacted as follows:—

Title.

1. This Act may be called THE SUITS VALUATION ACT, 1887.

PART I.

SUITS RELATING TO LAND.

Extent and commencement of Part I.

2. This Part shall extend to such local areas, and come into force therein on such dates, as the [2][Provincial Government] by notification in the Official Gazette, directs.

LEG. REF.

[1] For statement of Objects and Reasons, see *Gazette of India*, 1886, Pt. V. p. 791; for Report of the Select Committee, see *ibid.*, 1887, Pt. IV, p. 18 and for Proceedings in Council, see *ibid.*, 1886, Supplement, pp. 131 and 1155 and *ibid.*, 1887, Pt. VI, pp. 16 and 21.

[2] Substituted for "Governor-General in Council" by A.O., 1937.

NOTES.

Sec. 1: APPLICABILITY TO—SONTHAL PARGANAS.—It is doubtful if the Act applies to the Sonthal Parganas but the spirit of the Act should nevertheless be applied and the jurisdiction should follow the valuation on which the court-fees are paid. 13 P. 329 =1934 P. 184 (S.B.). *Prima facie* the valuation by plaintiff determines jurisdiction and that continues whatever the event unless a different principle comes into operation. 51 C. 137; 46 A. 250. Plaintiff not entitled to put a higher valuation for purpose of jurisdiction and a lower valuation for purpose of court-fees. 44 B. 331.

JURISDICTIONAL VALUE—PRINCIPLES APPLICABLE.—(1) Where the valuation of a suit for purpose of jurisdiction is contested the value must be determined by the Court; and

3. (1) The Provincial Government may, [1][*] make rules for determining the value of land for purposes of jurisdiction in the suits mentioned in the Court-Fees Act, 1870, section 7, paragraphs v and vi, and paragraph x, clause (*d*).

Power for Provincial Government to make rules determining value of land for jurisdictional purposes.

(2) The rules may determine the value of any class of land, or of any interest in land, in the whole or any part of a local area and may prescribe different values for different places within the same local area.

4. Where a suit mentioned in the Court-Fees Act, 1870, section 7, paragraph iv, or Schedule II, article 17, relates to land or an interest in land of which the value has been determined by rules under the last foregoing section, the amount at which for purposes of jurisdiction the relief sought in the suit is valued shall not exceed the value of the land or interest as determined by those rules.

Valuation of relief in certain suits relating to land not to exceed the value of the land.

LEG. REF.

[1] Words "subject to the control of the Governor-General in Council" by A. O., 1937.

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(2) where the valuation can be ascertained correctly the plaintiff cannot be allowed to put an arbitrary value upon his claim nor can he be allowed to overvalue or undervalue his claim with a view to choose his forum. 1932 A. L. J. 416=1932 A. 413. *See also* 1937 Cal. 643. This Act and the Court-Fees Act are purely fiscal enactments and they have no bearing on the question as to which is the proper Court for the institution of the suit having regard to the value of the property. 1932 A.L.J. 416=1922 A. 413. An erroneous payment of court-fee cannot affect jurisdiction. 35 L. W. 64=1932 M. 217. In a suit for redemption of a mortgage and for recovery of surplus profits from the mortgagee the valuation for purposes of jurisdiction is determined by the principal amount of mortgage. 1931 M. 479=60 M.L.J. 698. *See also* 1933 P. 625. A proceeding under S. 28 may be treated as a suit, but it cannot be said to be the intention of the legislature to enable the plaintiffs in such a case to fix more or less their own value on such proceedings in order to enhance the costs incurred. 11 L. 621=1931 L. 71. *See also* 39 M. 602. A suit for dissolution of partnership and accounts has to be valued under this Act for purposes of jurisdiction on the same basis as for purposes of Court-fee. 152 I.C. 608=1935 L. 40. The pecuniary jurisdiction of the Civil Court is ordinarily speaking governed by the value stated by the plaintiff in his plaint and if a suit for partnership accounts, having regard to the valuation in the plaint, is within the jurisdiction, such jurisdiction is not ousted by the Court ultimately finding that a decree for a sum exceeding the limits of its pecuniary jurisdiction should be given to the plaintiff. 13 P. 344=1934 P. 204 (S.B.).

Secs. 3 and 4.—Power to make rules. 41 M. 721=34 M.L.J. 397. Valuation—Landlord and tenant—Suit by tenant. 54 P.R. 1914=25 I.C. 437. Proper valuation of a suit to enforce a right of pre-emption. 41 M. 721=34 M. L. J. 397. Subject to the maximum value which should be calculated having regard to Ss. 3 and 4, the market value should determine the jurisdiction in a suit for determination of title, and it is not open to the plaintiff to value his relief as he likes. (43 B. 507; 1932 A.L.J. 416 and 56 I.C. 762, Rel. on.) 145 I.C. 942=1933 A. 903. Suit to reduce rate of maintenance awarded by decree—Valuation. *See* 42 L.W. 42=69 M.L.J. 202. As to declaratory suit by reversioner in respect of alienation of ancestral land in Punjab, *see* 39 P. L.R. 193=1937 Lah. 677.

Sec. 4.—Under this section a plaintiff is not entitled to put a higher value on the suit than his interest in litigation: 39 M. 602. A Court cannot fix a valuation for the plaintiff, even if plaintiff's valuation is deliberately fictitious. It can compel plaintiff to put a reasonable valuation. 39 A. 723=42 I.C. 891. Under S. 4, the value for purposes of jurisdiction cannot exceed the value as arrived at by applying the rules under the Court-Fees Act. 1930 M.W.N. 509=1931 M. 375. *See also* 58 C. 281=34 C.W.N. 870=1930 C. 686. *Suit for declaration* for the purpose of jurisdiction is the value of the property for which the declaration is asked for. 5 Pat.L.J. 397=56 I.C. 762; 81 P.R. 1918=46 I.C. 490. S. 4 gives no room for the idea of a notional value. Where the sole question for decision is whether the title as trustee of certain villages vests in the public or in private persons, that is whether they are the subject of public trust or a private trust, the title to these villages is affected by the relief sought and therefore the valuation for the purposes of jurisdiction is the market-value of the property itself. 17 Luck. 116=1941 Oudh 405. The value of the suit for partition for purposes of jurisdiction is the value of the share claimed. 29 I.C. 766=68 P.W. R. 1915; 24 A. 381; 5 P.L.J. 540; 1938 Nag. 149; 72 I.C. 342; 33 B. 658; (market-value); 43 M. 396=38 M.L.J. 92

Making and enforcement of rules.

5. (1) The Provincial Government shall, before making rules under section 3, consult the High Court with respect thereto.

(2) A rule under that section shall not take effect till the expiration of one month after the rule has been published in the Official Gazette.

Repeal of section 14 of the Madras Civil Courts Act, 1873.

6. On and from the date on which rules under section 3 take effect in any part of the territories under the administration of the Governor of Fort St. George in Council to which the Madras Civil Courts Act, 1873, extends, section 14 of that Act shall be repealed as regards that part of those territories.

PART II.

OTHER SUITS.

Extent and commencement of Part II.

7. This Part extends to the whole of British India, and shall come into force on the first day of July, 1887.

Court-fee value and jurisdictional value to be the same in certain suits.

8. Where in suits other than those referred to in the Court-Fees Act, 1870, section 7, paragraphs v, vi and ix, and paragraph x, clause (*d*), Court-fees are payable *ad valorem* under the Court-Fees Act, 1870, the value as determinable for the computation of Court-fees and the value for purposes of jurisdiction shall be the same.

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(plaintiff's valuation). Suit for declaration that mortgage is unaffected by attachment. 54 I.C. 543=37 M.L.J. 611. Suit under O. 21, R. 62 to cancel attachment of judgment-debtor's property. 39 M. 602=29 M.L.J. 728. Plaintiff *sued in redemption* of a *kanom* with the added prayer for Rs. 1,100 by way of damages. *Held*, that the value of the suit for purpose of jurisdiction is the *kanom* amount alone and not that amount plus the damages claimed. 138 I.C. 136=1932 M. 217. Where an unsuccessful claimant desires not only that the *attachment should be removed*, but also that his *title should be declared* as against the judgment-debtors, in cases in which the value of the property attached is more than the value of the decree, the value of the suit which governs the jurisdiction of the Court to deal with it is the value of the property itself and not merely the value of the decree. 137 I.C. 54=1932 R. 20. *See also* 1935 O. W.N. 305=1935 O. 271; 68 M.L.J. 231. Where a claimant whose objection to an attachment in executing a decree against a judgment-debtor is dismissed, files a *declaratory suit* that the property attached is his own and could not be attached, the valuation of the suit, in cases where the value of the property is greater than the amount of the decree, is the amount of the decree. 55 A. 315=1933 A. 249 (F.B.). *See also* 1937 R. 101. In a suit by a Hindu reversioner for a *declaration that the alienations made by the widow of the last male-holder are not binding* on the reversionary right and for a permanent injunction restraining the alienees from cutting down certain fruit trees on the properties, the plaintiff need not value the suit according to the market-value of the properties, for purposes of jurisdiction. 1935 M. 262=68 M.L.J. 248. In a suit for a *declaration that an adoption is invalid*, where the properties comprised in the suit are of the market-value of more than Rs. 10,000, the jurisdictional value has to be determined with reference to the market-value of the properties and not their value as under S. 7 (*v*) of the Court-Fees Act. 1935 M. 279=68 M.L.J. 329.

Secs. 4 and 8.—In a suit for partition by persons in joint-possession of the land, the value for the purpose of jurisdiction is the actual market value of the property in suit, although court-fee is payable under Art. 17-B of Sch. II of the Court-Fees Act (as amended in Madras). Hence where the value of the plaintiffs' share will not be less than Rs. 10,000, the suit has to be filed in a Subordinate Judge's Court as a District Munsiff's Court has no jurisdiction to entertain it. 54 L.W. 428=1942 M. 103=(1941) 2 M.L.J. 567.

Sec. 8: SCOPE OF SECTION.—Under S. 8 the valuation for purposes of court-fees determines the valuation for purposes of jurisdiction also in a case falling under S. 7: 1922 L. 236; 46 A. 419=22 A.L.J. 349; 47 A. 501=23 A.L.J. 244. The meaning of S. 8 is that the value for purposes of jurisdiction shall follow the value to be given for the purposes of Court-fee. 58 C. 281=34 C.W.N. 870=1930 C. 686. *See also* 12 R. 335=1934 R. 268; 32 P.L.R. 193=133 I.C. 120=1931 L. 307; 1931 M. 375. Under S. 8 the proper method is to value for the purpose of court-fees first and

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then to take that value for the purpose of jurisdiction. I.L.R. (1938) 2 Cal. 411=42 C.W.N. 667. The value as placed by the plaintiff in the plaint must be looked at, even though the plaintiff claims unnecessary relief. 9 I.C. 574=8 A.L.J. 266. The value of a suit is its value at the date of its institution and not what the value will become on some subsequent date. Nor does the value of a suit depend upon the competency of a Court to pass a decree for a particular claim. The claim may be absolutely untenable, but if a plaintiff claims relief, he has to value it and that value will determine the forum for the institution of the suit or appeal. 16 P.L.T. 103=1935 P. 160. *See also* 13 P. 344=1934 P. 204. The plaintiff has the right to put his own valuation on his claim for the purpose of court-fees in a suit for a declaration and for an injunction by way of consequential relief; and the same is the value for the purpose of jurisdiction. 44 B. 331=56 I.C. 340. *See also* 39 Bom.L.R. 138=1937 B. 167; 48 A. 412=24 A.L.J. 478=1926 A. 423. The Court can question the value of the reliefs in a suit coming under S. 7 (*iv*) (*c*) of the Court-Fees Act, where the valuation appears on the face of the plaint to be too small, as it is its duty to see that the reliefs claimed are properly valued. 21 I.C. 404 =40 C. 615. Jurisdiction depends on nature of claim and not on defence or result of suit. 1925 N. 183. *See also* 41 C.W.N. 851=1937 Cal. 430. As to applicability of section to suits under S. 33, U.P. Agricultural Relief Act, *see* 1940 A.L.J. 689 (F.B.).

ILLUSTRATIVE CASES.—Administration suit —Valuation for Court-fees and jurisdiction. 12 R. 512. Suit under Ss. 44 and 84, Agra Tenancy Act, 1926—Jurisdictional value. 1934 A.L.J. 708=1934 A. 825. *See also* 21 C.W.N. 310=44 C. 890. Suit to reduce rate of maintenance awarded by decree—Valuation. *See* 42 L.W. 42=69 M. L. J. 202. *See also* 1935 O.W.N. 522=162 I.C. 750=1936 O. 317 (Suit for declaration that property is not subject to charge for maintenance). In a *suit for a declaratory decree and consequential relief*, the amount at which the plaintiff values the relief sought for purposes of Court-fees determines the jurisdiction of the suit, including that on appeal. 43 B. 376=46 I.A. 15. (On appeal from 23 I.C. 221=38 B. 272; *see also* 27 Bom. L.R. 247=87 I.C. 80; 33 C.W.N. 231; 1933 M. 721=65 M.L.J. 420; 57 C.L.J. 465.) A suit for declaration that the plaintiff is the sole shebait and also for injunction restraining the defendant from interfering with his possession falls within S. 8. 40 C. 245. *See also* 37 Bom. L. R. 138. In a *suit for a declaration that property is not liable to attachment and sale in execution of a decree*, where the value of the property is in excess of the amount claimed in execution of the decree, the determination of the value of the suit for purposes of jurisdiction must rest upon the construction to be placed on the nature of the suit and the character of the relief claimed, if the suit could not be treated as one under O. 21, R. 63, C. P. Code, no objection having been filed by the plaintiff under O. 21, R. 58 before he instituted the suit. Where it is clear from the allegations made in the plaint and the relief sought therein that the sole object of the suit is to get a declaration that the property is not liable to attachment and sale in execution of the defendant's decree, and the judgment-debtor is made a *pro forma* defendant and no relief is claimed against him, the case is, in substance, in no way different from a suit brought under O. 21, R. 63, and the value of the suit for purposes of jurisdiction is not the value of property but the decretal amount. 1935 O.W. N. 305=1935 O. 271. *See also* 68 M.L. J. 231; 42 P.L.R. 364. As to suit for declaration and injunction, *see* 140 I.C. 73=33 P.L.R. 458; 137 I.C. 240=33 P.L.R. 488. *See also* 1933 M. 721=65 M. L. J. 420 (Suit for declaration and injunction—Appeal against decree—Value for purpose of jurisdiction. *See also* 39 Bom.L.R. 138= 1937 Bom. 167. *Suit for cancelling deeds*—Under-valuation. *See* 142 I.C. 705=1933 R. 40. Suit for *declaration and possession* —*Ad valorem* Court-fee payable—Fact that declaration is unnecessary if material. 26 A.L.J. 316. Where the plaintiff valued the suit for a declaration and injunction at Rs. 2,100, so as to give jurisdiction to a Court of a higher grade: *Held* that the value for purposes of jurisdiction and Court-fee was the same, namely, Rs. 2,100. The only way of avoiding payment of the higher Court-fee is for the plaintiff to bring a suit with a lesser valuation for purposes of jurisdiction and Court-fee. 32 P.L.R. 193 =1931 L. 307. In a *suit for accounts* the determination of the forum of appeal from the preliminary decree depends upon the valuation of the suit for purposes of jurisdiction, and the fact that the amount ultimately to be found may or may not exceed the valuation cannot disturb the course of appeal. 31 P.L.R. 536=1930 L. 832. *See also* 41 C.W.N. 851=1937 Cal. 430; 38 Bom.L.R. 754; 34 Bom.L.R. 44=1932 B. 111. A Court in a suit for an account can lawfully pass a decree for a sum which exceeds the pecuniary limit of its jurisdiction. In such a suit it is the plaintiff's valuation in his plaint which fixes the jurisdiction of the Court, and not the amount which may be found and decreed by the Court. (2 R. 408, Overr.) 1937 Rang.L.R. 214=1937 R. 320 (F.B.). *See also* 41 C.W.N. 851= 1937 C. 430; 56 B. 23=34 Bom.L.R. 42= 137 I.C. 702=1932 B. 111. Suit for rendition of account, value of—Court-fees. 109 I.C. 895=1928 P. 535. *Suit for specific performance* of a contract of a lease should first be valued for Court-fees under S. 7 (*x*) (*c*) of the Court-Fees Act and the value should be adopted under S. 8 of this

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Act for jurisdiction. 25 C.W.N. 768=66 I.C. 268. Where a *suit is for the recovery of a specific sum* of money, the reduction of the amount as a result of the adjudication by the Court or by a compromise between the parties does not alter the original valuation for purposes of appeal. 140 I.C. 223. S. 8 does not cover *redemption suits*. 51 C. 737=28 C.W.N. 710; 22 L.W. 408=1925 M.W.N. 747; 39 M. 447=29 M.L.J. 142. *See also* 1933 P. 625 (suit for redemption and surplus profits). In a suit for redemption of a mortgage of immovable property the value for purposes of jurisdiction is the amount of money which is found to be due on the mortgage. The market-value of the property can on no account be ever the value for jurisdiction in a redemption suit. 193 I.C. 871=1941 Pesh. 28. S. 8 does not include cases coming under cl. (*ix*) of S. 7 of the Court-Fees Act. The valuation of such a suit for purposes of Court-fee and jurisdiction is the same. 63 C. 657; 1936 O.W.N. 522=1936 Oudh 317 (Suit for declaration that property is not subject to any charge). The valuation of a *suit for foreclosure* for purposes of jurisdiction depends not on the principal but on the total amount claimed. 21 I.C. 918=9 N.L.R. 161. Where the suit is to *recover certain mortgage amount* together with interest, *held*, that the valuation both for purposes of Court-fee and for the purpose of jurisdiction was the valuation given in the plaint. 52 C.L.J. 589=1931 C. 159. *See also* 1933 P. 625. Co-mortgagees—Suit by one for his share only—Valuation—Share of plaintiff or whole mortgage-debt. (1941) 2 M.L.J. 986. In a partition suit, jurisdiction is determined by the value of the whole property and not merely plaintiff's share in it. The fact that plaintiff's title is disputed does not make it any the less a partition suit. 29 C.W.N. 76=1925 C. 320=52 C. 128=85 I.C. 870. The value for purposes of jurisdiction of a *suit for partition* pure and simple, where the plaintiff is in joint possession, of his share and there is no dispute as to his title or share, is the value of the whole of the property sought to be partitioned. 4 P.L.T. 257. *See also* 10 O.W.N. 1196=1933 O. 547. In a suit for partition of lands of which the plaintiff is in joint possession, he is entitled to value the suit at his own estimate for purposes of jurisdiction. 11 M.L.T. 155=13 I.C. 803. The value of the share claimed and not the value of the entire property is the value for the purpose of jurisdiction in a suit for partition where the plaintiff claims partition and separate possession of his share. 177 I.C. 684=1938 Nag. 149. In an administration suit, plaintiff's share determines jurisdiction and valuation. Where the parties were Mahomedans and the suit was for a share of inheritance, *held*, that Court-fees are payable *ad valorem*, as the suit is not of any of the classes referred to in paragraph 7 of the Court-Fees Act. 7 R. 164=1929 R. 211. In a *suit for dissolution of partnership and for accounts*, where there is one decree divisible in certain fixed proportions among the plaintiff or the plaintiffs and the defendant or the defendants, the aggregate of the specific amounts will represent the value of the subject-matter of the suit appeal, even though the tentative value fixed by the plaintiff be less or more. 11 L. 359=1930 L. 725. In a suit for *winding up of a partnership* and for accounts, the value determinable for the computation of Court-fees is the value for the purposes of jurisdiction. 22 I.C. 71=15 Bom.L.R. 1123. In a suit for settlement of partnership accounts, where the plaintiff is allowed to value his claim tentatively for purposes of Court-fee, Court can pass a decree beyond its pecuniary jurisdiction. *See* 18 S.L.R. 286=89 I.C. 353. *See also* 13 P. 344=1934 P. 204 (S.B.); 152 I.C. 608=1935 L. 40. An *administration suit* by a creditor is in fact a suit for an account within S. 7 (*iv*) (*f*) of the Court-Fees Act and the plaintiff can place his own valuation on the relief claimed in such a case. 21 C.W.N. 310=44 C. 890. *See also* 38 Bom.L.R. 754 (Suit for declaring will null and void and for administration of estate). For the purpose of jurisdiction, the value of a suit for declaration that certain house is not liable to attachment and sale in execution of a decree against both the decree-holder and the judgment-debtor, is the value of the property whether the judgment-debtor resists the claim or not. 1 Lah. L. J. 87. *Appeal value of suit for possession* is that of subject-matter as determined by the Court and not that stated in plaint. 1925 L. 1 (F.B.). *See also* 1933 R. 410. In a suit for recovery of immovable property from a tenant, the valuation for Court-fees is the same as that for jurisdiction. 38 M. 795=26 M. L. J. 573. Where the daughter by a predeceased wife sued the widow of the last male holder for certain declarations in respect of alienations made by her, *held*, that the suit should be valued for purposes of jurisdiction according to the market-value of the properties and that any rational value set by the plaintiff on his interest could not be taken into account. 1932 M. 671. *Semble*: there is some force in the argument that in cases where the plaintiff claims a vested right in certain properties, the value of the vested right must be taken to determine the jurisdiction. 139 I.C. 471=1932 M. 671. In a suit for a declaration as to a right of fishery, for damages for trespass and for an injunction against further trespass, the value of the suit for purposes of jurisdiction and for purposes of Court-fee must be the same, as provided by S. 8. 1940 Pat. 247==5 Cut.L.T. 35. S. 8 does not apply to a suit for restitution of conjugal rights. In such a suit therefore the value as determinable for the computation of Court-fees and the value for the purposes of jurisdiction are

9. When the subject-matter of suits of any class, other than suits mentioned in the Court-Fees Act, 1870, section 7, paragraphs v and vi, and paragraph x, clause (*d*), is such that in the opinion of the High Court it does not admit of being satisfactorily valued, the High Court may, with the previous sanction of the Provincial Government, direct that suits of that class shall, for the purposes of the Court-Fees Act, 1870, and of

Determination of value of certain suits by High Court.

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not necessarily the same. In a suit for restitution of conjugal rights the plaintiff is entitled for the purposes of jurisdiction to put any value he likes on the relief sought and thus determine the Court in which the suit is to be instituted, provided that the valuation is made *bona fide* and not in order to effect an improper purpose. 1941 Rang. L.R. 495=1941 Rang. 187 (F.B.). Caste —Ex-communicated member—Suit for declaration of illegality and impropriety of resolution of ex-communication and of plaintiff's right to enjoy caste property in common—Prayer for permanent injunction restraining caste from obstructing enjoyment of caste properties — Valuation—Jurisdiction. *See* 41 Bom.L.R. 425=1939 Bom. 287.

VALUATION IN APPEAL.—The general rule is that the value fixed by the plaintiff in his plaint must, *prima facie,* be the basis for determination of the forum of the suit or appeal arising out of it, though the position is different, it is found that the plaintiff has deliberately under-valued or over-valued his claim, with the object of having the suit tried or the appeal heard by a Court which would not have jurisdiction to try the suit or hear the appeal in case the claim is properly valued. Where the trial Court rejected the plea of the defendant that the plaintiff had under-valued his suit and decreed the plaintiff's claim, and the defendant filed an appeal valuing it at the plaintiff's valuation of the suit, it could hardly lie in the mouth of the plaintiff-respondent to say that he deliberately under-valued his claim in the plaint, even though the defendant repeated in his memorandum of appeal that the suit had been under-valued in the plaint. 154 I.C. 125=1935 O.W.N. 168.

VALUATION IN PLAINT—IF PRECLUDES DIFFERENT VALUATION FOR APPEAL.—A party who has previously made a valuation of his suit or appeal for the purpose of Court-fee is not always precluded from adopting, for his proposed appeal a higher valuation as representing the actual or market-value of the claim made in the suit. But where a plaintiff, having discretion to value his claim in alternative ways, chooses to value his claim in the plaint in a particular way, he is not entitled to set up subsequently that his valuation given in the plaint is not real. 38 C. W.N. 751=59 C.L.J. 448=1934 C. 809. The general rule in appeal is, that when the appeal is against the whole decree, and if the suit has been decreed in full, the value of the appeal is the same as the value of the original plaint. Plaintiff valued her suit for purposes of court-fee and jurisdiction at certain amount to which the defendant did not object. In appealing against the decision, the defendant valued the appeal for purposes of jurisdiction at the same value as in the plaint, but for purposes of court-fee, he valued the subject-matter at a considerably low amount. *Held,* that the defendant had to put a stamp on the value put for jurisdiction. 1933 R. 410.

PRACTICE AND PROCEDURE.—Objections to jurisdiction on the ground of wrong valuation should be taken at the earliest possible moment. 43 B. 507=46 I.A. 24=36 M.L. J. 437 (P.C.). (On appeal from 16 I.C. 1005; 36 B. 628). A mere finding of the plaintiffs having put a higher value on the subject-matter of the suit does not *per se* justify an order for the returning of the plaint. Such an order will be justified only if it is also found that the valuation is not made *bona fide* and has been made in order to effect an improper purpose. 198 I. C. 673=1942 Rang. 10. *See also* 1941 Pat. 532. The High Court has power to fix a proper valuation even though the lower Court has properly valued. 39 M. 447=29 M.L.J. 142. Valuation of—Set-off for purposes of jurisdiction. 2 R. 462.

Sec. 9.—Where plaintiff sues for *restitution of conjugal rights and for an injunction* restraining two persons from preventing the alleged wife from living with the plaintiff, the relief for injunction is merely ancillary. 52 I.C. 101=20 P. L. R. 1919. The terms of S. 9 permit of the re-valuation of the suit of the class contained in Art. 17 (*v*), Sch. II, Court-Fees Act, and, there can be no question that the valuation of Rs. 10 fixed under that article is an arbitrary one and so it is *intra vires* for the High Court, with the previous sanction of the Local Government, to have laid down the rule contained in Notification No. 1641 of 1911. 123 I.C. 417=1930 N. 73. Per *Findlay, J. C.*, and *Kotval, A. J. C.* (*Khinkhede, A. J. C., contra*).—A suit by a reversioner for a *declaration that an alleged adoption is invalid* as being opposed to law affects title of the adopted son to the property, since if a declaration is granted his title as adopted son to the property will go and so the reversioner has to pay *ad valorem* court-fee. A *suit for the issue of a perpetual injunction* to the effect that the defendant be ordered to *demolish the wall built* by him near plaintiff's ventilator and that he be restrained from

this Act and any other enactment for the time being in force, be treated as if their subject-matter were of such value as the High Court thinks fit to specify in this behalf.[1]

10. [*Repealed of S.* 32, *Punjab Courts Act* (*XVIII of* 1894)]. *Rep. by the Amending Act* (*XII of* 1891).

PART III.

SUPPLEMENTAL PROVISIONS.

Procedure where objection is taken on appeal or revision that a suit or appeal was not properly valued for jurisdictional purposes.

11. (1) Notwithstanding anything in section 578[2] of the Code of Civil Procedure, an objection that by reason of the over-valuation or under-valuation of suit or appeal a Court of first instance or lower appellate Court which had not jurisdiction with respect to the suit or appeal exercised jurisdiction with respect thereto shall not be entertained by an appellate Court unless—

LEG. REF.

[1] For rules as to valuation of certain classes of suits under this section in (1) Ajmere-Merwara, *see* A.M.R. & O., Vol. I; (2) Central Provinces, *see* C.P.R. & O.; (3) Oudh, *see* U.P. List of R. & O., Vol. I; (4) Punjab, *see* Punj. List of R. & O.; (5) for rules in regard to the value of the subject-matter of certain suits and appeals instituted or presented in Madras on or after a specified date, *see* Mad. R. & O., Vol. I.

[2] *See* now S. 99 of the Code of Civil Procedure (Act V of 1908).

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building a second storey on his shop within five feet of the window of the plaintiff's virtually falls under R. 4 framed by the Lahore High Court under S. 9, Suits Valuation Act, and therefore must be valued at a sum exceeding Rs. 100 and not exceeding Rs. 500. A first appeal over such a suit lies only to the District Judge. 155 I. C. 153=1934 L. 796. R. 7 of the Rules under S. 9 of the Act refers to a claim not necessarily to keep one window open but so many windows as are affected by the alleged tortious acts of the defendants. 1938 A.M.L. J. 130.

Sec. 11: SCOPE AND APPLICATION OF SECTION.—56 I.C. 918. Where the valuation given in the plaint is never objected to either in the Court of first instance or in the Court of appeal, and where on the face of the valuation so given an appeal lies to the High Court, and such appeal is entertained and disposed of, it is not competent to the defendant to raise the objection on the scope of over-valuation by a subsequent application for review of judgment on the ground of over-valuation. 168 I.C. 399=1937 A. L.J. 474=1937 All. 628; 1940 O.W.N. 462 =1940 Oudh 164; 15 Luck. 619. S. 11 covers also an erroneous valuation under a mistake of law. 21 I.C. 918=9 N.L.R. 161; 6 L. 105=1925 L. 290 (F.B.). Where the defendant in a suit does not raise any objection to the valuation on the ground of gross under-valuation, though it is open to him, and fails to raise the objection in the appellate Court also which confirms the decree, it is not open to him in execution proceedings to raise that objection and plead that the decree under execution is a nullity on the ground that the same was without jurisdiction. A Court executing a decree may, no doubt, come to the conclusion that the decree is a nullity. But that can be only in cases where the want of jurisdiction of the Court which passed the decree is apparent on the face of the record. When that is not the case, the executing Court cannot hold the decree to be without jurisdiction and therefore a nullity on that ground. S. 11 is a complete answer to the plea of want of jurisdiction when the defendant had not thought fit to raise the objection either in the trial Court or in the appellate Court, but only seeks to raise it in execution proceedings. He cannot be permitted to plead that the decree originally obtained in the suit was a nullity on the ground of want of jurisdiction arising from under-valuation. 22 Pat.L.T. 855=1942 Pat. 152. The mere fact that a suit has been over-valued or under-valued cannot be allowed to affect the decree, unless the disposal of the suit on the merits has been prejudicially affected owing to the over-valuation or under-valuation. (46 M. 631 and 36 A. 58, Ref.) 55 A. 315=1933 A. 249 (F.B.). The language of S. 11 is comprehensive enough to include all cases of erroneous valuation and does not suggest any distinction between cases in which the valuation depends upon rules having the force of law and those in which the valuation is determined otherwise. 13 P. 290=150 I.C. 378=1934 P. 240. S. 11 is limited to cases where by reason of over-valuation or under-valuation of a suit or appeal in the Court of first instance or the lower appellate Court, that Court had no jurisdiction with respect to the suit or appeal but has exercised jurisdiction with respect thereto. It has

(*a*) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded, or in the lower appellate Court in the memorandum of appeal to that Court, or

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no application where there has been no under-valuation or over-valuation, but the nature of the suit was wrongly understood as when an unclassed suit was wrongly assumed to be a suit of small cause nature. 1941 Lah. 313=43 P.L.R. 432. Where on an appeal from a decree, the appellate Court finds that the trial Court had no jurisdiction to try the suit, the proper course is not to summarily dispose of the matter by setting aside the decree and remanding the suit for return of the plaint to the plaintiff for presentation to the proper Court. Even in cases where the point as to under-valuation is properly taken, the Court can deal with the appeal, provided S. 11 (2) of the Act is complied with. But it cannot act under S. 11 (2) if it is satisfied that the question of under-valuation has prejudicially affected the disposal of the suit on the merits. If the appellate Court does not address itself to this question, its decision setting aside the trial Court's decree and remanding the suit is wrong and must be set aside. The appellate Court must consider the provisions of S. 11 (2) and (3) of the Act and then proceed to dispose of the appeal. 194 I.C. 385=1941 P.W.N. 547=1941 Pat. 532. The general rule is that the value fixed by the plaintiff in his plaint must *prima facie* be the basis for determining the forum of the suit or appeal arising out of it. But the position is different if it is found that the plaintiff has deliberately under-valued or over-valued his claim. The position is also the same where the plaintiff has acted recklessly in fixing the valuation of the suit. 7 O.W.N. 1188=1931 O. 58. *See also* 154 I.C. 125; 38 C.W.N. 751=1934 C. 809. The plaintiff cannot fix an arbitrary valuation and make the suit cognizable by a Court of a particular grade. 29 I.C. 796. But *see* 10 L.W. 221=1919 M.W.N. 707 *contra*. Erroneous valuation caused by wrong application of the sections of the Court-Fees Act is included in the term "over-valuation" in S. 11. 62 I.C. 715. Where the defendant did not raise his objection to the pecuniary jurisdiction of the Court either in his written statement or at the time of the settlement of issues, and the trial Court was allowed to enter into matters of fact without any such question being raised, the Court is justified in refusing to entertain such a plea subsequently. 13 P. 329=1934 P. 184 (S.B.). Where a suit is under-valued and the suit is tried by a Court of lower jurisdiction and objection taken, the duty of the appellate Court is to see if the trial has prejudiced the defendant on the appeal. Duty of appellate Court pointed out. 116 I. C. 209. *See also* 55 A. 315=1933 A. 249 (F. B.); 12 R. 335=1934 R. 268. There is no prejudice within the meaning of S. 11, merely by reason of a trial in a Court not having large enough jurisdiction. 41 P.L.R. 386=1939 Lah. 451. The mere fact that an appeal had to be brought in a Subordinate Court instead of the High Court cannot be held to have prejudicially affected the disposal of the appeal on the merits within the terms of S. 11 of the Act. 1940 O.W.N. 462=1940 Oudh 164. Valuation reduced by plaintiff without objection by defendant—Appeal—Decree not a nullity. 4 Pat.L.T. 525=75 I.C. 305.

PRINCIPLES OF SECTION.—36 A. 58=22 I. C. 614=12 A.L.J. 21.

OBJECT OF SECTION.—10 L.W. 221=52 I. C. 992 (2). But *see* 29 I.C. 796, *contra*.

MEANING OF WORDS.—"Over-valuation" and "under-valuation": 8 I.C. 1043; prejudicially affecting the disposal of a suit or appeal on its merits: 46 M. 631=45 M.L.J. 135 (F.B.).

PRACTICE AND PROCEDURE.—Objection to valuation when allowed in appeal: 41 I.C. 167 cannot be raised for the first time before the High Court: 46 I.C. 852 (P.); 46 A. 250; *see also* 1927 L. 860; 107 I.C. 620. It is not the policy of the law to allow such objection to be raised in appeal by the parties except under very restricted conditions: 79 I.C. 857. [*See also* 13 P. 344=1934 P. 204 (S.B.)] nor in execution proceedings: 36 P.L.R. 238=1934 L. 804; 13 P. 290=1934 L. 240. As to *waiver* of objection to jurisdiction, *see* 138 I.C. 62=1932 L. 538; 37 C.W.N. 764. This section is no bar to an objection being taken in second appeal. 5 Pat.L.J. 397. *See also* 56 M.L.J. 489. Under S. 11 (2) even if objection to jurisdiction was taken at an early stage in the trial Court, the appellate Court is required to dispose of the appeal as if there had been no defect of jurisdiction, unless it is satisfied that the over-valuation or under-valuation has prejudicially affected the disposal of the suit or appeal on its merits. 1929 R. 228. Objection to pecuniary jurisdiction of trial Court cannot be entertained in appeal, unless taken at the earliest opportunity and the appeal Court is satisfied that valuation has affected merits. 11 L. 15=1929 L. 509 (2). *See also* 56 M.L.J. 489. Where in a partition suit an objection on the ground of pecuniary jurisdiction was raised for the first time before the High Court in revision and it appeared that the under-valuation had not prejudicially affected the disposal of the suit on its merits, *held*, that the objection could not be entertained. 37 C.W.N. 764.

Sec. 11 (1) (b).—Over-valuation of a suit is not fatal unless it also appears that it has materially affected the disposal. 1931 A.L.J. 214=1930 A. 869. *See also* 55 A.

(*b*) the appellate Court is satisfied, for reasons to be recorded by it in writing, that the suit or appeal was over-valued or under-valued, and that the over-valuation or under-valuation thereof has prejudicially affected the disposal of the suit or appeal on its merits.

(2) If the objection was taken in the manner mentioned in clause (*a*) of sub-section (1), but the appellate Court is not satisfied as to both the matters mentioned in clause (*b*) of that sub-section and has before it the materials necessary for the determination of the other grounds of appeal to itself, it shall dispose of the appeal as if there had been no defect of jurisdiction in the Court of the first instance or lower appellate Court.

(3) If the objection was taken in that manner and the appellate Court is satisfied as to both those matters and has not those materials before it, it shall proceed to deal with the appeal under the rules applicable to the Court with respect to the hearing of appeals; but if it remands the suit or appeal, or frames and refers issues for trial, or requires additional evidence to be taken, it shall direct its order to a Court competent to entertain the suit or appeal.

(4) The provisions of this section with respect to an appellate Court shall, so far as they can be made applicable, apply to a Court exercising revisional jurisdiction under section 622[1] of the Code of Civil Procedure or other enactment for the time being in force.

(5) This section extends to the whole of British India, and shall come into force on the first day of July, 1887.

Proceedings pending at commencement of Part I or Part II.

12. Nothing in Part I or Part II shall be construed to affect the jurisdiction of any Court—

(*a*) with respect to any suit instituted before rules under Part I applicable to the valuation of the suit take effect, or Part II has come into force, as the case may be, or

(*b*) with respect to any appeal arising out of any such suit.

THE SUPREME COURTS OFFICERS' TRADING ACT (XV OF 1848).

Year.	No.	Short title.	Amendment.
1848	XV	The Supreme Courts Officers' Trading Act.	Repealed in part, XII of 1876.

Short title given, Act XIV of 1897.

LEG. REF.

[1]*See* now S. 115 of the Code of Civil Procedure (Act V of 1908).

NOTffS.

315=1933 A. 249 (F.B.); 37 C.W.N. 764. Suit beyond pecuniary jurisdiction of a Court—Trial and decision without objection by any of the parties—Decree—Not to be set aside by fresh suit. 22 A.L.J. 122; 107 I.C. 620. Plaintiff under-valuing suit and instituting in Munsiff's Court—Subsequent suit in Subordinate Judge's Court—Plea of constructive *res judicata*—Plea by plaintiff that former suit is not triable by Munsif. 1937 M.W.N. 1292. On this section, *see also* 5 P. 505=1926 P. 351.

[17*th June*, 1848.

An Act to forbid trading by the officers of the Supreme Courts.

Preamble.

For the better discharge of their duties by the officers of the undermentioned Courts of Justice; It is enacted as follows:—

Prohibition, in case of officers of Supreme Courts, against accepting gifts; holding certain offices; carrying on dealings.

1. No officer of any of the Courts of Judicature established by Royal Charter within the territories subject to the Government of the East India Company, or any Court established for the relief of insolvent debtors within the said territories, shall directly or indirectly by himself, or by any other person or persons on his behalf, accept from any person or persons any gift or reward for any act or behaviour in his office, other than his legal salary and fees and profits of office, or hold any office in any bank or public company, except as hereinafter excepted or carry on or be concerned in any dealings as a banker or trader or as agent, factor or broker either for his own advantage or for the advantage of any other person or persons, except such dealings as it may be part of the duty of any such officer by virtue of his office to carry on.

Exemption of officers who are also advocates, etc.

2. This Act shall not be construed to forbid any officer of any of the said Courts, who is also a practising advocate, attorney, solicitor or proctor in any of the said Courts, from taking the usual fees and emoluments of advocates, attorneys, solicitors, or proctors, nor to apply to any advocate, attorney, solicitor, proctor, sheriff, assignee, receiver or committee, so far as he is held to be in that capacity merely for some purposes an officer of any of the said Courts.

Holding unpaid office in society.

3. This Act shall not be construed to forbid any officer of any of the said Courts from holding any unpaid office in any society for charitable purposes or for the advancement of knowledge, or for the encouragement of science, art or manufactures.

Punishment for contravention of Act.

4. Every officer of any of the said Courts who shall knowingly offend against this Act shall, on conviction thereof, be liable to be punished by deprivation of his office, and also, by the sentence of the Court before which he shall be convicted, may be declared incapable, and in that case shall become incapable, of being appointed to the same or any other office of the same Court, or to serve Her Majesty [1][* * * *] in the territories under the Government of the East India Company, or in such part of the said territories as shall be specified in the sentence, or in the discretion of the Court may be otherwise punished by fine or fine and imprisonment for his misdemeanour as to the Court shall seem fit, regard being had to the nature of his offence.

LEG. REF.

[1] Repealed by Act XII of 1876.

NOTES.

Secs. 1 and 2.—*See* 4 I.C. 697=36 C. 990. (Although certain commissions were allowed as a matter of practice by the Calcutta High Court to the official assignee on sales of insolvent's estate, such commissions were disallowed when they were found to be contrary to the provisions of this Act.)

THE INDIAN TARIFF ACT (XXXII OF 1934).

Amendments:—Amended by Act X of 1936; Act XII of 1936; Act XX of 1937; Government of India (Adaptation of Indian Laws) Order, 1937.

Year.	No.	Short title.	Amendments.
1934	XXXII	The Indian Tariff Act, 1934.	Repealed in part, III of 1937*; XX of 1937; XLI of 1940; Amended, II of 1935; X of 1936; XII of 1936; XX of 1937; XXI of 1937; The Indian Finance Act, 1937; XXVII of 1937; XIV of 1938; XVI of 19 8; I of 1939; The Indian Finance Act, 1939; XVIII of 1939 XX of 1939; The Indian Tariff (Third Amendment) Act, 1939; XXIX of 1939; XVI of 1940; XXI of 1940; XXII of 1940; VII of 1941; VIII of 1941; IX of 1941 and XII of 1942

[*8th September*, 1934.

An Act to consolidate the law relating to customs duties.

WHEREAS it is expedient to consolidate the law relating to customs duties on goods imported into or exported from British India by sea and to customs duties on goods imported into or exported from British India by land; It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE INDIAN TARIFF ACT, 1934.

(2) It extends to the whole of British India [1][*].

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette appoint in this behalf.

Duties specified in Schedules to be levied.

2. (1) There shall be levied and collected in every port to which this Act applies, the duties specified in the First and Second Schedules.

(2) The Central Government may, by notification in the Official Gazette fix, for the purpose of levying the said duties, tariff values of any articles enumerated, either specifically or under general headings, in the said Schedules as chargeable with duty *ad valorem* and may alter any tariff values for the time being in force.

(3) Different tariff values may be fixed for different classes or descriptions of the same article.

(4) Nothing in this Act shall authorize the levy of customs duties on any article carried from one customs port in British India to another such port except salt, opium, and spirit.

Levy of duty where standard rate and preferential rate are specified.

3. (1) Where in respect of any article a preferential rate of revenue duty is specified in the First Schedule if the article is the produce or manufacture of the United Kingdom or of a British Colony, the duty to be levied and collected shall be at the standard rate, unless the article is the produce or manufacture of the United Kingdom or of a British Colony and the article is determined, in accordance with rules made under sub-section (2), to be such produce or manufacture.

LEG. REF.

[1] Words 'except the Chief Commissionership of Aden' omitted by A.O., 1937.

(2) The Central Government may, by notification in the Official Gazette make rules—

(*a*) for determining if any article is the produce or manufacture of the United Kingdom or a British Colony; and

(*b*) making provision in cases where at the time of importation proof is not forthcoming where required in accordance with the rules made under clause (*a*) that any article is the produce or manufacture of the United Kingdom or a British Colony—

(*i*) whereby duty may be levied at the standard rate and a refund given of the extra duty paid, if such proof is produced within a prescribed period, and

(*ii*) whereby duty may be accepted provisionally at the preferential rate on execution of a bond for the payment of the balance of duty if such proof is not produced within the prescribed period, and for the recovery of any balance due after the expiry of the prescribed period as if such balance were duty short levied within the meaning of section 39 of the Sea Customs Act, 1878.

(3) For the purposes of this section and of the First Schedule, the expression "United Kingdom" means the United Kingdom of Great Britain and Northern Ireland, and the expression "British Colony" includes a British Protectorate and any of the Mandated Territories of Tanganyika, the Cameroons under British Mandate and Togoland under British Mandate.

Power of Central Government to alter protective duties.

4. (1) Where, in respect of any article chargeable under the First Schedule with a duty characterized in the third column thereof as protective, the Central Government is satisfied, after such inquiry as [it][1] thinks necessary, that such duty has become ineffective or excessive for the purpose of securing the protection intended to be afforded by it to a similar article manufactured in India, [it][1] may, by notification in the Official Gazette increase or reduce such duty to such extent as [it][1] thinks necessary either generally or in respect of such article when imported from or manufactured in any country or countries specified in the notification:

Provided that the duty leviable on any such article shall in no case be less than the duty leviable on a like article of British manufacture.

(2) The Central Government may, by notification in the Official Gazette prescribe the conditions subject to which articles shall be deemed to be of British manufacture for the purposes of this section and of the First Schedule.

Duties on imports and exports by land.

5. Where a customs duty at any rate prescribed by or under this Act or any other law for the time being in force is leviable on any article when imported into, or on any article when exported from, a port in British India, the Central Government may, by notification in the Official Gazette, direct that a duty of customs at the like rate shall be leviable on any such article when imported or exported, as the case may be, by land from or to any territory outside British India, which [it][1] may, by a like notification, declare to be foreign territory for the purposes of this section.

Duty on salt, opium and spirit, when protected by a certificate.

6. (1) Salt, opium and spirit imported from any port in British India and protected by the certificate of any officer empowered in that behalf by the Central Government [2][*] are chargeable with only the amount, if any, by which the duty leviable thereon under the First Schedule exceeds the duty shown by such certificate to have been already paid in respect thereof.

LEG. REF.

[1] Substituted by A.O., 1937 for 'he'.

[2] Words 'or the Local Government' omitted by A.O., 1937.

(2) The amount, if any, paid to the Government as the price of such salt or opium is not duty within the meaning of this section.

(3) Nothing in this section applies to spirit which is exported under bond for excise duty from one customs-port to another customs-port under the provisions of Chapter XIV of the Sea Customs Act, 1878.

7. [Application of certain provisions as to duties and goods.] [*Repealed by Act III of* 1937.]

Additional import duty on bounty-fed articles.

8. (1) Where any country, dependency or colony pays or bestows, directly or indirectly, any bounty or grant upon the production therein or the exportation therefrom of any article and the article is chargeable with duty under the provisions of this Act, then, upon the importation of any such article into British India, whether the same is imported directly from the country of production or otherwise, and whether it is imported in the same condition as when exported from the country of production or has been changed in condition by manufacture or otherwise, the Central Government may, by notification in the Official Gazette, impose an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

(2) The net amount of any such bounty or grant as aforesaid shall be, from time to time, ascertained, determined and declared by the Central Government and the Central Government may, by notification in the Official Gazette, make rules for the identification of such articles and for the assessment and collection of any additional duty imposed upon the importation thereof under sub-section (1).

Special import duty on sugar in certain cases.

9. (1) Where the rate of duty or other taxation imposed in any country, dependency or colony upon sugar not produced therein exceeds the rate of duty or other taxation imposed upon sugar produced therein by more than the equivalent of six francs per one hundred kilogrammes in the case of refined sugar or five francs and fifty centimes per one hundred kilogrammes in the case of other sugar, then, upon the importation of any sugar from such country, dependency or colony into British India, whether the same is imported directly from the country of production or otherwise, and whether it is imported in the same condition as when exported from the country of production or has been changed in condition by manufacture or otherwise, the Central Government may, by notification in the Official Gazette impose,[1] in addition to any other duty or taxation imposed under this Act or any other law for the time being in force, a special duty not exceeding one moiety of such excess.

(2) The Central Government may, from time to time, by general or special order, declare, for the purposes of sub-section (1),—

(*a*) what articles or substances containing any saccharine matter shall be deemed to be "sugar" and what kinds of sugar shall be deemed to be "refined sugar" or "other sugar", respectively; and

(*b*) what sums in the currency of British India shall be deemed to be the equivalent of "francs" and "centimes," respectively.

(3) The amount of the excess referred to in sub-section (1) shall be from time to time ascertained, determined and declared by the Central Govern-

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LEG. REF.

[1] For instance of such a notification imposing an additional duty, *see* No. 1327 S. R., dated 20th March, 1899, Genl. Stat., R. & O., Vol. III. As to remission of such duties in the case of countries parties to the Brussels Sugar Convention of 1902, *see* Genl. Stat. R. and O., Vol. III. As to refund of excess duty paid under the first named notification, see *Gazette of India*, 1900, Pt. I, p. 526.

ment and the Central Government may, by notification in the Official Gazette, make rules for the identification of sugar and for the assessment and collection of any special duty imposed upon the importation thereof under sub-section (1).

10. [In contracts amount of increased or decreased duty to be added or deducted.] [*Repealed by Act XLI of* 1940.][1]

Duration of protective duties and power of Government to modify or remit certain duties.

11. (1) When the duty specified for any article in the First Schedule is characterized as protective in the third column of that Schedule, that duty shall have effect only up to the date, if any, specified in the seventh column of that Schedule.

(2) If, after such inquiry as [2][it] thinks necessary, the Central Government is of opinion that the duty specified in the First Schedule in respect of wheat has become unnecessary or excessive, [2][it] may, by notification in the Official Gazette, remit such duty or reduce it to such extent as he thinks fit.

(3) If, after such inquiry as [2][it] thinks necessary, the Central Government is of opinion that the duty specified in First Schedule in respect of wheat flour is excessive, [2][it] may, by notification in the Official Gazette, reduce such duty to such extent as [2][it] thinks fit, but not so as to make it lower than an *ad valorem* duty of twenty per cent.

Power to cancel notifications.

12. All notifications published under this Act may be cancelled by the authority publishing the same.

13. Repeals. [*Repealed by Act XX of* 1937.]

CONTENTS OF THE FIRST SCHEDULE OF THE INDIAN CUSTOMS TARIFF.

IMPORT TARIFF.

SECTIONS.

I.—Live Animals and Products of the Animal Kingdom.

II.—Products of the Vegetable Kingdom.

III.—Fatty Substances, Greases, Oils and Products of their Decomposition; Prepared Alimentary Fats; Waxes of Animal or Vegetable Origin.

IV.—Products of the Food-Preparing Industries; Beverages, Alcoholic Liquors and Vinegars; Tobacco.

V.—Mineral Products.

VI.—Chemical and Pharmaceutical Products; Colours and Varnishes; Perfumery; Soap; Candles and the like; Glues and Gelatines; Explosives; Fertilisers.

VII.—Hides, Skins, Leather, Fur Skins and Manufactures of these Materials.

VIII.—Rubber and Articles made of Rubber.

IX.—Wood and Cork and Wares of these Materials; Goods made of Plaiting Materials.

X.—Paper and its Applications.

XI.—Textile Materials and Textile Goods.

SECTIONS.

XII.—Footwear, Hats, Umbrellas and Parasols; Articles of Fashion.

XIII.—Wares of Stone and of other Mineral Materials; Ceramic Products; Glass and Glassware.

XIV.—Real Pearls, Precious Stones, Precious Metals and Wares of those Materials; Coin (Specie).

XV.—Base Metals and Articles made therefrom.

XVI.—Machinery and Apparatus; Electrical Material.

XVII.—Transport Material.

XVIII.—Scientific and Precision Instruments and Apparatus; Watchmakers' and Clockmakers' Wares; Musical Instruments.

XIX.—Arms and Ammunition.

XX.—Miscellaneous Goods and Products not elsewhere included.

XXI.—Works of Art and Articles for Collections.

XXII.—Articles not otherwise specified.

THE SECOND SCHEDULE.

EXPORT TARIFF.

EXCISE DUTIES LEVIABLE ON CERTAIN ARTICLES PRODUCED OR MANUFACTURED IN BRITISH INDIA.

CESSES LEVIABLE ON CERTAIN ARTICLES ON EXPORT OT OTHERWISE.

LEG. REF.

[1][(1) Section 10 of the Indian Tariff Act, 1934, is hereby repealed.

(2) Nothing in the repeal effected by sub-section (1) shall affect or be deemed to affect—

(*a*) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or

(*b*) any legal proceedings or remedy in respect of any such right, title, interest, obligation or liability, or

(*c*) anything done or suffered before the commencement of this Act.—(Act XLI of 1941, S. 3.]

[2] Substituted by A.O., 1937 for 'he'.

INDIAN CUSTOMS TARIFF.

NOTE 1.—In the expression "ad valorem" used in these Schedules the reference is to "real value" as defined in section 30 of the Sea Customs Act 1878 (VIII of 1878), unless an article has a tariff value assigned to it.

NOTE 2.—The tariff value specified in the second column of the First Schedule shall, unless otherwise expressly provided, apply whether the article is assessed to duty under the item specified in the corresponding entry in the first column or under any other item.

NOTE 3.—The description of tariff-valued articles in the second column follows the ordinary trade description and covers all reduced grades and mixtures unless they are specially provided for.

NOTE 4.—In this publication, the expression "standard rate of duty" means, in the case of articles liable to preferential rates of duty, the standard rate of duty as opposed to the preferential rate, and in the case of other articles, the ordinary rate of duty.

NOTE 5.—Postal parcels, packets and letters on whose contents the total duty payable is not more than 12 annas, are exempt from payment of import duty.

NOTE 6.—The expression "Far east" covers China, including Hongkong and Macao, Japa and the Japanese Empire, the Straits Settlements, Malaya, Tailand, French Indo-China, The Netherlands East Indies, Sarawak, British North Bornet, The Philippines, Burma and Ceylon.

THE FIRST SCHEDULE—IMPORT TARIFF.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	Burma.	
	SECTION I. **LIVE ANIMALS AND PRODUCTS OF THE ANIMAL KINGDOM.**						
1	Animals, living, all sorts ...	...	Free ...	...	...	...	...
2	Bacon and Ham, not canned or bottled ...	Revenue	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
3	Fish, not otherwise specified ...	Revenue ...	25 per cent. ad valorem...	...	...	10 per cent. ad valorem.	
3 (1)	Fish, salted, wet ...	Revenue ...	Such rate or rates of duty not exceeding one rupee per Indian maund of 82⅔ lbs. avoirdupois weight as the Central Government may, by notification in the Official Gazette from time to time prescribe[1],	...	...	Free	...
	Tariff values— Rs. A. P. per Indian maund.						
	(i) Soormai ... 6 4 0						

[1]The rate on the 1st January, 1942, and until further notice is annas 9⅜ per maund of 82⅔ lbs. avoirdupois.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	Burma.	
	SECTION—*Contd.*						
	LIVE ANIMALS AND PRODUCTS OF THE ANIMAL KINGDOM—*Contd.*						
	(ii) Bangdas ... 3 4 0 (iii) All other sorts ... 7 8 0		plus 6¼ per cent. ad valorem.				
3 (2)	Fish, salted, dry ...	Revenue ...	15 per cent. ad valorem...	...	...	Free	...
3 (3)	Fish, unsalted, dry ...	Preferential revenue	30 per cent. ad valorem...	... ad valorem	20 per cent.	10 per cent. ad valorem.	...
	Tariff value— Rs. A. P. per cwt. Bomlas ... 4 8 0						
3 (4)	Fishmaws, including singally and sozille and sharkfins.	Revenue ...	25 per cent. ad valorem...	...	...	10 per cent. ad valorem.	...
	Tariff values— Rs. A. P. per cwt. Sharkfins, loose or in bundles from Arabian and Persian Gulf ports ... 5 8 0 per lb. Sharkfins loose or in bundles from China and the Straits. 3 8 0						
4	Butter Cheese and Ghee ...	Revenue ...	25 per cent. ad valorem...	...	...	10 per cent. ad valorem.	...
	Tariff values— Rs. A. P. per lb. Butter ... 1 1 0 per cwt. Ghee ...50 0 0						
4 (1)	Milk [1]condensed or preserved including milk cream.	Revenue ...	25 per cent. ad valorem...	...	...	10 per cent. ad valorem.	...
5	Coral, unprepared ...	Revenue ...	25 per cent. ad valorem....	...	...	10 per cent. ad valorem.	...

5 (1)	Cowries and Shells ...	Revenue ...	25 per cent. ad valorem...	...	...	10 per cent. at valorem.	...
	Tariff values— Rs. A. P.						
	Chanks— per thousand.						
	Sound live ...88 0 0						
	Sound dead ...55 8 0						
	Other sorts ..13 0 0						
	per cwt.						
	Cowries, bazar, common ... 7 8 0						
	Cowries, yellow, superior quality ...10 0 0						
	Cowries, mottled, commonly known as Zillah, Tiger and similar other qualities. 7 8 0						
	Cowries, Maldives ...13 8 0						
	Cowries, Sankhli ...165 0 0						
	Mother-of-pearl, nacre ...21 0 0						
	Nakhla 225 0 0						
	per lb.						
	Tortoise-shell ...11 4 0						
	Tortoise-shell, nakh ... 1 14 0						
5 (2)	Ivory, unmanufactured ...	Preferential revenue.	30 per cent. ad valorem...	...	20 per cent. ad valorem.	10 per cent. ad valorem.	...
	Tariff values— Rs. A. P.						
	per cwt.						
	Elephants' grinders ... 300 0 0						
	Elephants' tusks (other than hollows, centres, and points), each exceeding 20 lb. in weight, and hollows, centres, and points each weighing 10 lb. and over. 525 0 0						
	Elephants' tusks (other than hollows, centres, and points) not less than 10 lb. and not exceeding 20 lb. each, and hollows, centres, and points each weighing less than 10 lb. 500 0 0						
	Elephants' tusks each less than 10 lb. (other than hollows, centres, and points). 190 0 0						
	Sea-cow or moye teeth, each not less than 4 lb. 275 0 0						

[1]Under Government of India, Finance Department (Central Revenues), Notification No. 33 dated the 22nd June, 1935, as amended subsequently, dried skim milk, that is to say, dried milk powder containing not more than 4 per cent. of fat and no added ingredients, is exempt, from payment of import duty.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	Burma.	
	SECTION II. **PRODUCTS OF THE VEGETABLE KINGDOM.**						
	Sea-cow or moye teeth, each not less than 3 lb. and under 4 lb. 220 0 0 Sea-cow or moye teeth, each less than 3lb. 130 0 0						
6	Plants, living, not otherwise specified ...	...	Free ...	...	...	...	...
6 (1)	Rubber stumps ...	...	Free ...	...	...	...	...
7	Vegetables, all sorts, fresh, dried, salted or preserved, not otherwise specified. *Tariff value*— Rs. A. P. per cwt. Potatoes ... 7 0 0	Preferential revenue.	30 per cent. ad valorem...	...	20 per cent. ad valorem.	Potatoes and Onions-5 per cent. ad valorem; all others 10 per cent. ad valorem.	...
8	Fruits, all sorts, fresh, dried, salted or preserved, not otherwise specified[1] *Tariff values*— Rs. A. P. per cwt. Almonds— (i) Without shell ... 75 0 0 (ii) In the shell— (*a*) Iranian Kagazi ... 60 0 0 (*b*) Iranian other than Kagazi ... 20 0 0 (*c*) Other than Iranian— (1) Soft shell including half-hard shell qualities such as prunele and the like. 33 8 0 (2) Hard shell ... 21 0 0 Cashew or cajoo kernels, not skinned ... 20 0 0 per thousand. Coconuts, Straits, Dutch East Indies and Thailand— Husked ... 58 0 0	Preferential revenue.	30 per cent. ad valorem...	...	20 per cent. ad valorem.	10 per cent. ad valorem.	...

	Unhusked ... 64 0 0 Coconuts, Ceylon ... 40 0 0 Coconuts, other except Maldives, ... 23 0 0 per cwt. Dates, dry, excluding seedless— Kapkapa, Shekra or Shakeria, Chhara Chupchap, Sakina and Brami. 10 0 0 All other qualities 7 0 0 Dates, wet, in bags, baskets and bundles. 3 12 0 Dates, wet, packed in other receptacles. 9 0 0 Figs, dried, Iranian ... 13 8 0 Pistachio nuts ... 65 0 0 Raisins, red, Persian Gulf ... 11 0 0							
8 (1)	Currants ...	Revenue ...	Re. 1-4 per cwt. ...	...	...	Free	...
9	Coffee not otherwise specified ...	Preferential revenue.	25 per cent. ad valorem plus one anna per pound.	...	25 per cent. ad valorem.	10 per cent. ad valorem.	...
9 (1)	Coffee, canned or bottled ...	Preferential revenue	30 per cent. ad valorem...	...	20 per cent. ad valorem.	10 per cent. ad valorem.	...
9 (2)	Tea[1] ...	Preferential revenue.	Five annas per pound ...	...	Three annas per pound	Two annas per pound.	...
9 (3)	The following Spices, whether ground or unground, namely :— Cardamoms, cassia, cinnamon, cloves, nutmegs, and pepper *Tariff values*— Rs. A. P. per cwt. Spices, unground— Cardamom seed ... 60 0 0 Cassia lignea ... 40 0 0 Cloves ... 52 0 0 Cloves exhausted ... 20 0 0 Cloves stems and heads 18 0 0 per lb. Nutmegs ... 0 6 0 Nutmegs in shell 0 4 0 per cwt. Pepper, black ... 14 0 0 Pepper, long ... 30 0 0 Pepper[2] white ... 27 0 0	Preferential revenue.	45 per cent. ad valorem...	...	$37\frac{1}{2}$ per cent. ad valorem.	10 per cent. ad valorem.	...

[1] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, raw cashew-nuts are exempt from payment of import duty.

[2] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, as amended subsequently, Black Brick tea, the produce of China, when imported at Calcutta from a port in Burma is exempt from payment of import duty.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	Burma.	
	SECTION II—*Contd.* PRODUCTS OF THE VEGETABLE KINGDOM—*Contd.*						
9 (4)	The following unground Spices, namely :— Chillies ginger and mace ...	Preferential revenue.	30 per cent. ad valorem...	...	22½ per cent. ad valorem.	10 per cent. ad valorem.	...
	Tariff values— Rs. A. P. per cwt.						
	Ginger, dry, unground ... 19 0 0 per lb.						
	Mace unground ... 1 0 0						
9 (5)	Betelnuts ...	Preferential revenue.	45 per cent. ad valorem.	...	37½ per cent. ad valorem.	20 per cent. ad valorem.	...
	Tariff values— Rs. A. P. per cwt.						
	Betelnuts (husked)—						
	Whole from Straits Dutch East Indies and Thailand. 10 0 0						
	Whole from Goa ... 11 0 0						
	Whole from Ceylon ... 12 0 0						
	Split from Straits, Dutch East Indies and Thailand—						
	(*a*) Mature ... 12 0 0						
	(*b*) Immature ... 19 0 0						
	Split from Ceylon—						
	(*a*) Mature ... 9 0 0						
	(*b*) Immature ... 17 0 0						
	Sliced all sorts ... 16 8 0						
	All other sorts ... 10 0 0						
9 (6)	Vanilla beans ...	Revenue ...	25 per cent. ad valorem...	...	...	10 per cent. ad valorem.	...
10	Grain and Pulse, not otherwise specified, including broken grains and pulse, but excluding flour.	...	Free ...	...	...	...	...
10 (1)	Wheat[1] [2] ...	Protective ...	Re. 1-8 per cwt. ...	...	...	Free	March 31st 1942.

11	Flour not otherwise specified ...	Revenue ...	25 per cent. ad valorem...	...	...	10 per cent. ad valorem.	...		
11 (1)	Wheat flour ...	Protective	Re. 1-8-0 per cwt. ...	...	...	Free.	March 31st 1942.		
11 (2)	Sago flour ...	...	Free ...	...	...	...	...		
11 (3)	Sago, Tapioca and Tapioca flour ...	Preferential revenue.	30 per cent. ad valorem.	...	20 per cent. ad valorem.	10 per cent. ad valorem.	...		
	Tariff values— Rs. A. P. per cwt.								
	Cassava, Tapioca or Sago ... 12 8 0								
	Cassava or Tapioca flour ... 11 0 0								
11 (4)	Starch and farina ...	Revenue ...	15 per cent. ad valorem...	...	...	Free.	...		
12	Seeds, all sorts, not otherwise specified ...	Revenue ...	25 per cent. ad valorem...	...	...	10 per cent. ad valorem.	...		
12 (1)	Oilseeds imported into British India by sea from the territories or any Prince or Chief in India.	...	Free ...	...	...	...	...		
12 (2)	Oilseeds, non-essential, all sorts not otherwise specified, including copra or coconut kernel.	Preferential revenue.	30 per cent. ad valorem...	...	20 per cent. ad valorem.	10 per cent. ad valorem.	...		
	Tariff values— Rs. A. P. per cwt.								
	Copra or coconut kernel ... 9 0 0								
	Poppy seeds 9 8 0								
12 (3)	Rubber seeds ...	...	Free ...	...	...	...	...		
12 (4)	Hops ...	...	Free ...	...	...	...	...		
12 (5)	Fodder, bran and pollards ...	Revenue ...	2½ per cent. ad valorem...	...	...	Free.	...		
13	Dyeing and Tanning Substances, all sorts, not otherwise specified.[3]	Revenue ...	25 per cent. ad valorem...	...	...	Free.	...		
	Tariff values— Rs. A. P. per lb.								
	Cochineal ... 1 12 0 per cwt.								
	Gallnuts ... 38 8 0								
13 (1)	Barks aor tanning ...	Revenue ...	3 per cent. ad valorem ...	...	...	Free.	...		
13 (2)	Cutch and gambler, all sorts ...	Preferential revenue.	30 per cent. ad valorem...	...	20 per cent. ad valorem.	5 per cent. ad valorem.	...		

[1] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, wheat imported by or on behalf of any person who is engaged in milling flour for export is exempt from payment of import duty, provided that such person, before clearance of the wheat for consumption or from bond, as the case may be, has produced documentary evidence to the satisfaction of the Customs-Collector that he has entered into a contract to sell a quantity of wheat flour representing 87 per cent. of the quantity of wheat imported in respect of which exemption is claimed and that the said wheat flour is to be shipped to a destination outside India before a date specified in the contract.

[2] Under Government of India, Commerce Department, Notification No. 156-T (3)/41, dated the 6th December, 1941, wheat is exmept from payment of import duty.

[3] Under Government of India, Finance Department (Central Revenues), Notification No. 57 Customs, dated the 15th November, 1941, wattle extract or tanning is liable to import duty at 10 per cent. *ad valorem*.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom	A British Colony.	Burma.	
	SECTION II—*Contd.* PRODUCTS OF THE VEGETABLE KINGDOM—*Contd.*						
13 (3)	*Tariff values*— Rs. A. P. per cwt. Gambier, cube .. 16 8 0 Gambier in flakes or circular pieces.. 48 0 0 Gums, Resins and lac, all sorts not otherwise specified. *Tariff values*— Rs. A. P. per cwt. Gum olibanum or frankincense ... 16 0 0 Gum Iranian (false) ... 9 8 0 Myrrh, excluding cleaned and sifted Myrrh. 50 0 0	Revenue ...	25 per cent. ad valorem...	...	...	Free.	...
13 (4)	Gums, Arabic, Benjamin (ras and cowrie) and Dammer (including unrefined batu) and rosin. *Tariff values*— Rs. A. P. per cwt. Dammer batu, unrefined ... 8 8 0 Acacian gums, other than ground, including gum Arabic, gum Senegal and gum African but excluding gums cleaned and sifted . 21 8 0 Gum Benjamin, ras ... 20 0 0 Gum Benjamin, cowrie (excluding pure cowrie). 40 0 0 Gum Dammer (or Copal) ... 37 0 0	Preferential revenue.	30 per cent. ad valorem...	...	20 per cent. per valorem	Free.	...
13 (5)	Stick or Seed Lac ...	...	Free ...	...	...	...	...
13 (6)	Opium ...	Revenue ...	Rs. 30 per seer of 80 tolas or 18¾ per cent. ad valorem, whichever is higher.	...	...	Free.	...
13 (7)	Cinchona bark ...	...	Free ...	...	...	...	...
14	Canes and Rattans ...	Revenue ...	25 per cent. ad valorem...	...	...	10 per cent. ad valorem.	...

	Tariff values—							
		Rs. A. P. per 100 pieces.						
	Canes—							
	Malacca	... 36 0 0						
	Chimity	... 15 0 0						
	Tries	... 6 0 0						
	Root moonah	... 25 0 0						
	Mannu	22 0 0						
	Polo, all kinds—							
	Not exceeding 10 feet in length	... 40 0 0						
	Exceeding 10 feet in length	... 50 0 0						
		per cwt.						
	Tohite	... 16 0 0						
	Rattans—							
	Chair	... 22 8 0						
	Basket	... 19 0 0						
	Outers	... 39 8 0						
	Inners	... 30 0 0						

SECTION III.

FATTY SUBSTANCES, GREASES, OILS AND PRODUCTS OF THEIR DECOMPOSITION; PREPARED ALIMENTARY FATS; WAXES OF ANIMAL OR VEGETABLE ORIGIN.

15	All sorts of Stearine, wax, grease and animal fat not otherwise specified.	Revenue ...	25 per cent. ad valorem...	...	...	10 per cent. ad valorem.	...	
	Tariff values— Rs. A. P. per lb.							
	Lubricating grease ... 0 6 6							
	Petroleum jelly, white ... 0 6 9							
	Petroleum jelly, all other sorts ... 0 3 6							
15 (1)	Lard, not canned or bottled ...	Revenue ...	25 per cent. ad valorem...	...	...	10 per cent. ad valorem.	...	
15 (2)	Beeswax ...	Revenue ...	25 per cent. ad valorem...	...	...	10 per cent. ad valorem.	...	
15 (3)	Tallow ...	..	Free ...	...	...	...	...	
15 (4)	Fish oil including whale oil not otherwise specified ...	Revenue ...	25 per cent. ad valorem...	...	...	10 per cent. ad valorem.	...	
15 (5)	Fish oil and whale oil, hardened or hydrogenated ...	Revenue ...	Rs. 10 per cwt. ...	...	...	Free.	...	
15 (6)	Vegetable Non-essential oils not otherwise specified...	Preferential revenue.	35 per cent. ad valorem...	...	25 per cent. ad valorem.	15 per cent. ad valorem.	...	
15 (7)	The following Vegetable Non-essential oils, namely, coconut, groundnut and linseed[1].	Preferential revenue.	35 per cent. ad valorem...	..	25 per cent. ad valorem.	15 per cent ad valorem.		

[1] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, the duty leviable on linseed oil at the standard rate is 25 per cent. *ad valorem*.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	Burma.	
	SECTION III—*Contd.*						
	FATTY SUBSTANCES GREASES, OILS, ETC—*Contd.*						
	Tariff values—	Rs. A. P. per cwt.					
	Coconut oil	... 13 0 0 per Imperial gallon.					
	Linseed oil, raw or boiled	... 3 8 0					
15 (8)	All sorts of Animal oils not otherwise specified	...	Revenue ...	25 per cent. ad valorem...	...	...	10 per cent. ad valorem. ...
	SECTION IV.						
	PRODUCTS OF THE FOOD-PREPARING INDUSTRIES; BEVERAGES, ALCOHOLIC LIQUORS AND VINEGARS; TOBACCO.						
16	Canned or bottled bacon, ham and lard	...	Revenue ...	25 per cent. ad valorem...	...	...	10 per cent. ad valorem. ...
16 (1)	Fish, canned	...	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem. ...
16 (2)	Isinglass, canned or bottled	...	Revenue ...	25 per cent. ad valorem...	...	...	10 per cent. ad valorem. ...
17	Sugar excluding confectionary	...	Protective ...	The rate at which excise duty is for the time being leviable on Sugar other than *khandsari* or palmyra Sugar, produced on British India[1] plus Rs. 6-12 per cwt.	...	...	The rate at which excise duty is for the time being leviable on Sugar other than *khandsari* or palmyra sugar produced in British India.[1] March 31st, 1942
17 (1)	Molasses	...	Revenue ...	31¼ per cent. ad valorem.	...	...	10 per cent. ad valorem. ...

17 (2)	Confectionary ...	Revenue ...	50 per cent. ad valorem...	...	...	10 per cent. ad valorem.	...
17 (3)	Sugar-candy ...	Revenue ...	Rs. 10-8 per cwt. ...	...	...	Free.	...
18	Cocoa and chocolate other than confectionery ...	Revenue ...	25 per cent. ad valorem...	...	...	10 per cent. ad valorem.	...
19	Biscuits, cakes and tarinaceous and patent foods, canned or bottled.	Revenue ...	25 per cent. ad valorem...	...	...	10 per cent. ad valorem.	...
	Tariff values— Rs. A. P. per cwt.						
	[1]Vermicelli, flour, from the Far East.... 16 0 0						
	[1]Vermicelli, peas, from the Far East ... 24 0 0						
	[1]Vermicelli, rice, from the Far East ... 15 8 0						
	[1]The tariff values given in this item apply also to imports assessed to duty as provisions and oilman's stores and groceries, all sorts not otherwise specified under Item No. 21 (1) below.						
20	Vegetable product, jams, jellies, pickles, chutnies, sauces and condiments, canned or bottled.	Revenue ...	25 per cent. ad valorem...	...	...	10 per cent. ad valorem.	...
	Tariff value— Rs. A. P. per lb.						
	Vegetable product (excluding hardened coconut oil). 0 10 0						
20 (1)	Fruit Juices ...	Preferential revenue	30 per cent. ad valorem...	...	20 per cent. ad valorem.	10 per cent. ad valorem.	...
20 (2)	Fruits and Vegetables, canned or bottled ...	Preferential revenue.	30 per cent. ad valorem...	...	20 per cent. ad valorem.	10 per cent. ad valorem.	...
	Tariff values— Rs. A. P. per case of 48 tins of 1 lb. each.						
	China canned fruit ... 11 0 0 dozen tins of 1½ lbs. each.						
	Preserved pine-apples from the Far East. 2 8 0						
21	Canned or bottled provisions, not otherwise specified.	Revenue ...	25 per cent. ad valorem...	...	...	10 per cent. ad valorem.	...
	Tariff values— Rs. A. P. per box of six large or twelve small jars.						
	China preserves in syrup ... 9 0 0						

[1] The rate of excise duty on the 1st January, 1942, and until further notice, on sugar, other than *khandsari* or palmyra sugar, produced in any factory in British India and either issued out of, or used within, such factory is Rs. 3 per cwt. The rate of excise duty on *khandsari* sugar produced in any factory in British India and issued out of such factory is eight annas per cwt.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom	A British Colony.	Burma.	
	SECTION IV—*Cntd.*						
	PRODUCTS OF THE FOOD-PREPARING INDUSTRIES, BEVERAGES- ALCOHOLIC LIQUORS AND VINEGARS ; TOBACCO—*Contd.*						
	per lb. [1]China preserves, dry, candied 0 3 0 [1]The tariff value given in this item applies also to imports assessed to duty as provisions and oilman's stores and groceries, all sorts not otherwise specified under Item No. 21 (1) below. *N. B.*—For other tariff values under this item see those marked with note No. 1 under Item No. 21 (1) below.						
21 (1)	Provisions and Oilman's Stores and Groceries, all sorts not otherwise specified. *Tariff values*— Rs. A. P. per cwt. Cocum ... 6 12 0 per lb. Vegetable product (excluding hardened coconut oil), not canned or bottled. 0 4 6 per cwt. [1]Yeast, from the Far East ... 17 0 0 [1]The tariff value given in this item applies also to imports assessed to duty as canned or bottled provisions under Item No. 21 above. *N.B.*—For other tariff values under this item see those marked with note No. 1 under Items Nos. 19 and 21 above.	Revenue ...	25 per cent. ad valorem...	...	...	10 per cent. ad valorem.	...
21 (2)	All sorts of food not otherwise specified ...	Revenue ...	25 per cent. ad valorem...	...	...	10 per cent. ad valorem.	...
22	All sorts of drink not otherwise specified ...	Revenue ...	25 per cent. ad valorem...	...	...	10 per cent. ad valorem.	...
[1]22 (1)	.....	...	...	...	...	...	...

22 (2)	Ale, beer, porter, cider and other fermented liquors—								
	(*a*) in barrels or other containers containing 27 oz. or more.	Revenue	...	Fifteen annas per imperial gallon.	...	...	The rate at which excise duty is leviable at the place of importation	...	
	(*b*) in bottles containing less than 27 oz. but not less than 20 oz.	Revenue	...	Two annas and six pies per bottle.	...	...		...	
	(*c*) in bottles containing less than 13½ oz. but not less than 10 oz.	Revenue	...	One anna and three pies per bottle.	...	...	...	...	
	(*d*) in bottles containing less than 6¾ oz. but not less than 5 oz.	Revenue	...	Seven and half pies per bottle.	...	...	...	...	
	(*e*) In other containers[2] ...	Revenue	...	Re. 1-4 per Imperial gallon.	...	...	...	...	
22 (3)	Wines, not containing more than 42 per cent. of proof spirit—								
	(*a*) Champagne and other sparkling wines ...	Revenue	...	Rs. 13-2 per Imperial gallon.	...	...	The rate at which excise duty is leviable at the place of importation.	...	
	(*b*) Other sorts ...	Revenue	...	Rs. 7-8 per Imperial gallon.	...	...			
22 (4)	Spirits (other than denatured spirit)—								
	(*a*) Brandy, gin, whisky and other sorts of spirits not otherwise specified, including wines containing more than 42 per cent. of proof spirit.	Revenue	...	Rs. 37-8 per Imperial gallon of the strength of London proof.	...	...	The rate at which excise duty is leviable at the place of importation.	...	
	(*b*) Liquors, cordials, mixtures and other preparations containing spirit not otherwise specified—								
	(*i*) entered in such a manner as to indicate that the strength is not to be tested.	Revenue	...	Rs. 50 per Imperial gallon.	...	...		...	
	(*ii*) not so entered ...	Revenue	...	Rs. 37-8 per Imperial gallon of the strength of London proof.	...	...		...	
	Provided that—								
	(*a*) the duty on any article included in this item shall in no case be less than the duty which would be charged if the article were liable to a duty of 25 per cent. ad valorem ;								
	(*b*) where the unit of assessment is the Imperial gallon of the strength of London proof, the duty								

[1] There is no entry bearing Item No. 22 (1).

[2] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, as amended subsequently ale and beer in containers other than bottles are exempt from so much of the duty as is in excess of the duty that would have been leviable if such containers were bottles.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom	A British Colony.	Burma.	
	SECTION IV—*Contd.*						
	PRODUCTS OF THE FOOD PREPARING INDUSTRIES ; BEVERAGES, ALCOHOLIC LIQUORS AND VINEGARS ; TOBACCO—*Contd.*						
	shall be increased or reduced in proportion as the strength is greater or less than London proof.						
22 (5)	Spirits—						
	(*a*) Bitters—						
	(i) entered in such a manner as to indicate that the strength is not to be tested.	Preferential revenue.	Rs. 50 per Imperial gallon.	...	Rs. 45 per Imperial gallon.	The rate at which excise duty is leviable at the place of importation.	...
	(ii) not so entered ...	Preferential revenue.	Rs. 37-8 per Imperial gallon of the strength of London proof.	...	Rs. 33-12 per Imperial gallon of the strength of London proof.		...
	(*b*) Drugs and medicines containing spirit—						
	(*i*) entered in such a manner as to indicate that the strength is not to be tested.	Preferential revenue.	Rs. 40 per Imperial gallon.	Rs.36 per Imperial gallon.	Rs. 36 per Imperial gallon.		...
	(*ii*) not so entered ...	Preferential revenue.	Rs. 29 per Imperial gallon of the strength of London proof.	Rs.26 per Imperial gallon of the strength of London proof	Rs. 26 per Imperial gallon of the strength of London proof.		...

	(*c*) Perfumed spirits ...	Revenue ...	Rs. 60 per Imperial gallon or 25 per cent. ad valorem, whichever is higher.	...	...			...
	(*d*) Rum ...	Preferential revenue.	Rs. 37-8 per Imperial gallon of the strength of London proof.	...	Rs. 33-12 per Imperial gallon of the strength of London proof.			...
	Provided that— (*a*) on any article chargeable under this item with the lower rate of duty, the duty levied shall in no case be less than 20 per cent. ad valorem, and on any article chargeable under this item with the higher rate of duty, the duty levied shall in no case be less than 30 per cent. ad valorem ; (*b*) where the unit of assessment is the Imperial gallon of the strength of London proof, the duty shall be increased or reduced in proportion as the strength is greater or less than London proof.							
22 (6)	Denatured spirit ... *Tariff value*— Rs. A. P. per Imperial gallon. Spirit denatured before clearance ... 1 0 0	Revenue ...	$9\frac{3}{8}$ per cent. ad valorem...	...	...	Free.		...
22 (7)	Vinegar in casks ...	Revenue ...	$2\frac{1}{2}$ per cent. ad valorem...	...	...	Free.		...
23	Oilcakes ...	Revenue ...	25 per cent. ad valorem...	...	...	10 per cent. ad valorem.		...
24	Tobacco, manufactured, not otherwise specified ...	Revenue ...	Rs. 3-12 per lb. ...	...	...	...		...
24 (1)	Cigars ...	Revenue ...	$112\frac{1}{2}$ per cent. ad valorem.	...	...	10 per cent. ad valorem.		...
24 (2)	Cigarettes ...	Revenue ...	25 per cent. ad valorem and in addition either Rs. 8-2 per thousand or Rs. 3-4 per lb., whichever is higher.	...	...	...		...
24 (3)	Tobacco, unmanufactured[1] ...	Preferential revenue.	Rs. 3-4 per lb. ...	...	Rs. 2-12-0 per lb.	10 per cent. ad valorem.		...

[1]Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, tobacco leaf for the manufacture of cigars when proved to have been imported for use in a cigar factory is liable to duty at Rs. 2 per lb. (standard) and Re. 1-8 per lb. (preferential).

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom	A British Colony.	Burma	
	SECTION V. MINERAL PRODUCTS.						
25	China clay ...	...	Free ...	...	...	...	...
25 (1)	Salt, excluding salt exempted under item No. 25 (2) ...	Revenue ...	The rate at which excise duty is for the time being leviable on salt manufactured in the place where the import takes place.[1]	...	...	...	...
25 (2)	Salt imported into British India and issued, in accordance with rules made with the previous sanction of the Central Government for use in any process of manufacture; also salt imported into the port of Calcutta and issued with the sanction of the Central Government to manufacturers of glazed stoneware; also salt imported into any port in the provinces of Bengal and Bihar and Orissa and issued, in accordance with rules made with the previous sanction of the Central Government for use in curing fish in those provinces.	...	Free ...	...	...	...	...
25 (3)	The following building and engineering materials, namely, chalk, lime and clay.	Revenue ...	25 per cent. ad valorem...	...	...	10 per cent. ad valorem.	...
25 (4)	Cement not otherwise specified ...	Preferential revenue.	30 per cent. ad valorem.	20 per cent. ad valorem.	...	10 per cent. ad valorem.	...
25 (5)	Portland cement excluding white Portland cement ...	Revenue ...	Rs. 13-12 per ton ...	...	...	10 per cent. ad valorem.	...
25 (6)	Stone prepared as for road metalling ...	...	Free ...	...	...	...	...
25 (7)	Marble and stone not otherwise specified[2] ...	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
26	Metallic ores, all sorts except ochres and other pigment ores.	...	Free ...	...	...	...	...
27	Coal, coke and patent fuel	Revenue ...	Ten annas per ton ...	...	...	Free	...

27 (1)	Asphalt ...	Preferential revenue.	25 per cent. ad valorem...	...	15 per cent. ad valorem.	5 per cent. ad valorem.	...	
27 (2)	Pitch and Tar ...	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...	
	Tariff values— Rs. A. P. per cwt.							
	Coal pitch ... 7 0 0							
	Stockholm pitch ... 12 0 0							
27 (3)	All sorts of mineral oils not otherwise specified ...	Revenue ...	25 per cent. ad valorem.	...	..	10 per cent. ad valorem.	...	
	Tariff values— Rs. A. P. per Imperial gallon.							
	Mineral Colza oil ... 1 4 0							
.....	Transformer oil, including transil and switch oil, other than that assessed to duty under the proviso to Item No. 72 (3) of the First Schedule of the Indian Tariff Act, 1934. 2 4 0							
27 (4)	Kerosene ;[3] also any mineral oil other than kerosene and motor spirit which has its flashing point below one hundred degrees of Fahrenheit's thermometer by Abel's close test.	Revenue ...	Three annas and nine pies per Imperial gallon.	...	...	...	...	
27 (5)	Mineral Oil, not included in Item No. 27 (4) or Item No. 27 (6) which is suitable for use as an illuminant in wick lamps.	Revenue ...	Three annas and nine pies per Imperial gallon.	...	...	...	...	
27 (6)	Motor Spirit[4] ...	Revenue ...	The rate at which excise duty is for the time being leviable on motor spirit.	...	...	...	...	
27 (7)	Mineral oil—							
	(*a*) which has its flashing point at or above two hundred degrees of Fahrenheit's thermometer, and is ordinarily used for the batching of jute or other fibre ;	Revenue ...	Rs. 15-10 per ton ...	...	...	Free.	...	
	(*b*) which has its flashing point at or above one hundred and fifty degrees of Fahrenheit's thermometer, is not suitable for use as an illuminant in wick lamps, and is such as is not ordinarily used except as fuel or for some sanitary or hygienic purposes.	Revenue ...	$12\frac{1}{2}$ per cent. ad valorem.	...	...	...	...	

[1] The rate of excise duty on the 1st January, 1942, and until further notice is Re. 1-9 per maund of $82\frac{2}{7}$ lbs. avoir.

[2] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, sandstone is exempt from payment of import duty.

[3] The rate of excise duty on the 1st January, 1942, and until further notice, on all kerosene produced in a manufactory in British India is 2 annas and $9\frac{3}{4}$ pies per Imperial gallon.

[4] The rate of excise duty on the 1st January, 1942, and until further notice, on all motor spirit produced in a manufcactory in British India is 12 annas per Imperial gallon.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom	A British Colony.	Burma.	
	SECTION V—*Contd.*						
	MINERAL PRODUCTS—*Contd.*						
	Tariff value— Rs. A. P. per ton.						
	Mineral oil which has its flashing point at or above one hundred and fifty degrees of Fahrenheit's thermometer, and is such as is not ordinarily used except as fuel or for some sanitary or hygienic purposes, if imported naked in bulk. 46 0 0						
27 (8)	Lubricating oil, that is, oil such as is not ordinarily used for any other purpose than lubrication, excluding any mineral oil which has its flashing point below two hundred degrees of the Fahrenheit's thermometer by Abel's close test.	Revenue ...	Two annas and one pie per Imperial gallon.	...	...	Free.	...
	SECTION VI.						
	CHEMICAL AND PHARMACEUTICAL PRODUCTS; COLOURS AND VARNISHES; PERFUMERY; SOAP; CANDLES AND THE LIKE; GLUES AND GELATINES; EXPLOSIVES; FERTILISERS.						
28	Chemicals, Drugs and Medicines, all sorts not otherwise specified.[1]	Preferential revenue.	30 per cent. ad valorem.	20 per cent. ad valorem.	20 per cent. ad valorem.	10 per cent. ad valorem.	...
	Tariff values— Rs. A. P. per cwt.						
	Alkali, Indian (sajji-khar) ... 3 0 0						
	Ammonium carbonate or bicarbonate 27 0 0						
	Ammonium chloride—						
	Muriate of ammonia, crystalline ... 19 0 0						
	Salammoniac, sublimed ... 35 0 0						
	Other sorts, including compressed ... 24 8 0						
	Calcium chloride ... 7 0 0						

	Carbonic acid gas including compressed or liquefied gas.	per lb. 0 4 3							
	Chlorine ...	0 8 0							
	Copper sulphate ...	per cwt. 26 0 0							
	Menthol (peppermint) crystals ...	per oz. 0 15 0							
	Soda, caustic, flake, petal or powder	per cwt. 14 8 0							
	Soda, caustic, solid. ...	12 0 0							
	Soda crystals ...	9 0 0							
	Sodium hydrosulphite ...	80 0 0							
	Sodium sulphide ...	16 0 0							
	Sodium thsosulphate (Hypo). ...	15 0 0							
	Banslochan (bamboo camphor), crude.	per lb. 1 11 0							
	Calumba root ...	per cwt. 12 12 0							
	China root (Chobchini) rough ...	14 8 0							
	China root (Chobchini) scraped ...	24 8 0							
	Cubebs ...	70 0 0							
	Galangal ...	11 0 0							
	Salep ...	170 0 0							
	N. B.—The tariff values apply to articles packed in containers of not less than 14 lbs. except in the case of menthol (peppermint) crystals ; the tariff value for the latter applies to all menthol in containers of $\frac{1}{2}$ oz. and above.								
28 (1)	Bleaching paste and bleaching powder ...	...	...	Free	...	...	...	...	...
28 (2)	Copperas, green (ferrous sulphate) ...	Revenue	...	$2\frac{1}{2}$ per cent. ad valorem	...	...	...	Free	...
28 (3)	Sulphur ...	...	...	Free	...	...	...	...	...
28 (4)	Sode ash, including calcined natural soda and manufactured sesqui-carbonates.	Preferential revenue.		25 per cent. ad valorem.		...	15 per cent. ad valorem.	5 per cent. ad valorem.	...
	Tariff values—	Rs. A. P. per cwt.							
	Soda ash in bags including calcined natural soda and manufactured sesqui carbonates.	5 12 0							
	N. B.—The tariff value applies to articles packed in containers of not less than 14 lbs.								

[1] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, as amended subsequently, calcium acetate radium salts and cryolitc are exempt from paymtenof import-duty.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom	A British Colody.	Burma.	
	SECTION VI—*Conta.* CHEMICAL AND PHARMACEUTICAL PRODUCTS, ETC.—*Contd.*						
28 (5)	Heavy Chemicals, the following, namely :— Magnesium chloride ...	Protective	Twelve annas per cwt. or 25 per cent. ad valorem whichever is higher.	...	...	10 per cent. ad valorem.	March, 31st, 1946.
28 (6)	The following Chemicals, namely :— Alum (ammonia alum, potash alum and sodalum.)	Revenue ...	25 per cent. ad valorem or Re. 1-6 per cwt., whichever is higher.	...	...	10 per cent. ad valorem.	...
	(*b*) Magnesium sulphate or hydrated magnesium sulphate.	Revenue ...	25 per cent. ad valorem or Re. 1-4 per cwt., whichever is higher.	...	...		...
28 (7)	The following Chemicals, namely, cadmium sulphide, cobalt oxide, liquid gold for glass making, selenium, and uranium oxide.	Revenue ...	25 per cent. ad valorem...	...	...	10 per cent. ad valorem.	...
28 (8)	The following Chemicals, Drugs and Medicines, namely, acetic, carbolic, citric, hydrochloric, nitric, oxalic, sulphuric, tartaric and other acids, anhydrous ammonia, naphthalene, potassium bichromate, potassium chlorate, potassium cyanide and other potassium compounds, bicarbonate of soda, borax, sodium bichromate, sodium cyanide, sodium silicate, arsenic, calcium carbide, glycerine, lead, magnesium and zinc compounds not otherwise specified, aloes, asafœtida, cocaine, sarasaparilla and storax.	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
	Tariff values—	Rs. A. P. per lb.					
	Acetic acid ...	0 11 0					
	Ammonia gas, anhydrous, including compressed or liquefied gas.	1 0 0					
		per cwt.					
	Borax, granular, powdered or crystalline.	21 8 0					

	Boric acid ... 33 0 0 Naphthalene balls ... 25 0 0 Sodium bicarbonate ... 8 0 0 Sodium silicate (in liquid form) ... 9 8 0 Asafœtida, coarse (hingra) ... 45 0 0 *N. B.*—The tariff values apply to articles packed in containers of not less than 14 lbs.							
28 (9)	Saccharine (except in tablets) and such other substances as the Central Government may, by notification in the Official Gazette, declare to be of a like nature or use to saccharine.	Revenue ...	Rs. 6-4 per lb. ...	...	...	Free	...	
28 (10)	Saccharine tablets ...	Revenue ...	$18\frac{3}{4}$ per cent. ad valorem or Rs. 6-4 per pound of saccharine contents, whichever is higher.	...	...	Free	...	
28 (11)	Alkaloids of Opium and their derivatives ...	Revenue ...	Rs. 30 per seer of 80 tolas or $18\frac{3}{4}$ per cent. ad valorem, whichever is higher.	...	...	Free	...	
28 (12)	Alkaloids extracted from Cinchona Bark including Quinine and alkaloids derived from other sources which are chemically identical with alkaloids extracted from Cinchona Bark.	...	Free ...	...	...	...	...	
28 (13)	Anti-plaguex Serum ...	...	Free ...	...	...	...	...	
28 (14)	Toilet Requisites not otherwise specified ...	Revenue ...	25 per cent. ad valorem...	...	...	10 per cent. ad valorem.	...	
29	Cinematograph Films, not exposed ...	Revenue ...	20 per cent. ad valorem...	...	...	5 per cent. ad valorem.	...	
29 (1)	Cinematograph Films, exposed ... *Tariff values*— Rs. A. P. per foot. Exposed standard positive films, new or used— Feature films ... 0 7 0 Other films ... 0 3 0	Revenue ...	$37\frac{1}{2}$ per cent. ad valorem.	...	...	20 per cent. ad valorem.	...	
30	Paints, colours and painters' materials, all sorts not otherwise specified, including paints, solutions and compositions containing dangerous petroleum within the meaning of the Indian Petroleum Act, 1934. *Tariff values*— Rs. A. P. per cwt. Cuttle fish bone ... 8 0 0	Preferential revenue.	30 per cent. ad valorem...	20 per cent. ad valorem.	...	10 per cent. ad valorem.	...	

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	Burma.	

SECTION VI—*Contd.*

CHEMICAL AND PHARMACEUTICAL PRODUCTS ETC.

		per lb.					
	Gamboge	1 8 0					
30 (1)	Dyes derived from coal-tar, and coal-tar derivatives, used in any dyeing process.	Revenue ...	10 per cent. ad valorem...	...	...	Free	...
	Tariff values—	Rs. A. P.					
		per cwt.					
	Alizarine, moist—						
	(*a*) not exceeding 16 per cent.	... 165 0 0					
	(*b*) over 16 per cent. not exceeding 20 per cent.	185 0 0					
	(*c*) exceeding 20 per cent.	... 340 0 0					
		per lb.					
	Alizarine, dry—						
	(*a*) not exceeding 40 per cent.	5 0 0					
	(*b*) exceeding 40 per cent.	... 9 8 0					
	Congo red	... 1 13 0					
	Coupling dyes of the naphthol group—						
	(*a*) Naphthols	... 8 8 0					
	(*b*) Rapid fast colours (rapid salts).	14 0 0					
	(*c*) Bases	... 10 0 0					
	(*d*) Other salts	... 6 0 0					
	Vats—						
	(*a*) Indigo	... 2 10 0					
	(*b*) Carbazole blue	... 8 0 0					
	(*c*) Other sorts—						
	(i) Paste	... 8 0 0					
	(ii) Powder	... 33 0 0					
	Sluphur black	... 1 6 0					
	Metanil yellow	... 1 14 0					
	Aniline oil	... 1 4 0					

	Aniline salts ... 1 2 0 All others ... 3 0 0							
30 (2)	Paints, colours and painters' materials, the following, namely :—					10 percent. ad valorem.	...	...
	(*a*) Red lead, genuine dry, genuine moist and reduced moist.	Preferential revenue.	30 per cent ad valorem or Rs. 4-12 per cwt., whichever is higher.	20 per cent. ad valorem.	...			...
	(*b*) White lead, genuine dry ...	Preferential revenue.	30 per cent. ad valorem or Rs. 5-12 per cwt., whichever is higher.	20 per cent. ad valorem.	...			...
	(*c*) Zinc white, genuine dry ...	Preferential revenue.	30 per cent. ad valorem or Rs. 6 per cwt., whichever is higher.	20 per cent. ad valorem.	...			...
	(*d*) Paints, other sorts, coloured, moist—							
	(*i*) in packing of 1 lb. or over ...	Preferential revenue.	30 per cent. ad valorem or Rs. 8-8 per cwt., whichever is higher.	20 per cent. ad valorem.	...			...
	(*ii*) in packing of ½ lb. and over but less than 1 lb.	Preferential revenue.	30 per cent. ad valorem or Rs. 11-4 per cwt., whichever is higher.	20 per cent. ad valorem.	...			...
	(*iii*) in packing of ¼ lb. and over but less than ½ lb.	Preferential revenue.	30 per cent. ad valorem or Rs. 17 per cwt., whichever is higher.	20 per cent. ad valorem.	...			...
	(*iv*) in packing of less than ¼ lb. ...	Preferential revenue.	30 per cent. ad valorem or Rs. 24 per cwt., whichever is higher.	20 per cent. ad valorem.	...			...
30 (3)	Paints, colours and painters' materials, the following namely :—							
	(*a*) Red lead, reduced dry ...	Revenue ...	25 per cent. ad valorem or Rs. 4-12 per cwt., whichever is higher	...	...	10 per cent. ad valorem.	...	...
	(*b*) White lead, genuine moist and reduced dry or moist.	Revenue. ...	25 per cent. ad valorem or Rs. 5-12 per cwt., whichever is higher.	...	...			...
	(*c*) Zinc white genuine moist ...	Revenue ...	25 per cent. ad valorem or Rs. 6 per cwt. which ever is higher.	...	...			...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	Burma.	
	SECTION VI—*Contd.*						
	CHEMICAL AND PHARMACEUTICAL PRODUCTS ETC.—*Contd.*						
	(*d*) Zinc white, reduced dry or moist ...	Revenue ...	25 per cent. ad valorem or Rs. 4-4 per cwt., whichever is higher.	...	...	...	...
30 (4)	The following Paints, colours and painters' materials, namely, barytes, turpentine, turpentine substitute, and varnish not containing dangerous petroleum within the meaning of the Indian Petroleum Act, 1934.	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
30 (5)	Plumbago and graphite ...	Preferential revenue.	30 per cent. ad valorem.	...	20 per cent. ad valorem.	10 per cent. ad valorem.	...
30 (6)	Printers' ink ...	Revenue ...	10 per cent. ad valorem	...	...	Free.	...
30 (7)	Lead pencils ...	Revenue ...	25 per cent. ad valorem or one anna per dozen whichever is higher.	...	...	10 per cent.	...
30 (8)	Slate pencils ...	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
31	Natural Essential Oils, all sorts not otherwise specified.	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
	Tariff value— Rs. A. P. per lb.						
	Cassia oil, natural, from the Far East. 1 12 0						
31 (1)	The following Natural Essential Oils, namely citronella, cinnamon, and cinnamon leaf.	Preferential revenue.	30 per cent. ad valorem.	...	20 per cent. ad valorem.	10 per cent. ad valorem.	...
	Tariff value— Rs. A. P. per lb.						
	Citronella oil, natural, from the Far East. 1 8 0						
31 (2)	The following Natural Essential Oils, namely, almond, bergamot, gajupatti, camphor, cloves, eucalyptus, lavender, lemon, ott-orose and peppermint.	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...

	Tariff values— Rs. A. P. per lb. Gajupatti oil, natural, from the Far East. 2 10 0 [1]Peppermint oil, natural, from the Far East. 5 12 0 [1]The tariff value applies to peppermint oil packed in containers of more than 1 oz.									
31 (3)	Essential Oils, synthetic ...	Revenue.	...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...		
31 (4)	Camphor ...	Revenue	...	50 per cent. ad valorem.	...	...	20 per cent. ad valorem.	...		
31 (5)	Perfumery, not otherwise specified ...	Revenue	...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...		
	Tariff values— Rs. A. P. per cwt. Gowla, husked and unhusked ... 75 0 0 Kapurkachri (zedoary) ... 14 10 0 Patch leaves (patchouli) ... 28 0 0 Rose-flowers, dried ... 15 8 0									
32	Soap not otherwise specified ...	Revenue.	...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...		
32 (1)	Soap, toilet	Revenue	...	25 per cent. ad valorem. or Rs. 20 per cwt., whichever is higher.	...	...	10 per cent. ad valorem	...		
32 (2)	Soap, household and laundry—						Re. 1-8 per cwt.			
	(*a*) in plain bars of not less than one pound in weight.	Revenue	...	Rs. 4 per cwt. ...	...	...		...		
	(*b*) other sorts ...	Revenue	...	Rs. 6-8 per cwt. ...	...	...		...		
32 (3)	Polishes and compositions ...	Revenue	...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...		
32 (4)	Candles ...	Revenue	...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...		
33	Glue, not otherwise specified ...	Revenue		25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...		
33 (1)	Glue, clarified, liquid ...	Revenue	...	10 per cent. ad valorem.	...	...	Free	...		
34	Gunpower for cannons,rifles,pistolss &porting purposes	Revenue	...	50 per cent. ad valorem.	...	...	20 per cent. ad valorem.	...		
34(1)	Explosives, namely, blasting gunpowder, blasting gelatine, blasting dynamite, blasting roburite, blasting tonite, and all other sorts, including detonators and blasting fuze.[1]	Revenue	...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...		

[1] Under Government of India, Finance Department (Central Revenues), Notification No. 33 dated the 22nd June, 1935, as amended subsequently, explosives specially adapted for use in coal mines and included in the list of "Permitted Explosives" issued by the Chief Inspector of Mines in India

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom	A British Colony.	Burma.	
	SECTION VI—*contd.* CHEMICAL AND PHARMACEUTICAL PRODUCTS ETC.—*Contd.*						
34 (2)	Fireworks specially prepared as danger or distress lights for the use of ships.	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
34 (3)	Fireworks, not otherwise specified[1] ...	Revenue ...	50 per cent. ad valorem.	...	...	20 per cent. ad valorem.	...
34 (4)	Matches, undipped splints and veneers— (*a*) Matches— (1) in boxes or booklets containing on an average not more than 40 matches.	Protective ...	The rate at which excise duty is for the time being leviable on such matches manufactured in British India[2] plus ten annas per gross of boxes or booklets.	...	...	The rate at which excise duty is for the time being leviable on such matches manufactured in British India.[2]	...
	(2) in boxes or booklets containing on an average more than 40 but not more than 60 matches.	Protective ...	The rate at which excise duty is for the time being leviable on such matches manufactured in British India[3] plus fifteen annas per gross of boxes or booklets.			The rate at which excise duty is for the time being leviable on such matches manufactured in British India	
	(3) In boxes or booklets containing on an average more than 60 but not more than 80 matches.	Protective ...	The rate at which excise duty is for the time being leviable on such matches manufactured	...	...	[3]The rate at which e xcise duty is for the	...

				in British India[4] plus Re. 1-4 per gross of boxes or booklets.				
	(4) All other matches	...	Protective	... The rate at which excise duty is for the time being leviable on such matches manufactured in British India[5] plus one pie for every 48 matches or fraction thereof.	...	...	... The rate at which excise duty is for the time being leviable on such matches manufactured in British India.[5]	...
	(*b*) Undipped splints such as are ordinarily used for match-making.		Protective	... Five annas and seven and a half pies per lb.	...	...	10 per cent. ad valorem.	...
	(*c*) Veneers such as are ordinarily used for making boxes, including boxes and parts of boxes made of such veneers.		Protective	... Seven annas and six pies per lb.	...	...	10 per cent. ad valorem.	...
35	Manures, all sorts, including animal bones and the following chemical manures :—Basic slag, nitrate of ammonia, nitrate of soda, muriate of potash, sulphate of ammonia, sulphate of potash, kainit	...		Free ...	...	...	...	...

under the Indian Coal Mines Regulations, 1926, and in force for the time being are exempt from payment of import duty.

[1] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, as amended subsequently, fireworks specially designed for the use of aircraft are liable to duty at 25 per-cent. *ad valorem*.

[2] The rate of excise duty on the 1st January, 1942, and until further notice is Rs. 2 per gross of boxes or booklets. The rate of excise duty on matches of the type known as "Bengal lights" in boxes containing on an average not more than 12 matches is 10 annas per gross of boxes.

[3] The rate of excise duty on the 1st January, 1942, and until further notice is Rs. 3 per gross of boxes or booklets. But under Government of India, Finance Department (Central Revenues) Notification No. 33, dated the 22nd June, 1935, as amended subsequently, matches in boxes or booklets containing on an average more than 40 but not more than 50 matches are liable to duty at the rate equivalent to the excise duty leviable on such matches plus 12 annas and 6 pies per gross of boxes or booklets. The rate of excise duty on such matches on the 1st January, 1942, and until further notice is Rs. 2-8 per gross of boxes or booklets.

[4] The rate of excise duty on the 1st January 1942, and until further notice is Rs. 4 per gross of boxes or booklets.

[5] The rate of excise duty on the 1st January, 1942, and until further notice is 8 annas for every 1,440 matches or fraction thereof.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom	A British Colony.	Burma.	
	SECTION VI(—*Contd.*) CHENICAL AND PHARMACENTICAL PRODUCTS. ETC.—(*Contd.*)						
	salts, carbolime, urea, nitrate of lime, calcium cyanamide, ammonium phosphates,mineral pho sphates and mineral superphosphates.						
	SECTION VII. HIDES, SKINS, LEATHER, FUR SKINS, AND MANUFACTURES OF THESE MATERIALS.						
36	Hides and skins not otherwise specified ...	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
36 (1)	Hides and skins, raw or salted ...	...	Free ...	...	...	...	...
36 (2)	Skins (other than Fur Skins), tanned or dressed, and unwrought leather.	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
37	The following leather manufactures, namely, saddlery harness, trunks and bags.	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
37 (1)	Leather cloth including artificial leather, and other manufactures of leather not otherwise specified.	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
38	Fur Skins, dressed ...	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
	SECTION VIII. RUBBER AND ARTICLES MADE OF RUBBER.						
39	Rubber, raw ...	... ...	Free ...	...	...	...	...
39 (1)	Rubber tyres and tubes and other manufactures of rubber, not otherwise specified, excluding apparel and boots and shoes. *Tariff values*— Rs. A. P. per dozen. Cycle tyres (pneumatic) from the Far East. 14 0 0 Cycle tubes from the Far East ... 6 0 0 per ln. Solid rubber tyres for carriages and rickshaws. 0 8 9	... ...	25 per cent. advalorem	...	...	10 per cent. ad valorem.	...

SECTION IX.

WOOD AND CORK AND WARES OF THESE MATERIALS; GOODS MADE OF PLAITING MATERIALS.

40	Wood and Timber, all sorts, not otherwise specified, including all sorts of ornamental wood.	Revenue	...	25 per cent. ad valorem.	...	...	Free	...			
40 (1)	Firewood ...	Revenue	...	2½ per cent. ad valorem.	...	...	Free	...			
40 (2)	Furniture and cabinetware, not otherwise specified, excluding mouldings.	Revenue	...	25 per cent. ad valorem.	...	...	Free	...			
40 (3)	Tea chests and parts and fittings thereof ...	Revenue	...	25 per cent. ad valorem.	...	...	Free	...			
41	Cork manufactures not otherwise specified ...	Revenue	...	25 per cent. ad valerem.	...	...	10 per cent. ad valorem.	...			
42	Furniture of wickerwork or bamboo ...	Revenue	...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...			

SECTION X.

PAPER AND ITS APPLICATIONS.

43	Wood pulp ...	Protective	...	25 per cent. ad valorem or Rs. 30 per ton, whichever is higher.	...	...	10 per cent. ad valorem.	March, 31st, 1942.			
44	Writing paper—										
	(*a*) Ruled or printed forms (including letter paper with printed headings) and envelopes made of writing paper and account and manuscript books and binding thereof.	Protective	...	Nine pies per lb. or 25 per cent. ad valorem, whichever is higher.	...	...	10 per cent. ad valorem.	March, 31st, 1942.			
	(*b*) All other sorts ...	Protective	...	Nine pies per lb.	...	...	...	March 31st., 1942.			
44 (1)	Printing paper, excluding poster and stereo and all coated papers, but including art paper, all sorts which contain no mechanical wood pulp or in which the mechanical wood pulp amounts to less less than 70 per cent. of the fibre content.	Protective	...	Nine pies per lb.	...	...	10 per cent. ad valorem.	March 31st., 1942.			
44 (2)	Printing paper, all sorts not otherwise specified which contain mechanical wood pulp amounting to not less than 70 per cent. of the fibre content.[1]	Revenue	...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...			
44 (3)	Paper, including poster and stereo and all coated papers except art paper, all sorts, not otherwise specified.	Revenue	...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...			
44 (4)	Pasteboard, millboard, cardboard and strawboard, all sorts.	Revenue	...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem	...			
44 (5)	Trade catalogues and advertising circulars imported by packet, book or parcel post.	...		Free ...	...	...	...	...			
44 (6)	Paper money ...	...		Free ...	...	...	...	...			
44 (7)	Newspapers, old, in bales and bags ...	Revenue	...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...			

[1] Under Government of India, Finance Department, (Central Revenues) Notification No. 33, dated the 22nd June, 1935, as amended subsequently, the following classes of printing paper containing mechanical wood pulp amounting to not less than 70 per cent. of the fibre content are exempt from

Itemm No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom	A British Colony.	Burma.	
	SECTION X—*(Contd.)* PAPER AND ITS APPLICATIONS—*(Contd.)*						
45	Articles made of Paper and Papier Mache ; Stationery including drawing and copy books, labels, advertising circulars, sheet or card almanacs and calendars, Christmas, Easter and other cards, including cards in booklet forms ; including also waste paper but excluding paper and stationery otherwise specified.[1]	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
45 (1)	Books, printed, including covers for printed books, maps, charts and plans, proofs, music manuscripts, and illustrations specially made for binding in books.[2]	...	Free	...	...	...	...
45 (2)	Prints, Engravings and Pictures (including photographs and picture post cards) on paper or cardboard.*	Revenue ...	50 per cent. ad valorem.	...	...	20 per cent. ad valorem.	...
	SECTION XI. TEXTILE MATERIALS AND TEXTILE GOODS.						
46	Silk, raw (excluding silk waste and noils), and silk cocoons. *Tariff values*— Rs. A. P. per lb. Silk, raw— Chinese— Waste products ... 2 8 0; Duppion all kinds ... 4 8 0; Hand reeled (excluding re-reeled). 5 4 0; All other sorts ... 6 12 0; Japanese filatures and hand reeled and hand re-reeled but excluding duppion all kinds. 9 4 0	Protective ...	25 per cent. ad valorem plus 14 annas per lb.	...	...	10 per cent. ad valorem.	March 31st, 1942.
46 (1)	Silk waste and noils ...	Protective ...	25 per cent. ad valorem.	...	...	10 per cent. advalorem	March 31st, 1942

46 (2)	Wool, raw, and wooltops ...	...	...	Free ...	...	...	...	Free	...	
46 (3)	Cotton, raw ...	Revenue	...	One anna per lb. ...	...	...			...	
46 (4)	Textile materials, the following :— Raw flax, hemp, jute and all other unmanufactured textile materials not otherwise specified.	Revenue	...	Raw hemp—18¾ per cent. ad valorem all others—25 per cent. ad valorem	...	...		Raw hemp—free ; all others 10 per cent. ad valorem.	...	
46 (5)	Sisai and Aloe fibre ...	Preferential revenue.		30 per cent. ad valorem.	...	20 per cent. ad valorem.		10 per cent. ad valorem.	...	
47	Silk yarn including thrown silk warps and yarn spun from silk waste or noils but excluding sewing thread[3]	Protective	...	25 per cent. ad valorem plus 14 annas per lb.	...	...		10 per cent. ad valorem.	March 31st., 1942.	
47 (1)	Silk sewing thread ...	Protective	...	25 per cent. ad valorem.	...	...		10 per cent. ad valorem.	March 31st 1942.	
47 (2)	Artificial silk yarn and thread ...	Revenue	...	25 per cent. ad valorem or 5 annas per lb. whichever is higher.	...	...		10 per cent. ad valorem.	...	
47 (3)	Woollen yarn not otherwise specified ...	Revenue	...	25 per cent. ad valorem.	...	...		10 per cent. ad valorem.	...	
47 (4)	Woollen yarn for weaving and knitting wool ...	Revenue	...	25 per cent. ad valorem.	...	...		10 per cent. ad valorem.	...	
47 (5)	Cotton thread other than sewing or darning thread.	Revenue	...	25 per cent. ad valorem.	...	...		10 per cent. ad valorem.	...	
47 (6)	Cotton twist and yarn and cotton sewing or darning thread[4]— (*a*) of counts above 50's— (*i*) of British manufacture ...	Protective	...	5 per cent. ad valorem ...	...	...		Free	March 31st. 1942.	
	(*ii*) not of British manufacture ...	Protective	...	6¾ per cent. ad valorem.	...	...			March 31st.. 1942.	

payment of so much of the import duty as is in excess of the amount mentioned against each :—(1) newsprint in reels, unglazed—Re. 1-8 per cwt., (*ii*) newsprint in reels, other sorts—Re. 1-12 per cwt., and (*iii*) all sorts not in reels (excluding chrome, marble, flint, poster, stereo and art paper) white or grey—Rs. 2 per cwt.

[1] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, as amended subsequently, posters, pamphlets and other printed material intended for tourist propaganda purposes, provided they are issued by or under the auspices of the Governments of the countries, being countries outside India, within which travel is to be stimulated and are not primarily intended to advertise the services of any private tourist agency, are exempt from payment of import duty.

[2] Under Government of India, Finance Department (Central Revenues) Notification No. 33, dated the 22nd June, 1935, wall pictures and diagrams such as are ordinarily used for instructional purposes are exempt from payment of import duty.

[3] Under Government of India, Finance Department Central Revenues) Notification No. 33, dated the 22nd June, 1935, as amended subsequently' noil yarn is exempt from payment of the additional specific duty of 14 annas per lb.

[4] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, as amended subsequently, cotton sewing or darning thread wound on reels, balls, tubes, cards, bobins, spools, cops, cheeses and cones is liable to duty at 5 per cent. *ad valorem* when the thread is of British manufacture and at 6 per cent. *ad valorem* when it is of non-British manufacture.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom	A British Colony.	Burma.	
	SECTION XI—*Contd.* TEXTILE MATERIALS AND TEXTILE GOODS—*Bontd.*						
	(*b*) of counts 50's and below— (*i*) of British manufacture ...	Protective	5 per cent. ad valorem or $1\frac{1}{4}$ annas per lb. whichever is higher.	...	...		March 31st, 1942.
	(*ii*) not of British manufacture ...	Protective	$6\frac{1}{4}$ per cent. ad valorem or $1\frac{7}{8}$ annas per lb. which ever is higher.	...	...		March 31st, 1942.
47 (7)	Twist and yarn of flax or jute ...	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
47 (8)	Yarn (excluding cotton yarn) such as is ordinarily used for the manufacture of belting for machinery.	Revenue ...	$6\frac{1}{4}$ per cent. ad valorem.	...	...	Free	...
48	Fabrics not otherwise specified containing more than 90 per cent. of silk including such fabrics embroidered with artificial silk—					20 per cent. ad valorem.	
	(*a*) Pongee ...	Protective ...	50 per cent. ad valorem plus Re. 1 per lb.	...	...		March 31st, 1942.
	(*b*) Fuji Boseki and corded (excluding white cord).	Protective ...	50 per cent. ad valorem plus Re. 1-8 per lb.	...	...		March 31st, 1942.
	(*c*) Other sorts[1] ...	Protective ...	50 per cent. ad valorem plus Rs. 2 per lb.	...	...		March 31st, 1942.
48 (1)	Fabrics not otherwise specified containing more than 90 per cent. of artificial silk—					15 per cent. ad valorem.	
	(*a*) of British manufacture ...	Protective ...	30 per cent. ad valorem or $2\frac{1}{2}$ annas per square yard whichever is higher.	...	...		March 31st, 1942.
	(*b*) not of British manufacture[2] ...	Protective ...	50 per cent. ad valorem or 4 annas per square yard whichever is higher.	...	...		March 31st, 1942.
48 (2)	Woollen fabrics not otherwise specified containing more than 90 per cent. of wool excluding felt and fabrics made of shoddy or waste wool.	Revenue ...	25 per cent. ad valorem or Re. 1-2 per lb. whichever is higher.	...	...	10 per cent. ad valorem.	...

48 (3)	Cotton fabrics not otherwise specified, containing more than 90 per cent. of cotton—						5 per cent. ad valorem.	
	(*a*) Grey piecegoods (excluding bordered grey chadars, dhuties, saris and scarves)—							
	(*i*) of British manufacture[3] ...	Protective ...	15 per cent. ad valorem or $2\frac{6}{8}$ annas per lb., whichever is higher.	...	...			March 31st, 1942.
	(*ii*) not of British manufacure ...	Protective ...	50 per cent. ad valorem or $5\frac{1}{4}$ annas per lb., whichever is higher.	...	...			March 31st, 1942.
	(*b*) Printed piecegoods and printed fabrics—							
	(*i*) of British manufacture[4] ...	Protective ...	17½ per cent. ad valorem.	...	...			March 31st, 1942
	(*ii*) not of British manufacture[4] ...	Protective ...	50 per cent. ad valorem.	...	...			March 31st, 1942.
	(*c*) Cotton piecegoods and fabrics not otherwise specified—							
	(*i*) of British manufacture[5] ...	Protective ...	15 per cent. ad valorem.	...	...			March 31st, 1942.
	(*ii*) not of British manufacture ...	Protective ...	50 per cent. ad valorem.	...	...			March 31st, 1942.
48 (4)	Fabrics, not otherwise specified, containing more than 10 per cent. and not more than 90 per cent. silk—	Protective ...					20 per cent. ad valorem.	
	(*a*) containing more than 50 per cent. of silk or artificial silk or of both.		50 per cent. ad valorem plus Rs. 2 per lb.	...	...			March 31st, 1942.
	(*b*) containing not more than 50 per cent. of silk or artificial silk or of both—							
	(*i*) containing more than 10 per cent. artificial silk[6]	Protective ...	50 per cent. advalorem or Re. 1-8 per lb. whichever is higher.	...				March 31st. 1942.
	(*ii*) containing no artificial silk or not more than 10 per cent. artificial silk.[1]	Protective ...	50 per cent. ad valorem.	...	...			March 31st, 1942.

[1] Under Government of India, Finance Department (Central Revenues) Notification No. 33, dated the 22nd June, 1935, (1) Chinese silk piecegoods the ollowing, namely, Ghat-Pote, plain and flower, and Gauze, plain and flower are liable to duty at 50 per cent. *ad valorem* plus Re. 1 per lb. and (2) Paj. all sorts, are exempt from so much of the duty as is in excess of 75 per cent *ad valorem*.

[2] Under Government of India, Commerce Department, Notification No. 341-T. (6)/41., dated the 21st July, 1941, the articles assessable under this sub-item are liable to duty at 50 per cent. *ad valorem* or 7 annas per square yard, whichever is higher.

[3] Under Government of India, Commerce Department, Notification No. 20-T. (17)/39, dated the 16th April, 1940, the articles assessable under this sub-item are liable to duty at $12\frac{1}{2}$ per cent. *ad valorem* or $24\frac{1}{2}$ annas per lb. whichever is higher.

[4] Under Government of India, Commerce Department, Notification No. 20-T. (17)/39, dated the 16th April, 1940, the articles assessable under this sub-item are liable to duty at 10 per cent. *ad valorem*.

[5] Under Government of India, Commerce Department, Notification No. 20-T. (17)/39, dated the 16th April, 1940, the articles assessable under this sub-item are liable to duty at $12\frac{1}{2}$ per cent. *ad valorem*.

[6] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, woollen all-overs embroidered with artificial silk are exempt from so much of the duty as is in excess of 25 per cent. *ad valorem* or Re. 1-2 per lb., whichever is higher.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom	A British	Burma. Colony	
48 (5)	Fabrics not otherwise specified containing not more than 10 percent silk but more than 90 per cent. artificial silk—					15 per cent. ad valorem.	
	(*a*) containing 50 per cent or more cotton						
	(*i*) of British manufacture... ...	Protective ...	30 per cent. ad valorem or 2 annas per square yard whichever is higher.	...	...		March 31st, 1942.
	(*ii*) not of British manufacture[1] ...	Protective ...	50 per cent. ad valorem or 3½ annas per square yard whichever is higher.	...	...		March 31st, 1942.
	(*b*) containing no cotton or containing less than 50 per cent. cotton—						
	(*i*) of British manufacture ...	Protective ...	30 per cent. ad valorem or 2½ annas per square yard whichever is higher.	...	...		March 31st, 1942.
	(*ii*) not of British manufacture[2] ...	Protective ...	50 per cent. ad valorem or 4 annas per square yard whichever is higher.	...	...		March 31st, 1942.
48 (6)	Fabrics not otherwise specified containing not more than 10 per cent. silk or 10 per cent. artificial silk but containing more than 10 per cent. but not more than 90 per cent. wool.	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
48 (7)	Fabrics not otherwise specified, containing not more than 10 per cent. silk or 10 per cent. artificial silk or 10 per cent. wool but containing more than 50 per cent. cotton and not more than 90 per cent. cotton—					15 per cent. ad valorem.	
	(*a*) of British manufacture ...	Protective ...	25 per cent. ad valorem.	...	...		March 31st, 1942.
	(*b*) not of British manufacture ...	Protective ...	50 per cent. ad valorem.	...	...		March 31st, 1942.
48 (8)	Fabrics not otherwise specified containing not more than 10 per cent. silk or 10 per cent. artificial silk or 10 per cent. wool or 50 per cent. cotton.	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	

48 (9)	The following Cotton fabrics namely Sateens including Italians of Sateen weave, velvets and velveteens and embroidered all-overs—						5 per cent. ad valorem.		
	(*a*) Printed fabrics—								
	(*i*) of British manufacture[3]	...	Protective	...	17½ per cent. ad valorem.	...	...		March 31st, 1942.
	(*ii*) not of British manufacture	...	Protective	...	35 per cent. ad valorem..	...	...		March 31st, 1942.
	(*b*) Other fabricc—								
	(*i*) of British manufacture[4]	...	Protective	...	15 per cent. ad valorem..	...	...		March 31st, 1942.
	(*ii*) not of British manufacture	...	Protective	...	35 per cent. ad valorem..	...	...		March 31st, 1942.
48 (10)	Fabrics containing gold or silver thread	...	Protective	...	50 per cent. ad valorem..	...	...	20 per cent. ad valorem.	March 31st, 1942.
49	Textile manufactures, the following articles when made wholly or mainly of any of the fabrics specified in Item No. 48, 48 (1), 48 (3), 48 (4), 48 (5), 48 (7), 48 (9) or 48 (10) :—		Protective	...	The ad valorem rates of duty applicable to the fabric of which the article is wholly or mainly made.	...	...	The ad valorem rates of duty applicable to the Burmese fabric of which the article is wholly or mainly made.	The duration applicable to the fabric of which the article is wholly or mainly made.
	Bed sheets Bed spreads. Bolster cases. Counterpanes. Cloths, table. Cloths, tray. Covers, bed. Covers, table. Dusters. Glass-cloths. Handkerchiefs. Napkins. Pillow cases. Pillow slips. Scarves. Shirts.								

[1] Under Government of India, Commerce Department, Notification No. 341.T. (6)/41, dated the 21st July, 1941, the artitles assessable under this sub-item are liable to duty at 50 per cent. *ad valorem* or 5½ annas per square yard, whichever is higher.

[2] Under Government of India, Commerce Department, Notification No. 341-T. (6)/41, dated the 21st July, 1941, the articles assessable under this sub-item are liable to duty at 50 per cent. *ad valorem* or 7 annas per square yard, whichever is higher.

[3] Under Government of India, Commerce Department, Notification No. 20-T. (17)/39, dated the 16th April, 1940, the articles assessable under this sub-item are liable to duty at 15 per cent. *ad valorem.*

[4] Under Government of India, Commerce Department, Notification No. 20-T. (17)/39, dated the 16th April, 1940, the articles assessable under this sub-item are liable to duty at 12½ per cent. *ad valorem*....

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	Burma.	
	SECTION XI—*Contd.* TEXTILE MATERIALS AND TEXTILE GOODS—*Contd.*						
	Shawls. Sacks (cotton). Towels Umbrella Coverings.						
49 (1)	Fents, being bona fide remnants of piecegoods or other fabrics—						
	(*a*) of materials liable to duty under Item 48 (3) not exceeding 4 yards in length.	Preferential revenue.	35 per cent. ad valorem.	25 per cent. ad valorem.	...	20 per cent. ad valorem.	...
	(*b*) of materials liable to duty under Item 48, 48 (1), 48 (4) or 48 (5), not exceeding $2\frac{1}{2}$ yards in length.	Preferential revenue.	35 per cent. ad valorem..	25 per cent. ad valorem.	...		...
	(*c*) of other materials, not exceeding 4 yards in length.	Preferential revenue.	35 per cent. ad valorem...	25 per cent. ad valorem.	...		...
49 (2)	Ribbons ...	Revenue ...	50 per cent. ad valorem..	...	...	20 per cent. ad valorem.	...
49 (3)	Blankets and rugs (other than floor rugs), excluding blankets and rugs made wholly or mainly from artificial silk.	Revenue ..	25 per cent. ad valorem...	...	...	10 per cent. ad valorem.	...
49 (4)	Woollen carpets, floor rugs shawls and other manufactures of wool, not otherwise specified including felt.[1]	Preferential revenue.	35 per cent. ad valorem..	25 per cent. ad valorem.	...	15 per cent. ad valorem.	...
49 (5)	Cotton braids or cords the following, namely :— Ghoonsis and Muktakesis. ...	Protective ...	$6\frac{1}{2}$ annas per lb. ...	...	...	Free	March 31st, 1942.
50	Jute manufactures not otherwise specified ...	Revenue ...	25 per cent. ad valorem..	...	...	10 per cent. ad valorem.	...
50 (1)	Second hand or used gunny bags or cloth made of Jute.	...	Free ...	...	...	...	...

50 (2)	Hemp manufactures ...	Revenue	...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...			
50 (3)	Cotton, hair and canvas ply belting for machinery ...	Revenue	...	$6\frac{1}{4}$ per cent. ad valorem.	...	...	Free.	...			
50 (4)	Ropes, cotton ...	...		Free ...	...	...	...	...			
50 (5)	Oil cloth and floor cloth ...	Revenue	...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...			
50 (6)	Cordage, rope and twine of vegetable fibre other than jute and cotton not otherwise specified.	Revenue	...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem	...			
50 (7)	Mats and Mattings, not otherwise specified ...	Revenue	...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...			
50 (8)	Coir fibre, coir yarn and coir mats and matting ...	Preferential revenue.		30 per cent. ad valorem.	...	20 per cent. ad valorem.	10 per cent. ad valorem.	...			
	Tariff values— Rs. A. P. per cwt. Coir fibre ... 6 0 0 Coir yarn ... 10 0 0										
51	Socks and stockings made wholly or mainly from silk or artificial silk.	Revenue	...	50 per cent. ad valorem.	...	...	20 per cent. ad valorem.	...			
51 (1)	Woollen hosiery and woollen knitted apparel. that is to say, all hosiery and knitted apparel containing not less than 15 per cent. of wool by weight.	Revenue	...	25 per cent. ad valorem or Re. 1-2 per lb. whichever is higher.	...	...	10 per cent. ad valorem.	...			
51 (2)	Cotton knitted apparel, including apparel made of cotton interlocking material, cotton undervests, knitted or woven, and cotton socks and stockings—						10 per cent. ad valorem.				
	(*a*) of a weight not exceeding 4 lbs. per dozen...	Protective	...	25 per cent. ad valorem or 12 annas per lb. whichever is higher.	...	...			March	31st, 1942.	
	(*b*) of a weight exceeding 4 lbs. per dozen ...	Protective	...	25 per cent. ad valorem or 10 annas per lb., whichever is higher.	...	...			March	31st, 1942.	
51 (3)	Cotton knitted fabric ...	Protective	...	50 per cent. ad valorem or 12 annas per lb., whichever is higher.	...	...	20 per cent. ad valorem.		March	31st. 1942.	
52	Apparel, hosiery, haberdashery, millinery and drapery not otherwise specified.	Revenue	...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...			
52 (1)	Silk or artificial silk goods used or required for medical purposes, namely :—silk or artificial silk ligatures ; elastic silk or artificial silk hosiery, elbow pieces, thigh pieces, knee, caps, leggings, socks, anklets, stockings, suspensory bandages, silk or artificial silk, abdominal, belts, silk or artificial silk web catheter tubes, and oiled silk or artificial silk.	Revenue	...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...			

[1] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, woollen waste and rags are exempt from payment of import duty.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture			Duration of protective rates of duty.
				The United Kingdom	A British Colony.	Burma.	
	SECTION XI—*Contd.* TEXTILE MATERIALS AND TEXTILE GOODS—*Contd.*						
52 (2)	Uniforms and Accoutrements appertaining thereto, imported by a public servant for his personal use.	...	Free ...	...	...	...	...
52 (3)	Insignia and Badges of official British and Foreign Orders.	...	Free ...	...	...	...	...
53	Textile manufactures, not otherwise specified ...	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
53 (1)	Rags and other paper-making materials excluding wood pulp.	...	Free ...	...	...	...	...
	SECTION XII. FOOTWEAR, HATS, UMBRELLAS AND PARASOLS; ARTICLES OF FASHION.						
54	Boots and Shoes ...	Revenue ...	25 per cent. ad valorem or six annas per pair, whichever is higher.	...	...	10 per cent. ad valorem.	...
[1]54 (1)	.....	...	.....	...	...	...	...
54 (2)	Uppers for boots and shoes unless entirely made of leather.	Revenue ...	25 per cent. ad valorem or three annas per pair, whichever is higher.	...	...	10 per cent. ad valorem.	...
55	Hats, caps, bonnets and hatters' ware not otherwise specified.	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent.	...
56	Parasols and Sunshades and fittings for umbrellas parasols and sunshades.	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
56 (1)	Umbrellas.	Revenue ...	25 per cent. ad valorem or eight annas each, which ever is higher.	...	...	10 per cent. ad valorem.	...
[1]57	.....	...	.....	...	...	...	...
	SECTION XIII. WARES OF STONE AND OF OTHER MINERAL MATERIALS; CERAMIC PRODUCTS; GLASS AND GLASSWARE.						
58	Articles made of Stone or Marble ...	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...

58 (1)	Asbestos manufactures, not otherwise specified ...	Revenue	...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
58 (2)	Packing—Engine and Boiler —all sorts not otherwise specified.;	Revenue	...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
59	Building and Engineering materials, all sorts not of iron, steel or wood not otherwise specified, including tiles other than glass. earthenware or porcelain tiles, and firebricks not being component parts of any articles included in Item No. 72 or No. 74 (2).[2].	Revenue	...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
59 (1)	Building and Engineering bricks ...	Revenue	...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
59 (2)	Earthenware, china and porcelain, all sorts not otherwise specified.	Revenue	...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
59 (3)	Earthenware pipes and sanitary ware ...	Revenue	...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
59 (4)	Tiles of earthenware and porcelain ...	Revenue	...	25 per cent. advalorem or two annas per square foot, whichever is higher.	...	...	10 per cent. ad valorem.	...
59 (5)	Domestic Earthenware, china and porcelain, the following, namely :—						10 per cent. ad valorem.	
	(*a*) Tea cups and coffee cups—							
	(*i*) having a capacity of more than $7\frac{1}{2}$ ozs. ...	Revenue	...	25 per cent. ad valorem or ten annas per dozen whichever is higher.	...	...	...	...
	(*ii*) having a capacity of not more than $7\frac{1}{2}$ ozs.	Revenue	...	25 per cent. ad valorem or four annas per dozen; whichever is higher.	...	...	...	...
	(*b*) Saucers—							
	(*i*) for use with tea cups or coffee cups having a capacity of more than $7\frac{1}{2}$ ozs.	Revenue	...	25 per cent. ad valorem or five annas per dozen, whichever is higher.	...	...	...	...
	(*ii*) for use with tea cups or coffee cups having a capacity of not more than $7\frac{1}{2}$ ozs.	Revenue	...	25 per cent. ad valorem or two annas per dozen, whichever is higher.	...	...	...	...
	(*c*) Tea-pots—							
	(*i*) having a capacity of more than 20 ozs. ...	Revenue	...	25 per cent. ad valorem or Rs. 3 per dozen whichever is higher.	...	...	...	...
	(*ii*) having a capacity of more than 10 ozs. and not more than 20 ozs.	Revenue	...	25 per cent. ad valorem or Re. 1-8 per dozen, whichever is higher.	...	...	...	...

[1] There are no entries bearing Item Nos. 54 (1) and 57.

[2] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, sand is exempt from payment of import duty.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom	A British Colony.	Burma.	
	SECTION III—*Contd.*						
	WARES OF STONE AND OF OTHER MINERAL MATERIALS; CERAMIC PRODUCTS; GLASS AND GLASSWARE—*Contd.*						
	(*iii*) having a capacity of not more than 10 ozs.	Revenue ...	25 per cent. ad valorem or twelve annas per dozen, whichever is higher.	...	...	...	...
	(*d*) Sugar-bowls ...	Revenue ...	25 per cent. ad valorem or Re. 1--8 per dozen, whichever is higher.	...	...	...	[4]...
	(*e*) Jugs having a capacity of over 10 ozs. ...	Revenue ...	25 per cent. ad valorem or twelve annas per dozen, whichever is higher.	...	...	...	...
	(*f*) Plates over $5\frac{1}{2}$ inches in diameter—						
	(*i*) over $8\frac{1}{2}$ inches in diameter ...	Revenue ...	25 per cent. ad valorem or Re. 1 per dozen, whichever is higher.	...	...	...	...
	(*ii*) not over $8\frac{1}{2}$ inches in diameter ...	Revenue ...	25 per cent. ad valorem or ten annas per dozen, whichever is higher.	...	...	...	...
59 (6)	Covered crucibles for glass-making ...	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
60	Glass and Glassware not otherwise specified and lacquered ware.	Revenue ...	25 per cent. ad valorem.	...	...	Lacquered ware—free; all others 10 per cent. ad valorem.	...
	Tariff values— Rs. A. P. per gross.						
	Aerated water bottles, empty, from the Far East—						
	Codd's pattern—						
	Under 10 ozs. ... 25 0 0						
	10 ozs. ... 27 0 0						
	Over 10 ozs. ... 28 0 0						
	Crown cork pattern—						
	7 ozs. and under ... 19 0 0						
	Over 7 ozs. up to and including 10 ozs. 20 0 0						
	Over 10 ozs. 21 0 0						

60 (1)	Glass globes and chimneys for lamps and lanterns—								
	(*a*) Globes for hurricane lanterns	...	Revenue	...	25 per cent. ad valorem or four annas and six pies per dozen, whichever is higher.	...	...	10 per cent. ad valorem. ...	...
	(*b*) Other globes and chimneys having an external base diameter of over one inch.		Revenue	...	25 per cent. ad valorem or three annas per dozen, whichever is higher.	...	...	...	...
60 (2)	Electric lighting bulbs	...	Revenue	...	50 per cent. ad valorem.	...	...	20 per cent. ad valorem.	...
60 (3)	Glass bangles, glass beads and false pearls	...	Revenue	...	50 per cent. ad valorem...	...	...	20 per cent. ad valorem.	...
	Tariff values—	Rs. A. P. per 100 pairs.							
	Glass bangles—								
	China—								
	Nimuchi and pasalal	... 2 0 0							
	Bracelet, Jadi and fancy, kinds.	all 4 0 0							
	Rajawarakh, all kinds	... 10 8 0							
		per dozen pairs.							
	Japan—								
	Reshmi or lustre, all colours—								
	Fancy (including all kinds of Vankwel or zigzag but excluding hexagonal bangles).	0 1 8							
	Fancy hexagonal	... 0 0 9							
	All others	0 1 0							
	Hollow or tube, all colours	... 0 2 6							
	Sonerikada (golbala)—								
	Containing gold in their composition.	0 13 0							
	All others	... 0 3 0							

SECTION XIV.

REAL PEARLS, PRECIOUS STONES, PRECIOUS METALS AND WARES OF THOSE MATERIALS; COIN (SPECIE).

61	Precious Stones, unset and imported uncut, and Pearls, unset.	...			Free	...	...	...	...
61 (1)	Precious Stones unset and imported cut[1]	...	Revenue	...	25 per cent. ad valorem.	...	...	...	...

[1] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, as amended subsequently, precious stones imported cut and unset are liable to duty at 5 per cent. *ad valorem*.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom	A British Colony.	Burma.	
	SECTION XIV—*Contd.*						
	REAL PEARLS, PRECIOUS STONES, PRECIOUS METALS AND WARES OF THOSE MATERIALS ; COINS (SPECIE)—*Contd.*						
61 (2)	Silver bullion and silver sheets and plates which have undergone no process of manufacture subsequent to rolling.[1]	Revenue ...	Three annas per ounce.	...	...	...	...
61 (3)	Gold bullion and gold sheets and plates which have undergone no process of manufacture subsequent to rolling.	...	Free ...	...	...	...	...
61 (4)	Silver plate and silver manufactures, all sorts not otherwise specified.	Revenue ...	50 per cent. ad valorem.	...	...	20 per cent. ad valorem.	...
61 (5)	Silver thread and wire (including so-called gold thread and wire mainly made of silver) and silver leaf including also imitation gold and silver thread and wire, lametta and metallic spangles and articles of a like nature, of whatever metal made.[2]	Protective ...	62½ per cent. ad valorem.	...	...	20 per cent. ad valorem.	March 31st, 1942.
61 (6)	Gold plate, gold leaf and gold manufactures, all sorts not otherwise specified.	Revenue ...	50 per cent. ad valorem.	...	...	20 per cent. ad valorem.	...
61 (7)	Gold or gold-plated pen nibs ...	Revenue	50 per cent. ad valorem.	...	...	20 per cent. ad valorem.	...
61 (8)	Articles, other than cutlery and surgical instruments, plated with gold or silver.[3]	Revenue ...	50 per cent. ad valorem.	...	...	20 per cent. ad valorem.	...
61 (9)	Cutlery plated with gold or silver ...	Revenue ...	50 per cent. ad valorem.	...	...	20 per cent. ad valorem.	...
61 (10)	Jewellery and Jewels.[4] ...	Revenue ...	50 per cent. ad valorem.	...	...	20 per cent. ad valorem.	...
62	Current coin of the Government of India ...	...	Free ...	...	...	...	...
62 (1)	Silver coin, not otherwise specified ...	Revenue ...	Three annas per ounce...	...	...	...	...
62 (2)	Gold coin ...	...	Free ...	...	...	...	...
	SECTION XV.						
	BASE METALS AND ARTICLES MADE THEREFROM.						
63	Iron or Steel, old[5] ...	Revenue ...	15⅝ per cent. ad valorem.	...	...	Free	...
	Tariff value— Rs. A. P. per cwt.						
	Iron or steel, old ... 3 8 0						

63 (1)	Iron alloys, viz., ferro-manganese, ferro-silicon, ferro-chrome, spiegeleisen and the like as commonly used for steel making.	Revenue ...	$15\frac{5}{8}$ per cent. ad valorem.	...	...	Free	...	
63 (2)	Iron or steel angle, channel, tee, flat, beam, zed, trough and piling—					Free		
	(*a*) not fabricated—							
	(*i*) of British manufacture—							
	not coated with other metals ...	Protective ...	$1\frac{1}{3}$ times the excise duty leviable for the time being on steel ingots produced in British India;[5] or 10 per cent. ad valorem, whichever is higher.	...	...		March 31st 1942.	
	coated with other metals ...	Protective ...	$1\frac{1}{3}$ times the excise duty leviable for the time being on steel ingots produced in British India ;[5] or 10 per cent. ad valorem, whichever is higher..	...	...		March 31st, 1942.	
	(*ii*) not of British manufacture ...	Protective ...	$1\frac{1}{3}$ times the excise duty leviable for the time being on steel ingots produced in British India[5] plus Rs. 43 per ton.	...	...		March 31st, 1942.	
	(*b*) fabricated—							
	(*i*) of British manufacture ...	Protective ...	$1\frac{1}{2}$ times the excise duty leviable for the time being on steel ingots produced in British India[5] plus Rs. 40 per ton.	...	...		March 31st, 1942.	

[1] The rate of excise duty on the 1st January, 1942, and until further notice, on all silver produced in silver works in British India, is 3 annas per ounce.

[2] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, all the articles included in this Item are liable to duty at 50 per cent. *ad valorem*.

[3] Under Government of India, Finance Department (Central Revenues), Notification Nol. 33, dated the 22nd June, 1935, as amended subsequently, articles of imitation jewellery (including buttons and other fasteners) which consist of, or include, base metal plated with gold or silver or both and in which the proportion of gold or silver or both together to total metallic contents is less than 1.5 per cent. are liable to duty which would have been leviable had they contained no gold or silver.

[4] Under Government of India, Finance Department (Central Revenues), Notification No. 80-c dated the 4th October, 1941, iron and steel, old, including used iron or steel railway track material, when imported, from Burma, are exempt from payment of import duty.

[5] The rate of excise duty on the 1st January, 1942, and until further notice, on all steel ingots produced in British India is Rs. 4 per ton.

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Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom	A British Colony.	Burma.	
	SECTION XV—*Contd.* BASE METALS AND ARTICLES MADE THEREFROM—*Contd.*						
	(*ii*) not of British manufacture ...	Protective ...	1½ times the excise duty leviable for the time being on steel ingots produced in British India[1] plus Rs. 40 per ton.	...	...		March 31st, 1942.
63 (3)	Iron or steel bar and rod— (*i*) of British manufacture ...	Protective ...	1½ times the excise duty leviable for the time being on steel ingots produced in British India[1] plus Rs. 10 per ton ; or 10 per cent. ad valorem, whichever is higher.	...	...	Free	March 31st, 1942.
	(*ii*) not of British manufacture ...	Protective ...	1⅓ times the excise duty leviable for the time being on steel ingots produced in British India[1] plus Rs. 39 per ton ; or 20 per cent. ad valorem, whichever is higher.	...	...		March 31st, 1942.
63 (4)	Iron, pig ...	Revenue ...	15⅝ per cent. ad valorem.	...	...	Free	...
63 (5)	Iron rice bowls ...	Revenue ...	15⅝ per cent. ad valorem.	...	...	Free	...
63 (6)	Cast iron pipes and tubes : also cast iron fittings therefor, that is to say, bends, boots, elbows, tees, sockets, flanges, plugs, valves, cocks and the like—						
	(*i*) of British Manufacture[2] ...	Protective ...	10 per cent. ad valorem.	...	...		March 31st, 1942.
	(*ii*) not of British manufacture ...	Protective ...	Rs. 57-8-0 per ton ...	...	...		March 31st, 1942.
63 (7)	Cast iron plates ...	Revenue ...	15⅝ per cent. ad valorem.	...	...	Free	...

63 (8)	Steel ingots ...	Revenue ...	The excise duty leviable for the time beingon steel ingots produced in British India[1]; or $15\frac{5}{8}$ per cent. ad valorem whichever is higher	...	...	Free	...	
	Iron or steel blooms, billets and slabs, provided that no piece less than $1\frac{1}{2}$ inches square or thick shall be included in this item.[3]							
63 (9)	Iron or steel structures, fabricated partially or wholly, not otherwise specified, if made mainly or wholly of iron or steel bars, sections, plates or sheets, for the construction of buildings, bridges, tanks, well curbs, trestles, towers and similar structures or for parts thereof, but not including builders' hardware or any of the articles specified in Item Nos. 72, 72 (3), 74 (1), 75 (3), 75 (4) or 76 (1)—					Free		
	(*a*) of British manufacture ...	Protective ...	$1\frac{1}{2}$ times the excise duty leviable for the time being on steel ingots produced in British India[1] plus Rs. 40 per ton.	...	...		March 31st, 1942.	
	(*b*) not of British manufacture ...	Protective ...	$1\frac{1}{2}$ times the excise duty leviable for the time being on steel ingots produced in British India[1] plus Rs. 40 per ton.	...	...		March 31st, 1942.	
63 (10)	Steel, tinplates and tinned sheets, including tin taggers, and cuttings of such plates, sheets or taggers—					Free		
	(*i*) of British manufacture ...	Protective ...	$1\frac{1}{2}$ times the excise duty leviable for the time being on steel ingots produced in British India[1] plus Rs. 38 per ton.	...	...		March 31st, 1942.	
	(*ii*) not of British manufacture ...	Protective ...	$1\frac{1}{2}$ times the excise duty leviable for the time being on steel ingots produced in British	...	...		March 31st, 1942.	

[1] The rate of excise duty on the 1st January, 1942, and until further notice, on all steel ingots produced in British India is Rs. 4 per ton.

[2] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, as amended subsequently, cast iron fittings for cast iron pipes and tubes, that is to say, bends, boots, elbows, tees, sockets, flanges, plugs, valves, cocks and the like of British manufacture are exempt from so much of the duty as is in excess of Rs. 57-8 per ton.

[3] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, iron or steel billets are, exempt from payment of the alternative *ad valorem* duty.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom	A British Colony.	Burma.	
	SECTION XV—*Contd.* BASE METALS AND ARTICLES MADE THEREFROM—*Contd.*						
			India[2] plus Rs. 59 per ton.				
63 (11)	Iron or Steel anchors and cables ...	Revenue ...	15⅝ per cent. ad valorem.	...	...	Free	...
63 (12)	A. Iron or Steel bolts and nuts, including hookbolts and nuts for roofing but excluding fish bolts and nuts—					Free	
	(i) of British manufacture[1] ...	Protective ...	1½ times the excise duty leviable for the time being on steel ingots produced in British India;[2] or 10 per cent. ad valorem, whichever is higher.	...	...		March 31st, 1942.
	(ii) not of British manufacture ...	Protective ...	1½ times the excise duty leviable for the time being on steel ingots produced in British India;[2] plus Rs. 1-9-0 per cwt.	...	...		March 31st, 1942.
	B. Iron or Steel fish bolts and nuts—					Free	
	(i) of British manufacture ...	Protective ...	1½ times the excise duty leviable for the time being on steel ingots produced in British India;[2] or 10 per cent. ad valorem, whichever is higher.	...	...		March 31st, 1942.
	(ii) not of British manufacture ...	Protective	1½ times the excise duty leviable for the time being on steel ingots produced in British India[2] plus Rs. 4-5-0 per cwt,	...	...		March 31st, 1942.

63 (13)	Iron or steel expanded metal ...	Revenue ...	$15\frac{6}{9}$ per cent. ad valorem.	...	...	Free	...
63 (14)	Iron or steel hoops and strips ...	Preferential revenue.	20 per cent. ad valorem.	10 per cent. ad valorem.	...	Free	...
63 (15)	Iron or Steel rivets—					Free	
	(*i*) of British manufacture[3] ...	Protective ...	$1\frac{1}{2}$ times the excise duty leviable for the time being on steel ingots produced in British India ;[2] or 10 per cent. ad valorem, whichever is higher.	...	...		March 31st, 1942.
	(*ii*) not of British manufacture ...	Protective ...	$1\frac{1}{2}$ times the excise duty leviable for the time being on steel ingots produced in British India[2] plus Rs. 1-14-0 per C.W.T.	...	...		March 31st, 1942.
63 (16)	Iron or Steel nails and washers, all sorts not otherwise specified.	Revenue ...	$15\frac{5}{8}$ per cent. ad valorem.	...	...	Free	...
63 (17)	Iron or Steel pipes and tubes and fittings therefor, if rivetted or otherwise built up of plates or sheets—						
	(*i*) of British manufacture	Protective ...	$1\frac{1}{2}$ times the excise duty leviable for the time being on steel ingots produced in British India[2] plus Rs. 12 per ton ; or 10 per cent. ad valorem, whichever is higher.	...	...		March 31st, 1942.
	(*ii*) not of British manufacture ...	Protective ...	$1\frac{1}{2}$ times the excise duty leviable for the time being on steel ingots produced in British India[2] plus Rs. 35 per ton.	...	...		March 31st, 1942.

[1] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, iron or steel bolts and nuts of British manufacture, including hook-bolts and nuts for roofing but excluding fish bolts and nuts are exempt from so much of the duty as is in excess of Rs. 37-4 per ton.

[2] The ratf e oexcise duty on the 1st January, 1942, and until further notice, on all steel ingots produced in British India is Rs. 4 per ton.

[3] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, iron or steel rivets of British manufacture are exempt from so much of the duty as is in excess of Rs. 43-8 per ton.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom	A British Colony.	Burma.	
	SECTION XV—*Contd.*						
	BASE METALS AND ARTICLES MADE THEREFROM—*Contd.*						
63 (18)	Iron or Steel pipes and tubes; also fittings therefor, that is to say, bends, boots, elbows, tees, sockets, flanges, plugs, valves, cocks and the like, excluding pipes, tubes and fittings therefor otherwise specified.	Revenue ...	15⅝ per cent. ad valorem.	...	...	Free	...
63 (19)	Iron or Steel plates excluding cast iron plates—					Free	
	(*a*) not fabricated—						
	(*i*) of British manufacture[1]—						
	not coated with other metals ...	Protective ...	1½ times the excise duty leviable for the time being on steel ingots produced in British India ;[2] or 10 per cent. ad valorem, whichever is higher.	...	...		March 31st, 1942.
	coated with other metals ...	Protective ...	1⅓ times the excise duty leviable for the time being on steel ingots produced in British India ;[2] or 10 per cent. ad valorem, whichever is higher.	...	...		March 31st, 1942.
	(*ii*) not of British manufacture ...	Protective ...	1⅓ times the excise duty leviable for the time being on steel ingots produced in British India[2] plus Rs. 25 per ton.	...	...		March 31st, 1942.
	(*b*) fabricated—						
	(*i*) of British manufacture ...	Protective ...	1½ times the excise duty leviable for the time being on steel ingots produced in British India[2] plus Rs. 40 per ton.	...	...		March 31st, 1942.

	(*ii*) not of British manufacture	...	Protective ...	$1\frac{1}{2}$ times the excise duty leviable for the time being on steel ingots produced in British India[2] plus Rs. 40 per ton.	...	...		March 31st, 1942.
63 (20)	Iron or Steel sheets—						Free	
	(*a*) not fabricated—							
	(1) not galvanized—							
	(*i*) of British manufacture[3]	...	Protective ...	$1\frac{1}{2}$ times the excise duty leviable for the time being on steel ingots produced in British India[2] plus Rs. 11 per ton ; or 10 per cent. ad valorem, whichever is higher.	...	...		March 31st, 1942.
	(*ii*) not of British manufacture	...	Protective ...	$1\frac{1}{2}$ times the excise duty liable for the time being on steel ingots produced in British India[2] plus Rs. 32 per ton.	...	...		March 31st, 1942.
	(2) galvanized—							
	(*i*) of British manufacture[4]	...	Protective ...	$1\frac{1}{3}$ times the excise duty leviable for the time being on steel ingots produced in British India[2] plus Rs. 10 per ton ; or 10 per cent. ad valorem, whichever is higher.	...	...		March 31st, 42.
	(*ii*) not of British manufacture	...	Protective ...	$1\frac{1}{3}$ times the excise duty leviable for the time being on steel ingots produced in British India[2] plus Rs. 40 per ton.	...	...		March 31st, 1942.

[1] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, as amended subsequently, iron or steel plates of British manufacture, assessable under this sub-item are exempt from so much of the duty as is in excess of Rs. 30-5-4 per ton.

[2] The rate of excise duty on the 1st January, 1942, and until further notice, on all steel ingots produced in British India is Rs. 4 per ton.

[3] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, as amended subsequently, iron or steel sheets of British manufacture assessable under this sub-item are exempt from so much of the duty as is in excess of Rs. 37-5-4 per ton.

[4] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, as amended subsequently, iron or steel sheets of British manufacture assessable under this sub-item are exempt from so much of the duty as is in excess of Rs. 45-5-4 per ton.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom	A British Colony.	Burma.	
	SECTION XV—*Contd.* BASE METALS AND ARTICLES MADE FHEREFROM—*Contd.*						
	(*b*) fabricated— (1) not galvanized— (*i*) of British manufacture[1] ...	Protective ...	1½ times the excise duty leviable for the time being on steel ingots produced in British India[2] plus Rs. 12 per ton; or 10 per cent. ad valorem, whichever is higher.	...	...		March 31st, 1942.
	(*ii*) not of British manufacture ...	Protective ...	1½ times the excise duty leviable for the time being on steel ingots produced in British India[2] plus Rs. 35 per ton.	...	...		March 31st, 1942.
	(2) galvanized— (*i*) of British manufacture[3] ...	Protective ...	1½ times the excise duty leviable for the time being on steel ingots produced in British India[2] plus Rs. 11 per ton; or 10 per cent. ad valorem, whichever is higher.	...	...		March 31st, 1942.
	(*ii*) not of British manufacture ...	Protective ...	1½ times the excise duty leviable for the time being on steel ingots produced in British India[2] plus Rs. 44 per ton.	...	...		March 31st, 1942.

63 (21)	Iron or Steel Railway Track Material—							
	A. Rails (including tramway rails the heads of which are not groved)—							
	(*a*) 30 lbs. per yard and over, and fish-plates therefor—							
	(*i*) of British manufacture[1] ...	Protective ...	$1\frac{1}{3}$ times the excise duty leviable for the time being on steel ingots produced in British India;[2] or 10 per cent. ad valorem, whichever is higher.	...	...	Free	March 31st, 1942.	
	(*iii*) not of British manufacture[2] ...	Protective	$1\frac{1}{3}$ times the excise duty leviable for the time being on steel ingots produced in British India;[2] or 20 per cent. ad valorem, whichever is higher.	...	...		March 31st, 1942.	
	(*b*) under 30 lbs. per yard and fish-plates therefor—							
	(*i*) of British manufacture[1]	Protective ...	$1\frac{1}{3}$ times the excise duty leviable for the time being on steel ingots produced in British India[2] plus Rs. 10 per ton; or 10 per cent. ad valorem, whichever is higher.	...	...		March 31st, 1942.	
	(*ii*) not of British manufacture[1] ...	Protective ...	$1\frac{1}{3}$ times the excise duty leviable for the time being on steel ingots produced in British India[2] plus Rs. 39 per ton.	...	...		March 31st, 1942.	
	B. Switches and crossings including stretcher bars and other component parts, and switches and crossings including stretcher bars and other component parts for tramway rails the heads of which are not grooved—							
	(*a*) for rails 30 lbs. per yard and over—							

[1] Under Government of India, Finance Department (Central Revenues), Notification No. 80-C., dated the 4th October, 1941, iron and steel, old, including used Iron or steel railway track material, when imported from Burma, are exempt from payment of import duty.

[2] The rate of excise duty on the 1st January, 1942, and until further notice, on all steel ingots produced in British India, is Rs. 4 per ton.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom	A British Colony.	Burma.	
	SECTION XV.—BASE YETALS AND ARTICLES MADE THEREFROM—*Contd.*						
	(*i*) of British manufacture[1] ...	Protective ...	1½ times the excise duty leviable for the time being on steel ingots produced in British India[2]; or 10 per cent. ad valorem, whichever is higher.	...	...		March 31st, 1942.
	(*ii*) not of British manufacture[1] ...	Protective ...	1½ times the excise duty leviable for the time being on steel ingots produced in British India;[2] or 20 per cent. ad valorem, whichever is higher.	...	...		March 31st, 1942.
	(*b*) for rails under 30 lbs. per yard— (*i*) of British manufacture[1] ...	Protective ...	1½ times the excise duty leviable for the time being on steel ingots produced in British India[2] plus Rs. 11 per ton; or 10 per cent. ad valorem, whichever is higher.	...	...		March 31st, 1942.
	(*ii*) not of British manufacture[1] ...	Protective ...	1½ times the excise duty leviable for the time being on steel ingots produced in British India[2] plus Rs. 43 per ton.	...	...		March 31st, 1942.
	C. Sleepers, and sleeper bars, other than cast iron (*i*) of British manufacture[1 3] ...	Protective ...	1⅓ times the excise duty leviable for the time being on steel ingots produced in British	...	...		March 31st, 1942.

			India;[2] or 10 per cent. ad valorem, whichever is higher.				
(*ii*) not of British manufacture[1], [3]	...	Protective	...	1 1/3 times the excise duty leviable for the time being on steel ingots produced in British India[2] or 20 per cent. ad valorem, whichever is higher.	...	...	March 31st, 1942.
D. Spikes (other than dog-spikes) and tie-bars—							
(*i*) of British manufacture[1]	...	Protective		1 1/3 times the excise duty leviable for the time being on steel ingots produced in British India[2] plus Rs. 10 per ton; or 10 per cent. ad valorem, whichever is higher.		...	March 31st 1942.
(*ii*) not of British manufacture[1]		...Protective		1 1/3 times the excise duty leviable for the time being on steel ingots produced in British India[2] plus Rs. 39 per ton.	...	...	March 31st 1942.
E. Dog-spikes—							
(*i*) of British manufacture[1]	...	Protective	...	1 1/2 times the excise duty leviable for the time being on steel ingots produced in British India[2] plus 7 annas per cwt.; or 10 per cent. ad valorem, whichever is higher.	...	...	March 31st, 1942.
(*ii*) not of British manufacture[1]	...	Protective	...	1 1/2 times the excise duty leviable for the time being on steel ingots produced in British India[2] plus Rs. 2-15-0 per cwt.	...	...	March 31st, 1942.

[1] Under Government of India, Finance Department (Central Revenues), Notification No.80-C, dated the 4th October, 1941, iron and steel old, including used iron or steel railway track material, when imported from Burma, are exempt from payment of import duty.

[2] The rate of excise duty on the 1st January, 1942, and until further notice, on all steel ingots produced in British India is Rs. 4 per ton.

[3] Under Government of India, Finance Department, (Central Revenues), Notification No. 33, dated the 22nd June, 1935, iron or steel sleeper bars, other than cast iron, are exempt from payment of the alternative *ad valorem* duty.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom	A British Colony.	Burma.	
	SCECTION XV—*Contd.* BASE METALS AND ARTICLES MADE THEREFROM—*Contd.*						
	F. Gibs, cotters, keys (including tapered key bars) distance pieces and other fastenings for use with iron or steel sleepers—						
	(*i*) of British manufacture[1] ...	Protective ...	$1\frac{1}{2}$ times the excise duty leviable for the time being on steel ingots produced in British India[2] plus 7 annas per cwt.; or 10 per cent. ad valorem, whichever is higher.	...	...		March 31st, 1942.
	(*ii*) not of British manufacture[1] ...	Protective ...	$1\frac{1}{2}$ times the excise duty leviable for the time being on steel ingots produced in British India[2] plus Rs. 2-15-0, per cwt.	...	...		March 31st, 1942.
63 (22)	Iron or Steel Railway Track materials[1] not otherwise specified, including bearing plates, cast iron sleepers and lever boxes.	Revenue ...	$15\frac{5}{8}$ per cent. ad valorem.	...	...	Free	...
63 (23)	Iron or Steel Tramway Track materials not otherwise specified, including rails, fish-plates, tie-bars, switches, crossings and the like materials of shapes and sizes specially adapted for tramway tracks.	Revenue ...	$15\frac{5}{8}$ cent. per ad valorem.	...	...	Free	...
63 (24)	Iron or Steel barbed or stranded wire and wire rope....	Preferential revenue.	20 per cent. ad valorem.	10 per cent. ad valorem.	...	Free	...
63 (25)	Iron or Steel wire, other than barbed or stranded wire, wire rope or wire netting; and Iron or steel wire nails—					Free	
	(i) of British manufacture ...	Protective ...	$1\frac{1}{2}$ times the excise duty leviable for the time	...	...		March 31st 1942.

			being on steel ingots produced in British India[2] plus Rs. 25 per ton.					
	(*ii*) not of British manufacture ...	Protective ...	1½ times the excise duty leviable for the time being on steel ingots produced in British India[2] plus Rs. 60 per ton.	...	...		March 31 1942.	
63 (26)	Iron or Steel (other than bar or rod) specially designed for the reinforcement of concrete.	Revenue ...	15⅛ per cent. ad valorem.	...	...	Free,		...
63 (27)	Iron or Steel, the original material (but not including machinery) of any ship or other vessel intended for inland or harbour navigation which has been assembled abroad, taken to pieces and shipped for reassembly in India—					Free		
	(*i*) of British manufacture ...	Protective ...	1½ times the excise duty leviable for the time being on steel ingots produced in British India ;[2] or 10 per cent. ad valorem, whichever is higher.	...	...		March 31st, 1942.	
	(*ii*) not of British manufacture ...	Protective ...	1½ times the excise duty leviable for the time being on steel ingots produced in British India[2] plus Rs. 27-8-0 per ton; or 20 per cent. ad valorem, whichever is higher.	...	...		March 31st 1942.	
	Provided that articles dutiable under this item shall not be deemed to be dutiable under any other item.							
63 (28)	All sorts of Iron and Steel and manufactures thereof not otherwise specified. *Tariff values*— Rs. A. P. Iron and Steel cans or drums— when imported containing kerosene and motor spirit, namely :—	Revenue ...	25 per cent. ad valorem.	...	...	Free	...	

[1] Under Government of India, Finance Department (Central Revenues), Notification No. 80-C., dated the 4th October, 1941, iron and steel, old, including used iron or stee railway track material, when imported from Burma, are exempt from payment of import duty.

[2] The rate of excise duty on the 1st January, 1942, and until further notice, on all steel ingots produced in British India is Rs. 4 per ton.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	Burma.	
	SECTION XV—*Contd.*						
	BASE METALS AND ARTICLES MADE THEREFORM.						
	Cans, tinned, of four gallons capacity. Rs. A. P per can. 0 6 0						
	Cans or drums, not tinned, of two gallons capacity— per can or drum.						
	(*a*) with faucet caps ... 1 0 0						
	(*b*) ordinary ... 0 6 0						
	Drums of four gallons capacity— per drum.						
	(*a*) with faucet caps ... 1 8 0						
	(*b*) ordinary ... 0 14 0						
63 (29)	Enamelled ironware, the following, namely :—						
	(*a*) Sign-boards ...	Revenue ...	25 per cent. ad valorem or four and a half annas per square foot, whichever is higher.	...	...	Free	...
	(*b*) Domestic hollow-ware, the following, namely, basins, bowls, dishes, plates and thalas, including rice-cups, rice-bowls and rice-plates—						
	(*i*) having no diameter exceeding 19 centimetres.	Revenue ...	25 per cent. ad valorem or per dozen four annas plus one anna for every two centimetres or part thereof by which any diameter exceeds 11 centimetres, whichever is higher.	...	...		...
	(*ii*) having any diameter exceeding 19 centimetres.	Revenue ...	25 per cent. ad valorem or per dozen eight annas plus two annas	...	...		...

			for every two centimetres or part thereof by which any diameter exceeds 19 centimetres, whichever is higher.					
64	Copper, wrought and manufactures of copper all sorts not otheriwse specified.	Preferential revenue.	30 per cent. ad valorem.	20 per cent. ad valorem	...	Free	...	
64 (1)	Copper, scrap[1]	Revenue ...	25 per cent. ad valorem.	...	...	Free	...	
65	German silver including nickel silver[1] ...	Revenue ...	25 per cent. ad valorem.	...	...	Free	...	
66	Aluminium—circles, sheets and other manufactures not otherwise specified.[1]	Revenue ...	25 per cent. ad valorem.	...	...	Free	...	
66 (1)	Unwrought ingots, blocks and bars of aluminium[1] ...	Revenue ...	25 per cent. ad valorem.	...	...	Free	...	
67	Lead, wrought—the following articles, namely, pipes and tubes and sheets other than sheets for tea Chests.[1]	Revenue ...	25 per cent. ad valorem.	...	...	Free	...	
67 (1)	Lead sheets for tea chests[1] ...	Revenue ...	25 per cent. ad valorem.	...	...	Free	...	
68	Zinc or spelter, wrought or manufactured, not otherwise specified.[1]	Revenue ...	25 per cent. ad valorem.	...	...	Free	...	
68 (1)	Zinc, unwrought including cakes, ingots, tiles (other than boiler tiles), hard or soft slabs and plates dust, dross and ashes; and broken zinc.[1]	...	Free ...	...	...	...	...	
69	Tin, block[1] ...	Revenue ...	Rs. 312-8 per ton ...	...	...	Free	...	
70	Brass, bronze and similar alloys, wrought, and manufactures thereof not otherwise specified.[1]	Revenue ...	25 per cent. ad valorem.	...	...	Free	...	
70 (1)	All sorts of metals other than iron and steel, and manufactures thereof, not otherwise specified.[1] [2]	Revenue ...	25 per cent. ad valorem.	...	...	Free	...	
71	Hardware, ironmongery and tools, all sorts not otherotherwise specified, including incandescent mantles but excluding machine tools and agricultural implements. *Tariff value*— Rs. A. P. per gross. Crown corks (except those bearing monogram or trade mark or name of an importer.) 0 12 0	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...	

[1] Under Government of India, Finance Department (Central Revenues), Notification No. 8[illegible]-C., dated the 4th October, 1941, waste and scrap of base metals, when imported from Burma, are exempt from payment of import duty.

[2] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, radium is exempt from payment of import duty.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom	A British Colony.	Burma.	
	SECTION XV—*Contd.*						
	BASE METALS AND ARTICLES MADE THEREFORM—*Contd.*						
71 (1)	The ol owing Hardware, ironmongery and tools, namely, agricultural implements not otherwise specified, buckets of tinned or galvanized iron, and pruning-knives.	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
71 (2)	Cutlery, all sorts not otherwise specified ...	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
71 (3)	Metal furniture and cabinetware ...	Revenue ...	25 per cent. ad valorem.		...	10 per cent. ad valorem.	...
71 (4)	Printing type ...	Revenue ...	One anna and three pies per lb.	...	...	Free	...
71 (5	The following printing materials namely leads, brass rules, wooden and metal quoins, shooting sticks and galleys and metal furniture.	Revenue ...	2½ per cent. ad valorem.	...	...	Free	...
71 (6)	Racks for the withering of tea leaf[1] ...	Revenue ...	2½ per cent. ad valorem.	...	...	Free	...
	SECTION XVI.						
	MACHINERY AND APPARATUS: ELECTRICAL MATERIAL.						
72	Machinery namely such of the following articles as are not otherwise specified[2]:— (*a*) prime-movers, boilers, locomotive engines and tenders for the same, portable engines (including power-driven road rollers, fire engines and tractors), and other machines in which the prime-mover is not separable from the operative parts;	Revenue	10 per cent advalorem			Free	

	(*b*) machines and sets of machines to be worked by electric, steam, water, fire or other power, not being manual or animal labour, or which before being brought into use require to be fixed with reference to other moving parts ; (*c*) apparatus and appliances, not to be operated by manual or animal labour, which are designed for use in an industrial system as parts indispensable for its operation and have been given for that purpose some special shape or quality which would not be essential for their use or any other purpose ; (*d*) control gear, self-acting or otherwise, and transmission-gear designed for use with any manhinery above specified, including belting of all materials (other than cotton, hair and canvas ply) and driving chains, but excluding driving ropes not made of cotton ; (*e*) bare hard-drawn electrolytic copper wires and cables and other electrical wires and cables, insulated or not, and poles, troughs, conduits and insulators designed as parts of a transmission system, and the fittings thereof. NOTE.—The term 'Industrial system' used in sub-item (*c*) means an installation designed to be employed directly in the performance of any process or series of processes necessary for the manufacture, production or extraction of any commodity.							
72 (1)	The following textile machinery and apparatus by whatever power operated, namely, healds ; he ald cords and heald knitting needles ; reeds and shuttles ; warp and weft preparation machinery and looms ; bobbins and pirns ; dobbies ; Jacquard machines ; Jacquard harness linen cords ; Jacquard cards ; punching plates for Jacquard cards ; warping mills ; multiple box sleys ; solid border sleys ; tape sleys ; swivel sleys ; tape	Revenue ...	10 per cent. ad vlaorem...	...	...	Free	...	

[1] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, as amended subsequently, component parts of racks for the withering of tea leaf when proved to have been imported for use in racks for the withering of tea leaf are also liable to duty at $2\frac{1}{2}$ per cent. *ad valorem*.

[2] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, as amended subsequently, coffee pulpers and component parts thereof are exempt from payment of import duty, provided that nothing shall be deemed to be a component part of a coffee pulper for the purpose of this exemption unless it is essential for the working of such machine and has been given for that purpose some special shape or quality that would not be essential for its use for any other purpose.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom	A British Colony.	Burma.	
	SECTION XVI—*Contd.*						
	MACHINERY AND APPARATUS; ELECTRICAL MATERIAL—*Contd.*						
	looms; wool carding machines; wool spinning machines; hosiery machinery; coir mat shearing machines; coir fibre willowing machines; heald knitting machines; dobby cards; lattices and lags for dobbies; wooden winders; silk looms; silk throwing and reeling machines; cotton yarn reeling machines; sizing machines; doubling machines; silk twisting machines; cone winding machines; piano card cutting machines; harness building frames; card lacing frames; drawing and denting hooks; sewing thread balls making machines; cumbli finishing machinery; hank boilers; cotton carding and spinning machines; mail eyes, lingoes, comber boards and comber board frames; take-up motions, temples and pickers; picking bands; picking sticks; printing machines; roller cloth; clearer cloth; sizing flannel; and roller skins.[1]						
72 (2)	Printing and Lithographic Material, namely, presses, lithographic plates, composing sticks, chases, imposing tables, lithographic stones, stereo-blocks, wood blocks, half-tone blocks, electro-type blocks, process blocks and highly polished copper or zinc sheets specially prepared for making process blocks, roller moulds, roller frames and stocks, roller composition, lithographic nap rollers, standing screw and hot presses, perforating machines, gold blocking presses, galley presses, proof presses, arming presses, copper plate printing presses, rolling presses, ruling machines, ruling pen making machines, lead cutters, rule cutters, slug cutters, type casting machines, type setting and casting machines, paper in rolls with side perforations to						

	be used after further perforation for type-casting, rule bending machines, rule mitreing machines, bronzing machines, stereotyping apparatus, paper folding machines, paging machines but excluding ink and paper.[1]						
72 (3)	Component parts of machinery as defined in Item Nos. 72, 72 (1) and 72 (2), namely, such parts only as are essential for the working of the machine or apparatus and have been given for that purpose some special shape or quality which would not be essential for their use for any other purpose : Provided that articles which do not satisfy this condition shall also be deemed to be component parts of the machine to which they belong if they are essential to its operation and are imported with it in such quantities as may appear to the Collector of Customs to be reasonable.	Revenue ...	10 per cent. ad valorem.	...	...	Free	...
72 (4)	Passenger lifts, and component parts and accessories thereof.	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
72 (5)	Domestic Refrigerators ...	Preferential revenue.	30 per cent. ad valorem.	20 per cent. ad valorem.	...	10 per cent. ad valorem.	...
72 (6)	Machinery and component parts thereof, meaning machines or parts of machines to be worked by manual or animal labour, not otherwise specified and any machines (except such as are designed to be used exclusively in industrial processes) which require for their operation less than one-quarter of one-brake horse-power.	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent.	...
72 (7)	Water-lifts, sugar-mills, sugar centrifuges, sugar pug-mills, oil-presses, and parts thereof, when constructed so that they can be worked by manual or	...	Free ...	...	...	...	...

[1] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935 as amended subsequently, the following textile machinery and apparatus and component parts thereof namely (1) ground stamping machines (2) automatic hand repeating machines (3) pattern cutting machines, (4) cloth analysis machines, (5) hand card punches and (6) automatic weaver knotters, are also liable to duty at 10 per cent. *ad valorem*, provided that nothing shall be deemed to be a component part of textile machinery and apparatus for the purpose of this exemption unless it is essential for the working of such machinery and apparatus and has been given for that purpose some special shape or quality that would not be essential for its use for any other purpose. Under the same Notification jacquard harness linen cordage is liable to duty at 10 per cent. *advalorem* or 4 annas per lb. whichever is higher and striking combs used in textile machinery at 10 per cent. *ad valorem*.

† Under Government of India, Finance Department (Central Revenues) Notification No. 33, dated the 22nd June, 1935, as amended subsequently, the following printing machinery and apparatus, namely, composing rocks and cases, composing cabinets, diestamping machines, galley racks, embossing mcahines, graining machines, furniture cases and racks, line-up and register tables, book sewing machines, and cloth stripping machines are liable to duty at 10 per cent. *ad valorem*.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				Uni-king-dom.	A British Colony.	Burma.	
	SECTION XVI—*Contd.*						
	MACHINERY AND APPARATUS; ELECTRICAL MATERIAL— *ontd.*.						
72 (8)	animal power and pans for boiling sugar-cane juice. The following Agricultural implements, namely, winnowers, threshers, mowing and reaping machines, binding machines, elevators, seed and corn crushers, chaff-cutters, root-cutters; ensilage-cu ters horse and bullock gear, ploughs, cultivators, scarifiers, harrows, clod-crushers, seed-drills, hay-tedders, hay presses, potato-diggers, latex spouts, spraying machines, powder-blowers, white-ant exterminating machines, beet pullers, broadcast seeders, corn pickers, corn shellers, culti-packers, drag scrapers, stalk cutters, huskers and shredders, potato planters, lime sewers, manure spreaders, listers, soil graders, and rakes; also agricultural tractors, also component parts of these implements, machines or tractors, provided that they can be readily fitted into their proper places in the implements, machines or tractors for which they are imported, and that they cannot ordinarily be used for purposes unconnected with agriculture.[1]	...	Free ...	...	...	...	...
72 (9)	The following Dairy and Poultry Farming Appliances, namely, cream separators, milking machines, milk sterilizing or pasteurizing plant, milk aerating and cooling apparatus, churns, butter dryers, butter workers, milk-bottle fillers and cappers, apparatus specially designed for testing milk, and other dairy produce, and incubators; also component parts of these appliances, provided that they can be readily fitted into their proper places in the appliances for which they are imported, and that they cannot ordinarily be used for other than dairy and poultry farming purposes.[1]	...	Free ...	...	...	...	...

72(10)	Sewing and Knitting machines (and parts thereof) to be worked by manual labour or which require for their operation less than one-quarter of one brake-horse power.	Preferential revenue.	30 per cent. ad valorem	20 per cent ad valorem.	...	10 per cent. ad valorem	...
73	Electrical instruments, apparatus and appliances, not otherwise specified, excluding telegraphic and telephonic.	Preferential revenue.	30 per cent. ad valorem.	20 per cent. ad valorem.	...	10 per cent. ad valorem.	...
73 (1)	The following Electrical Instruments, Apparatus and Appliances, namely :— Electrical Control Gear and Transmission Gear namely, switches (excluding switch boards), fuses and current-breaking devices of all sorts and descriptions, designed for use in circuits of less than ten amperes and at a pressure not exceeding 250 volts ; and regulators for use with motors designed to consume less than 187 watts ; bare or insulated copper wires and cables, any one core of which, not being one specially designed as a pilot core, has a sectional area of less than one-eightieth part of a square inch, and wires and cables of other metals of not more than equivalent conductivity ; and line insulators, including also cleats, connectors, leading-in tubes and the like, of types and sizes such as are ordinarily used in connection with the transmission of power for other than industrial purposes, and fittings thereof but excluding electrical earthenware and porcelain otherwise specified.	Preferential revenue.	30 per cent. ad valorem.	20 per cent. ad valorem.	...	10 per cent. ad valorem	...
73 (2)	The following Electrical Instruments, Apparatus and Appliances, namely, telegraphic and telephonic instruments, apparatus and appliances not otherwise specified, flash lights, carbons, condensors, and bell apparatus and switch-boards designed for use in circuits of less than ten amperes and at a	Revenue	25 per cent. advalorem.	...	...	10 per cent. ad valorem.	...

[1] Under Government of India, Finance Department (Central Revenues) Notification No. 33, dated the 22nd June, 1935, the following agricultural machines and implements, namely, flame throwers for attachment to spraying machines designed for the extermination of locusts, and latex cups, are exempt from payment of import duty.

[2] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, as amended subsequently, (1) dairy appliances, excluding transport containers and articles included in this item, provided they are specially designed as dairy appliances and for use for milking the cow or for any subsequent process carried out in the dairy in connection with milk, cream, butter or cheese and (2) component parts of such dairy appliances, provided they can be readily fitted into their proper places in the appliances for which they are imported and they cannot ordinarily be used for other than dairy purposes are exempt from payment of import duty.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	Burma.	
	SECTION XVI—*Cotdd.*						
	MACHINERY AND APPARATUS; ELECTRICAL MATERIAL—*Contd.*						
	pressure not exceeding 250 volts; also accumulators, batteries and electro-medical apparatus.[1 2 3]						
73 (3)	Telegraphic Instruments and Apparatus and parts thereof imported by, or under the orders of, a Railway Administration.	Revenue ...	15⅝ per cent. ad valorem.	...	...	Free	...
73 (4)	Wireless Reception Instruments and Apparatus and component parts thereof, including all electric valves, amplifiers and loud speakers which are not specially designed for purposes other than wireless reception or are not original parts of and imported along with instruments or apparatus so designed.[1]	Preferential revenue.	50 per cent. ad valorem.	40 per cent. ad valorem.	...	20 per cent. ad valorem.	...
73 (5)	Electrical earthenware and porcelain, the following, namely :—					10 per cent. ad valorem.	
	(*a*) insulators, Shackle, Sinclair, Cordeaux or Pin-type, not otherwise specified—						
	(*i*) fitted ...	Revenue ...	25 per cent. ad valorem or Re. 1-2 per dozen, whichever is higher.	...	...		...
	(*ii*) not fitted ...	Revenue ...	25 per cent. ad valorem or fourteen annas per dozen, whichever is higher.	...	...		...
	(*b*) two-way cleats ...	Revenue ...	25 per cent. ad valorem or four annas per gross of pairs, whichever is higher.	...	...		...
	(*c*) Spacing insulators ...	Revenue ...	25 per cent. ad valorem of two annas per gross, whichever is higher.	...	...		...
	(*d*) Ceiling roses—						
	(*i*) fitted ...	Revenue ...	25 per cent. ad valorem or ten annas per dozen, whichever is higher.	...	...		...
	(*ii*) not fitted. ...	Revenue ...	25 per cent. ad valorem or eight annas per	...	...		...

				dozen, whichever is higher.				10 per cent advalorem		
	(*e*) Joint-box cut-outs—									
	(*i*) fitted	...	Revenue	...	25 per cent. ad valorem or eight annas per dozen, whichever is higher.	...	...			...
	(*ii*) not fitted	...	Revenue	...	25 per cent. ad valorem or six annas per dozen, whichever is higher.	...	...			...
73 (6)	Rubber-insulated Copper Wires and Cables, no core fo which, other than one specially designed as a pilot core, has a sectional area of less than one-eightieth part of a square inch, whether made with any additional insulating or covering material or not.		Revenue	...	6¼ per cent. ad valorem.	...	...	Free		...
					SECTION XVII. TRANSPORT MATERIAL.					
74	Coal tubs, tipping wagons and the like conveyances designed for use on light rail track, if adapted to be worked by manual or animal labour and if made mainly of iron or steel ; and component parts thereof made of iron or steel—							Free		

[1] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, as amended subsequently, the following wireless apparatus is liable to duty at 2½ per cent. *ad valorem* :—

(*i*) apparatus for wireless reception (excluding apparatus specially designed for the reception of broadcast wireless and apparatus of the description specified in clause (*ii*)] and component parts of such apparatus, when imported under cover of (*a*) a certificate issued by the Director-General of Posts and Telegraphs to the effect that he is satisfied that the apparatus will not be used for the reception of broadcast wireless or (*b*) a certificate to the same effect issued by the Controller of Broadcasting, if the apparatus is imported for the All-India Radio, by the Officer Commanding, Aircraft, Depot, Royal Air Force (India), if the apparatus is imported by the Royal Air Force, by the following officers, if the apparatus is imported by the Royal Indian Navy, namely—at Bombay, by the Naval Store Officer ; at Karachi, by the Sea Transport Officer ; and at Calcutta and Madras, by the Agent for Government Consignments concerned, and by the following officers, if imported for the Army, namely—at Karachi, by the Embarkation Supply and Stores Officers, Kiamari ; at Bombay, by the Ordinance Officer, Bombay Depot ; at Calcutta, by the Embarkation Supply and Stores Officer at that port and at other ports, by the Agent, for Government Consignments concerned ;

(*ii*) apparatus for wireless reception incorporated in a single unit with transmitting apparatus ;

(*iii*) wireless transmission apparatus and component parts thereof :

Provided that nothing shall be deemed to be a component part of apparatus for wireless telegraphy or telephony for the purpose of this exemption unless it is essential for the working of such apparatus and has been given for that purpose some special shape or quality that would not be essential for its use for any other purpose.

[2] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated 22nd June, 1935, telegraphic instruments and apparatus and parts thereof imported for supply from bond for use of a Railway Administration are liable to duty at 15⅝ per cent. *advalorem*, provided that (*i*) at the time of delivering the bill of entry, for warehousing a declaration is made thereon by the importer to the effect that the goods have been imported for supply from bond for the use of a Railway Administration ; and (*ii*) a certificate from an Officer of the Railway Administration, duly empowered in that behalf by the Agent, is produced along with the application for clearance out of bond that the goods in question are not merely guaranteed stock, but will be definitely appropriated for the use of such Railway on clearance from bond.

[3] Under Government of India Finance Department (Central Revenues) Notification No. 33 dated the 22nd June 1935 as amended subsequently. carbon blocks such as are ordinarily used for the manufacture of carbon brushes for electrical motors and generators are liable to duty at 15 per cent. *ad valorem*

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom	A British Colony.	Burma.	
	SECTION XVII—*Contd.* TRANSPORT MATERIAL—*Cotnd.*						
	(*a*) of British manufacture ...	Protective ...	1½ times the excise duty leviable for the time being on steel ingots produced in British India ; [1]or 10 per cent. ad valorem, whichever is higher.	...	...		March 31st, 1942.
	(*b*) not of British manufacture ...	Protective ...	1½ times the excise duty leviable for the time being on steel ingots produced in British India[1] plus Rs. 40 per ton ; or 20 per cent. ad valorem, whichever is higher.	...	...		March 31st, 1942.
74 (1)	Tramcars and component parts and accessories thereof	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
74 (2)	Railway materials for permanent-way and rolling-stock, namely, sleepers, other than iron and steel, and fastenings therefor ; bearing plates, chairs, interlocking apparatus, brake-gear, shunting skids, couplings and springs, signals, turn-tables, weigh-bridges, carriages, wagons, traversers, rail removers, scooters, trollies, trucks ; also cranes, water-cranes and water-tanks when imported by or under the orders of a railway administration : Provided that for the purpose of this entry 'railway' means a line of railway subject to the provisions of the Indian Railways Act, 1890, and includes a railway constructed in a State in India and also such tramways as the Central Government may, by notification in the Official Gazette, specifically include therein :	Revenue ...	15 per cent. ad valorem.	...	...	Free	...

	Provided also that articles of machinery as defined in item No. 72 or No. 72 (3) shall not be deemed to be included hereunder.						
74 (3)	Component parts of Railway Materials, as defined in Item No. 74 (2), namely, such parts only as are essential for the working of railways and have been given for that purpose some special shape or quality which would not be essential for their use for any other purpose : Provided that articles which do not satisfy this condition shall also be deemed to be component parts of the railway material to which they belong, if they are essential to its operation and are imported with it in such quantities as may appear to the Collector of Customs to be reasonable.	Revenue ...	$15\frac{5}{8}$ per cent. ad valorem.	...	...	Free	...
75	Conveyances not otherwise specified and component parts and accessories thereof ; also motor vans and motor lorries imported complete.	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
75 (1)	Motor cars including taxi cabs and articles (other than rubber tyres and tubes)adapted for use as parts and accessories thereof, provided that such articles as are ordinarily also used for other purposes than as parts and accessories of motor vehicles included in this Item or in Items Nos. 75 (2) and 75 (3) shall be dutiable at the rate of duty specified for such articles.	Preferential revenue.	$37\frac{1}{2}$ per cent. ad valorem.	30 per cent. ad valorem.	...	20 per cent. ad valorem.	...
75 (2)	Motor cycles and motor scooters and articles (other than rubber tyres and tubes) adapted for use as parts and accessories thereof except such articles as are also adapted for use as parts and accessories of motor cars.	Preferential revenue.	$37\frac{1}{2}$ per cent. ad valorem.	30 per cent. ad valorem.	...	20 per cent. ad valorem.	...
75 (3)	Motor omnibuses ; chassis of motor omnibuses, motor vans and motor lorries; and parts of mechanically propelled vehicles and accessories not otherwise specified, excluding rubber tyres and tubes and such parts and accessories of motor vehicles included in this item as are also adapted for use as parts and accessories of motor cars.	Preferential revenue.	25 per cent. ad valorem.	$17\frac{1}{2}$ per cent. ad valorem.	...	5 per cent. ad valorem.	...
75 (4)	Carriages and carts which are not mechanically propelled, not otherwise specified, and parts and accessories thereof; excluding rubber tyres and tubes.	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...

[1] The rate of excise duty on the 1st January, 1942, and until further notice, on all steel ingots produced in British India is Rs. 4 per ton.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	Burma.	
	SECTION XVII—*Contd.* TRANSPORT MATERIAL—*Contd.*						
75 (5)	Cycles (other than motor cycles) imported entire or in sections, and parts and accessories thereof; excluding rubber tyres and tubes.	Preferential revenue.	30 per cent. ad valorem.	20 per cent. ad valorem.	...	10 per cent. ad valorem.	...
76	Aeroplanes, aeroplane parts, aeroplane engines, aeroplane engine parts and rubber tyres and tubes used exclusively for aeroplanes.[1]	Revenue ...	$2\frac{1}{2}$ per cent. ad valorem.	...	...	Free	...
76 (1)	Ships and other vessels[2] for inland and harbour navigation, including steamers, launches, boats and barges imported entire or in sections: Provided that articles of machinery as defined in item No. 72 or No. 72 (3) shall, when separately imported, not be deemed to be included hereunder.	Revenue ...	$15\frac{5}{8}$ per cent. ad valorem.	...	...	Free	...
76 (2)	Light ships ...	...	Free ...	...	...	..	...
76 (3)	Furniture tackle and apparel, not otherwise described, for steam-sailing, rowing and other vessels.	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
	SECTION XVIII. SCIENTIFIC AND PRECISION INSTRUMENTS AND APPARATUS; WATCH-MAKERS' AND CLOCKMAKERS' WARES; MUSICAL INSTRUMENTS.						
77	Instruments, apparatus and appliances other than electrical, all sorts not otherwise specified, including photographic.[3]	Preferential revenue.	30 per cent. ad valorem.	20 per cent. ad valorem.	...	10 per cent. ad valorem.	...
77 (1)	Instruments, apparatus and appliances, imported by a passenger as part of his personal baggage and in actual use by him in the exercise of his profession or calling.	...	Free ...	...	...	...	...
77 (2)	Optical, Scientific, Philosophical and Surgical Instruments, apparatus and appliances.	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
77 (3)	Artificial Teeth ...	Preferential revenue.	25 per cent. ad valorem.	...	15 per cent. ad valorem.	5 per cent ad valorem.	...
78	Clocks and watches and parts thereof ...	Revenue ...	50 per cent. ad valorem.	...	...	20 per cent. ad valorem.	...

79	Musical Instruments and parts thereof, all sorts and records for talking machines.	Revenue	...	50 per cent. ad valorem.		...		...	20 per cent. ad valorem.		...
	SECTION XIX. ARMS AND AMMUNITION.										
80	Save where otherwise specified, all articles which are arms or parts of arms within the meaning of the Indian Arms Act, 1878 (excluding springs used for air guns), all tools used for cleaning or putting together the same, all machines for making, loading, closing or capping cartridges for arms other than rifled arms and all other sorts of ammunition and military stores, and any articles which the Central Government may, by notification in the Official Gazette, declare to be ammunition or military stores for the purposes of thi sAct.[4]	Revenue	...	50 per cent. ad valorem.		...		...	20 per cent. ad valorem.		...
80 (1)	Subject to the exemptions specified in Item No. 80 (3) —Firearms, including gas and air guns, gas and air rifles and gas and air pistols, not otherwise specified, but excluding parts and accessories thereof.[4]	Revenue	...	Rs. 18-12 each or $37\frac{1}{2}$ per cent. ad valorem, whichever is higher, plus $12\frac{1}{2}$ per cent. ad valorem.		...		...	20 per cent. ad valorem.		...
80 (2)	Subject to the exemptions specified in Item No. 80 (3)—								20 per cent. ad valorem.		
	(*a*) Barrels, whether single or double, for firearms, including gas and air guns, gas and air rifles, and gas and air pistols, not otherwise specified.	Revenue	...	Rs. 18-12 each.	or $37\frac{1}{2}$ per cent. ad valorem, whichever is higher, plus $12\frac{1}{2}$ per cent. ad valorem.	...		...			...
	(*b*) Main springs and magazine springs for fire-arms, including gas guns, gas rifles and gas pistols.	Revenue	...	Rs. 6-4 each.		...		...			...
	(*c*) Gun stocks and breech blocks ...	Revenue	...	Rs3-12 each		...		...			...
	(*d*) Revolver cylinders, for each cartridge they will carry.	Revenue	...	Rs. 2-8 each.		...		...			...
	(*e*) Actions (including skeleton and waster), breech bolts and their heads, cocking pieces, and locks for muzzle loading arms.	Revenue	...	Re. 1-4 each.		...		...			...

[1] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, (1) aircraft (other than aeroplanes) such as autogyros, airships, and the like; their parts, their engines, and parts of such engines and (2) aircraft materials, such as dope, 3 ply wood duralumin sheets and fabric which have been given for use as aircraft materials some special shape or quality which would not be essential for their use for any other purpose are liable to duty at $2\frac{1}{2}$ per cent. *ad valorem*.

[2] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, as amended subsequently, (*a*) ocean-going vessels, imported to be broken up, and (*b*) parts of vessels under repair removed for replacement are liable to duty at $15\frac{5}{8}$ per cent. *ad valorem*, provided that articles contained in any such vessel not forming part of her necessary tackle, apparel or furniture (*e.g.*, pianos, crockery, cutlery) shall be assessed to duty separately under the appropriate items of the Tariff.

[3] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, photo-litho films are liable to duty at 10 per cent. *ad valorem*.

[4] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, arms forming part of military equipment of officers and non-commissioned officers of foreign armies detailed for training at Army Schools of Instruction in India are exempt from payment of import duty.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom	A British Colony.	Burma.	
	SECTION XIX—*Contd.*						
	ARMS AND AMMUNITION—*Contd.*						
	(*f*) Machines for making, loading, or closing cartridges for rifled arms.	Revenue ...	50 per cent. ad valorem.	...	...		...
	(*g*) Machines for capping cartridges for rifled arms.	Revenue ...	50 per cent. ad valorem.	...	...		...
80 (3)	The following Arms, Ammunitions and Military Stores :—	...	Free ...	...	...	...	...
	(*a*) Arms forming part of the regular equipment of a commissioned or gazetted officer in His Majesty's Service entitled to wear diplomatic, military, naval, Royal Air Force or Police Uniform.						
	(*b*) A revolver and an automatic pistol and ammunition for such revolver and pistol up to a maximum of 100 rounds per revolver or pistol, (*i*) when accompanying a commissioned officer of His Majesty's regular forces, or of the Indian Auxiliary Force or the Indian Territorial Force or a gazetted police officer, or (*ii*) certified by the commandant of the corps to which such officer belongs, or, in the case of an officer not attached to any corps, by the officer commanding the station or district in which such officer is serving or, in the case of a police officer, by an Inspector-General or Commissioner of Police, to be imported by the officer for the purpose of his equipment.						
	(*c*) Swords for presentation as army or volunteer prizes.						
	(*d*) Arms, ammunition and military stores imported with the sanction of the Central Government for the use of any portion of the military forces of a State in India being a unit notified in pursuance of the First Schedule to the Indian Extradition Act, 1903.						

	(*e*) Morris tubes and patent ammunition imported by officers commanding British and Indian regiments or volunteer corps for the instruction of their men.[1]									
08 (4)	Ornamental Arms of an obsolete pattern possessing only an antiquarian value ; masonic and theatrical and fancy dress swords, provided they are virtually useless for offensive or defensive purposes ; and dahs intended exclusively for domestic, agricultural and industrial purposes.	Revenue	...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...	
81	Cartridges cases, filled and empty ...	Revenue	...	50 per cent. ad valorem.	...	...	20 per cent. ad valorem.	...	

SECTION XX.
MISCELLANEOUS GOODS AND PRODUCTS NOT ELSEWHERE INCLUDED.

82	Coral, prepared ...	Revenue	...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...	
82 (1)	Ivory, manufactured, not otherwise specified ...	Revenue	...	50 per cent. ad valorem.	...	...	20 per cent. ad valorem.	...	
82 (2)	Bangles and beads, not otherwise specified ...	Revenue	...	50 per cent. ad valorem.	...	...	20 per cent. ad valorem.	...	
	Tariff values— Rs. A. P. per doz. pairs.								
	I. Celluloid bangles, viz.:—								
	(1) All plain, flat, bangles without border or groove of width not over $\frac{3}{4}$ inch but not under $\frac{1}{4}$ inch. 0 10 6								
	(2) All plain, flat, bangles with border or groove of width not over $\frac{3}{4}$ inch but not under $\frac{1}{4}$ inch, excluding bangles with multiple borders or grooves. 0 14 0								
	II. Celluloid fancy bangles, viz.:—								
	(1) Patla bangles, all colours, including zigzag patla bangles, of width under $\frac{1}{8}$ inch but not under $\frac{1}{4}$ inch. 0 4 9								
	(2) Rubber rings, passa, vavto, zigzag all colours and rainbow designs but excluding *Coils, Dantia and Coral roote.* 0 3 3								

[1] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, as amended subsequently, ·22 inch Adapters, aim teachers and aperture sights for service rifles imported by officers commanding a unit of the Army in India for the instruction of their men are also exempt from payment of import duty.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of			Duration of protective rates of duty.
				The United Kingdom	A British Colony.	Burma.	
	SECTION XX—*Contd.*						
	MISCELLANEOUS GOODS AND PRODUCTS NOT ELSEWHERE INCLUDED—*Contd.*						
83	Brushes, all sorts ...	Revenue ...	25 per cent. ad valorem.		...	10 per cent. ad valorem.	...
84	Toys, games, playing cards and requisites for games and sports, bird shot, toy cannons, air guns and air pistols for the time being excluded in any part of British India from the operation of all the prohibitions and directions contained in the Indian Arms Act, 1878, and bows and arrows. *Tariff values*— Rs. A. P. per cwt. Bird shot ... 50 0 0 per dozen. Tennis balls ... 10 0 0	Revenue ...	50 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
85	Buttons, metal ...	Revenue ...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
85 (1)	Smokers' requisites excluding tobacco and matches : Provided that mechanical lighters as defined in the Mechanical Lighters (Excise Duty) Act, 1934, shall be liable in addition to a duty equal to the amount of the excise duty imposed by that Act, on mechaincal lighters manufactured in British India[1].	Revenue ...	50 per cent. ad valorem.	...	...	Mechanical lighters— 20 per cent. ad valorem plus the amount of the excise duty on mechanical lighters manufactured in British India[1]; all others— 20 per cent. ad valorem.	...

SECTION XXI.
WORKS OF ART AND ARTICLES FOR COLLECTIONS.

86	Prints, Engravings and Pictures (including photographs and picture post cards), not otherwise specified.[2]	Revenue	...	50 per cent. ad valorem.	...	...	...	...
86 (1)	Art, works of, not otherwise specified ...	Revenue	...	25 per cent. ad valorem.	...	...	10 per cent. ad valorem.	...
86 (2)	Art, the following works of:—(1) statuary and pictures intended to be put up for the public benefit in a public place, and (2) memorials of a public character intended to be put up in a public place, including the materials used, or to be used in their construction, whether worked or not.	...		Free ...	...	...	...	...
86 (3)	Specimens, Models and Wall diagrams illustrative of natural science, and medals and antique coins.[2]	...		Free ...	...	...	...	...
86 (4)	Postage Stamps, whether used or unused ...	...		Free ...	...	...	...	...

SECTION XXII.
ARTICLES NOT OTHERWISE SPECIFIED.

87	All other articles not otherwise specified, including articles imported by post.[3]	Revenue	...	25 per cent. ad valorem...	...	...	10 per cent. ad valorem.	...

[1] The rate of excise duty on the 1st March, 1942, and until further notice is Rs. 3 per lighter.

[2] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, wall pictures and diagrams such as are ordinarily used for instructional purposes are exempt from payment of import duty.

[3] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated th 22nd June, 1935, unmanufactured mica and wreaths imported for being placed on graves are exempt from payment of import duty and stereo-flong is liable to duty at 10 per cent. *ad valorem*.

THE SECOND SCHEDULE.
EXPORT TARIFF.

No.	Names of articles.	Per	Rate of duty.
	JUTE, OTHER THAN BIMLIPATAM JUTE.		Rs. A.
1	Raw Jute—		
	(1) Cuttings	Bale of 400 lbs. ...	1 4
	(2) All other descriptions ...	Bale of 400 lbs. ...	4 8
2	Jute Manufactures, when not in actual use as coverings, receptacles or bindings, for other goods—		
	(1) Sacking (cloth, bags, twist, yarn, rope and twine).[1]	Ton of 2,240 lbs. ...	20 0
	(2) Hessians and all other descriptions of Jute Manufactures not otherwise specified.[2]	Ton of 2,240 lbs. ...	32 0
[3]3	.....	.....	...
	RICE.		
4	Rice, husked or unhusked, including rice flour but excluding rice bran and rice dust which are free.	Indian maund of 82⅔ lbs. avoirdupois weight.	Two annas and three pies.

EXCISE DUTIES LEVIABLE ON CERTAIN ARTICLES PRODUCED OR MANUFACTURED IN BRITISH INDIA.

Serial No.	Articles.	Rate of Excise duty.
1	Salt	Re. 1-9-0 per maund of 82⅔ pounds avoirdupois.
2	Sugar—	
	(*i*) Khandsari sugar	Eight annas per cwt.
	(*ii*) All other sugar except palmyra sugar.	Rs. 3-0-0 per cwt.
3	Kerosene	2 annas 9¾ pies per Imperial gallon.
4	Motor spirit	12 annas per Imperial gallon.
5	Matches—	
	(*i*) in boxes or booklets containing on an average not more than 40 matches.	Rs. 2-0-0 per gross of boxes or booklets.
	(*ii*) in boxes or booklets containing on an average more than 40 but not more than 50 matches.	Rs. 2-8-0 per gross of boxes or booklets.
	(*iii*) in boxes or booklets containing on an average more than 50 but not more than 60 matches.	Rs. 3-0-0 per gross of boxes or booklets.
	(*iv*) in boxes or booklets containing on an average more than 60 matches but not more than 80 matches.	Rs. 4-0-0 per gross of boxes or booklets.
	(*v*) in boxes containing on an average not more than 12 matches of the type known as "Bengal lights,"	10 annas per gross of boxes.
	(*vi*) all other matches.	8 annas for every 1,440 matches or fraction thereof.

[1] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, as amended subsequently, bagging for raw cotton made from cadis rove or from rove containing, in addition to cadis or other material not subject to export duty, not more than 15 per cent. jute weighing not less than 1⅛ lbs. per square yard and having a total of not more than 140 single or double warp and weft threads per square yard, is exempt from payment of export duty and bagging for raw cotton made from jute rove (excluding bagging specified above as exempt from payment of export duty), weighing not less than ·75 lbs. per square yard, and having not more than 360 warp and weft threads per square yards is liable to export duty at Rs. 5-8 per ton.

[2] Under Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, jute rags such as are used for paper making are exempt from payment of export duty provided that the Customs Collector is satisfied that they are useless for any purpose to which cloth or rope is ordinarily put.

[3] There is no entry bearing Item No. 3.

Serial No.	Articles.	Rates of Excise duty.
6	Silver	3 annas per ounce.
7	Steel ingots	Rs. 4-0-0 per ton.
8	Mechanical lighters	Rs. 3-0-0 per lighter.
9	Coal and Coke—	
	(*i*) Coal and Soft Coke	2 annas per ton.
	(*ii*) Hard Coke	3 annas per ton.
10	Coffee[1]	Re. 1-0-0 per cwt.
11	Tyres[2]	10 per cent. ad valorem.
12	Goods specified in item 40 of List II of the 7th Schedule to the Government of India Act, 1935, *viz.*:— (*a*) Alcoholic liquors for human consumption ; (*b*) Opium, Indian hemp and other narcotic drugs and narcotics ; non-narcotic drugs ; (*c*) Medicinal and toilet preparations containing alcohol or any substances included in (*b*) above	Rates vary in different provinces.

CESSES LEVIABLE ON CERTAIN ARTICLES ON EXPORT OR OTHERWISE.

No.	Name of Article.	Cess leviable.
[3]1	Tea	Re. 1-6 per 100 lbs.
[4]2	Jute— (*a*) Raw including Jute cuttings and rejections.	Two annas per bale of 400 lbs.
	(*b*) Manufactured Jute	Twelve annas per ton of 2,240 lbs.
[5]	Cotton (ginned)— (*a*) Baled	Two annas per standard bale of 400 lbs.
	(*b*) Unbaled	Six pies per 100 lbs.
[6]4	Lac— (*a*) Any form of manufactured or unmanufactured lac.	Seven annas per maund.
	(*b*) Refuse lac	Five annas per maund.

LEG. REF.

[1] A duty of excise at the rate of one rupee per cwt. s leviable under the Coffee Market Expansion Ordinance, 1940, on all coffee (except coffee sold and delivered before the estate became subject to the provisions of the ordinance)—(*i*) which a registered estate is permitted to sell in India according to its internal sale quota, whether such coffee is actually sold or not, and (*ii*) which is released for sale in India by the Indian Coffee Market Expansion Board from the surplus pool.

NOTE.—The present duration of the Ordinance is up to the 30th June, 1942.

[2] Under the Government of India, Finance Department (Central Revenues), Notification No. 16-Central Excise, dated the 1st April, 1941, tyres specially designed for use on animal drawn vechicles are exempt from payment of this duty.

[3] The cess is levied on all tea exported from any Customs port, to any port beyond the limits of British India. Under the Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, as subsequently amended, tea exported to any place in the Janjira State, or exported from any Customs port, to any port in Kathiawar and tea exported by post, is exempt from payment of this duty.

[4] The cess is levied on all jute exported by sea from the port of Calcutta to any other port whether beyond or within India and from the port of Chittagong to any other port beyond or within India (except raw jute exported to Calcutta).

[5] The cess is levied on all cotton produced in India and (*a*) consumed in any mill in British India, or (*b*) exported from any Customs port to any port outside British India, or (*c*) exported by land to the French and Portuguese territories of Pondicherry, Karaikal, Goa and Daman. The cess is not, however, leviable on cotton waste, kapok and cotton fly. Under the Government of India, Finance Department (Central Revenues) Notification No. 33, dated the 22nd June, 1935, as subsequently amended, cotton exported from any Customs port to any port in Kathiawar and linters are exempt from payment of this duty.

[6] The cess is levied on all lac and refuse lac produced in India and exported from any Cus-

No.	Name of article.	Cess leviable.
[1]5	Coffee	Re. 1 per cwt.
[2]6	(*i*) Bones[3]	
	Tariff value per cwt.	
	Bones, broken or crushed (including bone grist). 3 0 0	
	(*ii*) Bristles ...	
	(*iii*) Butter ...	
	Tariff value— Rs. A. P. per lb.	
	Butter ... 0 15 0	
	(*iv*) Cereals, other than Rice and Wheat ...	
	Tariff values— Rs. A. P. per cwt.	
	Bajri ... 5 0 0	
	Barley ... 3 12 0	
	Jowar ... 4 6 0	
	Maize ... 4 6 0	
	(*v*) Drugs[4] ...	
	(*vi*) Fibre for brushes ...	
	Tariff value— Rs. A. P. per cwt.	
	Fibre for brushes, all kinds. 11 0 0	
	(*vii*) Fish ...	½ per cent. ad valorem.
	(*viii*) Fruits ...	
	Tariff values— Rs. A. P. per cwt.	
	Almonds in the shell 28 0 0	
	Almonds without 80 0 0	
	Cashew kernels ... 40 0 0	
	per thousand.	
	Coconuts ... 40 0 0	
	per cwt.	
	Raisins, all kinds 15 8 0	
	Tamarind ... 6 0 0	
	Walnut in the shell. 18 0 0	
	Walnut kernel ... 25 0 0	
	(*ix*) Ghee ...	
	Tariff values— Rs. A. P. per Indian maund.	
	Ghee ... 52 0 0	
	per cwt.	
	Ghee substitute including vegetable ghee and hydrogenated edible oil and fat mixture. 24 0 0	

LEG. REF.

toms port to any port beyond the limits of British India. Under the Government of India, Finance Department (Central Revenue), Notification No. 33, dated the 22nd June, 1935, as subsequently, amended, lac and refuse lac exported from any Customs port to any port in Kathiawar are exempt from payment of these duties.

[1] The cess is levied on all coffee taken by sea or land to any place beyond the limits of British India. Under the Government of India, Finance Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, as subsequently amended, coffee taken by sea or by land to any place in the Travancore State or Cochin State or by land to any place in the Mysore State, or exported from any Customs port to any port in Kathiawar is exempt from payment of this duty.

[2] Under the Government of Indian, Finance Department, (Central Revenues) Notification No. 33, dated the 22nd June, 1935, as subsequently amended, articles included under item No. 6, exported (*a*) by sea as passengers' baggage, (*b*) by post, (*c*) to any place in the Janjira State, and (*d*) from any Customs port to any port in Kathiawar are exempt frompayment of this duty.

[3] Under the Government of India, Department of Education, Health and Lands Notification No. F. 8/40 dated the 11sh September, 1940, Bones, human, exported as anatomical specimens, are not subject to this duty.

[4] Under the Government of India, Department of Education, Health and Lands Notification No. F. 8/40, dated the 11th September, 1940, Drugs, manufactured, are not subject to this duty.

No.	Name of Article.	Cess leviable.
16—*Contd.*	(*x*) Hides, raw ...	
	Tariff values— Rs. A. P. per lb.	
	Buffalo hides—	
	(*i*) Arsenicated ... 0 5 0	
	(*ii*) Salted ... 0 3 0	
	Cow hides—	
	(*i*) Arsenicated ... 0 7 6	
	(*ii*) Salted ... 0 5 0	
	(*xi*) Manures ...	
	Tariff values— Rs. A. P. per cwt.	
	Manures of animal origin, all kinds. 3 8 0	
	(*xii*) Oilcakes ...	
	Tariff values— Rs. A. P. per ton.	
	Groundnut oilcakes. 30 0 0	
	Linseed oilcakes ... 40 0 0	
	Oilcakes other kinds. 35 0 0	
	(*xiii*) Pulses	
	Tariff values— Rs. A. P. per cwt.	
	Dal, all kinds ... 6 0 0	
	Pulses, all kinds ... 5 8 0	
	(*xiv*) Seeds ...	
	Tariff values— Rs. A. P. per cwt.	
	Ajwan ... 8 12 0	½ per cent. ad valorem.
	Aniseed ... 13 0 0	
	Caster seed ... 6 8 0	
	Celery seed ... 36 0 0	
	Coriander seed ... 7 0 0	
	Cotton seed ... 3 0 0	
	Mustard and rape seeds. 6 8 0	
	Til (Sesamum) ... 6 8 0	
	(*xv*) Skins, raw ...	
	Tariff values— Rs. A. P. per piece.	
	Goat skins ... 0 14 0	
	Sheep skins ... 0 7 0	
	(*xvi*) Spices	
	Tariff values— Rs. A. P. per cwt.	
	Chillies, dry ... 12 8 0	
	Ginger, dry ... 14 0 0	
	Pepper, black ... 16 0 0	
	Turmeric ... 12 0 0	
	(*xvii*) Tobacco, unmanufactured ...	
	Tariff values— Rs. A. P. per lb.	
	Class I—	
	Flue cured ... 0 8 0	
	Non-flue cured ... 0 4 0	
	Class II—	
	Flue cured ... 0 4 0	
	Non-flue cured ... 0 3 0	
	Bengal qualities ... 0 2 9	
	Guntur qualities ... 0 1 0	

LEG. REF.

[1] Under the Government of India, Finance Department (Central Revenues), Notification No. 33 dated there 22nd June, 1935, as subsequently amended, articles included under item No. 6, exported (*a*) by sea as passengers' baggage, (*b*) by post, (*c*) to any place in the Janjira State, State (*d*) from any Customs port to any port in Kathiawar are exempt from payment of this duty.

No.	Name of article.	Cess leviable.
16—Contd.	(*xviii*) Vegetables	
	Tariff values— Rs. A. P. per cwt.	
	Garlic ... 10 0 0	
	Onions ... 3 4 0	
	Potatoes ... 5 0 0	
	(*xix*) Wheat ...	1½ per cent. advalorem.
	Tariff value— Rs. A. P. per cwt.	
	Wheat, all kinds ... 5 0 0	
	(*xx*) Wheat flour ...	
	Tariff values— Rs. A. P. per cwt.	
	Wheat atta ... 6 8 0	
	Wheat flour and suji. 7 8 0	
	(*xxi*) Wool raw ..	

THE THIRD SOHEDULE.

ACTS REPEALED.

[*Repealed by Act XX of* 1937.]

THE TOLLS ACT (VIII OF 1851).

Year.	No.	Short title.	Amendment.
1851	VIII	The Indian Tolls Act, 1851 ..	Repealed in part, XIV of 1870; XII of 1876; II of 1901, schedule. Repealed in part, amended and supplemented, VIII of 1888. Amended (locally), XV of 1864. Supplemented, XVIII of 1892. Amended, XXXVIII of 1920; and Madras Act VI of 1938. „ Government of India (Adaptation of Indian Laws) Order, 1937.

[*4th July,* 1851.

An Act for enabling Government to levy Tolls on Public Roads and Bridges.

Preamble.

WHEREAS it is expedient to enable Government to levy tolls upon roads and bridges; It is enacted as follows:—

1. [2][* * * * * *]

Extent.

[3][1-A. This Act extends to the territories administered on the fourth of July, eighteen hundred and fifty-one by the Governor of the Presidency of Fort William in Bengal, the Lieutenant-Governor of North-Western Provinces of Bengal and the Governor of the Presidency of Fort St. George in Council.]

Power to cause levy of tolls on roads and bridges within certain rates.

2. The [4][Provincial Government] may cause such rates of toll [4][* * * * * *] such rates of toll [5][* * * * *]

LEG. REF.

[1] Under the Gvernment of India, Finance, Department (Central Revenues), Notification No. 33, dated the 22nd June, 1935, as subsequently amended, articles included under item No. 6, exported (*a*) by sea as passengers' baggage (*b*) by post, (*c*) to any place in the Janjira State and (*d*) from any Customs port to any port in Kathiawar are exempt from payment of this duty.

[2] This section was repealed by Act XIV of 1870.

[3] S. 1-A inserted by Government of India by A.O., 1937.

[4] Substituted by *ibid*.

[5] The words "not exceeding the rates mentioned in the Schedule annexed to this Act" and the Schedule were omitted by Act XXXVIII of 1920, Sch.

as [1][it thinks fit] to be levied upon any road or bridge which has been, or shall hereafter be, made or repaired at the expense of the [1][Central or any Provincial] Government; and may place the collection of such tolls under the management of such persons as may appear to them proper; and all persons employed in the management and collection of such tolls shall be liable to the same responsibilities as would belong to them if employed in the collection of the land revenue.

and to appoint collectors.

Collector's responsibilities.

3. In case of non-payment of any such toll on demand, the officers appointed to collect the same may seize any of the carriages or animals on which it is chargeable, or any part of their burden of sufficient value to defray the toll; and, if any toll remains undischarged for twenty-four hours, with the cost arising from such seizure, the case shall be brought before the officer appointed to superintend the collection of the said toll, who may sell the property seized for discharge of the toll, and all expenses occasioned by such non-payment, seizure and sale, and cause any balance that may remain to be returned, on demand, to the owner of the property; and the said officer, on receipt of the property, shall forthwith issue a notice that, at noon of the next day, exclusive of Sunday, or any close holiday, he will sell the property by auction:

Their powers for recovery of toll.

Provided that, if, at any time before the sale has actually begun, the person whose property has been seized shall tender the amount of all the expenses incurred, and of double the toll payable by him, and the said officer shall forthwith release the property seized.

Release of seized property on tender of dues.

4. No tolls shall be paid for the passage [2][* * *] of police-officers on duty, or of any person or property in their custody, but no other exemption from payment of the toll levied under this Act shall be allowed.

Exemptions from payment of toll.

5. All police-officers shall be bound to assist the toll-collectors, when required, in the execution of this Act; and, for that purpose, shall have the same power which they have in the exercise of their common police duties.

Assistance of collectors by police officers.

6. Every person, other than the persons appointed to collect the tolls under this Act, who shall levy or demand any toll on any public road or bridge, or for passing through any bazaar situated thereon, and also every person who shall unlawfully and extortionately demand, or take any other or higher toll than the lawful toll, or under colour of this Act seize or sell any property knowing such seizure or sale to be unlawful, or in any manner unlawfully extort money or any valuable thing from any person under colour of this Act, shall be liable on conviction before a Magistrate to imprisonment for any term not exceeding six calendar months, or to fine not exceeding two hundred rupees, any part of which fine may be awarded by the Magistrate to the person aggrieved; but this remedy shall not be deemed to bar or affect his rights to have redress by suit in the Civil Court [3][* * *].

Penalty for offences under Act.

Compensation to person aggrieved. Saving of his right to sue.

LEG. REF.

[1] Substituted by A.O., 1937.

[2] Certain words were repealed by Act II of 1901.

In Upper Burma for the last 16 words of this section, "or of any person or property exempted by order of the Local Government from payment of tolls" were substituted by Burma Act XIII of 1898.

[3] The last words were repealed by Act XII of 1876.

NOTES.

Secs. 6 and 7.—*See* 22 W.R. 76 (Cr.); 15 C. 259.

7. A table of the tolls authorised to be taken at any toll gate or station shall be put up in a conspicuous place near such gate or station legibly written or printed in English words and figures, and also in those of the vernacular language of the district, to which shall be annexed, written or printed in like manner, a statement of the penalties for refusing to pay the tolls and for taking any unlawful toll.

Exhibition of table of tolls, and statement of penalties.

8. The tolls levied under this Act shall be deemed public revenue[1] [* * * *].

Application of proceeds of tolls.

SCHEDULE.

[*Repealed by S. 2 and Sch. I of Act XXXVIII of* 1920.]

THE TOLLS ACT (XV OF 1864).

Year.	No.	Short title.	Amendment.
1864	XV	Indian Tolls Act.	Supplemented, Act VIII of 1888. Amended Act, XXXVIII of 1920.

Short title given, Act XIV of 1897.

Declared in force—

in the Sonthal Parganas, Reg. III of 1872, S. 3, as amended by Reg. III of 1899, S. 3; in the Central Provinces and the Sambalpur District, Act XX of 1876, S. 3; in the Punjab, Act VIII of 1888, S. 1;

in Upper Burma (except the Shan States), Act XIII of 1898, S. 4.

[*24th March,* 1864.

An Act to amend Act VIII of 1851 (*for enabling Government to levy Tolls on Public Roads and Bridges*).

WHEREAS by Act VIII of 1851 (*for enabling Government to levy tolls on Public Roads and Bridges*) authority was given for the levy of certain rates of toll [2][* * *]; it is enacted as follows:—

Preamble.

1. [3][* * * * * * *].

2. Any person entrusted with the management of the collection of tolls under Act VIII of 1851 may in his discretion compound for any period not exceeding one year with any person for a certain sum to be paid by such person for himself or for any vehicle or animal kept by him, in lieu of the rates of toll [4][authorised to be levied under the said Act VIII of 1851].

Collectors of tolls, may compound for tolls leviable under Act VIII of 1851 or this Act.

3. The Provincial Government may extend this Act to any place in which the said Act VIII of 1851 is in force; and the Provincial Government of any place in which the said Act VIII of 1851 is not in force may extend the said Act VIII of 1851 and this Act to such place.

Power to extend Act.

4. [5][* * * * * * *]

SCHEDULE.

[*Repealed by S. 2 and Sch. I of Act XXXVIII of* 1920.]

[1] Deleted by A.O., 1937.

[2] The words "not exceeding the rates mentioned in the Schedule annexed to that Act; and whereas it is expedient to make certain alterations in respect to the rates in the said schedule mentioned," were omitted by Act XXXVIII of 1920, Schedule.

[3] This section as a whole was repealed by S. 2 and Sch. I of XXXVIII of 1920.

[4] Substituted by Act XXXVIII of 1920, S. 2 and Sch.

[5] Omitted by A.O., 1937.

THE TOLLS ACT (VIII OF 1888).

Year.	Vol.	Short title.	
1888	VIII	Indian Tolls Act.	Repealed in part, Act XII of 1891.

Short title given, Act XIV of 1897.
Declared in force in Upper Burma (except the Shan States), Act XIII of 1898, S. 4.

[*5th September*, 1888.

An Act to remove doubts as to the legality of the levy of certain tolls.

WHEREAS doubts have been raised as to the operation of the Acts of the Governor-General in Council, No. VIII of 1851. (*An Act for enabling Government to levy tolls on Public Roads and Bridges*) *and No. XV of* 1864 (*An Act to amend Act VIII of* 1851); It is hereby enacted as follows:—

Enforcement of Acts VIII of 1851 and XV of 1864 in the Punjab.

1. Acts VIII of 1851 and XV of 1864 shall be deemed to be in force throughout the territories now administered by the Lieutenant-Governor of the Punjab, and from the twenty-first day of August, 1857, and the twenty-fourth day of March, 1864, respectively, to have been in force in the territories for the time being administered as part of the Punjab.

Operation of the Act in the Punjab and certain other parts of British India.

2. (1) In any part of British India beyond the limits of the territories administered by the [1][Provincial Government of Madras, Bengal and North-Western Provinces] to or in which Acts VIII of 1851 and XV of 1864 may be or have been extended, or may be or have been declared to be in force, under the latter of those Acts or by this Act or by or under any other enactment, the Provincial Government shall be deemed to have and, where the Acts have been in force before the passing of this Act, to have had the same authority as if it had been included among the Provincial Governments specified in section 2 of Act VIII of 1851.

[2][(2) * * * * * * * *]

Validation of past levy of tolls.

3. All tolls levied, or purporting to have been levied, under Acts VIII of 1851 and XV of 1864, or either of those Acts, before the passing of this Act, shall be deemed to have been lawfully levied.

Saving.

4. Nothing in the foregoing sections shall affect any proceedings commenced in any Civil Court before the first day of July, 1888.

5. [2][* * * * * * * *]

THE TRADE DISPUTES ACT (VII OF 1929).

Year.	No.	Short title.	Amendment.
1929	VII	The Trade Disputes Act.	Amended by Acts XIX of 1932; XIII of 1934; XX of 1937; XVII of 1938; XXXIV of 1939 and Government of India (Adaptation of Indian Laws) Order, 1937.

LEG. REF.

[1] Substituted by A.O., 1937.

[2] Omitted by *ibid*.

PREFATORY NOTE.—The following extracts from the Statement of objects and Reasons indicate the reasons that led up to the passing of the Act:—

"The outbreak of industrial unrest on a large scale was a feature of the period succeeding the close of the War and led the Government of India to explore the possibility of providing some machinery for the settlement of industrial disputes. The inquiries made with this purpose in 1920 led to the conclusion that in the conditions then existing, legislation for this purpose was not likely to be effective.

2. The succeeding years saw a distinct change in the position by reason of the growth of organizations of industrial workers and of the increasing influence exercised by public opinion on the course of disputes. And in 1924 the Government of India prepared a draft Bill 'for enabling the investigation and settlement of trade disputes' and circulated it in order to ascertain the views of those directly interested and of the public generally on the subject. As a result of the inquiries made in 1924-25 and the experience which has become available since that period, the Government of India are satisfied that legislation for the prevention and settlement of trade disputes is likely to prove of considerable value; and the present Bill has been prepared for this purpose.

3. The main part of the Bill falls into three parts. Clauses 3 to 14 relate to the establishment of tribunals for the investigation and settlement of trade disputes. This part of the Bill is based generally on the British Industrial Courts Act, 1919, and its detailed provisions are adapted for the most part from clauses in that Act. The main difference is that, whereas the British Act sets up a Standing Industrial Court, the Conciliation Boards which the Bill proposes to establish are intended to be appointed *ad hoc* like the Courts of Inquiry, in order to deal with particular disputes. The object of the Courts of Inquiry which will ordinarily be composed of persons having no direct interest in the dispute will be to investigate and report on such questions connected with the dispute as may be referred to them. The object of Boards of Conciliation, which will ordinarily include representatives of the parties to a dispute, will be to secure a settlement of the dispute. Both Courts of Inquiry and Boards of Conciliation will be able to enforce attendance of witnesses and the production of documents, and their reports are to be published. Neither party will be under any obligation to accept the findings of the Court or the advice of the Board; and in cases where the dispute is not brought to an end during the deliberations of the tribunal that has been appointed, reliance is placed on the force of public opinion which will be enabled by the publication of the report of the tribunal to arrive at just conclusions on the merits of the dispute.

4. The second part of the Bill consists of clause (15) which relates to public utility services. 'Public utility services' is defined in clause (2) (*f*), and it will be observed that, in accordance with this definition, clause (15) is only applicable to such railway services as have been notified by the Governor-General in Council. The clause makes it a penal offence for workers employed on monthly wages in public utility services to strike without previous notice, and also provides heavier penalties for persons abetting such an offence. The clause is based on the principle that persons whose work is vital to the welfare of the community generally should not be entitled to enter into a strike before sufficient time has been given to examine the merits of their grievances and to explore the possibilities of arriving at a peaceful settlement. Provisions of a somewhat similar type already exist in the Indian Post Office Act and in a number of Municipal Acts in India, and the principle is one which is widely accepted in other countries.

5. Clauses (16) to (20) contain certain special provisions relating to illegal strikes and lock-outs. These clauses follow closely the provisions of sections 1, 2 and 7 of the British Trade Disputes and Trade Unions Act, 1927. They are applicable only in the case of strikes and lock-outs which satisfy both of two conditions; in the first place, the strike or lock-out must have other objects than the mere furtherance of a trade dispute within the industry to which the strikers or employers belong, and, in the second place, the strike or lock-out must be designed to coerce Government either directly or by inflicting hardship on the community. If these conditions are satisfied, the strike or lock-out, becomes illegal. Persons furthering the strike or lock-out are liable to punishment and are deprived of the protection granted to them by the Indian Trade Unions Act, while persons refusing to take part in it are protected from trade union disabilities to which they might otherwise be subjected."—(*Statement of Objects and Reasons.*)

The following is the Report of the Select Committee on the Bill:—

Clause 1.—We have decided to limit the duration of the Act to five years.

Clause 2.—The slight amendment which we have made in sub-clause (*c*) is intended to bring out more clearly the fact that the definition of "employer" is not intended to be exhaustive.

In view of the provision which we have made in clause (4) that all the members of a Court of Inquiry shall be persons unconnected with the dispute or with any industry affected thereby, we have considered it desirable to give some definition of what we mean by the expression "an independent person", and have inserted a definition accordingly as clause (*d*) of this clause.

Sub-clause (f) [*now sub-clause* (g)].—We are of opinion that a wide power enabling the Government to declare any industry, business or undertaking to be a public utility service is undesirable as well as unnecessary, and we have therefore omitted it. After considerable discussion in regard to the question of specifying certain other industries or undertakings as public utility services, we have reached the conclusion that clauses (*i*), (*ii*), (*iii*) and (*iv*) of this sub-clause as it stands comprise all the services which it is essential to specify in the first place, and, in view of the fact that the general power which the Bill as introduced conferred upon the Government was only exercisable after three months' notice, we think there should be no difficulty in providing for any necessary additions to the clause by an amendment of the Act should occasion arise.

Sub-clause (j) [*now sub-clause* (k)].—We have amplified the definition of "workman" on the lines of the similar definition in the Canadian Act, and at the same time made it clear that the expression includes clerical workers; and we have added the Royal Indian Marine Service to the Services which the Bill excludes from its scope.

Clause 3.—We have considered various proposals designed to lay upon the Government a definite obligation to convene a Court of Inquiry or a Board of Conciliation in cases where one of the parties so required. We think, however, that, unless both parties are agreed in desiring a reference, it would be useless to fetter the discretion of the Government as to the time at which the matter is ripe for action under this clause. At the same time, we think that no option should be left to the Government to refuse to appoint a Court or Board where the Government is assured that both parties are agreed as to the necessity of a reference, as well as to the form which it should take.

Clause 4.—As already mentioned, we have provided that in every case a Court of Inquiry, whether it consists of one or of more persons, shall not include persons, having an interest in the dispute or in any industry affected by it.

Clause 6.—We have made an amendment to sub-clause (2) to make clear the original intention which was that only persons appointed to a Board to represent the parties should be appointed on the recommendation of the parties; and we have made slight alterations in the proviso to sub-clause (3) in order to bring it into line with the wording of clause (10).

Clauses 7 and 9.—The amendments which we have made to these clauses are of a purely drafting nature.

Clause 10.—In view of the fact that members of Courts and Boards will now invariably be independent persons except in the case where a Board is composed of an independent chairman and an equal number of representatives of each party and that the case of a vacancy in the office of any such representative member is already dealt with in clause (6), clause (10) will now apply to independent members only, and we have amended it accordingly.

Clause 12.—We have amended this clause on the lines of the English Act to make it quite clear that every report of a Court or Board, whether a final or interim report, must be published, and that only the publication of such information or evidence as the appointing authority thinks fit should be left to its discretion.

Clause 14.—We consider it inadvisable to forbid the representation of parties before Courts and Boards by legal practitioners subject only to exceptions. As we have redrafted the clause, such representation will ordinarily be permissible, subject however to such conditions and restrictions as may be provided by rules.

Clause 15.—We have decided to accept the principle of this clause which, however, as originally drafted, was open to certain criticisms. For example, it was pointed out that many persons are actually employed upon a daily wage which is in practice paid monthly; also that the clause would appear to penalise abstention from work on the part of a particular individual; and further that the clause is one-sided and inflicts no penalty upon an employer who locks-out his workmen. The latter point is, we think, one which must certainly be met and as by the nature of his employment a casual or day-to-day labourer must be entitled to cease work at any moment and be similarly liable to dismissal, we agree that he should be excluded altogether from the operation of this clause. We have accordingly adopted a suggestion made by the Bombay Government which makes it clear that the cessation of work must be in the nature of a strike as defined in the Bill, and we have provided that, in order to render it a penal offence, the strike must be in breach of a definite contract between the employer and the workman; we have further made a collateral provision penalising an employer for locking out his workman in breach of any contract.

We have decided to omit sub-clause (2) of the Bill as introduced, which imposed a more severe penalty upon the abettor of an offence under sub-clause (1), as we think such persons can be sufficiently dealt with under the ordinary criminal law of abetment.

As regards sub-clause (3) [now sub-clause (4)], the point was taken that, where the employer is a Government Department, the authority whose sanction would be necessary to enable a prosecution to be instituted would be the Government itself. A suggestion was accordingly made that where a trade union exists in the affected industry, a special resolution of three-fourths of the members, confirmed by a similar resolution at a later period, should be sufficient warrant for the launching of a prosecution. We cannot, however, accept this as a satisfactory solution of what we feel is only a technical difficulty in view of the fact that

many classes of prosecutions of Government servants can only be undertaken with the sanction of the Government itself.

Clause 16.—We have adopted this clause, but with some amendments which we think will restrict its scope without materially impairing its effectiveness. Our attention has been particularly directed to the provisions of clause (*b*) of sub-clause (1), which, as drafted, we consider to be too wide and uncertain in its meaning. It is possible to hold that any strike inflicts a certain degree of hardship upon the community, and it would therefore be possible for a strike which fulfils both the conditions in (*a*) and (*b*) to be brought within this clause, although it was in the nature of a demonstration and lasted for no more than one day. The amendments which we suggest, apart from the omission in clause (*a*) of the words "or in addition to" accordingly make it clear that the strike or lock-out must be designed to cause really severe, general and prolonged hardship to the community for the purpose of compelling Government to take any particular action, whether in connexion with the dispute or otherwise.

In sub-clause (2) we have made it clear that, for the application of money to be illegal, it must not merely tend to further or support the strike, but have the direct effect of so doing. This is intended to exclude a case in which money is spent upon the relief of the dependants or strikers.

In sub-clause (3) we have borrowed a provision from the English Act of 1927 further explaining the circumstances in which a group of workmen should be deemed to be within the same trade or industry.

Clause 17.—We have somewhat modified the penalties provided for the instigation of an illegal strike.

Clause 18.—We have decided to omit this, as the provisions of section 17 of the Indian Trade Unions Act, 1926, will not apply in the case of an agreement to commit an offence, and therefore specific exclusion of the case of an illegal strike is not necessary. As regards section 18 of the Indian Trade Unions Act, this section only applies in the case of acts done in furtherance of a trade dispute, and, if a genuine trade dispute forms part of the ground for any illegal strike, we think that no harm will be done by leaving the provisions of section 18 to operate in the case of registered trade unions.

Clause 20.—We think there is no sufficient justification for giving a power to the Government to apply for injunctions restraining the expenditure of the funds of a trade union in connexion with an illegal strike. Under clause 16 such expenditure has been declared to be illegal and the persons properly interested in seeing that the funds are not mis-spent are the members of the trade union concerned.

Clause 21 (*now clause* 19).—The only alteration which we have made in this clause is consequential upon the amendment made to clause 14.—[There were a number of Dissenting members.]

THE TRADE DISPUTES ACT (VII OF 1929).

[12*th April*, 1929.

An Act to make provision for the investigation and settlement of trade disputes, and for certain other purposes.

WHEREAS it is expedient to make provision for the investigation and settlement of trade disputes, and for certain other purposes hereinafter appearing; It is hereby enacted as follows:—

Short title, extent, commencement and duration.

1. (1) This Act may be called THE TRADE DISPUTES ACT, 1929,

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

(4) [1][* * * * * * *].

Interpretations.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "Board" means a Board of Conciliation constituted under this Act;

(*b*) "Court" means a Court of Inquiry constituted under this Act;

(*c*) "employer," in the case of any industry, business or undertaking carried on by any department of [2][any Government in British India], means

LEG. REF.

[1] Omitted by Act XIII of 1934.

[2] Substituted by A.O., 1937.

the authority prescribed in this behalf or, where no authority is prescribed, the head of the department;

[1][(*cc*) "Federal Railway" has the same meaning as in the Government of India Act, 1935];

(*d*) a person shall be deemed to be "independent" for the purpose of his appointment as the chairman or other member of a Court or a Board if he is unconnected with the dispute with reference to which the Court or the Board is appointed and with any trade or industry directly affected by the dispute;

(*e*) "lock-out" means the closing of a place of employment, or the suspension of work, or the refusal by an employer to continue to employ any number of persons employed by him, where such closing, suspension or refusal occurs in consequence of a dispute and is intended for the purpose of compelling those persons, or of aiding another employer in compelling persons employed by him to accept terms or conditions of or affecting employment;

(*f*) "prescribed" means prescribed by rules made under this Act;

(*g*) "public utility service" means—

(i) any railway service which [2][in the case of a Federal Railway, the Central Government, and in the case of any other railway, the Provincial Government] may, by notification in the Official Gazette, declare to be a public ultility service for the purposes of this Act; or

[3][(i-a) any water transport service carrying passengers to whose vessels any of the provisions of the Inland Steam-Vessels Act, 1917, apply or tramway service, if the Provincial Government by notification in the Official Gazette, declares the water transport or tramway service, as the case may be, to be a public utility service for the purposes of this Act, or];

(ii) any postal, telegraph or telephone service; or

(iii) any industry, business or undertaking which supplies [3][power] light or water to the public; or

(iv) any system of public conservancy or sanitation;

(*h*) "railway company" means a railway company as defined in S. 3 of the Indian Railways Act, 1890;

(*i*) "strike" means a cessation of work by a body of persons employed in any trade or industry acting in combination, or a concerted refusal, or a refusal under a common understanding, of any number of persons who are or have been so employed to continue to work or to accept employment;

(*j*) "trade dispute" means any dispute or difference between [3][employers and employers or between] employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of the employment, or with the conditions of labour, of any person; and

(*k*) "workman" means any person employed in any trade or industry to do any skilled or unskilled manual or clerical work for hire or reward, [3][and includes for the purposes of any proceedings under this Act in relation to a trade dispute a workman discharged during that dispute], but does not include any person employed in the naval, military or air service of the Crown [4][* * * *].

Reference of Disputes to Courts and Boards.

Reference of disputes to Courts or Boards.

3. If any trade dispute exists or is apprehended [5][* * *], the [2][Provincial Government] or, where [6][an employer concerned] is the head of a department under the control of the Central Government [2][or is the Federal Railway

LEG. REF.

[1] Inserted by A.O., 1937.
[2] Substituted by *ibid*.
[3] Inserted by Act XVII of 1938.
[4] Omitted by *ibid*. and Act XX of 1937.
[5] Omitted by Act XVII of 1938.
[6] Substituted by Act XVII of 1938.

Authority or a railway company operating a Federal Railway], the Central Government may, by order in writing,—

(*a*) refer any matters appearing to be connected with or relevant to the dispute to a Court of Inquiry to be appointed by the Provincial Government or the Central Government, as the case may be; or

(*b*) refer the dispute to a Board of Conciliation to be appointed by the Provincial Government or the Central Government, as the case may be, for promoting a settlement thereof:

Provided that, where both parties to the dispute apply, whether separately or conjointly, for a reference to a Court, or where both parties apply, whether separately or conjointly, for a reference to a Board, and the authority having the power to appoint is satisfied that the persons applying represent the majority of each party, a Court or a Board, as the case may be, shall be appointed accordingly.

Courts of Inquiry.

Constitution of Courts.

4. (1) A Court shall consist of an independent chairman and such other independent persons as the appointing authority thinks fit, or may, if such authority thinks fit, consist of one independent person.

[1][(2) A Court, having the prescribed quorum, may act notwithstanding the absence of the chairman or any of its members or any vacancy in its number:

Provided that if the appointing authority notifies the Court that the services of the chairman have ceased to be available the Court shall not act until a new chairman has been appointed.]

Duties of Courts.

5. (1) A Court shall, either in public or in private, at its discretion, inquire into the matters referred to it and report thereon to the authority by which the Court was appointed.

(2) A Court may, if it thinks fit, make interim reports.

Boards of Conciliation.

Constitution of Boards.

6. (1) A Board shall consist of a chairman and two or four other members, as the appointing authority thinks fit, or may, if such authority thinks fit, consist of one independent person.

(2) Where the Board consists of more than one person, the chairman shall be an independent person and the other members shall be either independent persons or persons appointed in equal numbers to represent the parties to the dispute; all persons appointed to represent any party shall be appointed on the recommendation of that party:

Provided that, if any party fails to make the necessary recommendation within the prescribed time, the appointing authority shall select and appoint such persons as it thinks fit to represent that party.

[1][(3) A Board, having the prescribed quorum, may act notwithstanding the absence of the chairman or any of its members or any vacancy in its number:

Provided that if the appointing authority notifies the Board that the services of the chairman or where the Board includes an equal number of persons representing the parties to the dispute the services of any such person have ceased to be available the Board shall not act until a new chairman or member, as the case may be, has been appointed.]

LEG. REF.

[1] Substituted by Act XVII of 1938.

Duties of Boards.

7. (1) Where a dispute has been referred to a Board under this Act, it shall be the duty of the Board to endeavour to bring about a settlement of the same, and for this purpose the Board shall, in such manner as it thinks fit and without delay, investigate the dispute and all matters affecting the merits thereof and the right settlement thereof, and in so doing may do all such things as it thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute, and may adjourn the proceedings for any period sufficient in its opinion to allow the parties to agree upon terms of settlement.

(2) If a settlement of a dispute is arrived at by the parties thereto after it has been referred to a Board and during the course of the investigation thereof, a memorandum of the settlement shall be drawn up by the Board and signed by the parties, and the Board shall send a report of the settlement, together with the memorandum, to the authority by which the Board was appointed.

(3) If no such settlement is arrived at during the course of the investigation, the Board shall, as soon as possible after the close thereof, send a full report regarding the dispute to the authority by which the Board was appointed, setting forth the proceedings and steps taken by the Board for the purpose of ascertaining the facts and circumstances relating to the dispute and of bringing about a settlement thereof, together with a full statement of such facts and circumstances and its findings thereon and the recommendation of the Board for the determination of the dispute.

(4) The recommendation of the Board shall deal with each item of the dispute and shall state in plain language what in the opinion of the Board ought and ought not to be done by the respective parties concerned.

General.

Finality of orders constituting a Court or Board.

8. No order of the Central Government or of a Provincial Government appointing any person as a member of a Court or a Board shall be called in question in any manner.

Procedure and powers.

9. (1) Courts and Boards shall, subject to the provisions of this Act, follow such procedure as may be prescribed.

(2) Courts and Boards shall have the same powers as are vested in Courts under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters:—

(*a*) enforcing the attendance of any person and examining him on oath;

(*b*) compelling the production of documents and material objects; and

(*c*) issuing commissions for the examination of witnesses, and shall have such further powers as may be prescribed, and every inquiry or investigation by a Court or Board shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code.

Filling of vacancies.

10. (1) If the services of the chairman or of any other independent member of a Court or Board cease to be available at any time for the purposes of the Court or Board, the appointing authority shall in the case of a chairman, and may, in the case of any other member, appoint another independent person to fill the vacancy, and the proceedings shall be continued before the Court or Board so re-constituted.

(2) Where the Court or Board consists of one person only and his services cease to be available as aforesaid, the appointing authority shall appoint another independent person in his place, and the proceedings shall be continued before the person so appointed.

[1][(3) Where a Board includes an equal number of persons representing the parties to the dispute, and the services of any such person have ceased to be available as aforesaid, the appointing authority shall appoint in the manner specified in sub-section (2) of section 6 another person to take his place, and the proceedings shall be continued before the Board so reconstituted.]

Form of report.

11. The report of a Court or Board shall be in writing and shall be signed by all the members of the Court or Board:

Provided that nothing in this section shall be deemed to prevent any member of a Court or Board from recording a minute of dissent from a report or from any recommendation made therein.

Publication of results of inquiry.

12. (1) The final and any interim report of a Court or Board, together with any minute of dissent recorded therewith, shall, as soon as possible after its receipt by the authority by which the Court or Board was appointed, be published by that authority in such manner as it thinks fit.

(2) The said authority may publish or cause to be published from time to time, in such manner as such authority thinks fit, any information obtained, or conclusions arrived at, by the Court or Board as the result or in the course of its inquiry or investigation.

Certain matters to be kept confidential.

13. (1) Notwithstanding anything contained in S. 12, there shall not be included in any report or publication made or authorised by a Court or Board or the authority appointing a Court or Board any information obtained by the Court or Board in the course of its inquiry or investigation as to any Trade Union or as to any individual business (whether carried on by a person, firm or company) which is not available otherwise than through evidence given before the Court or Board, [2][if the Trade Union, person, firm or company in question has preferred a request to the Court or Board that such information shall be treated as confidential] nor shall any individual member of the Court or Board or any person concerned in the proceedings before it disclose any such information [2][without the consent in writing of the Secretary of the Trade Union or the person, firm or company in question, as the case may be].

(2) If any member of a Court or Board or any person present at or concerned in the proceedings before a Court or Board [3][wilfully] discloses any information in contravention of the provisions of sub-section (1), he shall, on complaint made by or under the authority of the Trade Union or individual business affected, be punishable with fine which may extend to one thousand rupees:

Provided that nothing in this sub-section shall apply to the disclosure of any such information for the purposes of a prosecution under section 193 of the Indian Penal Code.

LEG. REF.

[1] S. 10, sub-S. (3) added by Act XVII of 1938.

[2] For the words "except with the consent in writing of the Secretary of the Trade Union or of the person, firm or company in question" and "without such consent", the words in brackets have been respectively substituted by Act XIX of 1932.

[3] After the words "before a Court or Board" the word "wilfully" has been inserted by *ibid*.

NOTES.

Sec. 13: SUIT BY RAILWAY UNION—PROPER PLAINTIFFS.—Where in the heading the plaintiff purported to be the N.-W. Railway Union, Lahore, through two Vice-Presidents who were named and the plaint stated that the plaintiffs were the Vice-Presidents of the North-Western Railway Union, Lahore. *Held*, that *prima facie* the proper plaintiff was not before the Court and that the Union was not properly represented. 1933 L. 203.

[4][(3) No Criminal Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence under this section.

(4) No Criminal Court shall take cognizance of any offence under this section except with the previous sanction of the authority appointing such Court or Board; and no Civil Court shall without the like sanction entertain any suit against a member of a Court or Board, or any person present at or concerned in the proceedings before a Court or Board, for any matter arising out of such proceedings.]

Representation of parties.

14. Subject to such conditions and restrictions as may be prescribed, any party to a dispute under inquiry or investigation by a Court or Board shall be entitled to be represented before the Court or Board by a legal practitioner.

Special provision regarding Public Utility Services.

Sudden strikes and lock-outs in utility services.

15. (1) Any person who, being employed in a public utility service, goes on strike in breach of contract without having given to his employer, within one month before so striking, not less than fourteen days' previous notice in writing of his intention to go on strike or, having given such notice, goes on strike before the expiry thereof, shall be punishable with imprisonment which may extend to one month, or with fine which may extend to fifty rupees, or with both.

(2) Any employer carrying on any public utility service who locks-out [1][any of his workmen] in breach of contract without having given them, within one month before such lock-out, not less than fourteen days' notice in writing of his intention to lock them out or, having given such notice, locks them out before the expiry thereof, shall be [1][punishable with] imprisonment which may extend to one month, or [1][with fine] which may extend to one thousand rupees, or with both.

[2][(2-A) If on any day an employer receives from any persons employed by him any such notices as are referred to in sub-section (1) or gives to any person employed by him any such notices as are referred to in sub-section (2), he shall within five days report to the Provincial Government or such authority as the Provincial Government may prescribe the number of such notices received or given on that day, and, if he fails to do so, he shall be punishable with fine which may extend to five hundred rupees];

(3) Where the employer committing an offence [1][under sub-section (2) or sub-section (2-A)] is a corporation, company or other association of persons, any secretary, director or other officer or person concerned with the management thereof shall be punishable as therein provided unless he proves that the offence was committed without his knowledge or without his consent.

(4) [3][No Court shall take cognisance of any offence under this section or of the abatement of any such offence save on complaint made by or under authority from the Central Government where the public utility service in question is a railway service connected with a Federal Railway or a postal, telegraph or telephone service and the Provincial Government in other cases.]

(5) No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence under this section.

LEG. REF

[1] Substituted by Act XVII of 1938.

[2] S. 15, sub-S. (2-A) added by Act XVII of 1938.

[3] Sub-S. (4) to S. 15 substituted by A. O., 1937.

[4] After sub-S. (2) the new sub-Ss. (3) and (4) have been inserted by *ibid*.

Special provision for Illegal Strikes and Lock-outs.

Illegal strikes and lock-outs.

16. (1) A strike or a lock-out shall be illegal which—

(*a*) has any object other than [1][or in addition to] the furtherance of a trade dispute within the trade or industry in which the strikers or employers locking out are engaged; and

(*b*) is designed or calculated to inflict severe, [2][and general] hardship upon the community and thereby to compel [3][any Government in British India, the Federal Railway Authority or the Crown Representative] to take or abstain from taking any particular course of action.

(2) It shall be illegal to commence or continue, or to apply any sums in direct furtherance or support of any such illegal strike or lock-out.

(3) For the purposes of this section—

(*a*) a trade dispute shall not be deemed to be within a trade or industry unless it is a dispute between employers and workmen, or between workmen and workmen, in that trade or industry, which is connected with the employment or non-employment or the terms of the employment, or with the conditions of labour, of persons in that trade or industry;

(*b*) without prejudice to the generality of the expression "trade or industry," workmen shall be deemed to be within the same trade or industry if their wages or conditions of employment are determined in accordance with agreements made with the same employer or group of employers.

(4) A strike or a lock-out shall not be deemed to be calculated to compel [3][any Government in British India, the Federal Railway Authority or the Crown Representative] unless such compulsion might reasonably be expected as a consequence thereof.

Penalty.

17. (1) If any person [2][commences, continues], instigates, incites others to take part in, or otherwise acts in furtherance of, a strike or lock-out which is illegal under the provisions of section 16, he shall be punishable with simple imprisonment which may extend to three months, or with fine which may extend to two hundred rupees, or with both:

Provided that no person shall be deemed to have committed an offence under this section by reason only of his having ceased work or refused to continue to work or to accept employment.

(2) No Court shall take cognisance of any offence under this section save on complaint made by, or under authority from, the [4][appropriate Government].

[5][In this sub-section "the appropriate Government" means—

(*a*) in relation to industries, businesses and undertakings carried on by the Central Government or by the Federal Railway Authority or by a railway company operating a Federal Railway, the Central Government; and

(*b*) in other cases, the Provincial Government.]

(3) No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence under this section.

Protection of persons withholding from illegal strike or lock-out.

18. (1) No person refusing to take part, or to continue to take part, in any strike or lock-out which is illegal under the provisions of section 16 shall, by reason of such refusal or by reason of any action taken by him under this section, be subject to expulsion from any trade union

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LEG. REF.

[1] Inserted by Act XVII of 1938.
[2] Substituted by *ibid*.
[3] Substituted for 'the Government' by A. O., 1937.
[4] Substituted for 'Governor-General in
[5] Inserted by *ibid*.

or society, or to any fine or penalty, or to deprivation of any right or benefit to which he or his legal representatives would otherwise be entitled, or be liable to be placed in any respect, either directly or indirectly, under any disability or at any disadvantage as compared with other members of the union or society, anything to the contrary in the rules of a trade union or society notwithstanding.

(2) Nothing in the rules of a trade union or society requiring the settlement of disputes in any manner shall apply to any proceeding for enforcing any right or exemption secured by this section, and in any such proceeding the Civil Court may, in lieu of ordering a person who has been expelled from membership of a trade union or society to be restored to membership, order that he be paid out of the funds of the trade union or society such sum by way of compensation or damages as that Court thinks just.

[1][*Conciliation Officers.*

Amendment of conciliation officers.

18-A. (1) The Central Government, in respect of industries, businesses and undertakings carried on by [1][it] or under [1][its authority [2][or by the Federal Railway Authority or a Railway Company operating a Federal Railway]], and the Provincial Government, in respect of other businesses, industries or undertakings within [2][the] Province, may, by notification in the Official Gazette, appoint officers, herein referred to as conciliation officers, charged with the duty of mediating in or promoting the settlement of trade disputes.

(2) A conciliation officer may be appointed for a specified area or for specified businesses, industries or undertakings and either permanently or for a limited period.

(3) A conciliation officer, may for the purposes of inquiring into an existing or apprehended trade dispute after giving reasonable notice, enter the premises occupied by any industry, business or undertaking and may call for and inspect any document which he has ground for considering to be relevant to the trade dispute, and for the purposes of any such inquiry shall be deemed to be a public servant within the meaning of the Indian Penal Code.

(4) If any person supplying information or producing a document to a conciliation officer requests in writing that the information or the document or any part thereof shall be treated as confidential the conciliation officer shall not disclose such information or the contents of such document or part thereof except to—

(*a*) the authority which appointed him to be a conciliation officer; or

(*b*) the parties concerned in the dispute for the purpose of mediating therein or promoting the settlement thereof.

(5) If the conciliation officer contravenes the provisions of sub-section (4), he shall be punishable with fine which may extend to one hundred rupees.

(6) No Criminal Court shall take cognizance of an offience under this section except with the previous sanction of the authority appointing the conciliation officer; and no Civil Court shall without the like sanction entertain any suit against a conciliation officer in respect of the disclosure of any information or the contents of any document or part thereof of the nature referred to in sub-section (4).]

LEG. REF.

[1] S. 18-A and its heading inserted by Act XVII of 1938.

[2] Substituted by Act XXXIV of 1939.

Rules.

Power to make rules.

19. (1) The Central Government in respect of industries, businesses and undertakings carried on by [2][it] or under [2][its] authority] [1][or by the Federal Railway Authority or a railway company operating a Federal Railway] and the Provincial Governments in respect of other businesses, industries or undertakings within their respective provinces, map make rules for the purpose of giving effect to the provisions of this Act.

(1) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :—

(*a*) the powers and procedure of Courts and Boards, including rules as to the summoning of witnesses, the production of documents relevant to the subject-matter of an inquiry or investigation and the number of members necessary to form a quorum;

(*b*) the alllowances admissible to members of Courts and Boards and to witnesses;

(*c*) the ministerial establishment which may be allotted to a Court or Board and the salaries and allowances payable to members of such establishments;

(*d*) the conditions and restrictions subject to which persons may be represented by legal practitioners in proceedings under this Act before a Court or Board;

(*e*) any other matter which is to be or may be prescribed.

(3) All rules made under this section shall be published in the Official Gazette [2][* * * * * * *] and shall, on such publication, have effect as if enacted in this Act.

THE TRADE-MARKS ACT (V OF 1940).

PREFATORY NOTE: TRADE-MARK, WHAT IS.—"A trade-mark may be defined as a name, sign, symbol, or device which is attached to goods offered for sale in the market so as to distinguish them from similar goods, and to identify them with a particular trader, or with his successors, as owners of a particular business, as being made, worked upon, imported, selected, certified, or sold by him or them. It has been aptly described as the commercial substitute for one's own autographic signature, certifying to the genuineness of the goods to which it is affixed.

FUNCTION OF TRADE-MARK.—The sole office or function of a trade-mark is to indicate the origin or ownership of the goods to which it is affixed, and thus to distinguish the goods of one person from those of another. More than one trade-mark may be acquired for the same goods. (*See* Ame. Cyc.; and Rul., Case Law, Title "Trade-marks".)

PROTECTION OF TRADE-MARK.—The obvious purpose of distinguishing the goods of one person from those of another is to enable one to reap the benefit of the good-will and reputation which he has built up for his goods by means of his honesty, skill, and industry. Good-will is property. The unauthorized use or imitation of another's trade-mark being a means of appropriating the benefit of the latter's good-will, the real basis of the remedy for infringement is the protection of one's property rights in his business and good will. (*See* 1930 Cal. 678; 1930 Lah. 999).

GOODS SUBJECT TO TRADE-MARK.—Strictly speaking, trade-marks are applicable only to articles of traffic, that is, such articles as are bought and sold in the market. Sometimes, the term is loosely applied to names and marks used in a business, but not in connection with articles of traffic. This use of the term is inaccurate and probably means no more than that such names and marks will be protected under the doctrine of unfair competition. (*See* 49 All. 92=1927 All. 81.) A valid technical trade-mark may be acquired for use in connection with any lawful vendible commodity, and it is immaterial whether such article be natural or artificial, so long as it is the subject of barter and sale in the market. (*See* 59 Bom. 373=1935 Bom. 101.)

LEG. REF.

[1] Substituted by A.O., 1937.

[2] Repealed by A.O., 1937.

NATURE OF TRADE-MARK RIGHT.—Since the sole function of a trade-mark is to indicate the origin or ownership of vendible commodities, trade-marks cannot exist separate and apart from a business to which they point and of which they are incident. There is no exclusive ownership of names, devices, or marks which constitute a trade-mark apart from the use or application of them. There is no such thing as an abstract right, or right in gross, to any particular name or mark. The property right of the proprietor is in the peculiar and added function of the word or mark as an identification of his goods, and in that alone. Trade-marks confer no exclusive right to represent an idea. ((1937 Lah. 186; 1939 Rang. 343 (F.B.); 66 C.L.J. 210; 1939 Lah. 999.)

RIGHT LIMITED TO PARTICULAR CLASS OF GOODS.—The right to the exclusive use of a trade-mark is further limited to a use on the particular class of goods upon which it has been actually used, and other persons may use even the identical mark or name in connection with a different class of goods. But the right extends to other goods of the same general class as that in which it has been applied. When one has acquired a trade-mark in connection with particular goods, no one else will be permitted to use such trade-mark upon goods which, while different, belong to the same general class. So where a trade-mark has been used on a particular species of goods, it cannot be thereafter appropriated by another as a trade-mark for a class of goods which includes such species. Goods are in the same class when the general and essential characteristics of the goods are the same, so that the general public would be likely to be misled if the same mark were used. The same trade-mark may be applied by the same person to many different classes of goods and is a valid trade-mark for each class. (39 P.L.R. 317=1937 Lah. 186; 1935 Bom. 101=59 Bom. 373=36 Bom.L.R. 1165; 35 Bom. 425=13 Bom.L.R. 242.)

The true test to see whether two goods are of the same species is whether the two sets of goods are so commonly dealt in by the same trader that his customers knowing his mark in connection with one set and seeing it upon the other would be likely to suppose that it was used upon them also to indicate that they were his goods. Defendants were using certain mark on their piece goods and plaintiffs used the same for their balls of thread. Subsequently the defendants used the same mark for their yarn whereupon plaintiff sued for injunction, restraining defendants from using the mark for their yarn. *Held,* that cloth and yarn were goods of the same species and that the defendants were entitled to use their trade-mark on yarn. (39 P.L.R. 317=1937 Lah. 186.)

TERRITORIAL LIMITS.—Notwithstanding expressions to be found in some authorities to the effect that a trade-mark acknowledges no boundaries, and may be infringed anywhere, trade-mark rights are confined to the limits of the country under whose laws they were acquired. One person may own a particular trade-mark in one country, and the same trade-mark may belong to another person in another country, or the trade-mark may be valid in one country and invalid in another. Trade-marks are, however co-extensive with the jurisdiction of the sovereignty granting the right, and it is immaterial that the proprietor has not extended his business to a particular locality. Treaties between various countries have to some extent made provision for the protection of the trade-mark rights of their respective citizens.

WHO MAY ACQUIRE TRADE-MARK RIGHTS.—Only those persons who have some connection or relation to the goods to which the mark is applied can obtain a trade-mark, because the sole function of a trade-mark is to indicate that relation, and show the origin or ownership of the goods. Any persons, including corporations, and aliens, who are connected with particular goods in any of the following capacities, may acquire a trade-mark to indicate that connection, and to secure to them the benefits of their good-will: *viz.*, manufacturers, workmen, dealers, or jobbers who merely select or sell goods manufactured by others, exporters, importers, commission merchants, and other persons bearing a similar relation to the goods. (*See* 1939 Rang. 381; 50 Cal. 762; 35 Bom. 425—importers.)

ACQUISITION OF RIGHT, MODE OF.—In common law, a trade-mark is acquired by mere adoption and user as such, subject to certain well-established rules as to what may be exclusively appropriated as a trade-mark, and as to what manner of use will constitute the mark used a trade-mark. The mark must be used in this country in order to acquire a trade-mark in this country.

A trade-mark right can be acquired only by actual use of the word or mark in the manner that trade-marks must be used. The goods with the mark must be placed upon the market. Mere adoption with intent to use in the future will not create a trade-mark.

It is not necessary that the word or mark should have been used for any definite or considerable length of time. A single actual use with intent to continue such use *eo instanti* confers a right to such word or mark as a trade-mark. It is sufficient if the article with the mark upon it has actually become a vendible article in the market, with intent upon the part of the proprietor to continue its production and sale. It is not necessary that the goods should have acquired a reputation for quality under that mark. Actual use under such circumstances as show an intention to adopt and use as a trade-mark is the test rather than the extent or duration of the use. A mere casual, intermittent, or experimental use may be insufficient to show an intention to adopt the mark as a trade-mark for specific article.

AFFIXATION OF MARK TO GOODS.—In order to become a valid trade-mark, the name or mark must be in some way physically attached to the goods, and go with them into the market. Use only as a name or sign upon a place of business, or in advertisements, circulars, and other similar ways, without being actually affixed to the goods is insufficient; however, it would suffice if the mark is affixed either upon the goods themselves, or upon the package or wrapper containing them or in any other way physically attached to the goods. (As to infringment by advertisement, *see* 37 All. 446=13 A.L.J. 697.)

USE OF TRADE-MARK.—In order to become a trade-mark, the mark must be used as a trade-mark, that is to say, it must be used as a distinguishing mark for the purpose of indicating the origin or ownership of the goods, and not merely their grade, class, or quality.

It is unnecessary, however, to give notice that a particular mark is claimed as a trade-mark; use of it as such is sufficient. A feature adopted merely for ornament is not a trade-mark; but of course an ornamental feature may be adopted and used as a trade-mark.

INFRINGEMENT OF TRADE-MARK.—Infringement of a trade-mark consists in the unauthorized use or colorable imitation of it upon substituted goods of the same class as those for which the mark has been appropriated. Relief is afforded upon the ground that it is a fraud to use another's trade-mark and thus pass off different goods as and for the goods of the proprietor of the mark rather than upon the ground of property in the mark itself. The essence of the wrong consists in the sale of the goods of one manufacturer or dealer as and for those of another by means of such trade-mark. It is only when this false representation is directly or impliedly made that relief will be granted. Use or imitation of a trade-mark at the instance of its owner affords him no cause of action. The doctrine of *volenti non fit injuria* applies. (As to acquiescence, *see* 1937 Rang. 490; 1939 Rang. 98.)

When a trade-mark is actually copied and used upon other goods of the same class, there is of course an infringement, and this is true even though other words or accessories are used in connection with it, because, being exclusive, it must not be used at all. But the words of a trade-mark may be lawfully used by another, if used, not as a trade-mark for rival goods, but honestly, in good faith, without any deceptive artifice, as part of a truthful descriptive statement applied to the goods. Unless colour is made an essential element of the trade-mark, it may be infringed by using it in the same or any other color. A trade-mark consisting of a name or word is infringed by use in any form or style of print, either with or without additions.

In order to constitute an infringement, it is not necessary that the trade-mark be exactly or literally copied. Similarly, identity is not the test of infringement of a trade-mark. It is not necessary that every word should be appropriated. The imitation need not amount to a forgery or an entire counterfeit. There is an infringement where the substantial and distinctive part of the trade-mark is copied or imitated, notwithstanding evasive attempts to hide the fact of imitation or the addition of colorable explanations, or the omission of non-essential parts. But the essential feature at least must be copied or imitated. If the words or marks look or sound alike there is an infringement. (*See* 1926 Cal. 837=43 C.L.J. 405; 1942 P.C. 40; 1935 Bom. 101.)

TEST OF INFRINGEMENT—TENDENCY TO DECEIVE.—Whether or not an imitation which is not an exact copy constitutes an infringement depends upon whether the resemblance is sufficiently close to deceive purchasers and so pass off the goods of one man as being those of another. Where one mark could not reasonably be mistaken for the other, and deception is improbable or impossible, there is no infringement. In applying this test it has been said that all doubts ought to be resolved in favour of the prior trader and against the imitator. Proof of actual deception of purchasers is not necessary to obtain relief. (1926 Cal. 837.) It is the probability of deception which calls for a remedy. Of course actual instances of deception constitute the strongest possible proof of the deceptive character of the imitation. The doctrine of infringement of trade-marks by deceptive imitation is nothing more than an application of the broader doctrine of unfair competition. (59 Bom. 373=1935 Bom. 101=36 Bom.L.R. 1165.)

SIMILARITY—TEST TO DETERMINE WHEN SIMILARITY CONSTITUTES INFRINGEMENT.—In determining whether an alleged infringing trade-mark is sufficiently similar to be deceptive, and therefore an infringement, ordinary purchasers, buying under the usual conditions prevailing in the trade, and giving such attention as such purchasers usually give in buying that class of goods, are the standard. If such a purchaser would probably be deceived into purchasing one article thinking it was the other, there is an infringement, otherwise not. Some cases hold the similarity to be an infringement if sufficient to deceive an "incautious" or "unwary", "unobservant", or "unsuspecting" purchaser, while a few cases refer to deception of a cautious or careful purchaser, or otherwise apparently require a somewhat greater degree of similarity. It has been said that it must appear that the ordinary mass of purchasers, paying that attention which such persons usually do, would probably be deceived. The resemblance need not be sufficient to deceive experts or persons specially familiar with the goods. The ultimate consumer who makes the market

not the immediate purchaser, is the one whose deception is the vital fact. If upon the whole there is a deceptive similarity between the marks, it is immaterial that a critical inspection and comparison discloses differences, or that persons seeing the two trade-marks side by side would not be deceived. Ocular comparison of the *tout ensemble* is the best means of determining the fact of deceptive and infringing imitation. (99 I.C. 727=4 Rang. 381=1927 Rang. 49; 1926 Cal. 837.)

INFRINGEMENT—QUESTION OF FACT.—What similarity between two marks is sufficient to deceive, and hence to constitute an infringement is a question of fact to be determined in each case by its own circumstances.

INTENT TO DECEIVE.—Guilty knowledge or fraudulent intent is not an essential element of infringement of a techical trade-mark. It is well settled that an infringement will be restrained irrespective of the question of intention on the part of defendant. [I.L.R. (1937) Bom. 85=38 Bom.L.R. 894=1936 Bom. 418; 54 M.L.J. 644=1928 Mad. 759].

It is the invasion of plaintiff's property right in his good-will that supports the remedy. Fraudulent intent may be material, however, where an accounting of damages and profits is sought in addition to injunctive relief.

Persistence in the use of an infringing mark after notice constitutes intentional infringement, and is strong evidence of fraud. Fraudulent intent may be inferred from imitation.

REMOVAL AND SUBSTITUTION OF TRADE-MARK BY DEALER.—A dealer may legally remove the trade-marks from articles made by another and purchased by himself, and resell them with his own trade-marks placed thereon.

REFILLING MARKED BOTTLES OR PACKAGES.—It is a plain infringement to take another's bottles or packages marked with his trade-mark, and refill them with spurious goods, and then sell them in the market.

RELATIVE MERITS OF GOODS—NOT MATERIAL.—Upon the question of infringement, it is immaterial whether defendant's goods are of inferior or superior quality to that of plaintiff's. In either case he has no right to sell them under plaintiff's mark, and thereby avail himself of the benefit of the good-will and reputation of plaintiff's goods.

USE OF ONE'S OWN NAME ON GOODS.—The mere fact that an infringer uses his own name in connection with the mark is not sufficient to rebut deception and prevent his use or imitation of the mark from being an infringement. [*See* 56 I.C. 709; 1931 P.C. 15 (P.C.).]

CONTRIBUTION OF TRADE-MARK.—A trade-mark consisting of a combination of common elements is not infringed unless the combination is used. Where only the common and non-exclusive feature is used there is no infringement.

CONTRIBUTORY INFRINGEMENT.—One who furnishes another with the means of infringement is liable as a contributor infringer.

USE OF MARK ON DIFFERENT CLASS OF GOODS.—The right to the exclusive use of a trade-mark is limited to a use of it upon some particular class of goods. Accordingly, it is not an infringement for another person to use even the same identical trade-mark upon a different class of goods from that to which the prior user applied it. Goods are in the same class, within this rule, whenever the use of a given trade-mark name, or symbol would enable an unscrupulous dealer to palm off on unsuspecting customers spurious goods as being the genuine goods of the proprietor of the trade-mark. [*See* 67 I.A. 212=44 C.W.N. 737=1940 P.C. 86=(1940) 2 M.L.J. 151 (P.C.).]

UNFAIR COMPETITION AND PASSING OFF ACTIONS.—Unfair competition consists in passing off or attempting to pass off, upon the public the goods or business of one person as and for the goods or business of another. It consists essentially in the conduct of a trade or business in such a manner that there is either an express or implied representation, to that effect. And it may be stated broadly that any conduct, the natural and probable tendency and effect of which is to deceive the public so as to pass off the goods or business of one person as and for that of another constitutes actionable unfair competition. The definition is comprehensive enough to reach every possible means of effecting the result. Unfair competition as thus defined is a legal wrong for which the courts afford a remedy. It is a tort and a fraud. The basic principle is that no one has a right to dress up his goods or otherwise represent them in such a manner as to deceive an intending purchaser and induce him to believe he is buying the goods of another. (*See* 59 Bom. 373=36 Bom. L.R. 1165=1935 Bom. 101; 1937 M.W.N. 271; 1936 Bom. 418.)

No inflexible rule can be laid down as to what conduct will constitute unfair competition. Each case is, in a measure, a law unto itself. Unfair competition is always a question of fact. The question to be determined in every case is whether or not, as a matter of fact, the name or mark used by defendant has previously come to indicate and designate plaintiff's goods, or, to state it another way, whether defendant, as a matter of fact, is by his conduct passing off his goods as plaintiff's goods, or his business as plaintiff's business. The universal test question is whether the public is likely to be deceived. (1931 Mad. 461.)

Unfair competition involves trading upon another's reputation and good-will, and the injury is the same regardless of the intent with which it is done. An actual fraudulent intent need not be shown. (38 Bom.L.R. 894=1936 Bom. 418; 1928 Mad. 759=54 M.L. J. 644.)

TRADE-MARK CASES DISTINGUISHED.—The infringement of a trade-mark is one means of passing off the goods of one person as and for the goods of another and indeed, the remedy for infringement is based upon this principle. Accordingly the law of trade-marks is merely a specialized branch of the broader doctrine of unfair competition. The doctrine of unfair competition, although not under that name, was recognised at a very early day. (*See* 157 I.C. 902.)

Protection gainst unfair competition is afforded upon the same general principles upon which technical trade-marks are protected. The principal distinction between infringement of trade-mark and unfair competition is that in the latter class of cases no exclusive proprietary interest in the names or marks used to deceive is necessary to relief, while in trade-mark cases an exclusive right is necessary. In trade-marks cases it is not necessary to prove that the mark or name has acquired a secondary meaning, and come to indicate plaintiff's goods. In unfair competition cases this is necessary, and, in fact, is the very basis of relief. (157 I.C. 902; 46 L.W. 635=1938 Mad. 1=(1938) 2 M.L.J. 651.)

It is the duty of a subsequent trader coming into an established trade not to dress up his goods or market them in such a way as to cause confusion between his goods or business and that of a prior trader. Even conceding that the later trader has an equal abstract right to use particular words, names, or marks, yet if his unexplained use of them will cause confusion and deception, he must accompany such use with affirmative distinguishing features sufficient to render deception improbable. This rule applies to all classes of names including descriptive, generic, personal, and geographical names, which, although primarily *publici juris,* have acquired a secondary meaning. Where a name has aiquired a secondary meaning, and come to indicate the source of particular articles, the mere use of such a name by another, unaccompanied by adequate distinguishing statements, in itself amounts to an artifice calculated and intended to deceive, and constitutes unfair competition. (1937 M.W.N. 271; 1936 Bom. 418.)

TRADE-NAMES.—Trade names have been frequently confused with trade-marks, and, broadly considered, they do include names which may constitute technical trade-marks. More accurately, however, trade-names are names which are used in trade to designate a particular business of certain individuals considered somewhat as an entity, or the place at which a business is located, or of a class of goods, but which are not technical trade-marks either because not applied or affixed to goods sent into the market, or because not capable of exclusive appropriation by any one as trade-marks. Such trade-names may, or may not, be exclusive. Exclusive trade-names are protected very much upon the same principles as trade-marks, and the same rules that govern trade-marks are applied in determining what may be an exclusive trade-name. Non-exclusive trade-names are names that are *publici juris* in their primary sense, but which in a secondary sense have come to be understood as indicating the goods or business of a particular trader. Trade-names are acquired by adoption and user, and belong to the one who first used them and gave them a value. Abandonment of trade-names is governed by the same rules as apply to technical trade-marks. Trade-names are protected against use or imitation upon the ground of unfair competition. (1923 Bom. 119.)

REGISTRATION.—Registration under the statute confers no new rights to the mark claimed or any greater rights than already exist at common law without registration. It does, however, facilitate the remedy, which may be obtained and enforced throughout the entire State, and it establishes a record of facts affecting the right to the mark. Registration may also be important under treaty stipulations where international protection is sought for the trade-mark. Registration of matters or features which are *publici juris* confers no exclusive right therein. Registration does not itself create a trade-mark. The trade-mark exists independently of the registration which merely affords further protection under the statute. Common-law rights are left wholly unaffected. Priority in adoption and use as a common-law trade-mark is superior to priority in registration. (*See* 188 I.C. 462; 66 M.L.J. 440=1934 Mad. 211.)

A certificate reciting that the rules have been complied with and that the trade-mark has been duly registered is evidence of that fact. Registration is evidence that the name is not descriptive. A certificate from the patent office is evidence that what is shown to have been filed was filed at the time stated. The applicant is concluded as to date of adoption and user by his sworn statement made part of his application. Registered trade-marks are limited by the claim. The exclusive right to use the mark is limited to use upon the class of goods for which it was registered as set forth in the statement filed in the office.

INJUNCTIONS—PRELIMINARY INJUNCTION.—Preliminary injunctions, based upon *ex parte* affidavits, and in advance of a hearing upon full proofs, are granted much more cautiously than in the case of permanent injunctions upon final hearing. Accordingly all the limitations and qualifications upon the granting of permanent injunctions apply with

added force to preliminary injunctions. In trade-mark cases it is not a matter of course to grant preliminary injunctions even where plaintiff's case seems *prima facie* to be made out. The usual considerations affecting the just discretion of the Court in granting preliminary injunctions are fully applicable. The absence of fraudulent intent, the financial responsibility of defendant, and other like considerations may be taken into account in granting or denying the injunction. Preliminary injunctions rest in the sound discretion of the trial Court. The case must be reasonably strong and free from doubt to justify a preliminary injunction. But where plaintiff's right and defendant's infringement are clearly shown, a preliminary injunction would be granted. Thus where plaintiff's title to a trade-mark is *res judicata,* or at least established by a prior adjudication and infringement is admitted or clearly shown a preliminary injunction should be granted. (*See* 1938 Cal. 458; 26 S.L.R. 335=139 I.C. 490; 1933 Lah. 1046.)

The balance of convenience rule is especially applicable upon an application for injunction in trade-mark and unfair competition cases. Terms may be imposed. Thus, it is not unusual to require defendant to keep an account, or to give a bond, as a condition of denying a motion for a preliminary injunction, and plaintiff may also be required to give a bond as a condition of granting a preliminary injunction. (1933 Lah. 1046.)

A preliminary injunction will usually be dissolved upon the coming in of an answer denying the fact and showing cause which such injunction should not have been granted. A mandatory injunction will not generally be granted in advance of the trial or final hearing.

PERMANENT INJUNCTION.—A permanent injunction at final hearing is a matter of course and of right where plaintiff's title to the mark and defendant's infringement of it are clearly shown, and there are no countervailing equities. Actual or threatened infringement or violation of plaintiff's rights must be shown. Cessation of infringement, *pendente lite,* is no reason for refusing an injunction, and even discontinuance of infringement before commencement of the suit is not necessarily a bar, especially where that fact was unknown to plaintiff and defendant contests the suit, as there may be danger that he will resume the infringement. But an injunction may be denied where the infringement was discontinued in good faith, and there is no reason to believe it will be resumed. An injunction will be granted against threatened infringement, even in advance of any actual loss. Actual deception and damage need not be shown in order to support an injunction against infringement or unfair competition. An injunction may be granted, although the use shown is too slight to warrant an accounting. An injunction may be refused within the sound discretion of the Court. Plaintiff's right or title to the mark or name should be clear, or established at law, before injunction should be granted. Where there is a real controversy between the parties as to whether both were not concerned in the establishment of the business in connection with which the name or mark is used, it is not a case for injunction until the right has been determined in a regular suit or otherwise. (1923 Bom. 119; 4 A.W.R. 1028.)

The injunction must conform to the usual requirements; and it should be framed with a view to the exact nature of the injury, and the causes that mislead the public, in the particular case. The object of the Court in these cases is to see how effectually unfair trade can be put a stop to, not to be astute to see how little the fraudulent business of defendant can be interfered with. The degree of restraint in any particular case is always commensurate with the necessities of the situation. The injunction should be no broader than necessary to prevent deception and protect plaintiff's rights. (As to the form in which an injunction order is passed, *see* 1930 Cal. 678; 1937 Cal. 528; 61 Cal. 571.)

The injunction should be definite, precise, and particular, so that all who see it may know with certainty what is and what is not permitted. A decree in such general terms as to amount to a sweeping injunction to obey the law is objectionable upon the ground of indefiniteness, and should not be granted. It should enjoin specifically the use of the marks, words, or devices adjudged misleading, or an infringement, and to this specific injunction should be added a general clause to prevent merely colorable evasion. This form of decree will definitely determine that defendant may not continue the particular form of infringement or unfair competition which has been litigated and adjudicated, and it will leave him at liberty to determine for himself what other forms of inscriptions or devices he may safely and properly use. It is not a proper function of a Court of equity, after finding infringement, to indulge in label making, and to give its approval in advance to a changed form proposed to be adopted by defendant to avoid future liability.

DISOBEDIENCE OF INJUNCTION—CONTEMPT OF COURT.—Violation of an injunction may be punished as a contempt of Court. The president of a corporation may be guilty of contempt for violation of an injunction running against the corporation. An injunction restraining the use of certain marks, words, or names is violated by use thereof although in connection with other added matter.

SUCCESSIVE INJUNCTIONS AND RES JUDICATA.—The ordinary rules in respect to the doctrine of *res judicata,* and the granting of successive injunctions, have full application in this class of cases. But as infringement or unfair competition is a tort, and a continuing wrong, each deceptive "passing off" giving rise to a new and separate cause of action,

a prior decree is not an absolute bar to the maintenance of a subsequent suit for a continuance of the infringement or unfair competition, especially where the subsequent acts of defendant are not identically the same as those previously adjudicated. Even if a second injunction is unnecessary, because defendant is violating an injunction already granted by which he is bound, a new suit may be maintained upon the new cause of action; and *a fortiori* this rule applies where the new acts of infringement are committed in a different district or jurisdiction, where defendant cannot be reached by contempt proceedings, or where they were committed by one not a party to the prior suit and who cannot be punished as for a contempt, even if he could be reached. Where defendant has changed his form of infringement since the prior decree, and there is any substantial question whether the new form is an infringement, that question will not be adjudicated in contempt proceedings brought to punish for violation of the prior injunction, but the plaintiff will have to seek his remedy in fresh proceedings.

ACCOUNTING AND DAMAGES.—The general rule is that upon obtaining an injunction for infringement of a trade-mark, plaintiff is entitled to recover deft.'s profits on the goods sold under that mark, and to a reference to ascertain them. The same rule applies to cases of unfair competition, as in technical trade-marks. In such cases the Court holds the infringer or unfair trader liable as a trustee for the rightful owner to the extent of the profits realized upon the infringing goods or from the unlawful or wrongful business. The accounting is taken upon equitable principles, and any facts rendering the general rule inequitable will bar its application. Thus laches, acquiescence, and delay is a bar to an accounting for profits and a recovery of damages. Where the amount of damages suffered, or of profits realized, is seen to be very small, or the infringing use has been very slight, equity will limit its relief to an injunction and deny an accounting. An accounting will not be directed where the evidence shows that there is no rational rule by which to estimate the profits recoverable. An accounting will also be denied where both parties were found at fault. An accounting of profits or damages will not be ordered where the infringing use of the trade-mark or trade-name was merely accidental or without actual fraudulent intent. The profits obtained by defendant after the filing of the suit are not the result of innocent infringement and may be recovered. Where the infringement or unfair competition is wilful and intentional that is to say, fraudulent, the complainant is entitled to an accounting of damages and profits as a matter of course and of right in the absence of any valid defence. [1937 Cal. 528; 188 I.C. 462; 1932 Rang. 56; 56 M.L.J. 282 (P.C.); 1927 All. 81.]

Defendant must account for all profits made on all goods sold under the infringing mark or name, and not merely for those shown to be due to the infringement. (1939 Bom. 198=41 Bom.L.R. 290.)

If the right to use a trade-mark is common to two or more persons, neither will be allowed to recover full profits against an infringer, but each will be permitted to recover only according to his own interest.

The cost of manufacture and defendant's selling expenses should be deducted in ascertaining profits. Salaries paid to managing officers should ordinarily be allowed as a credit in ascertaining the cost of manufacture and sale.

No allowance can be made for defendant's services in wronging plaintiff by his unfair competition.

INTEREST ON PROFITS.—Interest on profits may be awarded from the time of commencement of the action.

BURDEN OF PROOF AS TO DAMAGES.—The burden of proof is upon plaintiff to show damages and profits if a recovery thereof is sought. (*See* 1932 Rang. 56.)

PRACTICE—DISCOVERY AND INSPECTION.—Plaintiff is entitled to the usual discovery and inspection from defendant in aid of his claim and upon the accounting.

COSTS.—Costs are governed by the usual rules, and, as in other cases, are largely discretionary, being granted or withheld as the equities of the particular case require. Costs will usually be awarded to a successful complainant upon the granting of an injunction, but may be denied where the infringement was inadvertent, and not persisted in, or where both parties have been found at fault. Costs subsequent to a preliminary injunction entered on defendant's consent may be imposed on plaintiff where he fails to secure any broader decree, Court generally exercises its discretion as to costs with great freedom. (*See* 52 L.W. 745=(1940) 2 M.L.J. 793=1941 Mad. 31.)

INFRINGEMENT OF TRADE-MARK—PENAL OFFENCE.—Violations of trade-marks have to some extent been made criminal or penal offences. An indictment, or complaint for a trade-mark offence must conform to the usual rules, and state facts showing every element of an offence under the statute. There must be no fatal variance between the facts charged and the facts proved. (*See* 1938 Lah. 186; 1930 Oudh 360; Indian Penal Code, Ss. 478 to 489.)

STATEMENT OF OBJECTS AND REASONS.—"In May, 1879, the Government of India introduced a Bill in the Imperial Legislative Council for the registration of trade-marks in India, but legislation was not proceeded with

owing to lack of support from commercial bodies. Since then the question of undertaking legislation has been considered by the Government of India on several occasions. Until 1928, commercial opinion of India was found, either unanimously or on the balance, to be against the proposal. The demand for legislation has, however, strengthened during the last ten years with the growth of industry and trade in India and the increasing realization that without a system of statutory registration trade-marks cannot enjoy adequate protection either at home or abroad.

TRADE MARKS ACT (V OF 1940).

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THE TRADE-MARKS ACT (V OF 1940).

[*11th March. 1940.*

An Act to provide for the registration and more effective protection of Trade Marks.

WHEREAS it is expedient to provide for the registration and more effective protection of trade marks ; It is hereby enacted as follows :—

NOTES.

TRADE-NAME—NATURE OF RIGHT.—The sole right to restrain anybody from using any name that he likes in the course of any business he chooses to carry on is a right in the nature of a trade-mark. 1923 Bom. 119. The principle underlying the use of trade-name is that a person shall not trade under a name so closely resembling that of the plaintiff as to be mistaken for it by the public. In other words a person shall not carry on his business in such a way as to represent that his business was the business of another person. The question to be determined in cases of this description is whether there is such a similarity between the two names as that the one is in the ordinary course of human affairs likely to be confounded with the other. It is not necessary to prove that the defendants in taking the name complained of by the plaintiffs had any fraudulent intent. It is enough if the plaintiffs prove that the act of the defendants in assuming the name complained of, does an injury to the plaintiffs' rights. There is no question in such cases of property or monopoly in the name. There is no property in the word but at the same time it is fraud on a person who has established a trade and carries it on under a given name that some other person assumes the same name with a slight alteration in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name. 24 Bom.L.R. 1181=1923 Bom. 119. *See also* 49 L.W. 556=1939 Mad. 555=(1939) 1 M.L.J. 635; 1940 Lah. 39. There are two distinct classes of rights in respect of the name of business: One only arises when that name or some part of it, whether it be what is known as a fancy word, an ordinary word or a geographical name, has come to mean the goods of, or to connote the skill, probity or excellence of the particular business. The other class of right

NOTES.

is to a distinct name, that is the right to prevent others from adopting a name which is likely to lead the public to mistake another new business for the plaintiff's business. This right arises immediately on the user of the name by the first person who uses it, provided that the name used does not infringe the rights of another person. 61 Cal. 571. A name which is substantially and widely established is not on the account any the less entitled to protection. It is difficult to perceive why, on the ground of public policy or otherwise, a reputation, once *de facto* found to be established, in a word of even universal currency in relation to restricted class of goods should be disentitled to the protection of the Courts. 157 I.C. 902.

TRADE-MARK AND TRADE-NAME—DISTINCTION.—A trade-mark must be some visible concrete device or design affixed to indicate the manufacturer whose property the trade-mark is. Distinction between trade-and trade-name pointed out. 40 Cal. 281=17 C.W.N. 227=18 I.C. 404.

CASES RELATING TO BUSINESS NAME AND TRADE-MARK—PRINCIPLES APPLICABLE—DISTINCTION.—One of the few distinctions between the principles applicable to cases relating to business names and those relating to trade-marks is that the rule as to anything being common to the trade does not apply to the former class, except when it is claimed that the business name or part of it connotes the plaintiff's goods or work. At the same time, any word descriptive or otherwise, which is common to the trade is not sufficiently distinctive to found a title to an exclusive right thereto, although the man, who is the first who uses a business name entirely consisting of words common to the trade, is entitled to restrain the use of a new name which is likely to deceive the public into a belief that a rival business is his. 61 Cal. 571.

TRADE NAME—INFRINGEMENT—QUESTION FOR CONSIDERATION AND DECISION.—Two issues must always arise in a passing off action. First, has the name or description or make up, or whatever it may be, of the wrongful user of which the plaintiff complains, come to be associated in the public mind with the goods, business or works of the plaintiff, secondly, is the defendant so describing or getting up, his goods or whatever it may be, as to be likely to mislead the public into believing that they are acquiring the plaintiff's goods, when in fact they are acquiring the defendant's goods. The foundation of a passing off action is that nobody is entitled to represent his goods as the goods of somebody else. The issues in each case have to be framed with reference to the facts of that case, but the plaintiff has always to succeed substantially on the two issues. 44 Bom.L.R. 505.

TRADE-NAME — FRAUDULENT USE OF—WHAT IS.—If the use by the defendants of their firm name does in fact necessarily result in their goods being taken for the goods of plaintiffs, the continued use by the defendants of that firm name would become fraudulent. 34 L.W. 977=1931 P.C. 15 =61 M.L.J. 334 (P.C.). *See also* 50 L. W. 872=1940 Mad. 145=(1940) 1 M.L.J. 749. In order to justify the Court at a plaintiff's instance from prohibiting the defendant firm from using its own name in all or any of its business transactions, it is essential for that plaintiff to establish by proper evidence two facts. He must prove that the words in the names of the firms are so alike that the latter will be taken as the same as or equivalent to the former. He must further prove that his firm name has acquired a secondary meaning, *i.e.*, that the word, when applied to goods, means that the goods are the goods of the plaintiff, and of no one else. 34 L.W. 977=1931 P. C. 15=61 M.L.J. 334 (P.C.). There can be no possibility of deception between two things which are essentially different, although the two things may bear the same name or title. Where both parties have, without any intention to deceive, taken the same title for their goods or works neither of them has any right to restrain the other from using the title unless he can show that it has become associated in the minds of the public with his work and nobody else's, and that there was any actual or any likelihood of deception by reason of the identity of the two names or titles. 44 Bom.L.R. 505. The foundation of a passing off action is always deception, or possibility of deception but it is not an action in deceit. It is never the case of the plaintiff in a passing-off action that he has been himself deceived by the action of the defendant. His case is that other people, the public, have been deceived, or are likely to be deceived. But a private individual cannot sue for a wrong decree to the public. The plaintiff must therefore prove that the action of the defendant has infringed some proprietary right of his own. It is not necessary to prove any fraudulent intention on the part of the defendant, though, if a fraudulent intention is proved, that usually assists the plaintiff's case. 44 Bom.L.R. 505.

TRADE-NAME—GOODWILL OF HOTEL BUSINESS.—Ordinarily a hotel connotes the business carried on by a person though sometimes the term is also used with regard to premises but it is only owing to their association with the original business carried on by them. Where a person purchased the materials and gardens in which a hotel had been run, *held*, that the vendee did not purchase the goodwill of the business or the right to use the name in which the hotel business had been carried on and that the vendee could not continue the business under the original name at some other place. 32 P.L.R. 542=1931 Lah. 650.

CHAPTER I.

PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called THE TRADE MARKS ACT, 1940.

NOTES.

TRADING IN OWN NAME, SUCH NAME ALSO BEING ANOTHER'S—SIMILARITY IN GET-UP OF GOODS—IF NECESSARY—PRINCIPLE—FORM OF INJUNCTION.—No man can have the right to represent his goods as the goods of another person; where a man merely uses his own name, there is no *prima facie* case that he is selling his goods as the goods of another person. The fundamental principle is that no man has any right to represent that his business is the business of another person, but where a man carries on business in his own name which happens to be also the name of another, he does not make any such representation, but represents only what is the 'accurate and exact truth,' namely, that it is his business. This principle cannot, however, be invoked by a person who uses his name in combination with other words as a trade name which, taken as a whole, does not represent the bare truth, and whose conduct otherwise also shows that he deliberately intends to pass off his goods as those of another. Where a name has acquired a secondary signification as exclusively denoting the goods of a particular trader, mere dissimilarity in get-up is immaterial and affords no protection to the person who uses that name, and he is liable to be restrained by an injunction from carrying on his business in such name without taking reasonable precaution to clearly distinguish the business carried on by him and the goods manufactured by him from the business carried on and the goods manufactured by the other person. 50 L. W. 872=1940 Mad. 145=(1940) 1 M.L.J. 749. *See also* 61 M.L.J. 334 (P.C.).

GOODS, IF TO BE IDENTICAL OR BELONG TO THE SAME CLASS.—Where a particular name has become associated with goods manufactured or sold by the plaintiff, he is entitled to the protection of its name against persons who use that name on goods which are so similar to that of the plaintiff that the purchaser might infer a common origin. It is not necessary that the goods should be identical or belong to the same class. 54 L.W. 207=1941 M.W.N. 1018=(1941) 2 M.L.J. 435.

DAMAGES—METHOD OF ASSESSMENT.—In a suit for damages against the defendant for setting up a similar business in a similar name which was likely to lead the public to mistake the defendant's business for the plaintiff's, the method of assessment is to allow the plaintiff's usual percentage of profits on the difference between the plaintiff's usual gross trade earning before the unfair competition began and his actual earnings thereafter, with a lump sum for expected increase of business. Where, however, the plaintiff's business was affected by trade depression, and the plaintiff cut down his advertising and shifted to cheaper premises, any increase of business is eliminated and something must be deducted for trade depression, change of address and curtailed advertising. 61 Cal. 571.

Sec. 1: *N. B.*—As this Act was passed only in 1940, cases bearing on the subject decided before the passing of the Act have been cited under the appropriate section.

TRADE-MARK, ACQUISITION OF—LAW PRIOR TO THIS ACT.—Prior to this Act a trade-mark could be acquired or abandoned in the same way. No length of time was required for either. 22 I.C. 372=40 Cal. 814. In a country like India, where there was no statute for registering trade-marks, a right to a trade-mark was acquired by user. 99 I.C. 353=49 All. 92=24 A.L.J. 975=1927 All. 81; 1929 Rang. 322. A registration of the ownership as regards a particular design under the Registration Act was nothing more than the opinion and claim of the declarant. As there was no statute for registering trade-marks in India 'a right to a trade-mark was acquired by user'. I.L.R. (1938) 1 Cal. 665=42 C.W.N. 1121=66 C.L.J. 210=1938 Cal. 216.

PROPERTY IN TRADE-MARK, ACQUISITION OF.—Property in a word name or any other trade-mark cannot be acquired until the vendible article is put on the market, for no property can be acquired except through the process of sale, or offering for sale, in the market. Nor can there be property in a trade-mark apart from the goods of which it has become the symbol. 59 Bom. 373=36 Bom.L.R. 1165=1935 Bom. 101.

RIGHTS ACQUIRED IN ENGLAND—NO EFFECT ON RIGHTS IN INDIA.—In respect of rights in trade-marks and trade names any rights acquired by the parties in England have no effect on the rights of the parties in India. The rights of industrial property in India are governed by the laws of India and are in no way affected by the laws of England or by the action of parties in England. 50 Bom. 402=28 Bom.L.R. 243=1926 Bom. 200.

DECLARATION OF DESCRIPTION—EVIDENCE OF GENUINENESS.—Although there was no Trade-mark Act in India prior to 1940 a declaration of the description of a trade-mark served the useful purpose of being some evidence of the genuineness of the mark which may be the subject-matter of it. 1930 Cal. 678.

TRADE-MARKK—WHAT IS—A NUMERICAL FIGURE.—A number may be a trade-mark as much as any other design. 41 Bom. 49=

NOTES.

34 I.C. 529=18 Bom.L.R. 206. A combination of numerals, if distinctive, can form a trade-mark. 59 Bom. 373=36 Bom.L.R. 1165=1935 Bom. 101.

RIGHT TO TRADE-MARK—HOW ACQUIRED—DISTINCTIVE AND DESCRIPTIVE MARK—DIFFERENCE BETWEEN.—A trader acquires a right of property in a distinctive mark merely by using it upon or in connection with his goods irrespective of the length of such user and of the extent of his trade. Where a mark or phrase merely describes the quality or origin of an article such as "custard Powder," "Malted Milk" or "Gripe Water," it is not capable of distinguishing the goods of one maker from those of others, and the mark is merely descriptive; but a mark is distinctive where it points to the goods of a particular person as for instance in the cases of "Life Buoy" soap, "Wincarnis," or "Three Nuns" tobacco. If the mark be a distinctive one, the trader who adopts it is entitled to protection directly the article having assumed a vendible character is launched upon the market. As between two competitors who are each desirous of adopting a mark which is distinctive in character it is, to use familiar language, entirely a question of who gets there first. 1939 Rang. L.R. 488=1939 Rang. 343 (F.B.). *See also* 66 C. L. J. 210=I.L.R. (1938) 1 Cal. 665=42 C.W. N. 1121.

DESCRIPTIVE AND FANCY NAMES.—Where the articles can be denoted by a proper descriptive name, but the person inventing or discovering it chooses to describe the article by a fancy name, and manufactures and sells the same under that fancy name, no one is allowed to appropriate that name, and manufacture and sell the article under that fancy name. 'Urea Stibamine' is not a descriptive name of the article at all and has no chemical meaning, but it is a fancy name. 95 I.C. 667=43 C.L.J. 405=1926 Cal. 837. For the protection of public it is necessary that a trade-mark should be something beyond a mere adjective describing the quality of the material. If a foreign word or a word in dead language not known to people in general is used that word itself because it is not understood may very reasonably become a trade-mark. *Ragget* v. *Findlater,* (1874) 17 Eq. 29, Rel.) (*Ford* v. *Foster,* 7 Ch. 611; *Braham* v. *Bustard,* 1 H. & M. 447 and *Reddaway* v. *Banham,* (1896) A.C. 190, Ref.) 1930 Lah. 999.

PROPERTY—TRADE-MARK—NATURE OF.—In a trade-mark there can be no property in gross, apart from goods of which it has become the symbol. 35 Bom. 425=10 I.C. 805=13 Bom. L. R. 242. In the case of a trade-mark identified with a particular manufactory the rights of the person whose trade-mark it was would not differ substantially from those which would exist if it were strictly speaking his property. (*Reddaway* v. *Banham,* (1896), A. C. 199, Ref.) 1930 Cal. 678.

ACQUISITION OF TRADE-MARK RIGHT—CONDITIONS.—Nobody has any exclusive right or ownership in any mark alone, unless that mark is associated by use with a particular description or species of goods imported or manufactured by him. In such a case the person concerned becomes the owner of that trade-mark but only with regard to that description or species of goods. 39 P. L.R. 317=1937 Lah. 186.

RIGHT TO USE OF MARK—IF CONFINED TO ARTICLE BEARING PARTICULAR MARK—ENGLISH LAW.—Unlike as in England where a trade-mark is registered not only for a particular article but for a class of goods under which the article falls, in India the right to use a particular trade-mark is confined to the article to which it is affixed; but a plaintiff may prove, by proper and sufficient evidence, that the trade-mark in question has become so identified and associated with his products that his name would suggest itself to a purchaser on seeing it on any product like the one which is alleged by the plaintiff to be an "allied" product. But the acquisition of an exclusive right to a trade-mark in respect of a particular commercial article cannot confer on the owner thereof a right to prohibit the use by others of such mark in relation to goods of a totally different character. 59 Bom. 373=36 Bom.L.R. 1165=1935 Bom. 101. Although in India the exclusive right to use a particular mark is confined to the article to which it is affixed, it is open to a party claiming a right in a particular mark to establish that it has been so identified and associated with his products that his name would suggest itself to a purchaser on seeing it on any other allied product. 39 P.L.R. 317=1937 Lah. 186.

LAW APPLICABLE BEFORE PASSING OF THIS ACT.—Before this Act, in India, the law of trade-marks was not governed by statute. There was no statutory system of registration and the rights and liabilities in connection with trade-marks were determined by reference to the principles of the Common Law of England. (38 Cal. 110, Ref.) 42 Cal. 262=27 I.C. 483=19 C.W.N. 1.

ENGLISH DECISIONS — APPLICABILITY.—In trade-mark cases conditions peculiar to India must be borne in mind in applying any doctrine of English law, and English decisions which turn or partly turn on questions of fact—as do most cases of common law trade-marks and passing off—can only be applied with care and circumspection. 67 I.A. 212=I.L.R. (1940) A. 466=52 L.W. 25=44 C.W.N. 737=1940 P.C. 86=(1940) 2 M.L.J. 151 (P.C.). Per *Niamatullah, J.*—There was no statutory law in India on the subject of trade-marks. Cases of alleged infringement of trade-marks had to be decided according to rules of justice, equity and good conscience. English law on the subject was applied not because it is applicable as such in India, but because it

(2) It extends to the whole of British India.

(3) This section and section 85 shall come into force at once ; the remaining provisions of the Act shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint in this behalf. Any notification if issued may be mention in the notes as to commencement.

Definitions.

2. (1) In this Act, unless there is anything repugnant in the subject or context,—

(*a*) " associated trade marks " means trade marks deemed to be, or required to be registered as, associated trade marks under this Act ;

(*b*) " certification trade mark " means a mark adapted in relation to any goods to distinguish in the course of trade goods certified by any person in respect of origin, material, mode of manufacture, quality, accuracy or other characteristic, from goods not so certified and registrable as such under the provisions of Chapter VIII in respect of those goods in the name, as proprietor of the certification trade mark, of that person ;

(*c*) " District Court " has the meaning assigned to it in the Code of Civil Procedure, 1908 ;

(*d*) " High Court " means a High Court as defined in sub-section (1) of section 219 of the Government of India Act, 1935 ;

(*e*) " limitations " (with its grammatical variations) means any limitations of the exclusive right to the use of a trade mark given by the registration of a person as proprietor thereof, including limitations of that right as to mode of use, as to use in relation to goods to be sold or otherwise traded in within British India, or as to use in relation to goods to be exported to any market outside British India ;

(*f*) " mark " includes a device, brand, heading,label, ticket, name, signature, word, letter or numeral or any combination thereof ;

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embodies rules of justice, equity and good conscience. Conditions peculiar to this country however, necessitated acceptance of the English law with certain modifications. In England there is now the Trade-Marks Act of 1905, under which trade-marks are registered for specified classes of goods. Though the provisions of that enactment are based on decisions given before the Act was passed, the decisions under the Act should be applied with caution, as they are not infrequently based on the terms of the statute rather than on the broad principles of justice, equity and good conscience, which influenced the decisions before the Act. 57 A. 510=1935 A. 7. A decision of a High Court in India based on English law not conflicting with the ordinary principles of jurisprudence with regard to trade-marks and those forbidding the passing-off of goods, will not be disturbed by their Lordships of the Privy Council, although the English Trade-Marks Act is not in force in India. 51 I.A. 269=51 Cal. 892 =29 C.W.N. 81=1924 P.C. 187=47 M. L.J. 69 (P.C.).

RIGHT TO TRADE-MARK — PROTECTION — CONDITIONS FOR GRANT OF.—Protection cannot be granted in respect of a trade-mark unless the plaintiff establishes that the particular mark indicates not merely a certain quality of goods but also that they are the goods of the plaintiff's manufacture. But no claim can be made to a trade-mark in respect of a commodity which is neither manufactured nor sold by the plaintiff at the date of the suit. 59 Bom. 373=36 Bom.L.R. 1165=1935 Bom. 101. Before the passing of this Act, there was no protection in this country to a registered trade-mark as such and the owner had to prove by evidence that he had acquired a right thereto in the sense that the trade-mark or the trade-name was associated in the minds of the public with the goods manufactured by him. 151 I.C. 5=38 C.W.N. 265= 1934 Cal. 600.

USE OF FIRM'S NAME.—If the use by the defendants of their firm name does in fact necessarily result in their goods being taken for the goods of plaintiffs, the continued use by the defendants of that firm name would become fraudulent. 1931 P.C. 15 (P.C.). *See also* 56 I.C. 709.

IMPORTER SELLING GOODS WITH REGISTERED TRADE-MARK — RIGHT TO PROTECTION.— Where goods imported have been sold by the importer with his own registered trade-mark and owing to his care and precaution in selecting goods, advertisement and pushing, the goods have acquired great reputation, the importer is entitled to protection of the Court and can maintain an action against the manufacturer of those goods using mark closely resembling that used by the importer. 187 I.C. 37=1939 Rang. 381. *See also* 50 Cal. 762=1924 Cal. 216. An importer who by advertising and pushing the sale of goods under a particular mark secures a wide popularity for the mark, is protected by the Court for the

(*g*) "permitted use" means the use of a trade mark by a registered user thereof in relation to goods with which he is connected in the course of trade and in respect of which for the time being the trade mark remains registered and he is registered as a registered user, being use such as to comply with any conditions or restrictions to which his registration is subject ;

(*h*) "prescribed" means prescribed by rules made, in relation to proceedings before a High Court, by such High Court, and in other cases, by the Central Government ;

(*i*) "registered" (with its grammatical variations) means registered under this Act ;

(*j*) "registered trade mark" means a trade mark which is actually on the register ;

(*k*) "registered user" means a person who is for the time being registered as such under section 41 ;

(*l*) "trade mark" means a mark used or proposed to be used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right, either as proprietor or as registered user, to use the mark whether with or without any indication of the identity of that person ;

(*m*) "transmission" means transmission by operation of law, devolution on the personal representative of a deceased person and any other mode of transfer, not being assignment ;

(*n*) "tribunal" means the Registrar, or as the case may be, the Court before which the proceeding concerned is pending.

(2) References in this Act to the use of a mark shall be construed as references to the use of a printed or other visual representation of the mark, and references herein to the use of a mark in relation to goods shall be construed as references to the use thereof upon, or in any other relation whatsoever to, such goods.

Application of other laws not barred.

3. The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

CHAPTER II.

THE REGISTER AND CONDITIONS FOR REGISTRATION.

The register of trade marks.

4. (1) For the purposes of this Act there shall be established at the Patent Office a [1][Trade Marks Registry], and a record called the Register of Trade Marks (in this Act referred to as the register) shall be kept thereat wherein shall be entered all registered trade marks [2][except those entered in the Bombay register under Chapter IX

LEG. REF.

[1] Substituted by Act XXVII of 1941.
[2] Inserted by Act XXVII of 1941.

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mark unless he has abandoned it. 35 Bom. 425=10 I.C. 805=13 Bom.L.R. 242.

PROTECTION OF TRADE-MARK—JURISDICTION OF COURTS IN BHOPAL STATE.—Although there is no Trade-Marks Act in Bhopal State, the Courts have jurisdiction to protect a trade-mark and stop its infringement under the existing law. A trader living outside the limits of the Bhopal State is as much entitled to a protection of his trade-mark as any person residing and carrying on business within such limits. A foreigner by using a particular trade-mark and selling his goods in Bhopal acquires in respect of that mark such rights as the Courts here would protect. 188 I.C. 462.

SUSPENSION DURING WAR OF TRADE-MARK RIGHT—REVIVAL ON PEACE.—The right to a trade-mark in whatever way acquired in a British country, is a right of industrial property coming under the Conventions of Paris and Berne. Such a right acquired before the War and suspended during the continuance of hostilities, is revived and restored to him under the Peace Treaty. 50 Bom. 402=28 Bom.L.R. 243=1926 Bom. 200.

Sec. 4.—This section provides for the maintenance of a register of trade-marks at the Patent Office, Calcutta, under the control and management of the Controller of Patents and Designs, who, for the purposes of the Act, will be called the Registrar of Trade-Marks.

REGISTRATION—LAW BEFORE THIS ACT.—In

with the names, addresses and descriptions of their proprietors, notifications of assignments and transmissions, the names, addresses and descriptions of registered users, disclaimers, conditions, limitations, and such other matters relating to registered trade marks as may be prescribed, but there shall not be entered in the register any notice of any trust express, implied or constructive, nor shall any such notice be receivable by the Registrar.

(2) Subject to the superintendence and direction of the Central Government, the register shall be kept under the control and management of the Controller of Patents and Designs, who shall for the purposes of this Act be called the Registrar of Trade Marks and is in this Act referred to as the Registrar.

(3) The register shall at all convenient times be open to the inspection of the public, subject to such conditions and restrictions as may be prescribed.

Registration to be in respect of particular goods.

5. (1) A trade mark may be registered only in respect of particular goods or classes of goods.

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India there was no method by which a trade-mark could be registered. 1929 Rang. 322. The Registration Act related to registration of documents alone and had nothing to do with the registration of trade-mark. 49 All. 92=24 A.L.J. 975=1927 All. 81.

PROPERTY IN—HOW ACQUIRED—REGISTRATION—EFFECT OF, BEFORE THIS ACT.—Mere registration of a trade-mark did not confer on anybody a right to use it. It could not go beyond establishing the time a particular trade-mark is being used since. Property in a trade-mark could only be acquired by its use for a considerable time. 188 I.C. 462. *See also* 66 M.L.J. 440.

DISTINCTION BETWEEN REGISTERED AND UNREGISTERED TRADE-MARK—PROPERTY ACQUIRED BY USER.—The only difference between a suit for infringement of a trade-mark registered under the Act and that of a trade-mark not registered appears to be that a trade-mark, registered under the Act of 1875 in England, gives an immediate property in the registered trade-mark, whether that property has got to be acquired by user in a country where there is no registration. 57 Mad. 600=1934 Mad. 211=66 M. L. J. 440. *See also* 188 I. C. 462. *See now* S. 20 of the Act, *infra*. A registrable trade-mark must contain or consist of at least one of the following essential particulars: (1) The name of a company, individual or firm represented in a special or particular manner; (2) the signature of the applicant for registration or some predecessor in his business; (3) an invented word or invented words; (4) a word or words having no direct reference to the character or quality of the goods and not being according to its ordinary signification, a geographical name or a surname; (5) any other distinctive mark, but a name signature or word or words, other than such as fall within the description in the above paras. (1), (2), (3) and (4) shall not, except by order of the Board of Trade or the Court, be deemed a distinctive mark. When none of these particulars appear there is no trade-mark. 146 I.C. 1084=1933 Nag. 344.

REGISTRATION—WORDS MERELY DESCRIPTIVE OF PATENTED PRODUCT—DESCRIPTIVE WORDS.—Where a name is merely descriptive of the patented product or of the character and quality of the goods in connexion with which it is used, the name, after the patent has expired, cannot be registered as a trade-mark because it would be attempting by registering the name of the patented product to prolong the patent monopoly. It is however clear that such a descriptive word may possibly have acquired a secondary meaning, and have come to mean or indicate that the goods in connexion with which it is used are the goods of a particular manufacturer, in other words that the word in question has in its secondary meaning become indicative of origin. But the onus on the person who attempts to establish this secondary meaning is a heavy one. If in addition to being descriptive of the goods in connexion with which it is used, it is in fact the name of the product of which those goods are composed, then a state of affairs exists which makes it extremely difficult that the word should ever become indicative of origin so as to render it capable of registration as a trade-mark. The difficulty may sometimes be overcome in a case where the alleged trade-mark is in fact a description of the goods, but is not recognised by the trade or the public as being such, and is taken by them as being a fancy name, *e.g.*, where a chemical description not generally known to the public has been adopted, or where an unusual substance unknown to the public is being used in the manufacture. Where, the words are purely descriptive and in common use it is even more difficult to conceive a case in which they could acquire a secondary meaning. In order to ascertain whether words have acquired secondary meaning it is of primary importance to see how the manufacturer used the words, *i.e.*, to see whether he used them as a trade name or common law trade-mark for the purpose of indicating the origin of the goods, or whether they were used by him merely descriptively. 175 I.C. 178=1938 P.C. 143 (P.C.).

Sec. 5.—Under this section a trade-

(2) Any question arising as to the class within which any goods fall shall be determined by the Registrar whose decision in the matter shall be final.

Distinctiveness requisite for registration.

6. (1) A trade mark shall not be registered unless it contains or consists of at least one of the following essential particulars, namely :—

(*a*) the name of a company, individual, or firm, represented in a special or particular manner ;

(*b*) the signature of the applicant for registration or some predecessor in his business ;

(*c*) one or more invented words ;

(*d*) one or more words having no direct reference to the character or quality of the goods, and not being, according to its ordinary signification, a geographical name or surname or the name of a sect, caste or tribe in India ;

(*e*) any other distinctive mark, provided that a name, signature, or any word, other than such as fall within the descriptions in the above clauses, shall not be registrable except upon evidence of its distinctiveness.

(2) For the purposes of this section, the expression "distinctive" means adapted, in relation to the goods in respect of which a trade mark is proposed to be registered, to distinguish goods with which the proprietor of the trade mark is or may be connected in the course of trade from goods in the case of which no such connection subsists, either generally or, where the trade mark is proposed to be registered subject to limitations, in relation to use within the extent of the registration.

(3) In determining whether a trade mark is adapted to distinguish as aforesaid, the tribunal may have regard to the extent to which—

(*a*) the trade mark is inherently so adapted to distinguish, and

(*b*) by reason of the use of the trade mark or of any other circumstances, the trade mark is in fact so adapted to distinguish ;

Provided that in the case of a trade mark which has been continuously used (either by the applicant for registration or by some predecessor in his business, and either in its original form or with additions or alterations not substantially affecting its identity) in relation to the same goods as those in relation to which registration is applied for, during a period from a date prior to the 25th day of February, 1937, to the date of application for registration, the Registrar shall not refuse registration by reason only of the fact that the trade mark is not adapted to distinguish as aforesaid, and may accept evidence of acquired distinctiveness as entitling the trade mark to registration.

Limitation as to colour.

7. (1) A trade mark may be limited wholly or in part to one or more specified colours, and any such limitation shall be taken into consideration by any tribunal having to decide on the distinctive character of the trade mark.

(2) So far as a trade mark is registered without limitation of colour it shall be deemed to be registered for all colours.

Prohibition of registration of certain matter.

8. No trade mark nor part of a trade mark shall be registered which consists of, or contains, any scandalous design, or any matter the use of which would—

(*a*) by reason of its being likely to deceive or to cause confusion or otherwise, be disentitled to protection in a Court of justice : or

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mark is registered only in respect of particular goods or classes of goods. *See* 1937 Lah. 186; 35 Bom. 425; 59 Bom. 373.

Sec. 6.—This section forms the pivot of the proposed legislation and lays down the conditions on which a trade-mark will be entitled to registration under the Act.

Sec. 7.—This section provides for the limitation of a trade-mark wholly or in part to one or more specified colours.

Sec. 8.—This section prohibits the registration as trade-mark of certain kinds of matter.

(*b*) be likely to hurt the religious susceptibilities of any class of his Majesty's subjects ; or

(*c*) be contrary to any law for the time being in force or to morality.

Use of names of chemical elements barred.

9. No word which is the commonly uesd and accepted name of any single chemical element or single chemical compound (as distinguished from a mixture) shall be registered as a trade mark in respect of a chemical substance or preparation, and any such registration shall, notwithstanding anything in section 24, be deemed for the purposes of section 46 to be an entry made in the register without sufficient cause or an entry wrongly remaining on the register, as the circumstances may require :

Provided that this section shall not apply to a word which is used to denote only a brand or make of the element or compound as made by the proprietor or a registered user of the trade mark, as distinguished from the element or compound as made by others, and in association with a suitable name or description open to the public use.

Prohibition of registration of identical or similar trade mark.

10. (1) Save as provided in section (2) no trade mark shall be registered in respect of any goods or description of goods which is identical with a trade mark belonging to a different proprietor and already on the register in respect of the same goods or description of goods, or which so nearly resembles such trade mark as to be likely to deceive or cause confusion.

(2) In case of honest concurrent use or of other special circumstances which, in the opinion of the Registrar, make it proper so to do he may permit the registration by more than one proprietor of trade marks which are identical or nearly resemble each other in respect of the same goods or description of goods, subject to such conditions and limitations, if any, as the Registrar may think fit to impose.

(3) Where separate applications are made by different persons to be registered as proprietors respectively of trade marks which are identical or nearly resemble each other, in respect of the same goods or description of goods, the Registrar may refuse to register any of them until their rights have been determined by a competent Court.

Registration of parts of trade marks and of trade marks as a series.

11. (1) Where the proprietor of a trade mark claims to be entitled to the exclusive use of any part thereof separately, he may apply to register the whole and the part as separate trade marks.

(2) Each such separate trade mark shall satisfy all the conditions applying to, and have all the incidents of, an independent trade mark.

(3) Where a person claiming to be the proprietor of several trade marks in respect of the same goods or description of goods which, while resembling each other in the material particulars thereof, yet differ in respect of—

(*a*) statements of the goods in relation to which they are respectively used or proposed to be used ; or

(*b*) statements of number, price, quality, or names of places ; or

(*c*) other matter of a non-distinctive character which does not substantially affect the identity of the trade mark ; or

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Sec. 9.—Under this section the use of the usual names of chemical elements as trade-marks is barred in respect of chemical substances or preparations. (*See* 1926 Cal. 837.)

Sec. 10.—This section prohibits the registration of identical or similar trade-marks under certain conditions. This restriction will not only protect owners of registered trade-marks but will also safeguard the interests of the public.

Sec. 11.—The registration as a series in one registration of marks which resemble each other in material respects is designed to secure that in the event of the assignment or transmission of such marks there will be no deception or confusion resulting from separate ownership. Such marks are deemed to be associated marks and are assignable or transmissible only as a whole and not separately.

(*d*) colour ;

seeks to register those trade marks, they may be registered as a series in one registration.

Associated trade marks.

12. (1) Where a trade mark which is registered, or is the subject of an application for registration, in respect of any goods is identical with another trade mark which is registered, or is the subject of an application for registration, in the name of the same proprietor in respect of the same goods or description of goods, or so nearly resembles it as to be likely to deceive or cause confusion if used by a person other than the proprietor, the Registrar may at any time require that the trade marks shall be entered on the register as associated trade marks.

(2) Where a trade mark and any part thereof are, in accordance with the provisions of sub-section (1) of section 11, registered as separate trade marks in the name of the same proprietor, they shall be deemed to be, and shall be registered as, associated trade marks.

(3) All trade marks registered in accordance with the provisions of sub-section (3) of section 11 as a series in one registration shall be deemed to be, and shall be registered as, associated trade marks.

(4) On application made in the prescribed manner by the registered proprietor of two or more trade marks registered as associated trade marks, the Registrar may dissolve the association as respects any of them if he is satisfied that there would be no likelihood of deception or confusion being caused if that trade mark were used by any other person in relation to any of the goods in respect of which it is registered, and may amend the register accordingly.

Registration subject to disclaimer.

13. If a trade mark contains—

(*a*) any part not separately registered as a trade mark in the name of the proprietor, or for the separate registration of which no application has been made, or

(*b*) any matter common to the trade, or otherwise of a non-distinctive character,

the tribunal, in deciding whether the trade mark shall be entered or shall remain on the register, may require, as a condition of its being on the register, that the proprietor shall either disclaim any right to the exclusive use of such part or of all or any portion of such matter, as the case may be, to the exclusive use of which the tribunal holds him not to be entitled, or make such other disclaimer as the tribunal may consider necessary for the purpose of defining the rights of the proprietor under the registration :

Provided that no disclaimer shall affect any rights of the proprietor of a trade mark except such as arise out of the registration of the trade mark in respect of which the disclaimer is made.

CHAPTER III.

PROCEDURE FOR, AND DURATION OF, REGISTRATION.

Application for registration.

14. (1) Any person claiming to be the proprietor of a trade mark used or proposed to be used by him who is desirous of registering it shall apply in writing to the Registrar in the prescribed manner, and subject to the provisions of this Act, the Registrar may refuse the application or may accept it absolutely or subject to such amendments, modifications, conditions or limitations, if any, as he may think fit.

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Sec. 12.—This section defines the circumstances in which trade-marks may be entered in the register as associated trade-marks.

Sec. 13.—The object of this section is to prevent the creation of a monopoly in non-distinctive parts of a registered trade-mark.

Secs. 14, 15 and 16.—These sections lay down the procedure for the registration of trade-marks in India.

(2) In the case of a refusal or conditional acceptance the Registrar shall, if required by the applicant, state in writing the grounds of his decision and the materials used by him in arriving thereat.

(3) The tribunal may at any time, whether before or after acceptance, correct any error in or in connection with the application, or may permit the applicant to amend his application upon such terms as it may think fit.

Opposition to registration.

15. (1) When an application for registration of a trade mark has been, accepted, whether absolutely or subject to conditions or limitations, the Registrar shall, as soon as may be after acceptance, cause the application as accepted, together with the conditions and limitations, if any, subject to which it has been accepted, to be advertised in the prescribed manner :

Provided that the Registrar may cause an application to be advertised before acceptance if it relates to a trade mark to which clause (*e*) of sub-section (1) of section 6 applies, or in any other case where it appears to him that it is expedient by reason of any exceptional circumstances so to do, and where an application has been so advertised the Registrar may, if he thinks fit, advertise it again when it has been accepted, but shall not be bound so to do.

(2) Any person may, within the prescribed time from the date of the advertisement of an application, give notice in writing in the prescribed manner to the Registrar of opposition to the registration.

(3) The Registrar shall serve in the prescribed manner a copy of the notice on the applicant and within the prescribed time the applicant shall send to the Registrar, in the prescribed manner, a counter-statement of the grounds on which he relies for his application, and, if he does not do so, he shall be deemed to have abandoned his application.

(4) If the applicant sends such counter-statement, the Registrar shall serve in the prescribed manner a copy thereof on the persons giving notice of opposition, and shall, after hearing the parties, if so required, and considering the evidence, decide whether, and subject to what conditions or limitations, if any, registration is to be permitted.

(5) If a person giving notice of opposition or an applicant sending a counter-statement after receipt of a copy of such notice, or an appellant against any order of the Registrar under section 14 or this section, neither resides nor carries on business in British India, the tribunal may require him to give security for costs of the proceedings before it, and in default of such security being duly given may treat the opposition or application or appeal, as the case may be, as abandoned.

Registration.

16. (1) When an application for registration of a trade mark has been accepted and either has not been opposed and the time for notice of opposition has expired, or having been opposed, has been decided in favour of the applicant, the Registrar shall, unless the application has been accepted in error, or unless the Central Government otherwise directs, register the said trade mark, and the trade mark, when registered, shall be registered as of the date of the making of the said application, and that date shall, subject to any directions made under section 83 applicable to such trade mark, be deemed for the purposes of this Act to be the date of registration.

(2) On the registration of a trade mark the Registrar shall issue to the applicant a certificate in the prescribed form of the registration thereof sealed with the seal of the Patent office.

(3) Where registraticn of a trade mark is not completed within twelve months from the date of the application by reason of default on the part of the applicant. the Registrar may, after giving notice to the applicant in the prescribed manner, treat the application as abandoned unless it is completed within the time specified in that behalf in teh notice.

17. (1) Save as provided in sub-section (2), nothing in this Act shall authorise

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Sec. 17.—This section is designed to safeguard the rights of persons who, though independent traders, are jointly interested in the same mark.

Jointly owned trade marks.

the registration of two or more persons who use a trade mark independently, or propose so to use it, as joint proprietors thereof.

(2) Where the relations between two or more persons interested in a trade mark are such that no one of them is entitled as between himself and the other or others of them to use it except—

(*a*) on behalf of both or all of them, or

(*b*) in relation to an article with which both or all of them are connected in the course of trade,

those persons may be registered as joint proprietors of the trade mark, and this Act shall have effect in relation to any rights to the use of the trade mark vested in those persons as if those rights had been vested in a single person.

Duration and renewal of registration.

18. (1) The registration of a trade mark shall be for a period of seven years, but may be renewed from time to time in accordance with the provisions of this section.

(2) The Registrar shall, on application made by the registered proprietor of a trade mark in the prescribed manner and within the prescribed period, renew the registration of the trade mark for a period of fifteen years from the date of expiration of the original registration or of the last renewal of registration, as the case may be (which date is in this section referred to as "the expiration of the last registration").

(3) At the prescribed time before the expiration of the last registration of a trade mark, the Registrar shall send notice in the prescribed manner tothe registered proprietor of the date of expiration and the conditions as to payment of fees and otherwise upon which a renewal of registration may be obtained, and if at the expiration of the time prescribed in that behalf those conditions have not been duly complied with the Registrar may remove the trade mark from the register, subject to such conditions (if any) as to its restoration to the register as may be prescribed.

Effect of removal from register for failure to pay fee for renewal.

19. Where a trade mark has been removed from the register for failure to pay the fee for renewal, it shall nevertheless, for the purpose of any application for the registration of another trade mark during one year next after the date of the removal, be deemed to be a trade mark already on the register, unless the tribunal is satisfied either—

(*a*) that there has been no *bona fide* trade use of the trade mark which has been removed during the two years immediately preceding its removal ; or

(*b*) that no deception or confusion would be likely to arise from the use of the trade mark which is the subject of the application for registration by reason of any previous use of the trade mark which has been removed.

CHAPTER IV.

EFFECT OF REGISTRATION.

No action for infringement of unregistered trade mark.

20. (1) No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark unless such trade mark has been continuously in use since before the 25th day of February, 1937, by such person or by a predecessor in title of his and unless an application for its registration, made within five years from the commencement of this Act, has been refused ; and the Registrar shall, on application in the prescribed manner, grant a certificate that such application has been refused.

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Sec. 18.—This section prescribes the duration of the first registration and of its subsequent renewal.

Sec. 19.—This section defines the effect of removal from the register of trade-mark for failure to pay the renewal fee.

Sec. 20.—This section provides in effect that a suit shall lie only for the infringement of a registered trade-mark, but it safe-

(2) Nothing in this Act shall be deemed to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof.

NOTES.

guards the rights of owners of unregistered marks who have failed to secure registration but have continuously used their marks since the 25th February, 1937.

INFRINGEMENT OF TRADE-MARK—WHAT IS.—A man has no right to put off his goods for sale as the goods of a rival trader and he cannot be allowed to use names, marks, letters or other indicia by which he may induce purchasers to believe that the goods he is selling are manufacture of another person. Whatever be the particular mode adopted by him, if the trade-mark is a work or device never in use before and meaningless, except as indicating by whom the goods in connection with which it is used were made, there can be no conceivable legitimate use of it by another person, his only object in employing it in connection with goods of his manufacture being to deceive. 1930 Cal. 678. *See also* 41 Bom. 49=18 Bom.L.R. 206. Nobody has any right to represent his goods as the goods of somebody else. A trader cannot be allowed to use names, marks, letters or other indicia by which he may induce purchasers to believe that the goods which he is selling are manufacture of another person. (*Perry* v. *Truefit,* (1842) 6 Bead. 66 Rel. on.] 1930 Lah. 999.

INFRINGEMENT—TEST.—The proper test for an injunction to restrain colourable imitation of trade-marks is whether an ordinary purchaser is likely to be misled, *i.e.,* whether there is a reasonable probability of deception. 10 Bur.L.T. 63=36 I.C. 965=8 L.B.R. 561. When an injunction against imitation is asked for points of similarity and not the points of difference constitute the proper test. 20 A.L.J. 537=44 A. 608=1922 A. 178.

INFRINGEMENT—MATTERS FOR CONSIDERATION.—If in an action for an alleged infringement of a registered trade-mark, no evidence of confusion either actual or probable is adduced, the question whether the mark which the defendant uses infringes the plaintiff's registered trade-mark must be answered by the Court, unaided by outside evidence, after a comparison of the defendant's mark as used with the plaintiff's registered mark, not placing them side by side, but by asking itself whether, having due regard to relevant surrounding circumstances, the defendant's mark as used is similar to the plaintiff's registered mark as it would be remembered by persons possessed of an average memory with its usual imperfections. Whether the defendant had acquired the good will of any business, and whether the defendant was properly on the register in respect of a mark which differs slightly from the mark actually in use by the defendant, are matters which are irrelevant to the question for determination. 202 I. C. 203=1942 P.C. 40 (P.C.). Where both the parties deal in the same manufacture the mere fact that the dealers in those manufactures are not deceived by the labels does not conclude the case. It has to be considered what class of people buy the manufactures. 1930 Cal. 678. If the goods of a manufacturer have from the mark he has used become known in the market by a particular name the adoption by a rival trader of any mark which would cause his goods to bear the same name in the market is as much a violation of the rights of the rival as a copy of his device. In such a case the dissimilarity of the rival marks cannot be relied on as a defence. Also in dealing with cases of infringement of trade-mark the Court must look to the ultimate purchasers who in India are not educated or critical. (Case-law discussed.) 99 I. C. 723=4 Rang. 401. Mere damage is insufficient to support an action on the infringement of trade-mark. The damage must be attributable to the passing-off of other goods as plaintiff's goods. There may be damage and yet there may be no passing-off. Thus a suit cannot be entertained if it is brought by a person not entitled to an action to restrain a defendant from passing off goods as the goods of a third party. He can bring the action only when the representation is that the goods are his goods. 1938 Sind 38. *See also* 1940 Sind 83. A trade-mark may be infringed by an advertisement. *See* 37 All. 446=29 I.C. 987=13 A.L.J. 697.

INFRINGEMENT—PROBABILITY OF DECEPTION ENOUGH.—In cases of infringement of patents, instances of actual deception need not be proved if the Court is otherwise satisfied of the probability of deception. 95 I.C. 667=43 C.L.J. 405=1926 Cal. 837. In a passing off action it is necessary to find an intentional copying by the defendant of the plaintiff's mark. The relevance of intention is merely that when dishonest intention is present, the Court's task in detecting a probability of deception becomes less burdensome. There is an onus both of commercial honesty and of legal obligation upon traders who adopt marks to avoid with scrupulous care anything tending to confusion with the mark of another. If they do not take pains when making a new trade-mark to make it quite unlike an existing one, they do so at the peril of making evidence against themselves. No man may sell his goods as the goods of another. 157 I.C. 902. To establish a claim to an injunction in an action for infringement of a trade-mark, the plaintiff must show that the particular mark used on his goods is symbolical only of his manufacture and that they have acquired a wide reputation in the market.

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It is not necessary to show that the defendant had the intention to deceive or to prove actual instances of deception. 59 Bom. 373=A.L.R. 1935 Bom. 169=36 Bom.L.R. 1165=1935 Bom. 101.

INFRINGEMENT—RIGHT OF ACTION—FRAUD NOT NECESSARY.—In a "passing-off" case it is well-settled that fraud is not a necessary element of the right of action. 1928 Mad. 759=54 M.L.J. 644; 59 Bom. 373=1935 Bom. 101.

RIGHT OF CONCURRENT USER.—In order to establish a concurrent right to use a trade-mark it is essential for the defendant to prove prior user. 1930 Cal. 678.

DEFENDANT USING HIS OWN NAME IN BUSINESS.—None can use a name if it leads the public to believe that the business carried on by him is the business of some other person with whom the name has been associated. The Court should not restrain a man from carrying on business in his own name simply because other people are doing the same and they will be injured by what he is doing. It must appear that the person who is carrying on the business in his own name is doing it in such a way as to pass-off his goods as the goods of somebody else. A person carrying on business in his own name which also happened to be the name of the plaintiff could not be restrained from using his own name. 56 I.C. 709. *See also* 1931 P.C. 15=61 M.L.J. 334 (P.C.). There is in principle no distinction between a case in which the name of the use of which the complaint is made, is the name of the person carrying on the business and a case in which it is not. In both cases the law is clear that—nobody has any right to represent his goods as the goods of somebody else; (*Valentime Meat Juice Co.'s case,* (1910) 83 L.T. 259; *Reddaway* v. *Benham,* (1896) A.C. 199, Ref.) 1931 Mad. 461=132 I.C. 650.

ACQUIESCENCE IN INFRINGEMENT.—A man may be entitled to the exclusive right to use, as applied to his goods, a particular get-up. But that right once exclusive, may in the course of time become *publici juris* by virtue of his either submitting to, or allowing, other persons to appropriate it to their use. The test must be whether the use of it by other persons is still calculated to deceive the public, whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade-mark as if they were his goods. If the mark has come to be so public and in such universal use that nobody can be deceived by the use of it, and can be induced from the use of it to believe that he is buying the goods of the original trader, however hard to some extent it may appear on the trade, yet practically, as the right to a trade-mark is simply a right to prevent the trade from being cheated by the other person's goods being sold as his goods through the fraudulent use to the trade-mark, the right to the trade-mark must be gone. 173 I.C. 224=10 R.R. 323=1937 Rang. 490. (As to the effect of acquiescence, *see also* 1934 Rang. 297; 1923 Rang. 114; 1930 Cal. 678. In a suit for infringement of trade-mark if the defendants prove that the plaintiff stood by knowingly and let them build up an important trade until it had become necessary to crush it, then the plaintiffs would be estopped by their acquiescence. 1939 Rang. L. R. 18=181 I.C. 792=12 R. R. 489=1939 Rang. 98. Where the owner of a trade-mark stands by and allows a number of different people to copy his mark he loses his right in it by reason of the fact that the mark has become common to the trade, but the owner of a trade-mark cannot be said to have thrown his mark open to the trade generally by acquiescing in one other person or firm using it. 12 Rang. 534=152 I.C. 855=1934 Rang. 297. It is of the essence of acquiescence, as a defence to an action for passing-off, that the party acquiescing should have been aware of the violation of his legal rights and the defendant should either have been ignorant of the plaintiff's rights or deluded by plaintiff's representation into thinking that his wrongful act was assented to by the plaintiff. Where the defendant was aware of the real legal position and yet deliberately put on the market the spurious goods, there is no room for the doctrine of acquiescence to operate in his favour. 10 Rang. 133=1932 Rang. 114. In a case of infringement of trade-mark it is not incumbent on the owner to prosecute every infringer though the latter might be a man of straw and might be willing to give an undertaking not to infringe in future. The mere fact of his omission to prosecute will not deprive him of his right to an injunction at a later date. If the defendant pleads acquiescence he must show that the party acquiesced was aware of and did by words and conduct represent that he assented to the violation of his rights. 1930 Cal. 678.

INFRINGEMENT—WAIVER.—In the case of piracy of a trade-mark the person who is entitled to the mark must be guided by reason and good sense. It may not be worthwhile to spend money on every man of straw who comes in his way and the person might not forthwith prosecute the infringer or might not take any step on the infringer giving an undertaking not to violate the right in future; the mere fact of his omission to prosecute in earlier cases does not in any way deprive the person of his right to an injunction suit. (*Rowland* v. *Michell,* 14 R. P. C. 43, Ref.) 1930 Cal. 678.

DEFENCE—DELAY.—Delay is not by itself fatal to an action for passing-off. It can only serve as a basis for an inference of acquiescence which, however, is a question of fact. But where an infringement takes

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place in Burma of the rights of a firm with its head office at Paris, it is but reasonable that some time should elapse before the local representative can advise the head office about the facts and the latter can instruct him to file a suit. 10 Rang. 133=1932 Rang. 114. *See also* 132 I.C. 650=1931 Mad. 461. Delay will in itself, quite apart from acquiescence, be a bar to a suit, but only if such delay has caused a change in the subject-matter of the action or brought about a state of things where justice cannot be done. 1939 Rang. L. R. 18=1939 Rang. 98. Mere delay, apart from acquiescence will not disentitle the plaintiff to the grant of an injunction to restrain the defendant from passing-off his goods as those of the plaintiff. (13 Rep. Pat. Cas. 457; (1878) 9 Ch.D. 176, Ref.) 1931 M.W.N. 311=1931 Mad. 461. Delay *simpliciter* may be no defence to a suit for infringement of a trade-mark or a trade-name, but where a trader allows a rival trader to expend money over a considerable period in building up a business with the aid of a mark similar to his own, he will not be allowed to stop his rival's business. What amounts to acquiescence must depend on the circumstances of each case. 52 L. W. 745=1940 M.W.N. 1157=I.L.R. (1941) Mad. 300=(1940) 2 M. L. J. 793=1941 Mad. 31.

SUIT FOR DECLARATION—EXCLUSIVE RIGHT TO MARK.—Every one has the right to use any kind of trade-mark he likes so long as he does not infringe the right of others already acquired. Hence where a plaintiff does not make out a case that the right to the use of a certain trade-mark is the "exclusive right of property" which he has acquired to the exclusion of every one else, a relief to declare that the plaintiff has got the right to use that trade-mark cannot be granted. (6 Rang. 291, Rel.) 55 All. 702 =1933 A.L.J. 1541=1933 All. 495.

INFRINGEMENT—REMEDY—NOT CONFINED TO CIVIL SIDE.—Although the criminal Court has a discretion in view of the peculiar circumstances of a particular case, *e.g.*, if there exists a *bona fide* dispute as to the right to use a trade-mark, or where there has been undue delay in commencing criminal proceedings, to stay its own hands and direct the complainant to establish his rights in a Civil Court, it is nowhere laid down by the legislature that an aggrieved person should seek his remedy in a Civil Court and not in a Criminal Court. 7 O.W.N. 598=1930 Oudh 360.

BOTH CIVIL AND CRIMINAL.—It is nowhere laid down by the legislature that under no circumstances could a dispute relating to the infringement of a trade-mark be entertained by a Criminal Court and that it should always be adjudicated upon by a Civil Court. The only thing which can be said is that the Criminal Court may, in view of the peculiar circumstances of a particular case, stay its own hands and direct the complainant to establish his right in Civil Court; (32 Cal. 431, Ref. to.) 108 I.C. 607=9 A.I.Cr.R. 406=29 Cr.L.J. 425=9 Lah. 491=29 P.L.R. 610=1928 Lah. 186. Before this Act, as there was no Act giving a right of property in trade-marks by registration, the only right of action a trader or manufacturer had was the common law right of action which entitled him to an injunction restraining the use of a trade-mark belonging to himself if such use was calculated to pass-off the defendant's goods as the goods of the plaintiff. 93 I.C. 857=50 Bom. 402=28 Bom. L. R. 243=1926 Bom. 200.

INFRINGEMENT—STANDARD OF COMPARISON—NOT THAT OF EXPERTS BUT THAT OF THE LAY PUBLIC.—For the purpose of establishing a case of infringement it is not necessary to show that there has been the use of a mark in all respects corresponding with that which another person has acquired an exclusive right to use. But if the resemblance is such as not only to show an intention to deceive but also such as to be likely to make unwary purchasers suppose that they are purchasing the article sold by the party to whom the right to use the trade-mark belongs. Therefore the standard of comparison is not that of the experts, but it is that of the lay public, of the unwary purchaser. (*Wortherspoon* v. *Currie*, 1872 L. R. 5 H.L. 508 Rel. on.) 34 C.W.N. 339 =51 C.L.J. 477=1930 Cal. 274.

MISLEADING TO INCAUTIOUS PURCHASERS.—No trader has a right to use a trade-mark so nearly resembling that of another trader as to be calculated to mislead incautious purchasers. The use of such a trade-mark may be restricted by injunction, although no purchaser has actually been misled, for the very life of a trade-mark depends upon the promptitude with which it is vindicated. The Judge has to make up his mind as to whether on the facts before him he thinks it probable that purchasers would be deceived by the similarity of the marks and general get up of the two sets of goods and it is not a matter for witnesses to say. 110 I.C. 312=52 Bom. 228=30 Bom.L.R. 514 =1928 Bom. 227. In a suit for infringement of trade-mark, it is not necessary to prove that any one has been actually deceived. It is enough to prove that he is likely to be deceived. (34 Cal. 495, 24 Cal. 364, Rel.; 65 P.R. 1902, Dist.) The Court has to see whether the device used by the deft. is such a colourable imitation of the plaintiff's mark as would be calculated to deceive incautious, ignorant or unwary purchasers. (34 Cal. 495; 7 Bom. 584, Foll.) 97 P.R. 1913=15 I.C. 116.

SIMILARITY OF MARKS—DIFFERENCES IN GET UP.—It is not an answer to the claim of a trader who established the right to a trade-mark (*e.g.*, a device or a fancy word) to say that, apart from the device or the word, the labels or containers of the rival

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trade are very different from those of the trade-mark owner. But the differences in get-up are not immaterial for, they must inevitably form an element in considering the question of probability of deception by the use of the mark. 67 I.A. 212=I.L.R. (1940) A. 446=44 C.W.N. 737=1940 P. C. 86=(1940) 2 M.L.J. 151 (P.C.).

COMPARISON OF MARKS SIDE BY SIDE—IF PROPER TEST.—The test of comparison of the marks side by side is not a sound one, since a purchaser will seldom have the two marks actually before him when he makes his purchase; the marks with many differences may yet have an element of similarity which will cause deception, more especially if the goods are in practice asked for by a name which denotes the mark or the device on it. 67 I.A. 212=I.L.R. (1940) A. 446=1940 P.C. 86=(1940) 2 M.L.J. 151 (P.C.). The defendant company—Oriental Assurance Company could not be called "Oriental" without regard to the other older companies, merely because it was dealing with the Orient. The name of the deft. company was so similar to the name of plaintiff company as to mislead people and there was real danger of the plaintiff suffering irreparable loss. A temporary injunction should therefore be issued. 21 I. C. 258=40 Cal. 570.

PROBABLE EFFECT UPON THE ULTIMATE CONSUMER.—No man is entitled to represent his goods as being the goods of another man; and no man is permitted to use any mark, sign or symbol device or other means whereby, without making a direct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie, or to make a false representation to somebody else who is the ultimate customer. (*Singer Manufacturing Co.* v. *Loog* (1888) 18 Ch.D. 412, Rel. on.) 1927 Rang. 49. If the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market, may be as much a violation of the rights of that rival as the actual copy of his device. [*Seixo* v. *Provezende,* (1865) 1 Ch. 192, Rel. on; 6 Mad. 108; 9 L.B.R. 31, Ref.] 1927 Rang. 49.

The law relating to this subject may be stated in a few propositions:

(1) It is unlawful for a trader to pass-off his goods as the goods of another.

(2) Even if this is done innocently it will be restrained.

(3) *A fortiori,* if done designedly, for that is a fraud.

(4) Although the first purchaser is not deceived, nevertheless if the article is so delivered to him as to be calculated to deceive a purchaser from him, that is illegal.

It is the probable effect upon the ultimate customer the lowest buyer on the scale, which must be most closely considered. [*Powell* v. *Birmingham,* (1896) 2 Ch. 79, Foll.] It is not necessary to prove actual instances of deception. The fact that the defendants' goods are sold at a lower price than the plaintiffs cannot militate against confusion. On the other hand, it indubitably increases chance of confusion in the districts where persons of the illiterate public who have no actual knowledge of the original ownership of the goods are the largest class of buyers. In a country like Burma it is the pictorial resemblance which confuses more than anything else. If one trader adopts the same symbol as another, even if he multiplies the number of the symbols, as long as he does not qualify them by the addition of another different symbol or symbols, he is bound to confuse. The writing on the label matters not at all to the country people. 99 I.C. 727=4 Rang. 381=1927 Rang. 49. *See also* 6 Rang. 221=1928 Rang. 210; 1939 Cal. 466; 1938 Sind 38; 1941 Lah. 262.

INTENTION TO DECEIVE—INFERENCE—CLOSE SIMILARITY.—Fraud is to be presumed where the similarity is close and remains unexplained. An intention to deceive may be inferred from the circumstances of the case, though no case of actual deception is proved. 173 I.C. 930=1938 Sind 38.

SIMILARITY—PROVINCE OF JUDGE—POINTS TO BE CONSIDERED.—While the Judge must not surrender his own independent judgment to any witness whatsoever, he must at the same time, in order to arrive at the proper conclusion, not disregard the evidence adduced in the particular case before him. In finding out the amount of resemblance, not only must one look at the distinguishing features, *i.e.,* dissimilarities, but one must look at the whole and not parts and then come to a decision. Each resemblance must not be taken by itself and a conclusion is not to be based thereon. The Court must look not only to the resemblance between the two names but also as to the get-up as a whole, and while not disregarding the parts which are common to the trade must try to find out whether plaintiff has made out a case showing that the defendant's goods are like the plaintiffs by reason of something peculiar to the plaintiff and by reason of the defendant having adopted some mark or devise or label or something of that kind which distinguishes the plaintiff's goods which have, like those goods, the features common to the trade. 84 I. C. 1014=40 C.L.J. 230=1925 Cal. 220.

COLOURABLE VARIATION—WHAT IS—NO GENERAL RULE.—In the case of an infringement of trade-mark no general rule can be laid down as to what is or is not a mere colourable variation. Standards differ and education is one of the factors. All that can be done is to ascertain in every case as it occurs whether there is such a resem-

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blance as to deceive a purchaser using ordinary caution. (11 H.L.C. 523, Foll.) 49 All. 92=24 A.L.J. 975=1927 All. 31. *See also* 17 Pat.L.T. 667; 1937 Nag. 158; 1939 Rang. 98.

COLOURABLE IMITATION—FACTS TO BE CONSIDERED.—It is a question of fact in every case whether the defendant's mark is or is not a colourable imitation of the plaintiff's mark. The surrounding circumstances of each case will have to be considered. It is not only necessary to look at the difference or at the resemblance between two given marks, but it is necessary to compare the two marks as a whole and then come to a decision. 173 I.C. 930=1938 Sind 38. Plaintiffs were importing matches from Sweden of different brands, *viz.*, "Three Stars," "One Star," "J.W.T. Star" and "Two Stars." The defendants also at the time but a little later tried to introduce in the market matches with label of five red stars. Plaintiffs claimed a monopoly of using a star or stars on matches. *Held*, that the plaintiffs were entitled to the user of "ThreeStar" and "J.W.T. Star" label as would justify restraining any other competitor in Burma from a colourable imitation of either of these marks, but they could not have a right to restrain all and sundry from using design for matches in which any number of stars was a distinctive mark. (*English Cases Referred* 4 Rang. 381, Reversed.) 6 Rang. 221=1928 Rang. 210.

COLOUR COMBINATION.—It is true that a person is entitled to take from anywhere even from a competitor's wrapper, a combination of colours and form of lettering which would improve the artistic form of his wrapper. But the colour combination and the lettering must be used for an honest purpose and must not be made an instrument whereby persons seeing the colouring and the lettering are led to believe that the imitator's goods are those of the competitor's. 1930 Rang. 326.

INFRINGEMENT—BURDEN OF PROOF.—Where the action for the infringement of trade-mark is in substance a *quia timet* action, in the absence of evidence of actual confusion, a strong case must be made to justify a conclusion that confusion will result from the appearance of the defendant's goods in the market. 31 L.W. 755=1934 P.C. 167=66 M. L.J. 588 (P.C.). If the accused passes his own inferior goods as superior goods of another by affixing that other's trade-mark to his own goods, the latter must prove the reputation of his goods. But if the accused puts the name of the other on the goods of the accused, the other need not prove the reputation. Mere affixing of name to the goods can be a good trade-mark: a definite amount of time is not necessary to validate a trade-mark. 12 S.L.R. 129=50 I. C. 165=20 Cr.L.J. 277. When the plaintiffs prove that the mark is a colourable imitation the burden of showing how the defendants came to adopt it is on the defendants. 57 Mad. 600=39 L.W. 319=1934 Mad. 211 =66 M.L.J. 440. Where in a suit by a company dealing in cloth against another company, also dealing in cloth, for an injunction restraining the latter from using a particular figure or mark on the goods on the ground that it would be calculated to cause any goods belonging to the defendant company to be taken as plaintiff's goods, no evidence is adduced to prove that any person has been deceived in the manner suggested by the plaintiffs, it being a *quia timet* action, the burden lies on the plaintiffs to satisfy the Court that an injunction should be granted to them at that stage upon the ground that unwary purchasers of goods who had not seen the figure marked on the plaintiff's goods might be reasonably led to think, when offered goods of the defendants with their figure on it, that they were obtaining the plaintiff's goods. 162 I.C. 765=1936 R. 193.

EVIDENCE OF ACTUAL DECEPTION NOT NECESSARY.—In order to get an injunction it is not necessary to prove that any one had in fact been deceived but that it is enough if the defendant's trade-mark bears such a resemblance to that of the plaintiffs as to be calculated to mislead incautious purchasers. 57 Mad. 600=39 L.W. 319=1934 Mad. 211 =66 M.L.J. 440. In cases of infringement of trade-marks, the plaintiff need not show that defendant's colourable imitation of plaintiff's mark did actually deceive any person or persons. Where it is clear that traders in rosewater used the words 'Ghazipore rose-water," as descriptive merely of a good kind of such water. *Held*, that people buying such goods do not set any particular value upon their coming from the particular place to which they are ascribed and such misdescriptions not being calculated to deceive any one, does not disentitle the plaintiff to the relief which he might otherwise have obtained. 30 I.C. 633=8 Bur.L.T. 113. A trade-mark or a name may become *publici juris* but the Court would require very strong evidence, which would show conclusively that the mark had come to be so public that nobody could be deceived by the use of it and could be induced from the use of it to believe that he was buying the goods of the original trader. 50 Bom. 402=28 Bom.L.R. 243=1926 Bom. 200. It does not matter that the infringer's goods are of a different and inferior class. It is not necessary to prove actual deception, only that the act of the defendant is calculated to deceive; and where there is deliberate imitation of a trade-mark the burden of proof is on the imitator. It is sufficient if the plaintiff shows that the defendant has put into the hands of an unscrupulous retailer the means of deceiving the ultimate purchasers. If there is any risk of damages, the plaintiff is entitled to protection at once and need not wait until the

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position gets worse, and an injunction can at once be granted. 41 Bom.L.R. 182=1939 Bom. 118. When once the intent to deceive is established it is only a short step to proving that the intent has been successful, but still it is a step, even though it be a short step. Whether the get-up of a particular article is calculated to deceive depends upon the circumstances prevailing in respect of the particular article in question. 1930 Rang. 326.

EVIDENCE—SIMILARITY.—In case of infringement of trade-mark it is the function of the Judge to say whether two designs are similar and not for a witness to express an opinion on the point. 49 All. 92=24 A. L.J. 975=1927 All. 81. The Court is justified in acting on its own comparison of exhibits before it. 57 Mad. 600=39 L.W. 319=1934 Mad. 211=66 M.L.J. 440.

EXPERT OPINION — ADMISSIBILITY.—The *expert* opinion of persons well acquainted with the trade as to whether an alleged resemblance between the contrasted marks is or is not calculated to deceive the unwary, is inadmissible, and in the absence of any direct evidence that the unwarys have been deceived, it is for the Court and the Court alone to decide whether there is a possibility of deception. 43 P.L.R. 269=1941 Lah. 262. In deciding whether one get-up is similar to another or is calculated to deceive purchasers into believing that they are purchasing the article of the other, one must remember the class of persons who are purchasers of the article in question. While the Judge must not surrender his own independent judgment to any witness whatsoever, he must, at the same time, in order to arrive at a proper conclusion, not disregard the evidence adduced in the particular case before him. (1925 Cal. 220, Foll.) 95 I.C. 667=43 C.L.J. 405=1926 Cal. 837.

SUIT FOR—DEFENCE TO — EFFORTS TO GUARD AGAINST DECEPTION.—If the use of a particular name has become associated with the goods of the plaintiff and the same name used by the defendants is calculated to deceive, the plaintiffs are entitled to protection and it is no answer for the defendants to say that special efforts are made to guard against deception in actual fact. 38 C.W.N. 265=1934 Cal. 600.

SUIT FOR INJUNCTION—POINTS TO BE CONSIDERED.—The fundamental principle is that a person shall not trade under a name so closely resembling that of the plaintiff as to be mistaken for it by the public. The question to be determined in cases of this description is whether there is such a similarity between the two names as that the one is in the ordinary course of human affairs likely to be confounded with the other. It is not necessary to prove that the defendants in taking the name complained of by the plaintiffs had any fraudulent intent. It is enough if the plaintiffs prove that the act of defendants in assuming the name complained of, is an injury to the plaintiff's rights. There is no question in such cases as property or monopoly in the name. The principle upon which the cases on this subject proceed is not that there is property in the word, but that it is a fraud on a person who has established a trade and carries it on under a given name, by some other person who assumes the same name or the same name with a slight alteration in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given reputation to the name. The question in this class of cases is not whether the intelligent section of the public is likely to be deceived but whether the public at large is likely to be deceived. 24 Bom.L.R. 1181=1923 Bom. 119. *See also* 57 A. 510. The general rule is that the plaintiffs, whose goods have acquired a reputation in the market through a trade-mark or name with which their goods have become associated, have a right to restrain the defendant from using a trade-mark or name which is identical with or similar to that of the plaintiffs, and such right extends not only to the particular goods sold by the plaintiffs, but also to cognate classes of goods, provided the cumulative effect of the similarity of the mark, the commercial connection between the plaintiff's goods and those of the defendant and surrounding circumstances is such as to lead the unwary customers to mistake the defendant's goods for those of the plaintiffs. 57 A. 510=1937 A. 7. It is difficult to define exactly over what area repute of an article should extend before it can be held that the said repute is locally universal. Where it was found that many consumers local and mofussil were likely to be misled. *Held*, that an injunction should be granted. In this country industry is not fully developed and the art of advertisement is in its infancy so that the repute of any article will not easily be spread over a wide area. 1930 Lah. 99. Mere proof that the trade-mark of one manufacturer has been appropriated by another is enough to entitle the person aggrieved for injunction to restrain its use. 1930 Cal. 678. Where the evidence is quite satisfactory to show that plaintiff's cloth was associated with the name of "lotus" and that any lotus device would lead to cloth being able to be palmed off as their cloth which was the cloth of another manufacturer, injunction should be granted; and the mere fact that if looked properly the defendant's trade-mark was not lotus but a rose would make no difference if the whole get-up of the one was like the whole get-up of the other. 51 All. 182=56 I.A. 1=1929 P.C. 11=56 M.L.J. 282 (P. C.). A man has no right to put up his goods for sale as the goods of a rival

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trader, and he cannot be allowed to use names, marks, letters or other indicia by which he may induce purchasers to believe that the goods he is selling are the manufacture of another person. Whatever be the particular mode adopted by him, if the trade-mark is a work or device never in use before and meaningless, except as indicating by him the goods in connection with which it is used were made, there can be no conceivable legitimate use of it by another person, his only object in employing it in connexion with goods of his manufacture being to deceive. Mere proof that the trade-mark of one manufacture has been thus appropriated by another is enough to entitle the person aggrieved for injunction to restrain its use. In the case of a trade-mark thus identified with a particular manufactory the rights of the person whose trade-mark it was would not differ substantially from those which would exist if it were strictly speaking his property. [*Reddaway* v. *Barham*, (1896) A.C. 190, applied.] 1930 Cal. 678.

FRAUDULENT MISREPRESENTATION NOT NECESSARY.—The parties who were dealing in condensed milk used labels having device of a cow. The plaintiff's label had 'Dan-cow' imprinted on it while the defendant used a similar label with the word 'cow'. They were alike in several respects, though there were minor points of difference also. The plaintiff having sued for an injunction in respect of the trade-mark, *held*, that an injunction should be issued. A fraudulent misrepresentation is not an essential ingredient for the issue of an injunction. Whether the plaintiff's goods are identified with the device used depends on the evidence. 26 S.L.R. 51=1932 Sind 84. *See also* 1933 Cal. 466.

INTERLOCUTORY INJUNCTION—GRANT OF.—Where in a suit based on an alleged infringement of a trade-mark on cotton spools, the plaintiffs pray for an interlocutory injunction restraining the defendants from selling cotton spools which are similar in appearance to those sold by the plaintiffs, but there is no evidence of any actual cases in which the defendants' cotton has been sold to persons desiring to purchase the plaintiffs' cotton or of cases where illiterate customers have been misled by the defendants' design into thinking that they were buying plaintiffs' cotton, no interlocutory injunction should be granted simply because the two spools have various features in common. 177 I.C. 473=1938 Cal. 458. The essence of an application for an interlocutory injunction is that it should be made with promptness. Improper delay although it does not amount to acquiescence may deprive a plaintiff of his right to such a remedy. Injunction may be refused on account of delay in a case of infringement of trade-mark. 26 S.L.R. 335=139 I.C. 490. Where in a suit for injunction and other reliefs for infringement of trade-mark by the defendants the plaintiff prays for an injunction the Court has to see on which side the balance of convenience lies assuming that the infringement exists. Where the loss to the defendants by the grant of injunction cannot be remedied if plaintiff fails, but the plaintiff's interest can be otherwise safeguarded, the injunction should be refused. 1933 Lah. 1046.

RIGHT OF SUIT OF MANUFACTURER AND OF IMPORTER.—A manufacturer of goods with a particular mark in England, who imports them to a dealer in India, has no cause of action against an infringer or a person who uses a colourable imitation of the mark, in the absence of any evidence of any reputation in him so far as India is concerned. But the importer may acquire the right to the exclusive use of a trade-mark. A merchant who sells particular goods under particular trade-mark is entitled to protection for that mark if he can show that it is established in the market with the goods which he sells, because the law will not permit a person to pass off his goods as those of another. It matters not whether the merchant has the goods made for him abroad or whether he has them made for him within the country. The fact that the manufacturer or supplier of the goods has also acquired a reputation in connection with it in another country does not affect him. If the manufacturer has never used the mark in India, it is open to the merchant or importer to adopt it for his business in India, and when he does so with the full consent of the manufacturer, he acquires a right to the mark in India. I.L.R. (1938) Mad. 466=46 L.W. 635=1938 Mad. 1=(1938) 2 M.L.J. 651. *See also* 1924 Rang. 333. A manufacturer of goods bearing a particular mark or name, who merely manufactures them in England for a trader in India and sends them on to the trader in India, but who does not himself sell those goods in India cannot be said to acquire any right at all in India in the trade mark or trade name. But the importer of the goods who is associated with them and has sold them for a considerable period with the particular mark, and who has sole rights to the use of the particular mark in India gets proprietary rights in the trade-mark by user and is entitled to sue for injunction against a person infringing the same. 1937 M.W.N. 271. The protection which the law affords to traders using a trade-mark in India would be seriously diminished if immunity from action were secured to rival traders who having brought goods into the market with the same mark were able to prove that in some quarter of the globe some other trader

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had been in the habit of using the mark for a period longer than that alleged by the plaintiff. (24 Mad. 163; 35 Bom. 425; 13 Cal. 82, Ref.) 2 Rang. 278=1924 Rang. 333.

AGENCY, REPRESENTATION AS TO.—Attempts to deceive unwary purchasers by false representations by the use of devices may be made in different forms and it is a question of fact in each case whether there is a false representation or not. *A dealer may not represent contrary to fact that he is an agent for a manufacturer* and use the real agent's label or design. (Injunction issued.) 26 S.L.R. 287=1932 Sind. 222.

INJUNCTION DECREE, FORM OF.—In a suit for an injunction for infringement of trade-mark, the injunction was ordered in the following form: "that the defendant, his servnts, and agents be restrained from selling or offering for sale . . . bearing labels . . . . in a form calculated or intended to pass off or to enable others to pass off his goods as and for the goods of the plaintiff. 1930 Cal. 678. *See also* 1937 Cal. 528.

DAMAGES—MODE OF ASSESSMENT.—If the plaintiff can establish that his sales decreased after the defendant started to use his trade-mark, he is entitled to the loss of profits resulting therefrom. If he can show that the average increase of the trade did not continue after that date he is entitled to the loss of profits on such average increase of sales. 176 I.C. 348=1937 Cal. 528. In suits for infringement of trade-mark, damages would deepnd upon the reduction in the sale of plaintiff's goods and consequent reduction in his profits owing to the defendant's action. A fall in the actual price of the imported goods of the plaintiff can never mean an equal fall in his profits. 188 I.C. 462. In a trade-mark case, the plaintiff is entitled, if he succeeds in getting an injunction, either to claim the damage sustained from the defendant's wrongful act or the profits which the defendant might have made by his wrongful act. The computation in the two cases is not the same. The proper way to approach the question as to how much damage the plaintiff had suffered by reason of the infringement of their mark by the defendants is to ascertain what profit the plaintiffs would have made if the offending articles had not been upon the market and the best evidence in support of such a claim is evidence of any loss of trade that the plaintiffs had suffered during the period in which the defendants were importing goods with the infringing mark on them. [51 A. 182 (P.C.), Ref.] 10 Rang. 85=1932 Rang. 56. There is no cut and dry rule which can be laid down by a Court of law for the estimation of damages in a case of infringement of trade-mark. But instead of making a speculative assumption of sales by defendant by trusting to their own goods without the misleading trade-mark, the safer basis would be to calculate on the falling-off in plaintiff's trade which came in after the pirated mark was introduced on the market. 51 All. 182=31 Bom.L.R. 285=56 I.A. 1=1929 P.C. 11=56 M.L.J. 282 (P.C.). In the case of infringement of a trade-mark the profits made by the defendant cannot always be a true criterion of damages awardable to a plaintiff. (English cases considered.) 49 All. 92=24 A.L.J. 975=1927 All. 81. Damages are in every case proportioned to the injury done. 49 All. 92=24 A.L.J. 975=1927 All. 81. When a registered trade-mark or design is innocently infringed, the owner of the trade-mark or design is not entitled to an *account of profits or an inquiry as to profits* unless the offender continues to infringe after notice of the owner's rights, though he is entitled to an injuncion against the offender. When the offender himself who has innocently infringed offers to pay the profits made by him by the sale of the offending goods, and the plaintiff is unable to prove any damage sustained by him by reason of the infringement of his rights in the trade-mark or design, he is not entitled at all to an order for inquiry as to the profits made by the defendant by the sale of the goods bearing the plaintiff's trade-mark or design. 182 I.C. 577=41 Bom.L.R. 290=1939 Bom. 198.

Sec. 20 (2): PASSING-OFF ACTION—ESSENTIALS OF.—The gist of a passing-off action is deceit; for "passing off" is one of the ways by which goods of one trader are sold by another in a manner calculated to deceive the purchaser into thinking that they are the goods of the former. There must be a reasonable probability of deception. There can be no such probability when the goods manufactured by the defendant have neither been manufactured nor sold by the plaintiff before. There is no infringement in such a case. 59 Bom. 373=36 Bom.L.R. 1165=1935 Bom. 101. If the goods of a manufacturer, from the mark or device he has used, have become known in the market by a particular name the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market may be as much an invasion of right of that rival as the actual copy of his device. (*Seixo* v. *Provezende*, L.R. 1 Ch.D. 192, Foll.) 99 I.C. 353=49 All. 92=24 A.L.J. 975=1927 All. 81. In England, the registration of a trade-mark constitutes proof of title, and an action for infringement is only associated with an infringement of a registered trade-mark. A condition precedent to an action for infringement is registration. In this country we have no such system of registration and the remedy of the aggrieved trader lies in a "passing off" action. The basis of a

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"passing off" action is a false representation. The plaintiff has to show that the act of the defendant complained of is calculated to lead to the passing off of the defendants' goods for those of the plaintiff, and it does not depend on whether the latter has acquired any right of property in the device under which he sells his goods. 12 Rang. 534=152 I.C. 855=1934 Rang. 297. (Law before the passing of this Act).

PASSING OFF—WHAT CONSTITUTES.—In considering whether defendant's mark is calculated to lead the purchasing public to believe that the goods bearing the defendant's trade-mark are the goods of the plaintiff, one must approach the two marks from a general aspect and see whether the defendants by having their mark upon the goods are representing them as plaintiff's goods. The actual physical resemblance of the two marks is not the sole question for consideration. If the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market may be as much a violation of the rights of that rival as the actual copy of his device. It may be that if they are placed side by side there are obvious differences; but if, one having so seen the plaintiff's mark and separately saw the defendant's mark, gets the general impression that it is the same mark, the defendant's mark must be held to be one which is calculated to deceive the public; and it must be held that goods bearing the defendant's mark are represented by this as being the goods of the plaintiff. 1937 M.W.N. 271. The basis of a passing off action is injurious falsehood or a false representation by the defendant, and it must be proved as a fact that the false representation was made. What the plaintiff has to prove in such a case is that the conduct of the defendant is such as is calculated or likely to pass off the defendant's goods as his. Fraudulent intention is not necessary. It is sufficient to prove that the practice complained of is of such a nature that it is likely in the ordinary course of business to deceive the public. In considering whether deception is probable or not account has to be taken not of expert purchasers but of the ordinary ignorant and unwary members of the public. The question really is whether the defendant has or has not knowingly put into the hands of retail dealers the means of deceiving the ultimate purchasers. If there is anything so characteristic in the get-up or appearance of the defendant's goods that it identifies those goods as the merchandise of the plaintiff, any deceptive adoption or imitation of that get-up or appearance or mark is enough. The Court has to find that the get-up is a colourable imitation on the face of the goods sold by, or belonging to, the defendant, and that, having regard to the surrounding circumstances, it is such a colourable imitation that it is likely to deceive a casual unwary purchaser into the belief that in buying the defendant's goods he is really buying the goods of the plaintiff. It is not necessary in such cases to show that there was any intention to deceive as a matter of fact. It is not necessary to prove that the defendant not only had the intention to deceive but was actually deceiving his customers. There is no reason why the ordinary presumption that a man intends the natural and ordinary consequences of his act cannot apply to passing off actions. If mere comparison is not sufficient, then the plaintiff must prove that what may be apparently innocent is really calculated to deceive. In such cases motive becomes material, and the Court may well assume that if a man is fraudulent, the steps which he himself thought sufficient would be likely to achieve his object. I.L.R. (1937) Bom. 85=38 Bom.L.R. 894=1936 Bom. 418. In a suit for injunction in a passing off action relief can only be granted on the ground that the defendant has done something which is calculated to deceive. It is essential in a passing off action to show that there has been a false representation. It is not enough for the plaintiff to claim that he has adopted a device as a trade mark and that the defendant has copied this device or used one so like it that deception is probable. *He must show that he has used the mark claimed by him on his goods or in connection with them and that the mark has become associated in the minds of the public with his goods. There must be user* of the mark, because without user no reputation can be acquired. *A reputation has to be established*, but that does not mean that the ultimate purchaser must know the actual name of the owner of the goods. It is sufficient if the ultimate purchaser knows that goods bearing this mark have a reputation and that this mark denotes the goods which he wishes to buy. I.L.R. (1938) Mad. 466=46 L.W. 635 =1938 Mad. 1=(1938) 2 M.L.J. 651.

TEST OF UNWARY PURCHASER—ABSOLUTE IDENTITY OF ARTICLES NOT NECESSARY.—It is by no means necessary that there should be absolute identity between the articles of the plaintiff and the defendant, nor is the fact that the two articles when placed side by side appear dissimilar to the European eye of much consequence. The main test is that notwithstanding the dissimilarities between the two articles there is contained in the defendant's article such characteristic features as might reasonably lead an unwary purchaser buying the article to believe that he was buying the plaintiff's article.

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For awarding damages to the plaintiff the extent of the sale of the defendant's articles is very material. (*The Singer Manufacturing Co.* v. *Loog.* 18 Ch.D. 395; *Seixo* v. *Provizendo,* 1 Ch.A. 192, Rel. on.) 34 I.C. 217=1931 Rang. 213. *See also* 1931 Mad. 461; 1936 Bom. 418.

POINTS OF SIMILARITY AND NOT DIFFERENCE—QUESTION OF EFFICACY IRRELEVANT.—Where the defendant encased a medicine in such a way that it could be readily passed off so as to deceive the ordinary village customer into the belief that he was purchasing the medicine of the plaintiff. *Held,* that the plaintiff was entitled to an injunction to restrain the defendant from selling the medicine in a way by which it could pass off as the medicine of the plaintiff. Whether the defendant's medicine is an imitation of the medicine of the plaintiff is to be decided from the points of similarity between the two and not from the points of difference. If a medicine has not been proved to be harmful and it has a large sale in the market for many days, the mere fact, that it is of an ordinary allopathic nature under a Sanskrit name and does not possess all the properties claimed for it, would not bar the protection of law which should be extended to it. 67 I.C. 353=20 A.L.J. 537=44 All. 608=1922 All. 178. As a matter of law it is not necessary for the plaintiff in a passing-off action to prove that the imitation is so similar and so close that there is hardly any difference noticeable between his goods and those of the defendant. Cases of exact imitation are very very rare. In most of the cases the question which the Court has to consider is whether, having regard to all the surrounding circumstances, the get-up was of such a nature as was likely to deceive people in the ordinary course of business into the belief that they were buying the plaintiff's goods and that in fact the defendant's goods were being passed off to them. Importance should not be attached to the minor characteristics, and little differences do not affect the question which the Court has to decide. I.L.R. (1937) Bom. 85=38 Bom.L.R. 894=1936 Bom. 418.

COLOURABLE IMITATION.—The question for decision as to whether an alleged *colourable imitation has or has not deceived anybody* is to be decided with reference to the ultimate purchaser. In passing off cases, the probability of misleading, not experts or persons who know the real facts, but ordinary or unwary customers, is the mischief to be guarded against. Non-deception of middlemen and vendors is immaterial. 173 I.C. 930=1938 Sind 38. *See also* I.L.R. (1939) Lah. 131=41 P.L.R. 478=1938 Lah. 803. A colourable imitation is the most common form in which a trade-mark or trade-name is infringed. The test is not whether a person after carefully and intelligently examining or studying the marks is not likely to be misled, but whether by the general impression produced there is a probability of its causing deception. There is no hard and fast rule which can be laid down as regards the amount or degree of resemblance required in such cases. 14 Mys.L.J. 1=41 Mys.H.C.R. 110.

PASSING OFF—USE OF SAME MARK ON OTHER GOODS—PERMISSIBILITY.—There can obviously be no monopoly in the use of the trade-mark. A manufacturer of cigarettes under an undoubted trade-mark such, as an animal, or any other device, cannot legally object to the use of the identical mark on, say, hats or soap, for the simple reason that purchasers of any of the latter kinds of goods could not reasonably suppose, even if they were well acquainted with the mark as used on cigarettes, that its use on hats or soap denoted that these goods were manufactured or marketed by the cigarette manufacturer. 67 I.A. 212=I.L.R. (1940) A. 446=44 C.W.N. 737=1940 P.C. 86=(1940) 2 M.L.J. 151 (P.C.).

PASSING OFF ACTION—EVIDENCE.—In an action for passing off an infringement of trade-mark, it is essential for the success of the plaintiffs that they should establish by evidence that their goods are known by some name or description of such nature that the use of the defendant's label will cause people to think that goods bearing that label are the goods of the plaintiff. 134 I.C. 657 =1931 P.C. 272 (P.C.). In a case of infringement of trade-mark, the Court must exercise its own judgment from the impression which it obtains from looking at the two products in question. In a passing off action, proof of actual deception is not necessary. It is quite sufficient if the plaintiff can prove the probability of deception. 176 I.C. 597=1938 Rang. 99. In order to justify the Court at a plaintiff's instance from prohibiting the defendant-firm from using its own name in all or any of its business transactions, it is essential for that plaintiff to establish by proper evidence two facts. He must prove that the words in the names of the firms are so alike that the latter will be taken as the same as or equivalent to the former. He must further prove that his firm name has acquired a secondary meaning, *i.e.*, that the word, when applied to goods, means that the goods are the goods of the plaintiff, and no one else. 1931 P.C. 15 (P.C.). The vital element is the probability of deception. This may depend on a number of matters as well as the question of similarity of the marks or of the get-up. Witnesses can be called to prove the circumstances and the place in which the articles are sold, the classes of persons who buy them, and whether they include persons who

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are illiterate or ignorant or the reverse, the manner in which the public are accustomed to ask for the articles, and any other matters which will assist the Court to decide whether deception is probable. Evidence of actual deception may be available and if available may be very valuable. There is no such person as an expert in human nature, and a witness cannot be called to say that it is likely that purchasers of the goods will be deceived. This can only be a matter of opinion formed after the dispute has arisen and too often without any judicial consideration of the opposing contentions. 67 I.A. 212=I.L.R. (1940) A. 446=44 C.W.N. 737=52 L.W. 25=42 Bom.L.R. 734=1940 A.L.J. 496=1940 P.C. 86 =(1940) 2 M.L.J. 151 (P.C.). It is difficult where a name is descriptive of patented product to conceive that a manufacturer could be held guilty of passing off, if he manufactured the goods in accordance with the expired patents, and the only similarity between the rival goods lay in the appearance of the goods so manufactured and the application to them of the name by which the patented goods had been known. It is conceivable that in the case of a patent, long ago expired, the evidence might possibly establish that the name had become distinctive of a particular manufacturer rather than descriptive of the goods, with the result that other manufacturers of the goods could be compelled to adopt some means of effectively distinguishing their goods from those of the particular manufacturer. But difficult as such a case is to prove in the case of a descriptive word it must be additionally difficult in the case where a word is the name of goods as well as being descriptive of those goods. 1938 P.C. 143 (P.C.). Before a case of passing off of a book on the similarity of title and get up can be proved, it must be shown that the public connect the title of the book with a particular work written by that author. Again as to get up, it must be shown that a particular style of printing or illustration indicates to the public that the work is that author's. 42 C.W.N. 541=1938 Cal. 594.

PASSING-OFF ACTION—BURDEN OF PROOF. —In actions for passing-off in connection with trade-marks, the plaintiff has to prove that his goods were known to the public by some distinct name, mark, badge, get-up or appearance, and that the defendant's use or imitation of the same is likely to mislead the public into believing that the defendant's goods are those of the plaintiff. Though the actual length of time during which a trade-mark is used or employed is not an important element to be considered, the user or employment must have been long enough to render probable the acquisition in the market of a reputation. 59 Bom. 373 =36 Bom.L.R. 1165=1935 Bom. 101. In an action for passing off, the plaintiff should in the first instance prove that the goods sold under their label and get-up were goods which had a reputation in the market as being goods manufactured or sold by them, of which the label and get-up was distinctive and well-known in the particular market and that the goods sold by the defendants were a colourable imitation of the label and get-up of the plaintiff's goods. 10 Rang. 133=1932 Rang. 114. A passing off action is, in essence, a suit in defence of the plaintiff's right of property in the particular name make or get-up he claims and in the goodwill attributed thereto. The plaintiff in every case has to establish that he has indeed acquired for himself or as goods a sufficient reputation, under the mark, or under the name by which, in consequence of the use of that mark, his goods have come to be known, to entitle him to treat it as his own, and to be protected. 157 I.C. 902. *See also* 1939 Rang.L.R. 18=1939 Rang. 98.

PASSING OFF ACTION—INJUNCTION—DAMAGES—INNOCENT AND FRAUDULENT PASSING OFF.—A man has a right of property in the goodwill of his business, which he has either built up or acquired. If any one interferes with that right by passing off his goods as the former's, the remedy is available to him by way of injunction to restrain the passing off even if the person so passing off is entirely innocent and acts in ignorance of the fact that he is interfering with the rights of another. If the passing off is done fraudulently then the owner of the trademark or goodwill can either ask for an account of the profits made by the person passing off his goods in that way or for damages. 14 Mys.L.J. 1=41 Mys.H.C. R. 110.

RIGHT TO INJUNCTION.—In a passing off action the plaintiff is entitled to ask for the issue of an injunction, if the defendant persists in denying that there had been any infringement of plaintiff's rights and does not give any undertaking with regard to the future. 43 P.L.R. 389=1941 Lah. 293. Before a dealer can restrain another from using a name or mark, it is not sufficient to show that the article with that name or mark has acquired a reputation in the market but it must also be shown that the public have grown to associate that particular name or mark with himself as the manufacturer of or dealer in that article. Where there is absolutely no evidence to establish any such association in the public mind between the plaintiff's business and the goods bearing the mark in question, the suit must fail. (33 Mad. 402; 25 Bom. 433 and 12 A.C. 453, Foll.) 43 L.W. 210=1936 Mad. 8. In a passing off action the Court is not justi-

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fied in refusing an injunction merely because, on a close and critical comparison of one with the other the Court is of opinion that there is no likelihood of deception. An ignorant purchaser probably trusts to his recollection, he has no opportunity for comparison, and if he is likely to take the one for the other, there is a *prima facie* case for an injunction. Where the Court finds that the defendant's article is comparatively new, it would be a greater inconvenience to allow him to flood the market with his goods and possibly infringe the plaintiffs' rights than to restrain the defendant for a short time and compensate him, if so entitled, for the loss sustained by him in consequence. 38 L.W. 771=65 M.L.J. 617. The Court must consider the ordinary characteristics and the normal sense of discrimination, or the lack of it, not only of those experienced dealers who purchase the goods from the another but also of those small retailers in district towns and villages who purchase from the larger dealers and the "man in the street" who is the ultimate purchaser. The Court can also take into account, in assessing the liability to deceive of a particular mark, the ordinary commercial opportunities for intentional deception by dishonest persons. A trader may deliberately set out to filch his rival's trade by a calculated copy of his trade-mark or get-up, or he may, while astute enough to avoid what he conceives to be a cynically deliberate copy, endeavour or even be content, to get near thereto as is pssible consistently with his remaining outside the reach of the Court's jurisdiction; or he may assume an offensive mark or get-up by carelessness or even inadvertance. But if it results in a reasonable probability of deception, the Court will protect the owner of the infringed mark in all cases, and grant an injunction. 157 I.C. 902. *See also* 142 I.C. 555. Whether a name originally descriptive has acquired a secondary meaning as denoting exclusively the plaintiff's goods depends on the facts of each particular case. Where the plaintiffs sued for an injunction on the ground that they had acquired an exclusive right to the use of the name "Madras Curry Powder" it appeared however that in the place where the article was sold it was not generally understood that "Madras Curry Powder" was powder exclusively manufactured by the plaintiffs *held*, that under those circumstances an injunction could not be issued against persons selling similar goods under similar names. 55 Mad. 966=36 L.W. 498=1932 Mad. 705=63 M.L.J. 568. If traders in India have acquired in any language the exclusive right to the use of certain particular marks or words not merely as descriptive of but as distinctive of their goods, they have the right to restrain another trader from copying those marks or words for use in connection with a similar class of goods in any other language in India. A person knowing a number of languages would very likely be deceived if a trader translates into one of the languages which he knows the trade-mark acquired by long user by a trader in another language with which that person is familiar and affixed that trade-mark so translated to a similar class of goods. If the Court comes to the conclusion that the *use of the words in another language* was an intention to deceive and in fact was likely to deceive, then the Court ought to restrain the use of such words. Where a particular brand of saline known as "fruit salt" had become well-known in trade as belonging exclusively to the plaintiff, and the defendant manufactured and sold a saline with the word "*Falaxar*" which was the *Marathi* equivalent of "Fruit Salt": *Held*, that the defendant had no right to use the words in any language in connection with similar goods as being likely to deceive and ought to be restrained from using the same. 42 Bom.L.R. 924=1941 Bom. 3

MARK WKEN PUBLICI JURIS—TEST.—œhe real test to find whether a mark has become *publici juris* is whether the use of it by other persons is still calculated to deceive the public, not the long duration of fraudulent user. If their user may still have the effect of inducing the public to buy goods not made by the original owner of the original trade mark as if they were his goods, then the principle of *publici juris* has no application. 142 I.C. 555.

PASSING OFF—ACTION—DAMAGES—MEASURE OF—*Exemplary or penal damages* are not usually awarded in a passing off action. The plaintiff can either ask for an account of profits or damages to cover his own losses; but in the latter case, the ordinary rule is to ascertain the actual losses. 43 P.L.R. 389=1941 Lah. 293. *See also* 134 I.C. 217=1931 Rang. 213. In a passing off action an injunction may be granted and nominal damages awarded merely on proof of an infringement of a trade-mark and reasonable probability of damage to the plaintiff's trade. But the position is different as regards a claim for an account. Substantial damages can only be awarded on proof of actual damage. If it is found that the plaintiff has taken action in time to prevent his trade being materially affected and if the evidence of the plaintiff does not lay the foundation for that form of relief, he is not entitled to an account for the purpose of assessing substantial damages. 41 Bom.L.R. 182=1939 Bom. 118. Where the plaintiff in a suit for infringement of a trade-mark succeeds in the action, he has a right to elect to claim an account of profits and not to ask for

Right conferred by registration.

21. Subject to the provisions of sections 22, 25 and 26, the registration of a person in the register as proprietor of a trade mark in respect of any goods shall, if valid, give to that person the exclusive right to the use of the trade mark in relation to those goods and, without prejudice to the generality of the foregoing provision, that right shall be deemed to be infringed by any person who, not being the proprietor of the trade mark or a registered user thereof using by way of the permitted use, uses a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion, in the course of trade, in relation to any goods in respect of which it is registered, and in such manner as to render the use of the mark likely to be taken either—

(*a*) as being use as a trade mark ; or

(*b*) to import a reference to some person having the right either as a proprietor or as registered user to use the trade mark or to goods with which such a person as aforesaid is connected in the course of trade.

No infringement in certain circumstances.

22. (1) The right to the use of a trade mark given under section 21 by registration shall be subject to any conditions or limitations entered on the register, and shall not be deemed to be infringed by the use of any such mark as aforesaid in any mode, in relation to goods to be sold or otherwise traded in, in any place, or in relation to goods to be exported to any market, or in any other circumstances, to which, having regard to any such limitations, the registration does not extend.

(2) The said right to the use of a trade mark shall not be deemed to be infringed by the use of any such mark as aforesaid by any person—

(*a*) in relation to goods connected in the course of trade with the proprietor or a registered user of the trade mark if, as to those goods or a bulk of which they form part, the proprietor or the registered user conforming to the permitted use has applied the trade mark and has not subsequently removed or obliterated it, or has at any time expressly or impliedly consented to the use of the trade mark ; or

(*b*) in relation to goods adapted to form part of, or to be accessory to, other goods in relation to which the trade mark has been used without infringement of the right given as aforesaid or might for the time being be so used, if the use of the mark is reasonably necessary in order to indicate that the goods are so adapted and neither the purpose nor the effect of the use of the mark is to indicate otherwise than in accordance with the fact a connection in the course of trade between any person and the goods.

(3) The use of a registered trade mark, being one of two or more registered trade marks which are identical or nearly resemble each other, in exercise of the right to the use of that trade mark given by registration as aforesaid, shall not be deemed to be an infringement of the right so given to the use of any other of those trade marks.

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damages. He is not disentitled to an account of profits if he gives up his claim for damages. 42 Bom.L.R. 924.

RIGHT TO NOMINAL DAMAGES.—In a case of infringement of trade-mark or trade name in the absence of proof of damages, the damages awarded should be really nominal. 43 P.L.R. 269=1941 Lah. 262. *See also* 41 Bom.L.R. 182=1939 Bom. 118. Where the plaintiff has proved that his right of trade-mark has been infringed but no damages have been proved, then nominal damages can be allowed, even though they are not proved. 57 A. 510=1935 A.L.J. 80.

RIGHT OF IMPORTER TO MAINTAIN ACTION.—Where in the local market a particular brand of goods is associated with the importers and not with their suppliers, the importer is entitled to institute an action for "passing off". (1924 P.C. 187, Rel. on.) 12 Rang. 534=1934 Rang. 297.

Sec. 21.—This section confers on the registered owner of a trade-mark in respect of any goods the exclusive right to use the mark in relation to those goods.

Sec. 22.—This section defines the circumstances in which no infringement of a trade-mark is deemed to have taken place.

23. In all legal proceedings relating to a registered trade mark, the fact that a person is registered as proprietor thereof shall be *prima facie* evidence of the validity of the original registration of the trade mark and of all subsequent assignments and transmissions thereof.

Registration to be *prima facie* evidence of validity.

24. In all legal proceedings relating to a registered trade mark, the original registration of the trade mark shall after the expiration of seven years from the date of such original registration be taken to be valid in all respects unless such registration was obtained by fraud, or unless the trade mark offends against the provisions of section 8.

Registration to be conclusive as to validity after seven years.

25. Nothing in this Act shall entitle the proprietor or a registered user of a registered trade mark to interfere with or restrain the use by any person of a trade mark identical with or nearly resembling it in relation to goods in relation to which that person or a predecessor in title of his has continuously used that trade mark from a date prior—

Saving for vested rights.

(*a*) to the use of the first-mentioned trade mark in relation to those goods by the proprietor or a predecessor in title of his, or

(*b*) to the registration of the first-mentioned trade mark in respect of those goods in the name of the proprietor or a predecessor in title of his,

whichever is the earlier, or to object (on such use being proved) to registration of that identical or nearly resembling trade mark in respect of those goods under sub-section (2) of section 10.

26. No registration of a trade mark shall interfere with any *bona fide* use by a person of his own name or that of his place of business, or of the name, or of the name of the place of business, of any of his predecessors in business, or the use by any person of any *bona fide* description of the character or quality of his goods, not being a description that would be likely to be taken as importing any such reference as is mentioned in clause (*b*) of section 21 or in clause (*b*) of section 57.

Saving for use of name, address, or description of goods.

27. (1) The registration of a trade mark shall not be deemed to have become invalid by reason only of any use after the date of the registration of any words which the trade mark contains or of which it consists as the name or description of an article or substance :

Words used as name or description of an article or substance.

Provided that, if it is proved either—

(*a*) that there is a well-known and established use of the said words as the name or description of the article or substance by a person or persons carrying on a trade therein, not being use in relation to goods connected in the course of trade with the proprietor or a registered user of the trade mark or (in the case of a certification trade mark) goods certified by the proprietor ; or

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Sec. 23.—This section lays down that the registration of a trade-mark constitutes *prima facie* evidence of its validity.

Sec. 24.—This section is designed to safeguard the position of registered owners by making the registration conclusive as to validity after ten years.

Sec. 25.—This section is designed to safeguard the rights of a prior user.

Sec. 26.—This section provides that registration of a trade mark does not interfere with the right of a person to the *bona fide* use for the purpose of business of his own name or the name of his place of business or a *bona fide* description of the character or quality of his goods. (*See* 1931 P.C. 15 (P.C.), 56 I.C. 709).

Sec. 27.—The provisions of this section are designed to safeguard the legitimate interests of ex-patentees and others without permitting the creation of an exclusive monopoly in words which the trade mark contains or of which it consists as the name or description of an article or substance.

(*b*) that the article or substance has been manufactured under a patent in force at or granted after the commencement of this section, that a period of two years or more after the cesser of the patent has elapsed, and that the said words are the only practicable name or description of the article or substance,—
the provisions of sub-section (2) shall apply.

(2) Where the facts mentioned in clause (*a*) or clause (*b*) of the proviso to sub-section (1) are proved with respect to any words, then—

(*a*) for the purposes of any proceedings under section 46—

(i) if the trade mark consists solely of such words, the registration of the trade mark, so far as regards registration in respect of the article or substance in question or of any goods of the same description, shall be deemed to be an entry wrongly remaining on the register ;

(ii) if the trade mark contains such words and other matter, the tribunal, in deciding whether the trade mark shall remain on the register, so far as regards registration in respect of the article or substance in question and of any goods of the same description, may, in case of a decision in favour of its remaining on the register, require as a condition thereof that the proprietor shall disclaim any right to the exclusive use in relation to that article or substance and any goods of the same description, of such words, provided that no disclaimer shall affect any rights of the proprietor of a trade mark except such as arise out of the registration of the trade mark in respect of which the disclaimer is made ;

(*b*) for the purposes of any other legal proceedings relating to the trade mark,—

(i) if the trade mark consists solely of such words, all rights of the proprietor under this Act or any other law to the exclusive use of the trade mark in relation to the article or substance in question or to any goods of the same description, or

(ii) if the trade mark contains such words and other matter, all such rights of the proprietor to the exclusive use of such words, in such relation as aforesaid, shall be deemed to have ceased on the date at which the use mentioned in clause (*a*) of the proviso to sub-section (1) first became well-known and established, or at the expiration of the period of two years mentioned in clause (*b*) of the said proviso.

CHAPTER V.

ASSIGNMENT AND TRANSMISSION.

Power of registered proprietor to assign and give receipts.

28. The person for the time being entered in the register as proprietor of a trade mark shall, subject to the provisions of this Act and to any rights appearing from the register to be vested in any other person, have power to assign the trade mark, and to give effectual receipts for any consideration for such assignment.

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Sec. 28.—Under this section a registered proprietor of a trade mark is empowered to assign the mark to another person and to give receipts for any consideration for such assignment.

ASSIGNMENT OF TRADE-MARK.—MODE OF—WRITING—NECESSITY.—A trade-mak is generally transmitted along with the good-will of a business, and can only be assigned in writing. 59 Bom. 373=36 Bom.L.R. 1165=1935 Bom. 101. It is established that a trade-mark cannot be assigned in gross for it is a mode of representing the origin of goods to which it is attached or their trade association, and the truth of the representation is essential. The representation of a trade-mark may perhaps be true only of its originator, but usage has sanctioned a more general treatment based on the principle of identification by succession, and therefore successors in the business have been allowed to use their predecessor's trade-mark where the representation continues to be substantially true. An originator of a trade-mark of a natural product who certifies to their good quality is entitled to it and has a right to alienate it. A trade-mark can be assigned together with the good-will of the business to which it relates. 27 I.C. 483=19 C.W.N. 1. |*See also* S. 29, *infra*).

TRADE-MARK—ASSIGNMENT OF—PERSONAL SKILL INVOLVED—VALADITY.—A trade-mark bearing the name of a person whose personal skill enters much into the value of the product, is impliedly a notice to the public

29. Notwithstanding anything in any other law to the contrary, a registered trade mark shall, subject to the provisions of this Chapter, be assignable and transmissible whether in connection with the goodwill of a business or not, and in respect either of all of the goods in respect of which it is registered or of some only of those goods.

Assignability of registered trade marks.

30. An unregistered trade mark shall be assignable and transmissible whether in connection with the goodwill of a business or not :

Assignability of unregistered trade marks.

Provided that, except in connection with the goodwill of a business, assignment or transmission shall be permissible only if—

(*a*) at the time of assignment or transmission of the unregistered trade mark it is used in the same business as a registered trade mark, and

(*b*) the registered trade mark is assigned or transmitted at the same time and to the same person as the unregistered trade mark, and

(*c*) the unregistered trade mark relates to goods in respect of which the registered trade mark is assigned or transmitted.

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that his personal supervision was employed in the manufacture and as such it would be unassignable. But on the other hand, the usage of trade may be such that no such inference would be drawn from the use of a trade-mark which contains a person's name and what all the purchasers would reasonably suppose is that goods bearing a trade-mark belong to a certain standard or quality or are made in a certain manner or after a certain formula, by persons carrying on the same business, that formerly was conducted by the person whose name is in the trade-mark and in such cases the assignment of the trade-mark would not be invalid. 22 I.C. 372=40 Cal. 814.

GOOD WILL, TRANSFER OF.—Good-will is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old established business from a new business at its first start. A transferee of good will is entitled to use the name in which the business was carried on and to represent himself as carrying on that business. 27 I.C. 483=19 C.W.N. 1. (*See also* S. 29, *infra*).

SALE OF BUSINESS BY STATE—PURCHASER —LIMITATIONS.—Appellant, who was a cigar manufacturer, prepared and sold cigars under a particular trade-mark and trade name. On the 6th October, 1917, the United States Trading with the Enemy Act became law. Under this Act the American Alien Property Custodian took possession of the appellant's factory and business in Manila and sold it to the respondent firm, including in the sale all the stock and the good will, trade-name and trade-marks of the appellant's business. At the conclusion of the war the appellant, who had in fact long before become a Belgian national, was cleared of enemy character by the United States Government, and the proceeds of sale of his Manila property and of other property which had been sequestrated, were handed back to him. He then filed an action against respondent on the ground that the assignment by the American Custodian did not affect rights outside the Phillippine Islands and that at the sale of cigars under the names and marks in question would lead the public in China to think that they were purchasing the appellant's goods: *Held*, that the assignment by the Custodian, although confined, so far as property was concerned, to property within the Phillippine Islands, not the less purported to include the business as a going concern and the goodwill, trade name and trade-marks thereof of the appellant's company doing business in the Phillippine Islands under the name of particular trade. This assignment could not transfer the title to trade-marks or trade names in China but it could enable the respondents, as between themselves and the appellant, to say that they were not passing off goods under a trade name to which they had no title, so long as they abstained from representing the goods as those of the appellant and that, though the respondents may have the right to make use of the names and marks in question, so long as they are descriptive of a kind and quality of cigar, it does not follow that the respondents have any right to represent the cigars as those guaranteed by the appellant or to print his signature as stating this, 107 I.C. 352=47 C.L.J. 263=30 Bom.L.R. 753=1928 P.C. 83 (P.C.).

Sec. 29.—This section permits of the assignment or transmission of a registered trade-mark for the whole or part of the goods.

Sec. 30.—This section provides for the assignment or transmission under certain conditions of unregistered trade-marks used

Restrictions on assignment or transmission where multiple exclusive rights would be created.

31. (1) Notwithstanding anything in sections 29 and 30, a trade mark shall not be assignable or transmissible in a case in which as a result of the assignment or transmission there would in the circumstances subsist, whether under this Act or any other law, exclusive rights in more than one of the persons concerned to the use, in relation to the same goods or description of goods, of trade marks nearly resembling each other or of identical trade marks, if, having regard to the similarity of the goods and of the trade marks the use of the trade marks in exercise of those rights would be likely to deceive or cause confusion :

Provided that an assignment or transmission shall not be deemed to be invalid under this sub-section if the exclusive rights subsisting as a result thereof in the persons concerned respectively are, having regard to limitations imposed thereon, such as not to be exercisable by two or more of those persons in relation to goods to be sold, or otherwise traded in, within British India (otherwise than for export therefrom), or in relation to goods to be exported to the same market outside British India.

(2) The proprietor of a registered trade mark who proposes to assign it may submit to the Registrar in the prescribed manner a statement of case setting out the circumstances and the Registrar may issue to him a certificate stating whether, having regard to the similarity of the goods and of the trade marks referred to in the case, the proposed assignment would or would not be invalid under sub-section (1), and a certificate so issued shall, subject to appeal and unless it is shown that the certificate was obtained by fraud or misrepresentation, be conclusive as to the validity or invalidity under sub-section (1) of the assignment in so far as such validity or invalidity depends upon the facts set out in the case, but, as regards a certificate in favour of validity, only if application for the registration under section 35 of the title of the person becoming entitled is made within six months from the date on which the certificate is issued.

Restrictions on assignment or transmission when exclusive rights would be created in different parts of British India.

32. Notwithstanding anything in sections 29 and 30, a trade mark shall not be assignable or transmissible in a case in which as a result of the assignment or transmission there would in the circumstances subsist, whether under this Act or any other law, an exclusive right in one of the persons concerned to the use of the trade mark limited to use in relation to goods to be sold, or otherwise traded in, in any place in British India and an exclusive right in another of these persons to the use of a trade mark nearly resembling the first-mentioned trade mark or of an identical trade mark in relation to the same goods or description of goods limited to use in relation to goods to be sold, or otherwise traded in, in any other place in British India :

Provided that in any such case, on application in the prescribed manner by the proprietor of a trade mark who proposes to assign it, or by a person who claims that a registered trade mark has been transmitted to him or to a predecessor in title of his since the commencement of this Act, the Registrar, if he is satisfied that in all the circumstances the use of the trade mark in exercise of the said rights would not be contrary to the public interest, may approve the assignment or transmission, and an assignment or transmission so approved shall not, unless it is shown that the

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in connexion with a registered mark.

Sec. 31.—Under this section assignments and transmissions which create an exclusive right to use the same mark in relation to the same goods in more than one person are prohibited.

Sec. 32.—This section prohibits assignments or transmissions to more than one person of the same or resembling marks in respect of the same goods in separate parts of British India, unless the Registrar is satisfied that the use of the marks in exercise of those rights would not be contrary to the public interest.

approval was obtained by fraud or misrepresentation, be deemed to be invalid under this section or section 31 if application for the registration under section 35 of the title of the person becoming entitled is made within six months from the date on which the approval is given or, in the case of a transmission, was made before that date.

Conditions for assignment otherwise than in connection with the goodwill of a business.

33. Where an assignment in respect of any goods of a trade mark which is at the time of the assignment used in a business in those goods, is made after the commencement of this Act otherwise than in connection with the goodwill of that business, the assignment shall not take effect unless the assignee, not later than the expiration of six months from the date on which the assignment is made or within such extended period, if any, as the Registrar may allow, applies to the Registrar for directions with respect to the advertisement of the assignment, and advertises it in such form and manner and within such period as the Registrar may direct.

Conditions for assignment and transmission of certification trade marks and associated trade marks.

34. (1) A certification trade mark shall not be assignable or transmissible otherwise than with the consent of the Central Government, for which application shall be made in writing in the prescribed manner through the Registrar.

(2) Associated trade marks shall be assignable and transmissible only as a whole and not separately.

Registration of assignments and transmissions.

35. (1) Where a person becomes entitled by assignment or transmission to a registered trade mark, he shall apply in the prescribed manner to the Registrar to register his title, and the Registrar shall on receipt of the application and on proof of title to his satisfaction, register him as the proprietor of the trade mark in respect of the goods in respect of which the assignment or transmission has effect, and shall cause particulars of the assignment or transmission to be entered on the register.

(2) Except for the purposes of an appeal against a decision of the Registrar under sub-section (1) or of an application under section 46, a document or instrument in respect of which no entry has been made in the register in accordance with sub-section (1) shall not be admitted in evidence before any tribunal in proof of the title to a trade mark unless the tribunal otherwise directs.

CHAPTER VI.

USE OF TRADE MARKS AND REGISTERED USERS.

Proposed use of trade mark by company to be formed.

36. (1) No application for the registration of a trade mark in respect of any goods shall be refused, nor shall permission for such registration be withheld, on the ground only that it appears that the applicant does not use or propose to use the trade mark, if the Registrar is satisfied that a company is about to be formed and registered under the Indian Companies Act, 1913, and that the applicant intends to assign the trade mark to that company with a view to the use thereof in relation to those goods by the company.

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Sec. 33.—This section empowers the Registrar, in cases of assignment otherwise than in connexion with the goodwill of a business to direct the assignee to advertise the assignment so that the fullest publicity may be given to the transfer. (*See also* 19 C.W.N. 1.)

Sec. 34.—This section requires that the consent of the Central Government shall be obtained to the assignment or transmission of a certification trade-mark, and provides that associated trade-marks are assignable and transmissible only as a whole.

Sec. 35.—This section prescribes the procedure for the registration of the title of a person to the assignments and transmissions of registered trade-marks.

Sec. 36.—The provisions of this section enable trade-mark owners to register their marks for use by a company which is about to be formed.

(2) The tribunal may, in a case to which sub-section (1) applies, require the applicant to give security for the costs of any proceedings relative to any opposition or appeal, and in default of such security being duly given may treat the application as abandoned.

(3) Where in a case to which sub section (1) applies, a trade mark in respect of any goods is registered in the name of an applicant who relies on intention to assign to a company, then, unless within such period as may be prescribed, or within such further period not exceeding six months as the Registrar may, on application being made to him in the prescribed manner, allow, the company has been registered as the proprietor of the trade mark in respect of those goods, the registration shall cease to have effect in respect thereof at the expiration of that period, and the Registrar shall amend the register accordingly.

Removal from register and imposition of limitations on ground of non-use.

37. (1) Subject to the provisions of section 38, a registered trade mark may be taken off the register in respect of any of the goods in respect of which it is registered on application in the prescribed manner by any person aggrieved to a High Court or to the Registrar, on the ground either—

(*a*) that the trade mark was registered without any *bona fide* intention on the part of the applicant for registration that it should be used in relation to those goods by him, or in a case to which the provisions of section 36 apply, by the company concerned, and that there has in fact been no *bona fide* use of the trade mark in relation to those goods by any proprietor thereof for the time being up to a date one month before the date of the application; or

(*b*) that up to a date one month before the date of the application, a continuous period of five years or longer elapsed during which the trade mark was registered and during which there was no *bona fide* use thereof in relation to those goods by any proprietor thereof for the time being :

Provided that, except where the applicant has been permitted under sub-section (2) of section 10 to register an identical or nearly resembling trade mark in

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NOTES.

Sec. 37.—This section provides that unused trade-marks may be removed from the Register of Trade-Marks as also the marks which have not been used for five years in a particular area or market in British India.

ABANDONMENT OF TRADE-MARK — LAW BEFORE PASSING OF THIS ACT.—No particular length of time is necessary for abandonment. If a trade drops out of the use of a party and another gains the reputation in the trade for goods made under the particular name, and his name is associated with the mark and the mark associated with his name, so that all who deal in the goods consider that when they see the mark they see the goods made by the plaintiff, then the original position of the competitor using the same mark has practically disappeared. 1939 Rang.L.R. 18=1939 Rang. 98.

FRAUDULENT USER OF ABANDONED TRADE-MARK OF ANOTHER.—Even if an owner of a trade-mark has abandoned or practically abandoned his rights to the trade-mark, it does not give a person any exclusive right thereto simply because he was perhaps the first to rush into the market with an imitation of that trade-mark. Where a person by imitating the trade-mark of others has caused his goods to pass as those of others, be cannot be heard to say that he alone has a monopoly to imitate and deceive people. Even if he succeeds in proving that he was the first in the market with an imitation, and maintains that having established a reputation on that imitation he had a right to prevent others from taking advantage of his exertions, he cannot be given any protection in a Court of law. Even if user be established extending over a considerable period, it does not follow that a title to the trade-mark is made out; for, if the user was fraudulent in its inception and is still calculated to deceive, the user gives no right. 173 I.C. 930 =1938 Sind 38. Before the plaintiff succeeds in his suit for infringement of his trade-mark he must prove a property in the trade-mark. It may be his property because he was the originator of it or because he purchased it or because, though not the originator of the mark, he has property in it, even though he has copied it from another, because that other has abandoned it and he has independently of this fortuitous circumstance, built up a trade and reputation on the merits of his goods. Where the trade-mark is proved a copy of a Japanese mark, the plaintiffs must show that the Japanese owners of the mark have abandoned it. I.L.R. (1940) Kar. 380=1940 Sind 83; *see also* 1938 Sind 38.

respect of the goods in question or where the tribunal is of opinion that he might properly be permitted so to register such a trade mark, the tribunal may refuse an application made under clause (*a*) or clause (*b*) in relation to any goods, if it is shown that there has been, before the relevant date or during the relevant period, as the case may be, *bona fide* use of the trade mark by any proprietor thereof for the time being in relation to goods of the same description, being goods in respect of which the trade mark is registered.

(2) Where in relation to any goods in respect of which a trade mark is registered—

(*a*) the circumstances referred to in clause (*b*) of sub-section (1) are shown to exist so far as regards non-use of the trade mark in relation to goods to be sold, or otherwise traded in, in a particular place in British India (otherwise than for export from British India), or in relation to goods to be exported to a particular market outside British India, and

(*b*) a person has been permitted under sub-section (2) of section 10 to register an identical or nearly resembling trade mark in respect of those goods under a registration extending to use in relation to goods to be so sold, or otherwise traded in, or in relation to goods to be so exported, or the tribunal is of opinion that he might properly be permitted so to register such a trade mark,

on application by that person in the prescribed manner to a High Court or to the Registrar, the tribunal may impose on the registration of the first-mentioned trade mark such limitations as it thinks proper for securing that that registration shall cease to extend to such use.

(3) An applicant shall not be entitled to rely for the purpose of clause (*b*) of sub-section (1) or of sub-section (2) on any non-use of a trade mark which is shown to have been due to special circumstances in the trade and not to any intention to abandon or not to use the trade mark in relation to the goods to which the application relates.

Defensive registration of well known trade marks.

38. (1) Where a trade mark consisting of any invented word has become so well-known as respects any goods in relation to which it is registered and has been used, that the use thereof in relation to other goods would be likely to be taken as indicating a connection in the course of trade between those goods and a person entitled to use the trade mark in relation to the first-mentioned goods, then, notwithstanding that the proprietor registered in respect of the first-mentioned goods does not use or propose to use the trade mark in relation to those other goods and notwithstanding anything in section 37, the trade mark may on application in the prescribed manner by such proprietor be registered in his name in respect of those other goods as a defensive trade mark and, while so registered, shall not be liable to be taken off the register in respect of those goods under the said section.

(2) The registered proprietor of a trade mark may apply for the registration thereof in respect of any goods as a defensive trade mark notwithstanding that it is already registered in his name in respect of those goods otherwise than as a defensive trade mark, or may apply for the registration thereof in respect of any goods otherwise than as a defensive trade mark notwithstanding that it is already registered in his name in respect of those goods as a defensive trade mark, in lieu in each case of the existing registration.

(3) A trade mark registered as a defensive trade mark and that trade mark as otherwise registered in the name of the same proprietor shall, notwithstanding that the respective registrations are in respect of different goods, be deemed to be, and shall be registered as, associated trade marks.

(4) On application in the prescribed manner by any person aggrieved to a High Court or to the Registrar, the registration of a trade mark as a defensive trade

NOTES.

Sec. 38.—This section provides for the registration of well-known trade-marks as defensive trade-marks subject to safeguards which are designed to protect the interest of the general body of traders.

mark may be cancelled on the ground that the requirements of sub-section (1) are no longer satisfied in respect of any goods in relation to which the trade mark is registered in the name of the same proprietor otherwise than as a defensive trade mark, or may be cancelled as respects any goods in relation to which it is registered as a defensive trade mark on the ground that there is no longer any likelihood that the use of the trade mark in relation to those goods would be taken as giving the indication mentioned in sub-section (1).

(5) The Registrar may at any time cancel the registration as a defensive trade mark of a trade mark of which there is no longer any registration in the name of the same proprietor otherwise than as a defensive trade mark.

(6) Except as otherwise expressly provided in this section, the provisions of this Act shall apply in respect of the registration of trade marks as defensive trade marks and of trade marks so registered as they apply in other cases.

Registered users.

39. (1) A person other than the proprietor of a trade mark may be registered as a registered user thereof in respect of all or any of the goods in respect of which it is registered (otherwise than as a defensive trade mark) and either with or without conditions or restrictions.

(2) The permitted use of a trade mark shall be deemed to be use by the proprietor thereof, and shall be deemed not to be use by a person other than the proprietor, for any purpose for which such use is material under this Act or any other law.

Power of registered user to take proceedings against infringement.

40. (1) Subject to any agreement subsisting between the parties, a registered user of a trade mark shall be entitled to call upon the proprietor thereof to take proceedings to prevent infringement thereof, and if the proprietor refuses or neglects to do so within three months after being so called upon, the registered user may institute proceedings for infringement in his own name as if he were the proprietor, making the proprietor a defendant.

(2) Notwithstanding anything contained in any other law, a proprietor so added as defendant shall not be liable for any costs unless he enters an appearance and takes part in the proceedings.

Application for registration as registered user.

41. (1) Where it is proposed that a person should be registered as a registered user of a trade mark, the proprietor and the proposed registered user shall make application in writing to the Registrar in the prescribed manner accompanied by an affidavit made by the proprietor, or by some person authorised to the satisfaction of the Registrar to act on his behalf,—

(*a*) giving particulars of the relationship, existing or proposed, between the proprietor and the proposed registered user, including particulars showing the degree of control by the proprietor over the permitted use which their relationship will confer and whether it is a term of their relationship that the proposed registered user shall be the sole registered user or that there shall be any other restriction as to persons for whose registration as registered users application may by made ;

(*b*) stating the goods in respect of which registration is proposed ;

(*c*) stating any conditions or restrictions proposed with respect to the characteristics of the goods, to the mode or place of permitted use, or to any other matter ;

(*d*) stating whether the permitted use is to be for a period or without limit of period, and, if for a period, the duration thereof ;

NOTES.

Sec. 39.—Under this section trade-mark owners who may not wish to assign or transmit their marks may appoint other persons as registered users of their trade-marks.

Sec. 40.—This section empowers a registered user of a trade-mark to institute proceedings for infringement if the proprietor thereof refuses or neglects to do so.

Sec. 41.—This section lays down the procedure for the registration of the registered user of a trade-mark.

and by such further documents, information or evidence as may be required by the Registrar or as may be prescribed.

(2) When the requirements of sub-section (1) have been complied with, if the Registrar is satisfied that in all the circumstances the use of the trade mark in respect of the proposed goods or any of them by the proposed registered user subject to any conditions or restrictions which the Registrar may think proper, would not be contrary to the public interest, the Registrar may register, subject as aforesaid, the proposed registered user as a registered user in respect of the goods as to which he is so satisfied.

(3) The Registrar shall refuse an application under this section if it appears to him that the grant thereof would tend to facilitate trafficking in a trade mark.

(4) The Registrar shall, if so requested by an applicant, take steps for securing that information given for the purposes of an application under this section (other than matter entered in the register) is not disclosed to rivals in trade.

(5) The Registrar shall issue notice in the prescribed manner—

(*a*) of the registration of a person as a registered user, to any other registered user of the trade mark ;

(*b*) of an application under section 42, to the registered proprietor, and each registered user, (not being the applicant) of the trade mark.

Power to registrar to vary or cancel registration as registered user.

42. Without prejudice to the provisions of section 46, the registration of a person as a registered user—

(*a*) may be varied by the Registrar as regards the goods in respect of which, or any conditions or restrictions subject to which, it has effect, on the application in writing in the prescribed manner of the registered proprietor of the trade mark ;

(*b*) may be cancelled by the Registrar on the application in writing in the prescribed manner of the registered proprietor or of the registered user or of any other registered user of the trade mark ;

(*c*) may be cancelled by the Registrar on the application in writing in the prescribed manner of any person on any of the following grounds, namely :—

(i) that the registered user has used the trade mark otherwise than by way of the permitted use, or in such a way as to cause or to be likely to cause, deception or confusion ;

(ii) that the proprietor or the registered user misrepresented, or failed to disclose, some fact material to the application for the registration, or that the circumstances have materially changed since the date of the registration ;

(iii) that the registration ought not to have been effected having regard to rights vested in the applicant by virtue of a contract in the performance of which he is interested ;

(*d*) may be cancelled by the Registrar in respect of any goods in relation to which the trade mark is no longer registered.

Registered user not to have right of assignment or transmission.

43. Nothing in this Act shall confer on a registered user of a trade mark any assignable or transmissible right to the use thereof.

44. (1) Where under the provisions of this Act use of a registered trade mark

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NOTES.

Sec. 42.—This section defines the power of the Registrar of trade-marks in the matter of cancellation of registration or the variation of the conditions on which a person is allowed as a registered user.

Sec. 44.—This section safeguards the interests of traders who for business reasons may have used a trade-mark differing slightly from the trade-mark as registered.

Use of one of associated or substantially identical trade marks equivalent to use of another.

is required to be proved for any purpose, the tribunal may, if and so far as it shall think right, accept use of a registered associated trade mark, or of the trade mark with additions or alterations not substantially affecting its identity, as an equivalent for the use required to be proved.

(2) The use of the whole of a registered trade mark shall for the purposes of this Act be deemed to be also a use of any trade mark being a part thereof and registered in accordance with sub-section (1) of section 11 in the name of the same proprietor.

Use of trade mark for export trade, and use when form of trade connection changes.

45. (1) The application in British India of a trade mark to goods to be exported from British India, and any other act done in British India in relation to goods to be so exported which, if done in relation to goods to be sold or otherwise traded in within British India would constitute use of a trade mark therein, shall be deemed to constitute use of the trade mark in relation to those goods for any purpose for which such use is material under this Act or any other law.

(2) The use of a registered trade mark in relation to goods between which and the person using the mark any form of connection in the course of trade subsists shall not be deemed to be likely to cause deception or confusion on the ground only that the mark has been or is used in relation to goods between which and the person using the mark or any predecessor in his business different form of connection in the course of trade subsisted or subsists.

CHAPTER VII.

RECTIFICATION AND CORRECTION OF THE REGISTER.

Power to cancel or vary registration and to rectify the register.

46. (1) On application in the prescribed manner by any person aggrieved to a High Court or to the Registrar, the tribunal may make such order as it may think fit for cancelling or varying the registration of a trade mark on the ground of any contravention of, or failure to observe a condition entered on the register in relation thereto.

(2) Any person aggrieved by the absence or omission from the register of any entry, or by any entry made in the register without sufficient cause, or by any entry wrongly remaining on the register, or by any error or defect in any entry in the register, may apply in the prescribed manner to a High Court or to the Registrar, and the tribunal may make such order for making, expunging or varying the entry as it may think fit.

(3) The tribunal may in any proceeding under this section decide any question that it may be necessary or expedient to decide in connection with the rectification of the register.

(4) A High Court or the Registrar, of its or his own motion, may, after giving notice in the prescribed manner to the parties concerned and after giving them an opportunity of being heard, make any order referred to in sub-section (1) or sub-section (2).

(5) Any order of the Court rectifying the register shall direct that notice of the rectification shall be served upon the registrar in the prescribed manner who shall upon receipt of such notice rectify the register accordingly.

NOTES.

Sec. 45.—This section permits of the use of a trade-mark acquired in India in relation to goods for export, and protects the use of a trade-mark when the user's form of trade connexion changes.

Sec. 46.—This section empowers the Registrar of a High Court to cancel or vary the registration of a trade-mark under certain circumstances.

Correction of register.

47. (1) The Registrar may, on application made in the prescribed manner by the registered proprietor,—

(*a*) correct any error in the name, address or description of the registered proprietor of a trade mark ;

(*b*) enter any change in the name, address or description of the person who is registered as proprietor of a trade mark ;

(*c*) cancel the entry of a trade mark on the register ;

(*d*) strike out any goods or classes of goods from those in respect of which a trade mark is registered ;

(*e*) enter a disclaimer or memorandum relating to a trade mark which does not in any way extend the rights given by the existing registration of the trade mark.

(2) The Registrar may, on application made in the prescribed manner by a registered user of a trade mark, correct any error, or enter any change, in the name, address or description of the registered user.

Alteration of registered trade mark.

48. (1) The registered proprietor of a trade mark may apply in the prescribed manner to the Registrar for leave to add to or alter the trade mark in any manner not substantially affecting the identity thereof, and the Registrar may refuse leave or may grant it on such terms and subject to such limitations as he may think fit.

(2) The Registrar may cause an application under this section to be advertised in the prescribed manner in any case where it appears to him that it is expedient so to do, and where he does so, if within the prescribed time from the date of the advertisement any person gives notice to the Registrar in the prescribed manner of opposition to the application, the Registrar shall, after hearing the parties if so required, decide the matter.

(3) Where leave is granted under this section, the trade mark as altered shall be advertised in the prescribed manner, unless the application has already been advertised under sub-section (2).

Adaptation of entries in register to amended or substituted classification of goods.

49. (1) The Registrar shall not, in exercise of any power conferred on him under clause (*a*) of sub-section (2) of section 84, make any amendment of the register which would have the effect of adding any goods or classes of goods to those in respect of which a trade mark is registered (whether in one or more classes) immediately before the amendment is to be made, or of antedating the registration of a trade mark in respect of any goods :

Provided that this sub-section shall not apply when the Registrar is satisfied that compliance therewith would involve undue complexity and that the addition or antedating, as the case may be, would not affect any substantial quantity of goods and would not substantially prejudice the rights of any person.

(2) A proposal so to amend the register shall be notified to the registered proprietor of the trade mark affected and advertised in the prescribed manner, and may be opposed before the Registrar by any person aggrieved on the ground that the proposed amendment contravenes the provisions of sub-section (1).

CHAPTER VIII.

CERTIFICATION TRADE MARKS.

50. Subject to the provisions of this Chapter, the other provisions of this Act

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NOTES.

Sec. 47.—Under this section the Registrar may at the request of the registered proprietor of a trade-mark make necessary corrections in the Register of Trade-Marks.

Sec. 48.—This section empowers the Registrar to alter a registered trade-mark at the request of a proprietor thereof.

Sec. 49.—This section provides that no amendment is to be made in the Register of Trade-Marks which may have the effect of adding any goods to those in respect of which a trade-mark is registered or of antedating the registration.

except sections 6, 21, 22, 31, 32, 33, 36, 37, 38, 39, 40, 41, 42 and 43 and sub-section (2) of section 45 shall apply to certification trade marks as they apply to trade marks.

Provisions of this Act applicable to certification trade marks.

51. A mark shall not be registrable as a certification trade mark in the name of a person who carries on a trade in goods of the kind certified.

Certification trade mark not to be registered in name of person trading in goods certified thereby.

52. In determining whether a mark is adapted to distinguish in accordance with the provisions of clause (*b*) of sub-section (1) of section 2, the tribunal may have regard to the extent to which—

Determination whether a mark is a certification trade mark.

(*a*) the mark is inherently so adapted to distinguish in relation to the goods in question ; and

(*b*) by reason of the use of the mark or of any other circumstances, the mark is in fact so adapted to distinguish in relation to the goods in question.

53. (1) An application for the registration of a mark as a certification trade mark shall be made to the Registrar [1][or the Bombay Registrar, as the case may be] in writing in the prescribed manner by the person proposed to be registered as the proprietor thereof, and accompanied by a draft of the regulations to be deposited under section 56.

Application for registration.

(2) The provisions of section 14 shall have effect in relation to an application under this section as they have effect in relation to an application under the said section, except that for references therein to acceptance of an application there shall be substituted references to authorisation to proceed with the application.

(3) In dealing under the said provisions with an application under this section, the tribunal shall have regard to the like considerations, so far as relevant, as if the application were an application under section 14 and to any other considerations (not being matters within the competence of the Central Government under section 54) relevant to applications under this section, including the desirability of securing that a certification trade mark shall comprise some indication that it is a certification trade mark.

54. When authorisation to proceed with an application under section 53 has been given, the Registrar shall forward the application to the Central Government who shall consider the application with regard to the following matters, namely :—

Consideration of application for registration by Central Government.

(*a*) whether the applicant is competent to certify the goods in respect of which the mark is to be registered ;

(*b*) whether the draft of the regulations to be deposited under section 56 is satisfactory ;

(*c*) whether in all the circumstances the registration applied for would be to the public advantage ;

and may either—

(i) direct that the application shall not be accepted ; or

LEG. REF.

[1] Inserted by Act XXVII of 1941.

NOTES.

Sec. 51.—This section provides that a certification trade-mark shall not be registered in the name of a person who carries on a trade in goods of the kind certified.

Sec. 52.—Provides criterion in determining whether a mark is a certification trade-mark or not.

Sec. 53.—This section embodies provisions for consideration of an application for the registration of a mark as a certification trade-mark by the Registrar.

Sec. 54.—This section provides for consideration of an application for the registration of a mark as certification trade-mark by the Central Government after permission to proceed with that application under S. 53 has been accorded by the Registrar of Trade-marks.

(ii) direct the Registrar to accept the application and approve the said draft of the regulations either without modification and unconditionally or subject to any conditions or limitations, or to any amendments or modification of the application or of the regulations, which it thinks requisite having regard to any of the said matters ;

but, except in the case of a direction for acceptance and approval without modification and unconditionally, the Central Government shall not decide the matter without giving to the applicant an opportunity of being heard :

Provided that the Central Government may, at the request of the applicant made with the concurrence of the Registrar, consider the application with regard to any of the said matters before authorisation to proceed with the application has been given, so however that the Central Government shall be at liberty, to reconsider any matter on which it has given a decision under this proviso if any amendment or modification is thereafter made in the application or in the draft of the regulations.

Opposition to registration.

55. (1) When an application has been accepted, the Registrar shall, as soon as may be thereafter, cause the application as accepted to be advertised in the prescribed manner, and the provisions of section 15 shall have effect in relation to the registration of the mark as if the application had been an application under section 14 :

Provided that, in deciding under the said provisions the tribunal shall have regard only to the considerations referred to in sub-section (3) of section 53, and a decision under the said provisions in favour of the applicant shall be conditional on the determination in his favour by the Central Government under sub-section (2) of this section of any opposition relating to any of the matters referred to in section 54.

(2) When notice of opposition is given relating to any of the matters referred to in section 54, the Central Government shall, after hearing the parties, if so required, and considering any evidence, decide whether, and subject to what conditions or limitations, or amendments or modifications, if any, of the application or of the regulations to be deposited under section 56, registration is, having regard to those matters, to be permitted.

Deposit of regulations governing the use of a certification trade mark.

56. (1) There shall be deposited at the Patent Office in respect of every mark registered as a certification trade mark regulations approved by the Central Government for governing the use thereof, which shall include provisions as to the cases in which the proprietor is to certify goods and to authorise the use of the certification trade mark, and may contain any other provisions which the Central Government may by general or special order require or permit to be inserted therein (including provisions conferring a right of appeal to the Registrar against any refusal of the proprietor to certify goods or to authorise the use of the certification trade mark in accordance with the regulations) ; and regulations so deposited shall be open to inspection in like manner as the register.

(2) The regulations so deposited may on the application of the registered proprietor be altered by the Registrar with the consent of the Central Government.

(3) The Central Government may cause such application to be advertised in any case where it appears to it expedient so to do, and where it does so, if within the time specified in the advertisement any person gives notice of opposition to the application, the Central Government shall not decide the matter without giving the parties an opportunity of being heard.

NOTES.

Sec. 55.—This section lays down the procedure to be followed after an application for the registration of a mark as certification trade-mark has been accepted by the Central Government.

Sec. 56.—This section requires the deposit of regulations approved by the Central Government for governing the use of each certification trade mark which is registered.

Right conferred by registration.

57. Subject to the provisions of sections 25, 26 and 58, the registration of a person as proprietor of a certification trade mark in respect of any goods shall, if valid, give to that person the exclusive right to the use of the certification trade mark in relation to those goods, and, without prejudice to the generality of the foregoing provision, that right shall be deemed to be infringed by any person who, not being the proprietor of the mark or a person authorised by him in that behalf under the regulations deposited under section 56, using it in accordance therewith, uses a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion, in the course of trade, in relation to any goods in respect of which it is registered, and in such manner as to render the use of the mark likely to be taken either—

(*a*) as being use as a certification trade mark ; or

(*b*) to import a reference to some person having the right either as proprietor, or by his authorisation under the said regulations, to use the mark, or to goods certified by the proprietor.

No infringement in certain circumstances.

58. (1) The right to the use of a certification trade mark given under section 57 by registration shall be subject to any conditions or limitations entered on the register, and shall not be deemed to be infringed by the use of any such mark as aforesaid in any mode, in relation to goods to be sold or otherwise traded in any place, in relation to goods to be exported to any market, or in any other circumstances, to which having regard to any such limitations, the registration does not extend.

(2) The said right to the use of a certification trade mark shall not be deemed to be infringed by the use of any such mark as aforesaid by any person—

(*a*) in relation to goods certified by the proprietor of the mark if, as to those goods or a bulk of which they form part, the proprietor or another in accordance with his authorisation under the relevant regulations has applied the mark and has not subsequently removed or obliterated it, or the proprietor has at any time expressly or impliedly consented to the use of the mark, or

(*b*) in relation to goods adapted to form part of, or to be accessory to, other goods, in relation to which the mark has been used without infringement of the right given as aforesaid or might for the time being be so used, if the use of the mark is reasonably necessary in order to indicate that the goods are so adapted and neither the purpose nor the effect of the use of the mark is to indicate otherwise than in accordance with the fact that the goods are certified by the proprietor :

Provided that clause (*a*) shall not apply to the case of use consisting of the application of any such mark as aforesaid to any goods, notwithstanding that they are such goods as are mentioned in that clause if such application is contrary to the said regulations.

(3) Where a certification trade mark is one of two or more registered certification trade marks which are identical or nearly resemble each other, the use of any of those marks in exercise of the right to the use of that mark given by registration, shall not be deemed to be an infringement of the right so given to the use of any other of those marks.

Cancellation or varying of registration.

59. (1) The Central Government may, on the application in the prescribed manner of any person aggrieved or on the recommendation of the Registrar, and after giving the proprietor an opportunity of opposing the application or recom-

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NOTES.

Secs. 57 and 58.—These sections analogous to Cls. 21 and 22, respectively, define the rights conferred on an owner of a certification trade-mark by registration and lay down the conditions and limitations in which there will be no infringement of a certification trade-mark.

Sec. 59.—Under this section the Central Government is empowered on the report of

mendation, make such order as it thinks fit for expunging or varying any entry in the register relating to a certification trade mark, or for varying the deposited regulations, on any of the following grounds, namely :—

(*a*) that the proprietor is no longer competent, in the case of any of the goods in respect of which the mark is registered, to certify those goods ;

(*b*) that the proprietor has failed to observe any provision of the deposited regulations to be observed on his part ;

(*c*) that it is no longer to the public advantage that the mark should be registered ;

(*d*) that it is requisite for the public advantage that, if the mark remains registered, the regulations should be varied ;

and neither a High Court nor the Registrar shall have any jurisdiction to make an order under section 46 on any of those grounds.

(2) The Registrar shall rectify the register and the deposited regulations in such manner as may be requisite for giving effect to an order made under sub-section (1).

Costs not to be awarded in certain cases.

60. The Registrar shall have no power to award costs to or against any party on an appeal to him against a refusal of the proprietor of a certification trade mark to certify goods or to authorise the use of the mark.

Decisions of Central Government to be final.

61. Save as otherwise expressly provided in this Chapter, every decision of the Central Government under this Chapter shall be final.

CHAPTER IX.

SPECIAL PROVISIONS FOR TEXTILE GOODS.

Textile goods.

62. The Central Government shall prescribe classes of goods (in this Chapter referred to as textile goods) to the trade marks used in relation to which the provisions of this Chapter shall apply ; and subject to the said provisions, the other provisions of this Act shall apply to such trade marks as they apply to trade marks used in relation to other classes of goods.

Separate Trade Marks Registry at Bombay.

[1][63. (1) For the purpose of facilitating the registration of trade marks in respect of textile goods there shall be established at Bombay a separate Trade Marks Registry (in this Act referred to as the Bombay Registry) and a separate Register of Trade Marks (in this Act referred to as the Bombay register) shall be kept thereat wherein shall be entered in the manner provided by section 4, all registered trade marks which are under the provisions of this Chapter to be registered by the Bombay Registrar.

(2) Subject to the superintendence and direction of the Central Government, the Bombay register shall be kept under the control and management of an officer appointed by the Central Government who shall be called the Registrar of Textile Trade Marks at Bombay (in this Act referred to as the Bombay Registrar).

(3) In all proceedings under this Act in relation to trade marks, applications for the registration of which lie under the provisions of this Chapter to the Bombay Registrar, the Bombay Registrar shall exercise and discharge the

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LEG. REF.

[1] Sections 63 and 63-A substituted for old section 63 by Act XXVII of 1941.

NOTES.

any aggrieved person or on the recommendation of the Registrar to cancel or vary entries in the Register of Trade-Marks relating to certification trade-marks.

Sec. 60.—This section prohibits the Registrar from awarding costs in certain cases on an appeal relating to certification trade-marks.

Sec. 62.—Under this section the Central Government is empowered to specify the classes of textile goods to which the provisions on the subject will be applicable.

Sec. 63.—This section provides for the establishment at Bombay of a Textile Marks Registry Office and the maintenance in that Office of a record of marks falling under textile marks as also a list called the Refused Textile Trade-Marks List.

powers and functions of the Registrar to the exclusion of the Registrar, and, in interpreting the provisions of this Act in relation to any such proceedings or any such trade marks, references, except in sub-sections (1) and (2) of section 4 and this Chapter and section 85, to the Patent Office or the Trade Marks Registry shall be construed as references to the Bombay Registry, and references to the Registrar and to the register shall be construed as references to the Bombay Registrar and the Bombay register, respectively :

Provided that the Central Government may, for the purpose of resolving a conflict or preventing an overlap of jurisdiction between the Registrar and the Bombay Registrar, direct by which of the two any particular matter arising out of this Act or out of any proceeding thereunder shall be disposed of.

Jurisdiction of Bombav Registrar and Registrar in respect of trade marks used in relation to textile goods.

63A. (1) When the applicant for registration of a trade mark used or proposed to be used in relation to textile goods is a person having his principal place of business situated in any one of the following Provinces, namely, Madras Bombay, the Punjab, the Central Provinces and Berar, the North-West Frontier Province or Sind, ahe application shall lie only to the Bombay Registrar.

(2) When once an application for registration of a trade mark used in relation to textile goods has been made to the Registrar or the Bombay Registrar, no subsequent change in the location of the principal place of business of the applicant shall divest the Registrar or the Bombay Registrar, as the case may be, of any of his powers or functions under this Act in relation to such trade mark.]

Restrictions on registration of piece-goods.

64. In respect of textile goods being piece goods—

(*a*) no mark consisting of a line heading alone shall be registrable as a trade mark ;

(*b*) a line heading shall not be deemed to be adapted to distinguish ;

(*c*) the registration of a trade mark shall not give any exclusive right to the use of a line heading ;

(*d*) the registration of letters or numerals, or any combination thereof, shall be subject to such conditions and restrictions as may be prescribed.

Calcutta and Bombay Textile Marks Records and Refused Textile Marks Lists.

[1]['65. (1) The Registrar shall supply a copy of every entry in the register relating to trade marks registered in respect of textile goods to the Bombay Registrar, who shall maintain a permanent record of the copy so received which shall be called the Calcutta Textile Marks Record.

(2) The Bombay Registrar shall supply a copy of every entry in the Bombay register to the Registrar who shall maintain a permanent record of the copy so received which shall be called the Bombay Textile Marks Record.

(3) Trade marks in respect of textile goods of which registration has been refused shall be entered by the Registrar and the Bombay Registrar in separate lists which shall be called the Calcutta Refused Textile Marks Lists, and the Bombay Refused Textile Marks Lists, respectively ; a copy of the Calcutta List shall be kept at the Bombay registry and a copy of the Bombay List at the Trade Marks Registry at the Patent Office as permanent records.

(4) The Textile Marks Records and the Refused Textile Marks Lists shall at all convenient times be open to the inspection of the public, subject to such conditions and restrictions as may be prescribed.]

66. (1) The Central Government may in the prescribed manner constitute

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LEG. REF.

[1] Section 65 substituted by Act XXVII of 1941.

NOTES.

Sec. 64.—This section prescribes the restrictions that are imposed on the classes of marks which could be registered in respect of textile goods.

Sec. 65.—This section lays down the procedure for the registration of textile goods.

Sec. 66.—Under this section the Central Government is empowered to constitute one or more Advisory Committees of experts to assist them in the disposal of applications for registration of textile marks.

Advisory Committees.

one or more Advisory Committees of persons versed in the usages of the textile trade for the purpose of this section.

(2) The Registrar [1][and the Bombay] Registrar shall consult any such Committee with respect to any circumstances peculiar to the textile trade arising on an application to register a trade mark in respect of textile goods.

(3) The place of meeting and the conduct of business of such Committees shall be determined by rules made under this Act.

CHAPTER X.

OFFENCES AND RESTRAINT OF USE OF ROYAL ARMS AND STATE EMBLEMS.

Penalty for falsification of entries in register.

67. If any person makes or causes to be made, a false entry in the register, or a writing falsely purporting to be a copy of an entry in the register, or produces or tenders, or causes to be produced, or tendered, in evidence any such writing, knowing the entry or writing to be false, he shall be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

Penalty for falsely representing a trade mark as registered.

68. (1) From such date, not being earlier than one year from the commencement of this Act, as the Central Government may, by notification in the Official Gazette, appoint in this behalf, no person shall make any representation—

(*a*) with respect to a mark not being a registered trade mark, to the effect that it is a registered trade mark ; or

(*b*) with respect to a part of a registered trade mark not being a part separately registered as a trade mark, to the effect that it is separately registered as a trade mark ; or

(*c*) to the effect that a registered trade mark is registered in respect of any goods in respect of which it is not in fact registered ; or

(*d*) to the effect that the registration of a trade mark gives an exclusive right to the use thereof in any circumstances in which, having regard to limitations entered in the register, the registration does not in fact give that right.

(2) If any person contravenes any of the provisions of sub-section (1), he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

(3) For the purposes of this section, the use in British India in relation to a trade mark of the word "registered," or of any other expression referring whether expressly or impliedly to registration, shall be deemed to import a reference to registration in the register, except—

(*a*) where that word or other expression is used in direct association with other words delineated in characters at least as large as those in which that word or other expression is delineated and indicating that the reference to is registration as a trade mark under the law of a country outside British India, being a country under the law of which the registration referred to is in fact in force ; or

(*b*) where that other expression is of itself such as to indicate that the reference is to such registration as is mentioned in clause (*a*) ; or

(*c*) where that word is used in relation to a mark registered as a trade mark under the law of a country outside British India and in relation solely to goods to be exported to that Country.

Restraint of use of Royal Arms and State emblems.

69. If a person, without due authority, uses in connection with any trade, business, calling or profession—

LEG. REF.

[1] Substituted for the words "or the Deputy" by Act XXVII of 1941.

NOTES.

Sec. 67.—Under this section penalty is provided for falsification of entries in the register.

Sec. 68.—This section provides for penalty for falsely representing a trademark as regirtered mark.

Sec. 69.—Under this section any person aggrieved may move the Registrar or a Court to restrain a person from using Royal Arms, State Emblems, etc.

(*a*) the Royal Arms (or arms so closely resembling the same as to be calculated to deceive) in such manner as to be calculated to lead to the belief that he is duly authorised so to use the Royal Arms, or

(*b*) any device, emblem or title in such manner as to be calculated to lead to the belief that he is employed by, or supplies goods to, or is connected with, His Majesty's Government or the Central Government or any Provincial Government or any department of any such Government,

he may, at the suit of any person who is authorised to use such Arms or such device, emblem or title or of the Registrar, [1][or the Bombay Registrar] be restrained by injunction from continuing so to use the same.

CHAPTER XI.

MISCELLANEOUS.

Procedure before the Registrar.

70. In all proceedings under this Act before the Registrar—

(*a*) the Registrar shall have all the powers of a Civil Court for the purposes of receiving evidence, administering oaths, enforcing the attendance of witnesses, compelling the discovery and production of documents and issuing commissions for the examination of witnesses ;

(*b*) evidence shall be given by affidavit, provided that the Registrar may, if he thinks fit, take oral evidence in lieu of, or in addition to, such evidence by affidavit ;

(*c*) the Registrar shall not exercise any power vested in him by this Act or the rules made thereunder adversely to any party duly appearing before him without (if required in writing within the prescribed time so to do) giving such party an opportunity of being heard ;

(*d*) the Registrar may, save as otherwise expressly provided in this Act, and subject to any rules made in this behalf under section 84, make such orders as to costs as he considers reasonable, and any such order shall be executable as a decree of a Civil Court.

Procedure before Central Government.

71. In all proceedings under this Act before the Central Government, evidence shall be given by affidavit, provided that the Central Government may, if it thinks fit, take oral evidence in lieu of, or in addition to, such evidence by affidavit, and shall for that purpose have all the powers of a Civil Court referred to in clause (*a*) of section 70.

Procedure in certain cases of option to apply to a High Court or the Registrar.

72. Where under this Act an applicant has the option of making an application either to a High Court or to the Registrar,—

(*a*) if any suit or other proceedings concerning the trade mark in question is pending before a High Court or a District Court, the application shall be made to that High Court or, as the case may be, to the High Court within whose jurisdiction that District Court is situated ;

(*b*) if in any other case the application is made to the Registrar, the Registrar may, if he thinks fit, refer the application at any stage of the proceedings to a High Court.

Suits for infringement to be instituted before District Court

73. No suit for the infringement of a trade mark or otherwise relating to any right in a trade mark shall be instituted in any Court inferior to a District Court having jurisdiction to try the suit.

LEG. REF.

[1]Inserted by Act XXVII of 1941.

NOTES.

Sec. 70.—This section lays down the procedure in respect of the proceedings under the Act before the Registrar.

Sec. 71.—This section prescribes the procedure in respect of the proceedings under the Act before the Central Government.

Sec. 72.—This section indicates the procedure where an option is allowed to the applicant to make an application either to a High Court or the Registrar.

Sec. 73.—This section lays down that suits relating to rights in a trade-mark

74. (1) In any suit or other legal proceeding in which the relief sought includes alteration or rectification of the register, the Registrar shall have the right to appear and be heard, and shall appear if so directed by the tribunal.

Appearance of Registrar in proceedings involving rectification of register.

(2) Unless the tribunal otherwise directs, the Registrar may, in lieu of appearing, submit a statement in writing signed by him, giving such particulars as he thinks proper of the proceedings before him relating to the matter in issue, or of the grounds of any decision given by him affecting it, or of the practice of the Patent Office in like cases, or of other matters relevant to the issues and within his knowledge as Registrar, and such statement shall be evidence in the suit or other proceeding.

(3) The costs of the Registrar shall be in the discretion of the tribunal, but the Registrar shall not be ordered to pay the costs of any of the parties.

75. (1) A printed or written copy of any entry in the register, purporting to be certified by the Registrar and sealed with the seal of the Patent Office, shall be admitted in evidence in all Courts in British India and in all proceedings without further [1][proof or production] of the original.

Evidence of entries in register and things done by Registrar.

(2) A certificate purporting to be under the hand of the Registrar as to any entry, matter or thing that he is authorised by this Act or the rules to make or do shall be *prima facie* evidence of the entry having been made, and of the contents thereof, or of the matter or thing having been done or not done.

76. (1) Save as otherwise expressly provided in this Act, an appeal shall lie, within the period prescribed by the Central Government, from any decision of the Registrar [1][or the Bombay] Registrar under this Act or the rules made thereunder to the High Court having jurisdiction :

Appeals.

Provided that if any suit or other proceeding concerning the trade mark in question is pending before a High Court or a District Court, the appeal shall be made to that High Court or, as the case may be, to the High Court within whose jurisdiction that District Court is situated.

(2) In an appeal by an applicant for registration against a decision of the Registrar under section 13 or section 14 or section 15, it shall not be open, save with the express permission of the Court, to the Registrar or any party opposing the appeal to advance grounds other than those recorded in the said decision or advanced by the party in the proceedings before the Registrar, as the case may be ; and where any such additional grounds are advanced, the applicant for registration may, on giving notice in the prescribed manner, withdraw his application without being liable to pay the costs of the Registrar or the parties opposing his application.

(3) Subject to the provisions of this Act and of rules made thereunder, the provisions of the Code of Civil Procedure, 1908, shall apply to appeals before a High Court under this Act.

77. A High Court may make rules consistent with this Act as to the conduct and procedure of all proceedings under this Act before it.

Power to High Courts to make rules.

78. If in any legal proceeding in which the validity of the registration of a trade mark comes into question, a decision is given in favour of the proprietor of the trade mark, the tribunal

Certificate of validity.

LEG. REF.

[1] Substituted by Act XXVII of 1941.

NOTES.

should be instituted before a District Court.

Sec. 74.—This section provides for the appearance of the Registrar before the tribunal in proceedings involving rectification of the Register of Trade-Marks.

Sec. 76.—This section provides for appeals to High Courts from the decision of the Registrar.

Sec. 78.—This section enables the registered owner of a trade-mark to protect him-

may grant a certificate to that effect, and if such a certificate is granted, then in any subsequent legal proceeding in which the said validity comes into question, the said proprietor on obtaining a final order or judgment in his favour shall, unless the said final order or judgment for sufficient reason directs otherwise, be entitled to his full costs, charges and expenses as between legal practitioner and client.

Trade usage, etc., to be taken into consideration.

79. In any suit or other proceeding relating to a trade mark, the tribunal shall admit evidence of the usages of the trade concerned and of any relevant trade mark or get up legitimately used by other persons.

Agents.

80. Where by or under this Act any act, other than the making of an affidavits is required to be done by any person, the act may,, subject to prescribed conditions or in special cases with the consent of the Central Government, be done, in lieu of by that person himself, by a duly authorised agent, being either a legal practitioner or a person registered in the prescribed manner as a trade marks agent.

Fees.

81. There shall be paid in respect of applications and registration and other matters under this Act such fees as may be prescribed by the Central Government.

Crown to be bound.

82. The provisions of this Act shall be binding on the Crown.

Power to make reciprocal arrangements with other Governments.

83. If at any time after the expiry of six months from the commencement of this section it is made to appear to the Central Government that any Government outside British India has made satisfactory provision for the protection within its territories of trade marks in respect of which an application for registration has been made in British India, the Central Government may, by notification in the Official Gazette, make provision with regard to trade marks in respect of which an application for registration has been made within the territories of that Government to enable any person who has applied within such territories for registration of a trade mark or his legal representative or assignee to obtain registration of the trade mark in British India under this Act on his making an application for registration in British India within such period as may be fixed in this behalf by the notification as if an application for registration under this Act had been made in respect of that trade mark at the date at which the application for registration was made within the territories of that Government.

Power of Central Government to make rules.

84. (1) The Central Government may, subject to the condition of previous publication by notification in the Official Gazette, make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(*a*) prescribe the classification of goods for the purpose of the registration of trade marks, and empower the Registrar to amend the register so far as may be necessary for the purpose of adapting the entries therein to any amended or substituted classification which may be prescribed ;

(*b*) require the making of duplicates of trade marks and other documents connected therewith ;

NOTES.

self in any legal proceedings by the production of a certificate of validity regarding the registration of his trade-mark.

Sec. 79.—Under this section it is obligatory on the tribunal to admit evidence of the trade usage, etc., in trade-mark cases.

Sec. 80.—This section provides for the appointment of Agents under the Act.

Sec. 83.—The provisions of this section will enable India to enter into reciprocal arrangements with other countries for the mutual protection of trade-marks.

Sec. 84.—This section empowers the Central Government to make rules subject to previous publication for carrying out the purposes of the Act.

Under this section the Central Government is empowered to make provision enabling intending applicants for the registration of trade-marks to deposit their application at the Patent Office prior to the commencement of the Act.

(*c*) provide for securing and regulating the publication, sale or distribution of copies of trade marks and other documents connected therewith ;

(*d*) prescribe additional matters to be entered in the register ;

(*e*) prescribe the conditions and restrictions subject to which the register, the Textile Marks [1][Records] and the Refused Textile Marks [1][Lists] may be inspected ;

(*f*) prescribe the form of certificates of registration ;

(*g*) prescribe the conditions under which a trade mark removed from the register may be restored under sub-section (3) of section 18 ;

(*h*) prescribe the further documents, information or evidence to accompany an application under sub-section (1) of section 41 ;

(*i*) prescribe classes of goods as textile goods for the purposes of Chapter IX ;

(*j*) provide for the constitution of Advisory Committees referred to in section 66, and prescribe the places of meeting, and conduct of business at meetings, of such Committees,

(*k*) regulate the awarding of costs by the Registrar under section 70 ;

(*l*) prescribe the conditions subject to which an agent referred to in section 80 may act ;

(*m*) prescribe the fees to be paid under this Act ;

(*n*) provide for the establishment of branches of the Trade Marks Registry when expedient for facilitating the working of this Act, and authorise the preparation of copies of the register to be kept at such branch offices ;

(*o*) prescribe the manner in which, in proceedings under this Act before the Central Government or the Registrar, applications shall be made, notices given and matters advertised ;

(*p*) prescribe times or periods required by this Act to be prescribed ;

(*q*) provide, generally, for regulating the business of the Trade Marks Registry and of branches established under clause (*n*) [2][* * *] and for regulating all things by this Act placed under the direction or control of the Central Government or the Registrar.

[3][(*r*) make such provisions as are neceseary to ensure uniformity of practice between the Registrar and the Bombay Registrar in all matters arising out of registration of trade marks in respect of textile goods.]

Power to Central Government to make provision for applications for registration before the coming into force of the remaining provisions of Act.

85. The Central Government may, by notification in the official Gazette, provide such procedure as it considers expedient to enable intending applicants to deposit trade marks at the Patent Office before the coming into force of the remaining provisions of this Act :

Provided that the deposit of a trade mark under this section shall not affect any right, existing or accruing in the trade mark.

THE INDIAN TRADE UNIONS ACT (XVI OF 1926).

Year.	No.	Short title.	Amendment.
1926	XVI	The Indian Trade Unions Act.	Amended XV of 1828; Government of India (Adaptations of Indian Laws) Order, 1937.

N.B.—Throughout this Act, except as expressly provided, for "Local Government" the words 'appropriate Government' have been substituted by Government of India (Adaptations of Indian Laws) Order, 1937. 25*th March*, 1926.

LEG. REF.

[1] The words "records" and "lists" substituted for the words "record" and "list" by Act XXVII of 1941.

[2] The words "or under section 63" omitted by *ibid*.

[3] Sub-Cl. (*r*) added by *ibid*.

An Act to provide for the registration of Trade Unions and in certain respects to define the law relating to registered Trade Unions in British India.

WHEREAS it is expedient to provide for the registration of Trade Unions and in certain respects to define the law relating to registered Trade Unions in British India; It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called THE INDIAN TRADE UNIONS ACT, 1926.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette; appoint.

Definitions.

2. In this Act, the [1][appropriate Government] means, in relation to Trade Unions whose objects are not confined to one province, the Central Government, and in relation to other Trade Unions, the Provincial Government, and unless there is anything repugnant in the subject or context,—

(*a*) "executive" means the body, by whatever name called, to which the management of the affairs of a Trade Union is entrusted;

(*b*) "officer," in the case of a Trade Union, includes any member of the executive thereof, but does not include an auditor;

(*c*) "prescribed" means prescribed by regulations made under this Act;

(*d*) "registered office" means that office of a Trade Union which is registered under this Act as the head office thereof;

(*e*) "Registered Trade Union" means a Trade Union registered under this Act;

(*f*) "Registrar" means a Registrar of Trade Unions appointed by the [2][appropriate Government] under section 3, and "the Registrar", in relation to any Trade Union, means the Registrar appointed for the province in which the head or registered office, as the case may be, of the Trade Union is situated;

(*g*) "trade dispute" means any dispute between employers and workmen or between workmen and workmen, or between employers and employers which is connected with the employment or non-employment, or the terms of employment or the conditions of labour, of any person, and "workmen" means all persons employed in trade or industry whether or not in the employment of the employer with whom the trade dispute arises; and

(*h*) "Trade Union" means any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business, and includes any federation of two or more Trade Unions:

LEG. REF.

[1] Inserted in S. 2 by A.O., 1937.

[2] Substituted by A.O., 1937.

NOTES.

Sec. 2 (h): TRADE UNION AND PARTNERSHIP.—When several businessmen by an arrangement form themselves into a combination for the common purpose of enriching themselves by preventing the cutting of prices for which various rules were made, and besides, provision was made for the payment into a common pool and a sharing out of it for arbitration in case of disputes, etc., on a question whether it amounted to a partnership, it was *held*, that it was simply a case of a combination of various businesses *inter se* to benefit the members and it was a case of a combination and not a case of a partnership and that it fell within the definition of Trade Union. 190 I.C. 491=1940 N.L.J. 239=1940 Nag. 228.

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

Provided that this Act shall not affect—

(*i*) any agreement between partners as to their own business;

(*ii*) any agreement between an employer and those employed by him as to such employment; or

(*iii*) any agreement in consideration of the sale of the goodwill of a business or of instruction in any profession, trade or handicraft.

CHAPTER II.

REGISTRATION OF TRADE UNIONS.

Appointment of Registrars.

3. [1][The appropriate Government] shall appoint a person to be the Registrar of Trade Unions for [2][each Province].

Mode of registration.

4. Any seven or more members of a Trade Union may, by subscribing their names to the rules of the Trade Union and by otherwise complying with the provisions of this Act with respect to registration, apply for registration of the Trade Union under this Act.

Application for registration.

5. (1) Every application for registration of a Trade Union shall be made to the Registrar, and shall be accompanied by a copy of the rules of the Trade Union and a statement of the following particulars, namely:—

(*a*) the names, occupations and addresses of the members making the application;

(*b*) the name of the Trade Union and the address of its head office; and

(*c*) the titles, names, ages, addresses and occupations of the officers of the Trade Union.

(2) Where a Trade Union has been in existence for more than one year before the making of an application for its registration, there shall be delivered to the Registrar, together with the application, a general statement of the assets and liabilities of the Trade Union prepared in such form and containing such particulars as may be prescribed.

Provisions to be contained in the rules of a Trade Union.

6. A Trade Union shall not be entitled to registration under this Act, unless the executive thereof is constituted in accordance with the provisions of this Act, and the rules thereof provide for the following matters, namely:—

(*a*) the name of the Trade Union;

(*b*) the whole of the objects for which the Trade Union has been established;

(*c*) the whole of the purposes for which the general funds of the Trade Union shall be applicable, all of which purposes shall be purposes to which such funds are lawfully applicable under this Act;

(*d*) the maintenance of a list of the members of the Trade Union and adequate facilities for the inspection thereof by the officers and members of the Trade Union;

(*e*) the admission of ordinary members who shall be persons actually engaged or employed in an industry with which the Trade Union is connected, and also the admission of the number of honorary or temporary members as officers required under section 22 to form the executive of the Trade Union;

LEG. REF.

[1] Substituted for 'Each Local Government' by A.O., 1937.

[2] Substituted by A.O., 1937.

(*f*) the conditions under which any member shall be entitled to any benefit assured by the rules and under which any fine or forfeiture may be imposed on the members;

(*g*) the manner in which the rules shall be amended, varied or rescinded;

(*h*) the manner in which the members of the executive and the other officers of the Trade Union shall be appointed and removed;

(*i*) the safe custody of the funds of the Trade Union, an annual audit, in such manner as may be prescribed, of the accounts thereof, and adequate facilities for the inspection of the account books by the officers and members of the Trade Union; and

(*j*) the manner in which the Trade Union may be dissolved.

Power to call for further particulars and to require alteration of name.

7. (1) The Registrar may call for further information for the purpose of satisfying himself that any application complies with the provisions of section 5, or that the Trade Union is entitled to registration under section 6, and may refuse to register the Trade Union until such information is supplied.

(2) If the name under which a Trade Union is proposed to be registered is identical with that by which any other existing Trade Union has been registered or, in the opinion of the Registrar, so nearly resembles such name as to be likely to deceive the public or the members of either Trade Union, the Registrar shall require the persons applying for registration to alter the name of the Trade Union stated in the application, and shall refuse to register the Union until such alteration has been made.

Registration.

8. The Registrar, on being satisfied that the Trade Union has complied with all the requirements of this Act in regard to registration, shall register the Trade Union by entering in a register, to be maintained in such form as may be prescribed, the particulars relating to the Trade Union contained in the statement accompanying the application for registration.

Certificate of registration.

9. The Registrar, on registering a Trade Union under section 8, shall issue a certificate of registration in the prescribed form which shall be conclusive evidence that the Trade Union has been duly registered under this Act.

Cancellation of registration.

10. A certificate of registration of a Trade Union may be withdrawn or cancelled by the Registrar—

(*a*) on the application of the Trade Union to be verified in such manner as may be prescribed, or

(*b*) if the Registrar is satisfied that the certificate has been obtained by fraud or mistake, or that the Trade Union has ceased to exist or has wilfully

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NOTES.

Sec. 8.—Under section 8, when an application is made for registration of a trade union, the duties of the Registrar of trade unions are to examine the application and to look at the objects for which the union is formed. If those objects are objects set out in the Act, and if those objects do not go outside the objects prescribed by the Act and if all the requirements of the Act and the regulations made thereunder have been complied with, it is his duty to register the union. He can do very little more than satisfy himself that technical requirements of the Act have been complied with. If he finds that the procedure in connection with the application is in order, and if on the face of the application form, he finds that the objects of the Trade Union are apparently lawful, legitimate and *intra vires* the trade union, and if he further finds that the funds of the Union are only to be used in furtherance of those objects, then he has no option but to register the trade union, no matter what happens to it subsequently if it in fact proceeds counter to law or seeks to carry out its lawful objects in an unlawful way. 63 Cal. 565=40 C.W.N. 97=1936 Cal. 57.

and after notice from the Registrar contravened any provision of this Act or allowed any rule to continue in force which is inconsistent wth any such provision, or has rescinded any rule providing for any matter provision for which is required by section 6:

Provided that not less than two months' previous notice in writing specifying the ground on which it is proposed to withdraw or cancel the certificate shall be given by the Registrar to the Trade Union before the certificate is withdrawn or cancelled otherwise than on the application of the Trade Union.

[1][11. (1) Any person aggrieved by any refusal of the Registrar to register a Trade Union or by the withdrawal or cancellation of a certificate of registration may, within such period as may be prescribed, appeal—

Appeal.

(*a*) where the head office of the Trade Union is situated within the limits of a Presidency-town [2][* *] to the High Court, or

(*b*) where the head office is situated in any other area, to such Court, not inferior to the Court of an additional or assistant Judge of a principal Civil Court of original jurisdiction, as the [3][appropriate Government] may appoint in this behalf for that area.

(2) The appellate Court may dismiss the appeal, or pass an order directing the Registrar to register the Union and to issue a certificate of registration under the provisions of section 9 or setting aside the order for withdrawal or cancellation of the certificate, as the case may be, and the Registrar shall comply with such order.

(3) For the purpose of an appeal under sub-section (1) an appellate Court shall, so far as may be, follow the same procedure and have the same powers as it follows and has when trying a suit under the Code of Civil Procedure, 1908, and may direct by whom the whole or any part of the costs of the appeal shall be paid, and such costs shall be recovered as if they had been awarded in a suit under the said Code.

(4) In the event of the dismissal of an appeal by any Court appointed under clause (*b*) of sub-section (1), the person aggrieved shall have a right of appeal to the High Court, and the High Court shall, for the purpose of such appeal, have all the powers of an appellate Court under sub-sections (2) and (3), and the provisions of those sub-sections shall apply accordingly.]

12. All communications and notices to a registered Trade Union may be addressed to its registered office. Notice of any change in the address of the head office shall be given within fourteen days of such change to the Registrar in writing, and the changed address shall be recorded in the register referred to in section 8.

Registered office.

13. Every registered Trade Union shall be a body corporate by the name

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LEG. REF.

[1] Substituted by Act XV of 1928.

[2] Words 'or of Rangoon' omitted by A.O., 1937.

[3] Substituted by A.O., 1937.

NOTES.

Sec. 11: Per *Costello, J.*—Under S. 11 (3), an appeal to the High Court from an order of the Registrar of trade unions refusing registration should come before a single Judge sitting on the Original Side of the Court who is to deal with the matter, if necessary in the same way as if he were trying a suit under the Code of Civil Procedure. 63 Cal. 565=40 C.W.N. 97=62 C.L.J. 442=1936 Cal. 57.

Sec. 13.—Where in the heading the plaintiff purported to be the N.-W.Ry. Union, Lahore, through two Vice-Presidents who were named and the plaint stated that the plaintiffs were the Vice-Presidents of the North-Western Railway Union, Lahore; *Held*, that *prima facie* the proper plaintiff was not before the Court and that the Union was not properly represented. 14 L. 330=1933 L. 203. S. 13, merely says that if a trade union is registered it can sue and be sued. In the case of a combination resembling a trade union which is not regis-

Incorporation of registered Trade Unions.

under which it is registered, and shall have perpetual succession and a common seal with power to acquire and hold both movable and immovable property and to contract, and shall by the said name sue and be sued.

Certain Acts not to apply to registered Trade Unions.

14. The following Acts, namely:—

(*a*) The Societies Registration Act, 1860,
(*b*) The Co-operative Societies Act, 1912,
[1][(*c*) The Provident Insurance Societies Act, 1912,
(*d*) The Indian Life Assurance Companies Act, 1912,] and
(*e*) The Indian Companies Act, 1913,

shall not apply to any registered Trade Union, and the registration of any such Trade Union under any such Act shall be void.

CHAPTER III.

RIGHTS AND LIABILITIES OF REGISTERED TRADE UNIONS.

Objects on which general funds may be spent.

15. The general funds of a registered Trade Union shall not be spent on any other objects than the following, namely:—

(*a*) the payment of salaries, allowances and expenses to officers of the Trade Union;

(*b*) the payment of expenses for the administration of the Trade Union, including audit of the accounts of the general funds of the Trade Union;

(*c*) the prosecution or defence of any legal proceeding to which the Trade Union or any member thereof is a party, when such prosecution or defence is undertaken for the purpose of securing or protecting any rights of the Trade Union as such or any rights arising out of the relations of any member with his employer or with a person whom the member employs;

(*d*) the conduct of trade disputes on behalf of the Trade Union or any member thereof;

(*e*) the compensation of members for loss arising out of trade disputes;

(*f*) allowances to members or their dependants on account of death, old age, sickness, accidents or unemployment of such members;

(*g*) the issue of, or the undertaking of liability under, policies of assurance on the lives of members or under policies insuring members against sickness, accident or unemployment;

(*h*) the provision of educational, social or religious benefits for members (including the payment of the expenses of funeral or religious ceremonies for deceased members) or for the dependants of memberss

(*i*) the upkeep of a periodical published mainly for the purpose of discussing questions affecting employers or workmen as such;

(*j*) the payment, in furtherance of any of the objects on which the general funds of the Trade Union may be spent, of contributions to any cause intended to benefit workmen in general, provided that the expenditure in respect of such contributions in any financial year shall not at any time during that year be in excess of one-fourth of the combined total of the gross income which has up to that time accrued to the general funds of the Trade Union during that year and of the balance at the credit of those funds at the commencement of that year; and

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LEG. REF.

Cls. (*c*) and (*d*) repealed by Act XXV of 1941.

NOTES.

tered, a suit by one member against another not in any representative capacity but as a contracting party to the combination is maintainable and the absence of registration does not affect the question. 1940 N.L.J. 239=1940 Nag. 228=I.L.R. (1941) Nag. 702.

(*k*) subject to any conditions contained in the notification, any other object notified by the [1][appropriate Government] in the Official Gazette.

Constitution of a separate fund for political purposes.

16. (1) A registered Trade Union may constitute a separate fund, from contributions separately levied for or made to that fund, from which payments may be made, for the promotion of the civic and political interests of its members, in furtherance of any of the objects specified in sub-section (2).

(2) The objects referred to in sub-section (1) are:—

(*a*) the payment of any expenses incurred, either directly or indirectly, by a candidate or prospective candidate for election as a member of any legislative body constituted under the Government of India Act [2][or the Government of India Act, 1935] or of any local authority, before, during or after the election in connection with his candidature or election; or

(*b*) the holding of any meeting or the distribution of any literature or documents in support of any such candidate or prospective candidate; or

(*c*) the maintenance of any person who is a member of any legislative body constituted under the Government of India Act [2][or the Government of India Act, 1935] or of any local authority; or

(*d*) the registration of electors or the selection of a candidate for any legislative body constituted under the Government of India Act [[2]or the Government of India Act, 1935] or for any local authority; or

(*e*) the holding of political meetings of any kind, or the distribution of political literature or political documents of any kind.

(3) No member shall be compelled to contribute to the fund constituted under sub-section (1); and a member who does not contribute to the said fund shall not be excluded from any benefits of the Trade Union, or placed in any respect either directly or indirectly under any disability or at any disadvantage as compared with other members of the Trade Union (except in relation to the control or management of the said fund) by reason of his not contributing to the said fund; and contribution to the said fund shall not be made a condition for admission to the Trade Union.

Criminal conspiracy in trade disputes.

17. No officer or member of a registered Trade Union shall be liable to punishment under sub-section (2) of section 120-B of the Indian Penal Code, in respect of any agreement made between the members for the purpose of furthering any such object of the Trade Union as is specified in section 15, unless the agreement is an agreement to commit an offence.

Immunity from civil suit in certain cases.

18. (1) No suit or other legal proceeding shall be maintainable in any Civil Court against any registered Trade Union or any officer or member thereof in respect of any act done in contemplation or furtherance of a trade dispute to which a member of the Trade Union is a party on the ground only that such act induces some other person to break a contract of employment, or that it is in interference with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or of his labour as he wills.

(2) A registered Trade Union shall not be liable in any suit or other legal proceeding in any Civil Court in respect of any tortious act done in contemplation or furtherance of a trade dispute by an agent of the Trade Union if

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LEG. REF.

[1] Substituted for 'Governor-General in Council' by A.O., 1937.

[2] Inserted by A.O., 1937.

NOTES.

Sec. 18.—S. 18 does not afford immunity to a trade union or to an officer thereof for any act of deliberate traspass. 185 I.C. 57=1939 Sind 256.

it is proved that such person acted without the knowledge of, or contrary to express instructions given by, the executive of the Trade Union.

Enforceability of agreements.

19. Notwithstanding anything contained in any other law for the time being in force an agreement between the members of a registered Trade Union shall not be void or voidable merely by reason of the fact that any of the objects of the agreement are in restraint of trade:

Provided that nothing in this section shall enable any Civil Court to entertain any legal proceeding instituted for the express purpose of enforcing or recovering damages for the breach of any agreement concerning the conditions on which any members of a Trade Union shall or shall not sell their goods, transact business, work, employ or be employed.

Right to inspect books of Trade Union.

20. The account books of a registered Trade Union and the list of members thereof shall be open to inspection by an officer or member of the Trade Union at such times as may be provided for in the rules of the Trade Union.

Rights of minors to membership of Trade Unions.

21. Any person who has attained the age of fifteen years may be a member of a registered Trade Union subject to any rules of the Trade Union to the contrary and may, subject as aforesaid, enjoy all the rights of a member and execute all instruments and give all acquittances necessary to be executed or given under the rules:

Provided that no person who has not attained the age of eighteen years shall be an officer of any such Trade Union.

Proportion of officers to be connected with the industry.

22. Not less than one-half of the total number of the officers of every registered Trade Union shall be persons actually engaged or employed in an industry with which the Trade Union is connected:

Provided that the [1][appropriate] Government may, by special or general order, declare that the provisions of this section shall not apply to any Trade Union or class of Trade Unions specified in the order.

Change of name.

23. Any registered Trade Union may, with the consent of not less than two-thirds of the total number of its members and subject to the provisions of section 25, change its name.

Amalgamation of Trade Unions.

24. Any two or more registered Trade Unions may become amalgamated together as one Trade Union with or without dissolution or division of the funds of such Trade Unions or either or any of them, provided that the votes of at least one-half of the members of each or every such Trade Union entitled to vote are recorded, and that at least sixty per cent. of the votes recorded are in favour of the proposal.

Notice of change of name or amalgamation.

25. (1) Notice in writing of every change of name and of every amalgamation, signed, in the case of a change of name, by the Secretary and by seven members of the Trade Union changing its name, and, in the case of an amalgamation, by the Secretary and by seven members of each and every Trade Union which is a party thereto, shall be sent to the Registrar, and where the

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LEG. REF.

1 Substituted for 'Local' by A.O., 1937.

head office of the amalgamated Trade Union is situated in a different province, to the Registrar of such province.

(2) If the proposed name is identical, with that by which any other existing Trade Union has been registered or, in the opinion of the Registrar, so nearly resembles such name as to be likely to deceive the public or the members of either Trade Union, the Registrar shall refuse to register the change of name.

(3) Save as provided in sub-section (2), the Registrar shall, if he is satisfied that the provisions of this Act in respect of change of name have been complied with, register the change of name in the register referred to in section 8, and the change of name shall have effect from the date of such registration.

(4) The Registrar of the province in which the head office of the amalgamated Trade Union is situated shall, if he is satisfied that the provisions of this Act in respect of amalgamation have been complied with and that the Trade Union formed thereby is entitled to registration under section 6, register the Trade Union in the manner provided in section 8, and the amalgamation shall have effect from the date of such registration.

Effects of change of name and of amalgamation.

26. (1) The change in the name of a registered Trade Union shall not affect any rights or obligations of the Trade Union or render defective any legal proceeding by or against the Trade Union, and any legal proceeding which might have been continued or commenced by or against it by its former name may be continued or commenced by or against it by its new name.

(2) An amalgamation of two or more registered Trade Unions shall not prejudice any right of any of such Trade Unions or any right of a creditor of any of them.

Dissolution.

27. (1) When a registered Trade Union is dissolved, notice of the dissolution signed by seven members and by the Secretary of the Trade Union shall, within fourteen days of the dissolution, be sent to the Registrar, and shall be registered by him if he is satisfied that the dissolution has been effected in accordance with the rules of the Trade Union, and the dissolution shall have effect from the date of such registration.

(2) Where the dissolution of a registered Trade Union has been registered and the rules of the Trade Union do not provide for the distribution of funds of the Trade Union on dissolution, the Registrar shall divide the funds amongst the members in such manner as may be prescribed.

Returns.

28. (1) There shall be sent annually to the Registrar, on or before such date as may be prescribed, a general statement, audited in the prescribed manner, of all receipts and expenditure of every registered Trade Union during the year ending on the 31st day of March next preceding such prescribed date, and of the assets and liabilities of the Trade Union existing on such 31st day of March. The statement shall be prepared in such form and shall comprise such particulars as may be prescribed.

(2) Together with the general statement there shall be sent to the Registrar a statement showing all changes of officers made by the Trade Union during the year to which the general statement refers, together also with a copy of the rules of the Trade Union corrected up to the date of the despatch thereof to the Registrar.

(3) A copy of every alteration made in the rules of a registered Trade Union shall be sent to the Registrar within fifteen days of the making of the alteration.

CHAPTER IV.

REGULATIONS.

Power to make regulations.

29. (1) [1][*] The [2][appropriate] Government may make regulations for the purpose of carrying into effect the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:—

(*a*) the manner in which Trade Unions and the rules of Trade Unions shall be registered and the fees payable on registration;

(*b*) the transfer of registration in the case of any registered Trade Union which has changed its head office from one province to another;

(*c*) the manner in which, and the qualifications of persons by whom, the accounts of registered Trade Unions or of any class of such Unions shall be audited;

(*d*) the conditions subject to which inspection of documents kept by Registrars shall be allowed and the fees which shall be chargeable in respect of such inspections; and

(*e*) any matter which is to be or may be prescribed.

Publication of regulations.

30. (1) The power to make regulations conferred by section 29 is subject to the condition of the regulations being made after previous publication.

(2) The date to be specified in accordance with clause (3) of section 23 of the General Clauses Act, 1897, as that after which a draft of regulations proposed to be made will be taken into consideration shall not be less than three months from the date on which the draft of the proposed regulations was published for general information.

(3) Regulations so made shall be published in the Official Gazette, and on such publication shall have effect as if enacted in this Act.

CHAPTER V.

PENALTIES AND PROCEDURE.

Failure to submit returns.

31. (1) If default is made on the part of any registered Trade Union in giving any notice or sending any statement or other document as required by or under any provision of this Act, every officer or other person bound by the rules of the Trade Union to give or send the same, or, if there is no such officer or person every member of the executive of the Trade Union shall be punishable with fine which may extend to five rupees, and, in the case of a continuing default, with an additional fine which may extend to five rupees for each week after the first during which the default continues:

Provided that the aggregate fine shall not exceed fifty rupees.

(2) Any person who wilfully makes, or causes to be made, any false entry in, or any omission from, the general statement required by section 28, or in or from any copy of rules or of alterations of rules sent to the Registrar under that section, shall be punishable with fine which may extend to five hundred rupees.

Supplying false information regarding Trade Unions.

32. Any person who, with intent to deceive, gives to any member of a registered Trade Union or to any person intending or applying to become a member of such Trade Union any document purporting to be a copy of the rules of the Trade Union or of any alterations to the same which he knows, or has reason to believe, is not a correct copy of such rules or

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LEG. REF.

[1] Words 'Subject to the control of the Governor-General in Council' omitted by A.O., 1937.

[2] Substituted for 'Local' by A.O., 1937.

alterations as are for the time being in force, or any person who, with the like intent, gives a copy of any rules of an unregistered Trade Union to any person on the pretence that such rules are the rules of a registered Trade Union, shall be punishable with fine which may extend to two hundred rupees.

Cognizance of offences.

33. (1) No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence under this Act.

(2) No Court shall take cognizance of any offence under this Act, unless complaint thereof has been made by, or with the previous sanction of, the Registrar or, in the case of an offence under section 32, by the person to whom the copy was given, within six months of the date on which the offence is alleged to have been committed.

THE TRANSFER OF PROPERTY (VALIDATING) ACT (XXVI OF 1917).

[*27th September*, 1917.

An Act to validate certain transfers of property made prior to the 1st of January, 1915.

WHEREAS it is expedient to validate certain transfers of property made prior to the 1st of January, 1915; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE TRANSFER OF PROPERTY (VALIDATING) ACT, 1917.

(2) It shall extend, in the first instance, to the United Provinces of Agra and Oudh, provided that the [1][Provincial Government of any Province] may, by notification in the Official Gazette extend it to [1][the whole or any part of that Province.]

Validation of certain transfers made prior to the 1st of January, 1915.

2. Where a mortgage or gift purports to have been effected by an instrument executed prior to the 1st of January, 1915, and such instrument is required by the Transfer of Property Act, 1882, to be attested, such mortgage or gift shall not be deemed to be invalid by reason only that any person who purported to attest such instrument as a witness did not see the executant sign it, provided that such person before signing his name on the instrument received from the executant a personal acknowledgment of his signature to the same.

Restoration of certain claims.

3. Where a claim under any such instrument executed prior to the 1st of January, 1915, has been wholly or in part dismissed, rejected, or withdrawn, after the 30th day of July, 1912, and before the commencement of this Act, in a Court of first instance or of revision or appeal, by reason only of the fact that some person who purported to attest such instrument as a witness, on having received before signing his name thereon a personal acknowledgment from the executant of his signature to the same, did not see the executant sign it, the case may, if the dismissal, rejection or withdrawal has had the effect of invalidating, in whole or in part, the said instrument as between persons claiming thereunder, be restored on review in accordance with the procedure provided by the Code of Civil Procedure, 1908, for review of judgments, on application in writing made within six months from the commencement of this Act; and on such restoration, the provisions of section 2 shall apply to such instrument:

Provided nevertheless—

(1) that every Court to whom such an application is made shall have a discretion to refuse the same if it is of opinion that such restoration would

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LEG. REF.

[1] Substituted by A.O., 1937.

prejudice the rights of any transferee for value in good faith under any transfer made subsequent to the said 30th day of July, 1912;

(2) that in the event of a decree being passed upon such application in favour of the applicant or his legal representative interest shall only be allowed under such instrument at the contractual rate up to the date of the original dismissal, rejection or withdrawal of such claim, and for a period of six months therefrom, and at the rate of 6 per cent. thereafter until realization; and

(3) that in the event of the case being so restored the Court shall be bound by the finding of the former Court, by or before whom the case was dismissed, rejected or withdrawn, on any issue of fact which was heard and finally determined by it.

THE TRANSFER OF PROPERTY ACT (IV OF 1882).

Year.	No.	Short title.	Repeals and amendments
1882	IV	The Transfer of Property Act, 1882.	Repealed in par:, XV of 1895 ; V of 1908; Madras Act, III of 1922. Repealed in part and amended, II of 1900. Amended, III of 1885 ; VI of 1904 · XI of 1915 ; XXXVIII of 1925 XXVII of 1926; X of 1927 ; XX of 1929; Acts XXV of 1934 ; and IV of 1938. See Act V of 1930; Government of India (Adaptation of Indian Laws) Order, 1937. Application of certain sections extended by Act XIII of 1889, S. 32.

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[*17th February, 1882.*

An Act to amend the law relating to the Transfer of Property by act of Parties.

WHEREAS it is expedient to define and amend certain parts of the law relating to the transfer of property by act of parties;
It is hereby enacted as follows :—

Preamble.

CHAPTER I.
PRELIMINARY.

Short title.

1. This Act may be called THE TRANSFER OF PROPERTY ACT, 1882.

NOTES.

APPLICABILITY OF AMENDING ACT OF 1929 TO N.W.F. PROVINCE..—Act XXI of 1929, Transfer of Property (Amendment) Supplementary Act, does not amend, a single provision either of Act XX of 1929 or of the Act of 1882 which Acts are not in force in the N.W.F. Province; but on the contrary it does amend numerous Acts which are in force in that Province. S. 10 thereof amends the Indian Registration Act. The Indian Registration Act is in force in this Province, and hence S. 10 of Act XXI of 1929 is also in force in this Province. 1935 Pesh. 69.

Sec. 1.—The Act has been repealed as to Crown grants by the Crown Grants Act (XV of 1895.)

SCOPE AND APPLICABILITY.—The Act is to be read in the light of the Contract Act, 1929 A. 394. It is not exhaustive; nor does it cover the whole of law of transfer. 109 I.C. 195=1928 N. 223. It is not exhaustive even on the law of mortgages. 83 I.C. 548 (2)=1924 S. 23; 34 Cal. 223; 14 C.L.J. 530; 23 C.W.N. 284=47 I.C. 428; 2 P.L.J. 293. The Act does not profess to be a complete code. In any case not covered by the Act the Court is entitled to apply rules of English law which are not inconsistent with the Act. Thus the holder of a statutory charge is entitled to a decree for sale. 61 Cal. 1047=38 C.W.N. 917 =1934 Cal. 862. *See also* 1940 N.L.J. 1=1940 Nag. 163=I.L.R. (1941) Nag. 513. Although the Act is not exhaustive, the application of the equitable principles embodied in the Act to cases not specifically provided for is not precluded by the Act. 42 Mad, 589=36 M.L.J. 543=46 I.A. 109 (P.C.); 51 All. 454. The Act does not apply to easements. 34 I.C. 450=20 C.W.N. 1158. The Act applies only to alienations *inter vivos* and has no application to disposal of property by will. 43 M.L.J. 486=46 M. 190 (F.B.); nor to transfers effected by an award. 45 I.C. 813=34 M. L.J. 184. In the absence of any rules to the contrary the principle of the Act is applicable to mortgages created before the Act came into force, 26 A.L.J. 887=1928 A. 381; and to

Commencement.[1] It shall come into force on the first day of July, 1882.

Extent. It extends in the first instance to the whole of British India except the territories respectively administered by the Governor of Bombay in Council [2][and] the Lieutenant Governor of the Punjab] [3][* * * * *].

[4][But this Act or any part thereof may by notification in the Official Gazette be extended to the whole or any part of the said territories by the Provincial Government concerned.]

[5][And any Provincial Government may, [5][* * * *] from time to time, by notification in the Official Gazette, exempt, [6]either retrospectively or prospectively, any part of the territories administered by such Provincial Government from all or any of the following provisions, namely :—

Sections 54, paragraphs 2 and 3, 59, 107 and 123.]

[7][Notwithstanding anything in the foregoing part of this section, sections 54, paragraphs 2 and 3, 59, 107 and 123 shall not extend or be extended to any district or tract of country for the time being excluded from the operation of the Indian Registration Act, [8][1908] under the power conferred by the first section of that Act, or otherwise.]

LEG. REF.

[1]COMMENCEMENT OF THE AMENDING ACT XX OF 1929.—The amending Act XX of 1929 came into force on the 1st April, 1930.

[2]Inserted by A.O., 1937.

[3]Words 'and the Chief Commissioner of British Burma' omitted by *ibid.*

[4]Substituted by *ibid.*

[5]This clause was substituted for the original clause by the Transfer of Property Act (1882). Amending Act, 1885 (III of 1885), S. 1 The words "with the previous sanction of the Coverner-Ceneral in council" were omitted by Act XXXVIII of 1920, Sch.

[6]No such exemption has yet been made.

[7]This clause was added by Act III of 1885, S. 2, and is to be deemed to have been added from the date on which Act IV of 1882 came into force.

S. 54, paras. 2 and 3 and Ss. 59, 107 and 123 extend to every cantonment in British India. *See* The Cantonments Act XIII of 1889, S. 32.

[8]The figures "1908" were substituted for the figures "1882" by Act XX of 1929, S. 2.

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mortgages in Upper Burma, 84 I.C. 395=1925 Rang. 13; 2 Rang. 382. Although the Act did not apply to Berar in 1902, yet the principle embodied in the Act would be applicable as principles of equity, justice and good conscience. Consequently, the Court could extend the time for payment under a mortgage in the exercise of its equitable jurisdiction. 1923 N. 81. *See* 42 M. 589=46 I.A. 109=36 M.L.J. 543 (P.C.). *See also* 38 P.L.R. 733=1936 Lah. 390. The act does not apply to N.-W.F. Provinces but its principles do govern cases arising amongst its residents. 152 I.C. 231=1934 Pesh 101; 160 I.C. 986=1936 Pesh. 43. 1937 Pesh 58; 1942 Pesh 43. The amending Act XXI of 1929 is however in force in N.-W.F. Province. 1935 Pesh. 69. The Act is not in force in the Punjab and though the Courts of the Province sometimes follow the equitable principles of common law which have been embodied in certain sections of the Act, the technical rules contained in that Act cannot be relied upon by any litigant in the Punjab, and therefore deeds in the Punjab need not be executed or attested according to the formalities required by the Act. 108 I.C. 57=1928 L. 148. *See also* 1930 L. 620=128 I.C. 296; 92 I.C. 479=1926 L. 286; 4 L. 439=1923 L. 646; 91 I.C. 778=6 L. 487; 17 I.C. 991=6 P.R. 1912 (Rev); 1925 L 575; 1925 L. 92; 1933 L. 151; 163 I.C. 114=1936 L. 390. The Act does not apply to Delhi though constituted a separate province. 1933 L. 920=34 P.LR. 245; 1933 L. 821. The provisions of the Act do not apply to a tenancy created before the Act came into force, and a non-permanent tenure created before the passing of Act is not transferable. 7 P. 341=109 I.C. 306=1928 P. 431. Settled raiyat—Acquisition of occupancy rights in homestead under S. 182, B.T. Act—Subsequent sale of agricultural land—Occupancy in homestead—If divested—Incidents of tenancy—Law applicable. 40 C.W.N. 182. Under-raiyati holding of homestead and agricultural land—Lease of homestead only by under raiyat after passing of B.T. Act—Incidents of—If governed by T.P. Act or B. T. Act. 40 C.W.N. 86. As to the power of Local Government to abrogate, the rule as to delivery of possession in the case of gifts under Muhammadan law, and as to the necessity of keeping in view the spirit of the Act, *see* 54 I.A. 23=5 R. 7=52 M.L.J. 36 (P.C.)

LOCAL EXTENT.—The Act is now extended and applies to the Bombay Presidency from the 1st January, 1893. *See* Notification, *Bombay Government Gazette*, 1892, Pt. I, p. 1071, dated 27th October, 1892 ; 18 B. 160 (170) ; and the area within the local limits of the ordinary civil jurisdiction of the Recorder of Rangoon, *see* Judicial Department Notification No. 236 of 1892, dated 20th June, 1892, *Burma Gazette*, 1892, Pt. I, p. 373 ; 17 I.C. 954 and to Berar from the 1st July, 1907. *See* Government of India, Foreign Department Notification No. 1138, dated 16th May, 1907 ; *Central Pro-*

2. In the territories to which this Act extends for the time being the enactments specified in the schedule hereto annexed shall be repealed to the extent therein mentioned. But nothing herein contained shall be deemed to affect—

Repeal of Acts.

Saving of certain enactments, incidents, rights, liabilities, etc.

(*a*) the provisions of any enactment not hereby expressly repealed ;

(*b*) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force ;

(*c*) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability ; or

(*d*) save as provided by section 57 and Chapter IV of this Act, any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction ;

and nothing in the second chapter of this Act shall be deemed to affect any rule of [1][* *] Muhammadan [1][* *] Law.

LEG. REF.

[1] The word "Hindu" and the words "or Buddhist" have been omitted by Act XX of 1929.

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vinces Gazette, dated 25th May, 1907, Pt. I, p. 270, also to cantonments in British India. (*See* Cantonment Code.) To Civil and Military Station of Bangalore—*See* Government of India Notification, dated 16th January, 1917. 61 M. L.J. 408 (P.C.). It has ceased to be in force in the Naga Hills district, the Dibrugarh Frontier Tract, the North Cachar Hills and the Meikei Hills Tract. (*See Assam Gazette*, 1884, Pt. II, pp. 212, 705.) It has not been yet extended to the Punjab and Sindh. *See* 3 S.L.R. 17=1 I.C. 952 (955) ; 5 S.L.R. 71 ; Upper and Lower Burma, *see* 3 L.B.R. 241 ; 4 L.B.R. 229 ; and Pegu, *see* 12 I.C. 849.

ACT IS NOT RETROSPECTIVE in its operation. *See* 17 I.C. 467=10 A.L.J. 522 ; 8 N.L.R. 136 =17 I.C. 141 ; 20 C.W.N. 322=33 I.C. 565. *See also* 52 M. 123=55 M.L.J. 794 (F.B.) ; 5 R. 772=1928 R. 101. As to whether the amending Acts of 1926 and 1927 are retrospective, *see also* 51 M.L.J. 641=99 I.C. 143= 1927 M. 85. As to the provisions of the new amending Act XX of 1929 which are not to have retrospective operation, *see* 1931 L. 501=134 I. C. 289. They are enumerated in S. 63 of Act XX of 1929.

N.B.—4 P. 510=87 I.C. 849 is not good law now.

"Nothing *herein contained*" refers to what is contained in the Act and not merely to what is contained in the section. 3 C. 802 (809).

Sec. 2 (a).—*See* 41 B. 170 (180).

Sec. 2 (b).—*See* 26 I.C. 184=16 M.L.T. 365.

Sec. 2 (c).—Under the law as it stood before the Act, tenancies whether of homestead lands or of agricultural lands were not transferable in the absence of a custom to the contrary or of an express contract to that effect. The law is not different in the case of lands let out for the purpose of living upon the land. (12 W.R. 495 held to be bad law.) 54 C. 333 =31 C.W.N. 231=1927 C. 39. On this cl. (*c*), *see also* 41 B. 170 ; 19 C.W.N. 525=20 C.L.J. 448 ; 39 C. 227 ; 39 C.W.N. 694. Rights that have become extinguished under a prior enactment are not revived by this Act. *See* 16 C. 693 (P.C.).

Sec. 2 (d).—S. 136 is controlled by S. 2, sub-cl. (*d*) and, therefore, a purchase in execution of a claim under a life insurance policy by a legal practitioner entitles him to claim the amount from the insurance company. 46 C.L. J. 225=1927 C. 691. There is no warrant for confining the operation of the saving provision of S. 2 (*d*) of the Act to Ss. 85 to 90. The saving provision is perfectly general in its terms and in virtue of it. S. 100 as amended applies to transfers by auction sales in execution of decrees. I.L.R. (1940) All. 669=1940 A.L.J. 560=1940 All. 456. S. 51 does not apply to a transfer in execution of a decree. 1931 A.L.J. 273 =1931 A. 277 (F.B.). The Act does not affect transfers by operation of law (as) on insolvency, forfeiture or execution sale. *See* 2 C. P.L.R. 137. A sale by an O.R. in insolvency is not a transfer coming with S. 2 (*d*). Such a transfer is not exempted from registration under S. 54. 40 L.W. 747=67 M.L.J. 746. Where an Official Receiver reports a sale of a house to the Court and highest bid and the Court accepts the report and approves of the sale, it falls within the words 'transfer by order of a Court of competent jurisdiction' in S. 2 (*d*). 14 Luck. 404=1939 O.W.N. 32=1939 Oudh 55. Where a Court obtains a security bond which hypothecated immovable property to secure a proper disposal of the money due to minors, deposited with it, an assignment of the security bond in favour of the minors on their attaining majority in order to enable them to realise the money from the surety can be made by an order of the Court without any registered deed of transfer. 53 A. 786=1931 A. 389 (F.B.). The technical provisions contained in this S. 2 (*d*) are not binding on the Courts in the Punjab. 35 P.L. R. 402=1934 L. 460. *See also* 1936 Lah. 390. Section 2 (*d*) if governs the word 'transfer' in S. 4 Partition Act. *See* 66 C.L.J. 87. The provisions as to apportionment do not apply to a dispute as to rent of land between

Interpretation clause.

3. In this Act, unless there is something repugnant in the subject or context,—

"immovable property" does not include standing timber, growing crops or grass ;

"instrument" means a non-testamentary instrument ;

[2]["attested," in relation to an instrument, means [3][and shall be deemed always to have meant] attested by two or more witnesses each of whom has seen

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N.B.—"The provision that nothing in this chapter shall be deemed to affect any rule of Hindu or Buddhist Law has been removde by the new amending Act II of 1929. So far, therefore, as the rules of Hindu Law are concerned, the saving clause in S. 2 seems unnecessary and we propose that the word "Hindu" be omitted from that section. We also understand that the Government of Burma as well as the Rangoon High Court have no objection to the omission of the word "Buddhist" from the last paragraph in S. 2. We, therefore, propose to omit that word also. In view of this and the changes proposed to be made in Ss. 15 and 16 of this Act and also Ss. 115 and 116 of the Indian Succession Act, we consider that it is not necessary that the Hindu Disposition of Property Act, 1916, and the Madras Acts of 1914 and 1921, referred to above, need be kept in force. We propose that these Acts be repealed.

Since the rules contained in Chapter II are not in all cases in conformity with the personal law of Muhammadans, we have retained the word "Muhammadans."—(*Statement of Objects and Reasons.*)

The amendment of this section by Act XX of 1929 is not to have any retrospective effect. *See* S. 63 of Act XX of 1929.

[2] Inserted by Act XXVII of 1926.

[3] Inserted by Act X of 1927.

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auction-purchaser and original landlord. 84 I. C. 77=1924 R. 365.

PROVISO.—Where the provision in the Act does not offend against any rule of Muhammadan Law, it will apply. 1930 A. 462.

Sec. 3 : IMMOVABLE PROPERTY.—"Property" is a most comprehensive term descriptive of every possible interest in a thing which a party can have or possess. 5 L.J. (Ch.) 90. The "property" of a person is the bundle of rights which he has in it. 27 A.L.J. 620=1929 A. 465 (F.B.). For other definitions of the term, see *General Clauses Act, S.* 3 (Act X of 1897). *Reg. Act, S.* 2 ; *Trustees Act,* (1866), *S.* 2 ; *Succession Act, S.* 3. The definition of the term in this Act cannot be imported into other enactments (as) the *Land Revenue Sales Act* (*XI of* 1859). 52 C. 862=90 I.C. 901. The term "immovable property" comprehends all that would be real property according to English Law and possibly something more. 13 B.L.R. 254 (P.C.). A debt secured on immovable property does not become identified with it and is not immovable property. 58 I.A. 323=35 C.W.N. 1034=61 M.L.J. 589 (P.C.). It can be transferred apart from security. (*Ibid.*) The following are *immovable property* :—*Right to fishery*, 20 C. 446 ; 29 C. 414 ; 12 B. 221 ; 3 C. 276 ; 24 C. 449. *See also* 3 P. L.T. 53=1922 P. 9. *Right of ferry*, 13 M. 54 ; *easements*, 24 W.R. 32 ; (as) *right of way*, 13 C. W.N. 451 ; or *water course*, 4 W.R. 107 ; [but not a mere chance of acquiring an easement (as) of light and air. 23 B. 704] ; *hereditary offices*, 9 B.H.C.R. 225 ; 5 B. 322 ; 10 C. 73 ; 6 B. 512 ; 2 M.I.A. 23 ; 4 B.H.C. 51 ; *office of heredtiary priest of tempte*, 6 B.H.C.R. 137 ; *life-interest in immovables*, 23 B. 1 ; *malikana*, 9 A. 591; 5 C. 921 ; *right to levy rate or cess* on all exports and imports, 33 B. 373 ; right to the assessment of the *dhara* is a *nibhanta* or immovable property. 34 B. 287=12 Bom.L.R. 9. *See also* 9 B.H.C.R. 222 ; 14 M.I.A. 551 ; *Mortgage debt* is not immovable property, 23 I.C. 129=15 M.L. T. 198 ; 21 B. 226 ; 21 O.C. 400=50 I.C. 157; 12 C. 546 ; 27 C.L.J. 453 ; 29 C. 1 ; 19 B. 121; 4 Bom.L.R. 18 ; 13 A. 89. *See also* 26 B. 305 ; 20 C. 806. *See contra* 45 I.C. 986=22 C.W.N. 641 ; 41 M.L.J. 453 ; 44 M. 196=40 M.L.J. 25 ; 34 P.L.R. 233=1933 L. 210. As to mortgage of mere superstructure exclusive of land, *see* 8 M.H.C.R. 100. As to *equity of redemption*, see 18 C. 164 ; 22 C. 33 ; 21 B. 226. *Claim for unpaid purchase-money* is in the nature of an interest in immoveable property. 28 M. 227. As to *claim for maintenance*. see 21, B. 327 ; 9 C. 555. *Toda Garas Hak* : 8 M.I.A. 1. *Right to annual payments charged on immovable property*. 23 B. 22. *See also* 23 A. 209 ; 6 B. 546 (grant made by Peishwas). *Right to rent from occupancy tenant*; 5 M.L.J. 95. [As to *future rents*, see 1942 Pat. 120 ; 196 I.C. 837] ; or to get the benefits of a *hat* or market or the lease of the same. 22 C. 752 ; or to collect dues from a fair, 27 A. 462 ; rights of certain class of Brahmins to receive dues from funerals, 15 A.L.J. 41. Doors and windows are not, 16 I.C. 877=38 M. 18 ; 11 C. 164 ; 13 M. 518 ; 14 M. 467 ; neither an interest in Royalty, 65 I.C. 673=1922 P. 36 ; nor a turn of worship, 46 C. 455 ; 39 C. 227 ; 19 C.W.N. 208 ; 22 C.W.N. 994 ; 4 C. 683 ; nor arrears of rent, 4 P. 43=83 I.C. 81 ; nor a mere right to get a lease executed. 1929 R. 184 ; nor machinery not permanently attached to the earth, 46 A. 286.

TREES.—"*Timber*" means trees fit for building and repairing houses, 24 B. 31 ; 31 B. 181. *Karuvela* and *velvela* trees are timber, and the word "timber" cannot be limited to the class of trees the timber of which is used for building purposes alone. 106 I.C. 421=1928 M. 392 ; after severance trees become movables, 24 Bom. 31 ; sugarcane is movable property. 10 A. 20 ; 21 B. 60 ; fruit trees are immovable property, 17 I.C. 910=10 A.L.J. 516 ; mango tree used as fruit tree and not as timber is immovable property. 1927 P. 1=5 Pat. 765. The question whether a mango tree is a standing timber is a question of intention. If the intention is that the plaintiff should enjoy the fruit of the tree

the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant ; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary ;]

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and not cut it down as timber, then it is immovable property and can only be conveyed by a registered instrument. 90 I.C. 769=1926 P. 125; 54 A. 437. Palm and date trees are trees the produce of which can be got and therefore are immovable property. (1926 P. 125, Rel. on.) 17 Pat. L.T. 170=1936 P. 66. Grove of *Mahua* trees is immovable property. 81 I.C. 650=1925 O. 108 (2). A grove consisting of *shisham* and *nim* trees, which are only timber trees, is not immovable property as defined by S. 3. 1938 All. 115=174 I.C. 315. A claim for possession of trees is a claim to an interest in immovable property. 63 I.C. 264(1) =3 Pat. L.T. 622.

GROWING CROPS.—Under S. 3 growing crops are not immovable property, and therefore a mortgage of such crops needs no registration. 89 I.C. 410=1926 A. 164. *See also* 10 A. 20; 9 C.W.N. 376=32 C. 459 ; 31 C. 667; 6 C.W.N. 881.

FIXTURES.—The English law relating to fixtures does not apply *in toto* in India. If a thing is imbedded in the earth or attached to what is so embedded for the permanent beneficial enjoyment of that to which it is attached, then it is part of the immovable property. If the attachment is merely for the beneficial enjoyment of the chattel itself, then it remains a chattel, even though fixed for the time being so that it may be enjoyed. An engine installed in a factory may be immovable property or may be attached according to the circumstances of the case. Where it appears that the intention of the parties was not that the engine should be permanently attached as an improvement to the premises for the benefit of whoever might be entitled to those premises, it cannot be regarded as immovable property. 51 L.W. 155=1940 Mad. 527.

INSTRUMENT.—Act has no application to testamentary instruments. *See* 43 M.L.J. 486=46 M. 190=1922 M. 457 (F.B.).

ATTESTATION.—As to requirements of valid attestation, *see* 52 M. 123=55 M.L.J. 794=1929 M. 1 (F.B.) ; 27 C.W.N. 263=1923 C. 149 ; 13 I.C. 557=1931 A.L.J. 342. If the attestors to a deed of mortgage executed by a gosha lady did not see her sign it, the lady did not acknowledge her signature to it, and the attestors themselves did not sign the instrument in the presence of the lady, the instrument is not properly attested within the meoning of the term 'attested' as defined by the Amending Act of 1926. 54 M. 163=1931 M. 140=60 M.L.J. 56. *See also* 8 O.W.N. 194=1931 O. 146. Whether an attesting witness signs his name in the presence of the executant is a question of fact depending on the circumstances of each case. Where a document executed by a pardanashin lady is attested by the witnesses while the lady is sitting behind a thin curtain and it is clear enough that, if she had been minded to see the witnesses sign, she could have done so, even if she did not actually see them through the curtain, it amounts to sufficient compliance with the provisions of S. 3. (10 O.W.N. 724= 1933 O. 365=144 I.C. 860, Reversed.) 63 I. A. 326=11 Luck. 346=1936 P.C. 207=71 M. L.J. 151 (P.C.). An attesting witness cannot be presumed, from the mere fact of attestation, to be aware of the contents of the document, much less of a mere recital of boundaries. (A. I.R. 1933 Lah. 551, Rel. on.) 177 I.C. 966= 1938 Lah. 97. It was held previous to the new definition of attestation in S. 3 that an attestation must be by a witness who had actually seen the executant sign the document. 48 C. 61; 35 M. 607 (P.C.); 5 P. 58 ; 42 A. 25; 46 M. 64=43 M.L.J. 745; 45 C. 748 =45 I.A. 94=34 M.L.J. 545 (P.C.); 26 Bom. L.R. 737=83 I.C. 170=1925 P.C. 89 (P.C.); 11 A.L.J. 757; 22 Bom. L.R. 86=44 B. 231; 35 C.L.J. 473; 2 P. 52; 38 C.L.J. 114=1924 C. 415. Now even acknowledgment of signature by executant before attesting witnesses would suffice. *See* 52 Bom. 219=30 Bom.L.R. 565= 1928 B. 267; 1927 C. 926 ; 28 L.W. 955; 55 M.L.J. 794; 105 I.C. 422; 92 I.C. 948=1926 C. 637; 47 C.L.J. 118=1928 C. 154; 16 I.C. 207. The words "personal acknowledgment" in S. 3 do not mean *express* acknowledgment. It is not necessary therefore that the acknowledgment of execution should be express or should be made verbally by the executant. An acknowledgement of signature may well be inferred from the conduct of executant at the time when the deed is attested by witnesses, for example, by gestures or by other ways. There is no ground for assuming that the law in India is different from that in England. I.L.R. (1937) All. 723=1937 A.L.J. 710=1937 All. 646. Registering officer or identifying witnesses before Registrar are not attesting witnesses, and so proof of registration is no proof of attestation. 165 I.C. 498=1936 A.L.J. 262=1936 A. 712. The signature of the Registrar or Sub-Registrar on the back of the document registered by him may be treated as a valid attestation: 19 N.L.J. 123=1936 N. 171. But before that can be done evidence is necessary to establish that the registering officer signed the document in the presence of the executant. 58 M. 220=1935 M. 178 (2)=68 M.L.J. 191; 67 C.L.J. 31; 1937 Sind 47; 150 I.C. 762=58 C.L.J. 545; 61 C. 525=38 C.W.N. 753=1934 C. 772 (case of gift deed). 1937 S. 47. It is the instrument that an attesting witness has to sign in order to comply with the terms of the definition of the word "attested." When the Registrar (or Sub-Registrar) appends his signature to the endorsements or to the particular endorsement relating to the admission of execution and when

"registered" means registered in British India under the law for the time being in force regulating the registration of documents ;

"attached to the earth" means—

(*a*) rooted in the earth, as in the case of trees and shrubs ;

(*b*) imbedded in the earth, as in the case of walls or buildings ; or

(*c*) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached ;

"actionable claim" means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable

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the witnesses append their signatures to the endorsement as to the identification, it cannot be said by any stretch of imagination that they are signing the instrument. Therefore the signatures of the Registrar and of the witnesses identifying the executant at registration, made in the manner required by Ss. 58 and 59, Registration Act, are not sufficient attestation of the deed for the purpose of the Transfer of Property Act, even if they signed the deed in the presence of the executant after receiving acknowledgment from him of his signature or mark thereon. 1939 Rang.L.R. 388=1939 Rang. 211. *See also* 1938 Mad. 959=(1938) 2 M.L.J. 775. Signature by third person for attesting witness with his consent is valid attestation. 1927 O. 510=3 Luck. 113. The meaning of the word "attest" in S. 3, T. P. Act as amended by Act XXVII of 1926, has been giving a retrospective effect by Act X of 1927. 105 I.C. 864 (1)=29 Bom.L.R. 1334; 51 M.L.J. 641. The decisions in 100 I.C. 651; 103 I.C. 662=1927 C. 763; 49 A. 25=24 A.L.J. 921=1927 All. 1 (F.B.) are now good law in view of the amending Act X of 1927. *See also* 1928 M.W.N. 425; 5 R. 772=1928 R. 101; 1927 O. 565; 105 I.C. 891=1928 Nag. 70; 1928 S. 93; 1928 B. 16; 53 C.L.J. 326; 1930 A. 223. The effect of the amending legislation regarding the definition of attestation in the Act is that in spite of the retrospective effect given by the explanation the invalidity of anything already done is unaffected. 111 I.C. 407=1928 M. 773. But *see* 53 C.L.J. 326; 1931 N. 95; 1932 M. 272. By the amending Act of 1927, the Legislature could not have intended to validate mortgages held by a competent Court to be invalid for want of proper attestation according to law then in force. 1931 S. 64. In 125 I.C. 507=1930 A. 669, it was held that the amendment cannot operate retrospectively on a deed of gift executed on Feb. 12, 1916. *See also* 1930 A.L.J. 623=1930 A. 669. Attestation can be by affixing marks, 53 A. 1=1931 All. 101 ; 58 M. 220=1935 M. 178 (2)=68 M.L.J. 191=1937 Rang. 393. Attestation must be with the intention of attesting the executant's signature. 1931 O. 146=8 Luck. 619.

SCRIBE AS AN ATTESTING WITNESS.—*See* 39 M. 1035=30 M.L.J. 250 ; 55 I.C. 616=44 B. 48 ; 53 I.C. 79=4 Pat.L.J. 511 ; 1 Pat.L.J. 129 ; 20 C.W.N. 699 ; 32 C.W.N. 1228=48 C.L.J. 281; 1927 S. 118 ; 1926 C. 150. But *see also* 62 I.C. 97=48 C. 61 ; 41 M. 535 ; 24 M.L.J. 534=19 I.C. 589 ; 39 M. 1035 ; 39 I.C. 153. The scribe will not be an attesting witness unless he intends to sign the deed as such. 1930 All. 223=52 A. 434. Whether the scribe is an attestor is a question of fact and must be determined by the Court as a question of fact. 90 I.C. 774=1926 C. 150 ; 41 M. 535=43 I.C. 983 ; 98 I.C. 205 =1926 R. 145. 'Attested' means that a person has signed the document by way of testimony of the fact that he saw it executed. In a case where a person places his signature upon a document and at the same time describes himself as the writer thereof. though the inference is that he signs as the writer and nothing else, it can, as a matter of fact, be shown that he signed as a witness as well, of the fact that he saw the document executed or received a personal acknowledgment from the executant that he had executed it. In other words, a scribe could play the dual role of a scribe and an attesting witness. 1940 Rang. L.R. 199=1940 Rang. 134. Where the executant is a marksman, the scribe, who writes out the name of the executant (in case of a lady executant) cannot be an attestor. *See* 1925 Oudh 737; 1932 M. 272. But *see also* 1927 S. 118; 33 Bom. 44=10 Bom. L.R. 943; 41 Bom. 384; 35 A. 254; 46 C. 522; 44 Bom. 405. Where a mortgage is signed by the writer as well as the mortgagee without indicating that they signed as attestors, the mortgage is not validly attested. 65 I.C. 64. But *see* 91 I.C. 507=1926 Oudh 209. The writer of a document, who signs after an admitted attestor signs as an attestor, though he merely describes himself as the writer, 26 I.C. 409. Where the scribe signed the deed after the executant signed it and then other witnesses, *held*, he may properly be described as an attesting witness. 1930 C. 750. Where the man put his name under the separate heading of "scribe," he is not an attesting witness. 32 C.W.N. 1228=1929 C. 123. Attestation is not notice of the contents of the document. 49 B. 25=25 Bom. L.R. 818=1925 B. 58. But when he was present at the transaction and attested the deed having heard its contents he is estopped from challenging the right of the transferee. 150 I.C. 765=1934 P. 93 [20 C. 296 (P.C.) Rel. on]

ATTACHED TO THE EARTH: BUILDING FOR SHELTERING MACHINERY.—If there was a building inside which a machinery was sheltered, it cannot be said that this machinery was attached to the building for the permanent beneficial enjoyment of the building itself as is contemplated in cl. (*c*) of the definition in S. 3. 46 A. 286=1924 A. 365. As to materials of a standing house, *see* 1923 L. 150.

ACTIONABLE CLAIM.—Actionable claim postulates a debt. A share of profits to be regarded as a debt must be liquidated sum. The right to recover profits does not become an actionable claim unless the profits are assigned. 1942 N.

property, or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent ;

[1][a person is said to have "notice" of a fact when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it.]

Explanation I.—Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any

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LEG. REF.

[1] Substituted by Act XX of 1929. The amendment of this section by Act XX of 1929 is not to have any restrospective effect, *see* S. 63 of Act XX of 1929.

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L.J. 30. Assignment of insurance money by way of charge must be in writing. 37 B. 198=40 I.A. 24=24 M.L.J. 60 (P.C.). It is immaterial whether the writing is on separate paper or is endorsed on the policy itself. 31 S.L.R 98=1937 S.181. Benefit of an executory contract for purchase of goods. 34 C. 289. *Book debt* is an actionable claim. 45 M. 196=40 M.L.J. 25. *See also* 43 P.L.R. 439=1941 Lah. 337 (money debt). A *claim to unpaid dower debt* is an actionable claim according to the new definition. 54 A. 499=1932 A.L.J. 275. *Claim to future rent* is actionable claim. 1926 M. 1173=98 I. C. 263 (2). *See also* 4 P. 43=83 I.C. 81 (right to rent after accrual constitutes a debt); but not a right to sue for breach of contract. 106 P. R. 1914=27 I.C. 115; 46 B. 719. *See also* 1938 All. 544 (Right of vendor to recover money left with vendee for payment of vendor's creditor). A claim to recover an ascertained amount is an actionable claim and can be validly transferred; but a claim for unliquidated damages for breach of contract after the breach, is not an "actionable claim" and cannot be transferred because of the provisions of cl. (e) of S. 6. 55 A. 814=1933 A. 642. A claim for damages, return or earned money with interest and a part of the purchase price is an actionable claim. "Debt" means an actually existing debt. 1927 S. 78=22 S.L.R. 1. *Prima facie* a liability to arise in the future on the part of an unknown person out of a relationship, contractual or otherwise, which does not yet exist, cannot, on any ordinary use of language, be described as a "debt", still less can it be described as an "existing" debt. Neither can it be "accruing" or "conditional" and it cannot be "contingent." A contingency is something that may happen in future which affects a present relationship. For instance, a contingent interest such as a contingent life-interest presupposes an existing interest which may or may not develop into interest in possessson. The interest is there all the time. It is even saleable as such. When S. 3 refers to an "existing" debt, it intends therby to exclude a debt which does not yet exist at all. So also S. 130 (1) in its terms points to an immediate interest of some sort passing. While, it is in every way appropriate to an accruing conditional or contingent debt, it cannot be reconciled with a debt which does not exist at all. 175 I.C. 786=1938 Rang. 1. "Debt"—Money due under policy of life assurance—Saleability. *See* 39 Bom. L.R. 493=1937 Bom. 382. *Claim to mesne profits* is not an actionable claim. 3 P. 575=1924 P. 551; 99 I.C. 735=1927 R. 39; nor a right to recover profits from the co-sharer which is enforceable in the Revenue Court: 1934 A. 155=56 A. 624 (F.B.); nor a claim under a decree of Court. 40 M.L.J. 123. A mortgage assigning by way of security a decree that would be passed in a pending money suit instituted by the mortgagor and containing a stipulation that the mortgagee would be entitled to realise out of the decretal amount a certain sum due to him, is not a transfer of a mere right to sue. What is transferred is the claim to a debt and as such would come within the definition of "actionable claim" as given in S, 3 of the T.P. Act. The mortgage must be deemed to attach itself to the decree as soon as it is passed, and the mortgagee is entitled to execute the decree as an assignee. I.L.R. (1939) 2 Cal. 341=43 C.W.N. 953=1939 Cal. 715. A *claim to recover goods lent* or damages for a breach of contract for failure to return them is a mere right to sue within S. 6 (*e*) and is not transferable. 1923 N. 67. A right to recover arrears of annuity is a debt, and though charged upon immovable property, the claim under it amounts to an actionable claim. 63 C. 1=62 I.A. 265=39 C.W.N. 1191=69 M.L.J. 503 (P.C). *See also* 1936 P.W.N. 395=1936 Pat. 527. The right of the subscriber or depositor to the Provident Fund money is an actionable claim. 1935 C. 756=63 C. 578. Copyright is no doubt beneficial interest in movable property, but hardly comes within the purview of "actionable claim" as defined in S. 3. I.L.R. (1939) All. 275=1939 A.L.J. 71=1939 All. 305.

EXPL. I—NOTICE WHETHER REGISTRATION CONSTITUTES.—"Notice," as defined in S. 3, includes both actual and constructive notice. There was a conflict of decisions whether the registration of a document under the Indian Registration Act is of itself constructive notice of the transaction effected by the document. The matter has been set at rest by the amending Act of 1929. The Statement of Objects and Reasons for the amendment regarding this matter is as follows:—

"In our opinion, in a country like India, where the system of registration has been generally applied, if registration is to be held as not implying notice, one of the objects for which instruments are required to be registered would be defeated. Moreover, as will be seen

person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, [1][where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section (2) of S. 30 of the Indian Registration Act, 1908, from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired or of the property wherein a share or interest is being acquired, is situated :]

Provided that—

(1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908, and the rules made thereunder,

(2) the instrument [2][or memorandum] has been duly entered or filed, as the case may be, in books kept under section 51 of that Act, and

(3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under section 55 of that Act.

Explanation II.—Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

Explanation III.—A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material :

LEG. REF.

[1]These words were substituted for the words "if the instrument has been registered under sub-section (2) of section 30 of the Indian Registration Act, 1908, from the earlist date on which a memorandum thereof has been filed by any Sub-Registrar under S. 66 of that Act" by Act V of 1930.

[2] Added by Act V of 1930.

NOTES.

below, one of the important changes suggested by us is 'compulsory registration.' It is therefore, necessary the express provision should be made in the Act making it clear that registration of an instrument relating to immovable property amounts to notice of the instrument from the date of the registration. For this purpose we propose to add Explanation I to the definition of 'Notice' in S. 3."

The latter portion of Expl. I was further amended by the Amending Act V of 1930, and the reason for the same have been stated as follows:—"The formal amendments contained in this Bill are designed to carry out the intentions of *Explanation I* contained in S. 4 of of the Transfer of Property (Amendment) Act, 1929. The difficulties sought to be met by the latter part of the body of the explanation are not confined to casees where registration is effected under sub-s. (2) of S. 30 of the Indian Registration Act 1908, but they are also encountered when an instrument relating to scattered properties is registered in the ordinary manner. Further, it is possible under the present Examination, that a subsequent transferee may make a genuine search in the offices of all the subdistricts in which the property he seeks to acquire is situated, and find no record of a transfer; but may still find himself saddled with notice of a transfer by reason of a memorandum relating to some other property, included in a previous transfer along with the property he is interested in, having been filed in some distant sub-district. The Bill is intended to remove these anomalies."—*Gazette of India*, Pt. V, p. 15, dated 25th January, 1930).

EXPL. II—POSSESSION HOW FAR IS NOTICE.—On this point the Statement of Objects and Reasons for the amendment of the section is as follows:—"We propose to add Explanation II to the definition of 'notice,' providing that the person dealing with any immovable property shall be deemed to have notice of the title of any person who, for the time being, is in actual possession thereof. It may be noted that notice in this case is not extended to possession which is merely of a constructive nature. The explanation is in accordance with Illustration 3 to S. 27 (*b*) of the Specific Relief Act."

EXPL. III—NOTICE TO AGENT—SCOPE AND EFFECT OF AMENDMENT—The Statement of Objects and Reasons for the amendment is as follows:—"The last portion of the existing definition of notice which relates to notice through an agent seems to us to be defective. It provides that a person has notice of the fact when information of the fact is given to or obtained by his agent under circumstances mentioned in S. 229 of the Indian Contract Act. The words 'given to or obtained by his agent' used in the definition suggest that the rule is r stricted to the facts of which the agent has actual knowledge, or, in other words, express notice. The reference to S. 229 of the Indian Contract Act does not extend the scope of the definition. If notice to the agent, whether actual *or constructive* is not made notice to the principal, it has been said that notice would be avoided in every case by employing agents." "The general rule that the knowledge of the

Provided that, if the agent, fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person, who was a party to or otherwise cognizant of the fraud.

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agent is the knowledge of the principal has no doubt certain limitations. It is necessary that the matter for which the agent was employed should be taken into consideration. It is necessary that the agent should be acting in the course of the particular business for which he was employed. (34 I.A. 179). This general principle is now embodied in S. 199 of the English Property Act, 1925. We propose, therefore, to add Explanation III to the definition." *Explanation* III which provides that notice to an agent whilst acting in the course of business is notice to his principal was criticised as being too general and vague. The Select Committee therefore added provisions to the effect that the notice must be of a fact which is material to the course of the business in which the agent is engaged, and that the agent must not fraudulendly have concealed the fact from his principal.

NOTICE—ILLUSTRATIVE CASES.—The Explanations to the definition of 'notice' in S. 3 inserted in the T.P. Act by Act XX of 1929, do not affect the terms or incidents of transfers made before the 1st April, 1930; 1936 O.W.N. 1086= 1937 O. 1. As the T.P. Act is not in force in the Punjab, the question whether registration is or is not notice in that province would depend on the facts of each case. 37 P.L.R. 168. The Transfer of Property Act is not in force in the Punjab and hence S. 3 of that Act as amended in 1929 does not affect that province. Consequently the state of law as existed prior to 1929 according to which registration did not necessarily amount to notice continues to hold good in that Province. 190 I.C. 599=1940 Lah. 269. Though a will is registered, except the executant or his agent, no one else is competent to take inspection or copies, and it will be scarcely justifiable to take registration as sufficient notice for the purposes of limitation. 1935 L. 313. If a mortgagee taking a mortgage in a place where he knows tha mortgages by deposit of title-deeds are legal and usual does not ascertain whether the title-deeds were already pledged, his failure so to ascertain is such abstention from an enquiry which he ought to have made or such negligence as to infer notice in terms of S. 3. 45 M.L.J. 505=51 C. 86=1 R. 637=50 I.A. 283 (P.C.). Registration of a sub-mortgage itself is no notice to the original mortgagor. But as the plaintiff in a mortgage suit is under a duty to Court to implead all parties interested in the property, his omission to search the register amounts to gross negligence, sufficient to fix him with constructive notice. 62 M.L.J. 272=1932 M. 1152. The registration of a sale deed by a judgment-debtor cannot be regarded as giving the decree-holder attaching the property sold constructive knowledge of the sale, because no duty lies on the decree-holder to search the registers. 1936 A.M.L.J. 104. Gross negligence and wilful abstention amounts to notice. 34 I. C. 906=20 M.L.T. 127 ; 6 L. 344=89 I. C. 615=1925 L. 542. *See also* 5 B. 342 ; 1929 C. 83 ; 15 M. 268. What would be gross negligence in one case would not be so in another. It all depends upon the man's knowledge and the means of information which lay to his hand. Where it is incumbent on a person, who was in possession of certain facts to inspect the registers, and omission to look into entries against the property in question and to look into them carefully, must be construed to be either due to wilful abstention or to gross negligence. A person can be charged with the negligence or bad faith of his agent. 1939 N.L.J. 129=1939 Nag. 132. *See also* 1937 Oudh 307. The words "wilful abstention from an inquiry or search" in S. 3, must be taken to mean such abstention from inquiry or search as would show want of *bona fides*, and a mere omission to make inquiries cannot be regarded as sufficient to constitute constructive notice within the meaning of the section. 53 L.W. 744=1941 Mad. 707=(1941) 1 M.L.J. 815. *See also* 1937 Oudh 301=1937 O.W.N. 438 ; 1940 O.W.N. 122. Ordinarily speaking, a purchaser must be held to have notice of a prior or registered mortgage unless special circumstances are shown which will excuse him from not making a search in the registration office. 1933 R. 153=145 I.C. 118. Purchaser of portion of *bhag* in possession—Subsequent purchaser of entire *bhag*—Failure to inquire of the prior purchaser whether amounts to wilful or gross negligence amounting to constructive notice. *See* 33 Bom.L.R. 499=1931 B. 430. Purchaser need not enquire into title of adjoining property. Vendor must disclose burdens, if any, on the property. 86 I.C. 19=1925 B. 183. *See also* 54 M.L.J. 109 ; 1929 P. 284. Where a person has to prove that notice has been given to another person, the mere fact that the transaction in question might have been known to a considerable number of people will not amount to the necessary proof. 107 I.C. 254=1928 A. 307. The fact that a customer of a bank was a man of business, well conversant with dealings of banks and bank rates of interest and thus had the means of knowing the rate of compound interest charged on his overdrafts was held to be equivalent to knowledge or reasonable grounds of belief so as to fix him with adoption or ratification of the rate of interest. 59 C. 662 =1932 C. 521. Notice to husband is no notice to wife. 2 O.W.N. 413=1925 O. 613. Notice to agent in the course of business is notice to the principal 97 I.C. 577=1927 S. 24. *See also* 31 B. 566 (P.C.) A notice sent to a firm and received by one member is notice to other members. 131 I.C. 289=1931 L. 227. Where one person is an officer of two companies, his personal knowledge is not necessarily the knowledge of both the companies. The knowledge which he has acquired as officer of one company will not be imputed to the other company unless he has some duty imposed on him to communicate his knowledge to the company sought to be affected by the notice, and some duty imposed on him by that company to receive that notice. 60 B. 326=37 Bom.L.R. 978. Constructive notice is not imputed to an involuntary purchaser as to a private purchaser.

Enactments relating to contracts to be taken as part of Contract Act.

4. The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872.

NOTES.

42 C. 625=19 C.W.N. 37. A *melkanomdar* who does not make enquiries whether the *kanomdar* has renewal in his favour should be deemed to have constructive notice of the renewal and the melcharath cannot be enforced as against the *kanomdar*. 55 M. 519=62 M.L.J. 525. A family settlement creating a charge on immovable property is compulsorily registrable and hence the fact of its registration would *per se* amount to constructive notice to the purchaser of the property in respect of the charge created on the property sold. (142 I.C. 376, Diss. from.) 1937 O.W.N. 438=1937 O. 301. Where some co-sharers sell joint property to stranger under a registered sale deed. the o her co-shares cannot be considered to have notice or knowledge of its contents, merely because it is registered. Though a subsequent transferee or any other person dealing with any property may be fixed with notice of a prior registered instrument, a co-sharer cannot be presumed to know the contents of a registered deed executed by his co-sharers who impliedly denied his title by executing the document. It is impossible to expect every owner of property to periodically inspect registration offices to find out if his property has been adversely dealt with by another person. 155 I.C. 824=1935 A.W.R. 728. But if the vendee takes possession of the property sold to him, in a manner calculated to give clear notice to the co-sharer that his right is denied and that he is excluded, the vendee's possession will be adverse 155 I.C. 824. As to the application of the doctrine of constructive notice, *see* 33 B. 1=35 I.A. 130 ; 45 M.L.J. 173 ; 55 M. 519=62 M. L.J. 525. Thus, a person wilfully refusing a registered letter sent by post will be deemed to have notice of its contents. 15 C. 681 ; 16 W. R. 223 ; 6 C.W.N. 134. Plea of *bona fide* purchaser—Attestation by purchaser of deed creating charge—Close relation with the family and circumstances—Constructive notice. 38 L.W. 463=1933 M. 715=65 M.L.J. 390. A person cannot be said to have knowledge of the contents of a document merely because he signs the document as an attesting witness. But there may be circumstances when he would be deemed to have notice of the contents of the documents. 33 P.L.R. 685=1932 L. 566. *See also* 14 L. 369=1933 L. 551 ; 35 Bom.L.R. 252. To a purchaser at an involuntary sale (as) in Court-auction constructive notice cannot be attributed to the same extent as at private sale. 42 C. 625=21 I.C. 201. As to what amounts to notice of vendor's lien, *see* 108 I.C. 291=54 M.L.J. 109. *See also* 8 P. 316=1929 P. 284. *See also* 1941 O.W.N. 122 (Notice of arrears of municipal taxes). Possession of stranger is notice of title of such person. 41 I.C. 628; 33 I. C. 121. *See also* 45 M.L.J. 175=1924 M. 67. Notice of tenancy is also notice of agreement with tenant, in absence of enquiry. 94 I.C. 538 =1926 C. 204. *See also* 45 M.L.J. 157. But the mere circumstance that the property was in possession of a tenant who, if questioned, would have named the lessor is not by itself sufficient to fix the purchaser with constructive notice of the nature and extent of the lessor's title. 134 I.C. 1211=34 L.W. 669. *See alse* 10 Mys.L.J. 67. An attesting witness need not as such be considered as being aware of the contents of the documents he attests. 25 Bom.L.R. 818=1924 B. 58. Attempt to separate the two questions of notice and *bona fides* is not usually sound. It is seldom possible to form an adequate or correct opinion of the conduct of the transferee without considering whether his good faith extends to his possession of actual or constructive notice with reference to the whole circumstances of the case. 44 M.L.J. 527=46 M. 478= 1923 M. 558.

Sec. 4.—S. 137 is to be taken as part of the Contract Act. 38 B. 255=21 I.C. 943. S. 107 of the T P. Act cannot be taken to have been inserted in S. 17 of the Registration Act and an unregistered lease deed for less than one year is not a document required to be registered under S. 17, and S. 49 of the Act can have no application to it. 39 M.L.J. 639=44 M. 55=59 I.C. 350 (F.B). The only effect of the provision in S. 4, T.P. Act, that S. 107 shall be read as supplemental to the Registration Act, *i. e.*, to S. 17 of the Registration Act, is that the proviso (that leases of immovable property from year to year or for any term exceeding one year or reserving a yearly rent shall be registered) contained in S. 17 of the Registration Act shall be read as amplified by the proviso to S. 107 of the T.P. Act. It has not the effect of requiring the Court to construe the word "lease" in S. 107 of the T.P. Act in the wider sense in which it is defined in the Registration Act. The question whether a contract is to be construed as a lease or merely as an agreement to lease must be gathered from the terms of the whole document, and where a contract operates as an actual demise it must be deemed to be a lease. 1923 O. 237. *See also* 16 C.W.N. 606; 35 M. 95. On this section, *see also* 2 Pat. L.J. 168. S. 4 properly read means, so far as it is applicable to the case of mortgages, that if and when a document of mortgage is executed, it must be registered as provided in the Registration Act, but this section does not in any way do away with the effect of S. 59 which expressly provides that in certain areas a mortgage can only be by means of an instrument in writing. 1933 R. 972. The expression "shall be read as supplemental to the Indian Registration Act" in S. 4 cannot be intended to mean that the sections mentioned therein are to be taken as a part of the Registration Act. Those sections cannot, therefore, be governed by the definitions in that Act, but must be governed by the definitions in the Transfer of Property Act. I.L.R. (1940) Lah. 70= 1939 Lah. 423.

[1][And Sections 54, paragraphs 2 and 3, 59, 107 and 123 shall be read as supplemental to the Indian Registration Act, (1908)[2]].

CHAPTER II.

OF TRANSFERS OF PROPERTY BY ACT OF PARTIES.

(A) *Transfer of property whether movable or immovable.*

"Transfer of property" defined.

5. In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself [3][*or to himself*] and one or more other living persons; and "to transfer property" is to perform such act.

[4][In this section, "living person" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.]

What may be transferred.

6. Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force.

LEG. REF.

[1] This paragraph was added by the Transfer of Property Act (1882) Amendment Act, (III of 1885), S. 3.

[2] The figures "1908" were substituted for the figures "1877" by Act XX of 1929, S. 5.

[3] Inserted by Act XX of 1929, S. 6.

[4] Last para. added by S. 6 of Act XX of 1929.

NOTES.

Sec. 5: EFFECT OF CHANGE.—The Select Committee have amended S. 5 to make it clear that a transfer can be made by a person to himself, as for instance by a person making a settlement or trust in which he constitutes himself a trustee. An explanation has also been added to the section to make it clear that the words "living person" include corporations and other associations of persons.—(*Report of Select Committee*).

"TRANSFER OF PTOPERTY".—The definition of "transfer of property" given in S. 5 applies suitably to all sections contained in Chap. II. But it seems very doubtful that the definition applies to the term "transfer" used in S. 130. 96 I.C. 1004=1926 N. 469. *See also* 5 A. 121 (137); 13 A 432. The definition does not apply to transfers contemplated by the Presidency-Towns Insolvency Act. 24 Bom. L.R. 861=1923 B. 107. A person acquiring another's right by transfer must acquire it by a valid transfer from the original owner or by operation of law. 9 N.L.R. 54=19 I.C. 759. Mere delivery of documents of title does not amount to a transfer. 96 I.C. 339=1926 N. 357. The Act is not exhaustive of all modes of transfer. Dedication to a temple is not a "transfer" within the meaning of this section. *See* 42 M. 440; 1926 N. 469=96 I.C. 1004. A gift to God Almighty is not a gift to a living person and does not require a registered instrument. 128 I.C. 791=1930 P. 610. Where a person entitled to an annuity allowance under a wakf transferred it. *Held*, that no human being has any interest in the dedicated property and the grantee cannot be said to have an interest in the income from the dedicated property in the hands of the mutawalli as the income cannot be said to be existing property which always, is contemplated in S. 5. 1936 P.W.N. 395=1936 Pat. 527. Where a transaction can only be regarded as a mutual relinquishment and admission of claim by all the parties, it cannot come within any of the class of transfers dealt with by this Act. 33 A. 356; 1923 N. 55 (2); 1930 A. 498 (2). A partition is not transfer. 52 A. 716=125 I.C. 1=1930 A. 687. But *see* contra 161 I.C. 861=1936 L. 220. A document by which a widow consents to give possession of the property to reversioners because they are reversioners of her deceased husband is not a transfer of property. 89 I.C. 722=1926 O. 69. Minority is no disqualification for acquiring property. 130 I.C. 200=18 O.C. 115. An arrangement, by which on dissolution of a parrnership certain partners are paid off and in return give up or assign their interests in the assets of the partnership is a "transfer of property" as defined by S. 5. I.L.R. (1939) Kar. 344=1939 Sind 288.

"LIVING PERSONS" includes juridical persons. 1926 N. 469=96 I.G. 1004.

Sec. 6: SCOPE OF SECTION.—Section does not apply to Punjab. 89 I.C. 792=1926 L. 39; 1933 L. 378. Hence sale of revesionary interest of a Hindu is transferable in the Punjab. 1929 L, 39. Section has no retrospective operation. Hence, where an agreement entered into between expectant heirs in 1868 provided for the division of the property after the succession opened: *Held*, that the agreement was not hit at by section 6, T.P. Act, or Section 23, Contract Act, and was enforceable. 14 P.L.T. 27=1933 P. 265. If controls S. 43—Duty of Court to reconcile Ss. 6 and 43. *See* 40 Bom. L. R. 147. The conveyance of an interest in remainder or interest *in futuro* is according to *Sunni* school invalid. 24 M. L. J. 258=18 I.C. 185. A Hindu religious endowment cannot be transferred, but its income can be pledged. 6 B. 552(F.B.)

(*a*) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.

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An assignment of an estate or interest which does not exist at the date of assignment cannot operate according to its tenor. In equity such a transfer may in certain circumstances create equitable rights. 1931 P.C. 203 =134 I.C. 324 (P.C.). Contract to assign property to come into existence in future. The assignment becomes complete when property comes into existence. 97 I.C. 257. The interest of a person's holding on which he has planted a grove is property and is transferable under S. 6 : 1924 A. 795. *See also* 123 I.C. 767=1930 A. 377. Interest of surety in the property furnished as security can be transferred subject to the charge. *See* 52 A. 619=125 I.C. 477=1930 A. 225 (F.B.).

CONSTRUCTION.—Decisions under S. 60, C. P. Code, as to what properties can be attached in execution of a decree are not of much assistance in construing this section which deals with voluntary transfers. 25 C. 778. *See also* 40 M. 302.

CLAUSE (*a*).—S. 6 (*a*) construed and reconciled with S. 43, *infra*. 57 All. 474. But *see* 145 I.C. 965=38 L.W. 610=1933 M. 795 =65 M.L.J. 588. "*Possibility*" and of a like nature, meaning and scope of. *See* 47 I.C. 563. A *contract for the future sale of future expectations* cannot be enforced. 45 M.L.J. 617=50 I.A. 239=50 C. 929 (P.C.). S. 6 (*a*) not only forbids the transfer of the expectations of an heir or legatee, but by the words 'of a like nature' prohibits any transfer of a similar kind of possibility. It is not the circumstances connected with a transfer which sanction or forbid its transfer but the inherent qualities of the chance itself. Where the granting of a gratuity to a Municipal employee is entirely in the discretion of the Municipality any transfer by such an employee of his chances of getting the gratuity, at a time when it had not been actually sanctioned, is void as a mere *spes* under S. 6 (*a*). The hope of a gratuity differs from a tradesman's book debts, in that the book debts are a necessary incident of every business conducted on a credit basis. A mortgage of such debts operates as an equitable assignment, fastening on the property when it comes into existence 1938 Rang.L.R. 542=1939 Rang. 8. A mortgage of future income to be derived from the work of scavenging to be done is invalid, as the subject of the transfer is an expectancy or a possibility within the meaning of S. 6 (*a*). 48 L.W. 258=1938 Mad. 881.

WHAT IS NOT MERE POSSIBILITY.—*See* 34 Bom. L.R. 366. Interest, *of a coparcener* is a vesting interest. 49 I.C. 907. The *interest of a donee subject to life-interest* is a vested interest and is transferable. 48 I.C. 396=21 O.C. 312. *See also* 31 S.L.R. 506=1937 Sind 306 (Life interest in a definite fund). Where, by a settlement, a vested interest is given in the income of a property and also a contingent interest in the corpus on the youngest child attaining the age of 20, the contingent interest is not a mere possibility or a mere right to sue. 8 R. 8=57 I.A 10=58 M.L.J. 83 (P.C.). An adopted son has a vested interest and such interest is not *spes successionis*. 40 A. 692=47 I.C. 599. Death of occupancy tenant leaving wife and daughter—Rent in respect of future possible lease cannot be assigned. 34 M.L.J. 236=1923 M. 3164 Offerings made at temple—Alienability when disassociated from priestly office. 113 I.C. 242.

WHAT IS "SPES SUCCESSIONIS."—The right of sons to get a share in the mother's estate. 48 C. 1059=25 C.W.N. 990. The interest of a reversioner is a mere *spes successionis* and is neither transferable nor divisible. *See* 13 N.L.R. 187=42 I. C. 737 ; 107 I. C. 987 =1928 N. 262 ; 1938 M.W.N. 259 ; 1938 Bom. 121=39 Bom.L.R. 1287 ; 1937 P.W.N. 183= 1937 Pat. 280 ; 1939 All. 689. It is not competent to a person to relinquish his rights in property to which he is the then nearest reversionary heir, expectant upon the death of a widow in possession. His son is, therefore, not estopped from claiming the property by reason of the relinquishment. 1938 O.W.N. 152= 1938 Oudh 94 ; 1930 M.W.N. 1054; 48 A. 637= =96 I.C. 595=1926 A. 715 ; 48 C. 536=25 C. W.N. 496 ; 22 C.W.N. 486 ; 62 I.C. 933=2 Pat. L.T. 471 ; 2 Pat.L.J. 578=41 I.C. 631 ; 86 I. C. 1016 (2)=1925 M. 941 ; 15 O.C. 122=13 I.C. 495. But in the Punjab, where the T. P. Act, is not in force, alienation of reversionary rights is not void. 1933 L. 378. Future offerings of worshippers. 43 C. 28=28 I.C. 675. But *see* 26 A.L.J. 115 ; 164 I.C. 1111=1936 O. W.N. 144 ; 1928 A. 721. The interest of the adopted son during the lifetime of the widow is not a mere *spes successionis*. 59 C. 859=55 C. L.J. 205. Under Muhammadan Law the right to succeed is a mere possibility. 41 M. 365= 34 M.L.J. 460 ; 41 I.C. 361 ; 108 I.C. 390. A Hindu daughter cannot bargain away her son's right as reversioner. 44 A. 428=1922 A. 217. A reversioner joining with a limited owner in a transfer is not estopped from claiming them as heir. 46 C. 566=36 M.L.J. 68 (P.C.) : 45 C. 590=45 I.A. 38=34 M.L.J. 298 (P.C.). But this clause does not bar a contract by one not to claim a share in property in the event of his succeeding to it. 27 I.C. 701=13 A.L.J. 110 ; 33 A. 414=8 A.L.J. 199 ; *also* 29 I.C. 549=29 M.L.J. 214 ; nor an agreement by an expectant heir to divide property in a particular way on the happening of a contingency. 33 A. 457= 9 I.C. 530 ; 1933 P. 165. But *see contra* 50 I.A. 238=45 M.L.J. 617=50 C. 929 (P.C.). A family arrangement is valid and binding not as an assignment or relinquishment of the rights in expectancy but as a settlement by which parties defined their respective interests to avoid future disputes and hence S. 6 (*a*) has no application to such an arrangement. 1938 O.W.N. 711= 1938 Oudh 190. The right of a Hindu reversioner is one in regard to which it is impossible to say that it would ever become concrete ; it could only become concrete upon the death of the widow and if the reversioner survived her. The bare transfer of such interest or its relinquishment in favour of another is void under

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S. 6 (*a*). But this is not necessarily so in every case. If the transfer was part and parcel of a family settlement or a compromise in dispute between rival claimants to property it would not necessarily be invalid. I.L.R. (1939) All. 950= 1939 A.L.J. 824=1939 All. 689 (F.B.). An agreement to sell Karnam inam lands when enfranchised cannot be enforced. 1925 M. 885= 48 M.L.J. 598. An agreement among reversioners to divide in particular shares the future estate is inoperative. 49 I.C. 260=35 M.L.J. 684. Family settlement deciding in what proportion several contesting members should inherit when succession opened is valid. 1929 L. 485; 1938 Oudh 190. The Transfer of Property Act does not recognise any distinction between a whole debt and a part of a debt. Both may be transferred under that Act if they come under the category of actionable claims as an actionable claim is "property." The *transferee of part of a debt* may however find that what is transferred to him is not an actionable claim as under O. 2, R. 2, C. P. Code, a single cause of action cannot be split up into several causes of action. But O. 2, R. 2, C. P. Code being a rule of procedure, does not affect the right of transfer, that is to say it can not make what is transferable non-transferable. It does however, bar the right of suit in certain cases, and it may prevent the transferee of a part of a debt from enforcing his claim, and thereby make the transfer nugatory. 18 Pat. 839=21 Pat.L.T. 928=1940 Pat. 170. Agreement not to claim a share on the death of a living person may be valid. 84 I.C. 208=1924 P. 736. Agreement that on death of one member his share is to pass to survivors is legal. 29 M.L.J. 214= 29 I.C. 549; 33 A. 414=8 A.L.J. 199. Where the daughters who had possession of the property during their mother's lifetime effected a partition of the same, *held*, that the partition was not a transfer and that S. 6 (*a*) did not apply. 52 A. 716=1930 A. 687. But *see* 38 P.L.R. 201=1936 L. 220. On the death of an occupancy tenant leaving a widow and daughter, the property was mutated in favour of the widow for her life or till re-marriage. After about 20 years, the widow applied to have the occupancy rights transferred in the name of her daughter, but the daughter was directed to file a suit to have her right declared. Accordingly, the daughter filed a declaratory suit that she was the legal heir and entitled to the property. The collaterals contended that the suit amounted only to an assertion of a *spes successionis* and as such was not maintainable. *Held*, the suit was maintainable, (9 L. 467, Not foll.; 10 L. 58 and 10 L. 489, Foll.) 34 P.L.R. 743=1933 L. 555. A *vested remainder* is not a mere *spes successionis*. 17 P.L.T. 876=1937 Pat. 163. However illegal and unenforceable a bare relinquishment or renunciation of the chance of a heir-apparent succeeding to an estate may be, different considerations prevail if that renunciation or relinquishment proceeds on a settlement of conflicting claims or *bona fide* disputes between the contracting parties. If, therefore, to avoid an adverse decision on the factum of his legitimacy, a plaintiff enters into a compromise with the defendants aud gains an immediate advantage for himself, it cannot be said that he is relinquishing a mere chance of succession. Such a compromise is valid and binding upon him. 44 P.L.R. 87. As to applicability of the rule as to *feeding title by estoppel*, see 6 O.W.N. 233. Two groves with some other property of the mortgagor were mortgaged for the purpose of purchasing the very two groves from its owner. *Held*, that the mortgage was enforceable against them on the principle of feeding the grant by estoppel, there being no third party's interest intervening between the execution of the security and the execution of the sale-deed. 131 I. C. 38=1931 A. 275. *A contract by a reversioner to sell his expected estate* is not specifically enforceable. 39 M. 554=28 M.L.J. 650. *See also* 132 I.C. 321=1931 A.L.J. 295; 130 I.C. 822 =1931 N. 51. (1928 N. 262 and 1928 O. 185, Diss. from.) *See also* 59 C. 859=55 C.L.J. 205. So also agreement by one reversioner with another to sell his interest or not to claim estate for certain sum to be paid annually. 1937 P.W. N. 183=1937 P. 280. The section has no application to a *bona fide* settlement of a right to succeed among rival competitors. 41 A. 611= 17 A.L.J. 822. *See also* 38 A. 107; 49 M.L.J. 296; 108 I.C. 440; 1929 L. 485. A family arrangement is not a transfer and cannot come under the prohibition. 1930 A. 498 (2). *See also* other cases cited on the point under S. 5.

RIGHT TO OFFERINGS MADE AT PLACE OF WORSHIP—TRANSFERABILITY.—It cannot be laid down as a broad proposition of law that the right to a share in the offerings made at a place of worship, or in the income of fairs or other functions held in connection therewith, is a mere "possibility" and therefore not alienable on the principle of law embodied in S. 6 (*a*) of the T. P. Act. Nor can it be said that such a transfer is, in every case, void as being opposed to public policy, as the making of offerings by persons resorting to temples and other places of worship is a matter of volition with them and no one can compel another to make offerings on a particular occasion to him and him alone. The determination of the question depends on a variety of considerations (*e.g.*) the nature of the institution, the occasion on, and the purpose for which the amount, is paid; the capacity in which it is appropriated by, or divided among, the persons concerned. A distinction must be drawn between cases in which emoluments are attached to a priestly office, and the cases in which the offerings are made to a deity and the persons who receive the same have not to render services of a personal nature as a consideration for the receipt of the offerings. The emoluments of the former kind are not, in the absence of a custom or usage to the contrary, ordinarily transferable. But when the right to receive the offerings made at a temple is independent of an obligation to render services involving qualifications of a personal nature such as officiating at the worship, then the right to receive the offerings, when made, is a valuable right and is property and is, therefore, transferable. 44 P.L.R. 403.

Sec. 6 (a) and (b).—Applicability—Transfer in consideration of release of *spes succes-*

(*b*) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.

(*c*) An easement cannot be transferred apart from the dominant heritage.

(*d*) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

[1][(*dd*) A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred.]

LEG. REF.

[1] Sub-cl. (*dd*) was added by Act X 1929.

NOTES.

sionis—Validity—Void contract—Duty of party receiving benefit to make compensation—Contract Act, S. 65. (1942) 2 M.L.J. 364.

CLAUSE (*b*).—A *transfer of a reversion of a lease* carries with it the right to enforce forfeiture of the lease for breach of a condition, even where the breach had accrued prior to the transfer. 43 B. 28=20 Bom.L.R. 767. *See also* 15 M. 125.

CLAUSE (*c*).—This clause means that there cannot be an "*easement in gross.*" 34 I.C. 450 =20 C.W.N. 1158 ; 20 A. 200. The clause does not bar waiver or release of rights of one in his own property. 26 I.C. 211=27 M.L.J. 272. *Kumaki* rights are not rights in gross and this clause applies to them. 15 I.C. 278. So also an *assignee of equity of redemption* cannot sue for unascertained excess profits. 96 I.C. 339= 1926 N. 357. But an *auction-purchaser at a revenue sale* can maintain a suit for recovering arrears of rent due by tenants. 91 I.C. 474.

CLAUSE (*d*).—*See* 1928 M. 1201. *Prima facie* proprietary rights are transferable and it is for the contesting party to show that such transfer is not permissible. So, a certain *muafi* granted by the ruler for the support of Brahmin, was transferable. 151 I.C. 562=1934 A. 973.

PERSONAL RIGHTS—WHAT ARE.—The widow's right to maintenance is a personal right and as such inalienable. But where property has been given to a widow of a Hindu joint family in lieu of maintenance, the transfer of such property by her is valid and effective during her lifetime. 54 A. 366=1932 A. 662. *See also* 69 M.L.J. 317 (Hindu widow's right of residence). The statutory non-transferability enacted by S. 6 (*d*) and S. 6 (*dd*) is based on the impossibility of transfer inherent in the nature of the right sought to be transferred, and not on notions of public policy. Where property has been given to a Hindu widow in lieu of maintenance, the transfer of the property during her life is not a transfer of her rights to maintenance and is valid. S. 6 (*d*) and (*dd*) have no application to such a case. (A.I.R. 1932 All. 662, Foll.) 42 C.W.N. 1258=1938 Cal. 405. *See also* 1936 Pat. 527 ; 1939 Pat. 506. An agreement by a vendee to pay revenue for other lands of vendor is personal. 38 A. 230=33 I. C. 187. Rent-free grant made in lieu of service or service inam is not transferable. 3 O.L.J. 235=34 I.C. 672 ; so also a contract of service. 47 I.C. 902 ; settlor reserving allowance to himself out of trust property. 52 M. 465=1928 M. 1201 ; lands given to a Hindu widow restricted to her personal use and preventing any alienation. 47 B. 597 ; 25 Bom.L.R. 293=1923 B. 276. In the absence of any restriction of alienation the grantee may have a right of alienation for the period of the limited interest. 125 I.C 461=1930 A. 593. Where a Hindu widow gifted certain property to her daughter and the widowed daughter-in-law consented to the same, provision for her maintenance having been made in the gift deed, *held*, S. 6 had no application. 32 Bom.L.R. 705=127 I.C. 332 =1930 B. 373. Where an owner in full right of certain property grants it to a trustee upon trust among other things to pay him an allowance per month for his maintenance, this is not a 'restricted' interest in the sense of Cl. (*d*) of S. 6 of the T. P. Act, and a hypothecation by such a person of his rights creates a valid charge on the allowance. I.L.R. (1938) Mad. 646=42 C.W.N. 565=67 C.L.J. 241= 40 Bom.L.R. 767=1938 P.C. 123=(1938) 1 M. L.J. 597 (P.C.). Mere right to sue—Hindu reversioners—Document executed by in favour of stranger authorising latter to file suit on their behalf for recovery of estate—Right given to stranger to conduct suit and to divide the property after recovery in case of success of suit and to take half-share—If operative and valid. 1938 M.W.N. 259. As to non-transferability of interests created for and restricted to the personal enjoyment of a particular person, *see* 5 Bom.L.R. 727 ; 1 M. 235 ; 7 W.R. 266 ; 1927 O. 436. *Right of pre-emption* is purely personal. 36 B. 139=11 I.C. 693 ; the right to hold markets on another's land. 6 A. 497. Alienation of hereditary fanning service inam in a temple is invalid. 25 I.C. 685=1914 M. W.N. 745. A rent-free grant in lieu of service is not transferable. 34 I.C. 672 ; *also* 42 M. L.J. 477=45 M. 620. A *contract of service* is not assignable before breach. 47 I.C. 902. But the right of enjoyment in certain property accruing to a person under an award of partition can be validly assigned. 1932 A.L.J. 821. Grant for grantee's *parwarish* for lifetime is personal. 105 I.C. 196. S. 6 (*d*) does not prohibit the beneficiaries for life under a gift deed from disposing of their interest in the property. 1927 R. 157=101 I.C. 625.

PERSONAL RIGHTS—WHAT ARE NOT.—*Malikana* rights of fixed share in the rent of lands are not personal and are transferable. 21 A.L. J. 289=1923 A. 304. The right to exercise the profession of a broker is not personal. 18 C. W.N. 1184=19 C.L.J. 313.

ADDITION OF NEW SUB-CL. (*dd*).—"Section 6, which enumerates property of different kinds which cannot be transferred, includes in cl. (*d*) an interest in property restricted in its enjoyment to the owner personally. A right to receive maintenance is a personal right, although any particular property or the income thereof may

(*e*) A mere right to sue [1][* * * * * * *] cannot be transferred.

LEG. REF.

[1]The words "for compensanction for a fraud or for harm illegally caused" were omitted by Act II of 1900, S. 3 (*i*).

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be charged with it. It is in accordance with public policy that these rights which are generally created for the maintenance or personal enjoyment of a qualified owner, *e.g.*, a Hindu female, ought to be inalienable; but in some cases it has been held that if the amount of maintenance is fixed by an agreement or by a decree, it can be assigned. (5 B. 99; 38 C. 13). Although an agreement or a decree would make such right definite, it is nevertheless a right created for the personal benefit of the qualified owner and should not be alienable. S. 60 of the C. P. Code which protects such right from the process of a Civil Court does not make any exception in the case of maintenance fixed by agreement or decree. The above reasoning, however, does not apply to arrears of maintenance which have accrued due. To make the position clear, we suggest that the following clause should be inserted as cl. (*dd*), *viz.*, 'a right to future maintenance in whatsoever manner arising or secured or determined cannot be transferred."—(*Report of Select Committee.*) Right of residence is connected with and is governed by the same rules as apply to a right of maintenance. 1 Punj.L.R. 209 (212, 213). *See also* 1937 Bom. 358=39 Bom.L.R. 458; 42 C.W.N. 1258=1938 Cal. 405.

ALLOWANCES CONFERRED BY WILL—TRANSFERABILITY.—The right to future maintenance contemplated by S. 6 (*dd*) means a personal right for the maintenance or personal enjoyment of the grantee. Allowances conferred by a will stand on an entirely different footing and they are transferable. 167 I.C. 52=1937 O.W.N. 188=1937 Oudh 420; 42 Bom.L.R. 165. What is intended by S. 6 (*dd*) is not a sum which is used as maintenance but which in fact is maintenance. There is nothing in the subsection to prevent an assignment of arrears of maintenance, that is to say, a sum which has already become due. The section deals with a right, under the personal law of the parties concerned, to maintenance. A sum will not come within the section merely because it is used as maintenance. The fact that the maintenance is secured by a deed does not exclude it from coming within the mischief of the section. 1939 Pat. 506=181 I.C. 37. A right to monthly maintenance allowance which has not accrued due already, cannot be assigned by way of mortgage in view of the provisions of S. 6 (*dd*) of the T. P. Act. These provisions will apply whether or not there was an antecedent obligation on the grantor to maintain the grantee under the personal law of the parties. There is no doubt a distinction between a maintenance allowance and an annuity, and whether an allowance is the one or the other will depend on the facts of each case. 77 C.L.J. 528. *See also* 1936 Pat. 527; 1938 Cal. 405; (1938) 1 M.L.J. 597=1938 P.C. 123=I.L.R. (1938) Mad. 646 (P.C.).

CLAUSE (*e*)—Right under a contract to sell is not a mere right to sue and is transferable. 1924 L. 709. If along with the land, the right to recover the profits of the land which have already accrued due is sold, it is not a "mere right to sue," but property with an incidental right *attached* to the property itself, to which the section has no application. 56 B. 403=44 Bom. L.R. 991. *See also* 1926 C. 428. Where the transfer is of a right to sue for the money which may be found to be in the hands of the agent and is not meant to include a right to sue for damages on account of negligence or in the sense of moneys which ought to have been in his hands if he were diligent, such a transfer cannot be a mere right to sue. 145 I.C. 123 =57 C.L.J. 46=1933 C. 461; nor where a transfer is made of the property which is the subject-matter of the litigation and if the transfer is for good consideration. 143 I.C. 575=37 C.W.N. 706=1933 C. 454. Where after the filing of a suit for damages for wrongful dispossession of premises in breach of an agreement of lease, the plaintiff assigns by way of sale the profit and loss of the suit to another, and on the death of the plaintiff thereafter, the assignee claims to be brought on record and to continue the suit, he cannot be permitted to do so. The right to recover damages whether for tort or contract is a mere right to sue. The assignment of the fruits of a pending action, though valid, gives the assignee no right to interfere in proceedings in the action. The Court has merely to consider the nature of the suit. 58 L.W. 64 =1941 Mad. 389=(1941) 1 M.L.J. 22. Though a right to sue for damages is a mere right to sue and not an actionable claim, and therefore ordinarily not transferable, the bar of S. 6, T. P. Act, cannot apply to a case where a person has transferred to another the whole of his rights in the property, in respect of the acquisition of which damages are claimed by the transferee. 1939 O.W.N. 500=1939 Oudh 196. Where a guardian has sold the minor's property and the minor does not file a suit within 3 years of his becoming a major to set it aside, but later on merely transfers the property to a third person, it is not a transfer of an actionable claim and it could not be a transfer of immovable property because the minor transferor, not having himself sued within time, had ceased to have any rights in the property which he was capable of transferring. The transfer was not one of anything more than a right to sue and therefore without effect in view of the bar of S. 6 (*e*). 1939 O.W.N. 241=1939 Oudh 122. Sale by guardian—Transfer by minor of the same properties on attaining majority being a mere right to sue, is invalid. 34 Bom.L.R. 1512. Mere right to sue—Bond by guardian to Court under Guardians and Wards Act—Breach—Assignment by Court to new guardian and assignment by latter to ward on becoming major —Validity—Suit by ward to enforce bond is Maintainable. *See* 1938 M.W.N. 379. As to a case where this clause was held not to apply, *see* 59 I.A. 41=11 P. 266=36 C.W.N. 280=62 M.L.J. 287 (P.C.).

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SCOPE.—What is a right to sue depends on facts of each case. 1925 S. 18. *See also* 7 P. 584=110 I.C. 526. The income of an estate deposited in Bank drawable by a successful litigant does not properly fall under this clause. 43 M.L.J. 486=46 M. 190. The section is not exhaustive. All contracts capable of specific performance are assignable. 19 M.L.T. 329=33 I.C. 696. Tbe obiect of the clause is to prevent trafficking in litigation. 3 B. 402 ; 12 B. 554. *See also* 1925 O. 299. Where a person transferred certain properties and all his interest in certain suits relating to the same, it was held that the transferee could maintain a suit to recover mesne profits and that the same was not prohibited by S. 6 (*e*). 33 C.W.N. 614. Under S. 6 (*e*) the prohibition is against the transfer of a mere right to sue. The word '*mere*' implies that the transferee acquires no interest in the subject of transfer other than the right to sue. Where the party purchased a tank along with a covenant against misfeasance, it was held that what was puchased was not a mere right to sue but a property. 10 Pat.L.T. 191=1929 P. 245. So also where a manager alienates the joint family proper y for himself and his minor brother. the latter has an interest in the property which he is capable of transferring, and hence an alienee from him is entitled to sue. 151 I.C. 1043=36 Bom.L.R. 474=1934 B. 234. What can be assigned is property or right which can be regarded as property capable of being assigned. The right to recover a share of village profits is not a contractual or personal right but a right which arises from ownership of property or ownership of land and is ancillary to the right of property. Whatever doubt there might be as regards the assignment of a mere right to recover past profits no question can arise, when the right is assigned as incidental to the proprietary share itself which is transferred. Such a transferee is entitled to sue for rendition of accounts of the village profits. 1942 N.L.J. 30.

WHAT ARE TRANSFERABLE.—The right to recover moneys found due on taking accounts is transferable. 42 I.C. 390 ; 1925 S. 72: 32 Bom. L.R. 894=1930 B. 409 ; 1926 M. 417=50 M. L.J. 54. Where at the time of the assignment, a liquidated amount had become due to the assignors of the plaintiff, the assignment of a right to recover his debt is more than a mere right to sue for accounts, and it does not therefore offend the provisions of S. 6 (*e*). 57 M. 1074=1934 M. 461=67 M.L.J. 158. The mere fact that a calculation will have to be made before determining the exact amount does not make that amount any the less a debt due to the assignors validly assignable in law. 57 M. 1074. A *right to mesne profits* under a decree is assignable. 20 I.C. 685=18 C.W.N. 450; 44 M. 539=40 M. L.J. 204; *also* 1 Pat.L.J. 427=37 I.C. 998: 113 I.C. 767=1929 A. 63. But *see* 125 I.C. 468=1930 A. 593. A right to take accounts and to recover such sums as may be found due is not assignable, being a mere right to sue within the meaning of S. 6, Cl. (*e*), and the assignee is therefore not entitled to maintain a suit for such a purpose. *See* 1937 Lah. 934. An agent has a right to claim an indemnity from his principal after rendering an account and not before. Consequently, a right to indemnity before rendering an account is a mere right to sue and cannot be assigned. 62 C. 510=39 C.W.N. 606. *A right of contribution.* 43 M.L.J. 129=1922 M. 397; *a right of reconveyance of land* 1921 M.W.N. 519. A *claim to recover arrears of rent* by purchaser of the whole estate is valid, as the purchase is not a bare right to sue but the estate together with that right. 91 I.C. 474. *See also* 1935 A. 342=1935 A.L.J. 348. *Right to recover unpaid purchase money.* 27 N.L.R. 288=1931 N. 89. *See also* 1942 Mad 209=(1941) 2 M.L.J. 695 (Right to recover purchase money when sale is set aside as vendor had no title to property sold); an *executory contract*; 31 I C. 604=18 M.L.T. 483; a right to recover from the transferor's agent moneys not brought to account fraudulently. 18 I.C. 138=24 M.L.J. 313; a share to *arrears of profits* of an estate. 60 I.C. 690=23 O.C. 384; 47 I.C. 634; 1925 A. 765 (*see contra* 89 I.C. 827). Right of a co-sharer to recover from *lambardar* his share of profits. 1926 M. 396=97 I.C. 189; 145 I.C. 228=1933 M. 710. *See also* I.L.R. (1940) Nag. 37=1939 Nag. 97. Transfer of a debt due by a debtor is not transfer of a mere right to sue. 1926 M. 417=50 M.L.J. 54, *See also* 149 I.C. 529=11 O.W.N. 691=1934 O 240. But the assignee of a debt so far as the claim to interest due before the date of assignment is conveyed purchases a mere right to sue which is not transferable. 1934 Oudh 240. A non-permanent tenure created after the passing of the T.P.Act and before the B.T.Act was passed is transferable. 1927 C. 220=103 I.C. 202. Sale by O.A. of properties in the possession of aliences from the insolvent is nothing more than a sale of right to litigate. 1927 P.C. 253=54 M.L.J. 88 (P.C.). Transfer by a beneficiary of his rights under a settlement is not a mere right to sue. 5 R. 145=1927 R. 165. A right of maintenance in a definite sum of money cannot be mere right to sue. It may not be attachable in advance under S. 60 (1) (*n*), C.P.Code, but that is not sufficient to bring it within S. 6 (*e*), T.P.Act, for it will, in case of a breach, support a suit for a debt and not for damages. 1936 P.W.N. 395=1936 Pat. 527. *See also* 1939 Pat. 506; 1938 Cal. 405. Sale of goods sent by Railway which had not reached its destination and about which investigation was proceeding, is not a transfer of a mere right to sue and hence such a sale is not illegal. 1941 A.M.L J. 35.

CASES WHERE THE CLAUSE APPLIES.—A claim to recover an ascertained amount is an actionable claim and can be validly transferred, but a claim for unliquidated damages for breach of contract, after the breach is not an "actionable claim" within the meaning of S. 3 and cannot be transferred because of cl. (*e*) of S. 6. 1933 A.L.J. 1009=1933 A. 642. A claim for *damages for breach of contract* after breach cannot be transferred. 86 I.C. 960=1925 L. 548; 106 P.R. 1914=27 I.C. 115; 36 C. 345=13 C.W.N. 384; 1935 N. 135; 1935 N. 2; 36 C. 345; 22 M.L.J. 207; 38 M. 138; 122 I.C. 264=1930 N. 22; *also* 1925 M. 62=47 M.L.J. 435; 47 B. 719=1923 B. 403; 4 O.L.J. 425=41 I.C. 436; 1935 N. 2. An executory contract

(*f*) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.

(*g*) Stipends allowed to military, [1][naval], [2][air force] and civil pensioners of [3][the Crown] and political pensions cannot be transferred.

(*h*) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) [4][for an unlawful object or consideration

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[1] Inserted by Act XXXV of 1934.

[2] The words "air foree" were added by th Repealing and Amending Act X of 1927.

[3] Substituted for 'Government' by Government of India (Adaptation of Indian Laws) Order, 1937.

[4] The words "for an illegal purpose" were omitted and these wor ds were inserted instead by S. 3 (*ii*) of Act II of 1900.

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for the future sale of immovable property is however not a mere right to sue, although a right to sue is involved in it on breach of its conditions. Where, however, at the time of the execution of the assignment deed by the vendee, the assignor is aware that the contract was incapable of execution, what he assigns is not an executory contract but a claim in respect of compensation for a breach thereof and hence more right to sue. 1934 N. 268; also a claim for past *mesne profits*. 38 M. 308=25 M.L.J. 410. *See contra* 103 I.C. 678 (2)]; right to sue for damages for *wrongful attachment of movable property* 5 A. 207. A mortgagor assigning his equity of redemption cannot transfer his right to unascertained excess of alleged profits. 1926 N. 350=96 I.C. 339. A *right to sue for recovery of debt* cannot be purchased. 17 A.L.J. 837. *See also* 62 Cal. 510=1938 Cal. 377 (Right of commission agent to sue for commission coupled with the obligation to render accounts). Where a person who has purchased a car on instalments sells it to another on payment of full price but dispossesses his vendee, the latter has only a personal right against the former. Such a right is a mere right to sue within S. 6 (*e*) and hence cannot be transferred. 30 N. L.R. 213=1934 N. 78. Where a mortgagor left a portion of mortgage-money with the mortgagee to be taken later on, *held*, the right to recover such amount is a mere right to sue and cannot be transferred. 7 O.W.N. 12=1930 O. 88. Mortgagor and mortgagee—Amount left with mortgagee to pay creditor of mortgagor in respect of claim in pending suit—Creditor getting decree for lesser sum and balance left with mortgagee—Right to recover balance from mortgagor—Assignment of right—*Held*, that the right transferred was not a mere right to sue within the meaning of S. 6 (*e*), but an actionable claim falling under S. 130 and the assignee was entitled to sue and recover on the basis of assignment. 1937 A.L.J. 518=1937 All. 470. S. 6 (*e*) is confined in its operation to the transfer of a mere right to sue. Where a vendee was directed by the sale deed to pay part of the consideration to a creditor of the vendor, the relation between the vendor and vendee is that of a debtor and creditor and the money left in the hands of the vendee is a debt which could be transferred. The right to recover this is an actionable claim as defined in S. 3. 1938 A.L.J. 851=1938 All. 544. Where the mortgagor completes his part of the contract by executing a usufructuary mortgage and by putting the mortgage in possession and the mortgagee fails to discharge the consideration, the mortgagor has a transferable claim and his assignee is entitled to sue the mortgagee for the amount. (1931 A. 95. Foll.) 162 I.C. 698=1936 L. 196. Right to indemnity is not transferable. 62 C. 510=39 C.W.N. 606.

CLAUSE (*f*).—Right to a public office is not transferable. 6 O.L.J. 157=51 I.C. 86; so also a right to receive gifts from worshippers: 51 I.C. 86; also the right to offerings in a Hindu temple. 37 I.C. 960 (P.). The right to recover a sum of money agreed to be paid to the plaintiff and charged upon particular land with the object that certain religious ceremonies should be performed by him is transferable, where it is found that the performance of the worship is not a condition precedent to his claim. 34 Bom.L.R. 198. The transfer of the rights of *mutwalli* is invalid. 47 I.C. 117=22 C. W.N. 996; 8 C. 372; 23 C. 645; 12 L.W. 590=1931 L. 379; so also office of the *Dharmakarta* of a temple. 15 M. 419; or of *archaka* of a Hindu temple: 7 M.H.C. 32; 4 M. 391; 1 C.W.N. 493; 14 W.R. 239; W.R. 266; 43 C. 28; 59 I.C. 86; 45 M. 620=1922 M. 197; or of *shebait* or *mutwalli* of a muhummadan mosque: 23 C. 645; 22 C.W.N. 996; 8 C. 732; 7 W.R. 226; also mirasi office: 16 M. 146. As to transfer of a religious office, *see also* 47 B. 529 where the authorities are fully discussed. Transfer of office of *Karnam* is not valid. 20 M. 145; so also that of *chowkidar*. 31 C. 1021. Public servant getting salary below attachable limit—Agreement with creditor for attachment and deduction of part every month not legal. *See* 43 Bom.L.R. 758=I.L.R. (1941) Bom. 415=1941 Bom. 389.

CLAUSE (*g*).—The word "*pension*" implies periodical payments of money by Government to the pensioner. 51 I.A. 215=35 C.W.N. 791=1931 P.C. 160 (P.C.). Agreement to transfer *political pension* is void. 1927 M. 604=50 M. 711=52 M.L.J. 622. A *bonus* or grant is not a pension and is transferable. 5 M. 272; so also grant of land once for all in lieu of pension. 29 B. 480; 30 M. 153; 32 A. 108; 28 A. 104; so also *Zemindari grant* for past service to Government is not a pension under this subclause. 26 A. 616.

CLAUSE (*h*).—*See also* Contract Act, S. 23 and notes thereunder,

Cl. (*h*) (2) (would be inapplicable where the object of the consideration for the transfer is itself not unlawful but the transfer may be ineffective on some other ground. 122 I.C. 872=1930 A. 1 (F.B.). Where a grant prohibits transfer to a person not holding a certificate, a

within the meaning of section 23 of the Indian Contract Act, 1872], or (3) to a person legally disqualified to be transferee.

[1][*i*) Nothing in this section shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee.]

Persons competent to transfer.

7. Every person competent to contract and entitled to transferable property, or authorized to dispose of transferable property not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner allowed and prescribed by any law for the time being in force.

Operation of transfer.

8. Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.

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[1] Cl. (*i*) was added by Act III of 1885, S. 4.

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person not holding such a certificate is not legally disqualified to be a transferee. 1928 R. 136=6 R. 423=111 I.C. 105. If the consideration or object of passing a sale-deed be immoral, *i.e.*, past or future co-habitation, the transfer would be void under S. 6 (*h*), T.P.Act, read with S. 23 of the Contract Act. 35 Bom. L.R. 345=1933 B. 209. A settlor cannot recover back property transferred for an immoral consideration, if it has already been achieved. 44 M. 329=39 M.L.J. 525. Inam grant burdened with temple service by family of grantee with hereditary right—Usufructuary mortgage of the same, if void. 1940 M.W.N. 404.

CLAUSE (*i*).—The relinquishment by a tenant of his agricultural holding is a transfer which is prohibited by this clause. 8 O.W.N. 1359.

SCOPE.—15 O.C. 67=13 I.C. 613. *Vatans* of the kind of *Desaigiri Hak* in Guzarat are alienable. 45 B, 948=23 Bom.L.R. 304. A *lease from year to year* is transferable generally. 36 I.C. 1006. But *tenancies from year to year of homestead lands* are non-transferable. 27 I.C. 500. The fact that by the same deed a transfer of both a transferable and non-transferable right is effected does not make the transfer of the former illegal. 39 A. 539=15 A.L.J. 544; 122 I.C. 872=1930 A. 1 (F.B.). As to right to transfer the *interest of an occupancy tenant* in land, *see* 5 A. 121; 13 A. 28; 28 C. 179,

Sec. 7.—A transfer by a person who is not the owner does not bind the real owner. 1923 A. 563. A man has no right to deal with property which is not his own and unless he can show some right to deal with it, either as agent or guardian of the owner or trustee or the like, any transfer which he purports to make cannot bind the lawful owner. 1923 A. 563=77 I.C. 705.

"COMPETENT TO CONTRACT AND ENTITLED TO TRANSFER PROPERTY."—A minor cannot transfer property. 33 C. 559 (P.C.). A lease by a minor is void; it is incapable of ratification express or implied by the acceptance of rent by the lessor on attaining majority. 130 I.C. 598=1931 B. 178. When he represents himself to be a major and if he has practiced fraud operating to deceive, he will be estopped from questioning the transfer. 20 B. 326. A transfer to a minor is valid. 40 M. 308=31 M.L.J. 575 (F.B.); so also to a person who is not of a sound mind (*see* Contract Act, S. 11). 44 A. 748=1922 A. 449; also to other persons who are legally disqualified (as) a person whose property is under the Court of Wards, and other disqualified proprietors under special Acts (as) the Chota Nagpur Encumbered Estates Act (1876). 17 C. 223. *See also* 30 A. A. 38; 17 C.P.L.R. 13.

"AUTHORIZED TO DISPOSE OF PROPERTY NOT HIS OWN" (as) *Guardians* under the Guardians and Wards Act; *Agents* (*see* 1923 A. 563): *Trustees* under the Trusts Act and the Trustees and Mortgagees Powers Act: *executors* and *Administrators* under the Succession Act; the *Administrator-General* under the Administrattor-Generals Act; the *Official Trustee*; *Manager* of a lunatic's estate; and *manager* of a joint Hindu family; as to *Manager of Malabar Tarwad*, *see* 39 M.L.J. 590. Lease on behalf of minor by his *de facto* guardians, is not initially void. 1930 L. 772. But *see* 1931 M. 147=59 M.L.J. 941, holding that a lease by a minor is void and the fact that it is executed by the lessee in favour of the minor lessor and not by the lessor does not cure its invalidity.

Sec. 8.—The object of S 8, is to stabilise title and remove from the region of pure speculation what passed in the mind of the transferor or the transferee at the date of the transfer. Per *Mukerji, J.*—When S. 8 speaks of transfer of property, it speaks of transfer of some property which may be tangible or intangible but not mere title. But when it speaks of interest it includes title large or small. 27 A.L.J. 620=116 I.C. 1=1929 A. 465 (F.B.). S. 8 is not a canon of construction but a rule relating to the effect of a grant. 1919 M.W.N. 353=52 I.C. 239. As far as po sible, a deed of grant ought to be construed strictly against the grantor. So a mortgage by a person of his rights in the mortgaged property would in the absence of express reservation include all interests of whatever kind possessed by him in the

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land. 18 C.L.J. 48=17 I.C. 494. *See also* 1923 N. 130; 1937 N. 205. As to what are "*legal incidents*" of property, *see* 5 A. 324. The section applies to negotiable instruments. 38 I. C. 339=32 M.L.J. 354. The section has no application to execution sales. 39 M. 283=17 M.L.J. 57. *See also* 45 M.L.J. 385=1924 M. 187. But the principle laid down in the section may be extended to *involuntary transfers*. 130 I. C. 489=1931 A. 62. *Vend r's lien* for unpaid purchase-money in the hands of the vendee, when sold in execution. passes to the purchaserby virtue of the sale certificate along with the debt. 1926 M. 903=51 M.L.J. 95. Where a person conveyed the land as also the past mesne profits to the vendee and the latter did not sue for the profits, the right of action still continues with the transferor and S. 130 is not bar to it. 1927 M. 817=53 M.L.J. 342. On a transfer of the village, all the interests of the transferor in the village, will pass, unless excepted. 1927 O. 240=2 Luck. 43. *See also* 4 A. 381; 30 C. 556 (1926 O. 358, Rel. on); 1941 O.W.N. 820=1941 Oudh 507; 1941 O.W.N. 618=1941 Oudh 395. On a transfer of a house, easements annexed thereto also pass. 15 W.R. 526; 6 W.R. 314. *See also* 14 C. 797.

TRANSFER TO HINDU WIDOW.—Where a gift deed is executed in favour of a Hindu widow by an adopted son, giving her immovable property belonging to him and in his possession, to be enjoyed by her perpetually and as she liked, the combined operation of S. 122 of the Act, read with S. 8 which would apply to Hindus (after the amendment of the Act in 1929), would give rise to the presumption that the deed confers on the donee the whole of the estate which the donor is capable of transferring. Even in the case of a deed of gift executed before 1929, *i.e.*, before the amendment of the Act, there being no "rule of Hindu law" requiring a transfer in favour of a woman to be treated as a limited transfer, or qualified transfer, the transfer by way of gift must be treated as conferring upon the donee the whole of the interest which the transferor is capable of passing at the date of the deed and hence the donee would take an absolute estate and not merely a qualified or limited estate. 39 Bom.L.R. 1217=1938 Bom. 125

APPLICATION OF THE SECTION.—Under S. 65, C.P.Code, and S. 8, T.P. Act, a purchaser in Court sale is entitled to the property from the date of sale, and not from the date of confirmation thereof. 40 C. 89 (P.C.); 1933 M. 482=145 I.C. 174. The transfer by an executor may be of not only his own interest in the estate but the whole estate. 42 C. 56=41 I.A. 189 =27 M.L.J. 93 (P.C.). *See also* 40 B. 69=28 I.C. 544. Where immovable property is mortgaged, fixtures as well pass to the mortgagee. 44 I.C. 211=22 C.W.N. 758. As well as all other rights in the land possessed by the mortgagor. 17 I.C. 494=18 C.L.J. 48. The right to the growing crop passes by the sale of the land in the absence of an express provision to the contrary, and in the case of a Court-sale, the right to the possession of the crop accrues from the date of the delivery of possession of the land. [13 M. 15 and 1919 C. 588, Rel. on.] 38 C.W.N. 854=1934 C. 610. A purchaser at an auction-sale is not entitled to crops sown by a stranger before the date of sale. 15 I.C. 619 =16 C.W.N. 1101. Trees and shrubs rooted in the soil will also pass as being attached to the soil. 2 N.W.P. 251; 83 I.C. 479=1924 N. 96; 4 N.L.R. 104. *See also* 24 A. 294; 13 M. 15; 22 B. 610; also the buildings erected on the land. 2 W.R. 123; 33 C. 556; 44 I.C. 211. On a transfer of land, the property in the bamboo clusters standing on the land also passes to the transferee. 1932 P. 344. The enumeration of words 'locks, keys, bars, etc.,' in S. 8, corresponds to fittings or permanent fixtures to the house. The words 'other things provided, etc.,' do not include a right of access by a staircase when the ownership of the staircase itself is not claimed and the right of way is not an easement of necessity. 1937 N. 179=I.L.R. (1937) Nag. 204. The phrase 'easements annexed thereto' in S. 8 refers to those easements which at and prior to the transfer were existing easements. It does not refer to an easement which first came into existence as a consequence of transfer. 1937 Nag. 179. Doors and windows also pass with the building, they having no separate existence. 11 C. 164. *See also* 37 C. 815. The English law as to fixtures does not apply to India. Fixture does not include machinery brought into the house for carrying on business. 45 M.L.J. 385=1924 M. 187. Test to determine what are fixtures under the section laid down. *See* 37 C. 723 (P.C.); 1925 R. 250. As to machinery attached to the soil, *see* 14 B.L.R. 201; 4 C. 946. As to fixtures on the land erected for agricultural purposes (as) wells, tanks, etc.. *see* 28 M. 539; 12 M.L.J. 432; (1888) Bom. P.J. 125; 25 M. 669. Reservation of rights cannot be inferred except from the terms of the document. 37 I.C. 870 (C.); 35 I.C. 262. Not all easements but only those annexed to the property pass with the transfer. 15 A. 270. A *mokarari lease* by Zamindar does not pass the right to minerals to the tenant. 37 C. 723. *See also* 33 C. 203 (P.C.). A right of way, not continuous, does not pass: 2 M, 46; unless express words of grant are used. 7 C. 670; 14 C. 797. In August, 1912, one *M*, a Sunni Mahomedan, executed a deed of sale in respect of two villages in favour of his mother *R*. He died in September, 1912, and *R*. made a wakf of both the villages in June, 1913. In December, 1917, by judgment of Court the aforesaid sale was declared to be void with the result that *R* took nothing by the sale-deed but was entitled as an heir of her son to one-third of the villages. *Held*, that in determining what passed by the deed of wakf and in order to ascertain *R's* intention in executing it, the whole transaction had to be looked at and since the sale was declared to be void the waktnama fell with it and was inoperative even to the extent of the third share which *R* had acquired as her son's heir. *Quaere*.—Whether S. 8, T.P.Act, had any application to the case. 60 I.A. 116=55 A. 83=64 M.L.J. 514 (P.C.).

PROFITS ACCRUED PRIOR TO TRANSFER.—A transferee cannot claim profits apart from the

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth ;

and, where the property is machinery attached to the earth, the movable parts thereof ;

and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith ;

and, where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer ;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

Oral transfer.

9. A transfer of property may be made without writing in every case in which a writing is not expressly required by law.

Condition restraining alienation.

10. Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or

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property *prior* to the transfer as the legal incidents of the transferor's interest under S. 8 include only rents and profits due *after* the transfer. 12 L.W. 44=58 I.C. 383; *also* 6 C. 213; 47 I.C. 158. *See also* 33 Bom.L.R. 158;8 104 I. C. 409=53 M.L J. 342; *see* further 29 C.W.N. 953=1926 C. 204 (as to whether prepayment of rent by tenant in advance with an agreement by landlord not to eject the tenant is binding on mortgagee-purchaser). *See also* 1 N.L.R. 48.

SECURITY FOR DEBT.—Transfer of debt carries with it the security for such debt. 26 B. 305. *See also* 52 I.C. 879=1919 M.W.N. 613 (promissory note secured by deposit of title-deeds). *See also* 44 M. 965.

ARREARS OF INTEREST.—The arrears of interest of assigned debt must be held to have been transferred with the debt. 8 Bur. L.T. 121=27 I.C. 896. But *see also* 27 B. 330 (interest not allowed on items barred by limitation). As to apportionment of interest between the transferor and transferee, *see* S. 36, *infra*. Where arrears of rent are transferred the interest on them being a legal incident of the arrears also passes to the transferee along with it. 7 I.C. 582 (C). *See also* 30 C. 213; 27 I.C. 896=8 Bur.L.T. 121. Interest is only accessory to the principal. 27 B. 330.

RIGHTS AND COVENANTS RUNNING WITH THE LAND.—A right to build a pucca structure on the land of the Secretary of State for India is a right that will run with the land. 74 I.C. 369 =1923 Oudh 114. A covenant for renewal being a covenant running with the land, where a grantee of land for a term of years transfers his interest, the right of renewal goes with the transfer unless there is an express or implied intention in the document of transfer to the contrary. 9 L.B.R. 263=51 I.C. 360.

Secs. 8 and 122.—Scope and effect of—Gift by adopted son in favour of Hindu widow—Absence of words of limitation—Nature of estate conferred. *See.* 39 Bom.L.R. 1217=1938 Bom. 125.

Sec. 9.—Before the T. P. Act no written conveyance was necessary. 42 C. 801=42 I. A. 1=28 M.L.J. 548 (P.C.). After the T.P.Act transfer of immovable property cannot be effected in any other manner than that prescribed by this Act. *See* 24 M. 377. Thus an admission in a petition to the Collector or a mutation of name in the Revenue Register, or delivery of possession cannot operate as a transfer. 21 M. 377. *See also* 23 A. 175. Admission as to ownership—Whether operates as conveyance. *See* 12 P. 616=1933 P. 264. As to *oral transfer*, see 120 I.C. 598=1930 L. 9. Grant of usufruct and not corpus requires no writing. 21 O.C. 360=49 I.C. 406. A surrender of lease need not be in writing, nor registered. 46 I.C. 100=28 C.L.J. 220; 19 I.C. 124; also a surrender of relinquishment by a ryotwari tenant of his holding under the Government. 13 L.W. 230=61 I.C. 852; also partition *of joint Hindu family property*. 10 C.L.J. 503=25 I.C. 498; 18 I.C. 524; so also a gift of the mere usufruct of land to be enjoyed for life, 49 I.C. 406; a grant for maintenance by husband to wife. 45 M. 612; a transfer effected under a compromise decree. 13 M.L.J. 500. Whether registration is necessary in a case where a deed of gift is executed in lieu of prior services and the donee has been let into possession, *see* 30 Bom.L.R, 451. There is nothing in the T.P. Act which prohibits a *family arrangement* from being made by oral agreement; this is clear from the provisions of S. 9, 1935 R. 355.

Sec. 10: SCOPE AND APPLICABILITY.—9 Pat.L. T. 747. S. 10 embodies a sound and equitable principle which should be applied to the Punjab, though the Act has no application in the Punjab. 1924 L. 647=76 I.C. 16. An ab-

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solute restriction in perpetuity on every sort of alienation for any purpose by a donee of land should not be recognized and enforced. 1924 L. 674; 1935 S. 182. Restraints on alienation imposed by the Legislature are binding on all parties. 13 I.C. 163. *See also* 15 O.C. 67. Where a deed of transfer at first absolutely transfers property to another, but by a subsequent clause makes the clause subject to a condition restraining the transferee from parting with or disposing of that interest to any person other than the transferor, the condition amounts to an absolute restriction on the right of transfer and so is void. 27 A.L.J. 515=1929 A. 381. The word "absolutely" in S. 10 should be construed in a reasonable manner. Where under a family arrangement a Hindu father in the Punjab governed by the Mitakshara law gave some property to his son stipulating that in respect of a portion of it, the son should not make any transfer during his father's lifetime. *Held*, that the condition which was sought to be imposed was not absolute, as it extended only to the lifetime of the father after which the son would be free to dispose of the property in any manner he liked and that, therefore it was binding on the son. 155 I.C. 699=1935 L. 503. *Restraint on alienation* generally or except to a particular person or a special class is void. 27 O.C. 350=1925 O. 125. Gift subject to condition that alienation should be with the donor's consent if valid. 7 R. 306. *See also* 64 I. C. 408; 63 I.C. 196; 1929 A. 381; 1939 All. 221. A provision in partition deed, by which properties are allotted absolutely to the respective sharees. prohibiting alienation, including mortgage, of the properties allotted in absolute interest to each sharer, except with the consent of the other share, is repugnant and is therefore invalid. 154 I.C. 587=40 L. W. 908=1935 M. 33. Where in a partition deed between the father and his sons in a Hindu family it is provided that certain houses (which had been used as the family residence) should be held by the members of the family as tenants in common, that no member should have the right to dispose of his share to a stranger, that if any of the sons chose not to live in the houses mentioned, "he shall not be at liberty in any manner to let or lease, etc., his undivided share to a stranger to the family but shall do so only to any of his brothers or his heirs for a sum not exeeeding Rs. 1,000" and it is found that the price of Rs. 1,000 fixed is far below the real price of the share and that there is no corresponding obligation on the part of the other members to buy the share of the member wishing to sell, the restriction against the alienation is void. The estate created is a tenancy in common, and the restriction against alienation amounts to an absolute restraint on alienation within the meaning of S. 10, T.P. Act, and therefore must be disregarded as void; the sons take the property as tenants in common without fetter. I.L.R. (1939) Mad. 954=1939 Mad. 769=(1939) 2 M.L.J. 345 (F.B.). A condition directing the enjoyment of the usufruct of a gifted property by a third person for life is valid. 11 I.C. 702. *See contra* 9 I.C. 951=13 Bom.L.R. 141. A general restriction on assignment does not apply to an assignment by operation of law taking effect *in invitum*, as a sale under an execution. 1924 N. 222; or a sale under the provisions of the insolvency law, 78 I.C. 802=1925 C. 471; or other involuntary alienations, (*Ibid.*); or compulsory sale by creditors. 17 C.W.N. 662=17 I C. 284. Where a *compromise* decree said that a party thereto and his heirs shall have no power to alienate or encumber the property by gift, mortgage or sale, *held*, that there was no provision in the compromise restraining sale in execution of a decree and there was nothing to prevent the property from being attached and sold. 99 I.C. 972=1926 S. 143 (1). *See also* 1924 L. 729; 3 A.L.J. 621; 25 O.C. 189=1922 O. 236; 47 B. 597; 24 Bom.L.R. 449=1922 B. 84. A compromise in a suit provided that *B* was to hold a certain property for his life and had no right to transfer it except for necessity and if his other property proved insufficient. There was also a provision that if *B* died without leaving any heirs of his body or legal widow, then the plaintiff would become owner and the other heirs of *B* would have no right to succeed. *Held*, (1) that it was the principle of English law that where an estate was created for life, for a man and afterwards to the heirs of his body then that would give him an absolute estate, and that there was nothing in the T. P. Act, which recognised that there could be any remainder left over after the creation of such an estate, and that, therefore, the estate which the compromise purported to set up was not an estate in which the plaintiff could claim to have any interest to restrain alienation; (2) and that the restraint on alienation by *B* would fail as it offended against S. 10 and amounted to an absolute restraint. 1937 A.L.J. 84=1937 A. 235 =168 I.C. 142.

APPLICABILITY TO CASES UNDER MAHOMEDAN LAW.—S. 10 does not apply to cases under the Mahomedan Law nor does it apply to family settlements which are not transfers. Where the Act itself is inapplicable the Court cannot apply the principles underlying the Act except in so far as they are general principles of law. 6 O.W.N. 169=1929 O. 193.

GIFT UNDER MAHOMEDAN LAW.—Where a gift is made subject to a condition restraining transfer, the condition is invalid and the donee takes an absolute estate under the Mahomedan law. 20 A.L.J. 466=44 A. 633=1922 A. 205. *See also* 85 I.C. 945=1925 M. 997; 6 M.H.C.R. 248. By an ante-nuptial agreement, the husband gave certain immovable properties to the wife as *malik mustaqil* (*i.e.*, as permanent proprietor), but with the condition superadded that she "shall not have power to transfer this property to a stranger; but the ownership thereof as family property shall devolve on her legal heirs, from generation to generation". *Held*, that on the construction of the document, the wife took only a life-estate and that the partial restriction imposed by it against alienations outside the family was not void for repugnancy. 7 Luck. 257 =59 I.A. 236=1932 P.C. 158=63 M.L.J. 180 (P.C.).

MALABAR LAW.—Section applies to properties allotted to *Tavazhis* in a Malabar Tarwad and restraint on their alienation is void. 86 I.

those claiming under him : Provided that property may be transferred to or for the benefit of a woman (not being a Hindu Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

Restriction repugnant to interest created.

11. Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

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C. 443=21 L. W. 362=1925 M. 624. Conditions in gifts under *Malabar Law*. *See* 21 L W. 362=1925 M. 624.

HINDU LAW.—There is no rule of Hindu Law that alienatiens may be prevented in the case of grants for maintenance and under S. 10 of the Act a restraint on alienation in the case of such grants is void. 38 M. 867=29 M.L.J. 617. *See also* 6 M.H.C.R. 248. A *life interest* is just as much preperty as an absolute interest and any condition absolutely restraining the transferee of property for life in lieu of maintenance from disposing of that property is void. 29 I.C. 251 (C).

RESTRAINT ON ALIENATION IN MORTGAGE DEEDS.—Restraint upon alienation in mortgage bonds does not prevent alienation subject to mortgagee's rights. 40 I.C 865 (C.).

RESTRAINT ON ALIENATION IN SALE DEEDS.—Where a deed of sale absolutely transferred property to another but by an agreement to recover forming part of the same transaction, the purchaser was restrained from alienating the same, the restriction on alienation is void, under the principle of S. 10, although the Act itself was not in force at the time of the contract, 33 Bom.L.R. 1296=1931 B. 578.

CASES OF LEASE.—There may be a restraint on alienation in a lease-deed which is for the benefit of the lessor. *See* 6 M. 159; 7 B. 256; 34 C. 516; 28 I.C. 904. A stipulation in a *darpatni* lease restraining the creation of a subordinate right is valid. 45 C. 940=46 I.C. 129. A condition in a lease-deed for pre-emption and pre-surrender is valid under S. 10 and can be enforced against transferee with notice. 9 M L.T. 484=9 I.C. 171. Condition that the lessee should not transfer the leased property, without a letter from the lessor, is not void. 36 C. 745=10 C.L.J. 49=2 I.C. 416. *See also* 6 M. 159; 34 I.C. 516; 17 C. 826. In a lease a covenant against alienation is void unless it is coupled with a right of re-entry. 10 I.C. 489=14 C.L.J. 614; 10 I.C. 374=14 C. L. J. 585. *See also* 1 Pat.L.J. 1=33 I.C. 408; 12 C.L.J. 126=6 I.C. 685. *Covenant in lease running with the land*—Liability of transferee. *See* 37 C.L.J. 538=1923 C. 679. Condition against transferability in perpetual lease is not illegal or void. 1942 O.A. 168=1942 O.W.N. 225.

PARTITION.—An agreement not to partition is enforceable though this would not restrain alienation. 29 M.L.J. 214=29 I.C. 549. Vendees or their assigns restrained from claiming partition of share purchased for all time—Court cannot enforce the condition. 1929 L. 648.

"ABSOLUTELY".—A restraint on alienation for an uncertain time or of indefinite duration is invalid. 25 O.C. 189=1922 O. 235. *See also* 25 I C. 743. Partial restraint on alienation qualified as to time, place etc., may be valid and binding. 11 I.C. 301=14 C.L.J. 303. *See also* 45 C. 940. The vendee of a house covenanted to live in the house himself, not to sell it piecemeal and if he wanted to sell it to give the option of first refusal to the vendor and his heirs at a certain fixed price. *Held*, the covenant was not void for remoteness or as a restraint on alienation. 80 I.C. 962=17 S.L.R. 1. A condition against transfer *to a stranger* by way of mortgage, sale or transfer otherwise would be invalid. 46 C. 163. *See also* 27 O.C. 350=80 I.C. 918=1925 O. 125; 64 I.C. 408=19 A.L.J. 848; 1929 A. 381=27 A.L.J. 515; 1935 A.L.J. 410=1935 A. 493. A valid restriction does not bar a compulsory sale. 17 C.W.N. 662=16 C.L.J. 354. A *gift with a condition precedent* attached thereto, fails when the condition is not fulfilled. 11 I.C. 634 (C.)

Secs. 10 and 126: IF RECONCILABLE.—Where by a deed of gift the donor removes himself from proprietary possession of property and puts the donee in possession, he confers full proprietary title upon the donee in respect of the property transferred. Where the donor reserves to himself and his heirs the power to revoke the gift in case of alienation by the donee it is a condition repugnant to the estate created by him. Though under S. 126 of the Act the donor is permitted to impose a condition and entitling him to revoke the gift, yet it could be only a condition and subject to the law of conditions in regard to the transfer of property contained in Ch. II of the T.P.Act. As such, if it restricts the donee's right of alienation it is invalid by reason of S. 10 of the T. P. Act. There is no difficulty in reconciling Ss. 10 and 126 of the Act. S. 10 embodies the general principle and it applies to all transfers including gifts. S. 126 of the T.P.Act, could not be contended to be an absolute exception to S. 10. I.L.R. 1939 All. 298=1939 A.L.J. 77=1939 All. 221.

Sec. 11. CHANGE IN THE PRESENT SECTION AND REASON FOR THE CHANGE.—"Ss. 11 and 40 of the Act refer to affirmative and negative covenants in a transfer. S. 11 refers to rights as between a transferor and transferee, while S. 40 relates to the rights of third parties against transferees. The words 'to compel its enjoyment', used in the second paragraph of S. 11 and in the first paragraph of S. 40, indicate that affirmative covenants for the beneficial enjoyment of one piece of the property of which the other piece has been transferred can in all cases be enforced. This paragraph seems to have been based on the observations of Lord

[1][Where any such direction has been made in respect of one piece of immovable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof.]

12. Where property is transferred subject to a condition or limitation making

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[1] Second paragraph substituted by Act XX of 1929, S. 8.

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Cottenham in 2 Ph. 774, a case decided in 1848. But in later English decisions such as 8 Q.B.D. 403, the observations in Tulk's case were not approved, and it is now settled that except in certain special cases affirmative covenants cannot be specifically enforced. Thus, in (1885) 29 Ch. D. 750, a covenant to spend money on the land was held as not binding on the purchaser of the land, although he had notice of the same. Indian Courts have followed the same principle. 27 Bom.L.R. 73. We propose that the second paragraph of S. 11 and the first paragraph of S. 40 should be so amended as to make it clear that, although an affirmative covenant is not by itself invalid as between a transferor and transferee (S. 11), negative or restrictive covenants only can be specifically enforced against a third person (S. 40)".—(*Statement of Objects and Reasons.*)

CASE-LAW.—The principle of this section applies as much to mortgages and leases as to gifts or sale. 8 A. 452. *See also* 24 C. 44. Such absolute restraints even in decrees of Settlement Courts are not given effect to. 25 I.C. 743. In a transfer where a condition may be given effect to without interfering with its immediate completeness, the condition is valid. 45 I.C. 307. Obligation arising out of restrictive covenant may be enforced against transferee with notice. 1929 P. 349. The principle of this section is recognized in Hindu as well as Mahomedan Law. 4 Bom. L.R. 555 (Hindu Law); 9 A.L.J. 798; 27 C.L.J. 512 (Mahomedan Law). Where an absolute estate is conferred on the grantee, a condition requiring the grantee to reside at a particular place is of no binding effect. 58 I.A. 270=61 M.L.J. 501=35 C.W.N. 903 (P.C.). A partial restraint on alienation also is void as repugnant to the absolute estate created. 61 M.L.J. 501 (P.C.). Where a grant which conferred an absolute estate on the grantee contained a condition that the property should not in any case pass to the heirs of the daughters of the grantee, *held*, it was an attempt to alter the legal course of succession to an absolute estate and was therefore void. 61 M.L.J. 501 (P.C.).

PARTITION AGREEMENTS.—An agreement among members of a joint family that they are only to enjoy the income does not estop them from claiming a partition. 27 I.C. 3. *See also* 6 C. 106; 1 C. 104; 28 A. 185; 31 A. 3 (right of a co-sharer for partition is an inseparable incident of co-ownership; and an agreement against partition is absolutely void); 7 B. 538. A partition agreement that in the event of one of the brothers dying issueless, his share is to go to the others is not void. 29 M.L.J. 214=29 I.C. 549. The rule laid down in S. 11 embodies principles of universal application which are not peculiar to those provinces only in which that statute is in force. Against parties not actually covenanting, such as the descendants or assigns of original contracting parties, a restriction against partition is void and unenforceable though it may be competent to the original parties to agreement to contract themselves out of their right to partition for their lifetime.—(*Per* Tekchand, J.). 1929 L. 648.

GIFTS.—Where in an absolute gift of a house the donee was not to abandon the house and go to another place, the restriction was void. 56 I.C. 364=44 B. 304. In Mahomedan Law a gift is valid though an invalid condition is attached to it. 22 C.W.N. 512=27 C.L.J. 502. Conditions imposed in a sale of a site of certain shops restricting the making of alterations in the shops by the vendee are void being in contravention of the provisions of S. 11. 40 P.L.R. 209=1938 L. 479. While the Court construing a document must examine the entire instrument in order to see what its effect is, the examination must be carried out in the light of S. 11, T. P. Act, when the instrument is one transferring immovable property. If the examination discloses that the transferor has used words creating an absolute interest, those words must be given effect to, notwithstanding that later words are used which restrict the right of full ownership. 49 L.W. 591=1939 M. 509=(1939) 1 M.L.J. 579. Where a portion of the arrears of maintenance due under a decree providing for payment of a certain amount every month and charging immovable properties for payment of the said amount is transferred by the holder of the decree in favour of another, the transferor is entitled to safeguard his rights in regard to the realisation of the rest of the arrears still due to him, and to stipulate that the assignee should not have the right to bring the charged property to sale. Such a restriction can be validly imposed, and would be covered by the proviso to S. 11. 49 L.W. 172=1939 M. 431. Absolute sale of land—Deed containing a stipulation that the vendee should pay the vendor and his heirs a certain amount as rent non-enforceability of the term. 13 Luck. 662=1938 O. 17=1937 O.W.N. 1138.

Sec. 12.—There is nothing contrary to the provisions of S. 12 in the rules of the Bombay N. S. and S. B. Association providing that, as and upon the declaration of default, the defaulting member's right and interest in the Association (whether in respect of his card of membership or otherwise) shall be extinguished and come to an end. 59 I.A. 318=56 B. 374=34 Bom.L.R. 1178. There would be no forfeiture of lease for involuntary alienation, unless that too was specifically provided for in the lease. 7

Condition making interest determinable on insolvency or attempted alienation.

any interest therein, reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void.

Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him.

Transfer for benefit of unborn person.

13. Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property.

Illustration.

A transfers property of which he is the owner to *B*, in trust for *A* and his intended wife successively for their lives, and, after the death of the survivor, for the eldest son of the intended marriage for life, and after his death for *A's* second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of *A's* remaining interest in the property.

Rule against perpetuity.

14. No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

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B. 256. Hereditary, rent-free, perpetual tenancies might exist without any power of alienation. 46 I.C. 73=5 O.L.J. 146; 37 C.L.J. 538=1923 C. 679; 12 C.L.J. 126=6 I.C. 685. Where one of the rules of a Provident Fund of a company was that in case a member transferred his interest in the Provident Fund during service, he was liable to forfeit the amount to the company; *Held*, that the rule offended against S. 12, and was void. 60 C. 926=37 C.W.N. 1050=1933 C. 701.

Sec. 13: OBJECT.—But for this rule, there might be a possibility upon possibility. 6 M. 159. A person cannot change the rule of succession under the colour of fictitious endowment. 24 I.C. 72. On this section, *see also* 48 I.A. 376=25 C.W.N. 770 (P.C.), cited under S. 14.

Sec. 14: SCOPE AND APPLICABILITY.—Section applies both to immovable and movable property. 20 B. 511. The rule against perpetuities is applicable only to future interest in land which may possibly vest beyond the legal limit of perpetuity. 36 C. 675=1 I.C. 626. Where the settlor directed that after the death of the tenant for life and after making provision out of the trust fund for the payment of a monthly allowance to the widow for life the trustee was to hold the rest of the trust estate for the use and benefit of his son or sons to be made over to him or them on the attainment of 21 years. *Held*, that the language of the deed pointed to an immediate vesting of the interest disposed of. *Held further*, that if the disposition was not covered by S. 19 it was contingent and the vesting in interest being postponed to a period longer than that permitted under S. 14, it was invalid. 58 C. 768=134 I.C. 436. A person cannot change the rule of succession under the colour of fictitious endowment. 1 O.L.J. 204=24 I.C. 72. As to creating a series of life estates in favour of persons unborn, *see* 6 O.W.N. 549. One *S* gave away property to *R* for life, and after her death if there be any male descendants, whether born of son or daughter to them absolutely. If *R* would have only daughters they were to have no power of transfer. In the absence of any issue whether male or female, living at the time of her death, the gifted property was not in any way to devolve upon her husband or his family, but it was to go to *D*, father of *R*. *Held*, that the gift in favour of *D* was dependent upon the failure of the prior interest in favour of the daughters and the result was that the gift in favour of *D* also failed. (16 B. 492, Dist.) 9 Luck. 329=1934 O. 35 (F.B.). A gift over on indefinite failure of male issue in the line of donor is void at its inception. 38 C. 603=15 C.W.N. 693=21 M.L.J. 1119 (P.C.). A grant executed by a Rajah in favour of his daughter conferred an absolute estate on her and contained a defeasance clause which provided that if the heirs of the grantee, that is, her sons, their male descendants and her daughters ceased to exist, the property should revert to the Rajah and his heirs. *Held*, the event referred to was an indefinite failure of the male issue of the grantee and the attempted gift over, was therefore void. 58 I.A. 270=61 M.L.J. 501=35 C.W.N. 903. (P.C.). An interest created by a document in favour of a person for generation after generation s clearly a perpetuity and as such offends against S. 14. 1934 A. 983. A devolution of property in perpetuity is not recognized by Hindu Law. 20 I.C. 429. *See also* 55 I.A. 180=50 A. 375=54 M.L.J. 42 (P.C.); 38 M. 114. Where at a partition among the members of a joint Hindu family a charge is created in favour of the son of Christain wife of one of the members and it is made heritable by his widow and

15. If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14, such interest fails [1][in regard to those persons only and not in regard to the whole class.]

Transfer to class some of whom come under sections 13 and 14.

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[1] Substituted by Act XX of 1929.

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children. S. 14 of the T. P. Act has no application. If the creation of the charge was a transfer of property; that transfer took place when the partition deed was executed. The charge was immediately created then and was to be inherited by his widow and children. Even if it be regarded as a transfer for life to that person followed by a transfer to his wife and children the latter would obviously be alive at his death or within a few months thereafter. 1942 A.W.R. (H.C.) 170. The rule applies even to Muhammadans. 73 I.C. 99; 26 B. 319; but not to a gift to a Malabar Tarwad. 39 M. 317=29 M.L.J. 481. The mortgagor's right of redemption is exempt from the operation of the rule against perpetuities. 17 C.W.N. 1053=21 I.C. 90. When the intention of the parties is to create a liability in perpetuity not capable of being redeemed absolutely at any time, the transaction cannot possibly be a mortgage. An agreement to pay maintenance allowance to a person and to continue to pay to his descendants from generation to generation making it a charge over property, creates a charge and not a mortgage. The rule against perpetuity would not apply to a charge of this kind which does not amount to a transfer of interest within the meaning of Ss. 13 and 14. [19 I.C. 661 and 42 M. 581 (P.C.) Rel. on] 1933 A. 934.

APPLICATION OF THE RULE.—The test whether a covenant violates the rule against perpetuities, one must look to all possible contingencies. 63 I.C. 196=25 C.W.N. 901; 9 Pat. L.T. 747=1928 P. 637; 1926 A. 283. Application of the rule against perpetuities in the creation of an annuity to daughter and to her unborn son. *See* 50 C. 266=1923 C. 27. A covenant to grant land free of cost for building purposes at some future uncertain date is not a covenant running with the land and offends the rule against perpetuities and is not enforceable against the covenantor or his assignees. 48 I.A. 376=61 I.C. 702=25 C.W.N. 770 (P.C.); *also* 1 Pat L.J. 238=34 I.C. 482.

APPLICATION OF THE RULE AGAINST PERPETUITIES: (1) TO SALES.—An agreement to sell or re-convey land is an agreement merely personal *not creating an interest in land*. Such an agreement does not offend the rule. 39 M. 462=28 M.L.J. 471. *See also* 18 M.L.T. 83=29 I.C. 435; 1935 C. 779. An agreement to re-convey land sold to the vendor after a certain number of years on payment of a certain amount does not offend the rule. 49 M. 387=51 M.L.J. 229. *See* 1928 B. 477; 28 Bom. L.R. 954=50 B. 566=1926 B. 497. *See also* 1934 M. 703=67 M.L.J. 635. Vendor can reserve inalienable interest for himself and his descendants reverting to vendee in the absence of vendor's descendants. 82 I.C. 326=1925 A. 65. *See contra* 92 I.C. 401=1926 A. 283. Transfer to vendee to take effect after extinction of the descendants of the vendor not valid. 1926 A. 283=92 I.C. 401.

(2) TO PRE-EMPTION CLAUSES IN SALE-DEEDS.—Contract of pre-emption does not offend against rule against perpetuities, no transfer of property being effected by such a contract. 49 A. 527=25 A.L.J. 289=1927 A. 170 (F.B.). *See also* 46 A. 333=1924 A. 400; 39 C.W.N. 710; 9 Pat. L.T. 747=1928 P. 637; 8 P. 243=113 I.C. 106; 35 C.W.N. 150=1929 C. 263; 39 M. 462=28 M.L.J. 471. *See contra* 24 Bom. L.R. 449=1922 B. 84; 64 I.C. 1001; 38 M. 114=24 M.L.J. 84. The rule against perpetuities applies to covenant for pre-emption. Such a covenant in a deed of exchange made binding upon the heirs and legal representatives of a party offends the rule against perpetuities and is not enforceable in law. 46 C.W.N. 147. When no time is fixed for the performance of an agreement to convey, a contract for pre-emption cannot be enforced against the heirs of the covenantor, as being obnoxious to the rule against perpetuities. 33 M. 114=24 M.L.J. 84.

(3) LEASES.—A clause entitling the lessor to terminate the lease at any time contained in a lease which is described as permanant, does not offend against the rule. 48 M.L.J. 463=1925 M. 732. *See also* 98 I.C. 46=1927 C. 41; 18 M.L.T. 83=29 I.C. 435. A covenant for renewal in a mining lease does not offend the rule against perpetuity. 12 L.W. 670=60 I.C. 591. *See also* 44 M. 230. A clause in a lease providing that the lease should be forfeited in certain circumstances is not against the rule of perpetuities. 7 I.C. 346 (C). A covenant to renew a lease from time to time at the lessee's option, is one running with the land and is not subject to any rule against perpetuity. 41 M.L.J. 94=44 M. 230=60 I.C. 591. A covenant by a permanent lessee that in case of transfer of his interest it would be made only to lessor for a proper price, and to third parties only with the lessor's permission, and that any transfer in violation of this covenant should be invalid, would be invalid under this section. 26 C.W.N. 874=1922 C. 474.

Secs. 14. 16, 17 and 18.—Applicability—Invalidity of part of gifts under, not fatal to the other valid dispositions. *See* 64 I.A. 5=1937 P.C. 4=(1) 1937 1 M.L.J. 166 (P.C.)=I.L.R. (1937) All. 3.

Sec. 15: CHANGE IN THE PRESENT SECTION AND REASON FOR THE CHANGE.—(*See* Statement o Objects and Reasons.) S. 15 deals with a gift to a class. It reproduces with slight verbal alterations the provisions of S. 102 of the Indian Succession Act, 1865 (now S. 115 of the Indian Succession Act, 1925), which was enacted on the principle of the decision in (1817) 2 Mer. 363. *See* 38 C. 468=38 I.A. 54=21 M.L.J. 387 (P.C.) *See also* 6 C. 267. "Definite class of persons"—Meaning of. *See* 15 B. 543 (549); 38 I.A. 54=21 M.L.J. 387 (P.C.); 58 C. 768 as to

[16.[1] Where, by reason of any of the rules contained in sections 13 and 14, an interest created for the benefit of a person or of a class of persons fails in regard to such person or the whole of such class, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.

Transfer to take effect on failure of prior interest.

17. (1) Where the terms of a transfer of property direct that the income arising from the property shall be accumulated either wholly or in part during a period longer than—

Direction for accumulation.

(*a*) the life of the transferor, or

(*b*) a period of eighteen years from the date of the transfer,

such direction shall, save as hereinafter provided, be void to the extent to which the period during which the accumulation is directed exceeds the longer of the aforesaid periods, and at the end of such last-mentioned period the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

(2) This section shall not affect any direction for accumulation for the purpose of—

(*i*) the payment of the debts of the transferor or any other person taking any interest under the transfer, or

(*ii*) the provision of portions for children or remoter issue of the transferor or of any other person taking any interest under the transfer, or

(*iii*) the preservation or maintenance of the property transferred ;

and such direction may be made accordingly.

18. The restrictions in sections 14, 16 and 17 shall not apply in the case of a transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind.]

Transfer in perpetuity for benefit of public.

LEG. REF.

[1] Substituted for original sections 16 to 18 by Act XX of 1929. This amendment has no retrospective operation.

NOTES.

the applicability of the section prior to the amendment.

Sec. 16. CASE-LAW.—For the applicability of this section to chartiable trusts, *see* 33 I.C. 677; 8 B.L.R. 208.

Sec. 17: CHANGE IN THE PRESENT SECTIONS AND REASON FOR THE CHANGE.—(*See* Statement of Objects and Reasons and Report of Select Committee.)

CASE-LAW.—Hindu law does not discountenance directions to accumulate. 6 M.I.A. 526; 25 C. 162; 24 C. 589; 34 C. 5. If a charitable gift is unconditional, a direction for accumulation is invalid. 33 I.C. 102=23 C.L.J. 241. But the only result is that the income is immediately distributed in charity, and the heirs or next of-kin are not let in. 33 I.C. 102 (105)= 23 C.L.J. 241.

(*N.B.*—But *see* now S. 18, *infra.*) Where under a contingency not contemplated by the transferor, there would be an acoumulation without any definite object, the transfer is contrary to the section. The following directions for accumulation are not invalid under this section;—Direction in Hindu will to accumulate income until a boy to be adopted attains 16 years of age or majority. 4 Bom. L.R. 893; a direction to accumulate surplus income until it amounts to a certain sum and then spend it is charity or feeding the poor; 34 C. 5; a testamentary direction to accumulate a fund for marriage of the testator's daughter or son. 15 C.W.N. 66. A direction to accumulate for all time, or for 99 years or until a huge sum is accumulated is bad. 4 B.L.R. (O.C.) 231; 2 B.L.R. (O.C.) 11. Where a widow was given a life-estate over some property and was also directed to accumulate the surplus income, to go with the estate to her sons after her, the direction is not invalid. 56 I.C. 373=47 C. 76. (Previous authorities fully reviewed.)

Sec. 18.—*See* under S. 17.

CASE-LAW.—A dedication for religious purposes will not be invalid by reason of offending the rule against perpetuites. 24 I.C. 72=1 O. L.J. 204. *See also* 11 B. 441; 6 B. 42; 25 C. 162; 20 C. 116. The following would be good and valid gifts under this section—Gift for erecting or maintaining a hospital: 14 B.L.R. 442; 6 C.W.N. 321; gift to university or an educational institution, 31 C. 166; or for choultries, 4 M.H.C.R. 44; or for feeding Brahmins, 6 B. 24; or to a temple, 23 B. 659; or to a temple with dharmasala attached to it in which pilgrims are fed for charity, 23 B. 659; 11 A. 18; a gift for Sadavarti, 23 B. 659; 14 B. 1; or for the maintenance of the priests of a temple. 25 C. 112; 8 B. 432; as to validity of wakf under

19. Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

Vested interest.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation.—An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that, if a particular event shall happen, the interest shall pass to another person.

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Mahomedan law, *see* 31 B. 136; 19 A. 211; 31 A. 136. In deciding the beneficial or charitable nature of the object of the gift, Courts should have regard to the customs, habits and public opinion among the community to which the parties belong. 6 B. 42. A gift to erect a well or water-tub in the public road for cattle and other animals to drink water at hot seasons is good. 14 B. 1. The following are not valid gifts :—Gift to dharma—as the word "dharma" by itself is too vague and indefinite for the Courts to enforce the same. *See* 18 B. 136 ; 17 B. 351 ; 23 B. 725. *See also* 13 N.L.R. 51 (62); 76 I.C. 209 (211) ; 78 I.C. 249 ; 12 C.W.N. 1083. Gift for merely spiritual ceremonies or superstitious uses, *see* 11 B. 441 ; 6 B. 42. *See also* 15 M. 424 ; 33 B. 122 (153) ; gift that would benefit only the grantor and his family. 14 M. 1. "For the benefit of the public"—Meaning of—Roman Catholic—Dedication of properties for defraying expenses of puja at father's tomb and for feeding pilgrims at festival is valid. 52 L.W. 793=(1940) 2 M.L.J. 803=1941 M. 188.

Sec: 19 : *N.B.*—This section may be compared with S. 119, Succession Act, 1925. As to what is *vested interest* and as to what is merely a *contingent interest*, see 40 A. 692 ; 47 A. 496 ; 4 M. 124 ; 1941 Rang. 239. The true criterion is the certainty or uncertainty of the event on the happening of which the gift is to take effect. 4 M. 124 ; 9 B. 491. The question whether particular words create a vested interest or not is one of construction. 8 C. 378 ; the words of the grant being construed in their plain and ordinary meaning. 28 C. 621=28 I.A. 159 (P.C.). *See also* 4 M. 124. As to the nature of the *right of inheritance of a heir*, see 30 B. 304. A *bequest subject to a prior life-estate* is a vested interest. 38 C. 468=38 I.A. 54=21 M.L.J. 387 (P.C.). *See also* 47 A. 496=86 I.C. 684=1925 A. 389 ; 39 M.L.J. 498=60 I.C. 802 ; 1930 R. 184. To enable a remainder to be vested there must be a direct gift. 55 I.C. 313=22 Bom.L. R. 71. *A gift in favour of a person merely*, without suspending or postponing its operation, confers a vested interest and the appointment of executor or guardian for a minor donee with a direction to make over the property to him on his attaining majority does not postpone the vesting of the estate. 28 C. 621=28 I.A. 159 (P.C.). With regard to S. 19 the burden of proving the contrary intention is on those who assert it and the weight of the burden is aggravated by the elimination in the explanation of circumstances which might apart from the explanation, be thought sufficient to discharge it. Vesting in interest if postponed—Postponement violating S. 19. 51 C. 768=1931 C. 651. *Transfer of occupancy right* in a field to a widow for life without power of transfer, with remainder to a third person, is not void and the widow cannot transfer the field even to the next possible heir. 101 I.C. 822=1927 N. 226. Where a donor granted and conveyed to the donee property to hold the same as and from the date of the death of the donor, the vesting of the right in the donee takes place as soon as the gift was executed and registered. 1917 M.W.N. 634=42 I.C. 265. In a suit by the reversioners disputing the genuineness of a will whereby the properties of the last male owner were bequeathed to his widow, mother, etc., a compromise was arrived at whereby some of the properties were to be taken by the plaintiffs on the death of the mother, the rights secured to the two reversioners by the compromise became a vested interest and it did not pass from one to the other by survivorship but was heritable and divisible between the two donees. 8 L.W. 140=47 I.C. 723. Where by a compromise between two brothers the elder was given a life-estate and the younger was given the remainder if he survived the former, the estate taken by the latter is a vested and not a contingent interest. Such an interest can be proceeded against in execution. 9 Luck. 173=1934 O. 454. A compromise effected between *R* and *L* was as follows :—In the event of *R* surviving *L*, *R* will be the permanent owner with powers of transfer and of transmitting inheritance of the whole of his property.....In the event of *R* not so surviving his male descendants according to the rule of lineal primogeniture will be entitled to the said property with powers of transfer and heritability. *Held*, that the words "R will be the permanent owner with powers of transfer and of transmitting inheritance" did not convey a vested interest which was liable to de defeated in case *R* did not survive *L*. 9 Luck 378=1934 O. 59.

Secs. 19 and 24.—A husband by *taksinama* provided as follows :—"The property shall devolve upon *B* or his legal heir and *B* or his legal heir shall become the absolute owner of my property on the death of my wife." *B* during the widow's lifetime sold the widow's

20. Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appear from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth.

When unborn person acquires vested interest on transfer for his benefit.

21. Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified undertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

Contingent interest.

Exception.—Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.

22. Where, on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age.

Transfer to members of a class who attain a particular age.

23. Where, on a transfer of property, an interest therein is to accrue to a specified person if a specified uncertain event shall happen, and no time is mentioned for the occurrence of that event, the interest fails unless such event happens before, or at the same time as, the intermediate or precedent interest ceases to exist.

Transfer contingent on happening of specified uncertain event.

24. Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer.

Transfer to such of certain persons as survive at some period not specified.

Illustration.

A transfers property to *B* for life, and after his death to *C* and *D*, equally to be divided between them, or to the survivor of them. *C* dies during the life of *B*. *D* survives *B*. At *B's* death the property passes to *D*.

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property and died during the life-time of the widow. The reversioner brought a suit for possession of the property. *Held*, that the case really came within the principle of S. 24 and not S. 19, and that the interest in favour of *B* was contingent and not vested and came to an end on his death during the lifetime of the widow. The sale made by him during the widow's life-time therefore would not affect the reversioner's right over the property after the death of the widow. 1937 P. 247=168 I.C. 605.

Sec. 21.—[*N.B.—Cf.* S. 120 of the Succession Act, 1925.] A bequest to daughters of the testator "when they will be married" was held not to be contingent having regard to the other provisions in the will. (Case turning on the construction of the will and arising under S. 111, Succession Act, 1865.) 38 C. 327=38 I.A. 7=21 M.L.J. 116 (P.C.). *See also* 13 B. 463. As to gift to sons on their attaining the age of majority or 21 years of age, *see* 12 B. 137.

Sec. 22.—*N.B.—Cf.* S. 121, Succession Act, 1925. On this section, *see* 4 C. 304.

Sec. 23.—This section may be compared with S. 124, Succession Act, 1925. *See* 10 C. 482=11 I.A. 1 (P.C.), where it was held that the principle of this section does not apply to Hindus. It is doubtful if it would still be good law in view of the new amendment of S. 2 (last para.), *supra*, in which the exceptions contained in the old section in favour of the rules of Hindu and Buddhist laws have been removed.

Sec. 24.—*Cf.* S. 125, Succession Act, 1925. If an estate is limited to two persons jointly and if one is not capable of taking, he who is capable takes the whole. 16 C. 677=16 I.A. 44 (P.C.). *See* 1937 P. 247 for a transfer coming under this section. (Noted under S. 19, *supra*.)

Conditional transfer.

25. An interest created on a transfer of property, and dependent upon a condition fails if the fulfilment of the condition is impossible, or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.

Illustrations.

(*a*) *A* lets a farm to *B* on condition that he shall walk a hundred miles in an hour. The lease is void.

(*b*) *A* gives Rs. 500 to *B* on condition that he shall marry *A's* daughter. *C*. At the date of the transfer *C* was dead. The transfer is void.

(*c*) *A* transfers Rs. 500 to *B* on condition that she shall murder *C*. The transfer is void.

(*d*) *A* transfers Rs. 500 to his niece *C* if she will desert her husband. The transfer is void.

Fulfilment of condition precedent.

26. Where the terms of a trasnsfer of property impose a condition to be fulfiled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled ir it has been substantially complied with.

Illustrations.

(*a*) *A* transfers Rs. 5,000 to *B* on condition that he shall marry with the consent of *C*, *D* and *E*. *E* dies. *B* marries with the consent of *C* and *D*. *B* is deemed to have fulfilled the condition.

(*b*) *A* transfers Rs. 5,000 to *B* on condition that he shall marry with the consent of *C*, *D* and *E*. *B* marries without the consent of *C*, *D* and *E*, but obtains their consent after the marriage. *B* has not fulfilled the condition.

Conditional transfer to one person coupled with transfer to another on failure of prior disposition.

27. Where, on a transfer of property, an interest therein is created in favour of one person, and by the same transaction, an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor.

But, where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

NOTES.

Sec. 25 : *N.B.—Cf.* Ss. 126 and 127 of the Succession Act and Ss. 23 to 30 of the Indian Contract Act (conditions forbidden by law). If a transfer on trust constitutes a charitable gift with conditions attached to it which are illegal, the charity takes effect without the conditions. 22 C.L.J. 593=34 I.C. 657. To determine the true construction of a deed of settlement, regard must be had to the object and the whole scope of the instrument and the deed must be viewed, if necessary, by reference to surrounding circumstances. 32 C.L.J. 453.

IMMORALITY.—A gift for an immoral consideration is void. 47 A. 619=1925 A. 437 ; but a gift to which an immoral condition is subsequently attached is good. The gift is valid and the condition void. 88 I.C. 411=1925 A. 437 =47 A. 612 ; 6 A. 313.

IMPOSSIBILITY.—Mere difficulty in the performance of the condition is not to be deemed an impossibility under this section. (Shep. & Brown, T. P. Act.)

ILLEGAL OR "FORBIDDEN BY LAW" (*see* Contract Act, Ss. 26-30).—A condition in restraint of marriage is forbidden by law. *See* 11 Beng. L.R. 129 ; so also a gift of a boy in adoption for a sum paid to the natural father. *See* 13 Beng. L.R.A.C. 42 ; so also a gift to a married woman and her husband on condition that the donor should have intercourse with the woman. 47 A. 619=1925 A. 437 ; such a condition is not only immoral but also opposed to public policy (*ibid*): so also an agreement to obtain a divorce in future. *See* 10 B. 152.

Sec. 26: [*N.B.—Cf.* S. 128 of the Succession Act, 1925.] Where a charitable gift is made upon a condition precedent the gift fails if the condition is not satisfied. 32 C.L.J. 453. As to what constitutes fulfilment of the condition, *see also* 28 M. 173=1 I.A. 387 (P.C.). Power of transfer subject to the condition of consent being obtained of three persons—Death of two persons, consent of third, is not a substantial compliance of the condition—Consent of heirs of deceased, necessity of. 1926 A. 181= 90 I.C. 887.

Sec. 27: *N.B.—Cf.* Ss. 129 and 130 of the Succession Act, 1925.

SCOPE OF SECTION.—This section deals with the doctrine of acceleration of estates (*i.e.*) where there is a gift in remainder, expectant on the determination of a life-estate and the prior estate is void, the subsequent gift is accelerated. 10 C. 482. An award provided that the managership of certain endowed property should devolve on the next successor after it had been held by the previous one for

Illustrations.

(*a*) *A* transfers Rs. 500 to *B* on condition that he shall execute a certain lease within three months after *A's* death, and, if he should neglect to do so, to *C*. *B* dies in *A's* lifetime. The disposition in favour of *C* takes effect.

(*b*) *A* transfers property to his wife; but, in case she should die in his lifetime, transfers to *B* that which he had transferred to her. *A* and his wife perish together, under circumstances which make it impossible to prove that she died before him. The disposition in favour of *B* does not take effect.

Ulterior transfer conditional on happening or not happening of specified event.

28. On a transfer of property an interest therein may be created to accrue to any person with the condition superadded that in case a specified uncertain event shall happen such interest shall pass to another person, or that in case a specified uncertain event shall not happen such interest shall pass to another person. In each case the dispositions are subject to the rules contained in sections 10, 12, 21, 22, 23, 24, 25, and 27.

Fulfilment of condition subsequent.

29. An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

Illustration.

A transfers Rs. 500 to *B*, to be paid to him on his attaining his majority or marrying, with a proviso that if *B* dies a minor or marries without *C's* consent, the Rs. 500 shall go to *D*. *B* marries when only 17 years of age, without *C's* consent. The transfer to *D* takes effect.

Prior disposition not affected by invalidity of ulterior disposition.

30. If the ulterior disposition is not valid, the prior disposition is not affected by it.

Illustration.

A transfers a farm to *B* for her life, and, if she do not desert her husband, to *C*. *B* is entitled to the farm during her life as if no condition had been inserted.

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twenty-one years. The manager who had been appointed for twenty-one years died before the expiry of the full period. *Held*, that the effect of the failure of the prior interest was to accelerate the subsequent interest, even though the failure may not have taken place in the precise manner laid down in the award. 8 O.W.N. 1138=1932 O. 161. The failure contemplated by S. 27 of the Transfer of Property Act and S. 129 of the Succession Act is the failure of a valid gift. Where the gift is *ab initio* void the subsequent gifts must also fail as provided by S. 16, T. P. Act, and S. 116, Succession Act. 44 Bom.L.R. 256. On this section, *see also* 33 C. 947=10 C.W.N. 695; 15 C. 282.

Sec. 28: *N.B.*—*Cf.* S. 131, Succession Act, 1925.

CONSTRUCTION OF SECTION—"INTEREST"—MEANING OF.—The word "interest" in S. 28, T. P. Act, has the same meaning as the "thing bequeathed" in S. 131 of the Succession Act. 156 I.C. 33=16 Pat.L.T. 245. It is a well-settled principle of law which has now been embodied in Ss. 28 and 30 of the Act that, in the case of a condition subsequent "if the ulterior disposition is not valid the prior disposition is not affected by it". 55 I.A. 180=50 A. 375=55 M.L.J. 42 (P.C.). For form of *contingent limitation*, see 4 C. 304. There is no forfeiture of interest if the condition cannot be fulfilled because of duress. 20 C. 15. On this section, *see also* 39 M.L.J. 498=60 I.C. 802. Gift of absolute estate by Hindu widow to daughters—Malik—Later provision that on death of any daughter issueless others should take—Effect of—Construction of gift deed. 156 I.C. 33=16 Pat.L.T. 245. The principle that an estate once vested cannot be divested is not recognized as a general rule even in the Hindu Law of Succession. Hence a clause of defeasance in a deed of partition among the Hindus, that if a particular event shall happen the interest of a particular person shall pass to another is not repugnant to any principle of Hindu Law. (*N.B.*—The question discussed in this case is not now of much practical importance in view of the recent amendment of S. 2 by Act XX of 1929).

Secs. 23 and 31: RELATIVE SCOPE AND EFFECT OF.—S. 28 deals with a case in which on the happening of a specified uncertain event the property transferred is to pass to a second donee, whereas S. 31 refers to a mere cesser of the first donee's interest on the happening of a specified uncertain event, in which case the property will in ordinary cases revert to the donor. 156 I.C. 33=16 Pat.L.T. 245.

Sec. 29. [*N.B.*—*Cf.* S. 132, Succession Act, 1925.] *See* 22 C.L.J. 593=34 I.C. 657; 20 C. 15. (A *breach of conditions subsequent* on account of duress or coercion will not work forfeiture of interest) referred to in 17 C.W.N. 39 (41). *See also* 24 C. 646.

Sec. 30: [*N.B.*—*Cf.* S. 133, Succession Act, 1925.] In case of a condition subsequent, "if the ulterior disposition is not valid the prior disposition is not affected by it". *See* 50 A. 375=55 M.L.J. 42 (P.C.). Specific trusts or estates which are valid in law are not rendered void by a subsequent illegal disposition of the remainder or residue of the estate. *See* 4 B.L.R. O.C. 231; 9 B.L.R. 377 (P.C.).

Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen.

31. Subject to the provisions of sections 12, on a transfer of property, an interest therein may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Illustrations.

(*a*) *A* transfers a farm to *B*, for his life, with a proviso that, in case *B* cuts down a certain wood, the transfer shall cease to have any effect. *B* cuts down the wood. He loses his life-interest in the farm.

(*b*) *A* transfers a farm to *B* provided that if *B* shall not go to England within three years after the date of the transfer, his interest in the farm shall cease. *B* does not go to England within the term prescribed. His interest in the farm ceases.

Such condition must not be invalid.

32. In order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest.

Transfer conditional on performance of act no time being specified for performance.

33. Where, on a transfer of property, au interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the act.

Transfer conditional on performance of act, time being specified.

34. Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time shall, as against him, be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But, if no time is specified for the performance of the act, then, if its performance is, by the fraud of a person interested in the non-fulfilment of the condition rendered impossible or indefinitely postponed, the condition shall , as against him, be deemed to have been uflfilled.

Election.

Election when necessary.

35. Where a person professes to transfer property which he has no right to transfer, and, as part of the same transaction, confers any benefit on the owner of the property, such owner must elect either to confirm such transfer, or to dissent from it; and in the latter

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Sec. 31.—*Cf.* S. 134, Succession Act, 1925. A *condition subsequent* by way of defeasance that any interest created shall cease to exist in case a specified uncertain event shall happen or in case a specified uncertain event shall not happen, can be valid. It does not follow that because the law allows such a condition being imposed, the Court is bound to enforce it in every case. 1933 O. 291=10 O.W.N. 759.

GIFT OVER.—In Indian law, the gift over corresponds with the terms of S. 31 of the T. P. Act and the condition superadded to a transfer of property that the interest should cease to exist in case a specified uncertain event shall happen or in a case a certain specified event shall not happen. Where there has been no defeasance, the gift over cannot come into operation and there can be no defeasance unless some event arises which makes it impossible for the absolute title to continue. 109 I.C. 835=1928 O. 67. *See also* 39 M.L.J. 498=60 I.C. 802; 24 C. 646.

Sec. 32. [*N.B.*—*Cf.* S. 135, Succession Act, 1925.] *See* S. 25, *supra* and Notes thereunder.

Sec. 33: *N.B.*—*Cf.* S. 136 of the Succession Act, 1925.

Sec. 34. [*N.B.*—*Cf.* S. 137, Succession Act, 1925.] *See* 97 I.C. 341=1926 C. 1225.

Sec. 35.—[*Cf.* Ss. 180 to 190 of the Succession Act, 1925.] An election to be binding must be with a full knowledge of the rights of the person entitled to elect. Where a person elects after creating substantial rights in favour of strangers in property which he would lose by the election, the strangers who had already acquired title would not be affected by the election. 38 A. 627=43 I.A. 212=31 M.L.J.

case, he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of,

subject nevertheless,

where the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer,

and in all cases where the transfer is for consideration,

to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

Illustrations.

The farm of Sultanpur is the property of *C* and worth Rs. 800. *A* by an instrument of gift, professes to transfer it to *B*, giving by the same instrument Rs. 1 000 to *C*. *C* elects to retain the farm. He forfeits the gift of Rs. 1,000.

In the same case *A* dies before the election. His representative must out of the Rs. 1,000 pay Rs. 800 to *B*.

The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own.

A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect.

A person who, in his own capacity, takes a benefit under the transaction may in another dissent therefrom.

Exception to the last preceding four rules.—Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if

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NOTES.

607 (P.C.). A debtor executed a settlemen- conveying his property to a trustee with direct tions as to payment of debts, maintenance, etc. A suit by a creditor attacking this deed of settlement was compromised and the trustee executed two mortgages to the creditor in respect of his pre-settlement debts and certain other loans. An heir of the settlor brought a suit to set aside these mortgages as being invalid against settled estate. It was decreed. Thereupon the creditor brought the suit on the original bonds and it was held that no question of election could arise as between these securities even on the footing that the later mortgages were valid, as by express agreement, the original hypothecation bonds and the invalid mortgages were to be cumulative and independent securities. Still less can it arise after the mortgages had been set aside. I.L.R. (1938) M. 646=42 C.W.N. 565= 47 L.W. 618=1938 P.C. 123=(1938) 1 M.L.J. 597 (P.C.). Where a person takes a mortgage in consideration of consenting to a decree for payment by instalments in a suit on a pro-note, he can execute the decree and enforce the mortgage. The doctrine of election has no application to the case. 10 M.L.T. 187=11 I.C. 837. As to the *applicability of the doctrine of election, see also* 109 I.C. 835=1928 O. 67. To constitute a waiver or election by a Hindu widow it must be shown that she was fully aware of her right under the law and with that knowledge made an election. A *pardanashin* lady is entitled to special protection in this respect. 37 C.L.J. 30. *See also* (1941) 1 M.L.J. 349 (applicability of doctrine of election to the case of surrender by Hindu widow). The doctrine of election is based on the principle of compensation and not of forfeiture. The *quantum* of compensation is not what the Court looks to. It only sees that a party deprived of a right vesting in him is recompensed by the gift of another property, whatever may be its nature or duration of enjoyment. He who accepts a benefit under a deed or a will must adopt the whole contents of the instrument conforming to all its provisions and renouncing every right inconsistent with it. The rule enunciated in S. 35 applies to Hindus. 36 M.L.J. 507=49 I.C. 527. *See also* 12 M.I.A. 186; 10 M.I.A. 340; 20 B. 316; 25 M. 361; 14 B. 438. On devise of property belonging to a legatee, legatee must choose between his property and the legacy. 1925 M. 164=78 I.C. 274. Election can be made but once. If two remedies are open and a person takes one and fails, he cannot turn round and adopt the other. 52 I.C. 362. *See also* 12 C. 60. If a mortgagee obtains a decree for rent and allows it to be barred, he cannot rely on the charge for the same. 41 M. 1013=35 M.L.J. 414; 49 I.C. 123. Whether receipt of rent for land granted on permanent lease by the prior holder will amount to election of recognising the lease. *See* 1925 A. 190 =78 I.C. 191.

DIFFERENT CAPACITIES.—Where a person takes a benefit in one capacity and asserts his right in another, no question of election arises. A person taking a benefit indirectly need not elect. 42 I.C. 18=20 O.C. 243. *See also* 9 C.L.J. 19. A person accepting a benefit under a will is not precluded from disputing a gift by the testatrix long before her death which is not the subject of the will at all though it is recited therein. 64 I.C. 481=1922 M. 357. Sale of property subject to mortgage—No provision for payment of debt—Vendee of part from original vendee selling to creditor reciting original sale —Creditor, if precluded from proceeding against rest of the property. 1935 M. 684.

such owner claim the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances.

Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed, if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent.

Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.

Illustration.

A transfers to *B* an estate to which *C* is entitled and as part of the same transaction gives *C* a coal mine. *C* takes possession of the mine and exhausts it. He has thereby confirmed the transfer of the estate to *B*.

If he does not, within one year after the date of the transfer, signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon the expiration of that period, require him to make his election; and, if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer.

In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

Apportionment.

Apportionment of periodical payments on determination of interest of person entitled.

36. In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee, to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.

NOTES.

Sec. 36: APPORTIONMENT OF RENT—PRINCIPLE OF.—The general principle of apportionment which is one of equity is that all rents, annuities, dividends and other periodical payments in the nature of income shall be deemed to accrue from day to day. This principle underlies the provision of S. 36. 101 I.C. 91=1927 Oudh 605. *See also* 1928 R. 26; 28 C.W.N. 1039=1924 C. 1069. In a suit by the plaintiffs as heirs of a deceased holder of an impartible estate against an executor *de son tort*, the plaintiffs are entitled to such rents and royalties due up to the date of the death of the deceased holder. S. 36 of the T. P. Act embodies a rule of equity and that principle should be applied to a case of this nature even though the section in its terms be not applicable having regard to S. 2, sub-S. (*d*). 61 C. 711. *See also* 1937 M. 219=(1937) 1 M.L.J. 77. The section applies to transfers by act of parties and not by operation of law as execution sales. 21 C. 386; 33 C. 786. *See also* 41 M. 370=33 M. L.J. 618; 39 M. 283. But *see* 26 M. 540 (*contra*); *also* 4 M. 370. Nor to compromise decrees. 16 P. 184=18 Pat. L.T. 162=1937 P. 237. Where there are equities in favour of a *bona fide* purchaser the principle of this section regarding apportionment of rent should be applied. 105 I.C. 487=6 Bur. L.J. 207.

Agricultural rents are not apportionable, for they accrue once and for all at the time the crops are reaped and do not accrue from day to day. 5 R. 803=1928 R. 67 (2). *See also* 21 C. 383; 64 I.C. 178. The section does not apply to landlord and tenant. It applies only between a *transferor and transferee*. 24 W. R. 219. The principle of S. 36 would also apply to the case of an assignee of a lessee claiming apportionment of rent. If the assignment be of a portion only of the premises included in a lease, the assignee is not liable for more than the proportionate rent due on what is comprised in his assignment. Where the principle of apportionment has become an incident of the tenancy by the course of dealing for a long period, an assignee is entitled to ask for apportionment of rent. 50 L.W. 608=1940 Mad. 21. *See also* 16 Pat. 184=1937 Pat. 237=18 Pat. L.T. 162. Transferee is entitled to rent from the date of his purchase to the date when the rent falls due. 102 I.C. 144. An assignee of a lease is liable only for the rent accruing after the assignment. 38 M. 86=23 M.L.J. 695. Section if applies to *execution sales* of lease. 41 M. 370=33 M.L.J. 618. *See also* 39 M. 283; 33 C. 786; 21 C. 383.

Apportionment of benefit of obligation on severance.

37. When, in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favour of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed, and that the severance does not substantially increase the burden of the obligation ; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation, the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose :

Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section, unless and until he has had reasonable notice of the severance.

Nothing in this section applies to leases for agricultural purposes unless and until the Provincial Government, by notification in the Official Gazette, so directs.

Illustrations.

(*a*) *A* sells to *B*. *C* and *D* a house situate in a village and leased to *E* at an annual rent of Rs. 30 and delivery of one fat sheep, *B* having provided half the purchase-money and *C* and *D* one quarter each. *E*, having notice of this, must pay Rs. 15 to *B*, Rs. 7½ to *C*, and Rs. 7½ to *D*, and must deliver the sheep according to the joint direction of *B*, *C* and *D*.

(*b*) In the same case, each house in the village being bound to provide ten days' labour each year on a dyke to prevent inundation, *E* had agreed as a term of his lease to perform this work for *A*. *B*, *C* and *D* severally require *E* to perform the ten days' work due on account of the house of each. *E* is not bound to do more than ten days' work in all, according to such directions as *B*, *C* and *D* may join in giving.

(*B*) *Transfer of Immovable Property.*

Transfer by person authorized only under certain circumstances to transfer.

38. Where any person, authorized only under circumstances in their nature variable to dispose of immovable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

NOTES.

When the landlord assigns his interest to the tenant, rent up to assignment is claimable by landlord. 64 I.C. 178. Rent collected by transferor after sale—Transferee is entitled to collect the same from the transferor. *See* 1927 A. 569=50 A. 18. As between *mortgagor and mortgagee* from the day of the deposit to redeem a mortgage the property is transferred to the mortgagor and under S. 36 mortgagor is entitled to collections made thereafter. 1922 A. 275. As to dividends declared subsequent to purchase of shares, *see* 1930 A. 615. Though this section does not in terms apply to suit for profits brought by one co-sharer against the *lambardar*, yet the principle underlying this section is applicable. 1932 A.L.J. 93.

Sec. 37: SCOPE.—The section applies only where the benefit of an obligation passes from one to several owners of the property. 2 M. 234. *See also* 25 M. 26 at pp. 32-33. (Section does not apply where the indivisible character of the property is kept up on a transfer by inheritance, in which case all the heirs would be jointly entitled to enforce the right of the deceased, and no question of apportionment arises.) Payment of rent by tenant to assignor landlord in good faith without notice of assignment protects him. 19 I.C. 865=17 C.L.J. 372. Though the section and S. 107 do not apply directly to *agricultural leases* in the Madras Presidency, yet the principle embodied therein have been applied by the Madras High Court even to such leases. 29 M. 29 (36) foll. in 26 M. L.J. 435 at p. 440; 38 M. 445.

Sec. 38.—As to what is *reasonable care*, *see* 6 M.I.A. 393, which is the leading case on the subject. *See also* 22 A. 326; 26 B. 433; 2 C. 262; 28 A. 508; 2 B. 494; 1 B. 404. Section pre-supposes an actual and completed transfer and does not apply to cases where the transaction is still incomplete. 22 B. 1 at pp. 9, 10. "*Any person*" meaning of. 56 I.C. 492=14 S.L.R. 12. *Bona fide* enquiry by the transferee as to the existence of legal necessity is sufficient. 92 I.C. 646 (N.) (as to enquiries to be made by alienee from Hindu widow). *See also* 1927 N. 65. The purchaser from the mother of a minor at the guardian, must prove that the mother was authorized to transfer. 33 I.C. 444=17 Bom. L.R. 1134. Where the vendor has absolute power to convey certain property, the vendee gets full title provided the vendor recites in the sale-deed that he intends to pass full title though the

Illustration.

A, a Hindu widow, whose husband has left collateral heirs, alleging that the property held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable to sell a field part of such property to *B*. *B* satisfies himself by reasonable enquiry that the income of the property is insufficient for *A's* maintenance, and that the sale of the field is necessary, and, acting in good faith, buys the field from *A*. As between *B* on the one part and *A* on the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

Transfer where third person is entitled to maintenance.

39. Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immovable property, and such property is transferred, [1][* * *] the right may be enforced against the transferee, if he has notice [1][thereof], or if the transfer is gratuitous ; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

[1][* * * *]

LEG. REF.

[1] In S. 39 the words "with the intention of defeating such right" are omitted; and for the words "of such intention" the word "thereof" is substituted; and the illustration to the old section is also omitted by Act XX of 1929, S. 11.

NOTES.

recitals be false. 39 M.L.J. 590=60 I.C. 77. Specific representations by the vendor may be ground for dispensing with the necessity for enquiry by the purchaser. 20 C. 296=19 I.A. 203 (P.C.); 25 M. 149. The plea of want of legal necessity cannot be raised by a donee. An alienee for value can raise the question of legal necessity. 1923 N. 127.

Sec. 39: CHANGE IN THE PRESENT SECTION AND REASON FOR THE CHANGE.—This is explained in the *Statement of Objects and Reasons* as follows:—"S. 39 is intended to protect persons who are entitled to receive maintenance or for whom provision is made for advancement or marriage from the profits of any immovable preperty. The section provides that such a right can be enforced against a transferee of the property, if the transfer has been made with the intention of defeating the right and the transferee has notice of the intention. The Courts have, therefore, always required proof of the intention on the part of the transferor and also of notice of the intention to the transferee. 22 A. 326; 24 A. 160. The illustration to the section is not consistent with the section itself and does not make any reference to the intention of the transferor. In actual practice it is impossible to adduce proof of mere intention. As stated in 12 Bom.L.R. 1075 at pp. 1077 and 1078, in order to enable such proof to be adduced, a transferor must have announced his fraudulent intention of defeating the rights of persons entitled to maintenance and the transferee must have heard him doing so. As it is desirable to protect persons entitled to maintenance or for whom provision for advancement has been made from improvident holders of the property, it is necessary that the reference to the transferor's intention should be omitted from the section, and the section should be amended accordingly." 53 L.W. 744 =1941 Mad. 707=(1941) 1 M.L.J. 815 (within S. 39 as amended has retrospective effect).

The Select Committee said : "We have thought it desirable to omit the *Illustration* to S. 39 instead of amending it." S. 39 does not in terms apply to the case of a charge created or declared by a decree of Court in a suit for maintenance. Such a charge created by a decree binds and is enforceable a subsequent transferee even though he may be a *bona fide* transferee for value without notice. 160 I.C. 169=19 N.L.J. 254.

Secs. 39 and 100: DISTINCTION BETWEEN.—S. 39 of the Transfer of Property Act does not deal with a charge but with a right which falls short of it, while S. 100 deals with charge itself. In the former case the charge does not arise until it is fixed by a decree or by agreement or operation of law. 1940 N.L.J. 1=1940 Nag. 163=I.L.R. (1941) Nag. 513.

Secs. 39 and 40 : SCOPE.—A transferee claiming under a transfer before 1929, cannot by reason of the amendment of the T. P. Act, in 1929, be required to do more than he was required to do by the law as it stood when the property was transferred to him. Nor can a mere omission to make inquiries be regarded as sufficient to constitute "notice" within the meaning of Ss. 3 and 39, T. P. Act. The abstention from inquiry must be designed, and due to a desire to avoid an inquiry which would lead one to ultimate knowledge before the omission to make inquiry can be said to constitute constructive notice. 53 L.W. 744=1941 M. 707=(1941) 1 M.L.J. 815. Ss. 39 and 40 have no application where under an award, immovable property is charged for payment of religious expenses and maintenance. They deal with personal rights which do not arise out of a specific charge. 5 Luck. 172=1929 O. 316. *See* 9 C. 335 ; 27 M. 268 ; 6 O.W.N. 493 ; 2 B. 494 ; 22 A. 326. The *right of maintenance of the wife* is not a charge on the husband's estate. Where property is transferred with the intention of defeating her right the case is governed by S. 38. 8 O.W.N. 1291. Where a Hindu husband who was on cordial terms with his wife, made a gift of his property to his wife in order to provide for her maintenance, *held*, that the wife was not a creditor and that the transfer in her favour could not take effect as against the claims of the husband's creditors. (*Ibid.*) Junior members in an *impartible estate* are not entitled to a charge for maintenance against a transferee. 48 I.C. 613=3 P.L.J. 648. A *gratuitous transferee* cannot in any case defeat the rights of the maintenance holder. 22 A. 326. S. 39 (prior to amendment of 1929)—Scope—Hindu widow's claim for maintenance—Enfor-

40. Where, for the more beneficial enjoyment of his own immovable property, a third person has, independently of any interest in the immovable property of another or of any easement thereon, a right to restrain the enjoyment [1][in a particular manner of the latter property], or

Burden of obligation imposing restriction on use of land.

LEG. REF.

[1] In S. 40 for the words "of the latter property, or to compel its enjoyment in a particular manner," the words "in a particular manner of the latter property", are substituted by Act XX of 1939, S. 12.

N.B.—The reason for amendment of S. 40 has already been dealt with along with S. 11. *See* notes under S. 11.

NOTES.

ceability against *bona fide* transferee. 40 L.W. 678.

BONA FIDE PURCHASER.—In order to affect a *bona fide* purchaser for value with notice, he must have notice not only of the existence of the right of maintenance but also of the existence of a charge actually created and binding on the estate. 26 S.L.R. 269. *See also* 40 L.W. 678. Where the plaintiff was only entitled to a right to receive part of his maintenance from the profits of a village by a contract with the owner which, being unregistered, created no charge for the same, the right cannot be enforced against a subsequent transferee for value without notice. 9 O.W.N. 1037. S. 39 does not in terms apply to the case of a charge created or declared by a decree of Court in a suit for maintenance. Such a charge created by a decree binds and is enforceable against a subsequent transferee even though he may be a *bona fide* transferee for value without notice. 19 N.L.J. 254. The holder of a decree for arrears of maintenance charged upon certain properties is entitled to enforce the same against the transferee of the properties for value with notice of the charge, even though the transferee purchased only a part of the estate. If he is obliged to satisfy the full amount of the charge, his only remedy is a suit for contribution against the owners of the remaining portion of the estate. 9 O.W.N. 900=1932 O. 336.

Sec. 40 : SCOPE.—On the section, *see also* notes under S. 11, *supra*. *See also* 5 Luck. 172, cited under S. 39. This section deals with what are known in English law as restrictive covenants. 11 M.L.J. 135. *See also* 46 A. 333. A person in whom there is a reversion in property leased after the expiration of the term of 499 years is said to possess his own immovable property and where for the more beneficial enjoyment of the reversion a negative stipulation is made, the principle of S. 40 should be applied. 64 C.L.J. 308=1936 C. 727=41 C.W.N. 203. A covenant running with the land is a *restrictive covenant* as the same restricts the use of the land. 1927 C. 41=44 C.L.J. 220. Enforcement of a *contract of pre-emption* against transferee with notice. 48 A. 12=1926 A. 72. The section does not apply where the benefit or obligation arising out of contract or annexed to ownership of immovable property amounts to an easement. 39 I.C. 778=48 P.W.R. 1917 ; 129 I.C. 717=1931 A. 207. (*See* para. 2 of the section) ; nor to a mere personal obligation to pay. 133 I.C. 543 =1931 A.L.J. 429. Covenant as to rent runs with the land. 62 C. 346=1935 C. 368. Where an *ekrarnama* provided that in the event of the executant not paying the allowance fixed for maintenance, the obligee was to have liberty to proceed against the properties relinquished by her and in case she was unable to realise the arrears from those properties, she might have recourse to the other properties of the obligor, no particular or specific property having been mentioned as liable for the claim, the deed cannot be construed as creating a charge, but only an obligation arising out of a contract annexed to the ownership of immovable property which, however, cannot be enforced against a *bona fide* purchaser without notice. 138 I.C. 24=36 C. W.N. 153. Vague references to antecedent contracts, in judicial sales, could not affect the purchaser's rights. 1922 P.C. 393. The right of reconveyance of a right of easement granted in perpetuity is a positive covenant arising out of contract and can be completely dissociated from the land itself as a right of reconveyance in respect of land sold. There is nothing which can fasten this condition on the land itself so as to make it a covenant running with the land ; it is a personal covenant independent of the land. Hence a vendee from the grantor cannot without an assignment of the right to sue for specific performance of the condition of repurchase. 1942 N.L.J. 392.

EXECUTION SALE.—"*Transferee*" means not only a private purchaser but also one in execution. 38 I.C. 107=5 L.W. 234. *See also* 6 O. W.N. 493 ; 45 M.L.J. 790=1922 P.C. 393 (P. C.). Subsequent attachment does not affect the right of vendee under a prior agreement of sale. 41 L.W. 739=1935 M. 193=68 M L.J. 67.

REVENUE SALE.—A revenue sale held on the footing that the defendant was bound to pay assessment would be invalid if it is found that he was, in fact, entitled to hold the lands free of assessment. The purchaser in such a sale would not get a good title except by adverse possession. The doctrine of a purchaser for value without notice, does not apply to sale held by Revenue Courts. 45 B. 45=59 I.C. 118 ; 38 I.C. 107=5 L.W. 224. *See also* 6 O.W.N. 493. (*Distinction between execution sale in Civil Courts and sales by Revenue Courts* for arrears of assessment pointed out. 45 B. 45=59 I.C. 118.)

CHARGES.—A transferee with knowledge of a charge on the property is bound by the charge. 41 B. 372=39 I.C. 96=19 Bom.L.R. 97. *See also* 1926 A. 70; 2 A. 162. *See also* 33 A. 163= 43 I.A. 43=20 C.W.N. 425 (P.C.); 2 A. 162; 36 M.L.J. 618 (623). Agreement in favour of wife hypothecating a property for securing a payment of a monthly allowance to her was held to be a bogus one and would not affect the purchaser for value without notice of agreement. 130 I.C. 299 (2)=1931 A. 338. Legatees and

where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon,

or of obligation annexed to ownership but not amounting to interest or easement.

such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

Illustration.

A contracts to sell Sultanpur to *B*. While the contract is still in force he sells Sultanpur to *C*, who has notice of the contract. *B* may enforce the contract against *C* to the same extent as against *A*.

41. Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

Transfer by ostensible owner.

NOTES.

heirs of a Zemindar are bound by a charge for maintenance created by him. 42 M. 581=36 M.L.J. 164=49 I.C. 704 (P.C.). S. 40 does not apply to cases of decrees creating a charge on property; such a charge prevails against a transferee for value without notice. 19 N.L.J. 254. A charge supported by consideration can be enforced even against a transferee without notice. 51 I.C. 963=36 M.L.J. 618 (623). *See also* 169 I.C. 169=19 N.L.J. 254. A purchaser is presumed to have constructive notice not only of the tenant's interests but also of the other equities which the tenant in possession had. 101 I.C. 836=1927 M. 699. Notice must be clear and unequivocal notice; mere vague references are of no effect. 1922 P. C. 393 (396). The question of notice is a question of fact. 1931 A. 338.

COVENANT RUNNING WITH THE LAND.—The test to find out whether a covenant runs with the land is to see whether, at its inception, it binds the land and secondly whether the covenant agrees with the nature, quality or value of the land. 36 C. 675=9 C.L.J. 523. As to contract giving rise to a right of pre-emption; *see* 46 A. 333; 48 A. 12; 1924 A. 657; 1926 A. 70.

WHAT ARE COVENANTS RUNNING WITH THE LAND.—*See* 55 I.C. 113=1 P.L.T. 84. A covenant between lessor and lessee for preparation of *jama papers* is one running with the land. 42 I.C. 521. A partition deed between four brothers provided that if any of them was obliged to pay off the debts of the family allotted to another, the person so paying would be entitled to a charge on the properties of the other to the extent of the amount paid. *Held*, that the clause was a restrictive covenant in the nature of an obligation annexed to the ownership of immovable property within the meaning of S. 40, and it was binding on a purchaser of the properties from one of the brothers with notice of the covenant. 38 L.W. 463=1933 M. 715=65 M.L.J. 390. A covenant to pay ground rent and taxes runs with the land. 27 Bom.L.R. 553=88 I.C. 79. On this point, *see also* 46 A. 33; 1925 A. 400; 1926 A. 70; 2 A. 162; 62 C. 346. A *restrictive covenant* runs with the land if created for the benefit of the land conveyed or of that of which the grantor remains the owner and is intended to be annexed to such land. The converse proposition also holds good, as a grantor may impose restrictions for the benefit of the land already sold as of that remaining in his hands which he proposes to sell especially when there are mutual covenants. 12 C.L.J. 259=7 I.C. 815. *See also* 41 A. 417=49 I.C. 869. *Contract of pre-emption*, if enforceable against purchaser. 46 A. 333=1924 A. 400; 1926 A. 70. On this section, *see also* 1922 P.C. 165.

WHAT ARE NOT COVENANTS RUNNING WITH THE LAND.—A covenant agreeing to restrict the use of property by owner is not a covenant running with the land and is not binding on a purchaser without notice. 59 I.C. 506=45 B. 170=22 Bom.L.R. 1158. Contract to grant lease is a personal covenant and not a covenant running with the land. 23 A.L.J. 307=47 A. 582. An obligation to pay *zar-i-chakram* cannot be said to be annexed to the ownership of immovable property within the meaning of S. 40. 1931 A.L.J. 429. Kanom deed—Stipulation that jenmi is to pay compensation at specified rates—If covenant running with the land. *See* (1940) 1 M.L.J. 165. A covenant by an alienee of a portion of land to pay land-revenue for the unsold portion as well cannot be enforced for all time. It is not a covenant running with the land. 19 I.C. 126=11 A.L.J. 231; 19 I.C. 67=11 A.L.J. 212. Covenant in a *patni* lease for reconveyance to the lessor being a positive covenant does not run with the land. 98 I.C. 46=1927 C. 41. A covenant to re-convey is only personal. It does not bind even the heirs. 35 B. 258=10 I.C. 814=13 Bom.L.R. 240. *See also* 44 C.L.J. 220=98 I.C. 46; 4 Bur.L.T. 74=10 I.C. 779.

Sec. 41: PRINCIPLE OF THE SECTION is that "where one of two innocent persons must suffer from the fraud of a third party, the loss should fall on him who has created or could have prevented the opportunity for the fraud; and in

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such cases hardship is caused by the strict enforcement of the general rule that no one can confer a better or higher right to property than what he himself possesses." *See* Proceedings in Council, *Gazette of India* Supp. (1884), p. 182. *See also* 5 P.L.J. 521 at 535; 17 A. 280; 85 I.C. 540=1925 C. 993; 8 O.W.N. 1148. The principle of S. 41 applies to mortgages. 190 I.C. 599=1940 L. 269. It cannot be said that S. 41 has no application to an application for pre-emption. 45 C.W.N. 735. Though S. 41 only relates to immovable property, the principle of that section can be applied where movable property, such as a decree for money, has been sold to a *bona fide* purchaser for value by the ostensible owner. Where one of two innocent persons has to suffer by the act of a third person, the person who has enabled the third person to occasion the loss must sustain it. 1942 M. 28=54 L.W. 426=(1941) 2 M.L.J. 601.

Sec. 41 and Evidence Act, S. 115.—Respective scope—Right to benefit of estoppel—Duty to make enquiries. 11 O.W.N. 1097.

CONDITIONS FOR APPLICABILITY.—S. 41 requires the following conditions for its application: (1) that it was by consent, express or implied, of the person claiming title that another person is held out as the ostensible owner of such property, (2) that such ostensible owner transfers it for valuable consideration, and (3) that the transferee has acted in good faith and has taken reasonable care to ascertain that the transferor had power to make the transfer. 48 C.L.J. 374. *See also* 11 B.L.R. 46 (P.C.); 35 I.C. 893; 1925 C. 993; 33 C.W.N. 526=1929 C. 83; 52 A. 248=1930 A. 847; 1933 L. 258=146 I.C. 210; 65 C.L.J. 347=41 C.W.N. 797; 1941 C. 318; 39 Bom.L.R. 1217=1938 Bom. 125. For the application of S. 41 of the T. P. Act, two things must concur (1) the ostensible owner who has no real title must be clothed with the insignia of ownership with the consent, express or implied, of the real owner, and (2) the person purchasing for value from the ostensible owner should take reasonable care to ascertain that his transferor has authority to make the transfer. A person purchasing from a person who is not the real owner can only protect himself by showing that he acted as a prudent man. If he makes no enquiry into title, such as a prudent purchaser would make, or avoids prosecuting such an enquiry he cannot claim protection and the principle that a man cannot give what he has not must apply. 65 C.L.J. 347=41 C.W.N. 797. For the operation of S. 41 it must be shown that the person who transfers the property was the ostensible owner with the consent express or implied of the person interested in the property. In a case where there is no evidence of tacit consent, the mere fact that an entry was made in the survey register showing the property as belonging to the transferor cannot be relied on as such consent. 1939 M. 299=(1939) 1 M.L.J. 74. In order that S. 41 may apply it is not necessary that the real owner should have consented. It is sufficient if the transferor is the ostensible owner to the knowledge of the real owner. The test is that the transferee should show that he acted like a reasonable man of business and with ordinary produce. 150 I.C. 81=1934 A.L.J. 554=1934 A. 193. If any one of the essential elements mentioned in S. 41 be wanting, the transferee is not entitled to the protection provided by that section. 85 I.C. 540=1925 C. 993; 5 P.L.J. 521=57 I.C. 353. The consent of the person interested is a consent to another person being the ostensible owner of the property and not a consent to the transfer of the property. 1937 Pesh. 58; 1936 L. 816; 1941 Pesh. 59. S. 41 does not in terms apply either to voluntary transfers by the ostensible owner or to the rights of the successors-in-interest of the real owner or to the rights of subsequent purchasers from volunteers or from first transferees for consideration from the ostensible owner. The rights of such successors-in-interest or subsequent transferees are to be determined on general equitable principles. If the first transferee from the *benamidar* is a *bona fide* purchaser for value without notice. he acquires good title and any transferee from him with or without notice of the real title would in equity acquire a good title. If the first transferee be either a volunteer or a transferee for value but with notice, a *bona fide* transferee from him for value without notice would in equity be still protected on the principle. 44 C.W.N. 813=71 C.L.J. 520=1940 Cal. 565; 1940 N. 7.

SCOPE OF SECTION.—The condition of the section must be strictly complied with. The section does not apply to transfer *in invitum* by order of Court. 102 I.C 64=1927 B. 368; 21 A.L.J. 488=1924 A. 63; 1939 N.L.J. 496=1940 Nag. 7. *See also* 118 I.C. 718=1929 A. 800; 45 A. 520=21 A.L.J. 424=1923 A. 983. Where the plaintiff did not claim under the person with whose consent the seller was the ostensible owner of the property. *See* 1930 A. L.J. 686=1930 A. 374. *See also* 1940 Sind 212=I.L.R. (1940) Kar. 403; 38 P.L.R. 90. S. 41 cannot be invoked by the purchaser of the equity of redemption on the ground that he purchased from the mortgagor as ostensible owner without notice of the mortgage. 27 N. L.R. 144. Mortgaged property standing in name of mortgagor—Mother of mortgagor present at time of negotiations finally inducing mortgagee to advance money—Mother, if can avoid mortgage. 1937 L. 272. *See also* 1940 Lah. 252. The section affords protection to *bona fide* transferees, though the real owner himself be innocent. 53 I.C. 970=22 O.C. 243. But the real owner must induce belief in the transferee that his transferor had power to transfer, and mere mutation of names is not sufficient as it does not create title. 97 I.C. 988=1927 N. 41. The section is not confined to purchasers from the ostensible owner alone. It extends also to subsequent purchasers. 43 C. L.J. 452=1926 C. 916. S. 41 does not apply to auction-purchasers. The "transfer" spoken of in the section must be voluntary transfer effected by an act of the ostensible owner. Consequently auction-purchasers are not entitled to the protection afforded by S. 41 or by any principle on which that section is based. 4 A. W.R. 492; 149 I.C. 357=11 O.W.N. 702=1934 O. 233. S. 41 of the T.P. Act applies only to voluntary sales and has no application

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to Court sales. 1939 N.L.J. 496=1940 Nag. 7 *See also* 1940 A.L.J. 166 ; 1940 Cal. 565. S. 41 is inapplicable, to a case where the plaintiff was at all material times a minor and incapable of consenting to his father holding himself out as the owner of the property. (36 B. 446; 34 A. 22 and 26 B. 433, Ref.) 12 R. 55=1934 R. 90. The question of priority between a mortgagee and a subsequent purchaser of the same immovable property is governed by S. 48. The purchaser is not protected by the provisions of S. 41, when there is no proof of negligence on the part of mortgagee. But even if the mortgagee be regarded as a person interested in the property, it cannot be said that with his consent, express or implied, the owner was the ostensible owner of the property. *Quaere* S. 41 makes no express reference to negligence. Therefore it is doubtful whether negligence can be a plea under S. 41: 150 I.C. 145=1934 O. 283. This section like S. 115 of the Evidence Act applies to a case where the person sought to be estopped has acted under a *mistake of fact*. 18 N.L.R. 27=1922 N. 79. *See also* 85 I. C. 540=1925 C. 993. Where the real owner himself is estopped under this section to question an alienation, *a successor in interest* of the real owner is also estopped 65 I.C. 245=26 C.W. N. 436. The principle of the section does not apply to *execution creditors* even though the judgment-debtor himself may be estopped by certain considerations. 43 M. 135=37 M.L.J. 442. *See also* 34 I.C. 494. S. 41 does not apply to tenancies. 1935 R.D. 62. The Transfer of Property Act does not apply to the N.-W. Frontier Province but the principles underlying its sections are used by the Courts there as principles of equity, justice and good conscience under S. 23, Frontier Law and Justice Regulation. 1942 Pesh. 68.

RELIGIOUS ENDOWMENTS are protected from the operation of the section as the idol is the shrine itself and no particular being can give consent express or implied. 73 I.C. 711. Applicability of section to trust property. *Held*, purchaser from a Mohant not protected because of negligence to make enquiry. 1930 A..L.J. 964. Where the mortgagors who were trustees of a religious institution mortgaged the trust properties and the mortgagee took the mortgage knowing of their character as trustees and without making sufficient inquiry; *Held*, that the mortgagee could not rely on S. 41. 35 Bom. L. R. 1091=1934 B.1. The appellant claimed to be trustee of certain temple property under a certain will and a decree, but did nothing to secure that the proper entries relating to this trust property were made in the Property Register. The appellant allowed *M* to hold himself out as the owner in a sale of the trust property. He stood by and did not even act with reasonable promptitude when the purchaser was building upon the land. There was nothing which would have put the purchaser on enquiry to ascertain the real title of the appellant. In a suit by the appellant to set aside the sale, *held*, that the sale could not be set aside as the provisions of S. 41 were attracted in the purchaser's favour. 1937 S. 177= 31 S.L.R. 197. Idols though for certain purposes can be spoken of as minors, cannot be given the special privilgees which are applicable only to flesh and blood minors who will come of age later on. The Sarbarakar acts for the idol and hence a plea under S. 41, of estoppel would be available against an idol. 1942 N.L.J. 405.

OSTENSIBLE OWNER.—45 A. 520=21 A.L.J. 424. *See also* 118 I.C. 718=1929 A. 800; 33 C. W.N. 994; 63 I.C. 125. As to who is an ostensible owner, *see* 27 Bom. L.R. 434=87 I.C. 951 =1925 B. 343. A person disclaiming title cannot afterwards set it up to the prejudice of third parties purchasing from the ostensible owner in good faith and for value. 5 O.L.J. 49 =45 I.C. 307; 22 C.L.J. 574=29 I.C. 84, *See also* 45 A. 520=21 A.L.J. 424=1923 A. 983. Person against whose property a charge is created by a decree is not ostensible owner. 27 Bom. L.R. 434=87 I.C. 951=1925 B. 343; *so also guardians*, 34 A. 22; 29 A. 292; agents, 4 Bur. L.T. 74; 1 I.C. 525. So also a *permissive possessor* is not an ostensible owner. 41 C.L.J. 374=1925 C. 1034. Possession by manager of property during owner's absence and transfer of registry in his name in Municipal book does not make him an ostensible owner. 44 A. 674=1922 A. 392; 19 C.W.N. 1055; *also* 36 A. 308=25 I.C. 158. As to *pardanashin ladies*, *see* 40 C. 378=25 M.L.J. 55 (P.C.). A house was owned by one *H*, who gifted it orally to his daughter-in-law in lieu of dower. The title-deed of the house was left in possession of her husband. The house was subsequently mortgaged by him and the title-deed was handed over to the mortgagee. The mortgagee attached and tried to sell the mortgaged property. The daughter-in-law objected. *Held*, that when she allowed her husband to retain possession of the title-deed, she impliedly consented to his holding himself out as the owner of the property and hence the mortgagee was protected by S. 41. Even the usual practice among the pardanashin ladies of allowing their husbands to manage their property could not get over the obvious fact. (1936 L. 816, Rel. on.) 1937 Pesh. 58. Where a vendor alienates property which stands in his name in revenue entries as sole owner, the vendee is protected, though others may be interested in the property actually. 1927 L. 666; 1936 L. 405. Where property belonging to the wife was mutated in favour of the husband and the wife not only did not attempt to challenge the mutation but also allowed the husband to remain in possession, she, having allowed him to act as the ostensible owner of the property, is estopped from challenging the title of the mortgagee from the husband, where the mortgage is made in good faith and for valuable consideration. 38 P.L.R. 90. But where the entry in the mutation register relied on by the transferee shows that other persons claimed ownership, the transfer is not by the ostensible owner. 8 O.W.N. 237=1931 O. 253. A person cannot be said to be an ostensible owner with the consent of the true owner on the basis of an entry in the revenue papers when the ostensible owner's name was entered in the revenue papers in the face of the opposition of true owner and was only entered as he was in possession

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at the time. 28 N.L.R. 227. Possession by servant in lieu of rendering services does not make him ostensible owner. 41 C.L.J. 374=1925 C. 1034. A minor who has an interest in property cannot by reason of the disability of infancy give his consent, and therefore, a transferee of such property from an adult brother of the minor cannot claim the protection of S. 41 as against the minor. 37 P.L.R. 112. Where some alone of several co-sharers are entered in the revenue records as owners, and on the basis of that a mortgagee entered into a mortgage with them, his title is protected under S. 41. 79 I.C. 174=46 A. 377. A sale by such co-sharers and the vendee stands in the position of the vendors and any defence available to them is open to him as regards the title to the property. 1933 L. 262=34 P.L.R. 714. Though a bequest by the widow of property inherited from her husband is invalid, yet where the next reversioners consented not only to the will but to the getting of the legatee's name entered in the *record-of-rights* and a third person has on the faith thereof advanced a loan to the ostensible owner, *i.e.*, the legatee, the reversioners are estopped from asserting their own title to the prejudice of the stranger. 27 N.L.R. 283. Having regard to the provisions of the Madras Estates Land Act, a patta granted by a landholder in respect of a ryot's holding is strong *prima facie* evidence of title, and is practically a title deed to the ryot in respect of his holding, so as to enable a transferee from the pattadar to claim the protection of S. 41. 51 L.W. 351= 1940 Mad. 523=(1940) 1 M.L.J. 791. Where a person purchases property at an auction-sale under circumstances which do not lead him to an enjuiry, S. 41 does not apply. 21 A.L.J. 498 =1924 A. 63 ; 28 N.L.R. 227. As to how far dealings by or with *benamidar* bind the real owner, *see* 26 C.W.N. 436 ; 19 W.R. 292 (P.C.). All that S. 41 requires is that the alienors should act as "ostensible owners" with the consent express or implied of the "persons interested." The trustees of a property come under the latter category. 37 P.L.R. 168. A *gift once, legally made is irrevocable*, and the donor cannot be heard to say as against the donee that it was never intended to be acted upon. As against the donor the donee acquires a good title from the date of the gift. Even when the donee happens to be only an ostensible owner, the right of third parties dealing in good faith with the donee are protected by S. 41, T. P. Act, much more so when the donee has acquired not only an ostensible but a real title. 1936 A.M.L.J. 118.

LIMITED OWNER.—When a Hindu lady cannot without legal necessity transfer a part of the estate in her possession so as to bind the reversioners, much less can she by orally transferring possession and putting such person in possession destroy the rights of the reversioners in case such person transfers the property. In such a case the transferee from such a person cannot plead estoppel under S. 41, for that section refers to personal estoppels arising out of the conduct of the plaintiffs or persons through whom they are claiming, and the mere fact that the Hindu widow's estate is vested in the limited owner for the time being cannot create an estoppel against the reversioners by virtue of the consent obtained from the limited owner. 55 A. 554=1933 A.L.J. 1185=1933 A. 493. *See also* 13 Mys.L.J. 61=39 Mys.H.C.R. 1119. Where a Hindu widow who had been unchaste and had not been living with her husband was allowed to succeed in the presence of the daughter living and enter into his property, it will hardly avail the reversioners to impeach a transaction of sale entered into by her on the ground that she was by reason of previous unchastity not lawfully entitled to succeed. If this is so, S. 41 may be of assistance to the purchaser from the widow to this extent; that the daughter by her conduct led the purchaser to believe that the widow was the person entitled to present possession of the property during her lifetime. 1937 P. 353. It is not open to the alienees from a Hindu widow to rely on S. 41 of the T. P. Act as a defence to a suit by reversioners. The section is not applicable to cases of adverse possession and the consent of the limited owner can be operative only so far as she is concerned. It cannot bind the reversioners so long as the limited owner remains in possession. 1942 A.L.W. 161=1942 A.W.R. (H.C.) 84 (2).

BURDEN OF PROOF.—The burden of proof is always on the transferee to show that he acted in good faith and that his transferor was the ostensible owner with the express or implied consent of the real owner. 1934 O. 165=150 I.C. 922. Existence of circumstances calling for inquiry is not necessary. Where he fails to look into papers to see whether vendor has power to sell property, he is not entitled to benefit of S. 41 and the mere fact that the vendor's name appears in Register *D* is not sufficient. 1934 P. 67. But *see* 1934 R. 313. It is not sufficient to establish merely that he made an enquiry. The vendee may have made a reasonably careful enquiry and may have ascertained the true fact, but chosen to ignore them. A finding of the absence of negligence is not therefore the same thing as a finding of good faith. A person may act without neglience but at the same time without honesty. 148 I.C. 742=1934 L. 658.

ATTESTATION.—Real owner cannot question an alienation by the *benamidar* when he himself has allowed and attested the same. 46 I. C. 102 ; 90 I.C. 547 ; 1926 O. 131 ; 126 P.W. R. 1918 ; 20 I.C. 291.

NOTICE.—A *bona fide* transferee is always protected. 9 I.C. 504=9 M.L.T. 365 ; 48 I.C. 936; 1919 P.H.C.C. 404 ; 21 A.L.J. 498; 29 I.C. 841=22 C.L.J. 574 ; 104 I.C. 394 ; 1928 N. 308 ; 1929 R. 112. Under this section notice may be either actual or constructive notice. *See* 33 C.W.N. 525=114 I.C. 142=1929 C. 83; 48 C.L.J. 374 ; 6 O.W.N. 169=1929 O. 193. A person knowing about the infirmity of title of his transferor cannot claim the benefit of this section. 22 I.C. 673 ; *also* 47 M.L.J. 622; 1929 A. 737. *See also* 44 C.W.N. 813=71 C. L.J. 520=1940 Cal. 565 ; 113 I.C. 373=1929 N. 28 ; 22 I.C. 673 ; 73 P.R. 1918=47 I.C. 367. Burden of proving that the purchaser had notice of the real title lies on the real owner. 35 I.C. 893=4 L.W. 209. *See also* 190 I.C.

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413=1940 Rang. 184 ; 1922 N. 226 ; 1928 N. 308 ; 1929 C. 626. Notice of possession by stranger amounts to notice of his rights. 20 I.C. 195=18 C.W.N. 657. Possession by real owner is notice of the *benami* nature of the transaction. 46 P.R. 1918=43 I.C. 556 ; 1925 B. 299 ; 29 C.W.N. 436. *See also* 33 Bom.L.R. 356=1931 B. 227. A Burmese husband lowed his wife and children to hold themselves out as the sole owners of the properties and to deal with them as if they were such owners. The wife and children mortgaged the properties and the mortgagee acted in good faith and without notice of the title of the husband. *Held*, the husband could not impugn the mortgage. 146 I.C. 1073 =1933 R. 361.

REASONABLE CARE.—What amounts to. 43 C.L.J. 452 ; 27 I.C. 14=1 L.W. 649 ; 1923 N. 15 ; 1926 C. 916 ; 100 I.C. 665=1927 M.W.N. 114 ; 99 I.C. 1=1927 A. 158 ; 1928 M. 778 ; 113 I.C. 373=1929 N. 28 ; 3 O.L.J. 224=34 I.C. 773 ; 6 R. 643. The expression '*reasonable care*' means such care as an ordinary man of business or a person of ordinary prudence would take. 33 C.W.N. 526. *See also* 1937 A.L.J. 1356 =1938 All.64. 'Reasonable care' would require the purchaser to inspect title-deeds under which the vendor cliams title and to ascertain if the vendor has power to transfer under the deeds. 111 I.C. 539=1928 M. 778; 11 C.L.J. 197=5 I.C. 334. He must also establish that he made reasonable inquiries ; an entry in the revenue papers in itself is not sufficient to constitute the basis of enquiries. I.L.R. (1936) N.177=1936 N. 214. What would be reasonable care is a question of fact. 36 A 308; 5 P.L.J. 521 ; 48 C. L.J. 374; 1929 C. 83; 1927 M. 1138=37 P.L.R. 168. Each case must be decided upon its own particular circumstances. 100 I.C. 665=1927 M. 1138 (Failure to inspect title-deeds is not conclusive). Where the purchaser made casual inquiries of persons who were not conversant with the vendor's affairs, *held*, that the purchaser had not taken reasonable care. 52 C.L.J. 492= 1931 C. 144. Where there is no evidence to prove that the mortgagee took the mortgage from the ostensible owner after taking reasonable care to ascertain that the transferor had power to make the transfer and that he (mortgagee) had acted in good faith. he cannot claim protection of S. 41. 8 O.W.N. 237=1931 O. 253.

ENQUIRY.—In order to support a plea under S. 41 there must be proof that the party made due enquiry. 10 P.L.T. 254=116 I.C. 779= 1929 P. 305. *See also* 1930 A. 422; 11 L.L.J. 219; 49 C.L.J. 532; 7 R. 276; 1929 R. 17; 6 O.W.N. 133=1929 O. 160; 1927 M. 1138; 1933 O. 166=10 O.W.N. 58. It is necessary under S. 41 to prove not merely consideration but also good faith and due enquiry. 33 Bom.L.R. 356=1931 B. 227=1934 R. 139. S. 41 of the Act protects a person who has acquired title from an ostensible owner. Neither this statutory provision nor equity can protect a transferee unless the transferee has taken reasonable care to ascertain that the transferee had power to make the transfer. A purchaser cannot be said to have acted like a reasonable man if he has taken no steps whatever to look at the registers and does not in any way ask or seek to obtain the production of the documents of title at least before the completion of sale. 1942 N.L.J. 353. If he makes no enquiry into title, such as a prudent purchaser would make, or avoids prosecuting such an enquiry, he cannot claim protection and the principle that a man cannot give what he has not must apply. 65 C.L.J. 347=41 C.W.N. 797. The enquiry need not extend to whether the seller's wife is *enceinte*. 26 I.C. 61=27 M.L.J. 580. Where a vendor claims title under an invalid document, title by prescription ought to be enquired into. 27 I.C. 777=8 Bur.L.T. 85. Full and proper enquiry ought to be made in the Registration Office records. 7 R. 118=1929 R. 117. A mere inspection of the *khewat* should not suffice as a sufficiently good inquiry, especially where the vendor or the judgment-debtor is a Mahomedan. 124 I.C. 757=1930 A. 521. Where, had the transferee made inquiries in the village, he would have come to know that the property had long ago been sold by the transferor and that he had no interest left in the property at all which he could transfer, transferee gets no title to the land. Mere inspection of the revenue papers by the transferee is not enough. 11 O.W.N. 421=1934 O. 165. A transferee consulting *khasra paimash* of the municipality or police records of levy of punitive tax, cannot be considered to have satisfied the requirements of S. 41. Such records have not been framed with a view to settle the ownership of properties, but only for the purpose of realisation of taxes. 1934 L. 885. *See also* 1933 A.L.J. 1036=1933 A. 917. Where it is found that the mortgagee had not made any enquiries he is not protected and is not entitled to benefits conferred by S. 41. The fact that the mortgagors' names were entered in the khewat is not sufficient enquiry nor the fact that the Court of Wards was in possession of the property. 1942 O.W.N. 127=1942 A.W.R. (C.C.) 95. Where a transferee takes a transfer from an heir to a deceased who is in possession of the property without making inquiries as to whether there are other co-heirs, he is not entitled to the protection under S. 41. 1934 A.L.J. 544= 1934 A. 193. It is not enough to assert generally that enquiries should be made or that a prudent man should have made further enquiries, but some specific circumstances should be pointed out as the starting point of an enquiry which might be expected to lead to some result. 1937 P. 353. It is not enough for the purchaser to say that an enquiry as regards the possession of the property had been made through a servant. The transferee should place before the Court the evidence showing what enquiries had been made by the servant, so that the Court might be in a position to judge for itself whether these enquiries which the servant made could be considered to be reasonable or not. 11 O.W.N. 702=1934 O. 233. Where a mother sold the share of her son in the estate of his father to her sister and it was not disputed that the transferor and the transferee lived in the same house together and that the transferee used to write the accounts in connection with the estate for the transferor, the only reasonable presumption that could be drawn from the

Transfer by person having authority to revoke former transfer.

42. Where a person transfers any immovable property, reserving power to revoke the transfer, and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power.

Illustration.

A lets a house to *B*, and reserves power to revoke the lease if, in the opinion of a specified surveyor, *B* should make use of it detrimental to its value. Afterwards *A*, thinking that such a use has been made, lets the house to *C*. This operates as a revocation of *B's* lease subject to the opinion of the surveryor as to *B's* use of the house having been detrimental to its value.

Transfer by unauthorised person who subsequently acquires interest in property transferred.

43. Where a person [1][*fraudulently or*] erroneously represents that he is authorized to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

LEG. REF.

[1] Inserted by Act XX of 1929, S. 13.

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circumstances is that the transferee purchased the share of the son in his father's estate knowing that his share had not been paid to him. 151 I.C. 314(2). Enquiry ought to be made as to collaterals before taking a transfer from the sister's son of the last full owner. 43 A. 263=19 A.L.J. 11=64 I.C. 14. (*See now* Act II of 1929). As regards non-enquiry regarding coparceners, *see* 86 I.C. 633=21 L.W. 295. Where the vendee is himself a co-sharer in the property and believes himself to be fully aware of the circumstances relating to the title of the vendors, and the vendors have been acting as ostensible owners for years and nothing has happened to put him on any further inquiry as to title. S. 41 is applicable to the circumstances of the case although the vendee does not make any inquiry as to title. 37 P.L.R. 168. As between members of a joint Hindu family the fact that the name of one member rather than that of another or of all the members is used in acquisition of property, does not amount to holding out that member as the ostensible owner, and a person dealing with one member of a Hindu family can hardly say that he was misled unless he proves that he made full inquiries and could not ascertain his title. 1937 P. 353=1937 P.W.N. 144. Dealing with the joint Hindu family property by one of the members as his own does not render the purchaser from such owner an ostensible owner. 1928 M. 635=110 I.C. 548. Alienee from a manager of joint family is not ostensible owner. 35 C.W.N. 693=1931 P.C. 118. Of two innocent transferees the one who renders it possible for the owner to deal with the property a second time, must suffer for his negligence. 53 I.C. 397. As to transferee from Hindu widow, *see* 13 R.D. 280. In the Punjab transfers may be oral and frequently are so. For this reason more importance is attached to the revenue records in the Punjab than in the other provinces, as there the transfers must usually be by means of registered deed. The searching of the registration records therefere in the case of agricultural land is not a practice commonly done. What is looked at is the entry in the revenue records. So where a mortgage does not get his mortgage entered in the revenue records and thus allows the mortgagor to remain ostensible owner, such mortgagee cannot question the alienation made by the mortgagor to others who from the revenue records found the property free from encumbrance. The mortgagee in such a case is estopped by his own negligent conduct is not getting his mortgage entered in the revenue records. 38 P.L.R. 1097=1936 L. 405.

"VOIDABLE".—There is no reason to accept the contention that the expression "voidable" in S. 41 must be construed as voidable in its entirely and that the section is not applicable to cases where the whole transaction is not so voidable. 111 I.C. 539=1928 M. 778.

Sec. 43: CHANGE IN THE PRESENT SECTION AND REASON FOR THE CHANGE.—This is explained as follows in the Statement of Objects and Reasons.—S. 43 refers to a person making an erroneous representation that he is authorized to transfer certain immovable property. The underlying Principle is also applicable to a case when the representation is fraudulent. The expression "erroneously" has, in fact, been construed to include all representations whether tainted or untainted with fraud. 7. A. 864; 20 C. 296. It is, however, desirable to make the meaning clear by using the word "fraudulently" along with the word "erroneously."

PRINCIPLE OF SECTION.—S. 43 is only an embodiment of the principle of estoppel. It is expressed variously, sometimes, as feeding the grant by estoppel, at another time, no person is allowed to derogate from his own grant, and yet again by the principle that equity considers that done which ought to be done. But under the guise of S. 43 the Court cannot uphold a transfer of property forbidden by law. 110 I.C. 357=1928 O. 344; 148 I.C. 721=1934 R. 51;

Illustration.

A, a Hindu, who has separated from his father *B*, sells to *C* three fields, *X*, *Y* and *Z*. representing that *A* is authorized to transfer the same. Of these fields *Z* does not belong to *A*, it having been retained by *B* on the partition ; but, on *B's* dying *A* as heir obtains *Z*. C, not having rescinded the contract of sale, may require *A* to deliver *Z* to him.

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1930 M.W.N. 1054. Sale by the reversioners of a Hindu widow. (*See also* 48 C. 1 (P.C.); 3 L. 636.) No estoppel when there is no represent tation. 56 I.A. 74=33 C.W.N. 289=1929 P.C. 56 (P.C.). *See also* 1930 M.W.N. 1054. Agreement between two persons that each will not question the rights of the other—One party subsequently acquiring the rights of the other in his property—Estoppel. *See* 118 I.C. 466. If there is a sale or pledge to a *bona fide* purchaser or pledgee for value by one who has no title, if that person subsequently obtains a title, it enures to the benefit of the purchaser or pledgee. 45 M.L.J. 516=56 M. 852 (F.B.). S. 43 does not apply to a case where there is no consideration. 31 A. 53; and where there is no erroneous representation on the part of the transferor, that he is authorised to transfer the property at the date of the transfer. 31 A. 53=1 I.C. 818; 68 I.C. 203=27.C.W.N. 918; 27 I.C. 982=19 C.W.N. 1272; 10 L.W. 221=52 I.C. 992; 35 M.L.J. 120; 28 M.L.J. 44. There can be no estoppel in favour of one against the other if both parties knew the true state of facts. 9 Luck. 359=148 I.C. 367=11 O.W.N. 145=1934 O. 112. *See also* 164 I.C. 193=1936 A.L.J. 1230=1936 A.W.R. 691=1936 A. 557; 1935 A. 244. S. 43 of the Act does not apply to a transferee who is not proved to have been misled by erroneous representations of the transferor as to his power to transfer. 59 I.C. 275=12 L. W. 449; 48 A. 150=92 I.C. 471=1926 A. 102. (Relying on 34 M. 159 and 31 A. 53.) 162 I. C. 451=1936 O.W.N. 483=1936 O. 313; I.L. R. (1938) All. 63=1937 A.L.J. 1240=1938 All. 22. S. 43 does not impose on the transferee any duty to make an inquiry into the true extent of the interest, of the transferor in the property transferred. 1936 O.W.N. 1241=1937 O. 127. But *See* 20 O.C. 72=39 I.C. 186, holding that it is not necessary that the transferee should have believed in and acted upon the erroneous representation. A Hindu who lends money on a mortgage by a Hindu widow must be deemed to be aware of the elementary principles of Hindu Law as to the limited interest of a widow inheriting the property of her deceased husband; and such a transferee cannot claim the benefit of S. 43, T.P. Act. 151 I.C. 561=1934 A. 969. An abandonment of a claim to property in a suit is not a transfer contemplated by S. 43: 1936 A.M.L.J. 124. Section is not applicable to void sales. 107 I.C. 872=1928 O. 153; 25 M.L.J. 635; 24 M.L.J. 881. S. 43 presupposes an attempt to transfer property which is transferable by law and does not extend to cases of transfers of property which cannot be transferred under S. 6 (a) of the Act. (30 M. 255; 31 B. 165; 1913 M.W.N. 415, Rel.) 20 O.C. 155=4 O.L J. 380=39 I. C. 540. *See also* 41 M. 749=34 M.L.J. 563. *The Illustration to S. 43 of the T.P. Act is repugnant to S. 6 (a) of the Act and is not good law.* The right of a presumptive reversioner to succeed to the property on the death of the limited owner in pessession is only a *spes successionis* and its transfer is invalid, though in form it purports to be a conveyance of a present interest in the property. The transfer, being expressly forbidden by S. 6 (a) does not become valid by the application of S. 43 of that Act on the vendor subsequently succeeding to the property, 146 I.C. 965=38 L.W. 610=1933 M. 795=65 M.L.J. 588. See also as to *transfer of reversionary interest* 123 I.C. 906=1930 N. 204; 6 O. W.N. 233=1929 O. 185; 1930 M.W.N. 1054. But *See* 29 I. C. 439=29 M.L.J. 733; 1927 M. 649=53 M.L.J. 218. There is a distinction between a transfer which is professedly one of mere right. *e.g.*, a right of reversion or expectancy and a transfer of specific property which the transferor erroneously represents he is authorised to transfer, though he may have, for the time being, merely a reversionary right therein. Transfers of the former class would obviously fall within the purview of S. 6 (a) and would be void *ab initio* while those of the latter class would be governed by S. 43; 130 I. C. 821=1931 N. 51. *See also* 4 A.W.R. 1121. It is not necessary that the option under the section should be exercised immediatly after the right to do so is attained. 20 O.C. 72=39 I.C. 186.

SCOPE.—The section does not apply to execution sales because the judgment-debtor's title is not guaranteed by the decree-holder. 40 C. 173=17 C.W.N. 137; 4 C. 677. *See also* 4 A. W.R. 492; 40 P.L.R. 202=1938 Lah. 360. The section applies when the contract of transfer subsists at the time of the acquisition of title. 10 I.C. 443. The section applies when a person grants a permanent lease professing a higher status than that of a ryot and subsequently acquire, absolute rights. 105 I.C. 290. *See also* 1939 Pat. 116. A sale by O.R. before the passing of the vesting order becomes effective when such order is passed subsequently, both by reason of its retrospective operation and by virtue of S. 43 of this Act. 1927 M.W.N. 794. The benefit of the section will apply against all persons claiming under the transferor other than a purchaser for value without notice. 27 I.C. 982=19 C.W.N. 1272. The acquisition of the property may be by inheritance. The transfer is not void as that of a *spes successionis* 29 I.C. 439=29 M.L.J. 733; 1927 M. 649=53 M.L.J. 218. *See also* 55 I C. 698; 41 M. 749=34 M.L.J. 563. Where in the case of a sale an erroneous representation is made by the transferor that he is the full owner of the estate sold (though in fact he merely has *spes successionis*), then if the transferor happens later to obtain the real interest, the previous transfer can operate on that interest. It is the duty of the courts to reconcile S. 43 with S. 6, if possible, and the operation of S. 6 must be confined to cases in which the transfer purports to be that of *spes successionis*, or where transferee knows that the transferor has no more to give. I.L.R. (1938) Bom. 155=40 Bom. L.R. 147=1938 Bom. 228.

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See also 1939 pat. 116. Where a person who has no title to a certain property mortgages that property as his own, but soon afterwards acquires title to that property by purchase, the property, at the option of the mortgagee, becomes liable to the mortgage. 172 I.C. 707 =41 C.W.N. 1124. *sale of partnership property by one partner—Sale of Same property to different person by the remaning partner—Allotment of that property to one of partners in subsquent arbitration proceedings—His transferee can claim benefit of S.* 43 I.L.R. (1940) A. 674=1940 A.L.J. 592=1940 A. 453. Where a Mahomedan husband makes his wife accept certain property in lieu of dower on the understanding that his father has permitted him to transfer it and hence he is competent to alienate it and the wife is not aware that the property does not belong to her husband, it amounts to a misrepresentation, pursuading the transferee to marry the transferor, and the wife is, under S. 43, entitled to enforce her claim against her husband, when, on the death of his father, he becomes the owner of the property. 162 I.C. 900=1936 Pesh. 103. And if the husband transfers the property to his wife by a deed of relinquishment, the transaction is *bona fide* and for consideration and cannot be challenged as being fraudulent by a creditor of the husband who subsequently attaches the property belonging to the husband; it cannot be attached and sold in execution of a decree obtained against the husband. (*Ibid*) The acquisition of title may be by purchase. 50 I.C. 778. If the property sold is under the Collector's management, the seller must convey the property after the Collector's management ceases. 26 B. 510=16 I.C. 570=14 Bom. L.R. 598. Where a non-transferable occupancy holding was mortgaged by the raiyat and on the death of the latter the landlord settled the lands with another on footing that the widow had abandoned the holding and obtained rent but he also brought the property to sale in execution of his mortgage-decree and purchased the same and the person who was subsequently inducted into the land sued for recovery of possession. *Held*, that the settlement in fovour of the subsequent lessee was valid and could be enforced by reason of the principles contained in S. 43. 58 C.L.J. 145=37 C.W.N. 1144.

LEASES.—The rule in this section also applies to leases. 2 C.L.R. 328 ; 19 C.W.N. 143=23 I.C. 69 ; 53 I.C. 96. Where lands were held from the Government under a temporary settlement, but permanent sub-leases were created, renewal of the Government settlement operated in favour of the lessees. 19 C.L.J. 308=23 I. C. 16=18 C.W.N. 907. *See also* 27 I.C. 785= 28 M.L.J. 44 ; 53 I.C. 96=4 Pat.L.J. 505. But *see* 40 I.C. 581=33 M.L.J. 370.

EXCHANGE.—Stands on the same footing as sale. 60 I.C. 819=33 C.L.J. 184.

MORTGAGES.—This section applies also to mortgages, and a mortgagee can enforce his charge on any interest which his mortgagor may acquire in the mortgaged property subsequent to the mortgage, although he had not such interest at the time of the mortgage. 3 Pat.L.T. 401=1922 P. 347 ; 35 A. 382=9 I.C. 298 ; 4 O.W.N. 1077 ; 122 I.C. 177=1930 A. 115; 4 R. 291=98 I.C. 323=1927 R. 14 (Equitable mortgage by deposit of title-deeds). *See also* 55 I.C. 698 ; 1924 A. 362 ; 58 I.C. 72=5 Pat.L.J. 605 ; 153 I.C. 984=1935 A.L.J. 214= 1935 A. 269. Two groves with some other property of the mortgagor were mortgaged for the purpose of purchasing the very two groves from its owner. *Held*, that the mortgage was enforceable against the groves on the principle of feeding the grant by estoppel, there being no third party's interest intervening between the execution of the security and the execution of sale-deed. 1931 A.L.J. 72=1931 A. 275. On the date of the mortgage in favour of the plaintiff, the defendant was an undischarged insolvent. At the time of the suit by the mortgagee, the insolvent had been discharged and the mortgaged property revested in the defendant. *Held*, that an alienation by an undischarged insolvent of property belonging to him was not void, but only voidable at the option of the Court or the receiver and that the mortgagee was, under the circumstances, entitled to enforce the mortgage by sale of the mortgaged property. 55 A. 503=1933 A.L.J. 475=1933 A. 449. A contract mortgaging a *spes successionis* in the Punjab, where the Act is not in force can be enforced as an agreement to convey the estate when it falls into possession. Where a person mortgages a certain land as his own property without purporting to mortgage his reversionary rights therein, the mortgage is not void *ab initio* and in any event the case is fully covered by the principles underlying S. 43 of the T. P. Act. 35 P.L.R. 732=1934 L. 996. So also where a Hindu coparcener executes a mortgage of certain property reciting in the mortgage deed that he is separate from the other members of the family, and subsequently on a partition the mortgagor gets properties allotted to him, the mortgage lien is transferred to the property which he gets on such partition. 16 P. 230. S. 43 is not applicable to cases of transfers of property which by law was not transferable. Where a father in joint Hindu family in Oudh alienates ancestral property without necessity and there is a subsequent division in the family, but the mortgage clearly indicated that there was a possibility of the transaction being assailed, there is neither a fraudulent or erroneous representation, nor a subsisting contract, inasmuch as the mortgage was void *ab initio* and hence the principles embodied in S. 43, are not applicable to the case. 1940 O.W.N. 982=16 Luck. 484=1941 Oudh. 123. Mortgage of property not transferable under law in force at the time—Subsequent change of law making it transferable—Effect—Enforceability of mortgage. 1937 A.W.R. 174=1937 All. 287. Mortgage by minor—Fraudulent concealment of minority—Suit to enforce mortgage after majority—Plea of minority and consequent invalidity of mortgage—Estoppel. 1937 A.W.R. 661=1937 All. 610 (F.B.). Mortgage by owner of property—Subsequent disappearance — Mortgagor not heard off for over seven years—Presumption of death—Sale by heir of mortgagor=Validity—Suit by vendee for possession—Maintainability—Decree on mortgage can be used as a shield. 1937 M.W.N. 416

CASE OF REVERSIONERS.—Where the paternal

44. Where one of two or more co-owners of immovable property, legally competent in that behalf, transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferors' right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Transfer by one co-owner.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

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uncle of the last male holder and his son as the *presumptive reversioners* to the estate brought a suit to set aside the alienation made by the widow and compromised the dispute with the alienee by which the uncle acting on his own behalf and on behalf of his minor son (the plaintiff) executed a sale-deed in respect of half of the property in favour of the alienee and subsequently after the death of the widow and the opening of his succession, the plaintiff brought, a suit to set aside the alienation. *Held*, (1) that the plaintiff cannot under S. 43 be allowed to set up his title; (2) that he was bound by the act of affirmation of his father in having compromised the dispute with the alienee and having purported to sell one half of the property to him. 1933 M. 856=65 M.L.J. 772. Where the reversioners join in an alienation by the limited owner, they are not estopped from questioning the necessity for the alienation on the death of the limited owner. The doctrine of title feeding the estoppel is inapplicable. 46 C. 566=28 C.W.N. 521; 48 C. 530=25 C.W.N. 496; 41 M. 749=34 M.L.J. 563. *See also* other cases cited earlier on this point.

EXERCISE OF THE OPTION.—Non-repudiation of a transfer when the misrepresentation of the transaction came to be known is an exercise of an option. 33 I.C. 975. Option need not be exercised immediately after the right to do so is attained. 39 I.C. 186=20 O.C. 72. As to the meaning of the words "during which the contract of transfer subsists." *See* 18 M. 492.

Sec. 44: SCOPE OF SECTION.—Section does not override the provisions of Hindu Law. 37 I.C. 168=31 M.L.J. 275; 13 M. 275. Section applies to all kinds of transferees, including mortgagees and lessees. 3 A.L.J. 474; 27 M. 361 at 367.

PARTITION.—The section provides for partition as a means of making the possessory right available. 25 I.C. 401. A transferee of the share of a joint owner in a particular property, may sue for partition of that property alone. 33 I.C. 17=23 C.L.J. 231. A stranger purchaser cannot have joint possession of family dwelling-house. 20 C.W.N. 675. When one co-owner transfers his right or interest in joint property, the other co-owners cannot impose on the share transferred any conditions or liabilities not affecting it (*i.e.*,) not existing at the date of transfer. 1925 N. 68=80 I.C. 920 at p. 923. As a general principle of law it cannot be laid down that a mortgagee of an undivided share of property from a tenant-in-common is not entitled to sue for partition. He is entitled to claim partition provided that it is necessary to give effect to the transfer. Where the mortgage is not a usufructuary mortgage and the mortgagee is not entitled to possession of the mortgaged property, he would not be entitled to partition. The fact that the mortgage-deed confers on the mortgagee a right to sue for partition would not entitle him to sue for partition if in law he is not entitled to. 51 L.W. 511=1940 Mad. 491.

REPAIR BY CO-OWNER.—All co-sharers are equally liable for necessary repairs; and when on the failure of other sharers in their duty, one of them does it negligently, he is not exclusively liable for it. 80 I.C. 920=1925 N. 68.

MONTHLY TENANCY. and such *temporary* rights not incapable of partition. 1929 C. 710; [24 C. 575, (F.B.) Foll.] *See also* 27 M. 361; 34 C. 1026.

Sec. 44, Para. 2: UNDIVIDED FAMILY—ESSENTIALS.—To constitute an undivided family for the purpose of S. 44, it is unnecessary that the members of the family should have constantly resided in the dwelling-house nor is it necessary that they should be joint in mess. (1929 C. 231, Ref.) 1935 M. 628. Principle of the para. enunciated in 5 B. 499 (504), procedure in such cases indicated. 35 I.C. 294=20 C.W.N. 675. S. 44 does not speak of a family dwelling-house nor does it say that the dwelling-house must be occupied either permanently or even occasionally by the undivided family. The only two requisites laid down in the section are (1) that the house must be a dwelling-house and (2) that it must belong to an undivided family. It does not matter if the house is occupied by tenants. Hence S. 44, would apply to the case of the purchaser of a share of one out of a number of dwelling-houses owned by an undivided family, which they have rented out. Where an undivided family owned dwelling-houses, which they rented out and the purchaser of a share in it claimed mesne profits from the date of purchase to the date of possession. *Held*, that the proviso to S. 44 applied, even though the members of the family did not reside therein, and that the purchaser was not entitled to mesne profits. (18 C. 10 and 1922 M. 150, Dist.) 1935 M. 628. *See also* 1929 C. 231 (where there was only occasional residence by members of the joint family, who were not joint in mess); 1940 Rang. 53. The words "*undivided family*" in para. 2 applies also to Mahomedan undivided family. 37 A. 324 (327)=5 A.L.J. 353 (F.B.), Foll. in 12 C.L.J. 525 (534); 97 I.C. 416. Even if it be assumed that the principle of S. 44 may be applied to a transfer which has been effected by reason of proceedings in execution of a decree for the purpose of pre-

Joint transfer for consideration.

45. Where immovable property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund ; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interest in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were repsectively entitled , or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

Transfer for consideration by persons having distinct interests.

46. Where immovable property is transferred for consideration by persons having distinct interests therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally, where their interests in the property were of equal value, and, where such interests were of equal value, proportionately to the value of their respective interests.

Illustrations.

(*a*) *A*, owning a moiety, and *B* and *C* each a quarter share of mauza Sultanpur, exchange an eighth share of that mausa for a quarter share of mauza Lalpura. There being no agreement to the contrary, *A* is entitled to an eighth share in Lalpura' and *B* and *C* each to a sixteenth share in that mauza.

(*b*) *A*, being entitled to a life-interest in mauza Atrali, and *B* and *C* to the reversion, sell the mauza for Rs. 1,000 . *A's* life-interest is ascertained to be worth Rs. 600, the reversion Rs. 400 *A* is entitled to receive Rs. 600 out of the purchase money, *B* and *C* to receive Rs. 400.

Transfer by co-owners of share in common property.

47. Where several co-owners of immovable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and, where they were unequal proportionately to the extent of such shares.

Illustration.

A, the owner of an eight-anna share, and *B* and *C*, each the owner of a four-anna share, in mauza Sultanpur, transfer a two anna share in the mauza to *D*, without specifying from which of their several shares the transfer is made. To give effect to the transfer, one anna share is taken from the share of *A*, and half an anna share from each of the shares of *B* and *C*.

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venting a stranger to the family from obtaining joint possession of a family dwelling-house, the proper stage for the members of the joint family to apply for an order of this nature would be at the time when a suit is instituted by the purchaser to recover possession of the property. If they allow an *ex parte* decree to be passed against them in that suit, they will be estopped from asking subsequently for an injunction restraining the purchaser from executing that decree. 46 C.W.N. 407.

Sec. 45: SCOPE.—Section applies to transfers, for consideration; and is not applicable to gifts: *see* 34 M. 80. There is nothing in S. 45 to suggest that it ought to be limited to voluntary transfers. S. 45 applies to involuntary transfers also. 1941 C. 416=200. In absence of specification of the shares purchased by two persons in the sale-deed it must be held that both purchased in equal shares. 1929 A. 817; 87 I.C. 17=1925 O. 369: 107 I.C. 149; 29 A. 354 (364); 26 C. 281. Where mortgage-money is advanced by two persons and their interests specified, their interests in the mortgaged property will be proportionate to their interests 96 I.C. 134=1926 A. 676. The provisions of S. 45 are not of any assistance in a case where the rights of the parties are determined by the contract of partnership and subsequent agreements as to the payments to be made in regard to the purchase. 1942 O.W.N. 269=1942 O.A. 205. Where a lease is executed in favour of three persons, in the absence of evidence to the contrary, the share of each must be presumed to be equal. It is for the person who claims a higher share to show by definite evidence that his share is higher. 1942 R.D. 562. The Court cannot take account of the second para. of S. 45 until there is an absence of evidence. Where evidence is available but is not produced, the presumption under S. 45, para. 2 cannot be made. 87 I.C. 17=1925 O. 369. *See also* 4 C.W.N. 465.

Sec. 46.—Hindu co-widows have no distinct interest, but only a joint interest in their husband's property. 7 A. 114; 1 M. 290 (P.C.). *See also* 11 M.I.A. 487.

Sec. 47.—As to the application of this section, *see* 18 M. 492; 14 M. 459. (Cases of en-

Priority of rights created by transfer.

48. Where a person purports to create by transfer at different times rights in or over the same immovable property, and such rights cannot all exist or be exercised to their full extent together, each later-created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

Transferee's right under policy.

49. Where immovable property is transferred for consideration, and such property or any part thereof is, at the date o thef transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property.

Rent *bona fide* paid to holder under defective title.

50. No person shall be chargeable with any rents or profits of any immovable property which he has, in good faith, paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

Illustration.

A lets a field to *B* at a rent of Rs. 50 and then transfers the field to *C*. *B*, having no, notice of the transfer, in good faith pays the rent to *A*. *B* is not chargeable with the rent so paid.

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largement of the transferor's share after the date of transfer.)

Sec. 48.—This section is based on the principle that he who is prior in time has the better title in law (*i.e.*) one who has the advantage of time on his side should also have the advantage in law. *See* 7 A. 568: 29 B. 42; *ibid.* 46; 8 A. 409. S. 48 of the T. P. Act must be read subject to S. 48 of the Registration Act and so a subsequent registered mortgage is entitled to priority over an earlier oral charge, not accompanied by delivery of possession, of which the mortgagee had no notice. 36 Bom.L.R. 277=1934 B. 189. "*Transfer*" in this section means a complete transfer, and does not include a mere contract for sale or an incomplete sale by an unregistered sale-deed where registration is compulsory. 4 B. 126 (F.B.); 8 A. 540. *See also* 10 C. 250. On the principle of this section when there are conflicting rights they must be treated as relating to different entities. 49 I.C. 39=21 O.C. 317. *See also* 9 M. 495; 6 B. 193. As between two substituted security rights no question of priority can arise; S. 48 applies only to successive mortgages of the same property. The rights in the substituted security of two rival claimants should be proportionate to the value of the original security as it stood on the date when the property mortgaged ceased to belong to the mortgagor. 48 L.W. 119=1938 Mad. 547. Priority is determined by the dates of the deeds and not by the dates of registration. 6 Bom. L.R. 687 =29 B. 42; 8 B. 182; 29 B. 46 (51). Where two deeds in respect of the same property are executed on the same day, it is a question of fact to be specially proved as to which deed was in fact first executed; and what deed will have priority. 11 C.W.N. 732=6 C.L.J. 74. The auction-purchaser of mortgaged property *is* bound by mortgage whether he had notice or not. But a purchaser from such person is not affected by the mortgage, if he had no notice. 16 I.C. 625=10 A.L.J. 114. *See also* on the section. 14 I.C. 585; 79 I.C. 249=1923 R. 41 (1). The vendee of immovable property cannot oust from the possession of the property a tenant for cultivation admitted into the property by the mortgagee with possession. 82 I. C. 203=1925 L. 165. Where a Receiver of property is authorised by the Court to mortgage the property and raise a loan for paying Government revenue and the Court ordered the mortgage to have priority over a pre-existing mortgage and the money is utilised for the payment of revenue and to save the property from sale, the mortgage so sanctioned by the Court has priority over the pre-existing mortgage. 1926 P. 94. In respect of payments made to avert a sale for arreas of revenue, even though it may be subsequent to the final decree on his mortgage, the decree-holder is entitled to a first charge on the sale proceeds in the mortgage suit in priority to the subsequent mortgagee. 35 C.W.N. 1040=1931 P.C. 226 =61 M.L.J. 343=59 C. (463 P.C.)

Sec. 49.—A mortgagee as such has no right against the insurance company which insured the machinery of a mill against fire. 1923 R. 6=11 L.B.R. 234=67 I.C. 777.

Sec. 50.—The language of the section is general, and applies not only to the case of assignment by the lessor of his interest during the tenancy, but also to a case of succession. 33 B. 96 (104); and the person paying the rent to the ostensible or *do facto* owner is protected under this section (*Ibid*). The section is intended only to protect a *bona fide* tenant and not the lessor. 27 C. 87. *Bona fides* is necessary before the section can apply. 101 I.C. 647=1927 N. 237. *See also* 27 C. 87 (F.B.); 7 C.W.N. 454; 19 I.C. 865. In order to get the benefit of the protection of S. 50 the tenant must

51. When the transferee of immovable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market value thereof, irrespective of the value of such improvement.

Improvements made by *bona fide* holders under defective title.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

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pay rent as rent due, and must not pay rent in advance which otherwise becomes a mere loan to the mottgagor. 94 I.C. 538=29 C.W. N. 953=1926 C. 204. *See also* 33 Bom. L.R. 1123; 3 P.L.T. 128=1922 P. 339: 1928 S. 95; 33 B. 96=10 Bom. L.R. 1190: 107 I.C. 209: 63 I.C. 517: 94 I.C. 538=1926 C. 204; 1926 B. 587=28 Bom. L.R. 1162. Such a payment cannot be pleaded by a tenant in a suit for compensation by the assignee of the property. 9 R. 470=1931 R. 292. But where the mortgagor of certain mortgaged premises let them to a tenant and received rent in advance as a condition precedent to letting, a receiver subsequently appointed in the mortgage suit cannot compel the lessee to pay rent over again. 7 L.B.R. 268=24 I.C. 693. *See also* 1927 C. 270. Where one of the two joint lessees knows the real owner of property but the other *bona fide* pays rent to another not the real owner. S. 50 cannot apply because the knowledge of one of them would be deemed to be the knowledge of the other also. 1942 O.A. 442. Where a person who under the law is liable to pay rent to a particular person whose title he has recognised, makes payments without proper inquiry, to a wrong person merely on the ground that the latter sends him a notice stating that he has purchased those lands it cannot be said that the payment is made in good faith within the meaning of S. 50. 1939 Pat. 540. *Trnant paying rent to landlord after notice of sale by landlord—Payment relating to period when suit was pending for cancellation of sale-deed—Tenant is protected.* 67 C.L.J. 527=42 C.W.N. 378.

Sec. 51: SCOPE AND APPLICABILITY.—A person who has been evicted can claim compensation under S. 51, provided he is (1) a transferee, (2) he has made the improvement, (3) he has made such improvement believing in good faith that he was absolutely entitled, and (4) he was evicted. The section does not provide for these various capacities or qualifications being filled or fulfilled by different persons. It is intended to provide for a right to compensation to an individual who fulfils all the conditions laid down. 60 C. 1388=1934 C. 290. *See also* 1940 Rang. 172. There is no general equitable principle entitling the person dispossessed to compensation apart from what has been laid down in S. 51. Hence a purchaser of a property at a Court-sale who has been dispossessed cannot claim compensattion for improvements effected by the vendor. The evictee himself must be the improver. 60 C. 1388. The principles underlying S. 51 have been extended in suitable cases on equitable grounds. Where the defendants being relations of the plaintiff were allowed to occupy a house or room many years ago, and where during the interval they had spent considerable sums of money on improving the building, it is suitable case in which the principles of S. 51 should be extended on equitable grounds. 1938 A.L.J. 572=1938 All. 342. The relief given by the section is not any species of property and such a right is neither heritable nor transferable. 60 C. 1388. Although S. 51 may not in terms apply to a particular case, the rule of equity embodied therein will be applied by Courts in proper cases. 27 A.L.J. 105=1929 A. 12. *See also* 51 A. 454. The principle of S. 51 is an exception to the maxim *quicquid plantatur solo solo cedit* and unless the equitable grounds mentioned in this section are made out the moment the improvements are made, they belong to the owner of the land by operation of law. 1928 R. 141. Section applies to both Hindus and Mahomedans. 30 M. 197 (199). The section is not applicable to a purchaser at a Court-sale. 36 M. 194=21 M.L.J. 969. *See also* 12 I.C. 444; 1926 N. 160; 53 A. 334=1931 A. 277 (F. B.). *See contra* 89 I.C. 18. S. 51 has no application to a case where improvements have been made by a trespasser who is not a transferee. 18 Lah 350=39 P.L.R. 1016; 1937 M. W.N. 533: 1937 Cal. 129. There can be no equities in favour of a trespasser or of a person who is fraudulently in possession. Such a person cannot claim to set off the amount claimed as compensation as against the mesne profits due by him. I.L.R. (1937) 1 Cal. 203=64 C. L.J. 280=1937 Cal. 129. S. 51 does not apply to every person who is in possession of property. It does not apply to a trespasser; it does not apply to a person who claims under a will because S. 5 of the Act relates to conveyances between living persons. I.L.R. (1940) Kar. 241=1940 Sind. 77. *See also* 1937 M.W.N. 533. The section applies only to defective and not to defeasible transfers. 107 I.C. 36 (37). So the transferee who has taken a sale from the father and manager of a joint Hindu family which has not been avoided by the son must be held to have believed himself in good faith to be the owner and *bona fide* improvements made by him would be protected. 25 A.L.J. 926=107 I.C. 39

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=1928 A. 41. *See also* 118 I.C. 235. Though the case of a lessee holding under a lease for over 99 years may be outside the contemplation of S. 51, the principle contained therein may be applied to lessees who are sought to be ejected. 1935 C. 62. Under S. 51 it is the person who has a better title within the meaning of the section, who has a right to decide whether to pay for improvements made by the transferee or to sell his own interest to the transferee ; and the transferee cannot compel the person having a better title to sell his interest to him. 1932 A.L.J. 54. 1942 A. 210Although the T.P. Act has not been introduced in Marwar, yet the Courts in Marwar can very well take into consideration the general principles embodied in this Act without being bound by its technical provisions. Where, therefore, the value of the property which the plaintiff seeks to obtain in assertion of a right of pre-emption has been enhanced by the vendee spending money over it in a reasonable and *bona fide* manner and the plaintiff himself has in a way acquiesced in the construction, the vendee should be allowed compensation for such improvements. 1939 Mar.L.R. 1 (Civ.) 'Transferee' within the meaning of S. 51 includes the transferee in a conveyance in the wider sense of the term within the meaning of the definition of S. 5 of the Act, and though a title derived from a will cannot be said to be a 'transfer' within the meaning of S. 5, a transfer of immovable property by oral sale can. The fact that to make such a transfer valid the property of a certain value must be conveyed by a registered instrument in writing does not affect the fact that it is a transfer within the definition of S. 5, a conveyance of property between living persons, so that a person to whom immovable property of the value of Rs. 100 or upwards has been transferred or purported to have been transferred by an oral sale is a transferee within the meaning of S. 51 of the Act and is entitled to the benefit of S. 51 provided he believed in good faith that he was absolutely entitled to the property in question. I.L.R. (1940) Kar. 241=1940 Sind. 77. *See also* 1938 O.W.N. 281.

WHAT ARE NOT IMPROVEMENTS.—Spending small sums every year in the manuring and levelling of land in the course of prudent cultivation, is not improvement for which tenant would be entitled to compensation. 24 I.C. 879 =1 L.W. 371. So also moneys spent in ordinary repairs of houses and buildings are not improvements. 24 I.C. 918 ; 31 Bom.L.R. 461=1929 B. 230. *See also* Ben. Ten. Act, S. 76. A lessee spending money in connection with his lease is entitled to be reimbursed when a suit is instituted to avoid the lease. 1927 M. 1023= 106 I.C. 131. *See also* 1938 P.W.N. 386 ; 1938 M.W.N. 1236 ; 1936 O.W.N. 385=1937 Oudh 75.

RIGHT TO IMPROVEMENTS is largely a question of fact. 111 I.C. 22=1928 M. 349. S. 51 does not entitle a person who has made improvements on another's land in good faith to retain the improvements or accessions or to remove the building materials. Such constructions are deemed to vest in the owner of the land, but he is given a right to claim their value. 53 A. 334 =1931 A. 277 (F.B.) Compensation for improvements—Decree for possession of certain property in favour of plaintiff—Defendant not keeping any accounts of income derived from it —No proof of present value of improvements made by him—Right to compensation for improvements on eviction by plaintiff. 39 P.L. R. 729=1937 Lah. 500.

GOOD FAITH means only honest belief and may be even negligent belief. 1 L.W. 369. *See also* 36 M. 194 ; 32 M. 530=4 I.C. 18=19 M.L.J. 284 ; 26 A.L.J. 887=1928 A. 381. It is true that absence of proper inquiry condemns bargain as one not made in good faith. But any and every negligence does not show want of good faith. Good faith within S. 51 is not necessarily precluded by facts showing negligence in investigating the title. (1930 P.C. 297, Rel. on.) 1935 C. 625. Improvement made by a person who does not *bona fide* believe that that he is entitled to make it does not entitle him to receive compensation. 33 A. 752 ; 23 I.C. 520; 1 L.W. 410 ; 1932 A.L.J. 54 ; 34 Bom.L.R. 164; 33 C. 1119 ; 1930 P. 20. So also improvements made by a transferee from the executor of a will, the transfer in whose favour is vitiated by want of good faith will not entitle him to claim compensation from the legatee to whom the said property was bequeathed. 134 I.C. 259=1938 N. 69. The definition of 'good faith' in the General Clauses Act as 'honestly' does not apply to the Act passed before 1897. *See* 25 A.L.J. 926=107 I.C. 36 (37). *Bona fides* is not incompatible with ignorance of law or even with a certain degree of negligence. 23 L.W. 496= 1926 M. 609 ; 32 M. 530 ; 51 B. 1140=1927 B. 611 ; 24 I.C. 940; 95 I.C. 789=1926 M. 921; 96 I.C. 483=51 M.L.J. 313. *See also* 26 A.L.J. 887=1928 A. 381. The question whether or not a transferee believed in good faith that he was absolutely entitled to the property cannot be subject of any hard and fast rule but should be decided on the merits according to the circumstances of each case. 1938 O.W.N. 281. *See also* 1940 Sind 77. A mortgagee from the certificated guardian of a minor without the permission of the District Judge is not entitled to compensation for improvements made by him on the mortgage being set aside, because he could not have believed in good faith that he was absolutely entitled thereto. 52 A. 831=1931 A. 201. "*Believing in good faith he is absolutely entitled*"—Meaning. 53 A. 334=1931 A.L.J. 273=1931 A. 277 (F.B.). *See also* 126 I.C. 279=1930 M. 298.

ILLUSTRATIVE CASES.—A person, who buys, from a person who could convey good title only under certain circumstances, in the absence of such circumstances, is not a *bona fide* purchaser for value and is not entitled to the value of the improvements under S. 51. 21 L.W. 115 =86 I.C. 195=1925 M. 670. Where the grantee of land under an order of the Tahsildar paid the assessment in respect of the land and spent money in putting the land to good use without knowing that there was an appeal decreed against him, *held*, that the grantee effected his improvements *bona fide* within S. 51 and was therefore entitled to the value thereof. 48 M.L.J. 682=1925 M. 963. Two persons exchanged lands and on application for mutation

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owing to the absence of one of the parties, mutation was refused to be effected in his name. Such person believed in good faith to be the owner of the land and erected a building thereon. When mutation was refused, the opposite party who had given the land in exchange executed a sale-deed in favour of the person who had built on it. Thereupon a collateral of the vendor applied for pre-emption. *Held*, that he was entitled to do so only on the payment of the full sale value of the land and costs of the building erected thereon and that S. 51 applied to the case. 1933 L. 540=146 I.C. 36. If a man enters upon land as a stranger purchaser in execution sale and effects improvements thereon, he is entitled to compensation therefor upon a reversal of the sale irrespective of any question of *bona fides*. In any event even if good faith is required, an honest belief by him in the validity of his title is enough. 89 I C. 18=1926 N. 164.

KNOWLEDGE —The real owner may claim land with the benefit of all improvements when they were made by a stranger with full knowledge of the title of the claimant. 35 B. 182 ; 45 I.C. 242 ; 59 I.C. 813 ; 42 I.C. 428 ; 33 A. 752. The section does not apply to *improvements by a trespasser* in law though made in good faith. 40 I.C. 464 ; 95 I.C. 789=1926 M. 921; 18 L. 350; I.L.R. (1937) 1 C. 203=64 C.L.J. 280=1937 C. 129. Purchasers of property who have knowledge of prior contract of sale of the property cannot claim compensation for improvements. 41 C. 852=19 C.W.N. 89. For improvements made on land before a *dharkast* was granted compensation cannot be claimed when it was revoked. 28 I.C. 51=1915 M.W.N. 148. If the improvements were made after grant of *dharkast*, compensation may be recovered. 1925 M. 963 =48 M.L.J. 682.

ESTOPPEL.—A real owner, who knowing that money is *bona fide* spent on improvements by persons who honestly believed they had good title, nevertheless stood by and allowed the improvements to proceed, would not be allowed to eject such persons or occupants without indemnifying them for their improvements. 29 C. 871 ; 18 B. 66. (*See also* Evidence Act, S. 115.) 20 M. 124 ; 29 B. 580 ; 33 C. 1119 (1129) ; 91 I.C. 1=1926 M. 314. As to the effect of delay in asserting title when the vendee was spending considerable sums of money, *see* 54 P.L R. 1915 =28 I.C. 350. *See also* 56 I.C. 174 (Lah.).

INVALID TRANSFER.—A lessee holding under an inalid lease cannot claim compensation of improvements before eviction under S. 51 or under S. 2 of the Mesne Profits Improvements Act 10 L.W. 137=52 IC.. 517. But *see* 40 M. 1134 and 161 I.C. 834=1936 O.W.N. 385= 1937 Oudh 75. The word "*transferee*" in S. 51 includes a transferee under an invalid transfer and the words "*the person causing the eviction*" include a transferor under an invalid transfer. 40 M. 1134=43 M.L.J. 252=43 I.C. 138. *See also* 51 B. 1040=109 I.C. 722=1927 B. 611 ; 26 A.L.J. 887. It includes a perpetual lessee, under an invalid lease. 161 I.C. 834=1936 O.W.N. 315=1937 Oudh 75. Persons in possession of trust property under void trust deed cannot retain possession of the property on the ground that they spent money on the property with the consent of the executant of the deed. 12 O.C. 236=3 I.C. 549.

PURCHASER FROM HINDU WIDOW.—The principle of S. 51 applies to a purchase from a Hindu widow where the purchaser in good faith believing himself to have acquired a good title to the property effects improvements on it. 48 I.C. 859 (M.) *See also* 31 Bom.L.R. 453=1929 B. 246 ; 96 I.C. 483=1926 M. 609=51 M.L.J. 313. An alienee from a Hindu widow has to make enquiries as to whether there was any necessity for the alienation and in the absence of same cannot be taken to have believed in good faith that he was absolutely entitled to the property in order to claim compensations for improvements under S. 51. 44 A 665=20 A.L.J 524 =1922 A. 194. *See also* 39 A. 463 ; 36 A. 387 ; 47 A. 430 ; 25 A.L.J. 926 ; 86 I.C. 195=1925 M. 670 ; 95 I.C. 265=1926 A. 384 ; 10 Mys.L. J. 65. Where a Hindu widow grants a permanent lease and the lessee makes improvements on the land although believing that she has a right to grant a permanent lease, he is not entitled to be compensated for the improvements when he is evicted by the reversioners on the widow's death. 47 A. 430=1925 A. 261. A partition between two co-widows operated only during their lives and on the death of one, the whole property passes to the other. Where one of the widows sold her share in her husband's house and on her death her co-widow brought a suit for possession, the purchaser was not entitled to the money expended by him for improvements. 32 A. 463=40 I.C. 71.

IMPROVEMENTS BY MORTGAGEE.—A mortgagee in possession of the mortgaged property under a usufructuary mortgage effected improvement in the property knowing full well that he was the mortgagee and not the owner. *Held*, the mortgagee was not entitled to compensation for the improvements in a suit for redemption by the mortgagor. 1937 N. 54. A *mortgagee* who believes he is the absolute owner of the property is entitled to compensation for improvements. 33 M.L.J. 316=42 I.C.438; 37A. 81; but not when the value of the improvements far exceeds the mortgage amount. 52 B. 307= 30 Bom.L.R. 427. Under S. 51 a mortgagor is entitled to exercise the option whether he will pay the value of the estimated improvement on the one hand or on the other hand "sell his interest to the transferee at the then market value irrespective of the value of the improvement." 28 Bom.L.R. 993=97 I.C. 700.

IMPROVEMENTS BY TENANTS.—*See also* 1937 O. 75; 1938 M.W.N. 1236; 1938 P.435. A permanent lessee is not entitled to claim the benefit of S. 51. So long as a transfer is subject to payment of rent or to any other condition, the transferee cannot believe that he is "absolutely entitled" to the property. 13 Luck. 450= 1937 O. 446. Tenants are not entitled to compensation for permanent structures erected without the permission of the landlord. 43 I.C. 643=35 M.L.J. 281; 41 I.C. 788=33 M.L.J. 84; 28 I.C. 840; 48 I.C. 354. *See also* 38 M. 710=25 M.L.J. 625. He can remove them before he quits the premises and has no right to demand compensation from the landlord for buildings though erected with his consent. 38

52. During the [1][pendency] in any Court having authority in British India, or established beyond the limits of British India by the [2][Central Government or the Crown Representative] of [3][any] suit or proceeding [4][which is not collusive and] in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Transfer of property pending suit relating thereto.

LEG. REF.

[1] Substituted for the words "active prosecution" by Act XX of 1929' S. 14.

[2] Substituted for 'Governor-General in Council' by A. O., 1937.

[3] Substituted for the words "a contentious" by Act XX of 1929, S. 14.

[4] Inserted by Act XX of 1929, S. 14.

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710=25 M.L.J. 625; 78 I.C. 191=1925 A. 190. *See also* 37 M. 1=7 I.C. 202; 48 I.C. I.C. 354; 51 I.C. 380.

IMPROVEMENTS "PENDENTE LITE".—There is no right to compensation for improvements made "*pendente lite*" with full knowledge of the risks in doing so. 25 M.L.J. 324=21 I.C. 219. But *see* 70 P.L.R. 1916=34 I.C. 957.

IMPROVEMENTS BY VENDEE.—A vendee making improvements on excess area not covered by the deed, is entitled to compensation on ejectment. 91 I.C. 1=1926 M. 314. Where the right to recover value of the improvements is decreed to the judgment-debtor, he is not entitled to remove the materials. 1928 R. 141, following 97 I.C. 700=1926 B. 599.

OPTION TO SELL or pay compensation for improvements rests with the person entitled to evict. 40 M. 1134=33 M.L.J. 252; 1926 B. 599=97 I.C. 700; 38 M. 710.

MEASURE OF COMPENSATION.—*See* 40 C. 555=25 M.L.J. 176=18 I.C. 946 (P.C.). In awarding compensation Court has to consider how far the property has improved in market value and not merely the amount expended. 31 Bom.L.R. 453=1929 B. 246; 19 M. 385; 20 M. 129; 40 M. 1134; 97 I.C. 700; 51 M.L.J. 313. As to valuing trees planted by tenant, *see* 18 M. 407. Valuation once made can be altered in proper cases, and, if necessary, according to the market value of the improvements on the actual date of eviction. 20 M. 129; 10 M. 367.

GROWING CROPS.—As to who would be entitled to growing crops on the land, *see* 8 A. 502.

Sec. 52: AMENDMENT OF SECTION AND REASON FOR IT.—In view of the difficulties created by the use of the words "active prosecution" and "contentious," it is proposed to substitute the word "pendency" for the words "active prosecution," and to omit the word "contentious," and to add an explanation to make it clear when the pendency of a suit or proceeding shall be deemed to commence and when it shall be deemed to end. We also propose to insert in the section the words "which is not collusive", for a collusive suit is no real suit at all, but merely a pretence. 6 B. 703; 11 B. 708; 49 C. 220; 14 C.W.N. 322. Further, to attract the doctrine of *lis pendens*, the suit must be pending in a Court of competent jurisdiction, and this has been made clear in the explanation. We have not thought it proper to include in the explanation cases where an order is passed against an intervenor in execution proceedings, as the proper remedy in such cases is a suit under O. 21, R. 63 of the Code of Civil Procedure, 1908. We have also excluded cases of review. It has been suggested that to avoid the difficulties that may arise by the application of the doctrine of *lis pendens*, the system of registration of suits prevailing in England should be adopted in this country at least in the Presidency-towns. This is really a question of administration and is beyond the scope of our reference."—*Statement of Objects and Reasons.*)

The *Select Committee* said:—"In the *Explanation* which prescribed the period during which *lis pendens* is to operate, we have provided for the case of the discharge of a decree by the relinquishment by a decree-holder of his decretal rights."—(*Report of the Select Committee.*)

The amended section has no retrospective effect in its operation. 1931 N. 138.

PRINCIPLE OF SECTION.—1926 C. 204 (211)=29 C.W.N. 953; 84 I.C. 490=40 C.L.J. 383. The doctrine of *lis pendens* rests upon this foundation, that it would plainly be impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were permitted. The correct mode of stating the doctrine is that *pendente lite* neither party to the litigation can alienate the property in dispute so as to affect his opponent. 40 C.L.J. 393=84 I.C. 490; 44 I.C. 726. The right treated by S. 52 is a statutory right, and the mere fact that one has made certain admission against his own interest, would not deprive him of the right which the statute gives him. 44 C.W.N. 783.

NATURE AND SCOPE OF THE DOCTRINE OF LIS PENDENS.—'*Lis pendens*' applies only to alienations inconsistent with the right which may be established by the decree in the suit. 40 M. 955=32 M.L.J. 374; 49 M.L.J. 68=1926 M. 50. *See also* 10 L.B.R. 43=52 I.C. 624; 8 O.W.N. 179=1931 O. 157. S. 52 only applies to rights of the other "party" involved in and arising out of the property which is the subject-matter of the suit. 64 C.L.J. 406=1938 C. 1. Where there was not a transfer but a dealing with property, and the object was prohibited by S. 52. *Held*, that the transaction could be avoided. 11 O.W.N. 390. A defendant will not be at liberty to erect buildings on a piece of land which forms the subject-matter of the litigation and thus compel the plaintiff to file another suit for the removal of the obstructions

[1] [*Explanation.*—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.]

LEG. REF.

[1] Explanation added by Act XX of 1929, S. 14.

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which came into existence after the suit had been filed. To such a case S. 52 applies. 1934 L. 978. *Lis pendens* applies even if the pending suit ends in a consent decree on compromise, but the compromise must be honest and not collusive. 151 I.C. 70=1934 P. 270. S. 52 does not debar a transferee from one party to a suit during the pendency of the suit from impeaching the decree on the ground of fraud subsequent to the transfer. 22 O.C. 171=53 I.C. 572. For the doctrine of *lis pendens* to apply under S. 52, it is immaterial whether the subsequent purchaser against whom the doctrine is pleaded was a party to the pending suit or not. 8 B.R. 819. S. 52, though it is in general terms, limits its own operation. In order that the doctrine of *lis pendens* may operate, the suit must be a suit in which the rights to immovable property are in issue, the "order" must be an order relating to rights in such property, and the transaction which will give place, or be made subject, to the order of the Court must be one which derogates from the other party's rights to the property in suit. Any "order" which may be made therein is subject to this limitation, that is, the order of the Court must relate to rights which the parties claim or which they might have claimed in the property involved in the suit. The Court cannot create in a party proprietary rights on grounds distinct from the property itself. The doctrine does not extend to the case of any order whatsoever. It can only apply to orders appropriate to the suit having regard to the nature of the property involved and the nature of the proceedings. 64 C.L.J. 406=1938 Cal. 1. The words "any other party thereto" in S. 52, cannot be construed as meaning only any opposite party or any party who has opposing interest. The words are unconditional. 19 Pat.L.T. 35=1938 Pat. 487.

"PENDENCY."—This word is substituted for the words "active prosecution" occurring in the old section; and consequently the question discussed in the several rulings as to when a suit or proceeding begins to be actively prosecuted, and when it ends [*see* for instance. 42 A. 319=18 A.L.J 303; 4 Bur.L.T. 140=12 I.C. 849; 14 C.W.N. 322=5 I.C. 691; 40 I.C. 826 (M.); 57 I.C. 952 (N.)] does not arise under the present section. In the case of a mortgage suit, the *lis* continues after the decree *nisi* and the doctrine of *lis pendens* is applicable to proceedings to realise the mortgage after the decree for sale. The explanation added by the amendment Act XX of 1929 does not alter the law but only emphasises that the correct view of it is that taken by the Calcutta High Court in 2 C.L.J. 288; 10 P. 234=1931 P. 64. *See also* 130 I.C. 666=1931 M. 120: 7 O.W.N. 676=1930 Oudh 362; 1932 A.L.J. 54. But if the decree holder took no active steps to execute his decree for specific performance of an agreement to execute a mortgage for nearly two years, the doctrine cannot be brought into operation. 34 Bom.L.R. 117. As to the meaning of the word "contentious" in the old section, *see* 1930 A.L.J. 1286=1931 A. 45; 1930 M.W.N. 572; I.L.R. (1937) Nag. 452=1937 Nag. 400. Suit does not cease to be contentious, simply because it ends in compromise or *ex parte* decree. 122 I.C. 887=1930 A. 354. A *foreclosure suit* is a contentious one where the mortgaged property was directly and specifically in question and a ususfructuary mortgage executed by the mortgagee in favour of a third person pending the passing of the final decree with the permission of the Court comes within the old section. 55 A. 225=1933 A. 201.

PENDENCY OF SUIT IN WRONG COURT.—The doctrine of *lis pendens* cannot apply where the suit concerned was pending in a Court which had no jurisdiction to entertain it at all. I.L.R. (1937) Bom. 895=39 Bom.L.R. 1287=1938 Bom. 121. Where during the Pendency of a suit by a minor for partition instituted in a wrong Court, the father executes a mortgage of the family property and subsequently the plaint is returned, for presentation to the proper Court and it is so presented after an interval of time and ultimately a decree for partition is passed, the mortgage is not effected by *lis pendens*. The suit that culminated in a decree for partition must be deemed to have been instituted only when the plaint was filed in the proper Court. 1940 N.L.J. 20=1940 Nag. 185.

"IMMOVABLE PROPERTY."—It is more than doubtful whether the principle of *lis pendens* applies to *movable property*, such as, in the particular case, money. 62 I.C. 900 (Pat.). *See also* 36 B. 189=14 Bom.L.R. 9=13 I.C. 849; 51 C. 1033. In 122 I.C. 189=1930 A. 380 it was held that the principle would be applicable to the transfer of a decree. The prinple of S. 52 may be applied to cases where the alienee of movables *pendente lite* has notice of the '*lis*.' 1 L.W. 587=25 I.C. 133. Hut is immovable property. 9 I.C. 1 (C.). A mere *claim for rent* is not a right to immovable property within the provisions of S. 52. 90 I.C. 431=1926 C. 191. *See also* 1928 C. 441=55 C. 701=32 C.W.N. 268; 63 C. 1117=40 C.W.N. 683=1936 C. 279. A transfer of mortgage debt during a partition suit is a transfer of immovable property. 11 I.C. 492 (A.). *See also* 13 O.C. 50=5 I.C. 800.

MISDESCRIPTION OF PROPERTY.—It is a settled principle of law, that in order to attract the doctrine of *lis pendens*, the property in suit must be described with sufficient precision. If there

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is such misdescription of the property that its identity cannot be established, the doctrine of *lis pendens* cannot apply. What description will be sufficient in a particular case, would of course, depend largely on the facts of that case. 44 C.W.N. 783. *See also* 49 M.L.J. 68. One of the conditions laid down by S. 52, as creating *lis pendens* is that in a suit a right to immovable property must be directly and specifically in question. Since under the rules of procedure, immovable property in question in suit, has to be specifically described in the plaint, as far as possible, a misdescription of the property in the pleadings will prevent the operation of the doctrine of *lis pendens*. But if in spite of the misdescription the property is sufficiently identified, the doctrine will apply, and an alienee who is aware of the identity of the property will be affected by *lis pendens* in in spite of the misdescription. A mere mistake in describing the situation of the property or a mis-spelling of the name of the property would not affect the doctrine of *lis pendens*. 1937 Bom. 244. An error in the description cannot be of any materiality so long as the Court and the parties understand which property is in question. Fraud or collusion might alter the situation, but subject to such considerations, the description of the property is for the Court and for the parties concerned. 39 Bom.L.R 224=1937 Bom. 244.

"IS DIRECTLY AND SPECIFICALLY IN QUESTION."—In a suit to recover money borrowed by the deceased by sale of jewellery pledged and if necessary by sale of property of deceased in the hands of heirs, the property does not come specifically in question within S. 52 till an order is passed for sale of the property for the balance, and therefore the plaintiff cannot claim priority over mortgages created on the property by the sons before the passing of the order. 51 C. 1033 =84 I.C. 880. A plaint in a simple money suit with a prayer added to it that the decree which may be passed be declared to be a charge upon the shares of the defendants of that suit cannot be said to be a plaint involving a claim against immovable property. 165 I.C. 567= 1936 P. 571. A proceeding under O. 34, R. 6, C. P. Code, in which a simple money decree is passed is not a proceeding in which any right to immovable property is directly and therefore a transfer made during the pendency of such proceeding is not hit at by S. 52, T. P. Act. 7 O.W.N. 122=1930 O. 93.

APPLICABILITY OF THE DOCTRINE OF LIS PENDENS.—Scope of the doctrine and meaning of the word "right" explained. 51 B. 37=1927 B. 93; 110 I.C. 389. Construction and scope—Any "order" which may be made therein—Meaning of—*Lis pendens*.—Operation of—Conditions. A.I. R. 1938 C. 1=64 C.L.J. 406. The principles of S. 52 applicable to transfers of property is not applicable to suits and decrees passed in such suits. 1937 A. 108. The Registrar of Co-operative Societies acting under R. 14 (5-*b*) of the rules framed under the Co-operative Societies Act is a "Court" and a purchase of properties from the owner pending an application by a Co-operative Society to obtain an award from the Assistant Registrar on default of the mortgagor is one made *pendente lite*. 57 M. 426= 66 M.L.J. 90. *See also* 54 L.W. 435= (1941) 2 M.L.J. 588=1942 Mad. 24. In any case, when once the award has been put before a competent Civil Court in execution and the Court directs the sale of the mortgaged property, any purchase made during such proceedings is made *pendente lite* and affected by the doctrine of *lis pendens*. 57 M. 426. The principle is applicable to Punjab. 11 L. 258=1930 L. 356 (F.B.). Section is applicable to transfer by Muhammadans also. 124 I.C. 722=1930 A. 462. The doctrine of *lis pendens* does not apply to the enforcement of a right which existed prior to the institution of a *lis*. 32 P.L.R. 283. Notice of pending suit is not necessary. 1929 A. 601; 62 I.C. 900; 20 I.C. 458; 1925 O. 30; 1928 B. 65; 130 I.C. 666=1931 M. 120= 33 L.W. 109; 33 Bom.L.R. 1123; 1927 B. 93; 1926 C. 204 (211)=29 C.W.N. 953; 39 Bom. L.R. 224. The doctrine is not applicable to a case where the sale is under a valid contract prior to the starting of the litigation. 45 M. 774 =43 M.L.J. 566; 1925 M. 710=48 M.L.J. 496; 43 I.C. 502 (M.); 39 Bom.L.R. 224. It operates only in favour of a plaintiff and cannot be invoked by a defendant. 40 I.C. 826 (M.). *See contra* 3 O.W.N. (Sup.) 232. *See also* 25 A. L.J 777. S. 52 only applies to rights of the other 'party' involved in and arising out of the property which is the subject-matter of the suit. 64 C.L.J. 406. The section has no application where the transfer is amongst persons ranged on the same side. 41 M. 458= 34 M.L.J. 262; nor where the transferor alone is affected. 41 I.C. 513=4 O.L.J. 386; (*See also* 33 C.W.N. 1091=30 L.W. 476=1929 P. C. 243; nor to a *friendly* suit. 38 M. 450; 27 C. 77.) *See also* 58 C. 598=1931 C. 763=134 I.C. 561. It applies to *ex parte* decrees and compromise decrees *bona fide* obtained. 42 A. 319; 29 M. 426; 49 C. 220; 45 M.L.J. 682; 49 M.L.J. 68; 1925 P. 462; 1928 Oudh 146. The plea cannot be raised by a party who is himself guilty of laches. 42 I.C. 54. The property must not only be specifically and directly involved in the suit. 8 I.C. 1208; 1925 C. 395; but it should also be properly and particularly specified. *See* 49 M.L.J. 68. A misdescription of the property in the pleadings will prevent the operation of the doctrine of *lis pendens*. But if in spite of the misdescription the property is sufficiently identified, the doctrine will apply, and an alienee who is aware of the identity of the property will be affected by *lis pendens* in spite of the misdescription. A mere mistake in describing the situation of the property would not affect the doctrine of *lis pendens*. 39 Bom.L.R. 224. As to what amounts to misdescription of property so as to render the doctrine inapplicable, *see* 49 M.L.J. 68=87 I.C. 213=1926 M. 50. *See also* 44 C.W.N. 783; 39 Bom.L.R. 224=1937 Bom. 244. Whether a Court sale in execution of a money decree, after the passing of a preliminary decree and before final decree is affected by *lis pendens*, see 1925 Oudh 496. As to applicability of the doctrine of *lis pendens* to proceedings in execution of money decree, *see* 1929 A. 846. Where during the pendency of a pre-emption suit the vendor's son brought an action for a declaration that the sale should not affect his right to

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succeed on the father's death and both the suits were decreed, and after the father's death the son sued the vendee to recover the property, *held*, that the title of the pre-emptor was not vitiated by the doctrine of *lis pendens*. 32 P.L.R. 283. *See also* 96 I.C. 450 ; 86 I.C. 126=1925 B. 176. Where after executing a security bond in favour of the Court for due performance of a decree that may be passed against the defendant' the property given as security is alienated, the rule of *lis pendens* operates. 165 I.C. 453=1936 M.W.N. 443=1936 M. 589.

EXECUTION SALES.—"Transfer" includes compulsory sales at Court-auction. 9 I.C. 840 (C.) The doctrine applies to sales in *invitum* to involuntary sales and execution sales. 28 I.C. 898=19 C.W.N. 152 ; 18 I.C. 177=17 C.W.N. 413 ; 155 I.C. 1082=1935 O.W.N. 698 ; 45 M.L.J. 825 ; 43 M. 696=39 M.L.J. 456 ; 1929 L. 589 ; 80 I.C. 453=1924 B. 451 ; 9 I.C. 772 ; 15 C.L.J. 137=11 I.C. 464 ; 14 C.W.N, 677=6 I.C. 40 ; 2 Luck. 496=1927 O. 261 ; 29 O.C. 37=1925 O. 496 ; 7 R. 734=1930 R. 132 ; 32 L.W. 416=59 M.L.J. 485 ; 1922 P. 542 ; 66 I.C. 631=1922 N. 89 (F.B.); 1922 N. 81 ; 51 B. 37=100 I.C. 582 ; 38 M. 535 ; 4 P. 619=90 I.C. 251 ; 95 I.C. 213 ; 102 I.C. 72 ; 6 B. 567 ; 27 B. 266 ; 1924 B. 467 ; 13 C.W.N. 226 ; 51 M.L.J. 475 ; 38 L.W. 880; 165 I.C. 373=1937 O. 159=12 Luck. 540 ; 1937 Nag. 400 ; (1940) 2 M.L.J. 1038 ; 1936 Cal. 590. So also the doctrine applied to a sale in execution pending a suit by a third party for a declaration of his lien on the property which had been hypothecated to him by the judgment-debtor. 34 P.L.R. 468=1933 L. 10 ; and to an execution sale pending a suit by the sons of the judgment-debtor for a declaration that the property was not liable to be attached. 141 I.C. 448=34 P.L.R. 531=1933 L. 171. Where, during the pendency of the proceedings for ejectment before the Revenue officer the sale takes place, the principle of *lis pendens*, will apply to it. It does not matter whether the sale was voluntary or not. 165 I.C. 833=1935 L. 512. Where sale in execution of a decree obtained on foot of a puisne mortgage takes place during the pendency of the suit on the prior mortgage, the sale in the subsequent mortgagee's suit is affected by the rule of *lis pendens* so as to make the purchaser's right subject to the result of the prior mortgagee's suit. 1933 A.L.J. 729=1931 A. 466 (F.B.). *See also* 41 P.L.R. 629=1939 Lah. 146. Where the first mortgagee obtained a decree for sale on the foot of his mortgage without impleading the second mortgagee and after the decree but, before the sale, the second mortgagee sued and obtained a decree for sale and the question was raised as to the rights of the purchasers under the two sales, *held*, that the sale under the first mortgage decree being pending the second mortgagee's suit, the first mortgagee purchaser's rights were subject to the rights obtained under the second mortgagee's decree and auction sale thereunder. 1930 M. 570=59 M.L.J. 39. *See also* 1942 A.L.W. 532. As to transfers made by order of Court, *see* 1926 P. 94. A suit brought under O. 21 R. 63, C. P. Code, is a mere continuation of the proceedings in a claim petition and all alienations during the continuance of the proceedings originated by the claim petition till the disposal of the suit brought to set aside the order passed thereon are affected by the doctrine of *lis pendens*. 42 P.L.R. 601=1940 Lah. 497. *See also* 1937 Rang. 473.

REVENUE SALES.—Whether section applies also to sales for non-payment of Government revenue, *see* 3 P.L.T. 296=1 P. 287 ; 10 C.L.J. 590=4 I.C. 731 ; 48 L.W. 927 ; 1922 P. 542 ; 7 R. 113=1929 R. 175 (arrears of Municipal tax realized under City Municipal Act). *See also* 1926 M. 1161=51 M.L.J. 475 (section applies to sales for arrears of abkari dues pending suit); 26 C. 766; 15 C. 546; 26 M. 230; 1929 B. 200 (also to sales under the order of a magistrate under S. 88, Cr.P. Code). *See also* 1938 M.W.N. 1243; (1940) 2 M.L.J. 791. Although the principle of *lis pendens* would apply to involuntary sales it cannot be made applicable to sales for the recovery of Government taxes and local rates, *e.g.*, sales under the Bombay Land Revenue Code for recovery of arrears due under a toll contract. 42 Bom.L.R. 1123. *See also* 48 L.W. 927. Applicability of section to proceedings before Registrar of Co-operative Societies or arbitrator on reference under Co-operative Societies Act. *See* 1942 Mad. 24=(1941) 2 M.L.J. 588.

PRE-EMPTION SUIT.—Doctrine of *lis pendens* applies also to *pre-emption suits*. 88 I.C. 202=1925 A. 502 ; 49 A. 516=1927 A. 336 ; 9 Luck 475=1934 O. 303 ; 24 I.C. 32=17 O.C. 150 ; 89 I.C. 219=23 A.L.J. 615. But it does not affect the validity of the sale effected by the vendee during the pendency of the pre-emption suit to a person possessing a right of pre-emption equal to that of the pre-emptor. 11 L. 258=1930 L. 356 (F.B.). *See also* 32 P.L.R. 283=1931 L. 435. Persons claiming superior right to pre-empt, whether can claim notwithstanding *lis pendens*. 27 A.L.J. 537=1929 A. 440. *See also* 47 A. 625 ; 96 I.C. 450 ; 47 A. 923=1926 A. 179 ; 48 A. 221=1926 A. 180. *See further* 11 I.C. 645 ; 8 L.L.J. 261=96 I.C. 450 ; 3 L. 264=1922 L. 403 ; 1925 A. 487 ; 24 I.C. 32 ; 38 I.C. 582 ; 3 I.C. 923 ; 5 I.C. 249 ; 10 I.C. 367 ; 10 I.C. 1007. Doctrine of *lis pendens* does not apply where pre-emptors had obtained decree before declaratory suit. 1929 L. 589. *See also* 96 I.C. 450.

SUIT FOR DOWER.—Section applies to a suit for dower by a Mahomedan wife in which a claim is made for charge or possession of the property. *See* 4 C. 402 ; 19 A. 504. But *see* 130 I.C. 113=1931 O. 63 where it was a mere money claim and the property left after transfer was ample. A transfer by a Mahomedan husband to his wife in discharge of his legal obligation to pay *dower* does not amount to a sale under S. 52. 1 Luck. 83=29 O.C. 108=1926 O. 186.

ADMINISTRATION SUITS.—The doctrine of *lis pendens* does not apply to administration suits. 1927 R. 186 ; 5 R. 266=103 I.C. 264 ; 2 R. 4=79 I.C. 729 ; 1923 R. 69 ; 27 L.W. 544=1928 M. 713 (F.B.) ; 55 I.A. 81=55 C. 532=54 M.L.J. 473 (P.C.) ; 74 I.C. 54. Where the creditor of the deceased was unaware of the will left by him and a suit instituted by a residuary

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legatee under the will for a declaration of his rights, brought a suit against the widow of the deceased in possession of some of his properties and got a decree. *Held*, the decree was binding on the residuary legatee and was not affected by S. 52. 54 M. 212=1930 M. 930=60 M.L.J. 97. Where a person purchased property from one of the heirs pending an administration suit, *held*, that the doctrine of *lis pendens* applied. 7 R. 734=1930 R. 132.

SUIT FOR INJUNCTION.—The doctrine of *lis pendens* applies to suits for injunction. The pendency of the suit under S. 52 as it stands after the amendment of 1929, extends up to the complete satisfaction of the decree passed in the suit ; and under the present law the injunction will go with the land and the decree can be executed against the legal representative and also against the transferee of the judgment-debtor. 1935 A.M.L.J. 67.

PAUPER SUITS.—A transfer made after the application for leave to sue *in forma pauperis* is filed but before it is registered as a suit is affected by the rule of *lis pendens*, when the immovable property transferred is specifically in issue in the suit. The fact that the immovable property is not in issue at the stage of the enquiry into the pauperism does not make any difference so far as the applicability of the rule of *lis pendens* is concerned. 1936 M. 853=71 M.L.J. 301=44 L.W. 427. *See also* 49 L.W. 241=1939 Mad. 275 ; I.L.R. (1940) Nag. 94=1938 Nag. 30.

MORTGAGE SUITS.—A suit brought by a mortgagee cannot be affected by *lis pendens* because another mortgagee, has already sued to enforce his own rights. Both have rights against the same owner and the title of each relates back to the date of his mortgage and is not created by the decree. 30 N.L.R. 284=1934 N. 36. In mortgage suits the rule of *lis pendens* only applies to transfers by plaintiff or defendant of their respective interest after the suit including transfers by Court-sale in money decrees against either party. It does not apply to previously existing transfers including mortgages or legal proceedings to enforce such transfers by those entitled. The sale in pursuance of a mortgage decree, the mortgage having been executed before the institution of the suit, is not affected by the doctrine of *lis pendens*. 139 I. C. 309=63 M.L.J. 394. *See also* 1934 M. 585 =67 M.L.J. 312 ; 1935 L. 646. *Lis pendens* in a mortgage suit continues until the mortgaged properties are sold. A purchase by an attaching decree-holder in execution of his money decree, after the filing of a suit on a mortgage of the same property and before the sale in execution of the mortgage decree is affected by *lis pendens* and confers no rights on the decree-holder purchaser as against the purchaser in execution of the decree in the mortgage suit. 18 Pat. 155=1939 Pat. 7. *See also* 15 Pat. 372 ; 1938 Lah. 448. When a mortgagor is adjudicated an insolvent during the pendency of a suit on his mortgage it cannot be said that his property is 'transferred or otherwise dealt with' within the meaning of S. 52. It cannot be said that the former owner of the property has transferred it or otherwise dealt with it. His whole estate devolves on the receiver, just as it would devolve on his heir in case of death. 1939 N.L.J. 202 =1939 Nag. 128. A purchaser at a sale held in execution of a mortgage decree must be construed to have purchased both the rights of the mortgagee and the mortgagor. He is, therefore, not hit by the doctrine of *lis pendens* although the mortgage sale was held during the pendency of a suit for declaration of a charge for maintenance upon the mortgaged property, when the execution of the mortgage itself is prior to the institution of the suit. 43 C.W.N. 666 =1939 Cal. 655. *See also* 46 C.W.N. 355. A puisne mortgage cannot be created during the pendency of a mortgage suit. 43 B. 240 ; 152 I.C. 1018=1935 O. 49 ; though the mortgage is with the sanction of a different Court. 42 B. 215. Where, pending a suit brought by the first mortgagee, the subsequent mortgagee who was not till then impleaded in the suit assigned his interest to a third party and long after the assignment, the subsequent mortgagee was added as a party to the mortgage suit and a decree obtained against him, *held*, that the assignment was not affected by *lis pendens* and that the decree obtained against the subsequent mortgagee did not affect the rights of the assignee. 11 P. 485. *See also* 15 Pat. 372. The plaintiff purchased property in execution of his mortgage decree. The defendant purchased a decree on a mortgage of another property of the mortgagor in favour of a Bank. Before bringing the property mortgaged to sale, the defendant obtained an order amending the decrees passed in the Bank's suit the result of which was that the property mortgaged to the plaintiff was added to that mortgaged to the Bank. The defendant purchased the property in auction-sale after the plaintiff obtained his decree and before the sale in his favour. Plaintiff sued the defendant for possession. *Held*, that S. 52 stood in the way of the defendant. 149 I.C. 187=1934 A. 972. Lease granted by a mortgagor who is in possession as tenant under the first mortgagee, after the institution of a suit by the second mortgagee is affected by the doctrine of *lis pendens*. 33 Bom. L.R. 1123 =1931 B. 539. When a decree for sale in a mortgage suit is passed on the Original Side of the High Court in respect of property which lies outside its local jurisdiction, such a decree does attract the operation of *lis pendens*. The fact that the decree is passed by consent of parties is immaterial. 58 C. 598=1931 C. 763. A mortgage created to discharge a mortgage on which a suit is pending is not void. 87 I. C. 264=1925 N. 21. A private transfer of the mortgaged property by the mortgagee under a power of sale conferred by the deed is not affected by the doctrine of *lis pendens*. 45 M. 774=43 M.L.J. 566. *See also* 15 Pat. 372.

LEASES.—The doctrine applies to leases *pendente lite*. 39 I.C. 182=21 C.W.N. 88 ; 14 N. L.R. 133=46 I.C, 762 ; 11 N.L.R. 21=27 I. C. 949 ; 20 A.L.J. 731=44 A. 748 ; 148 I.C. 653 =1934 A. 713 ; 1935 C. 746. *See further* 1924 N. 211 ; 1924 N. 226 ; 17 I.C. 1=17 C.L.J. 384; 38 I.C. 1=31 M.L J. 839 ; 103 I.C. 306 ; 103 I.C. 474 ; 1927 A. 657 ; 142 I.C. 188 ; 139 I. C. 166=1932 A.L.J. 572. *See contra* 39 M. 283 =28 I.C. 232 ; 103 I.C. 351=1920 N. 316. S. 52 does not apply to leases for agricultural purposes executed in the ordinary course of

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management of property. 1942 O.W.N. (B.R.) 16=1942 A.W.R. (Rev.) 14 (2). Where future crops form the subject-matter of the suit, any transfer of such crops or the right to raise such crops during the litigation is affected by the principle of *lis pendens*. 1936 M. 942=71 M.L.J. 638. It is wrong to think that leases for purposes of cultivation during the pendency of partition proceedings are bad under S. 52. 1938 A.L.J. (Supp.) 20=1938 R.D. 285. *See also* I.L.R. (1939) All. 809=1939 A.L.J. 692=1939 All. 611 ; I.L.R. (1937) 2 Cal. 181=1937 Cal. 763. A permanent lease during the pendency of a mortgage suit is not in the ordinary course of management of zamindari property and hence is a nullity under S. 52. 1939 O.W.N. 325=1939 A.L.J. (Supp.) 53. *See also* 19 N.L.J. 316. The mortgagee is not bound by lease created by mortgagor during pendency of mortgage suit. 85 I.C. 522=29 C.W.N. 94. *See contra* 103 I.C. 115=1926 N. 295 ; 1927 N. 316=142 I.C. 188. Where the mortgagor, after the institution of a suit on the mortgage, grants a lease of the property, taking premium or nazarana, the transfer is inoperative as against the purchaser in execution of the decree passed in the mortgage suit on two grounds : (1) the transfer is barred by S. 52, (2) the taking of a premium or nazarana is prohibited by S. 65-A (2) 19 N.L.J. 316. *See also* 1936 A.L.J. 1277=1936 A.W.R. 1035=1937 All. 9. Where the lease is for adequate rent, it is not obnoxious to the provisions of S. 52. The lessee holds the property subject to the rights of the mortgagee decree-holder. 1930 All. 289. Where before the Court-sale the previous owner admitted certain trespassers into tenancy on basis of economic rent and it appeared that it was beneficial to the estate; *Held*, that the arrangement was not hit at by the doctrine of *lis pendens*. 18 R.D. 282=15 L. R. 343 (Rev.). Both under S. 52 of the T.P. Act as well as according to the principle of *lis pendens*, it is necessary for an occupancy holder under a threat of ejectment from it in execution proceedings for arrears of rent to obtain the permission of the Court before he could transfer the holding to a third person. A transfer without such permission is null and void and can convey no title to the vendee. 1942 O.W.N. (B.R.) 227=1942 A.W.R. (Rev.) 139.

SUITS FOR SPECIFIC PERFORMANCE.—The doctrine of *lis pendens* applies to suits for the specific performance of agreements to sell immovable properties. Court sales and private sales equally come under the doctrine of *lis pendens*. 45 M.L.J. 825=1924 M. 307 ; 34 C.L.J. 79 =49 C. 495 ; 31 Bom.L.R. 345=1929 Bom. 200 ; 26 Bom.L.R. 418. As to the effect of inordinate delay in execution of a decree for specific performance, *see* 1931 N. 138 under the old section.

SUIT FOR CONTRIBUTION.—*See* 13 A. 371. Where a person purchases another's property by private sale during the pendency of a contribution suit against such person in which a simple money decree without reference to any charge was passed, the purchase is not affected by the doctrine of *lis pendens* and is not subject to the decree passed in suit. 165 I.C. 567=1936 P. 571.

SUITS FOR MAINTENANCE by Hindu widow asking for a charge on her husband's property; *see* 1927 M. 502=52 M.L.J. 520 ; 99 I.C. 564 =1927 M. 403 ; 46 M.L.J. 258 ; 1924 M. 449 =101 I.C. 806 ; 19 M. 271 ; 59 M.L.J. 485= 54 M. 132=1930 M. 824 ; I.L.R. (1941) Bom. 1: 29 M.L.J. 79. The doctrine of *lis pendens* applies to maintenance actions, and under the explanation to S. 52, as amended in 1929, the *lis* continues after the decree and up to the sale in execution of the properties charged by the decree. A mortgage executed by the judgment-debtor after the decree and before the sale is therefore affected by *lis pendens*. The fact that in a suit for maintenance by a Hindu widow a charge is claimed over all the family properties which are specified in the plaint would not make any difference in the application of the doctrine, if the properties are sufficiently designated so as to make them directly and substantially the subject-matter of the litigation. 1935 M. 867=69 M.L.J. 447. *See also* 43 L.W. 201= 1936 M. 84 ; 19 N.L.J. 254. The doctrine of *lis pendens* embodied in S. 52, applies to a sale made during the pendency of a suit for maintenance by a Hindu widow in which property sold is sought to be made a charge for the widow's maintenance. Even though the property is sold for the debts of the widow's husband which she may be bound to pay under the Hindu law, the alienation made during the pendency of her suit for maintenance claiming a charge would be subject to the principle o *lis pendens*, and the fact that the debts are binding on the widow would not make S. 52 inapplicable. 42 Bom.L.R. 883=1940 B. 395= I.L.R. 1941 Bom. 1; 1939 B. 403. Where a Hindu widow has obtained a decree for maintenance, the maintenance being made a charge on immovable properties, the holder of that decree is entitled to proceed against those properties though the properties or some of them have passed into other hands from the persons in whose hands they were at the time of the decree. The transfer is affected by *lis pendens*. The fact that the widow agreed with the transferee to release the properties in his hands from the charge for consideration does not prevent the doctrine from operating, until there is a release by her valid in law. The fact that part of the consideration for the release has been paid to the widow would not entitle the transferee to a release. The doctrine of part performance has no application to such a case, so as to override the rule of *lis pendens*. I.L.R. (1938) Mad. 829=48 L.W. 76=1938 M. 357 (F.B.). *See also* 41 Bom.L.R. 815=1939 B. 403.

INTERPLEADER SUIT.—Where a person purchases property from one of the parties after a decree creating a charge is passed in an interpleader suit the transfer is *pendente lite*. 33 L.W. 391=1930 M. 988=60 M.L.J. 79.

PARTITION SUITS.—The doctrine of *lis pendens* applies to the purchase of property during pendency of suit for partition relating to such property where the suit is not proved to be collusive. 148 I.C. 731=1934 L. 457. An ordinary partition suit where there is no contest as to the fractional share of the parties is not a suit in which their rights to the immovable

[1][53. (1) Every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Fraudulent transfer.

LEG. REF.

[1]This new S. 53, was substituted for old S. 53 by Act XX of 1929.

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property are directly and specifically in question. S. 52 does not apply to such a case. 195 I.C. 856=1941 C. 436. *See also* 1938 A.L.J. (Supp.) 20. Where a suit for partition is pending between a father and a son and the father between the preliminary decree and the final decree grants a patta of a part of the suit property in favour of a third person, the patta cannot prevail against the decree in the suit by which property affected by patta is allotted to the son. 44 L.W. 861=1936 M. 887. During the pendency of a partition suit by a Hindu minor against his father, a compromise was effected under which the father defendant executed a trust deed transferring all his rights in the family properties to trustees for the benefit of the minor plaintiff. *Held*, that the arrangement did not come within the prohibition of S. 52 and was not bad on the ground of *lis pendens*. 152 I. C. 715=36 Bom. L.R. 738. The property should be directly and specifically involved in the suit. 27 C. 77. 27 I.C. 940; but not otherwise; *see* 1928 N; 198; 1 C.W.N. 62. *See also* 37 B. 427=19 I.C. 885; 52 B. 208; 1930 A.L.J. 1286=1931 A. 45; 1938 M.W.N. 1243; (1940) 2 M.L.J. 791.

EFFECT OF ALIENATION PENDENTE LITE.—Alienation *pendente lite* is not void, but is valid subject to the result of the pending suit. 110 I.C. 548=1928 M. 635. *See also* 43 M. 696=58 I.C. 501; 13 I.C. 641 (A.); 55 M.L.J. 122 =55 I.A. 256 (P.C.); 2 O.L.J. 291; 95 I.C. 213; 87 I.C. 995=1925 N. 341; 165 I.C. 453=1936 M. 589; I.L.R. 1936 N. 22=1936 N. 125. If a property is transferred during the pendency of a suit with respect to that property, the decree passed therein cannot be impeached by the transferee. 13 O.C. 50=5 I.C. 800. A Court can bind a transferee *pendente lite* by the result of litigation, even though his name be not on the record if the fact of the transfer is admitted before the Court during the course of the trial. 2 O.L.J. 291=30 I.C. 289.

LACHES.—When a person intermeddles with outstanding disputes, he does so at his peril, and if he chooses to stand by and let his right slide, he cannot afterwards claim to be given the benefit of his laches and placed in a better position than his transferor to the detriment of others who have acquired rights in pending proceedings. The law will not allow a man to say that he did not know his rights. 168 I.C. 1003 =1937 Nag. 161.

REVIVAL OF SUIT.—Where a suit dismissed for default is revived within a reasonable time, there would be no suspension of *lis pendens*. It will be considered to be a continuous proceeding. *See* 50 I.C. 727.

PLEADINGS.—Plea of *lis pendens* can be entertained for the first time in appeal, if the matter can be decided solely on the evidence on record, 38 M. 450.

REGISTRATION.—Sale executed before but registered after suit is not affected by the doctrine of *lis pendens*. 1925 M. 710=48 M.L.J. 496. *See also* 48 M.L.J. 399=1922 M. 249; 83 I.C. 133=1925 M. 359. But *see* 5 P.L.J. 714.

Sec. 52, Expl. : SCOPE OF.—The explanation added to S. 52 makes it manifest that *lis pendens* continues till the decree obtained in the suit is completely satisfied or discharged or the execution of the same becomes barred by limitation. Where a subsequent simple mortgagee purchased the mortgaged property in execution of a decree for sale obtained in respect of his mortgage, a later usufructuary mortgagee under a usufructuary mortgage executed prior to such auction sale who redeemed a simple mortgage earlier to that of the one on which the decree had been obtained, was held to be not entitled to claim to hold that earlier mortgage as a shield against the claim for possession by the auction-purchaser. He was also held not entitled to claim any reimbursement in respect of the earlier mortgage redeemed by him. 1940 A. 141.

Sec. 53 : SCOPE.—The principle of the section applies to Hindus and Muhammadans. 11 B. 676; 5 B 154; 10 B. 616; 13 B 293. It applies also to Punjab: 1 P.L.R 513; 74 P.R. 1912=14 I.C. 282; 1924 L. 707; 29 P.L.R. 114; 8 L. 544 =101 I.C. 172; 53 P.R. 1916=23 I.C. 474 (F.B.); 75 I.C. 1043; 1927 L. 420; 115 I.C. 417. It may also be applied to transfers by operation of law. 51 A. 595=1929 A. 238. S. 53 may be extended to movables. 30 M. 6; 46 M. 478. 'Transfer" includes partition in joint family; 97 I.C. 70; 94 I.C. 282; 44 M.L.J. 513; 1926 N. 355; also surrender by widow of her widow's interest; I L.R. 1936 N. 69=1936 N. 166. *See also* 41 Bom. L.R. 1007=1939 Bom 496. *Acquiescence in mutation comes within this section*. 1938 O.W.N. 297. Mere preference of one creditor to another is not a transfer within the meaning of S. 53. There is a distinction between transfers in bankruptcy which are bad, because they do in fact prefer one creditor to another, and between transfers which fall under the provisions of S. 53, which are bad because they are sham transactions intended to benefit the debtor and defeat or delay the creditors generally. I.L.R. (1939) Kar. 136 =178 I.C 469=1938 Sind. 215. *See also* 42 P L.R. 119; 1939 Bom. 508; 1938 Lah. 156; 43 C.W.N. 1131. Preference by a debtor shown to one of his creditors is, provided the transaction is genuine, and not tainted by fraud no ground for avoidance merely because the other creditors happen to suffer. 38 P.L.R. 269= 1937 Lah 220. *See also* 42 P.L R. 119; 1939 O. W N. 398=1939 Oudh 230. The word 'transfer' used in S. 53, is comprehensive enough to embrace all kinds of transfers, whether with or without consideration. The crucial question is one of determining the intention and motive underlying the transfer. The mere fact that a transfer is executed without consideration as in the case of a gift, will not necessarily lead to an inference that the transfer was

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors.

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made with intent to defeat or delay the creditors of the transferor. Each case must be examined on its own merits and it must be found upon a consideration of the entire circumstances surrounding the execution of the deed of transfer, whether it was brought about with a fraudulent intent or otherwise. Under the general law the burden of proving that a transfer is fraudulent under S. 53, lies on the creditors. 1941 O.W.N. 56=1941 Oudh 205. Where a mortgagor effects a fraudulent lease of the mortgaged property the creditor who subsequently becomes purchaser of the property in execution of the mortgage decree can treat the lease as void under Ss. 52 and 53, and eject the lessee as a trespasser. 18 R.D. 368=15L.R. 447 (Rev.); 18 R.D. 367=15 L.R. 445 (Rev.). *See also* 1939 Pat. 5=1938 P.W.N. 738. A fraudulent lease pending suit may be set aside. 1927 N. 295; but not a security given by the debtor on his property. 15 L.R. 445 (Rev.); 1927 Nag. 295. The *relinquishment of his rights* by a coparcener in favour of another coparcener can not be strictly said to be a transfer within the meaning of S. 53. 1938 O.W.N. 104=1938 Oudh 65. Where a person who was borrowing money and squandering it by his extravagance and immoral habits was prevailed upon to execute a deed of *relinquishment* of his right in the family property in favour of his minor son with a view to protect the property from the creditors, the relinquishment cannot be said to have been made for the purpose of defrauding any creditors. 1938 O.W.N. 104=1938 Oudh. 65 *See also* 1936 Lah. 222. In determining the validity of a *trust deed executed by debtor for the benefit of his creditors*, the deed must be considered as a whole. The deed is valid if it is substantially for the benefit of the creditors and not simply a device for retaining a benefit for the author of the trust at their expense. A trust the main object of which is the payment of the debts of the author of the trust, is substantially for the benefit of the creditors, and it is not hit by S. 53 although there is a provision for the maintenance of the family of the author of the trust which is not inconsistent with the tenor and subject of the trust. 42 C.W.N. 1131 =1938 Cal. 818. A suit to set aside a transfer under this section will fail if it is not brought by the plaintiffs in a representative capacity on behalf of themselves and other creditors of the defendants. 139 I.C. 820=34 Bom. L.R. 862. *See also* 1933 N. 169=29 N.L.R. 246. Even if a person is the sole and only creditor, he can, and has to, sue under S. 53, in a representative capacity, on behalf of the general body of creditors. 1940 Rang. L.R. 777=1941 Rang. 76. The statutory remedy provided by S. 53, is merely supplementary to the common law right of a creditor in execution to obtain a declaration that a transfer by a decree-holder, by reason of its 'benami' character, never operated as a transfer at all and, accordingly left the property it purported to transfer available to him in execution. In such a case there is nothing to which S. 53 can apply, for there is nothing which can be voidable. I. L. R. (1940) A. 542=1940 A.L.J. 470=1940 All. 407. The primary object of an action under S. 53 is to make the assets of the tranferor available to the general body of creditors. If it would, then the action would in substance be an action under S. 53 and would have to be instituted by, or on behalf of all the creditors. If it would not. then the action cannot be regarded as one under that section. The proper test to apply when a question of this nature is raised is to see whether if the plaintiff succeeds in the action, the property claimed in the action would be available to the general body of creditors. Where there was no indication in in the plaint or elsewhere that the suit was filed on behalf of or for the benefit of other creditors but on the other hand there was every indication in the averments of the plaint, that the plaintiff wanted only to vindicate his personal and individual rights, and not the rights of other creditors, it was held that the suit was not one under S. 530 1941 O.W.N. 801=194 I.C. 588=1941 Oudh 457. Where an objection is raised by the defendant that the plaintiff's suit is bad as not being brought on behalf of all creditors, the fact of existence of other creditors is a matter clearly within the special knowledge of the defendant and in such circumstances it is the duty of the defendant to produce proof of the existence of such creditors. 1942 A.M.L.J. 3.

APPLICABILITY.—A plaintiff to bring a case under S. 53 should ask for the relief of a declaration that the transfer in question is void as regards him because he is defrauded, defeated or delayed. Where he does not sue for any such remedy, but on the contrary treats the transfer as a valid transfer, no issue under S. 53 arises on the pleadings and it is not necessary for the Court to give a decision on the point. 1934 A. 948. Though the purpose of S. 53 is to protect all creditors, the fact that there is only one creditor and not more, is no reason to exclude the application of the section if it is clear that the transfer is fraudulent and made for the purpose of defeating or delaying him. But the test to be applied to cases under this section is whether the purpose of the transfer is to prefer one creditor to the other, or whether the purpose is to prefer the transferor himself. S. 53 of the Act is not intended to apply to a transfer by which one creditor is

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preferred to another. It is intended to apply to transfers where the transferor prefers himself to his creditors where the transaction is a sham and bogus transaction. I.L.R. (1939) Kar. 269=1939 Sind 97. The principles of S. 53 are in accordance with the general principles of justice, equity and good conseience and as such should be taken as a guide by the Courts even in cases such as when a party bases his title on a transfer by a decree of the Court where the provisions of S. 53 do not apply. 27 A.L.J. 358=1929 A. 238=51 A. 596. *See also* 44 M.L.J. 513=1923 M. 577. The principle underlying 13 Eliz. R. 5 and S. 53, T. P. Act, ought to be applied in India to transactions relating to the transfer of *moveable property* upon the ground that these principles are in accordance with Justice, equity and good conscience- 9 R. 614=135 I.C. 641. The mere fact that the judgment debtor has other property to meet the decree does not prevent the application of S. 53. 1929 A. 451. S. 53 does not apply where a transfer is effected to prejudice the rights of pre-emption of a co-sharer of the village who is not the co-owner of the specific plots transferred. 47 A. 424=86 I.C. 741. Considerations affecting S. 53, do not apply to S. 36, Pro. Ins. Act. 2 Pat L.J. 101=38 I.C. 369. Nothing in S. 53 bars the right of any transferee in good faith and for consideration. Consequently, where a transfer has been made for consideration, the fact that its effect is to delay or defeat a creditor is immaterial. 105 I.C. 356=1928 P. 199. *See also* 25 A.L.J. 829=1927 A. 714; 12 I.C. 401 (O.); 126 I.C. 604=1930 M. 665; 9 R. 614=135 I.C. 641; *also* 1933 R. 162=145 I.C. 330. A *wakf* is a transfer and if executed as a device for defeating creditors it is governed by S. 53 which does not in any way infringe any rule of Mahomedan law. 27 A.L.J. 460=1929 A. 277; 1930 A.L.J; 616=1930 A. 462. Where a Mahomedan husband transferred property in lieu of an actual *dower debt, held*, that the transfer could not be impeached under his section. 1934 L. 705; 12 P. 297=14 Pat. L. T. 611=1933 P. 281; 1936 A.L.J. 1027=1936 A. 600; 1936 A. L.J. 966=1936 A. 803. But *see* 1936 Pesh. 216. The principle of the section will apply in case of *voluntary remissions of debts* made with a view to defeat the creditors. 27 I.C. 269 (M.). A transfer by a debtor, for a genuine debt, of a part only of his property is not voidable under S. 53. 2 L.W. 64=26 I.C. 834. There is no distinction between *fraudulent alienation and fraudulent acquisition* by a dishonest debtor, as each consists of a dishonest dealing with property. 1914 M.W. N. 595=25 I.C. 123. S. 53 does not apply to the purchase of property in the name of another as benamidar, as there is no transfer of property 60 B. 226=38 Bom. L.R. 251. Where the plaint in a suit clearly states that the sale deed in question was fictitious and without consideration that it was never acted upon or in other words that the sale was a sham and bogus transaction and that the property purporting to be conveyed by the sale deed was never conveyed at all and that it remained the property of the vendor such a suit is not affected by S. 53 and the transaction can be avoided without a suit under the section. I.L.R. (1940) All 542=1940 A. L.J. 470=1940 All 407. S. 53 does not apply to cases simply where one creditor is preferred to another, and the provisions of Para. 2 sub-S. (1) of S. 53 do not come into operation until the provisions of Para 1 of that sub-section have been fulfilled, I.L.R. (1939) Kar. 136=178 I. C. 469=1938 Sind 215. *See also* 1937 Rang. 531. S. 53 could have no application to a case where the deed of transfer in question is alleged to be fictitious and not that it is voidable on the ground of its execution with a fraudulent intention to defeat creditors. 1940 O.W.N. 1057 *See also* 200 I.C. 577=1941 Mad. 690. There is a distinction between a fictitious and fraudulent transfer. In the former case there is really no transfer at all and in the latter there is a transfer but,as it is the result of a conspiracy between the transferor and the transferee to defeat the claim of others it can be avoided by those others if they wish to avoid it. 1942 A. L.J. 399. The principle contained in S. 53, applies to transfers of movable property also. A transfer is wholly void if part of the consideration was non-existent and the object of it was to defraud the creditors. I.L.R. (1940) Nag. 316 =1938 Nag. 249.

SUBSEQUENT TRANSFEREE.—Transfer means voluntary transfer: An auction-purchaser at an execution sale is not entitled to impeach a previous transfer under the section. 53 I.C. 105; 39 B. 507. But *see* 33 M. 205=19 M.L.J. 741; 20 L.W. 538=1924 M. 779; 6 P.L.J. 48. But the principle of the section may apply in such a case. *See* 27 A. 358; 51 A. 595; 44 M.L.J. 513. A *bona fide* transferee even from a fraudulent transferee, is protected under S. 53. 1940 Lah 198.

VOIDABLE.—The section makes a transfer only voidable. 23 C.L.J. 570; 28 B. 639; 71 I.C. 409; 52 B. 208=1928 B. 65; 26 A.L.J. 524= 1928 A. 234; and not void; 1923 N. 195; 1936 A.M.L.J. 118 *See also* I.L.R. 1936 N. 183=1936 N. 207. A deed of gift executed in order to defeat the donor's creditors is not necessarily void under S. 53, unless it is meant by the executant to be fictitious. It is only *voidable* at the option of the creditors; and if the latter do not choose to avoid it, it is a perfectly valid instrument as between the parties to it. 155 I.C. 829=1935 R.D. 259. A transfer which is merely colourable and made with the intention of defrauding creditors can be set aside by the transferor at any time before the fraud has actually taken place; but not where the fraudulent purpose has been carried out. 135 I.C. 244; 139 I.C. 92=9 O.W.N. 275. Thus if the debt due to the creditor is paid by the transferee, he cannot complain that he has been defeated or defrauded by the transfer. 71 I.C. 409= 1923 N. 195. A creditor who chooses to affirm or accept the transaction cannot subsequently repudiate the same. 1928 A. 234 (235)=26 A.L.J. 524. Where without any special pressure upon judgment-debtor by creditor, he transferred the whole of his property to that creditor without receiving any cash consideration, and where all the consideration alleged was said to be old debts and money paid or promised to be paid to other creditors, some of which remained unpaid until date of inquiry

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Held, that the transfer must be regarded *prima facie* as voidable. 1933 R. 191. Where a debtor yielding to the immediate pressure exercised by one of the creditors by reason of a suit brought by him enters into a *bona fide* compromise with him, the mere fact that by the compromise he surrenders a portion of his property to the creditor does not show that he commits any fraud or has any intention of defrauding other creditors. 42 P.L.R. 385.

INTENT TO DEFRAUD.—25 B. 202. A transfer, when executable decrees against the transferor were existing, will not by itself support an inference of an intent to defraud: 15 I.C. 509; 19 A.L.J. 87 ; 1926 S. 109 ; 126 I.C. 604=1930 M. 665 ; nor the fact that the transferor and the transferee were related to each other. 3 R. 71=89 I.C. 436. *Wakf* executed for the benefit of the minor sons, provision being made for all existing debts is valid. 129 I.C. 333=1931 O. 134. An intention to defeat a particular creditor and not creditors generally is not fraud. 25 B. 202 ; 21 O.C. 97; 5 Bom.L.R. 142; 33 I.C. 695; 3 Bur.L.J. 112=8 I.C. 1205. *See contra* 2 P.L.J. 546; 1936 P.W.N. 968=1937 Pat. 609. Under S. 53, in addition to consideration, good faith is an essential condition of the validity of the transfer. But it is not sufficient to show want of good faith on the part of the transferor alone: the knowledge and intention of the transferee are the determining factors. Again a fraudulent preference can be attacked under the Bankruptcy Law but not under S. 53, T.P. Act. So long as the question does not arise under the law of Bankruptcy, a transfer made in favour of one or more creditors cannot be impeached, for what S. 53 prohibits is not an instrument which prefers one creditor to another, but an instrument which removes propertyfrom the debtors for the benefit of the debtor. So long therefore as a transfer is in satisfaction of genuine debts and without reservation of any benefit to the debtor, no ground arises for impeaching it under S. 53. 46 L.W. 927=(1937) 2 M.L.J. 865. Suit under by creditor to set aside transfer by debtor made prior to adjudication in insolvency —Sanction of Insolvency Court—Necessity. *See* I. L.R.(1941) 2 M.L.J. 684 (F.B.). The subsequent and the prior conduct as well as the contemporaneous conduct of the transferor are all relevant and must be considered in order to decide what his motive was in transferring the property. 1938 Lah. 136=180 I.C. 830. The mere fact that debts are due from transferor is not alone sufficient to establish a fraudulent intention; on the other hand it must be proved that at the time of the transfer, motive for the transaction was to defeat or delay the creditors. There can however ordinarily be no direct evidence of the existence of a fraudulent intention. This can be inferred from circumstances proved in the case. 180 I.C. 830=1938 Lah. 136. When the consideration for the transfer was intended to pay off some only of transferor's genuine debts, the transfer cannot be impeached. 34 C. 999 (confirmed by Privy Council in 43 C. 521). *See also* 40 M.L.J. 125. Transfer in favour of a preferred creditor is not voidable. 44 C. 662 (P.C.) ; 17 M.L.J. 11. *See also* 99 I.C. 774 : 101 I.C. 153 (2) : 126 I.C. 604=1930 M. 665 : 7 O.W.N. 123=1930 O. 93 ; 1928 M.W.N. 617 =1928 M. 860 ; 4 N.L.J. 149 ; 3 Bur.L.T. 112 =8 I.C. 1205 ; 5 O.W.N. 1077=114 I.C. 504 (Transfer to wife in lieu of her dower debt. *See also* 1936 A.L.J. 1027=1936 All. 600) ; 101 I.C. 568 (1); 100 I.C. 46 (2) ; 1927 A. 714 ; 1927 N. 205=103 I.C. 259 ; 106 I.C. 356 : 1921 P. 199 ; 30 P.L.R. 306=1929 L. 409 ; 78 I.C. 106=1925 O. 267. But *see* 1928 M. 793. In cases of conveyances from debtor to creditor the validity of such conveyance depends upon consideration and good faith *both co-existing*. If intention to defraud creditors is shared by a transferee, there is no good faith and the transfer will not stand though full consideration has passed. 12 L. 194 =1930 L. 1027. *See also* 13 O.C. 265=7 I.C. 614. If the transferor is in fact indebted to the transferee the mere fact of his relationship with former or the circumstance that the transfer had the effect of giving one creditor preference over the others will not render the transaction fraudulent. 12 L. 194=1930 L. 1027 ; 167 I.C. 599 =1937 R. 51. Even a time-barred debt can be a valid consideration for a transfer. 78 I.C. 106=1925 O. 267. *See also* 1930 S. 284. But see 16 B. 1. Where a substantial portion of the transfer is fraudulent, the whole transfer must be treated as fraudulent. 4 L. 211=1923 L. 423. *See also* 42 P.L.R. 613. A transfer made to defeat an anticipated execution is not one made with intent to defraud, delay or defeat creditors within S. 53. 60 I.C. 725=7 O.L.J. 699. *See also* 52 I.C. 873 (P.). The mere fact that a debtor retains some interest in the property sold by him would not in all cases make the transaction fraudulent as a matter of law. 21 C.L.J. 302=9 I.C. 623. Where a judgment debtor executes a deed of gift, which is merely a colourable transaction never intended to be acted upon, and continues, even after the deed, to be in possession of the property dealt with under the gift deed, and it is found that the transaction is effected in order to put obstacles in the way of the decree-holders or to defraud them, it must be held that the transfer is void against the decree-holder and he can threfore proceed to attach and sell the property. 194 I.C. 45=1941 Pat. 394. Converting immovable property into cash is the most obvious and effective method of defeating and delaying creditors. 46 M.L.J. 125=80 I.C. 147. *See also* 126 I.C. 604=1930 M. 665. Where there is nothing to show that a transferor intended a sale of his immovable property as a cloak or device for his own protection and where the *bona fides* of the transfer cannot be doubted, the transfer cannot be impeached as fraudulent 21 C.L.J. 441=29 I.C. 734. *See also* 126 I.C. 604=1930 M. 665. A certain property was attached in execution of a money decree. No sale was effected for want of bidders and case was closed. Subsequent to this but before a fresh attachment by decree-holder, the property was mortgaged. *Held*, that the previous attachment had ceased to exist, that the mortgage was valid and that mere knowledge of the mortgagee about the long pending execution against mortgagor did not make the transfer made *bona fide* for value invalid. 1933 R. 199 =146 I.C. 954. The inclusion of a debt in a

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document of transfer, which would otherwise not be within S. 53, is *prima facie* evidence of an intention to defeat and delay the creditors, and it lies upon the party who wishes to take advantage of the document to show that there was no such intention. 54 L.W. 76=1941 Mad. 690=(1941) 2 M.L.J. 99. *As to proof of fraud, see* 8 O.W.N. 593.

CREDITOR does not necessarily mean a judgment-creditor. It means any creditor. 27 B. 146 ; 73 I.C. 719 ; 96 I.C. 356=1926 N. 494. *See also* 30 M.L.J. 565=34 I.C. 778 ; 1923 L. 478=5 L.L.J. 435. S. 53 applies even though a single creditor may have been defrauded and hindered in realising his debt. 2 Pat.L.J. 546 =40 I.C. 685. But *see also* 3 Bur. L.T. 112= 8 I.C. 1205, *infra*. Where there is only one creditor, and the debtor transfers all his property to a stranger with a view to defeat him, the transfer could be set aside if the transferee had notice of the circumstances, and of the debtor's evil design. 126 I.C. 604=1930 M. 665. A landlord is a creditor in respect of rents due to him from tenant. 26 C. 536. A Hindu wife with a claim for past maintenance against her husband is a creditor. 101 I.C. 610=1927 M. 657. *See also* 109 I.C. 272=1928 A. 476. But *see* 8 O.W.N. 1291. A Mohamedan wife to whom dower debt is due is a creditor. 5 O. W.N. 1077=114 I.C. 504 ; 167 I.C. 48=1937 N. 1. A person whose ctaim is barred by limitation ceases to be a creditor. 16 B. 1. But *see* 1925 O. 267 (*contra.*) Even if a debt is time-barred, that may be good consideration for the purposes of S. 53. though it may also be some evidence of want of good faith. 174 I.C. 143= 1937 Rang. 471. A transfer on account of natural love and affection made *bona fide*, cannot be impeached. 26 B. 577 (585). But a gift of the entire property to wife and children by a donor declared insolvent a few years after is not a transfer in good faith for valuable consideration; but he is personally liable to maintain them does not alter the question. 7 L. 12=93 I.C. 1313=1927 L. 420. In a suit under S. 53, the onus of proving that the gift by the husband to his wife is fraudulent and fictitious, having been effected to defraud the donor's creditors, lies upon the plaintiff. Where unimpeachable evidence is available and is not produced by him and no reason is shown for this, he fails to discharge the onus on him. 192 I.C. 96=1941 Oudh. 178. The presumption under the Act before the amendment of 1929 does not find a place under the amended S. 53. It is only when there are creditors in existence at the time of the gratuitous transfer or when a transfer is made just before a man embarks on some very hazardous speculation that it can be presumed that the gift is made with intent to put his property out of the reach of his creditors. 1930 P.C. 255=60 M.L.J. 341 (P.C.) ; 1933 R. 252 ; 139 I.C. 120=34 Bom.L.R. 863. Where a donor had no debts on the date ot the gift, there is no presumption of intent so defraud future creditors and it is for the latter to prove such an intent. 12 A.L.J. 1398=25 I.C. 183. *See also* 19 A.L.J. 299 ; 33 M. 205. But *see* 1940 A. 610, It it doubtful whether a future creditor can avoid a voidable but real transfer under this section. 38 M, 1071=26 M.L.J. 612. As to subsequent creditors, *see also* 5 Bom. L.R. 255 ; 33 M. 205 ; 19 A.L.J. 299 on the point.

DEFRAUDING CREDITORS.— "Defeating or delaying creditors"—Meaning of. 1928 M.W. N. 617=1928 M. 860 ; 113 I.C. 129. It is not fraudulent to shield some particular property from being proceeded against by creditors so long as there are other properties from which the just dues of the creditors may be realised. 94 I.C. 33=1926 C. 850. *See also* 115 I.C. 330 =1929 S. 94 ; 1934 R. 308. A transfer which can be impeached under S. 53, is one in which the property is removed from the creditors for the benefit of the debtor. If the debtor does not retain any benefit for himself and if it is found that the transfer was for adequate consideration and the entire consideration was expended in satisfaction of genuine debts of debtor without reservation of any benefit to the debtor and in favour of one creditor, then the transfer cannot be regarded as fraudulent within the meaning of S. 53. I.L.R. (1937) Nag. 452= 1937 Nag. 400. Fraudulent transfer—Inference from circumstances. *See* 1938 Lah. 136 ; 40 P. L.R. 909=1938 Lah. 564 ; 1939 O.W.N. 136. The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain any benefit for himself. He may pay one creditor and leave another unpaid. 179 I.C. 267=1938 Lah. 156. Itt is open to a debtor to convey his property to one of two creditors to whom he is indebted in preference to the other though it may be effected to avoid the execution of his decree by the other. He may prefer any creditor he chooses. But in doing so he must not reserve any benefit for himself. The transfer of the property by a debtor to one creditor for a price far in excess of the debt due to him and the retention of the excess amount for his own benefit indicate an intention to defeat or delay the other creditors, especially when he has no other property left. Such a transfor is wholly void and cannot be upheld even to the extent of the amount actually due to transferee creditor. 41 Bom.L.R. 1104=1939 Bom. 508. A mere preference of one creditor to another is not fraudulent under this section. A creditor is a transferee in good faith if the transfer is made in satisfaction of his debt, even though he is aware that proceedings had been taken by another creditor for the recovery of his debt,if his primary object is to protect himself and not to defeat other creditors. 174 I.C. 143=1937 Rang. 471.

WHETHER SUIT BY CREDITOR IS NECESSARY.— Under this section avoidance by creditor need not necessarily be by suit, it can be expressed by clear conduct. *See* 12 L.W. 718=61 I. C. 580. Where a creditor attaches in execution the property transferred, that is a sufficient exercise of the option to avoid the transaction. 3 Pat.L.T. 613=1922 P. 572. The methods of avoidance are not restricted to proceedings against the property through attachment and sale for the purpose of recovering the debt. Section does not preclude recovery by other means. 12 L.W. 718=61 I.C. 580. *See also* 3 Pat.L.T. 613=68 I.C. 369. The creditor can in defence

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to a suit by the transferee impeach the transfer as fraudulent. 43 M. 760=39 M.L.J. 350 (F. B·) ; 50 I.C. 959 ; 16 C.W.N. 717 ; 19 A.L.J. 299 ; 23 C.W.N. 817 (P.C.) ; 50 I.C. 264.

EFFECT OF FRAUD *inter partes*.—As to what constitutes fraud, *see* 94 I.C. 33=1926 C. 850. Once it is established that the parties are in *pari delicto*, the Courts will not assist an illegal transaction in any respect, that is, the person who asks the Court to do something will fail. 46 A. 622=1924 A. 668 (1). *See also* 32 M.L.J. 484; 33 C. 967 ; 23 B. 406 ; 18 M. 378 ; 27 C. 231; 28 C. 370 ; 31 M. 97 ; 31 B. 405 ; I.L.R. 1936 N. 183=1936 N. 207. Where the owner of property transfers it to another for an illegal purpose and such purpose is carried into execution, neither the vendor nor his heirs can succed in a suit to eject the vendee in possession without proving that the purpose never got beyond the stage of intention. 78 I.C. 260=1924 N. 200. *See also* 1923 A. 411=71 I.C. 441 ; 27 O. C. 175=82 I.C. 333 (33 C. 967. Foll.) ; 78 I.C. 359=1924 O. 391. *See also* 65 I.C. 322=11 L.B.R, 89 ; 65 I.C. 459=11 L.B.R. 83. When the contemplated fraud is not effected, a party to the fraudulent transaction does not lose his right to be relieved from the effect of such a transaction. 19 C.W.N. 1151=29 I. C. 699. *See also* 33 M.L.J. 696=45 I.C. 333; 13 M.L.T. 227=17 I.C. 323; 18 C.L.J. 616= 22 I.C. 86; 1923 A. 164; 23 B. 406; 28 C. 370; 36 C.L.J. 491=1923 C. 90: 24 L.W. 500= 1926 M. 1196; 27 O.C. 175=1925 O. 120; 11 C.L.J. 99=1924 O. 321; 36 C.L.J. 82=1928 C. 154; 21 N.L.R. 21=82 I.C. 489; 94 I.C. 33 =1926 C. 850; 18 C.W.N. 1331=27 I.C. 230; 3 L.W. 111=32 I. C. 810; 1 L.W. 169=23 I.C. 620; 52 I.C. 866 (P.). Fraud accomplished—Fraudulent transfer to defraud creditor—Transferee continuing in possession after transfer —Dispossession by transferee under fraudulent deed—Transferor, if entitled to restoration of possession. 1936 R. 405.

FRAUDULENT PREFERENCE.—Though a sale in favour of creditor by which he was preferred and another creditor lost his money is not invalid under this section, yet where only a part of the consideration was the debt due to the creditor and the rest of it is fictitious, the whole transaction is void. 34 L.W. 749=1932 M. 182 (30 M. 6 and 37 M. 227, Ref.). *See also* 1939 M. 745=(1939) 2 M.L.J. 362. But if the vendee creditor has paid off four mortgages, two in his own favour and two in favour of another. the effect of setting aside the sale is that he holds the position of a mortgage under those four deeds of mortgage. 135 I.C. 582; (1939) 2 M.L.J. 362. A debt advanced to the mortgagor at the time of the execution of the deed cannot be considered as a part of his pre-existing liability to the mortgagee and no preference could be claimed for them over the debts of the other creditors. 1935 L. 404. Where there is no question of bankruptcy, the validity of a transfer is not affected by the circumstance that one creditor was preferred to the detriment of another. 136 I. C. 237=27 N.L. R. 382; 1937 N. 9. *See also* 40 P.L.R. 1000= 1938 Lah. 73; 1939 O.W.N. 136=1939 O.A. 306. S. 53 is directed against a transfer made in order to defeat or delay creditors generally and not one the effect of which is to give preference to one over other creditors. 168 I. C. 695=39 P.L.R. 499 (1); 38 P.L.R. 269. Where the transfer is in favour of a creditor for a pre-existing debt, the knowledge of the creditor that the transfer is likely to defeat or delay the other creditors does not make the transfer in his favour voidable under S. 53. 35 P.L.R. 163=1934 L. 161. *See also* 1935 L. 404. A transfer by a Mahomedan in favour of his wife in satisfaction of her prompt dower debt cannot be avoided under S. 53 on the mere ground that the intention was to give preference to the wife over the other creditors, in the absence of proof that the transaction was a wholly bogus and colourable one. Even if the wife was aware that the transfer to her was tantamount to giving her such preference. the transaction itself would neither be illegal nor void *ab initio*. 1937 A. 39=I.L.R. 1937 A. 153 ; 1937 O. W. N. 1176=1938 Oudh 44 ; 1936 All 600; 1936 Pesh. 216; 1917 Nag.1; 1936 All 803; Remedy of aggrieved party. 1937 All 39. *See also* 167 I. C. 48=1937 N. 1.

WHO CAN SUE.—A fictitious sale in fraud of creditors can be set aside by creditors only; 111 I.C. 251=1928 L. 9. *See also* 1928 A. 476, *i.e.*. subsequent creditors as well as those existing at the time it was made. 8 O W.N. 593; *See also* 6 Lnck. 397=1931 O. 134; 5 Bom. L. R. 255; 33 M. 205; 19 A.L.J. 299; 38 M. 1071. But *see* 121 I.C. 34=1930 N. 51 (2) holding that a person who is not a creditor at the date of the transfer cannot impeach it. One creditor alone can sue to set aside transfer under this section. But he must sue in a representative capacity and the benefit will enure in favour of all creditors. 27 B. 146; 44 C. 999; 30 M.L. J. 565; 7 Bur.L.T. 257; 22 L.W. 592=1926 M. 66; 12 L. 262. But *see also* 42 M. 143=36 M. L.J. 231. The point is made clear by the amendment of the section. Delay or laches of one creditor does not deprive the other creditors of their rights. *See* 22 L.W. 592=1926 M. 66; 12 L. 262=1931 L. 70 (2). Not-withstanding his remedy under S. 53 of the Pro. Ins. Act, Official Receiver can also sue under this section. 95 I.C. 300 (1)=1926 M. 826; 23 L. W. 643. *See also* 115 I.C 330=1929 Sind 94; 1923 L. 478. A secured creditor whose claim cannot be defeated by a transfer cannot sue to set it aside. 19 C. 336. A simple mortgagee who has obtained a decree for sale, whose right to a personal decree is not barred is a "creditor" within S. 53 and can bring a suit to set aside an alienation in fraud of creditors. 2 L. W. 479=29 I.C. 62. It is only a defeated or delayed creditor or a subsequent transferee who has the option to impeach a transfer under S. 53. A mere auction-purchaser of the property who is not the decree-holder himself is not a creditor, and he cannot impeach a transfer by the judgment-debtor after decree and before the sale as being fraudulent under S. 53. But a decree-holder who becomes the auction-purchaser of the same property which is privately transferred after the decree and before the sale in execution is entitled to impeach the transfer under S. 53. The decree-holder does not lose his right to the benefit of S. 53 by himself

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becoming the auction purchaser and if the property purchased by him at the auction had been transferred by the judgment-debtor with intent to defeat or delay him. the transfer is voidable at his option. He may plead S. 53 as a personal defence to a suit against him by the private purchaser, and it is not necessary for him to file a representative suit to avoid the transfer. 41 Bom.L.R. 1104=1939 Bom. 503. *See also* 43 L.W. 635=1936 Mad. 408. Ss. 2 (*d*) and 5 of the T.P. Act prevent S. 53 operating in the ease of a *transfer under an order or decree of Court.* But where a person obtains a transfer of property under an order of Court as the result of a gross fraud by collusively instituting a suit and obtaining a decree and purchasing the property in execution thereof, the Court has power to remedy the injustice by applying the principle of S. 53 and to set aside the sale 55 L.W. 422=(1942) 2 M.L.J. 213.

SUIT BY CREDITOR UNDER O. XXI, R. 63. C. P. CODE.—Rules of procedure laid down in S. 53 do not apply to the N.W.F. Province and a suit under O. 21, R. 63, C.P. Code, by a decree-holder for a declaration that the judgement-debtor has interest in certain property, is not bad, although not instituted for the benefit of all the creditors as required by S. 53. 164 I.C. 153=1936 Pesh. 158. A suit under O. 21 R. 63 instituted by a decree-holder to set aside a claim order on the ground that the sale-deed executed by the judgment-debtor to the claimant was collusive and benami and was created in order to defraud the plaintiff is not and cannot be treated as a suit under S. 53, T.P. Act. 62 C. L.J. 548=1936 C. 783. *See also* 1936 Pat. 15. A plaintiff who institutes a suit which is of the nature contemplated by S. 53 must comply with the provisions of that section, that is, he must sue on behalf of all the creditors, not for himself alone. The fact that he is a decree-holder against whom an adverse order has been made in claim proceedings under O. 21 R. 63, does not relive him of the necessity for obtaining leave of the Court under O. I, R. 8, C.P. Code, to sue on behalf of all the creditors of the judgment-debtor. There is nothing in S. 53. T. P. Act. which is incompatible with O. 21, R. 63. A suit under O. 21, R. 63 for a declaration that the transaction relied on by the successful claimant is a bogus one and to have the transaction set aside on the footing that it is a fraud on the creditors falls under S. 53, T.P. Act, and must fail, if leave of the Court is not obtained for suing on behalf of all the creditors. I.L.R. (1940) Mad. 803=1940 Mad. 789=(1940) 1 M.L.J. 872. *See also* 17 Pat. 588. When a suit is brought under the provisions of O. 21, R. 63, C. P.Code, by an attaching creditor to establish his right to atttach and bring to sale certain property, and in order to succeed *it is necessary to avoid a transfer of the property* on the ground that the transfer has been made with intent to defeat or delay the creditors of the transferor, the suit must be in the form of a representative suit on behalf of or for the benefit of all the creditors of the transferor as provided for in S. 53, T.P. Act and the provisions of O. 1, R. 8 will be applicable to such a suit. 12 R. 566=1934 R. 302; 39 Bom. L.R. 917; 40 Bom.L.R. 371; 1936 Cal 783=62 C.L. J. 548. The valuation for jurisdiction of such suit must be the value of the properties transferred and not the amount of the decree sought to be executed. Again this valuation cannot be the sum total of debts due to all the existing creditors, for the term 'creditor, includes not only creditors at the time of the assignment, but also those who subsequently become creditors. 1934 Rang. 302; 1936 Cal. 783. But when the suit of the attaching creditor *does not involve the avoidance of any transfer of property,* the Act has application and the suit need not be brought as a representative suit, and its valuation for jurisdiction would be the amount of the decree sought to be executed or the value of the property whichever is less. 1934 Rang. 302 ; 152 I.C. 506=1934 R. 200. A creditor had obtained a decree against the debtor but had not attached any of his property. The debtor alienated certain property during the pendency of the suit, The creditor brought a suit for declaration that the alienations were void. The suit was not styled as a representative suit. *Held*, there was no cause of action and the suit did not lie because it was not covered either by S. 53, T. P. Act or O. 21, R. 63, C.P.Code, or by S. 42, Specific Relief Act. 160 I.C. 444=1936 Pesh. 15. *See also* 17 Pat. 588; 1937 O.W.N. 1169. Where the judgment-debtor transfers his property in trust to the trustee who brings a suit for a declaration that property which is the subject of a charge by a consent decree cannot be sold in execution of that decree because it is trust property and not the property of the judgment-debtor; it is open to the attaching creditor to plead in defence that the transfer was in fraud of creditors. I.L.R. (1939) Kar. 269=1939 Sind 97. Objection as to frame of suit cannot be taken in appeal for the first time. 1934 R. 308=1935 R. 275; 1936 A.M.L.J. 104.

PRESUMPTION OF FRAUD.—'Gratuitous transfers are not always fraudulent. 1900 A.C. 323. *See also* 40 P.L.R 462=1937 Lah. 847 (Gift to daughter). The mere fact of indebtedness of a person is not sufficient to raise a presumption that a gift made by him was made with the intention of defrauding the creditors. 39 P. L.R. 490. And if the transferor has, subsequent to his transfer, satisfied some of his creditors it shows that the transferor was in a position to satisfy all creditors. 74 P.R. 1912 =14 I.C. 232. *See* 24 C.W.N. 145; 1923 N. 334; 8 L. 544=1927 L. 420; 1927 R. 331; 109 I.C. 272 (2)=1928 A. 476 (2); 20 M. 465; 3 L.W. 287=34 I.C. 744; 27 B. 322; 9 I.C. 623 =43 I.C. 256; 25 B. 202; 23 C.W.N. 817 (P. C.); 47 I.C. 932 (C.); 10 I.C. 647; 104 I.C. 557=6 Bur.L.J. 145; 1927 A. 731; 102 I.C. 92; 7 Bom.L.R. 267 (as to the circumstances under which the Court may presume fraud under the 2nd paragraph of the old section). Now that the paragraph is omitted, the Court has to consider all the circumstances of the case before coming to the conclusion as to fraud; ordinarily there can be no direct evidence to prove the fictitious and collusive nature of a transaction and this can be established and inferred mainly by circumstantial evidence. 123 I.C. 573=1930 L. 12; 164 I.C. 933; 1937 O. 349;

(2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purpose of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.

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See also 1938 Oudh. 330; 1937 Pat. 609. In looking at a transaction for purposes of S. 53 one must look to the intention of the transfer and not to the motive. Where the motive of the transferor was to safe-guard the maintenance of his family, but the intention was clearly to put the properties out of the reach of creditors, the transfer is one intended to defeat or delay creditors. 42 C.W.N. 34. Where a wife, in order to safeguard herself against the future improvidence of her husband, who is a spend-thrift, secures a gift of property in her favour as a provision for her future maintenance and the donor is not shown to be in debt or in embarrassed circumstances at the time of the gift, such a transaction cannot be held to be a transfer made with intent to defeat or delay the creditors of the transferor. 162 I.C. 922=1936 L. 222. *See also* 1938 Oudh. 65. The husband executed a *hiba bil ewaza* in favour of his wife in lieu of dower. The deed conveyed all properties movable and immovable including the household effects. The couple had been married for over 15 years and no explanation was forthcoming as to why the donor thought of making the gift just at the time when a suit had been instituted against him by one of the creditors. It was also found that no physical possession of the property had been transferred to the donee. *Held*, that the deed was not a genuine transaction, that it was made with the object of defrauding creditors and was invalid under S. 53. 8 O.W.N. 794=134 I.C. 415. *See also* 1936 A.L.J. 966=1936 All. 803. The judgment debtors made a deed of gift of a field as *wahiwatdars* of a Devasthanam. The gift deed was actually registered after the field had been attached. There was no evidence to show that there was any dedication to the Devasthanam. The judgment-debtors described the field in gift deed as "our land". *Held*, that the gift was not *bona fide* but was made to delay or defeat the claims of the creditors. Hence the gift must be deemed as voidable. I.L.R. 1936 N. 69=165 I.C. 944 =1936 N. 166. Where the donor was indebted to several persons at the time of the alleged gift and it is proved that thereafter he dealt with the property as if it were his own and that within five months of the gift he effected an equitable mortgage on the property by depositing its title deeds, the only inference to be drawn from these circumstances is that either this transaction was wholly fictitious or that it was intended to defeat and delay creditors. 39 P.L.R. 660=1937 Lah. 819. Each case under S. 53 must be decided on its own facts. Where a gift is alleged to have been made orally some time after a decree had been passed against the donor, that circumstance by itself is sufficient to raise a presumption that the object of the gift was to defeat or at least to delay the creditors. 1938 O.W.N. 922=1938 Oudh. 230. Grossly inadequate consideration may be evidence of fraud. 5 Bom L.R. 213; 44 B. 767; 44 A. 748; but *see* 1924 N. 124. In the case of a mortgage, consideration connot be said to be inadequate. 12 Lah. L. J. 107=1931 L. 213.

SHAM TRANSACTION.—S. 53 has no application to a sham sale-deed not intended to pass title though intended to defeat creditors. Such a deed does not require to be set aside. It is void and of no effect. 11 L.W. 136=55 I.C. 766; 30 M.L.J. 565=34 I.C. 778. *See also* 99 I.C. 443 (1); 55 I.A. 256=55 M.L.J. 122=1928 P.C. 139 (P.C.); 1927 M. 1104; 99 I.C. 443. But *see also*; 1925 B. 287=27 Bom.L.R. 205. 56 I.C. 873.

PARTIAL CONSIDERATION—Where the transfer is fraudulent and is effected with a mala fide intent the mere fact that a portion of the consideration is actually paid will not clothe the transaction with reality and take it out of the operation of S. 53. 43 I.C. 956 (M.) *See also* 1930 M.W.N. 1145; 1939 Mad. 743=(1939) 2 M.L.J. 362; 40 P.L.R. 613; 1923. Lah. 423. Where a transaction is intended to defeat and delay creditors, the mere fact that a portion of the consideration was paid is no ground for not setting aside the transaction entirely. When a debtor with a view to defeat or delay his creditors colludes with one of hie creditors and creates a mortgage in his favour for a consideration which is partly fictitious and partly made up of a true money debt due to the creditor, on the finding that the transaction, as a whole, was a collusive transaction intended to defeat and delay creditors; the transaction should be set aside as a whole and the creditor who is a party to the fraud should not be allowed the protection of the transaction to the extent of his prior debt discharged thereby. There is no distinction in this respect between fraudulent transfers by way of mortgage and fraudulent transfers by way of sale. 54 L.W. 76=1941 Mad. 690=(1941) 2 M.L.J. 99. Where part of the consideration for a mortgage executed in favour of a creditor is proved to be fictitious and this fictitious part of the consideration is put in the bond in order to protect the mortgagor's property from his other creditors, it is a transfer made to defeat and delay creditors and by virtue of S. 53 it becomes voidable *in toto*, and cannot be enforced partially in respect of the consideration which was actually paid. I.L.R. (1941) 1 Cal. 536=74 C.L.J. 111=45 C.W.N. 498=1941 Cal. 378. *See also* (1941) 2M.L.J. 99: 12 L. 194=1930 L. 1027 (transfer wholly void); 24 M L.J. 266=18 I.C. 768; 36 M. 29; 1927 M. 278 (mortgage); 1935 L. 404. The transfer merely creates a charge equal to the valid consideration. 1936 Pesh. 216. But *see*

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1936 A.M.L.J. 104. The fact that an assignment is set aside as being in fraud of creditors under S. 53 does not prevent the Court from declaring a charge on the property assigned to the extent of the payment made by the assignee towards the redemption of the previous mortgage. 43 C. 269=20 C.W.N. 188=29 I. C. 580; 21 C.W.N. 401=29 I.C. 690. The transferee is entitled to get credit only for the mortgage debt binding on the property that he may have discharged as part of the consideration for the document and not for the money debts of the transferor discharged by him. 131 I.C. 833=1931 M. 513; 1934 M. 587=67 M. L.J. 585. Payment by transferee of revenue and encumbrance on property ought to be refunded on setting aside transfer. 1933 R. 191.

PARTITION.—A partition among the members of a joint Hindu family is a transfer to which S. 53 would be applicable. 24 L.W. 180=97 I.C. 70. But *see* 10 L.W. 498=54 I.C. 146; 25 A.L.J. 873. *See also* 44 M.L.J. 513=1923 M. 597; 106 I.C. 519=1928 A. 29. A *mala fide* partition effected between father and son and entered into for the sole purpose of defeating the claims of the creditors of the father is voidable under S. 53, though a partition does not come strictly within the letter of S. 53. 94 I.C. 282=1926 N. 355. On a reference to arbitration, a partition of joint family properties was made by which the bulk of the properties was given to the only son and a monthly allowance to the father. The partition was attacked as a fraudulent transfer, and the plaintiff relied, in proof of fraud, on the presumption under S. 53 (2): *Held*, that, assuming that the partition was a transfer, the consideration was natural love and affection which could not be said to be grossly inadequate. that the award could not be said to be altogether one-sided since the father got residence, maintenance and an allowance under the award and that therefore no presumption of fraud could be made therefrom. 139 I. C. 820= 34 Bom.L.R. 862=1932 B. 498.

BURDEN OF PROOF.—The burden of proof lies on the person impeaching the transfer. 6 C. 265; 21 C. 612; 17 M.L.J. 11; 3 R. 71=89 I. C. 436; 123 I.C. 573=1930 L. 12: 126 I.C. 604=1930 M. 665; 62 I.C. 356=25 C.W.N. 409 (P.C.); 60 I.C. 825=19 A.L.J. 87; 4 Bur. L.T. 163=11 I C. 781. But when the circumstances raise a presumption of fraud, the burden of proving *bona fides* is on the transferee. 104 I.C. 557; 168 I.C. 53=1937 O.W.N. 391. Ordinarily speaking when a transaction is attacked under S. 53, the burden lies on the attacking party to show in the first instance that the transaction was a fraudulent one intended to defeat and delay creditors. Where a *prima facie* case has been made out on that basis, then the burden shifts to the alienee to show that he is a transferee in good faith for valuable consideration. 54 L.W. 76=1941 Mad. 690=(1941) 2 M.L.J. 99=200 I.C. 577; 1940 All. 407. In a suit under S. 53, the plaintiff cannot succeed in avoiding the transfer on the ground that it had been made with intent to defeat or delay the creditors of the transferor unless he succeeds in showing that the transfer, although genuine, was fraudulent within the meaning of the section. 1941 O.W.N. 801 =1941 O.A. 519=1941 Oudh 457. However suspicious a transaction may be, there must be evidence on which the fraudulent intention must be made out. 112 I.C. 228=1928 M. 793. *See also* 23 I.C. 341; 21 I.C. 333; 1934 R. 308. Transfer in part consideration of debts due to transferee. Burden of proving alleged debts is on transferee. 1936 A.M.L.J. 104. The onus of proof on the transferee is satisfied if the transferee shows the passing of consideration. He need not go further and show absence of fraudulent intent. If there is no consideration or if it is inadequate, it would raise a presumption of fraudulent intent. 50 I.C. 463. If the transferee has no notice of and did not share in the fraudulent intention the transfer will not be set aside. 1923 N. 133 (1). If a conveyance is duly registered, passing of consideration need not be proved by transferee unless circumstances suggest fraud. 3 R. 71=1925 R. 227. The burden of disproving fraudulent intent lies on the transferee. 2 I.C. 813; 50 I.C. 463.

PROTECTION OF *bona fide* PURCHASER FOR VALUE.—S. 53 protects a *bona fide* purchaser for valuable consideration, whether he purchases from the fraudulent grantor himself or from a fraudulent transferee from him. 46 M. 478=44 M.L.J. 527=1923 M. 558. *See also* 1930 A. 438; 1934 L. 318 (2), 1937 Nag. 9. A transferee who fails to make any inquiry of the person who could have given the best of information as to the defects in the title is not a transferee in good faith. 46 M. 478=44 M.L. J. 527. It is a question of fact in each case whether the transferee acted in good faith. 75 I.C. 1044; 1924 L. 707; *See also* 89 I.C. 953 (1)=1926 L. 24. Valuable consideration alone is insufficient. Good faith is also essential. 30 M. 6; 23 C.W.N. 769; 34 C. 999; 24 M.L. J. 293; 33 M. 334; 96 I.C. 356; 22 C.W.N. 427; 165 I.C. 124=1936 A. 663. *Bona fide* transferees for consideration are absolutely protected. 25 A.L.J. 873. Valuable consideration may indicate good faith. 5 Bom. L.R. 141. As to what is valuable consideration, *see* 29 B. 428. Where a part of the consideration alone was real, the whole transfer cannot be set aside. 36 M. 29, *contra*; 1927 M. 278, *See also* 24 M. L. J. 266; 18 I. C. 768. On the sale being set aside, the vendee can have a charge only for encumbrances discharged and not for simple debts. 1927 M. 278. But this is only where portions of the consideration are separable 35 C. 1051; 27 M.L.J. 266. For application of the sub-section, *see* 35 C. 999; 24 C. 825; 2 P.L.J. 546; 25 B. 202; 71 I.C. 20. A mortgage executed by a judgment-debtor against whom a money decree has been passed, before service of notice upon him under O. 21, R. 54, C.P.Code, for valuable consideration in favour of a mortgagee who had as notice of the execution proceedings, is valid 94 I,C. 420 (2)=1926 C. 469. A transferee for value knowing of impending execution against his vendor, but not of his intention to defeat or delay creditors, does not come under S. 53. 95 I.C. 487. As to the form of decree to be passed see 1941 Bom. 65.

[1]53-A. Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

Part-performance.

LEG. REF.

[1] This section is new and is added by Act XX of 1929.

NOTES.

PLEA IN DEFENCE.—A person who procured a legal flaw cannot take advantage of it in defence. 20 A.L.J. 392=44 A. 642=1922 A. 233 (2). An attaching decree-holder can plead as defence to a suit by the alienee whose claim has been disallowed that the transfer was fraudulent and intended to defeat or delay the transferors creditors. 39 M.L.J. 350=43 M. 760 (F,B.). *See also* 60 I.C. 896=19 A.L.J. 299; I. L.R. 1936 N. 69=1936 N. 166. Where the plaintiff seeks to recover possession of property on the basis of a trust deed, it is open to the defendant to plead by way of defence that the plaintiff should not be allowed to recover on the basis of the said document as it was a fraudulent one intended to defeat the rights of creditors among whom the defendant is one. 72 C. L.J. 420=1941 Cal. 233. *See also* 1938 Lah. 136; (1940) 2 M.L.J. 491. It is also open to a creditor who has been defeated or delayed to raise the plea in defence. 1936 A.L. J. 692=1936 A. 663.

PARTIES TO SUIT.—In a suit by a creditor impeaching a transfer by his debtor as being fraudulent under S. 53 or in an appeal passed from a decree passed in such suit, the receiver, where the debtor has been subsequently adjudged insolvent, is a necessary party and such a suit or appeal is incompetent when the receiver, who is a necessary party is not impleaded. 181 I.C. 655=1938 Lah. 856.

LIMITATION.—It is true that the creditor has to challenge the transfer only within six years, but where the creditor has occupied the position of a defendant, no time limit affects his defence and he can consequently challenge the transfer even though six years had expired. 1940 Lah. 198.

FRAME OF SUIT—OBJECTION IN APPEAL.—Where plaintiff filed a suit under S. 53, but failed to sue on behalf of or for the benefit of the creditors of judgment-debtor, but no objection was taken in the trial Court and the suit was decreed. *Held*, that the defendant was no entitled in the appellate Court to claim that the suit as framed was not maintainable. 1935 R. 275 ; 1936 A.M.L.J. 104. *See also* 1937 O.W. N. 1069. As to court-fee, *see* 1939 M.W.N. 778.

ISSUE UNDER SEC. 53—IF CAN BE RAISED BY WAY OF DEFENCE.—Where at the time of a sale o the judgment-debtor's property in execution of a decree an objection to the sale is made by a party under S. 47, C. P. Code, on the ground that he is owner of the property by virtue of a transfer of the property in his favour by the judgment-debtor, the decree-holder is entitled to contest the objector's claim on the ground that the property was transferred fraudulently and he need not file a separate suit to have that transfer declared fraudulent. To such a defence by the creditor, the rule contained in S. 53, Transfer of Property Act, as to the form in which the suit is to be brought does not apply. Moreover the defence of the creditor in such a case can be described to be made in a representative capacity to apply for a rateable share in the sale proceeds if the property is sold. 180 I.C. 830=1938 Lah. 136. *See also* (1942) 2 M.L.J. 491.

Sec. 53-A. NECESSITY FOR THIS NEW SECTION —See *Statement of Objects and Reasons.*

ENGLISH AND INDIAN LAW, DISTINGUISHED.—The right conferred by S. 53-A is limited to cases where the transferee has taken possession and against whom the transferor or any one claiming through him is debarred from enforcing any right other than that which is expressly provided in the contract. *Under the English Law* the equity of part performance is an active equity and the person in possession can enforce in an independent suit further proceedings. Under S. 53-A, the right is available only to the defendant to protect his possession. It is only in the case of specific performance that part performance assits a plaintiff ; and S. 27-A of the Specific Relief Act is the only case recognised by the Indian Legislature where the equity of part performance is an active equity as in English law, sufficient to support an independent action by the transferee in possession ; and though he may maintain a suit for injunction, as being in possession, as against a trespasser, he cannot maintain an injunction suit against a person claiming under colour of a title from the transferor. The proper procedure for him is to sue for specific performance. 41 C. W.N. 54 ; 164 I.C. 557=1936 N. 174. *See also* 42 C.W.N. 630=1939 Cal. 163 ; 1937 Nag. 74. The English doctrine of part performance is not available in India by way of defence to a suit for ejectment except under the provisions of S. 53-A of the Act and in cases to which that section is applicable. 71 C.L.J. 144=44 C.W. N. 357=1940 Cal. 254 ; 41 C.W.N. 54. Whether S. 53-A applies at all to an agreement to transfer a partial interest in property, such as a right to win minerals or cut timber or the like. It is at least possible that it only applies to an agreement to sell or otherwise dispose of the entirety of a piece of real property. 46 C.W. W.N. 374=(1942) 1 M.L.J. 1 =1941 P. C. 128 (P.C.)

SCOPE—IF RETROSPECTIVE.—S. 53-A does not affect any proceeding commenced before the amending Act of 1929. It is not retrospective. 14 P. 672=1935 P. 291 (F.B.) ; 1936 N. 115 ; 1936 N. 282=165 I.C. 934 ; 1936 O. 306=162 I.C. 712. But *see* 1936 N. 254=165 I.C. 957, *See also* 1936 M. 916=71 M.L.J. 639; 1937 All. 10 ; 1937 Cal. 467 ; 1937 Nag. 74 ; 1939 Pat. 488=20 Pat.L.T. 329 ; 19 Pat.L.T. 594= 1938 Pat. 337 ; 1939 Rang. 175 ; 1937 Rang. 402 ; 1938 Cal. 97=42 C.W.N. 38 ; 40 C.W.N. 34=1938 Cal. 795 ; 1937 Pat. 36 ; 1941 Cal. 33 =45 C.W.N. 240 ; 1941 Cal. 287 ; 63 M.L.J.

and the transferee has, in part-performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part-performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract :

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part-performance thereof.

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587. S. 53-A applies to all cases instituted on or after the 1st April, 1930, though the transfer took place before 1930. 1936 A.L.J. 1323=1936 A.W.R. 1038 ; 64 C.L.J. 558 ; 42 Bom. L.R. 382=1940 Bom. 193 ; 40 Bom.L.R. 1192=1939 Bom. 31 ; 41 Bom.L.R. 1310=1940 Bom. 90 ; 1941 Cal. 287. The question of the retrospective nature of S. 53-A arises not with respect to the particular contract in question but with respect to *the enforcement of the right* against the transferee. 15 Pat. 786=1937 P. 36. Doctrine applicable to Punjab. 162 I.C. 314=1936 L. 366 ; 43 P.L.R. 656=1941 Lah. 407. S. 53-A gives a party relying upon it such right which but for the lack of some formality, he would have under the written agreement; but it gives no more and does not give any right which the informal agreement would not give. 182 I.C. 618=1939 Pat. 296. The amendment of the law effected by the enactment of S. 53-A confers no right of action on a transferee in possession under an unregistered contract of sale. "The right conferred by S. 53-A is a right available only to the defendant to protect his possession." The section is so framed as to impose a statutory bar on the transferor ; it confers no active title on the transferee. Any other reading of it would make a serious in-road in the whole scheme of the T. P. Act. 66 I.A. 293=I.L.R. (1940) 1 Cal. 250 1940 P.C. 1=(1940) 1 M.L.J. 75 (P.C.). S. 53-A applies to a contract to transfer occupancy holding which has not been completed in the manner prescribed by S. 26-C of the B.T. Act. There is no provision in the latter Act which in any way takes away the right conferred by S. 53-A upon a purchaser to retain possession as against his vendor in the circumstance mentioned in that section. I.L.R. (1938) 2 Cal. 328=42 C. W.N. 630=1939 Cal. 163. S. 53-A is restricted in its application and cannot be extended further than its terms warrant. It places the transferee and those claiming under him in possession of a shield which they can wield against 'the transferor or any person claiming under him' but which is ineffective against third parties with independent rights. 1938 N.L.J. 123. *See also* 1940 Oudh 409=16 Luck. 191=1940 O. W. N. 782. Though the right conferred by S. 53-A is a right available only by way of a defence, where a suit is brought by a vendee under O. 21, R. 103, C.P. Code, he is merely seeking to protect his rights to which he is entitled and as such the suit is only one by way of a defence and S. 53-A of the T. P. Act would be available to such a plaintiff. 15 Luck. 43=1940 Oudh 1. In order to satisfy the requirement of S. 53-A it is enough to show that the transferee has taken possession or continued in possession in part-performance of the contract and has done some act in furtherance of it. The section does not require any concurrent act or any specific consent apart from the contract on the part of the vendor. 15 Luck. 43=1939 O.W.N. 876=1940 Oudh 1. A plaintiff cannot claim the benefit of S. 53-A, but it is available only as defence. 1939 A.L.J. 384=1939 All. 504. *See also* 19 N. L.J. 179=1930 Nag. 174 ; 16 Luck. 191=1940 O.W.N. 782=1940 Oudh. 409 ; I.L.R. (1940) Bom. 480=42 Bom.L.R. 501=1940 Bom. 281 ; 1936 Nag. 174.

INDIAN LAW OF THE DOCTRINE OF PART-PERFORMANCE.—Under the T. P. Act, as it stood before the amendment, the doctrine of part-performance had no place whatever ; and even if at the date of the suit by the legal owner the defendant had an enforceable contract of sale in his favour, he cannot rely on that fact as a defence to the claim in ejectment. At best he could only apply for stay of the ejectment until he obtained specific performance of his contract by suitable proceedings. S. 53-A of the amended Act is not retrospective and does not apply to pending proceedings. S. 16 of the Amending Act of 1929 clearly excluded such operation in respect of suits pending on the date of the coming into force of the Act, *i.e.*, 1st April, 1930. 1935 M.W.N. 267=41 L.W. 364. *See also* 37 Bom.L.R. 82 ; Bom.L.R. 1245=1935 B. 91 ; 39 C.W.N. 416 ; 151 I.C. 388=1934 A. 701 ; 1934 A. 768 ; 152 I.C. 499=1934 P. 546. The right conferred by S. 53-A of the T. P. Act is limited to cases where the transferee has taken possession and against whom the transferor or any one claiming through him is debarred from enforcing any right other than

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that which is expressly provided in the contract. 41 C.W.N. 54. *See also* 44 C.W.N. 357=1940 Cal. 254. Although the provisions of the T. P. Act are not in force in N. W. F. P. still its principles are applied as being principles of justice, equity and good conscience. 1937 Pesh. 58=43 P.L.R. 658. The section can apply only if the agreement is in writing and the terms have been set out with reasonable certainty. 35 Bom.L.R. 722=1933 B. 381=145 I.C. 557; 151 I.C. 227=1934 R. 127. The first requirement mentioned in S 53-A as a condition for the applicability of the section is that there should be a writing signed by the transferor or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty. The words "signed on his behalf" in the section mean signed by a person who has authority to bind or represent the transferor. 43 Bom.L.R. 603=I.L.R. (1941) Bom. 529=1941 Bom. 346. The doctrine of part-performance can have no relation under any circumstances to movable property. 152 I.C. 431=1934 R. 303. The earlier decisions which allowed the doctrine of part-performance to prevail even in cases where there was no writing, are no longer good law. 144 I.C. 788=1933 P. 485; 165 I. C. 934=1936 N. 282. S. 53-A clearly contemplates that the contract itself shall be in writing, and not that there shall be a writing referring to some part or parts of a contract which may previously have been oral. A distinction must be drawn between a writing which is a reduction into writing of a previous oral agreement which would fall within the provisions of S. 53-A and a writing in which there is a mere reference to a previous oral agreement. 1938 Rang.L.R. 692=1938 Rang. 356. A contract or an agreement in writing or a written agreement is a *sine quo non* under S. 53-A. Such written agreement may of course be the embodiment of what has already been orally agreed upon and may also refer to payment by the purchaser and receipt by the vendor of part of the purchase-money, but it must essentially be a written agreement. 174 I.C. 169=1938 Rang. 49. Section cannot be applied to any case in which there is no contract in writing. 1933 R. 136; 144 I.C. 825. S. 53-A cannot be applied to a family settlement which is neither a transfer of property nor a contract to transfer property, but which merely acknowledges the right of the other party. Such a settlement if in writing has to be registered; and if unregistered the defect is fatal and cannot be cured by S. 53-A. I.L.R. (1937) All. 817=1937 All. 578 =1937 A.L.J. 627 (F.B.); 165 I.C. 934=1936 N. 282 (Oral sale). *See also* 1939 A.L.J. 433=1939 All. 529. The decision of the question whether the doctrine of part performance could be pleaded by a purchaser from a Hindu widow, as against the reversioner, would depend upon the answer to the question whether the reversioner was a 'person claiming under him' (*i.e.* transferor, widow). The test to be applied is to see whether the acts of the deceased widow affecting the property bind the reversioner or not. 1940 Nag. 396=1940 N.L.J. 499. To establish the application of the principle of part-performance it must be shown that the respective parties have so changed their respective positions that the change can only be referable to the contract alleged. A mere payment of the purchase-money, for instance, is insufficient. 47 B. 621=25 Bom.L.R. 381=1923 B. 473. *See also* 45 M.L.J. 528=46 M. 919=1924 M. 271 (S.B.); 40 C.W.N. 1176. To constitute part-performance the act must be an act, unequivocally referring to and resulting from the agreement and such that the party would suffer an injury amounting to fraud, by the refusal to execute that agreement. 1924 P. 433. Where the purchaser was already in possession of the property as mortgagee and then continued in possession after the agreement to sell had been concluded and a portion of price was paid in addition to the amount already due on the mortgage, in respect of which the purchaser was already in possession. *Held*, that such payment was an unequivocal act which could not be referred to any other matter than the agreement for sale, and as such it was sufficient to satisfy the requirement of S. 53-A, *viz.*, that that some act must be done in furtherance of the contract. 1934 R. 303. When the agreement or contract is dependent upon the promisor obtaining the assent of another to the agreement proposed, the promisee is not entitled to sue for specific performance of the agreement as long as the assent is not obtained. S. 53-A would not apply to such an agreement. 15 P. 460=1936 P. 372. *See also* 45 C.W.N. 489. The contract contemplated by S. 53-A is a completed contract and a valid contract. 45 C.W.N. 489. *See also* 1940 A.W.R. (H.C.) 243. The object of this section is to protect persons in cases where there is a contract which cannot be proved in evidence or the specific performance of which is barred. 45 C.W.N. 489. *See also* 1936 Pat, 372. S. 53-A contemplates reliance upon the entire contract. It does not contemplate the splitting up of a contract into different parts. 45 C.W.N. 489. S. 53-A only enunciates the doctrine of part performance and does not in any way invest the transferee with any title to the property of which the transferee might have taken possession. 1941 I.T.R. 358. S. 53-A according to its terms, debars a transferor from exercising rights which he would have apart from the agreement. Although there is an exception to this disablement in the words "other than a right expressly provided by the terms of the contract," it is clear that the transferor cannot in any case derive any rights from the section which are inconsistent with the conditions subject to which the section comes into operation. Since it is a condition precedent that the transferee shall have performed his part of the contract or should be willing to perform his part of the contract at the time when the section is sought to be made use of, which is the material time, it necessarily follows that a suit by the transferor for damages for breach of contract can never be founded upon S. 53-A. 43 Bom. L.R. 603=I. L. R. (1941) Bom. 529=1941 Bom. 346. *See also* 45 C. W. N. 132. In order to avail oneself of the benefit of the provisions of S. 53-A it must be shown that the possession refers unequivocally to the contract. He must show either from the con-

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tract itself or from some other evidence that the continuance of his possession was in reference to or pursuant to the contract for sale. 45 C. W.N. 489. S. 53-A gives the right to the transferee-defendant to resist the transferor-Plaintiff's claim for possession only when he has himself performed his part of the contract or where performance on his part was still due, he has offered to perform what remained to be performed by him. 45 C.W.N. 132. *See also* 1941 Bom. 346. Lease pending suit on mortgage—Lessee obtaining possession through lease not signed by both parties—Private sale of mortgaged property—Suit by lessee against purchaser availing benefit of S. 53-A —If maintainable. 1939 A.L.J. 692. *See also* 17 Pat. 460=1938 P.W.N. 951=1938 Pat. 337. Where a party secures an advantage for himself in pursuance of an award relating to immovable property, he cannot be allowed to repudiate the award. The principles embodied in S. 53-A are applicable to such cases and even if the document requires registration, the defect is cured as soon as it is acted upon by the parties. 37 P.L.R. 459. Non-registration of sale-deed does not render the sale ineffectual if the vendee has paid the price and obtained possession; for, thereby the vendee obtains an equitable right that the vendor should complete the title by a formal registered conveyance. 9 I.C. 770; 46 A. 759=1924 A. 772. *See also* (1937) 1 M.L.J. 676; 1937 Pesh. 58=169 I.C. 958. But the English equitable doctrine of part-performance could not be applied so as to modify or override the mandatory provisions of the Act, as so to nullify the statutory requirements of a registered instrument. [42 C. 801 (P.C.) and 39 M. 509, Expl.] 58 I.A. 91=58 C. 1235=1931 P.C. 79=60 M.L.J. 538 (P.C.) A transferee, put in possession of the land, even if the title deed is not executed and registered, stands in the same position as if the document has been executed, provided specific performance can be obtained by the parties. 61 I.C. 687=33 C.L.J. 437; 27 C.W.N. 159= 1923 C. 130. *See also* 1934 L. 751; 1934 R. 284. A person invoking the aid of this section is not entitled to a declaration of *his title* to the property, but only to a declaration of *his right to the possession* thereof. 1934 R. 284. *See also* 1933 P. 428. Where a person obtained certain property from the Collector under a grant made by him after he had wrongfully terminated the grant in favour of another and there was neither consent nor acquiescence on the part of the former grantee to possession being taken or retained by the latter, *held*, that the doctrine of part-performance did not apply to the case. 139 I.C. 388=1932 S. 42. A person seeking specific performance of an agreement could not get round the plea of limitation by obtaining wrongful possession of the land and then pleading the agreement as a defence when his suit is barred by limitation. 1932 Sind 42. Where a purchase of land was made by the plaintiff with notice of a prior contract for sale by the plaintiff's vendor in favour of the defendant, *held*, that the plaintiff's title cannot prevail as against the rights of the defendants. 18 C.W. N. 445=20 I.C. 803. *See also* 1930 Nag. 377. (Facts from which notice can be inferred). It is for the person claiming the benefit of the doctrine of part-performance to show that the transferee, who otherwise has a legal title, had notice of the contract or of the part-performance thereof. 154 I.C. 474=1935 R. 12. Where a person enters into possession of immovable property belonging to another under an agreement that he was to appropriate the rent, and profits of the property in lieu of interest on money advanced by him, such an agreement does not create any interest in immovable property in favour of the person so entering into possession and he could not resist a claim for possession by the owner or his transferee. 11 L.B.R. 319=1922 L.B. 25. *See* 1933 C. 393=144 I.C. 598, where the doctrine of part-performance was held to apply to a claim for rent by the landlord under a registered kabuliyat. Where the agreement of transfer is void the doctrine of part-performance is inapplicable. 14 Pat.L.T. 27=1932 P. 165. The doctrine of part-performance was held not to apply where there was no promise to convey the lands outright, but only to lease them. 36 Bom.L.R. 1245=1935 B. 91; 1936 A.L.J. 1323 =1936 A.W.R. 1038. Though S. 53-A on the face of it applies primarily to contracts of transfer only, the words 'where there is an instrument of transfer' in the section show that it applies to transfers also. Where a permanent lease is unregistered and is defective in not complying with the requirements of S. 107 of the T. P. Act, the defect will be cured by the provision in S. 53-A that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force. 1939 O.W.N. 102=1939 Oudh 85. An agreement contained in a lease which ought to have been, but which is not, registered, is inadmissible in evidence. 18 R.D. 572. Neither under S. 53-A of the T. P. Act, nor under S. 49 of the Registration Act as amended in 1929, can a landlord recover rent under an unregistered lease, if the lease is one requiring registration. 62 C. 394. S. 53-A does not operate to create a form of transfer of property which is exempt from registration. It creates no real right: it merely creates rights of estoppel between the proposed transferee and transferor, which have no operation against third persons not claiming under those persons. 46 C.W.N. 374=55 L.W. 79= (1942) 1 M.L.J. 1 (P.C.)=1941 P.C. 128 (P.C.). Co-sharers—Deed effecting partition of properties—Inadmissibility due to non-registration— Co-sharer disturbed in possession by another co-sharer—Right to sue in ejectment on basis of deed. *See* (1941) 2 M.L.J. 707. *See also* 1941 O.A. 1050. Decree in money suit on compromise—Provision for charge on immovable property not comprised in suit—Non-registration— Subsequent appointment of receiver in execution at the instance of decree-holder—Possession by receiver—If in part-performance and if cures non-registration. 40 C.W.N. 974

RECEIPT.—A document which is primarily a receipt, cannot be said to be always insufficient for the purpose of S. 53-A. It would be sufficient if all the essential terms of the contract

CHAPTER III.

OF SALES OF IMMOVABLE PROPERTY.

"Sale" defined.

54. "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

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could with reasonable certainty be ascertained from it. Where a document recited the receipt of a sum of money from another as earnest money for the sale of a house for a particular price and that a portion of the consideration was to be reserved with the vendee for payment to a mortgagee, and the boundaries of the house were also given it was held that the receipt was sufficient for the purpose of S. 53-A as all the essential terms of the contract could with reasonable certainty be ascertained from it. 15 Luck. 43=1939 O.W.N. 876=1940 Oudh 1. Document contemplated by S. 53-A need not be a formal agreement or contract, nor need it purport to be in its entirety an agreement, but part of the document at least must be in essence an agreement or contract. It is not sufficient to say that the terms of an agreement can be ascertained from a document which purports to be on the face of it merely a receipt. Where therefore a document recited that a certain sum of money was received as an advance against the sale of a piece of land for a certain sum and the balance to be paid within a certain period. *Held*, that by merely mentioning the period within which the balance of the purchase-money was to be paid, the document could not be construed as an agreement much less in essence an agreement of the kind contemplated by S. 53-A. 1939 Rang.L.R. 575 =1939 Rang. 206.

LIMITATION.—S. 53-A confers only a passive right and is available to a defendant to protect his possession. Art. 113 of the Limitation Act certainly cannot apply to such a right. Consequently the right of defence under S. 53-A is available to a defendant although his right to sue for specific performance of the contract made in his favour is barred by limitation. I.L.R. (1938) 2 Cal. 328=42 C.W.N. 630=1939 Cal. 163.

PLEADINGS.—A defence under S. 53-A ought to be raised in specific terms, as it involves questions of fact. 45 C.W.N. 240=1941 Cal. 33.

Secs. 53-A and 27-A, SPECIFIC RELIEF ACT—DISTINCTION.—What S. 53-A, T. P. Act, creates, is a defence by prohibiting the enforcement of a right by the transferor. The difference between the protection given by that section and the right conferred by S. 27-A, Specific Relief Act, is that while the former creates a defence, the latter creates a ground of claim. S. 53-A strikes at and prohibits the action based on the contract and not the contract itself. I.L.R. 1936 N. 115. *See also* 41 C.W.N. 54; 1937 Nag. 74.

Secs. 53-A, 58 (d) and 59: ORAL USUFRUCTUARY MORTGAGE—SUIT FOR REDEMPTION.—Both in India and in Burma cultivators, in the teeth of the express terms of S. 59 are still wont to obtain loans by delivering their lands to the lenders upon the terms that the lenders may remain in possession until the loan is repaid, and appropriate the fruits of the land towards the repayment of the principal or of the interest due under the loan. Such transactions are usufructuary mortgages within S. 58 (*d*) and unless the instrument of mortgage in such a case is in writing, and the transaction also falls with-in S. 53-A, the terms of the mortgage cannot be relied on as a ground of attack or of defence by either either the plaintiff or the defendant in a mortgage suit, except in cases in which they are embodied in a duly registered written instrument. Accordingly a suit framed as a suit for redemption of lands which are the subject of an oral usufructuary mortgage cannot be sustained, inasmuch as the plaintiff pleads and relies on the oral mortgage which is required by law to be effected by a registered instrument. The proper course of the mortgagor to take in such a case would be to sue for possession relying on his title. In such a suit, it is not permissible for the defendant to rest his claim to remain in possession on the oral mortgage which could not be proved. 13 R. 274 (F.B.). But *see* 14 L.R. 157 (Rev.)=17 R.D. 201.

Secs. 53-A and 107.—S. 53-A, T. P. Act, cannot be invoked by a lessor under an instrument not complying with the provisions of S. 107 of the Act, to establish that he possesses any right of action under the instrument, considered purely as a lease. The main provisions of S. 53-A would protect the defendant lessee in his possession of the property if he proved that the necessary conditions had been satisfied. The lessor is debarred from enforcing against the lessee any right in respect of the property, 'other than a right expressly provided by the terms of the contract'. The implication is that while the instrument *qua* lease is invalid *qua* contract it can be enforced. Hence where one party has been in possession under an instrument which is defective in form, the contract can be looked into for the purpose of determining the rights and liabilities of the parties arising out of such possession. It is permissible to admit the defective instrument in evidence for that purpose. 1941 O.A. 1050.

Sec. 54: SCOPE AND APPLICABILITY.—No writing was necessary to validate a sale before the Act. 42 I.A. 1=42 C. 801=28 M.L.J. 548 (P.C.). The section is not exhaustive. 41 B. 438 (F.B.) *See also* 23 C.W.N. 284=47 I.C. 428. The Transfer of Property Act is not in force in Marwar so that the statutory provisions of that Act embodied in S. 54 as to the modes of transfer of property cannot be enforced and an oral sale can be recognised as valid. 1939 Mar.L.R. 266 (Civ.). Provisions of the section are imperative and Courts cannot disregard them on equitable grounds. 42 M.L.J. 449=45 M. 537; 59 I.C. 451 (N.). *See now* S. 53-A, *supra*. In order to create title in immovable property of the value of more than Rs. 100, it is necessary that a registered deed should be executed. 14 Pat.L.T. 224=1933 P. 428. In the

Sale how made.

[1]Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

[1]In the case of tangible immovable property, of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale.

A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property.

LEG. REF.

[1] As to limitation to territorial operations of paragraphs 2 and 3 of S. 54, *see* S. 1, *supra*. These paragraphs extend to every Cantonment in British India. *See* The Cantonments Act (XIII of 1889), S. 32 (1).

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case of property worth less than Rs. 100 there are according to S. 54, obviously two methods of transfering title (1) registered instrument and (2) delivery of the property. Any defect in one mode cannot obviously impair the validity of the other mode if properly carried out. If there is delivery of possession in lieu of the receipt of consideration, there is nothing more required to effectuate the sale. A superfluous unregistered sale-deed cannot invalidate the sale otherwise valid. 1941 N.L.J. 643. *See also* 1939 Pat. 218. Sale, meaning and essentials of—Use of formal words such as "convey"—Not necessary —Deed—Intention. *See* 71 M.L.J. 488. Although under S. 47, Registration Act, once a document is registered, the effect begins to commence from the date of execution; if the document is not registered it can never have any effect in law as a sale-deed, a valid transfer is not made until the deed is registered. 40 L.W. 413=1934 M. 637 (2)=67 M.L.J. 380. This definition of sale applies to Punjab. 53 P.R. 1916=33 I.C. 474 (F.B.). (But *see* 110 I. C. 243); and also to Burma. 28 I.C. 264. Section applies to Hindus and Mahomedans also. 10 A.L.J. 154. *See also* 46 B. 302; 16 A. 337; 20 C.W.N. 1048; 34 I.C. 210; 10 C.L.J. 601. The section applies to a conveyance by Official Receiver of an insolvent's estate. 53 I. C. 121=46 C. 887; 48 L.W. 959=1939 M. 220; 152 I.C. 988=40 L.W. 747=67 M.L.J. 746; and to a conveyance of a mortgage-debt. 68 I.C. 752=41 M.L.J. 453; 69 I.C. 473=41 M.L. J. 267. S. 54 makes a registered deed requisite by whomsoever the sale of a mortgagee's right is undertaken, except when it can clearly be shown that the sale takes place (*e.g.*) under O 21, C. P. Code. Where no receiver in insolvency is appointed and the Court by virtue of the powers conferred on it by S. 58 of the Provincial Insolvency Act sells the mortgagee interest of an insolvent firm, it does not proceed under the C. P. Code. It is one of the administrative actions which a receiver would take, and hence the sale could only be effected by registered instrument. 1940 Rang.L.R. 263=1940 R. 186. *See also* 1939 M. 220. A transfer of property effected under a compromise decree not evidenced by a registered document cannot be treated as a sale as defined in the Act. 53 A. 100. Where a document, though described as a sale-deed, is merely an agreement to divide the fruits, if any, of a contemplated litigation between the two parties of the agreement, the description of the document cannot make the transaction a sale. 132 I.C. 753=7 O.W.N. 1010. The T. P. Act does not apply to pre-emption sales, so far as the formalities are concerned. 1931 N. 166. *See also* 139 I.C. 693= 1932 A.L.J. 851=1932 A. 685. A mere contract for the sale of an immovable property which does not create an interest in such immovable property does not require registration. [51 A. 771 (P.C.) Expl.] 1933 A.L.J. 1584=1933 A. 846.

SALE-DEED—WHEN COMPLETE.—The executant of a sale-deed which is compulsorily registrable has no *locus penitentiae* to resile from the transaction, merely because the title under the deed is incomplete for want of registration, because such incompleteness is not a thing of which he can take advantage. If the instrument is otherwise complete, the executant is to be regarded as having done everything that was in his power to complete the sale and to make i effective. But as regards third parties the point of time at which the transfer is to be effective is when the deed can be said to be a registered deed. 61 C.L.J. 360; 1938 N. 253=I.L.R. (1939) N. 253. But *see* 167 I.C. 48=1937 N. 1. An agreement of sale gives the purchase an equitable title as owner in the property concerned. But, ordinarily, this is good only against the vendor himself, and does not operate against a person who obtains a legal interest in the same property in good faith without notice of the equitable title. Consequently, where the mortgagor enters into an agreement to sell property with a third party before mortgaging the same property and the sale is completed after the mortgage, the mortgagee if he had acted in good faith and had no notice of the agreement of sale is entitled to precedence over the purchaser. 194 I.C. 787=1941 L. 240. Contract to sell land—Subsequent attachment of land in execution of decree against owner—Effect—Sale in pursuance of contract—Subsequent Court sale in execution—Vendee under sale in pursuance of contract—Title of. *See* (1941) 2 M.L.J. 722. Mortgage-debt—Assignment—Registration

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—Necessity—Mortgage to Bank—Agreement between Bank and trust as to transfer of assets —Agreement neither completed nor registered—Right of suit on mortgage—Bank, if can sue. 155 I.C. 743=39 C.W.N. 834=1935 P.C. 108 (P.C.).

SALE DISTINGUISHED FROM LEASE: 4 O.W.N. 231; distinguished *from exchange*; 102 I.C. 142=1927 O. 204; sale and *mortgage* distinguished; 109 I.C. 18=1928 M. 459. Transfer of ownership marks the difference between sale and mortgage. In the latter the property is held merely as security for the debt; in sale the full right of the vendor passes to the purchaser. 7 A. 553. Sale is to be distinguished from the passing of rights under a *compromise* from one person to the other, a compromise being the acknowledgment of an existing or doubtful right and not a transfer of ownership. 34 B. 139.

CONSIDERATION.—A conditional payment of consideration is not opposed to public policy· 37 A. 631=30 I.C. 512; 51 I.C. 24; 66 I.C. 622. Third parties cannot question adequacy of consideration. 20 I.C. 952=25 M.L.J. 248; 110 P.L.R. 1912=15 I.C. 192. Portion of consideration alone found good, effect of, 114 I.C 192=26 A.L.J. 539=1928 A. 391. Inadequate consideration does not render a sale fictitious: 21 O.C. 97=46 I.C. 330. *See also* 26 A.L.J. 539=1928 A. 391; 76 I.C. 635=1924 N. 124; nor the fact that the consideration is not ascertained, but only capable of being ascertained. 66 I.C. 622=8 O.L.J. 346; 55 C. 285; nor mere non-payment of price. 46 I.C. 382=16 A. L.J. 454; 36 M. 8=21 M.L J. 800=10 I.C. 546; *copy of Koran* is good consideration for transfer of immovable property in the nature of *hiba-bil-ewaz*. 13 C.W.N. 160=4 I.C. 466. Gift in lieu of dower, whether sale or gift, *see* 34 P. L.R. 1915=27 I.C. 562; 14 O.C. 214=11 I.C. 928; 87 I.C. 176=1925 O. 407. Sale, the consideration for which is the getting of another document registered, is valid. 49 A. 680=100 I.C. 1029=1927 A. 422. Failure of sale-deed for want of consideration will not make the transfer good as a gift, 45 I.C. 330. *See also* 4 I.C 389 (A). Burden of proof of want of consideration is on the party who alleges it when the document recites receipt of consideration. 1923 N 15. As to the effect of payment of consideration, *see* 11 Bom.L.R. 383=2 I.C. 429; 11 A. 244, 30 A. 125; 18 M. 61; 23 B. 525; 22 B. 176; 7 I.C. 568. Suit for possession by vendee who has not paid consideration—Nature of decree to be passed. 1929 A. 85. *See also* 38 M.L.J. 467. Where a cash payment is to be made at the time of registration of a sale deed, the common practice in India is for the vendee, on payment, to present the deed for registration and get the registration receipt. 61 I.A. 115=13 P. 242=1934 P.C. 68=66 M.L. J. 255 (P.C.).

PRICE.—(*See also* "Consideration", *supra*). Meaning of: 2 Luck. 575. Price need not be ascertained in the first instance. 55 C. 285=104 I.C. 527; 66 I.C. 622; 30 C. 921. Price consists of money; where the thing given in exchange consists of anything else, it is not a sale. 102 I.C. 142=1927 O. 204; 9 M. 141; 11 M. 459; 25 B. 696; 45 M. 612 at p. 617; 2 Luck, 575. Service, past or present, is not price 34 B. 287=12 Bom.L.R. 9; 2 L. 199 at p. 202; so also forbearance to take certain legal proceedings. 54 M. 163=60 M.L.J. 56, following 45 M. 612 (F.B.). If the thing given in consideration of the sale of land is other land or house it is not sale, but *exchange*. 9 M. 141; 30 C. 921; 34 B. 287. So also transfer made in consideration or in pursuance of a compromise of a family dispute i snot sale. 34 B. 139.

NON-PAYMENT OF PRICE.—Non-payment of consideration does not, by itself, show that title did not pass. 65 I.C. 882=1922 P. 619. *See also* 44 I.C. 202 (C.).; 34 I.C. 106 (Cal.) 17 C.W.N. 1161=20 I.C. 325; 2 B. 547; 23 B. 525; 19 I.C. 562 (C.) 12 I.C. 534; 14 I.C. 120; 11 A. 244; 33 A. 125; 30 M. 524; 18 M. 61; 6 I.C. 477 (C.); 13 C.W.N. 692=4 I.C. 541; 3 I.C. 177; 53 P.R. 1916=33 I.C. 474 (F.B.); 9 I.C. 547 (L.); 40 I.C. 489 (L.); 32 I.C. 961; 1929 P. 550; 17 Pat. 318=1938 P. 505. If the price is not paid, the seller cannot on that account repudiate the sale and has only remedy is to sue for the price or the balance of the price not paid. The mere fact that the entire purchase price is payable before possession is delivered to the vendee does not make the sale incomplete until the entire purchase-money has been paid. 151 I.C. 163=1934 L. 917. A sale once registered passes title unless it is established to the satisfaction of the Court that the intention of the parties was that title should not pass until the payment of consideration. *See* 43 M. 712=38 M.L J. 467; 30 A. 125; 55 I.C. 569=7 O.L.J. 240. But *see also* 4 L.B.R. 369. In cases of sales, it is very seldom the intention of parties to allow title to pass without receiving the consideration. To gather the intention of the parties, one has only to refer to the *kobala* itself where the terms and conditions are mentioned, It cannot be said that merely by registration, title passes. 154 I.C. 612=1935 P. 45, *See also* 1934 P. 68=147 I.C. 767; 1934 L. 917=151 I C. 163. When the sale has been effected and possession delivered, if the consideration has not been paid, the vendor can only sue for it and cannot set aside the sale. 36 M. 8=21 M.L.J. 800. *See also* 51 I.C. 104=29 C.L.J. 250; 17 C.W.N. 1161=19 C.L.J. 146; 19 I.C. 562; 53 P.R. 1916=34 I.C. 474 (F.B.). In a suit for possession the vendee is entitled to a decree free of any condition for payment of price. 43 M. 712=38 M.L.J. 467. *See also* 1929 A. 85. Deed of sale executed by widow to her mother-in-law in lieu of maintenance due is sale. 1928 A. 204. Where the execution of sale-deed is admitted, it is for the vendor to prove that consideration did not pass in spite of the recital that it passed. But where the vendee does not get possession under the deed. for a long time; the burden of proving that consideration passed is shifted to him. 61 I.C. 634=10 L.B.R. 264. Where the vendor agrees to sell property to the vendee in consideration of certain decretal amounts due from him to the vendee, the decretal amounts change their legal character and become purchase-money in the hands of the vendors. 1937 Mad. 714=(1937) 2 M.L.J. 922.

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IMMOVABLE PROPERTY.—An interest under a deed of settlement, whereby a person is granted an income in future rents and profits of certain immovable property and also a share in the proceeds of the sale of the property in future, is immovable property within the meaning of S. 54, and sale or transfer of such interest cannot be effected, otherwise than by a registered instrument. Such a transfer cannot also be effected without a registered deed in view of Ss. 5 and 8, Trusts Act. 63 I.A. 340=14 R. 400=40 C.W.N. 1253=1936 P.C. 230=71 M.L.J. 440 (P.C.). *See also* 12 R. 589. Right of cutting and appropriating plants is an interest in immovable property. 15 I.C. 234; so also, an undivided share in immovable property. 11 I.C. 673=14 O.C. 161; 83 I.C. 270=1924 R. 257. Immovable property includes superstructure of a house. 91 I.C. 754=1926 M. 343; a mortgage-debt. 27 C.L.J. 453=22 C.W.N. 614; 1922 M. 344; and house property with option to pull it down. 1926 M. 343.

GRANT OF EASEMENT.—The *grant* of a mere easement does not involve such a transfer of ownership in immovable properties as is contemplated by S. 54 and the same does not require registration. 115 I.C. 145=1929 M. 79 =57 M.L.J. 45; 34 I.C. 95; 20 C.W.N. 1158= 34 I.C. 450. *See also* 31 A. 612.

SALE OF EQUITY OF REDEMPTION. must be registered. 50 A. 986=1928 A. 726 (F.B.). *See also* 15 I.C. 853; 38 I.C. 819; 49 I.C. 426; 37 M. 423; 23 M.L.J. 339; 11 A.L.J. 40= 18 I.C. 818; 23 C.W.N. 513=52 I.C. 558; 63 I.C. 284=24 O.C. 155. But *see* 39 B. 55=27 I.C. 613; 27 I.C. 594=16 Bom.L.R. 719 (Note); 26 A.L.J. 1084; 15 P. 772=1937 P. 178; I.L.R. (1939) Bom. 71=40 Bom.L.R. 1192=1939 Bom. 31. As to *sale of equity of redemption under a compromise* see 16 Bom.L.R 719 (Note)=27 I.C. 594.

REVERSION is intangible immovable property and a transfer of it requires registration. 40 B. 319. S. 54 deals with sales of immovable property. The 'other intangible thing' referred to in the section is intended to embrace those *imponderables* which are related to immovable property such as, for example, a reversionary right. There is nothing in the section or Act to justify the conclusion that all licences which are intangible things can only be transferred by a registered instrument There is no law which expressly enjoins that the transfer of a licence to sell electricity can be effected only by written or registered instrument. I.L.R. (1940) A. 568=1940 A.L.J. 449=1940 A. 458. A transfer of property to wife to be enjoyed for her life in lieu of maintenance needs no registration. 45 M. 612=42 M.L.J. 410. Transfer by a widow of her life interest for a price above Rs. 100 requires to be registered 34 I.C. 748. A transfer in lieu of *dower* is a sale and has to be registered. 64 I.C. 126=17 N.L.R. 403; 28 O.C. 227=87 I.C. 176. *See also* 35 P.L.R. 1915=27 I.C. 562; 38 C.W.N. 747 =1934 C 693. Before registration no title passes, though the deed of transfer has been executed, 5 Pat L.J. 715=59 I.C. 290. (*See* now S. 53-A. *Supra*). As to sale of *contingent interest*, see 11 I.C. 673. Joint family property —Undivided share of less than Rs. 100 in value —Delivery—Constructive delivery, not sufficient—Registration. the only mode of transfer. 144 I.C. 919 (N) All cases of *hiba-bil-evaz* cannot be held to be sales within the definition given in S. 54, Transfer of Property Act, and writing and registration is not always necessary. [1926 O. 186, Rel. on.] 11 O.W.N. 592=1934 O 163. S 54, has no application to an instrument assigning or transferring a decree for money. A simple decree for money (or for possession of immovable property) is not an "intangible thing" under S. 54. Nor can a decree for money be, by any stretch of reasoning regarded as immovable propery. The assignment of such a decree does not require registration for its validity. 17 Pat L.T. 536. As to assignment of copyright see 1939 All 305; as to assignment of rents and profits see 1940 Rang. L.R. 7; 1938 Lah 304

ADMISSIBILITY IN EVIDENCE—REGISTRATION.—37 M 480=16 I.C. 587. Where a deed is not compulsorily registerable it can be admitted in evidence to prove contract of sale and its terms. 41 I.C. 779=21 C.W.N. 1149; 31 I.C. 52=29 M.L.J. 721; 56 I.C. 382; *also* 30 C.W.N. 254; 2 I.C. 413 (Cal.); 23 C.W.N. 284=47 I.C. 428 67 I.C. 144; 1923 R. 230; or the nature of possession. 1925 A. 206 (1). Unregistered sale-deed for Rs. 90—Admissibility in evidence. *See* 26 A.L.J. 1084; 79 I.C. 394. It is admissible in evidence to prove the nature of possession of vendee. 1930 R. 188. Non-payment of price may be proved by oral evidence even in spite of a recital to the contrary in the sale-deed *See* 27 I A. 93=22 A. 370; 5 M. 6; 11 C. 480; 7 W.R. 428; 4 Pat. L J 517; 8 All. 649; 61 I.C. 634=10 L.B.R. 264.

SALE BY DELIVERY OF POSSESSION AND REGISTRATION.—Where an unregistered deed of sale in respect of immovable property worth less than Rs. 100 is executed on a particular day and the property sold is delivered to the purchaser some days later in pursuance of the sale-deed, there is no reason why the sale should not stand valid It is not necessary that delivery of possession of the property should be contemporaneous with the execution of the sale-deed though the unregistered sale-deed will not of itself confer any title on the purchaser. 1939 Pat. 218 *See also* 1941 N.L.J. 643. An unregistered sale-deed of properties of value less than Rs. 100 is invalid for purposes of conveying title. It can only be used as proof of the terms of the contract between the parties. But the title can pass to the vendees by delivery of possession of the properties. 10 Pat.L.T. 449; 14 Pat. L.T. 224. Even in the case of a sale for less than Rs. 100 where delivery of possession is not possible, the deed in order to be valid must be registered. 142 I.C. 582=1933 C. 544; 144 I.C. 919. Though there is no doubt abundant authority that copyright is an intangible thing it is equally clear that copyright is movable and not immovable property. S. 54 has no application to the sale of movable property and the words 'intangible thing' in that section have reference only to immovable property. The section has no application to the transfer of a copyright and it could be validly assigned by an unregistered instrument. I.L.R. (1939) All 275=1939 A.L.

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J. 71=1939 All. 305. A deed is necessary to effectuate a transfer of ownership of Crown lands even though the value may be less. than Rs. 100. 10 P. 203=1931 P. 268. Admission of parties cannot pass title when the section requires registration. 13 I.C 436; 43 C. 790. A purchaser of immovable property of the value of Rs. 100 and upwards cannot in the absence of registered deed sue for a declaration of title except when he has acquired title by adverse possession. 10 R. 529=140 I.C. 777; 151 I.C. 227=1934 R. 127.

TITLE BY ESTOPPEL.—Even in the absence of registered conveyance, acts of parties might create an estoppel, preventing the owner from asserting his title. 45 C. 909=45 I.A. 97=35 M.L.J. 46 (P.C.). *See also* 46 A. 759=22 A L. J. 719; 33 C.L.J 437; 2 R. 285=81 I.C. 857=1924 R. 214 (F.B). But mere admission cannot operate as an estoppel in creating title 20 I. C. 679=41 C. 148. There is no estoppel contrary to Ss. 54 and 118 of the Act. 32 I.C. 5=30 M.L.J. 1. *See also* 36 M. 564=23 M.L J. 301. But see now S. 53-A, *supra*. Conduct of parties and part-performance may create title even in the absence of a registered conveyance. 42 C. 801=42 I.A. 1=28 M.L.J. 548 (P.C.); 40 A. 187; 33 C.L.J. 437; 40 M. 1134=33 M. L.J. 252. Doctrine of part-performance as a defence, see 29 Bom. L.R. 1419. *See also* 75 I. C. 141. see now S. 53 A.

TITLE BY DELIVERY.—Where value is below Rs. 100 delivery will pass title. But real delivery is necessary. 48 C. 509=48 I.A. 127 (P. C.). *See also* 8 Bur.L.T. 268=33 I.C. 612; 8 Bur. L.T. 70=29 I.C. 886; 3 Bur.L.R. 49=8 I.C 443; 29 I.C. 413 (C.); 5 M.L.T. 263=4 I C. 1135; 10 Pat.L.T. 449. Constructive delivery by delivery of the instrument is insufficient. 60 I.C. 833=25 C.W.N. 985=40 M.L.J. 489 (P. C). Where the vendee is in possession, no actual delivery is necessary. 48 M.L.J. 264; 38 M 1158=27 M.L.J. 497; 92 I.C. 478=1926 A. 300 *See also* 11 Pat L.T. 478=123 I.C 799 =1930 P. 53; 60 C. 384=1933 C. 411=144 I. C. 155 But see 34 C. 207. If the parties put the terms of the sale in writing, sale ceases to be one by delivery. 28 L.W. 234=111 I. C. 677=1928 M, 546. *See also* 19 C. 623 (F.B.); 1925 A. 206; 51 I.C. 561; 29 M L.J. 721. Sale of property though less than Rs. 100 in value, if in writing, must be registered, 1928 M. 546; 30 C W.N. 254=93 I.C. 115=1926 C. 705. Even in the case of a sale for less than Rs. 100 where delivery of possession is not possible, the deed in order to be valid must be registered. 142 I.C. 582=1933 C. 544.

WHEN SALE IS COMPLETE.—See 59 I.C. 114; 1924 N. 146; 5 Pat. L.J. 715; 22 Bom.L.R. 1079: 39 B. 55=27 I.C. 613. The title passes on the execution and registration of the deed though the purchase money may remain wholly or partly unpaid except where there is an agreement to the contrary. 10 P. 264. An unregistered sale certificate cannot create title. 43 C. 790=20 C.W.N. 370; 1937 Nag. 1; 1938 Nag. 253; nor entry in revenue papers. 34 I.C, 171=38 A. 411: nor mutation proceeding; 100 I.C. 270=1927 A. 338; nor a rajinamah and kabuliyat; 59 I.C. 114=22 Bom.L.R. 1079, A conditional sale is not complete until the condition is performed. 112 P.L.R. 1911=9 I. C. 833. *See also* 5 R. 636. Where the vendee of the property sold is already in possession of it mutation of the vendee's name in the records is sufficient to constitute delivery of possession so as to satisfy S. 54 (34 I.C. 691, Rel. on.) 151 I.C. 55=1934 P. 301; 15 P. 772=1937 P. 178; 1936 R. 497; 1936 L, 756,

PRIORITY AND NOTICE.—A prior oral purchaser with possession can effectively retain his title against a subsequent registered purchaser. 57 I.C. 447=44 B. 586; 25 Bom.L.R. 1027=1924 B. 150; 9 P.L.R. 1916=29 I.C. 305. See *also* 30 I.C. 7; 15 Cr.L.J. 29=22 I.C. 285; 7 M.L.J. 372=5 I.C. 57. See *contra* 22 I.C. 285. Possession of the prior purchaser is held sufficient to put the later purchaser on enquiry. 20 M.L..J 127=34 I.C. 906. Prior agreement for sale has priority in law over later agreement or sale if there is knowledge of the prior agreement. 1929 A. 817.

SHAM TRANSACTION.—S. 54 no doubt lays down that immovable property worth less than Rs. 100 can be sold by means of a registered instrument but it does not lay down that if the parties to a socalled sale get a sham deed of sale registered without intending that the transaction should take effect even then the ownership of the property will pass from one to the other by registration. 13 Luck. 484=1937 O. 493. A sham transaction is not sale. It is only in cases where transfer is genuine and title passes that the vendee is entitled to possession and the vendor can maintain suit for consideration money if it has not been paid. Where however no consideration passes from the vendee nor is there any intention of passing the rights from the vendor to the vendee and the whole transaction is fictitious, title does not pass to the vendee and a suit by the latter for possession is not maintainable. 183 I.C. 221=1939 Pesh. 27.

SUIT FOR SPECIFIC PERFORMANCE.—Agreement to sell immovable property—Vendee's right to specific performance as against subsequent transferee under registered deed. 61 I.A. 115=13 P. 242=1934 P.C. 68=66 M.L.J. 255 (P.C.). A contract for sale of immovable property does not become unenforceable, merely because of failure to keep the dates assigned by the contract either for completion or for the step towards completion. Equity does not regard the terms or the letter of the contract, but rather its substance. The disregard of the terms of the contract so far as time is concerned may depend upon the express stipulations of the parties, the nature of the property or the surrounding circumstances. 15 Pat.L.T. 469=1934 P. 518. Earnest money is generally paid as a guarantee for the payer's performance of the contract and is subject to forfeiture if he makes default. "It is part of the purchase price when the transaction goes forward; it is forfeited when the transaction falls through by reason of the fault of the vendee". [50 M.L.J. 629 (P.C.), Ref.] Where after the purchaser failed to complete the contract for sale within a reasonable time, the seller parted with his property and put it out of his power to perform his part, that does not make the seller equally in default with the purchaser, and does not dis-

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entitle the seller from retaining the earnest money. 1933 M.W.N. 836.

SALE AND CONTRACT TO SELL WITH POSSESSION DISTINGUISHED.—S. 54 expressly enacts that a contract for the sale of immovable property does not of itself create any interest in or charge on such property. There is therefore no room for the application of the English equitable doctrine that a contract for sale of real property makes the purchaser the owner in equity of the estate. Thus under the law applicable before the insertion of S. 53-A, an averment of the existence of a contract of sale, whether with or without an averment of possession following upon the contract, was not relevant defence to an action of ejectment. If the contract is still enforceable the defendant may found upon it to have the action stayed, and by suing for specific performance obtain a title which will protect him from ejectment. But if it is no longer enforceable, its part-performance will not avail him to any effect. 61 I.A. 388=39 C.W.N. 34=1934 P.C. 235=67 M.L.J. 865 (P.C.). *See also* 45 M.L.J. 528=46 M. 919 (S.B.); 1930 P. 53 and cases referred to therein; 46 B. 722; 45 B. 434; 40 B. 498. *See contra* 29 I.C. 195; 39 B. 472=28 I.C. 946. *See* now S. 53-A. Contract of sale need not be registered. *See* 16 I.A. 233=17 C. 291; 5 B. 143; 7 B. 310; 9 M. 103; 26 C. 222; 5 M. 115; 28 B. 396; 12 M. 505; 13 M. 324; 14 M. 55; 1931 M.W.N. 297. In Indian Law contract to sell land creates no charge on the land. 44 C. 542=44 I.A. 15=32 M.L.J. 6 (P. C.); 41 I.C. 468=2 Pat.L.W. 108. Principles of English law have no application to places where the T. P. Act is in force. 44 C. 542 (P. C.). Contract to sell immovable property does not create even an equitable interest in property. 79 I.C. 429=1924 A. 396. *See also* 55 C. 35=32 C.W.N. 16=1927 C. 956. But *see* 33 Bom.L.R. 1296=1931 B. 578; 20 M.L.T. 127. It was otherwise before passing of T. P. Act. 24 Bom.L.R. 449=1922 B. 84. A contract for sale establishes only a fiduciary relationship which ends when a registered instrument comes into existence or something occurs to absolve the vendor for his promise and with the termination of that relationship the equitable right of the vendee to retain possession ends and he becomes a new trespasser. 121 I.C. 18=1930 M. 84. Contract is not vitiated by the rule against perpetuities. 45 A. 478=21 A.L.J. 430; 39 M. 462=28 M.L.J. 471. A valid contract by a manager of a joint Hindu family to sell, though it cannot be enforced against *bona fide* purchaser without notice, may be enforced against the surviving members of a joint family. 29 I.C. 435 (M.). Time can be made the essence of a contract to sell by parties, though ordinarily not. 48 M.L.J 150. Agreement to sell mortgage rights—Sale not completed—Rights of parties. 33 C.W.N. 907. *See also* 24 B. 400; 1925 R. 68; 18 B. 13; 23 B. 181; 24 M. 449. Contract of sale—Vendee let into possession before payment of purchase-money—Liability of interest in equity. 1933 M.W.N. 127=1933 M. 844. A contract for sale of immovable property though it does not create a charge or interest in immovable property, gives the obligee the benefit of an obligation to execute a conveyance under para. 2 of S. 40 which may be enforced against a transferee with notice of that obligation. 34 I.C. 906. Where a decree for specific performance of a contract was passed, *held*, the vendor could not recover rent but was entitled to interest on the purchase-money from the date when the contract was intended to be performed. 120 I.C. 538 (2)=1939 L. 131. A promisee who has paid advance under a contract of sale of land, but to whom no registered title has been conveyed cannot pass to others legal title to the land by a registered deed of sale. 2 R. 459=86 I.C. 205=1925 R. 68. As to distinction between contract to transfer and conveyance, *see* 122 I.C. 872=1930 A. 1 (F.B.).

SALE AND HIRE-PURCHASE AGREEMENT DISTINGUISHED.—The distinguishing mark of a true hire-purchase agreement as distinguished from a sale, is that the hirer should have a right to terminate the agreement at his pleasure and that the 'hirer' should be bound to pay the full value of the goods by way of instalments without any option to cancel the agreement if he so wished before the full value of the goods is paid. Where under an agreement the defendant bound himself to pay the plaintiff a certain sum in advance as monthly hire and it was further agreed that if he paid ten months hire regularly he should become the purchaser, but if he failed to pay regularly the plaintiff could cancel the transaction and terminate the agreement. *Held*, that the agreement was one of sale and not hire-purchase. 1932 A.L.J. 761=1932 A. 607.

ATTACHMENT SUBSEQUENT TO CONTRACT FOR SALE.—The section does not affect any equitable rights which may arise under a contract of sale. The person in whose favour the contract is made becomes the equitable owner and an attachment can only be subject to such obligation, if subsequent to the contract of sale. 5 L.W. 234=38 I.C. 107.

SALE WITH CONDITION TO RECONVEY.—Where a sale is effected with a condition to reconvey, on the sale consideration being paid back by a certain fixed date, money actually tendered before the date so fixed and paid into Court is good payment and has the same legal effect as a payment made into a Bank in which the person entitled to receive the money has an account to the account of such person. 100 I. C. 494=1927 O. 159.

Secs. 54 and 58 (c.)—SALE OR MORTGAGE BY CONDITIONAL SALE—TEST.—It is a matter often of some difficulty whether a particular document or set of documents disclose a transaction of mortgage by conditional sale or out-and-out sale. In order to bring a transaction within the category of mortgage, the relationship of debtor and creditor must subsist between the parties and if there is no debt for which the transfer is a security it is impossible to hold that the transaction is a mortgage. When a document appears on the face of it to be a sale deed, in the absence of fraud it must be held to embody a transaction of sale. The burden of proving it to be a deed of mortgage will rest heavily on the party alleging it to be so. Circumstances like the existence of a debt, a short period of repayment, grantor continu-

55. In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold :

Rights and liabilities of buyer and seller.

(1) The seller is bound—

(*a*) to disclose to the buyer any material defect in the property [1][or in the seller's title thereto] of which the seller is , and the buyer is not, aware, and which the buyer could not with ordinary care discover ;

LEG. REF.

[1]Inserted by Act XX of 1929, S. 17.

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ing in possession, stipulation for interest on repayment, inadequate price and a contemporaneous agreement for reconveyance indicate that a transaction is a mortgage. 1939 A.L.J. 377=1939 All. 539.

Sec. 55.—S. 55 only applies to those cases in which the ownership of property has passed under an agreement of sale ; and if an agreement falls under S. 17 (2) (*v*) of the Registration Act, it is one under which the ownership has not passed to the purchaser and therefore could not come under S. 55. The explanation added to S. 17, Registration Act, by Act II of 1927, does not deal with those cases in which a lien has been specifically created. 13 P. 620 =15 P.L.T. 443=1934 P. 495. The section applies to executory contracts as well. 94 I. C. 561=1926 M. 369=50 M.L.J. 228. The operation of this section can be controlled, curtailed or excluded by the agreement of the parties. 31 C. 57 (71) ; 47 I.C. 340. (Note the words "in the absence of a contract to the contrary" at the commencement of the section.) This "contract to the contrary" must be clearly and unambiguously expressed. 39 M.L.J. 449 =60 I.C. 235 ; 31 C. 57 (73) ; 41 M.L.J. 267. But *see* 1933 A.L.J. 201=1933 A. 203. Where it was held that the "contract to the contrary" need not be express and may be implied from the terms of the sale-deed, but that the contract, covenant or agreement must so clearly be inconsistent with the statutory rules as to lead to the inference that it had been made to qualify the generality of the law. If S. 55 be taken as a whole, there is no warrant for taking buyer and seller to mean those who have actually completed a sale ; those in the course of transacting a sale are also contemplated. A buyer who has taken an agreement can put an end to his contract if he finds before the completion of the sale that the seller is disabled from, performing his promise in its entirely, such as regarding the covenant to deliver vacant possession of the property sold. 1932 M.W.N. 122. Suit by vendee for possession—Portion of consideration remaining unpaid—Form of decree to be passed. 30 Bom.L.R. 1604=1929 B. 60 ; 39 M. 288=27 M.L.J. 746. There is a distinction between a sale where the consideration is intended to be paid and is not paid and were the consideration is not intended by both parties to be paid at all. In the former case, the title would pass to the purchaser and in the latter case though the vendor was tricked into going through the form of execution and registration of the document, the sale.deed would be void as a colourable transaction. 138 I.C. 534 =34 Bom.L.R. 427=1932 B. 247. Limitation for suit to enforce him for unpaid purchase money, *See* 1942 M.W.N. 631=(1942) 2 M.L. J. 482.

Cl. (1) (a).—*A covenant for title must be distinguished from a covenant for quiet enjoyment.* The former if broken, is necessarily broken immediately upon the execution of the assurance which contains it ; and the purchaser may bring an action immediately and is not bound to wait till he is evicted. But a covenant for quiet enjoyment affords no right of action until a disturbance. The onus is on the plaintiff to allege and prove a breach of the covenant. 57 M. 1016=1934 M. 687=67 M.L.J. 647. The cause of action from the breach of one part of the covenant will lapse if the remedy is not sought within the statutory period, but that will not destroy any remedy to which the vendee may be entitled by reason of the breach of the other part of the covenant. [1932 N. 5 (F.B.), Rel. on.] 30 N.L.R. 138=148 I.C. 480=1934 N. 16. Considerations regarding defective title, and duty to disclose the same. 52 B. 883= 113 I.C. 27. If the purchaser could have discovered the defect in title if he had taken reasonable care to investigate into title, the duty cast on the vendor is considerably narrowed. 58 B. 883. *See* 30 Bom.L.R. 1149=1928 B. 427. *See also* 55 I.A. 135=50 A. 371=55 M. L.J. 689 (P.C.). The words "ordinary care" are somewhat indefinite. A purchaser of property is under no legal obligation. But in dealing with real property, regard must be had to the usual course of business. A purchaser who wilfully departs from it to avoid knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects, which would have come to his knowledge if he had transacted the business in the ordinary way. 36 Bom.L.R. 1041. When a sale is complete and a conveyance is executed vendee cannot avoid the sale on subsequent, discovery of defect in vendor's title unless there has been fraud. His remedy is merely to sue for damages. (52 C. 914, Rel. on.) 1933 L. 262=34 P.L.R. 714. *See also* 1933 S. 144=144 I.C. 371. If the seller had knowledge of defect but the buyer had not, then it amounts to fraud. There is no fraud if the buyer had also knowledge. 50 C. 615=1923 C. 641 ; 50 M.L.J. 100 =1925 M. 1209. *See also* 32 C. 357. But knowledge of defect of title does not bar a suit for damages based on a special covenant for title. 1929 M. 775. *See also* 11 M. 419 ; 16 N.L.J. 201=1933 N. 364. Non-disclosure of defects unknown to vendor is not fraud and

(*b*) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power;

(*c*) to answer to the best of his information all relevant questions put to him by the buyer in respect of the property or the title thereto;

(*d*) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place;

(*e*) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession, as an owner of ordinary prudence would take of such property and documents;

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would not vitiate the sale (*cf.* S. 116, Contract Act). But the omission to disclose a known defect is fraudulent and the sale can be avoided. 1925 R. 372. For what is knowledge of defect in title, *see* 38 M. 887; 49 B. 245. Existence of mere doubts on the part of the vendee regarding the vendor's title will not disentitle th e vendee to damages. 22 L.W. 392=1925 M. 1209. A defect to be material must be of such a nature that it might be reasonably supposed, that if the buyer had been aware of it, he might not have entered into the contract at all, because he would be getting something different from what he contracted to buy. A defect in title, as distinct from a defect in the property itself, is a latent defect, because *prima facie* the seller knows his title and the buyer does not. Liability of the property sold to be acquired compulsorily under the Land Acquisition Act amounts to a material defect as well as a latent defect. 36 Bom.L.R. 1041. Non-disclosure of restrictive covenant contained in the conveyance to vendors from original owners and of vendor's breach thereof entitles vendee to repudiate contract. Mere reference to some covenant without mentioning even its purport is not enough. 49 B. 325=26 Bom.L.R. 1071; 36 Bom.L.R. 1041. Where after a sale of land with a warranty by the vendor to be liable for the purchase price in case of any defect in title a suit is brought against the vendor and vendee by the real owner and on the vendor admitting such owner's title the vendee had compromised the suit by giving up a portion of the property, the vendor was bound to return the purchase price as the sale had failed for want of consideration and it was not open to him to say that the vendee had made advantageous bargain with the real owner and had practically lost title thereby. 1934 P. 280=147 I.C. 1170.

Sub-cl. (b).—In the absence of demand on the part of the vendee the vendor is not bound to produce title deeds. 35 I.C. 573. The vendor is bound to produce a marketable title. 49 B. 245=1925 B. 60; 58 C.L.J. 513=1934 C. 372. The failure to produce title deeds is omission to carry out the terms of the contract and the purchaser is entitled to refund of the earnest money with interest at 6 per cent till date of recovery. 167 I.C. 858=1938 Pesh. 8. As to damages for breach of covenant for title *see* 39 M.L.J. 706=44 Mad. 167. *See also* 41 Bom. 300=32 M.L.J. 175=44 I.A. 36 (P.C.) as to production of documents.

Sub-cl. (c).—The vendee has got the right to put questions. But that does not affect the duty of the vendor to disclose material defects as laid down in cl. (*a*). *See* Sheppard and Brown T. P. Act); *see also* 26 B. 519; 1 Bom.H. C. 777; 16 C. 330. There may, however, be specific conditions expressed in plain and unambiguous words restricting the rights of the purchaser as regards his requisitions about title. *See* 12 B. 1 (17); 15 B. 657. Such right may be lost by waiver. 13 M. 158. Any information regarding the income or the rental of the property to be sold is a relevant question within S. 55 (1) (*c*) and it is the duty of the seller to answer such a question to the best of his information. If he gives an answer which he knows to be false he is guilty of a breach of duty and misrepresentation. Further if he volunteers any information about the income he is certainly bound to give true information. 28 N.L.R. 184=1932 N. 148.

Sub-cl. (d).—The purchaser has to tender a conveyance for execution; until such tender is made or waived by the vendor, the purchaser has no right to obtain the title-deeds. 31 C.L. J. 87=55 I.C. 791 (P.C.). *See also* 30 Bom.L. R. 920=1928 B. 328. But where the vendors specifically agree to convey the property sold to the vendee or his nominee, the vendee is under no duty to tender to the vendors a draft conveyance. 59 C.L.J. 503=1934 C. 699. Failure to pay expenses of sale and registration shows default on vendee's part. 26 I.C. 121=27 M. L.J. 482. *See also* 4 B.H.C.R. 125 (O.C.J.). When a person purchases the right, title and interest of an insolvent he is entitled to demand a conveyance either in favour of himself or in favour of another to whom he has in the meanwhile sold his rights in the property. The purchaser at the insolvency sale cannot be deprived of the benefit of S. 28 (3) of the Stamp Act. 37 Bom.L.R. 440. A purchaser is in actual possession or receipt of the rents and profits must pay interest upon his purchase-money from the time fixed for completioa of the transaction. 1923 N. 37; 55 I.C. 405. As to the *effect of non-registration owing to the default of vendee.* see 31 M.L.J. 181=12 L.W. 161=43 M. 822.

Sub-lc. (e).—The vendor is regarded as a trustee for the purchaser, who is in equitv the owner of the land. Fry on Sp. Performance 4th Ed. 605; Shep. and Brow. T. P. Act. *Cf.* also Trust Act, S. 15.

(*f*) to give, on being so required, the buyer or such person as he directs such possession of the property as its nature admits ;

(*g*) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all incumbrances on such property due on such date, and, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same :

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Sub-cl. (f).—The vendee cannot recover any expenses which he may have incurred subsequent to the sale in obtaining possession. If he wishes to rely upon the covenant granted to him by the statute, then he can enforce his rights only by a suit against the vendors for specific performance of the contract of sale or for damages. 167 I.C. 84=1937 R. 31. "Contract to the contrary". *See* 47 I.C. 340 ; 1924 A. 937. In every sale, covenant to deliver possession is implied. 45 M.L.J. 431=47 M. 150; 29 I.C. 195 ; 6 L. 308=1925 L. 481. The vendee has a right to possession even though a part of the consideration remains unpaid. 34 I.C. 106. Court can pass a conditional decree for possession on payment of balance of consideration. 39 M. 288=27 M.L.J. 746. *See also* 30 Bom. L. R. 1604=1929 B. 60. The Court in passing a decree for possessession in a suit for specific performance should also declare a statutory charge on the property in favour of the seller in respect of the unpaid purchase-money due to the seller from the purchaser, and should order that the vendee should pay the balance within a fixed period, and that in default the vendor should on payment of Court-fee recover that amount by sale of the property in suit, 31 S.L.R. 150=1937 S. 198. A vendee's suit for possession should be brought within the time allowed to his vendor who was out of possession on date of sale. 24 I.C. 216. Delivery of physical possession is necessary especially when thei dentification of the property difficult. 1 P.L.J. 140=35 I.C. 539. *See also* 149 I.C. 304=1934 A. 617. As to possession by mere attornment, *see* 1925 R. 372=92 I.C. 766. Art. 116 of the Lim. Act applies to a suit for refund of purchase-money on default in delivery of possession. 49 B. 596.

Sub-cl. (g).—The liability to discharge encombrances does not pass to the transferee on a sale. 22 L.W. 786. *See also* 119 I.C. 1=1929 A. 791; 93 I.C. 670=1926 M. 173; 27 N.L.R. 392 (and cases referred to therein). A vendee paying off a prior mortgagee to save the property from sale, can recover it from his vendor 87 I.C. 756=1925 A. 704. "Incumbrance" under the section is wide enough to include a recurring claim for maintenance charged on the property by a decree. 11 O.W.N. 1348=1934 O. 492. Where property has not been sold subject to any incumbrance, or making the vendee liable for any incumbrance, the vendor is clearly bound under S. 55 (g) to meet all the incumbrance. 1934 Oudh. 492. Covenant for discharge of encumbrance does not run with the land. 1927 M. 1072=106 I.C. 866. The provision under the clause cannot be enforced against the vendor without an express covenant after the completion of the purchase. 57 C. 683=51 C.L.J. 538=1930 C. 568. Where a leasehold is sold, the seller is bound to pay all rent accrued due up to the date of sale. 1924 P. 822. Express provision as to certain encumbrances does not exclude vendor's liability to discharge an undisclosed encumbrance. 87 I.C. 756=1925 A. 704. Effect of vendee paying off encumbrances, see 1922 A. 508; 1925 A. 704. Where properties are sold free from encumbrances and the purchaser pays off mortgages or decrees thereon he is entitled to a refund from the seller of moneys spent by him to clear his title. 42 M.L.J. 444=26 C.W.N. 514=1922 P.C. 176 (P.C.); 11 O.W,N. 1563=1935 O. 142. As to measure of damages, Sec. 1938 Nag. 257. Where the vendors undertake to indemnify their vendees, if they suffer any loss or damage on account of any claim to the property sold, where it is found the vendees were negligent in their defence of a suit on mortgage by the original owners and did not raise proper pleas available to them and that there was really no cloud on the title of their vendors and with a little diligence exercised on the part of the vendees the cloud that was sought to be cast on the title of the vendors could have been cleared. 182 I.C. 60=1938 Lah. 743. Contract to sell certain lands acceptable to vendee out of larger area belonging to vendor—Lands chosen by vendee found encumbered—Duty of vendor to discharge the encumbrances before conveyance. 14 R. 766=1937 Rang. 753.

"CONTRACT TO THE CONTRARY."—Express contract excludes statutory covenants. 22 A L.J. 576=79 I.C. 590=1924 A. 937.

S. 55 Cl. (2). An express condition in the the sale deed on the part of the seller to idemnify purchaser in case any defect in his title is subsequently discovered. is not necessary. 166 I.C. 302=1936 Lah. 746, In the basence of a contract to contrary there is an implied statutory covenant for title and power to transfer. 1938. A.L.J. 1136=1939 All. 170. Where the vendor had title to at least part of the property and the vendee obtained possession of at least part of the property, the vendee can only claim that the sale deed is voidable because of material defect in his vendor's title not disclosed by the vender. such non-disclosure amounting to fraud under S 55. The remedy in such circumstances is a suit for rescission of the sale deed, and for return of the price paid and not to ask for return of the price before the conveyance is rescinded. 1942 Sind. 81. Provisions of S. 55 compared with S. 108 as to *warranty of title in cases of*

Provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is incumbered or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof, from time to time, vested.

(3) Where the whole of the purchase money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power :

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sale and lease. 34 C.W.N. 347=1930 C. 561. The section applies to contracts to sell as well. 40 M. 338=32 M.L.J. 180 (F.B.); 49 M.L.J. 668; 50 M.L.J. 228; but not to a transfer of a mortgage debt; 31 I.C. 179=29 M.L.J. 454. Section does not apply to the Punjab and covenant as to guarantee of title cannot be implied in that province. But the Court may on equitable grounds apply analogous principles. 28 Punj.L.R. 74. As to covenant for title, *see* 1927 R. 134; 100 I.C. 327=1927 R. 90; 19 S.L.R. 337=1927 S. 120; 1929 M. 775. Sub-s. (2) of S. 55 does not apply where the vendee is dispossessed as a result of a pre-emption suit, inasmuch as it cannot be said that the interest which the vendor purported to sell to the vendor did not subsist at the time of the sale or that the vendee had no power to transfer his interest. 1935 O.W.N. 99=1935 O. 75. Though the Act does not apply to *pre-emption sales* so far as the formalities are concerned, the pre-emptor is entitled to enforce the implied covenant for title which runs with the land. 1931 N. 166=27 N.L.R. 392. The vendee is not entitled to payment of the difference between the sale price and that which he got from the pre-emtors who dispossessed him. 153 I.C. 715=1935 O. 75. Vendee's knowledge of defect of title —Effect. *See* 98 I.C. 450=1927 M. 193; 130 I.C. 88=1931 N. 14. Seller professing to transfer interest not subsisting commits a breach of covenant. 1922 A. 837. As to *extent of vendor's liability*, see 1933 A.L.J. 611=1932 A. 546. Unless the vendor's liability under S. 55 (2) is excluded by express convenant, his liability would be deemed to subsist though the vendee "may have some idea" as to the defect in title. 1933 A. 389=1933 A.L.J. 1938=144 I.C. 406; 8 P. 432=1929 P. 380. Covenant for title and contract to indemnify difference between. *See* 55 M.L.J. 151=51 M. 688. As to breach of covenant for title, see 31 Bom. L.R. 658 Express covenant in sale-deed—Suit to recover damages on the basis of implied covenant is maintainable. 1932 A.L.J. 69=1932 A. 224; In a suit brought not on the statutory covenanl contained in S. 55 (1) (f) but upon covenant of title contained in the sale-deed, a decree based on the provisions of the Transfer of Property Act cannot be passed. 167 I.C. 84=A.I.R. 1937 Rang. 31. When there is a guarantee of extent, shortness may justify withdrawal from contract. 69 I.C. 827. In all registered conveyances, a covenant for title is implied. 52 I.C. 269; 38 M. 1171; 27 M.L.J. 517; 38 M. 887=23 I.C. 570; 6 L. 308; 27 C.W.N. 1025=1924 C. 148; 127 I.C. 617=32 L.W. 138=1930 M. 748; 120 I.C. 163=31 P.L.R. 482; 1936 L. 746; but there is no implied covenant that the vendor shall put the vendee in possession. 94 I.C. 302=1926 M. 495=1926 M.W.N. 209. The mere passing of a decree for possession in favour of a third party would not constitute a cause of action for compensation for breach of the convenant of title, and the cause of action accrues only on dispossession in execution of the decree. 1936 O.W.N. 143=1936 Oudh 141. When the sale fails on account of want of title, sale price must be returned. 1923 L. 590. 13 I.C. 803=14 O.C. 343. *Caveat emptor* never applies to currency coins. 89 I.C. 2591=926 S. 17. But the doctrine of *caveat emptor* may apply when the seller does not in express terms guarantee title. 65 I.C. 734. Buyer having notice of facts indicating want of title of vendor does not mean that he covenants against benefit under this subsection. 40 M. 338=32 M.L.J. 180 (F.B.). The contract to the contrary must be in unambiguous terms. 39 M.L.J. 449=60 I.C. 235; 22 L.W. 704=29 M.L.J. 668. It cannot be oral because such an agreement would be inadmissible in evidence under S. 92 of the Evi. Act. 52 A. 604=124 I.C. 185=1930 A. 771. Notice of defect in title will enable the vendee to such rights only as his vendor had. 40 B. 498=37 I.C. 360. Notice or knowledge of defect in or want of title will not bar right to refund of proportionate price paid, unless there is a clear contract to the contrary. 60 I.C. 235=39 M.L.J. 449 ; 29 I.C. 747 ; 45 I.C. 669. The right to compensation or refund applies only in cases of complete sale. 27 I.C. 889=2 L.W. 155. In the case of a continuing breach, the cause of action arises when the title is finally declared to be in some person other than vendor. 47 I.C. 924=35 M.L.J. 124. But *see* 21 I.C. 740=1 L.W. 110. When the vendee is dispossessed, cause of action arises on the date of dispossession. 1921 M.W.N. 634. The benefit of this subsection is available even where the transferee compromises with the claimant. 35 A. 168=18 I.C. 52. Measure of damages is the price of land to which title was lost as on the date of eviction and not on the date of sale. 58 I.C. 757=1 L. 380 ; 44 M. 167=39 M.L.J. 706 ; 52 A. 704=1930 A. 771 ; 120 I.C. 163=31 P.L.R. 482 ; 130 I.C 88=1931 N. 14 ; 41 L.W. 728=68 M.L.J. 588. *See also* 1936 O.W.N. 143=1936 O. 141. And such damages include the value of improvements made by vendee. 130 I.C. 88=1931 N. 14. *Measure of damages* is the difference between the market value of the pro-

Provided that, (*a*) where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and (*b*) where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case (*a*) the seller, and in case (*b*) the buyer of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require ; and in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncancelled and undefaced, unless prevented from so doing by fire or other inevitable accident.

(4) The seller is entitled—

(*a*) to the rents and profits of the property till the ownership thereof passes to the buyer ;

(*b*) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer, [any transferee without consideration or any transferee with notice of the non-payment][1], for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part [from the date on which possession has been delivered.][1]

LEG. REF.

[1] Inserted by Act XX of 1939, S. 17.

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perty on the date of eviction and the price originally paid. 1929 L. 416 ; 19 S.L.R. 337=101 I.C. 704=1927 S. 120. If the purchaser free of all incumbrances had to pay off mortgages those moneys are recoverable from the transferor. 42 M.L.J. 444=26 C.W.N. 514=1922 P.C. 176 (P.C.) ; 41 C.L.J. 571=52 C. 914. As to *covenant to indemnity for expenses incurred in defending title*, see 43 M. 898=39 M. L.J. 316. Where there is a stipulation as to the payment of damages on given contingency it is not open to the vendee to receive further damages by way of compensation for the costs of litigation incurred in protecting title against a third person. 132 I.C. 892=1931 A.L.J. 97. *Implied warranty of title.*—Right of vendee to recover damages. *See* 1932 A.L.J. 598=1932 A. 553. Declaratory decree in suit by sons that sale by Hindu father is for necessity only in part—Vendee's right to sue for damages—Cause of action—When arises. 1935 L. 70. As to *limitation for a suit for damages for breach of an implied covenant of title*, see 52 A. 604=1930 A. 771 ; 14 N.L.J. 125 (F.B.) ; 68 M.L.J. 588.

Sec. 55, Cl. (3).—As to the documents of title to be delivered to buyer, *see* 11 B. 485 ; 15 B. 657. Land forming a block—Sale in different parcels to different persons—Covenant to produce title-deeds when called upon—Sale of remaining plot comprising largest area—Right to title-deeds—Covenants in prior sale-deeds to produce—If bar—Duty of purchaser to indemnify vendor. 42 Bom. L. R. 1024=I. L. R. (1941) B. 55=1941 B. 48. A deed of mortgage under which the mortgagee exercises a power of sale is clearly a document of title, and must be surrendered to purchaser of the property. 1939 M. 774=(1939) 2 M.L.J. 434.

Sec. 55, Cl. (4).—Applicability of English Common Law Rules, *see* 1926 M. 55 ; 44 C. 542 (P.C.). Where a portion of the purchase-money is left with the vendee for payment to a creditor who remitted a portion of the debt, the vendor could recover it from the vendee. 18 I.C. 503 (A). The unpaid vendor's lien is an interest in immovable property and an instrument assigning such a right, when the property is worth more than Rs. 100 in value, is compulsorily registerable under S. 17, Registration Act. 142 I.C. 730=1933 M. 181 ; 152 I.C. 375=10 L.W. 481=1934 M. 615. The vendor's lien is not extinguished by the vendee's undertaking to pay the vendor's creditors. 54 M.L.J. 109=108 I.C. 291. *See also* 39 M. 997=31 M.L.J. 530 (F.B.), (overruling) 33 M. 446 and 21 M.L.J. 359 ; 18 I.C. 503 ; 43 A. 314=60 I.C. 933. *See contra* 33 I.C. 527.

Sub-cl. (b).—The principle of equity that a purchaser of immovable property has a lien on the property purchased is recognised in S. 55 (4) (*b*) 8 O.W.N. 1313. But the principle does not apply to an exchange. 16 I.C. 109=1912 M.W.N. 535 ; nor to a lease. 48 M. 821=49 M.L.J. 313. A mortgagee decree-holder purchased the entire mortgaged property in execution of his decree and before the formal confirmation of the sale in his favour, agreed to transfer a portion of the mortgaged property to the mortgagor for a certain sum. In pursuance of the agreement, a compromise petition was presented to the Court and the Court confirmed the sale, in respect of the mortgaged property excepting the portion which was the subject-matter of the transfer. The judgment-debtor failing to pay the amount executed a simple mortgage in respect of the property in favour of the decree-holder. The decree-holder brought a suit on the mortgage to recover the money by sale of the mortgaged property. The lower appellate Court held that the transaction could not operate as a mortgage as the deed had not been attested. *Held*, that the transaction in respect of the transfer of the portion of the mortgaged property, although it could not operate as a mortgage, constituted a sale and that under S. 55 (4) (*b*) the mortgagee decree-

(5) The buyer is bound—

(*a*) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest ;

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holder was entitled to a charge upon the property transferred in the hands of the mortgagor judgment-debtor for the amount of the purchase-money and for interest thereon. The charge could be enforced by sale of the property under S. 100, T. P. Act, and under O. 34, R. 15, C. P. Code, as in the case of a simple mortgage. 63 I.A. 304=59 M. 910=1936 P. C. 204=71 M.L.J. 347 (P.C.) Where the vendee of the equity of redemption who retains part of the consideration for paying off the mortgage gets a reduction of the interest under the Agr. Rel. Act and discharges the mortgage, the vendor has a right to recover the difference between the amount paid and that agreed to the paid, as it is unpaid purchase-money. I.L.R. 1940 A. 340=1940 A.L.J. 203=1940 A. 351. An agreement to receive purchase-money by instalments does not imply abandonment of lien. 43 A. 544=63 I.C. 495 ; whether execution of a pro-note implies abandonment of lien is a question of fact regarding the intention of the parties. 84 I.C. 949=47 M.L.J. 737 ; 21 M.L.J. 849=11 I.C. 890 ; 44 I.C. 523=35 M. M.L.J. 304. *See also* 18 I.C. 81=1913 M.W.N. 826 ; 107 I.C. 302=1928 M. 486. Where the consideration for a sale is a sum of money, and for a portion of such consideration the vendee executes a promissory note in favour of the vendor, the vendor can, in the absence of anything to show that the statutary charge has been abandoned, enforce the statutory charge for the amount covered by the promissory note and remaining unpaid. 1939 M. 590=(1939) 1 M.L.J. 344. Promissory note for purchase-money executed by vendee in favour of third party as benamidar for vendor—Effect. *See* 51 M.L.J. 856=50 M. 548=108 I.C. 291 ; 35 M. L.J. 304=44 I.C. 523 ; 9 O.W.N. 1032 ; (1940) 2 M.L.J. 827. *See also* 43 Bom.L.R. 1014 ; 1941 L. 10 ; (1942) 1 M.L.J. 603. An assignment of the vendor's lien is valid. 44 C. 573= 44 I.A. 30=32 M.L.J. 206 (P.C.). *See also* 42 C. 489=19 C.W.N. 899 ; 103 I.C. 690=1927 N. 332 ; also by Court auction-purchaser of vendor's interests. 1936 M.W.N. 926=1937 M. 92. The lien can be exercised against a transferee without notice. 38 A. 254= 35 I.C. 284 ; 25 I.C. 939 ; 25 I.C. 208 ; but not against a transferee for value without notice. 3 O.W.N. 25. *See also* 38 A. 254 ; 91 I.C. 917=1926 O. 81=1 Luck. 7 ; 1937 M. 92 ; 41 P.L.R. 377=1939 L. 273. Where under a sale-deed the bulk of the consideration is retained with the vendee for being paid to certain holders of decrees against the vendor it cannot be said that the statutory charge in respect of the vendor's lien for unpaid purchase money is given up. The mere fact that the vendor asks the vendee sometime after the sale-deed not to pay the amount due to one of the creditors does not mean that the vendor intends to give up or waive the right given to him by the statute in the shape of a charge on the property for unpaid purchase-money. The charge is an interest in property and is saleable. Where the holder of one of the decrees, who is not paid by the vendee brings the property to sale in execution of the decree against the vendor, it is the charge for unpaid purchase-money which the vendor had in the property after the private sale by him that passes to the purchaser of the property at the execution sale, and from him to a subsequent purchaser from him. Such a purchaser is entitled to enforce the charge against the original vendee. 1938 M. 457=(1938) 1 M.L.J. 316. The statutory lien does not cease to exist but continues, so long as there is no novatio or a direct undertaking between the vendee and the mortgagee for the payment to the latter of the money retained in the vendee's hands. Where there is no privity between the vendee and the creditor who is to be paid off the money remains in fact money at the disposition of the vendor who can countermand the instructions given to the vendee as to the disposal of that fund. 1939 M 876=(1939) 2 M.L.J. 493. A mortgagee purchasing the property from mortgagor, knowing that the mortgagor had not paid his vendor the purchase price in full is entitled to decree possession only on payment of the balance of the purchase price due by his mortgagor to the vendor. The mortgagor's vendor should not be asked to file a separate suit for declaration of his lien. 147 I.C. 742= 1933 R. 401. *See also* I.L.R. (1939) Nag. 636 =1939 N.L.J. 252=1939 Nag. 210. A Burmese Buddhist husband purchased some property in his own name. He paid part of the consideration out of cash belonging jointly to himself and his wife, and for the balance executed a registered mortgage of the property which he had just purchased. In a suit on the mortgage without making wife a party a decree for sale was passed. The wife then brought a suit for declaration that the mortgage decree was not binding on her share. *Held* that the wife's interest was subject to the mortgage as it was executed for the balance of the purchase price. But as the wife was not made a party to the mortgage suit the decree passed thereon was inoperative as against the share of the wife in the mortgage property. 153 I.C. 1026=1934 R. 190 (2). Where the sale of land is to three persons in certain shares, the vendor has a lien on the land for the unpaid purchase-money against all and is not concerned with the proportion paid by the various co-sharers. 150 I. C. 725=1934 L. 348. It will take effect as against a purchaser at a Court auction sale. 8 O.W.N. 1313. The section prior to amendment of 1929 did not in terms give the vendor a charge on the property in the hands of any one but the buyer. But still the vendor can always follow the property in the hands of a transferee who had notice of the non-payment of the purchase-money. The amendment of 1929 merely gave effect to this principle. 9 R.

(*b*) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs : provided, that, where the property is sold free from incumbrances, the buyer may retain, out of the purchase-money, the amount of any incumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto ;

(*c*) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury, or decrease in value of the property not caused by the seller ;

(*d*) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

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56=1931 R. 139. As to *vendor's right to interest on unpaid purchase-money*, see 24 L.W. 257=1926 M. 1031. The unpaid vendor is not entitled to a statutory charge for interest. 31 S.L.R. 150 =1937 S. 198. *Interest on the sale price* is to be calculated only from the date of delivery of possession. 43 B. 181=36 M.L.J. 1 (P.C.) ; 6 L.W. 233=42 I.C. 509 ; 46 B. 195=64 I.C. 492=1922 B. 186 ; 121 I.C. 641 (1)=1930 N. 32. *See also* 35 M. 625=21 M.L.J. 236. Purchase price left with vendee for payment to vendor's decree-holders—Default by vendee—Vendor's right to interest at one per cent. per mensem. 165 I.C. 352=1936 A.L.J. 1081. Where enjoyment of property is not entirely transferred to buyer, interest is not payable. 48 M.L.J. 721=1925 M. 660. As to the effect of a direction to pay purchase-money to third person, *see* 39 M. 997=31 M.L.J. 530=37 I.C. 429 (F.B.). Hence where there was an agreement to transfer certain clay works to another company, the consideration for which was partly in cash, partly in promise to employ the transferor at a certain rate, and partly for the allotment of shares to the transferor and the company went into liquidation before the conditions were carried out, the transferor could not claim a charge against the assets of the company under S. 55. His remedy is by action against the company for breach of contracts. 1939 Rang. 46.

DEFAULT OF VENDEE TO DISCHARGE ENCUMBRANCES—REMEDY OF VENDOR.—*Held*, on the facts that the vendor was entitled to a decree for refund of the whole on the amount left in the hands of the vendee together with interest at the rate running on the mortgage debts. He was however not entitled to any decree for damages without proving the extent of the damages actually incurred. The vendor could compel the vendee to pay the amount in order to release the vendor's other properties from liability even though he might not yet have suffered actual loss. 56 A. 766= 1934 A.L.J. 318=1934 A. 406 (F.B.). Undertaking by vendor to discharge encumbrance immediately—Default—Vendee can retain part of purchase-money. 1942 M.W.N. 353=(1942) 1 M.L.J. 603. Vendee defaulting to pay debts of vendor out of consideration left with him—Right to enforce statutory charge is negatived by absence of pecuniary loss. 1942 A.L.W. 317.

PRE-EMPTION SUIT.—The covenant in a sale deed only provided that, if the vendees were dispossessed, the vendor would be liable to refund the whole of the purchase-money. The vendees being dispossessed in pursuance of a decree in a pre-emption suit by the vendor against vendees for the balance of purchase-money, the vendees sought to set-off the expenses incurred by them in contesting the pre-emption suit against the unpaid purchase-price. *Held*, the covenant was merely intended to cover defect of title and that it did not cover any loss resulting from the pre-emption suit. 1933 L. 522=146 I.C. 120.

Sec. 55, cl. (5) (a).—Omission to make the disclosure required by this section would amount to fraud on the part of the buyer. As to setting aside sale under this sub-section, *see* 5 B. 450.

Sec. 55, cl. (b).—Where the transaction of sale is completed there is a personal remedy against the vendee apart from the statutory lien. 52 A. 901=130 I.C. 198=1931 A. 99 ; 35 M.L.J. 692=49 I.C. 313 ; 9 A.L.J. 534= 14 I.C. 244=34 A. 429. *See also* 5 M.L.T. 247=4 I.C. 1121. In such a case the plaintiff is damnified because interest was mounting upon his debts and he has a valid cause of action to sue for recovery of money. 131 I. C. 686 (2)=1931 A. 419. Where the consideration for sale is left in the hands of a purchaser for payment to a prior mortgagee, the purchaser is not bound to redeem the mortgage if the amount due under it is in excess of that deposited with him. 10 A.L.J. 480=15 I.C. 854. Vendee charged with discharged part of encumbrance can deny liability to discharge on ground of vendor not paying off balance. *See* 55 L.W. 403=(1942) 2 M.L.J. 94. Agreement for sale—Specific performance—Direction for execution of sale deed—Payment of unpaid purchase.money to mortgagee—Failure—Liability of vendee. 1932 A.L.J. 556=1932 A. 454. Limitation for enforcement of liability under this clause. 15 P. 753.

Sub cl. (d).—A vendee subject to a mortgage can contest its legality. 21 I.C. 79=18 C.L.J. 354. *Sale subject to encumbrance*—Effect of encumbrance proving invalid. *See* 31 A. 583 =19 M.L.J. 682=36 I.A. 203 (P.C.). The law does not require the purchaser of property subject to a mortgage to give notice of his purchase to the mortgagee. 19 O.C. 12=34 I.C. 266. Purchaser has to satisfy the encumbrance, even though it is not disclosed in the sale: 30

(6) The buyer is entitled—

(*a*) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof;

(*b*) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, [1][* *] to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract, or to obtain a decree for its rescission.

An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (*a*), and paragraph (5), clause (*a*), is fraudulent.

[2][56. If the owner of two or more properties mortgages them to one person

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[1]The words "*with notice of the payment*" were omitted by Act XX of 1929, S. 17.

[2]Substituted by Act XX of 1929. The amendment has no retrospective operation.

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I.C. 238; but he can recover the same from the vendor. *See* 1925 A. 704 (*See* cl. (1) (*g*)).

Sec. 55, Cl. (6) (a).—A person who purchases the assets including a mortgage right, at a sale by the Official Receiver, but does not get a registered deed of sale is not entitled to maintain a suit on the mortgage as against the original mortgagor merely on the strength of his purchase and payment of the sale price. Though he would get a charge or lien in his favour under S. 55 (6), the charge would attach to all the items purchased by him and he would not be entitled to throw the whole burden on one of the items covered by the charge. 48 L.W. 766 =1939 Mad. 165=(1939) 1 M.L.J. 582 The right to growing crops passes by the sale of the land, in the absence of an express provision to the contrary, and in the case of a Court-sale, the right to possession of the crops accrues from the date of delivery of possession of the land. 151 I.C. 662=61 C. 991=38 C.W.N. 854=1934 C. 610.

Sec. 55, cl. (6) (b).—The principle of S. 55 (6) (*b*) being a general rule of English law applies in the Punjab, as being in accordance with justice, equity and good conscience. 43 P. L.R. 656=1941 Lah. 407 (F.B.). A charge under S. 55 (6) (*b*) has the same force as one by act of parties. Where a guardian agrees to sell minor's property for a binding purpose and receives an advance, to that extent the minor's estate becomes charged. 1939 N.L.J. 260=1939 Nag. 209. The lien can be execluded only by a contract to the contrary. 176 I.C. 444= 1937 Mad. 714=(1937) 2 M.L.J. 922. The lien commences as soon as any part of the purchase money has been paid. 33 I.C. 121; 10 N.L.R. 19=39 I.C. 50. *See also* 30 Bom.L.R. 923 =1928 B. 328. Such a charge is not subject to the provisions of S. 100, and is operative not only against the seller, but also against all persons claiming under the seller irrespective of notice. I.L.R. 1937 B. 140=167 I.C. 804=38 Bom.L.R. 1200=1937 B. 142. When earnest money is Rs. 100 or upwards, an agreement to sell becomes compulsory registrable. 98 I.C. 890. *See also* 31 C.W.N. 125 (P.C.). [But *see* now the amendment of S. 17, Reg. Act, by Act II of 1927 according to which such an agreement is not compulsorily registrable.] Though the sale may be invalid for want of registration the vendee in possession has a lien for the money paid: 24 I.C. 57=7 L.B.R. 262; or when the seller has failed to perform his part of the contract. 25 Bom.L.R. 1144=1924 B. 282. The question whether a purchaser by part-payment can obtain a charge on the property depends on whether the default in completing the contract was committed by him or the vendor and that is a question of fact in each case. 54 M. 708= 131 I.C. 487. *See also* 1938 Rang. 367. S. 55, (6), cl. (*b*) applies to the case of the sale having fallen through and the purchaser consequently acquiring a right to refund of his money. 8 M.L.T. 361=8 I.C. 144. *See also* 1938 Rang. 367; 1937 Pesh. 8. Contract of sale cancelled and purchaser allowed to remain in possession till repayment of purchase price paid by him—Suit by subsequent transferee from seller for possession—Purchaser under cancelled sale alleging novation but not proving it—No question of statutory charge under S. 55 (6) (*b*) raised in trial Court—Appellate Court, cannot entertain such question—Purchaser's possession, not sufficient notice. 54 L.W. 237=46 C.W.N. 57=1941 P. C. 47 (P.C.). If a sale is wholly invalid the vendee has no charge upon the property for the purchase-money paid by him. 8 M.L.T. 464= 8 I.C. 1089.

Sec. 56: SCOPE.—S. 56 has no application to a case of an *auction sale*. 51 A. 606=116 I.C. 297; 43 P.L.R. 321=1940 Lah. 291; 15 C.W.N. 80=7 I.C. 4: 41 C. 418=25 I.C. 118; the rule in this section has been applied to *execution sale* 5 M. 385; 7 A. 711; 43 A. 589. But *see* 1929 A. 309. Section applies only between purchaser and original mortgagor and not between one purchaser and another. 42 A. 336; 31 C. 95; 130 I.C. 817=1931 N. 91. Section (as amended in 1929) is exhaustive and the right of marshalling in equity and in law, is co-extensive, there is no justification to extend the legal right of marshalling by relying on the provisions of O. 34, Rr 4 and 5, in a way which cannot be justified by any well-established principles.

Marshalling by subsequent purchaser.

and then sells one or more of the properties to another person, the buyer is, in the absence of a contract to the contrary, entitled to have the mortgage-debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties.]

Discharge of Incumbrances on sale,

57. (*a*) Where immovable property subject to incumbrance, whether immediately payable or not, is sold by the Court, or in execution of a decree, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court,—

Payment by Court for incumbrance and sale freed therefrom.

(1) in the case of an annual or monthly sum charged on the property, or of a capital sum charged on a determinable interest in the property—of such amount as, when invested in securities of the Central Government, the Court considers will be sufficient, by means of the interest thereof, to keep down or otherwise provide for that charge, and

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52 L.W. 120=1940 Mad. 776=(1940) 2 M.L.J. 27. There cannot be any preferential right to reserve mortgaged property from sale between two persons who are both auction-purchasers of the mortgagors' rights in different portions of the mortgaged property. 1930 A. 684. A mortgagee who has obtained a foreclosure decree would be entitled to the benefit of this section, just as a purchaser. 41 C. 418. Where a property is mortgaged and a portion of the same is afterwards assigned to a third party free of incumbrances, the assignee cannot be asked to contribute towards the mortgage debt in respect of his portion of the mortgaged property. 78 I.C. 52=1924 M. 749. *See also* 41 C. 418.

APPLICATION.—7 A. 711; 42 A. 336=59 I.C. 67; 19 A.L.J. 584=63 I.C. 209=43 A. 589; 18 A.L.J. 287. It was held under the old section that it did not apply as between the mortgagee of the seller and the buyer. 35 B. 395=11 I.C. 989. The principle of the section does not apply to leases. 30 C.W.N. 183=94 I.C. 786=1926 C. 525. S. 56 applies to charges. 167 I.C. 962=1937 O.L.R. 188=1937 O.W.N. 438=1937 O. 301. But *see* I.L.R. 1936 N. 22=165 I.C. 550=1936 N. 125. Where a survey number when it became liable for the recovery of a Land Improvement Loan advance upon it, was a single property and not capable of description as two or more properties, and later on a portion of it is sold, this does not make the property two or more properties at the time the liable or charge under S. 7 (1) (c) of the Land Improvement Loans Act was created. To such a case S. 56 of the Transfer of Property Act has no application. 1939 N.L.J. 235. Prior mortgage debts, unless they are agreed to be paid by the vendee, are to be paid only by the vendor. 21 O.C. 360=49 I.C. 406. The section does not apply where the purchase is subject to the prior encumbrance. 6 Pat.L.T. 393=1925 P. 484. "Contract to the contarry," see 24 A.L.J. 527=95 I.C. 343=1926 A. 415. Where a portion of the property was sold free of encumbrances and, the remaining item was subsequently sold the later vendee was directed to pay off the subsisting mortgage debt, the subsequent purchaser is liable to pay off the entire mortgage debt and the first purchaser is entitled to rely on the rules as to marshalling. 8 P. 585=1929 P. 664. *See asso* 1925 M. 124. S. 55 applies only to cases where the party claiming marshalling is a purchaser and the party against whom it is claimed is the original mortgagor. Where a prior mortgagee has acquired the equity of redemption in proceedings to which the puisne mortgagee is not a party, the puisne mortgagee is not thereby necessarily deprived of his ordinary right of bringing the mortgagee property to sale subject to the first mortgage. 8 S.L.R. 257=28 I.C. 49.

Secs. 56, 81 and 82 : SCOPE.—The right to contribution is controlled by the right of marshalling as shown by Ss. 56 and 81, T. P. Act. 69 M.L.J. 303. Ss. 58 and 81 of the Act do not apply to N.-W.F. Province but their principles are applicable as principles of equity, justice and good conscience. A *pro rata* share should be recovered from the property which has been proceeded against if the mortgagee has released another property which was also liable for the security. 195 I.C. 322=1941 Pesh. 49.

Sec. 57.—S. 57 applies only when the payment is made either before the sale is complete or as part of the sale transaction. The section (taken almost *verbatim* from the English Conveyancing Act of 1881) is seldom made use of in India. An application under the section before a final decree in a mortgage suit is passed is incompetent. 1936 A.M.L.J. 58. In a mortgage suit the Court can pass by consent a combination of several decrees in favour of different mortgagees, determining the order in which they are to be paid and incorporating orders which the Court would be amply justified in making under S. 57. 58 C. 598. Where an auction-purchaser in execution of decree for a maintenance charge purchased a house specifically subject to the charge that is, without adopting the appropriate procedure under S. 57, he could not claim to hold the property free from charge.

(2) in any other case of a capital sum charged on the property—of the amount sufficient to meet the incumbrance and any interest due thereon.

But in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency except depreciation of investments not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reasons (which it shall record) thinks fit to require a larger additional amount.

(*b*) Thereupon the Court may, if it thinks fit, and after notice to the incumbrancer, unless the Court, for reasons to be recorded in writing, thinks fit, to dispense with such notice, declare the property to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

(*c*) After notice served on the person interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same and generally may give directions respecting the application or distribution of the capital or income thereof.

(*d*) An appeal shall lie from any declaration, order or direction under this section as if the same were a decree.

(*e*) In this section "Court" means (1) a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, (2) the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situate, (3) any other Court which the Provincial Government) may, from time to time, by notification in the Official Gazette, declare to be competent to exercise the jurisdiction conferred by this section.

CHAPTER IV.

OF MORTGAGES OF IMMOVABLE PROPERTY AND CHARGES.

"Mortgage" "mortgagee" "mortgagor" "mortgage-money" and "mortgage-deed" defined.

58. (*a*) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of engagement which may give rise to a pecuniary liability.

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That house could, be sold again to realise the same charge, as the charge was not wiped out. 166 I.C. 796=1937 N. 36.

Sec. 58 (a).—The definition of a "mortgage-deed" in the Stamp Act is very wide and more general than that in the T. P. Act. 27 C. 587. The sub-sections deal only with how the mortgages may be expressed. But the legal effect is the same as indicated in cl. (*a*). 41 C. 770 =1917 M.W.N. 794. Where a partner of a firm on entering into the partnership redeemed a mortgage and kept with him the title-deeds, but there was no entry in the account books as to the creation of a mortgage from that date, the transaction must be treated as merely an advance by one partner and not a mortgage. 45 M.L.J. 776=1 R. 545=1923 P.C. 87 (P.C.). A mortgage can be created by a decree. 56 P.R. 1918=46 I.C. 440. *See also* 14 I.C. 213. A hypothecation to secure a contingent liability is a mortgage. 1925 P. 288. A hypothecation of movables without possession, though not provided for either in the Contract Act or in the T. P. Act, is nevertheless a valid transaction and enforceable at law. 10 Mys.L.J. 16. A charge is not exactly identical with a mortgage, and although a similar remedy is available a suit for the enforcement of a charge is not necessarily the same as a suit for sale on the basis of a mortgage. One obvious distinction is that a mortgage is for a fixed term whereas a charge may be in perpetuity. In the case of a mortgage it can be ultimately redeemed, whereas a charge in perpetuity cannot be redeemed at all. There is therefore no question of redeeming a charge but only paying up the arrears of the amount charged and preventing the sale of the property in execution of decree. 147 I.C. 302 =1933 A. 934. *See also* 42 C. 625=19 C.W. N. 37. (*See also* S. 100). A mortgage is a transfer of an interest in property: in a charge, the person in whose favour the charge exists is only entitled to have his claim satisfied out of the particular property. There is no transfer of any interest as such. *See* 35 C. 834; 1 P. 387; 26 I.C. 601; 4 P.L.T. 6=1922 P. 529: 9 I.C. 828; 1922 P. 36; 42 A. 158=38 M.L. J. 302=55 I.C. 550 (P.C.). There can be no mortgage of profits that would accrue from immovable property from year to year because such profits are not an interest in the immovable property. Such profits also cannot be pledged as pledge can be of movable property or goods

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

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and such profits are neither movable property nor goods. 41 P.L.R. 239=1939 Lah. 15. As to creation of *equitable charge on an insurance policy*, *see* 37 B. 198=24 M.L.J. 60 (P.C.). *See also* 44 I.C. 734; 14 L.W. 99=66 I.C. 554 (2): 51 I.C. 963=36 M.L.J. 618; 38 I.C. 813; 26 I.C. 601; 60 I.C. 611; 18 I.C. 461 (Oudh). Writing is essential to the creation of an equitable charge over moneys due under an insurance policy. 37 B. 198=24 M.L.J. 60 (P.C.). Security bond executed to Court by defendants over some property to account for mesne profits creates only charge. 42 A. 158=38 M.L.J. 302 (P.C.); 29 I.C. 605; 1936 Rang. 303. A *Kootchit deed* executed by stake-holder falls within definition of a mortgage. 103 I.C. 814=1927 M. 773 =53 M.L.J. 550; (1916) 2 M.W.N. 263=38 I.C. 813. For distinction between a mortgage and sale, 1933 L. 155=148 I.C. 234. *Distinction between lease and mortgage*, *see* 2 P. 217=3 P.L.T. 797; 2 Pat.L.J. 195. A mortgage of an interest under a lease is not an absolute assignment under the Indian law and does not create privity of estate between the lessor and the mortgagee and hence the mortgagee is not liable by the privity of the estate for the burdens of the lease. 66 I.A. 50=I.L.R. (1939) 1 Cal. 283=43 C.W.N. 281=1939 P.C. 14=(1939) 1 M.L.J. 544 (P.C.). A mortgage is complete when the contract is entered into and not when the money is paid. 33 I.C. 474=53 P.R. 1916 (F.B.); 47 I.C. 563 (M.); 78 I.C. 457=1925 P. 288; 60 I.C. 611=12 L.W. 674; 1 P. 281=3 Pat.L.T. 307. Even though the debt secured is a future debt, the mortgage will have a priority over any intermediate mortgage subsequently created, though at the time the future debt had not come into existence. 12 L.W. 674=60 I.C. 611; 1922 P. 299. A mortgage is not void or voidable because of non-payment of consideration. 42 M. 20=35 M.L.J. 740; 22 O.C. 112=52 I.C. 91; 2 Pat.L.J. 168=38 I.C. 887; 1924 L. 387. Neither a formal transfer of an interest nor the express mention of a power of bringing the properties to sale is essential for a mortgage. 1 L.W. 1025=26 I.C. 274. *See also* 16 M.L.T. 444 =26 I.C. 71; 23 M.L.J. 131=16 I.C. 209; 27 M.L.J. 58=24 I.C. 24. Delivery of possession of land as security for money in absence of writing or registration is not mortgage. 1923 R. 51. In all mortgages except where there is a right of sale, a personal covenant to pay is implied. 5 N.L.J. 49=18 N.L.R. 145=1922 N. 98; 1924 N. 97. Where a mortgagor having already mortgaged his lands with possession to the mortgagee, takes a further advance from him in a later year on the security of the land already mortgaged, on the same conditions as on the original mortgage, such a transaction does not amount to a new mortgage. 13 L. 660=1932 L. 465 (F.B.). Similarly if the new transaction raises the aggregate mortgage-money to a figure in excess of the value of the land, it will really be a sale, though ostensibly given in the form of a mere advance on the security. 13 L. 660. Transferee of simple mortgaged property takes it subject to mortgage but is not personally liable to pay mortgage-money. In the case of transferee of usufructuary mortgaged land it is even so. But if usufructuary mortgagee is dispossessed by such transferee then transferee is liable to repay the mortgage debt. 148 I.C. 23=1934 P. 1.

AGREEMENT TO CREATE A MORTGAGE, whether amounts in itself to equitable mortgage. *See* 2 Luck. 299=1927 O. 55. An agreement to mortgage cannot constitute a mortgage or charge within the meaning of Ss. 58 and 100. 123 I.C. 157=1930 P.C. 76=58 M.L.J. 453 (P.C.). A mere agreement does not confer a title on a usufructuary mortgagee. 38 A. 494=43 I.A. 264 (P.C.). But where the mortgagee is put in possession on the basis of the agreement, it is specifically enforceable and can be set up as defence to a suit for redemption. 1930 P. 479. Where the mortgagee knows already that the mortgagor is not in possession of the mortgaged properties and that he has only a doubtful and disputed title to them, and when in spite of such knowledge he takes a mortgage, the transaction does not amount to a mortgage within the definition of S. 58. 176 I.C. 913= 1938 Cal. 48.

SPECIFIC IMMOVABLE PROPERTY.—A property can be specific so long as it is identifiable though it may not be in existence on the date of the transfer. 47 I.C. 563 (M.). Turn of worship is immovable property. 42 C. 455= 20 C.L.J. 183. *See contra* 39 C. 227=14 C.L.J. 369. Malikhana rights of a superior proprietor in a village can be mortgaged. 10 N.L.R. 185=27 I.C. 498. Mortgage of future crops is valid and operates as an agreement to assign. 5 I.C. 373 (A.). *See also* 1939 Lah. 15=41 P.L.R. 239. A mortgage of a charge is perfectly valid in law. 75 I.C. 579=1924 O. 209. A mere right to specific performance cannot be the subject of a mortgage. 33 I.C. 696. Under the Hindu Law as under the English Law a mortgage debt is only treated as movable property, the land being considered only as a pledge or security for money lent. 31 I.C. 983=20 C.W.N. 142. Where only a part payment of the consideration is made, the mortgage is valid to that extent. 50 I.C. 952; 43 I.C. 871; 25 C.W.N. 942=66 I.C. 694; 1 Pat. L.J. 138=35 I.C. 35; 47 I.C. 563 (M.); 7 L.W. 36=43 I.C. 871. A decree for foreclosure may be passed in a suit by a mortgage by conditional sale even if full consideration has not been paid by him. 34 A. 273= 13 I.C. 573. *See also* 10 I.C. 258; 32 I.C. 341; 29 I.C. 690. But a mortgage is unenforceable where there is an absolute failure of consideration. 11 I.C. 4; 1924 L. 381; 23 I.C. 805. *See also* 42 M. 20=35 M.L.J. 740; 21 M.L.T. 351=41 I.C. 208. Combinations of different kinds of mortgages and creations of mortgages other than the four specified ones would be dealt with only according to the terms of the contract. 43 M. 589=28 M.L.J. 56; 2 Pat.L.J. 293=39 I.C. 564. *See* S. 98.

(*b*) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money and agrees expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

Simple mortgage.

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MORTGAGE MONEY includes interest along with the principal. 119 I C. 439=1929 A. 411; 9 L.B.R. 106=43 I.C. 921. But *see* 1 Pat.L.T. 544=58 I.C. 216; 1923 M. 71=16 L. W. 743. *See also* 113 I.C. 750=1929 A. 77.

Sec. 58, Cl. (b): SIMPLE MORTGAGES.—The term 'mortgage' includes instruments which create no actual transfer of interest or confer express power of sale. Such an instrument may be a simple mortgage. 1914 M.W. N. 501=27 M.L.J. 58=24 I.C. 24. Mere omission to use words like 'mortgage' does not prevent the transaction from being a mortgage if the intention from the document as a whole is clear. 36 A. 201=22 I.C. 973. The intention that the property was to be sold in default is essential in a simple mortgage. 19 I.C. 658= 11 A.L.J. 570; 20 I.C. 870. For essentials of a a simple mortgage, *see* 34 A. 446=15 I.C. 435; 11 I.C. 629=21 M.L.J. 562; 1929 L. 289; 26 I.C. 274=1915 M.W.N. 21. It is not necessary for a simple mortgage that there should be an express provision giving the mortgagees power of sale. Where a mortgage deed contains a personal covenant under which the mortgagor undertakes to pay the mortgage money on the due date, the personal covenant carries with it by necessary implication a power of sale. 148 I.C. 1197=11 O.W.N. 760=1934 O. 255. The mere fact that the mortgagee is entitled to take possession in default of payment of the principal does not convert an otherwise simple into an usufructuary mortgage. Where a mortgage is simple, it must be held to carry with it a personal covenant to pay the principal and interest. 13 L. 508=1932 L. 630. Such a mortgage is not an anomalous mortgage within the meaning of S. 98 of the Act. 1934 O. 255. A covenant to pay is essential. 24 I.C. 372=26 M.L.J. 514. *See also* 24 I.C. 127 =1914 M.W.N. 618; 6 L.W. 296=33 M.L.J. 679=42 I.C. 349; personal covenant explained. 47 I.C. 852=1918 M.W.N. 672; 1914 M.W.N 618=24 I.C. 127. Where there is nothing in the terms of a mortgage-deed to exclude the personal liability of the mortgagor, but on the other hand it is emphasised that this liability would subsist even after the property mortgaged has been sold if the sale-proceeds are found to be insufficient to discharge the amount due as principal and interest, the transaction is a simple mortgage. 42 P.L.R. 660=1940 Lah. 486. *See also* 1939 Pesh. 41. Where in a usufructuary mortgage it is provided that if the mortgagee did not obtain possession or if he lost possession he could recover his money and interest by sale of the mortgaged or any other property of the mortgagor, it amounts to an implied agreement that the mortgagor will give possession to the mortgagee and whether the deed is considered an usufructuary or an anomalous mortgage there is no reason why effect should not be given to the agreement. It is open to the mortgagee to sue either for possession or for the mortgage money. 1941 O.W.N. 1220=1942 Oudh 172. A simple mortgagee has merely the right to sue upon the personal covenant or to bring the property to sale; he cannot satisfy his claim out of the rents and profits of the mortgaged property nor can he acquire the absolute ownership of the estate by foreclosure. 13 Pat.L.T. 525=1932 P. 360. The assignee of the equity of redemption is not personally liable. 1930 N. 139 (2). Mere covenant against alienation will not create a mortgage. 39 A. 244=39 I.C. 18 (F.B.). Property secured for maintenance allowance is not mortgage. 19 I. C. 661=11 A.L.J. 580. A promise to redeem at a certain time cannot be construed as implying a personal covenant to pay. 47 I.C. 852=1918 M.W.N. 672. A mortgagee cannot sue for a simple money decree in the absence of a personal covenant. 58 I.C. 30. *How possession affects nature of mortgage.* 1922 A. 232; 10 I.C. 272=21 M.L.J. 1147 (P.C.). But *see* 63 I.C. 533; 1923 N. 161; 31 I.C. 473. But when the mortgagee was originally placed in possession of the property to be enjoyed in lieu of interest, the mortgage cannot be a simple one. 16 L.W. 743=1923 M. 71. In Upper Burma, the usual form of mortgage is not simple but usufructuary. If an exception is set up to it, it should be proved. 15 I C. 919 =(1912) 1 U.B R. 125.

RIGHTS OF PARTIES.—The mortgagor continues to be owner before and after default of payment. 32 I.C. 901=3 L.W. 341; 44 C. 425=21 C.W.N. 177. The right of simple mortgagee is only to have the property sold. 44 C 425=21 C.W N. 177. Where there was a registered simple mortgage of land and a subsequent transfer of possession of the land to the mortgagees without document by the mortgagors, and the latter asserted that this was under the original mortgage whilst the former pleaded it was a fresh transaction amounting to an outright but invalid sale to them, the mortgagees in a suit by the mortgagors for redemption of the mortgage can plead and prove the invalid sale in equity as a shield. 4 R 368=1927 R. 33 (F.B) Mortgagee can enforce the whole claim against any portion of the property. 64 I.C. 451=44 A. 146=1922 A. 352. As to right to have receiver appointed, *see* 56 M. 945=145 I.C. 449=1933 M. 570= 65 M.L.J. 222 (F.B.); *see also* 34 P.L.R. 950 (1). But *see* 13 Pat.L.T. 525=1932 P. 360: 54 M. 565=61 M.L.J. 111.

Sec. 58 (b) and (c)—SIMPLE MORTGAGE AND ENGLISH MORTGAGE—DIFFERENCE BETWEEN—In the case of a simple mortgage, the security which the mortgagee obtains before making an

Mortgage by conditional sale.

(*c*) Where the mortgagor ostensibly sells the mortgaged property—

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made, the sale shall become void, or

on condition that on such payment being made, the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale, and the mortgagee a mortgagee by conditional sale :

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advance is that of the land itself; if the mortgagor makes default the mortgagee has the right to cause it to be sold. This does not mean he can sell it himself without the intervention of the Court; the right to bring the land to sale must be worked out in execution proceedings under the supervision of the Court. There may be, and generally is, a personal obligation not only to repay the loan but also to pay interest upon it, but in the absence of express provision to the contrary the rents and profits from the land belong to the mortgagor and do not form part of the security for the payment of the mortgage money or the interest on the loan. But in an English mortgage there is a transfer of the ownership of the property with a promise to repay the debt on a certain date. If the money is duly paid the mortgagor has a right to have the property re-transferred to him by the mortgagee. 1939 Rang. L.R. 403=1939 Rang. 321 (F.B.).

Sec. 58, cl. (c).—*See* 1924 P.C. 226. The definition is not self-sufficient. It is necessary to determine whether there is a mortgage at all before this clause is applied. 1929 A. 174=116 I.C. 807 ; 36 I.C. 991 (All.). *See also* 16 I.C. 638; 40 B. 378. In a province in which the Bengal Regulation (XVII of 1806) is in force, a suit for possession cannot be maintained by a mortgagee in a mortgage by conditional sale if he has not taken foreclosure proceedings under the Regulation. 1933 L. 174=145 I.C. 159. Meaning of "*ostensible*" explained. *See* 116 I.C. 807=1929 A. 174; 1929 A. 864. A *mortgage by conditional sale* is a form of voluntary alienation. 1929 A. 864. In the case of a mortgage by conditional sale there is no future interest in property contemplated to be created, and consequently there is no scope for the application of the rule against perpetuities. 106 I.C. 168=54 M.L.J. 96. *See also* 1937 A.L.J. 849=1937 All. 724. There is no presumption in favour of mortgage by conditional sale. 47 M.L.J. 385=84 I.C. 505=1925 M. 37; 1921 M.W.N. 510. It lies on the party who contends that a document *prima facie* connoting an absolute sale is really a mortgage to prove his contention. 129 I.C. 719=1931 A. 113. In deciding whether a mortgage is one by conditional sale, the *intention of the parties is the test.* 49 A. 405=104 I.C. 504=1927 A. 321; 116 I.C. 807=1929 A. 174; 67 I.C. 113; 47 M.L.J. 385=84 I.C. 505 =1925 M. 37; 129 I.C. 719=1931 A. 113. Where the consideration is fair and reasonable and the deed contains a condition for re-transfer within a year provided that the vendor is able to pay back the amount out of his own pocket the transaction is a sale and not a mortgage. 1939 A.L.J. 946=1939 All. 713. Where a deed of transfer contained a stipulation that if at any time within three years the transferor was to pay back the amount paid to him in respect of the property transferred with interest after deducting the income which the transferee might derive from the property there should be a reconveyanee to the transferor, the transaction amounted only to a mortgage by conditional sale and not a sale with a condition for re-purchase. 187 I.C. 594= 1939 N.L.J. 544=1940 Nag. 84. The fact that there was no bargaining as to the amount of consideration and the price was inadequate is more in favour of the deed being a mortgage and not a sale than *vice versa.* 13 Luck. 680= 1937 O.W.N. 1236=1938 Oudh 57. The proposition, that where a contract of sale and a contract of re-purchase are evidenced by a single document or more or less contemporaneous documents, the transaction is a mortgage by conditional sale and is not a sale out-and-out with the condition of re-purchase, is too broad to be accepted as an accurate statement of the law. Where the original intention of the parties was to execute a sale for particular price, but before it was executed, it was agreed that the consideration should be reduced and that the owner could get back his property on payment of that amount together with interest at Rs. 2 per cent. per mensem within a time fixed and that the other party should re-convey on such a payment, the transaction is an out-and-out sale and not a mortgage by conditional sale. 1940 A.L.J. 113=1940 All. 227. *See also* 40 Bom. L.R. 1251. Subsequent agreement by vendee to convey property back to vendor on his fulfilling certain conditions—Transactions do not constitute mortgage by conditional sale. 1937 Rang. 402. "*Contract to reconvey,*" whether runs with the land. 48 A. 787=1927 A. 137. *Essential characteristic of a mortgage by conditional sale* explained. 48 A. 302=94 I.C. 849=1926 A. 493 ; 110 I.C. 392 ; 1928 C. 825 ; 1933 L. 174=145 I.C. 159. *Sale with stipulation for reconveyance,* nature of. *See* 96 I.C. 780=1926 A. 670 ; 10 I.C. 630 (A.) ; 33 A. 337=9 I.C. 140 ; 38 A. 570=36 I.C. 38 (P.C.). Hindu forms of mortgages by conditional sale are not affected by the Act. 38 M. 667=26 M.L.J. 47. To bring a case under this clause there must be an ostensible sale to begin with. 91 I.C. 330=1926 B. 107. There is no personal covenant to pay in the case of a pure mortgage by conditional sale. 46 I.C. 326 ; 3 I.C. 871. The section does not raise a presumption that a sale with an agreement to reconvey is a mortgage by conditional sale

[1][Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.]

LEG. REF.

[1]Added by Act XX of 1929.

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1921 M.W.N. 519 ; 42 M. 407 = 36 M.L.J. 385 ; 1929 A. 174. Where the agreement regarding reconveyance is in the same deed, the terms in the deed ought to be looked into to see whether the transaction was a sale or mortgage. 84 I. C. 505 = 1925 M. 37 ; 45 A. 72 ; 10 I.C. 630 ; 21 I.C. 19 ; 49 B. 378 ; 35 B. 258 ; 1929 A. 174 ; 33 Bom.L.R. 633. Tests for finding out if a transaction is a sale or a mortgage are : relationship of creditor and debtor between the parties ; stipulation or provision in the deed for payment of interest ; whether price paid is adequate, if the rent reserved by the lease is fair ; with whom the possession continues, etc. "The transfer of possession is more consistent with a sale whereas retention of possession by the transferor is an indication of a mortgage". 33 Bom.L.R. 633. *See also* 149 I.C. 354 = 1934 N. 18. If a deed of sale and a contract of re-purchase are by separate and independent transactions and not connected and interdependent parts of one and the same transaction they do not amount to a mortgage by conditional sale. 129 I.C 719 = 1931 A. 113 = 1931 A.L.J. 571. Where a document which was in the margin described as a *kat-kabala*, but in the body purported to be a deed of sale with a condition that "if the said principal amount and an equal amount of profit be paid to you within the period of eight years, then you shall return back the said lands with this kabala". The deed is an out-and-out sale and not a mortgage by conditional sale. 60 C. 167 = 144 I.C. 220 = 1933 C. 381. Where simultaneously with a sale-deed, the vendee executed an agreement by which the vendor was given a right of re-purchase of the property for the sale-price at any time after 25 years from the date of sale, time was not the essence of the contract, and the transaction is not an out-and-out sale but only a mortgage by conditional sale and the vendor is entitled to redeem within 60 years after the expiry of the 25 years period fixed in the agreement. 1933 A. 443 = 145 I.C. 147 = 1933 A.L.J. 907. Mortgage by conditional sale—Failure of mortgagee to take possession after expiry of period—Unregistered acknowledgment of amount due—Effect. 1933 L. 174 = 145 I.C. 159. A single contract, though evidenced by two separate documents, a sale and an agreement, would be a mortgage by conditional sale. *See* 1930 A.L.J. 610 = 1930 A. 283 ; 147 I.C. 1191 = 35 P.L.R. 337 = 1934 L. 453. (But *see* new proviso.) Subsequent conduct is only admissible for the purpose of construing a deed when it is impossible to arrive at a clear finding as to the meaning of the deed from its own terms and from surrounding circumstances. 25 A.L.J. 849 ; 48 I.C. 465 (C). Test of surrounding circumstances. 32 I.C. 192 (A.). *See also* 1929 A. 174. Effect of *Lohan Gahan* mortgage is same as that of a conditional mortgage. 25 N.L.R. 187 = 119 I.C. 684 = 1929 N. 254 (F.B.) and cases referred to therein. For cases where the transactions were held to be a mortgage by conditional sale, *see* 47 M.L.J. 809 = 47 M. 729 = 1924 P.C. 226 (P.C.) ; 46 A. 173 = 79 I.C. 626 = 1924 A. 444 ; 130 I.C. 15 = 1930 A. L.J. 1435 = 1931 A. 196 (sale with condition for release) ; 45 A. 72 = 1923 A. 41. Where the mortgagees are authorized to reconstruct the transferred house "according to their liking at their own cost" and there is a stipulation in the deed that at the time of redemption, if it is found that the amount due to the mortgagees cannot be recovered in full from the mortgaged property, the mortgagors would be liable to make good the deficiency, the transaction is a mortgage and not an out-and-out sale. 148 I.C. 234 = 1933 L. 155. For cases where the transaction was not held to be mortgages by conditional sale, *see* 1924 A. 743 ; 45 A. 581 = 1923 A. 586 ; 21 I.C. 19 (C.) ; 11 I.C. 124 (C.) ; 2 I.C. 930 (C.) ; 13 I.C. 667 ; 14 N.L.J. 31 (Rev.). Where the document is one of outright sale with no agreement of re-purchase, and the agreement to re-purchase is contained in a subsequent document, the transaction shall not be deemed to be one of mortgage. 1935 R. 212.

PAYMENT OF RENT by debtor to creditor will indicate the mortgage nature of the transaction. 40 B. 74 = 31 I.C. 338. Difference between the value of the property and the money paid is also relevant. 29 I.C. 898. But the non-mention by the deed of sale that the amount of consideration was the market value of the land is no evidence as to a mortgage being intended by the parties. 47 M.L.J. 385 = 84 I.C. 505 = 1925 M. 537. The fact that profits are to be accounted for may indicate such a circumstance to evidence a mortgage by conditional sale. 42 A. 437 = 58 I.C. 717 ; 26 I.C. 753 = 16 Bom.L. R. 774 ; 26 I.C. 751 = 39 B. 119.

PAYMENT OF INTEREST.—Presumption as to, in mortgage by conditional sale after due date. *See* 93 I.C. 958 = 1926 O. 378 ; 8 L.L.J. 70 = 1926 L. 237.

TIME OF EXECUTION of the subsequent agreement would be material. If the sale-deed and the agreement to re-convey are executed on the same date an almost irresistible presumption arises that the transaction is a mortgage by conditional sale. 33 A. 585 = 9 I.C. 1013 ; 33 A. 122 = 7 A.L.J. 998. Possession with vendor is also material. 50 I.C. 12 (C.).

THE RELATIONSHIP OF DEBTOR AND CREDITOR must be indicated to be maintained. 31 M.L.J. 375 = 36 I.C. 393 ; 34 I.C. 475 = 30 M.L.J. 338 ; 37 I.C. 91 = 9 Bur.L.T. 177 ; 15 I.C. 423 = 5 Bur.L.T. 99 ; 78 I.C. 547 = 1925 O. 11 ; 47 M.L.J. 385 = 1925 M. 37 ; 67 I.C. 113 (C.) ; 8 I.C. 981. Cl. (*a*) of the section governs Cl. (*c*) and in spite of the new proviso added by the amending Act of 1929, unless there is a debt and a relationship of creditor and debtor between the parties, there can be no mortgage even if the condition of re-purchase is embodied in one document which effects the sale. 33 Bom.L.R. 633 = 1931 B. 371. It is immaterial that prior to the transaction the relationship of

(*d*) Where the mortgagor delivers possession [1][or expressly or by implication binds himself to deliver possession] of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money and to receive the rents and profits accruing from the property [2][or any part of such rents and profits and to appropriate the same] in lieu of interest, or in payment of the mortgage money, or partly in lieu of interest [3][or] partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

Usufructuary mortgage.

LEG. REF.

[1] Inserted by Act XX of 1929, S. 19.

[2] Substituted for the word "and to appropriate them" by Act XX of 1929, S. 19.

[3] "Or" substituted for "and" by Act XX of 1929, S. 19.

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debtor and creditor existed between the parties. 1929 A. 174. Inadequacy of consideration indicates mortgage : absence of time limit does not necessarily indicate sale. 42 C.L.J. 74=90 I.C. 100 ; 106 I.C. 158=54 M.L.J. 96; 111 I.C. 701=1928 A. 34. A deed of absolute sale and a subsequent agreement for re-sale to vendor on payment of price do not constitute a mortgage by conditional sale unless it appears from the circumstances of the case that the parties so intended. 38 A. 570=43 I.A. 284=31 M.L.J. 750 (P.C.) ; 26 M.L.T. 291=49 I.C. 659. *See also* 45 C. 320 (P.C.) ; 27 M. 7 ; 27 M. 848. (*See* now proviso newly added.) When there is a waiver of sale on the happening of the condition, the old terms will be deemed to continue. 8 L.L.J. 70=1926 L. 237 ; 93 I.C. 958=1926 O. 378.

EFFECT OF LAPSE OF TIME FIXED.—The equity of redemption in the mortgaged property will subsist all through in spite of the expiration of the period for redemption agreed, until a decree for foreclosure is made in a suit brought by the mortgagee or till the confirmation of the sale in pursuance of a decree for sale obtained by him. 78 I.C. 547=1925 O. 11 ; 114 I.C. 81. But *see also* 25 I.C. 93 (C.). Condition that, if mortgage-money is not paid in two years, mortgagee would take property absolutely is not illegal : it is merely a mortgage by conditional sale. *See* 1927 L. 748=102 I.C. 283 ; 114 I.C. 81=1928 C. 825 ; 25 A.L.J. 849=1928 A. 34 ; 39 I.C. 849=13 N.L.R. 69 ; 39 I.C. 377=11 Bur.L.T. 36 ; 1925 O. 11. But *see* 27 I.C. 868=8 Bur.L.T. 125. Mortgage by conditional sale—Provision for return of documents—Time for payment whether need be fixed. *See* 103 I.C. 158=1928 M. 28=54 M.L.J. 96 In Sind, time is the essence of the contract of mortgage by conditional sale. On the expiry of the time fixed the mortgage becomes a sale. 19 I.C. 428=6 S.L.R. 178. The principle of English Law that in mortgages time is not of the essence of contract does not apply to India. *See* 97 I.C. 725=1927 S. 46.

BURDEN OF PROOF lies on the party who contends that a document *prima facie* connoting absolute sale is really a mortgage by conditional sale. 47 M.L.J. 385=84 I.C. 505=1925 M. 37.

PROVISO.—The proviso newly added is of the nature of the law of evidence. The protection afforded to agriculturists by S. 10-A of the Dekkhan Agriculturists Relief Act has not been affected or taken away by the proviso. S. 10 (*a*) of the Dekkhan Agriculturists Relief Act would exclude the operation of the proviso and therefore an agriculturist is not precluded from leading or proving that a transaction entered into by him, though apparently a sale, was not really a sale, but a mortgage by way of conditional sale. 30 S.L.R. 196=1936 S. 209. *See also* 1939 N.L.J. 544=1940 N. 84. The effect of the proviso is only that a transaction of mortgage by conditional sale shall not be deemed to be a mortgage unless the condition of reconveyance is embodied in the document. It does not necessarily follow that if the condition is embodied in the document the transaction shall be deemed to be a mortgage. 17 Luck. 198=1941 O. 582.

Sec. 58, cl. (d).—There is no distinction between mortgaging land and handing it over as security for debt, though the word 'mortgage' is not used. 84 I.C. 468=1925 R. 102. A condition for the rendition of accounts or an express or implied provision for redemption is not necessary. A mortgage can be so made that nothing remains to be paid at the end of the term specified 1922 N. 156. A usufructuary mortgage does not cease to be usufructuary, merely because of a provision for irredeemability within a time fixed. 68 I.C. 417=41 M.L.J. 563; 1939 Lah. 235=41 P.L.R. 270; 43 M. 589=28 M.L.J. 56; or because of a provision that it is to be redeemed within a certain time: 38 M. 667=26 M.L.J. 47; 12 A. 233; 21 M. 1; 26 B. 252; 17 I.C. 329; or because the document was described by the mortgagor in his attestation as a '*dostawazarki*'; 16 R.D. 16. An oral usufructuary mortgage creates no title. 1937 Rang, 473. The term '*Zuripeshgi*' is an ambiguous one. The fact that no interest was provided may give rise to an inference that the transaction was only a lease. 28 I.C. 383=19 C.W.N. 794. *See also* 14 L.R. 226 (Rev.)=17 R.D. 270. Each case of "*Zuripeshgi*" is to be decided on its own facts. 44 I.C. 153=4 P.L.W. 146; 8 P. 16. Prior to the amendment of 1929 where the whole of rents and profits were not to be appropriated to the mortgage-money but part of it was payable to the mortgagor, it was not an usufructuary but anomalous mortgage. 1931 M.W.N. 595. The amendment of 1929 does not govern transactions entered into and rights and liabilities created before the passing of the amending Act. 9 O.W.N. 1027. As to distinction between lease and mortgage, *see* 28 M.L.J. 303=28 I. C. 842. Where a person goes into possession of property for the purpose of securing the payment of his debts owing to him and the language of the document creates a charge and gives a power of a conditional sale, the transaction amounts to an usufructuary mortgage and not a lease or a charge.

(*e*) Where the mortgagor binds himself to re-pay the mortgage-money

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1934 P. 217. Whether a person is an usufructuary mortgagee or a lessee must be decided on a consideration of the contents of the documents themselves, with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts. 1934 Pat. 217. *See also* 1933 L. 786. A loan evidenced by a simple money bond and lease of occupancy land in favour of creditor with the understanding that the rent should be appropriated towards interest would not amount to an usufructuary mortgage. 1930 A.L.J. 332=1930 A. 375; 1935 A. L. J. 275=1935 A. 150. A *lakhammukhi* mortgage is an usufructuary mortgage. 1 L. 21=51 I.C. 956. Where the deed evidenced a combination of simple and usufructuary mortgages, a suit in ejectment is maintainable by the mortgagee by his right as usufructury mortgagee. 139 I. C. 449=1932 M. 768=63 M.L.J. 310.

RIGHTS OF PARTIES.—45 B. 523=59 I.C. 765. In every contract of usufructuary mortgage, there is an implied covenant for quiet possession which also implies a contract to pay the Government revenue. 45 A. 388=21 A.L.J. 294=1923 A. 433 (2). As to further advances, *see* 63 I.C. 750. *See also* 16 I.C. 982. Where an usufructuory mortgagee failed to pay off other encumbrances as agreed, a suit for refund of the amount to the mortgagor is not one for specific performance of a mere agreement to lend money and is maintainable. 52 A. 761=124 I.C. 764=1931 A. 95. *See also* 140 I.C. 495=33 P.L.R. 1085=1933 L. 1. Nor is the failure of the mortgagee to obtain possession through no default of the mortgagor any defence to the action. 1931 All. 95. *See also* 13 R. 274. 1941 O.W.N. 1220; 1941 Pat. 301. Right of sale after time fixed for payment accrues, if there is a covenant to pay, 1 Pat. 350=1922 Pat. 167. If the profits are to be adjusted only to a portion of the interest, the mortgagee cannot be called on to account generally for profits accrued at the time of redemption. 7 A.L.J. 787=7 I.C. 293. In usufructuary mortgages possession is an essential part of the security and what is kept alive is not the security only, but the rights of the mortgagee in the property under the deed. 4 L.W. 477=37 I.C. 456. Where a mortgagee files a suit for possession *simpliciter* if the Court finds that much of the consideration is paid, the mortgagee is entitled to possession. The exact sum to be paid need not be determined till the time of redemption. 1933 L. 193=145 I.C. 182. A mortgage executed by *A* in favour of *B* was for a term of 10 years, and was in form a mortgage with possession. Possession was not in fact taken by the mortgagees, but by a second document of even date, the mortgaged land was leased to *A* for the same term at a rent which may be taken to represent the yearly interest on the mortgage debt. Mutation was duly recorded in the Goverment records on the basis of the mortgage in the names of the mortgagees. There had been previous transaction between the parties of a similar character. *B* sued *A* for possession after ten years in his capacity as mortgagee. *Held*, that there was no reason to construe the mortgage as other than a possessory mortgage, as it clearly purported to be, and that the term of the lease having expired, the mortgagee was entitled to possession. Evidence to show that mortgage was in reality a simple mortgage according to the intention of the parties was inadmissible under S. 92, Evidence Act, and no presumption could be drawn from the previous transactions. 60 I.A. 273=14 L. 466=65 M.L.J. 150 (P.C.). In case of an additional mortgage, mortgagee if entitled to retain possession till the additional mortgage is also redeemed. 44 A. 37=1922 A. 174 (F.B.).

REFUSAL OF POSSESSION gives the mortgagee a right to sue for principal and interest. 17 I. C. 362=21 P.L.R. 1913. *See also* 1941 Pat. 301. If in a usufructuary mortgage, the property is secured only for the amount borrowed and not for interest and if the mortgagee does not take steps to get possession, he loses his right to interest. 45 B. 523=59 I.C. 765=22 Bom.L.R. 1435. When a due date is fixed for payment of the money in an usufructuary mortgage, the mortgagee can bring the properties to sale after that date. 1 P. 350=3 P.L.T. 332. But *see* 56 M. 892=38 L.W. 161=1933 M. 613=65 M. L.J. 194; 167 I.C. 755=1937 P. 94, where it was held that the deed contained no personal covenant to pay. so as to entitle the plaintiff to sue for sale of the mortgaged property. An usufructuary mortgagee as such can only continue to enjoy the mortgaged properties till redemption. He has no right to institute a suit for sale of the properties, unless the mortgage deed contains, an express personal covenant to pay the money. (*Ibid.*) A suit for sale on what is purely an usufructuary mortgage is incompetent, even though a personal covenant to pay is embodied in the deed. 1933 L. 151=34 P.L R. 245. A mortgagor will be liable to compensate the usufructuary mortgagee for interest and improvements at the time of redemption. 57 I.C. 341 (L.) If he had not delivered possession, the usufructuary mortgagee is entitled to interest in the shape of damages for non-delivery of possession. 1931 M.W.N. 751. The claim for such damages is not barred so long as the claim for the principal is not barred. 1931 M.W.N. 751. In a mortgage with possession, where the mortgagee is bound to render account of rent and profits, the rent can be taken to be equivalent to the interest only in the absence of a definite finding as regards rent. 1933 L. 141=145 I.C. 122.

Sec. 58 (d) and (g): MORGAGE DEED—CONSTRUCTION—IF USUFRUCTUARY OR ANOMALOUS. —A deed containing one clause which would make it an usufructuary mortgage with another clause providing explicitly for recovery of the amount due from the mortgaged property is not an usufructuary but anomalous mortgage. 181 I.C. 620=1938 Lah. 145.

Sec. 58 (e).—The definition of English mortgage must be read subject to the definition of a mortgage as given in cl. (*a*), and consequently an English mortgage in India can hardly be regarded as the transfer of

English mortgage.

on a certain date, and tranfers the mortgaged-property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

Mortgage by deposit of title deeds.

[1][(*f*) Where a person in any of the following towns, namely, the towns of Calcutta, Madras, Bombay, [2][and] Karachi, [3][* * * *] and in any other town which the [4][Provincial Government concerned] may by notification in the Official Gazette specify in this behalf, delivers to a creditor or his agent documents of title to immovable property with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

LEG. REF.

[1] Added by Act XX of 1929. S. 19, This corresponds to the last paragraph of S. 59, now omitted by Act XX of 1929, S. 20.

[2] Inserted by A.O., 1937.

[3] Words 'Rangoon, Moulmein, Bassein, and Akyab' omitted by *ibid.*

[4] Substituted for "Governor-General in Council' by A.O., 1937.

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entire estate by the mortgagor to the mortgagee. Some estate (it cannot be correctly called an equitable estate) is left in the mortgagor and only an interest therein is transferred to the mortgagee. 59 C. 1314=36 C. W.N. 709=1932 C. 775. *See also* 40 C.W.N. 1270=1936 C. 646. S. 58 (*e*) speaks of the mortgagor transferring the 'mortgaged property absolutely to the mortgagee' construed to mean that no interest or legal interest and it adds the proviso that the mortgagee 'will retransfer' the property upon payment of the mortgage money as agreed. It does not declare an 'English mortgage' to be an absolute transfer of property. It declares only that such a mortgage would be absolute were it not for the proviso for retransfer. 66 I.A. 50=I.L.R. (1939) 1 Cal. 283=43 C.W.N. 281=1939 P.C. 14=(1939) 1 M.L.J. 544 (P.C.). *Essentials and ingredients of an English mortgage.* 25 M. 220: 43 C. 653; 23 S.L.R. 97=112 I.C. 722; 45 C. 653=22 C.W.N. 793. *See also* 62 C.L.J. 28=1935 C. 659. English mortgages are not generally executed in the mofussil; and when executed there, they are treated as a mortgage by conditional sale between which and the English mortgage there is only very little distinction. 41 I.C. 770: 1917 M.W.N. 794. *See also* 12 C. 614. Where the deed of mortgage contains all the elements of an English mortgage as defined in S. 58 (*e*), the mere fact that there is an undertaking by the mortgagor to pay the rates and taxes of the mortgaged premises, does not make the mortgage other than an English mortgage. 40 C.W.N. 1270=1936 C. 646. The fact that under a mortgage which fulfils all the requirements of an English mortgage in a certain event the date of payment is changed and the mortgagor has agreed to pay the cost of insurance and other charges would not detract from the absolute transfer to the mortgagee,and would not make it any the less an English mortgage falling within the definition. (1942) 2 M.L.J. 406=I.L.R. (1942) M. 851. An English mortgagee may be entitled to possession. 1925 C. 77=81 I.C. 1025. The mortgagor who has created an English mortgage has no power to grant a lease without the concurrence of the mortgagee. 57 C. 82=1930 C. 335. A subsequent lease by the mortgagor is void and inoperative as against the mortgagee. 28 Bom.L.R. 1162=1926 B. 567. In an English mortgage, the rents and profits arising out of the property mortgaged form part of the mortgage which is created to secure repayment of the loan. The position of the mortgagee under the Indian law, so far as the right to the rents and arrears of rent is concerned, is the same as that under the English law. If in a suit on the mortgage, the mortgagee has a receiver appointed by the Court, and a decree for foreclosure is passed on the mortgagor making default in payment of the mortgage money on the date finally fixed for redemption. the mortgagee is entitled to the rents collected by the Receiver since the date finally fixed for redemption, and to the arrears of rents which fell due since the appointment of the Receiver in the suit. I.L.R. (1940) 1 Cal. 197=1940 Cal. 429. S. 58 does not purport to enumerate a complete catalogue of permissible mortgages. Nor does it enact that a mortgage by absolute transfer shall not be effective unless it complies with all the terms of an English mortgage. A lessee in India mortgaging his interest by an English mortgage passes the whole of his interest to the mortgagee, and the latter (certainly when in possession) becomes liable for the rent reserved by the lease. The law has not been altered by the amending Act of 1929. as the legislature took no steps to amend S. 58 (*e*) of the Act; nor did it repeal S. 58 (*e*). The Act therefore continues to contemplate an absolute transfer of the mortgaged property. 17 Pat. 499=1939 Pat. 146. *Quaere:* Whether privity of estate exists or not in Indian Law. 17 Pat. 499=1939 Pat. 146. As to *limitation* for suit on English mortgage, *see* (1942) 2 M. L.J. 406=I.L.R. 1942 M. 851. The fact that the mortgagee obtained possession by proceedings which subsequently proved to be a nullity could not stand in his way. 28 C.W.N. 920=81 I.C. 1025=1925 C. 77.

SEC. 58 (f); GENERAL.—Equitable mortgage is created by deposit of title-deed and by it an interest in the property is transferred. It is a kind of mortgage. 112 I.C. 722; 1 R. 637 =50 I.A. 283=45 M.L.J. 505=51 I.C. 86 (P. C.). A deposit of some of the title deeds relating to property is enough to create a valid equitable mortgage over the entire property if it is the intention of the parties that the mortgage

(*g*) A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage.]

Anomalous mortgage.

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should be in respect of the entire property to which the documents of title relate; it is sufficient if the deeds deposited are material evidences of title and are proved to have been deposited with the intention of creating a mortgage. 48 L.W. 202=1938 Mad. 865=(1938) 2 M.L.J. 534. *See also* 1938 Rang.L.R. 316=1938 Rang. 149 (F.B.). S. 58 (*f*) as amended in 1929 has not introduced any change in the law. It is not necessary that the debtor giving the security should be in that town personally. The proper construction of the clause is that the debtor should deliver, in any of the towns mentioned, to a creditor or his agent, the documents of title to immovable property with intent to create a security thereon. I.L.R. (1937) Bom. 763=38 Bom.L.R. 1222=1937 Bom. 39. Principle of this sub-clause applies to the Punjab. 3 Lah.L.J. 373; 1935 L. 10. Pro-note for debt and deposit of title-deeds may be simultaneous: 1925 C. 485; but mere deposit of title-deeds and a contemporaneous loan will not be sufficient to prove an equitable mortgage. The intention by such deposit to create an equitable mortgage must also be made out. 38 B. 372=23 I.C. 140; 11 I.C. 721; 14 Bom.L.R. 1020=17 I.C. 722; 7 R. 28=116 I.C. 475=1929 R. 65. Mortgages by deposit of title-deeds come under one of the following three possibilities:—(*i*) the title deeds may be passed "without more" or "with nothing said" except that they were to be security; (*ii*) the delivery may be accompanied with a bargain, which either is not written, or if written, does not constitute a contract; (*iii*) there may be a written bargain —a memorandum which is tacitly considered by the parties themselves as the only repositary and appropriate evidence of the agreement. Only the third class requires registration. 34 Bom.L.R. 748=1932 B. 401 (2). As to whether a mere agreement to create a mortgage amounts to an equitable mortgage, *see* 29 Bom. L.R. 253=1927 B. 167; 27 L.W. 633=108 I. C. 291=54 M.L.J. 109; 112 I.C. 491=1928 M. 972. Where title-deeds are deposited under an oral agreement to cover present and future advances, as each advance is made, it becomes a charge on the property comprised in the title deeds by the force of the prior oral agreement. Fresh deposit of title deeds for subsequent advances is not necessary. 40 C.W.N. 1277=1936 C. 412. The documents must show the mortgagor's title, but that does not mean that they should never be sufficient, unless they actually connect the mortgagor with some predecessor of his whose title the decuments show. 59 C. 781=140 I.C. 662=36 C.W.N. 420=1932 C. 589. A debtor executed pro-notes in favour of the agent of the creditors and also delivered to him the title-deeds of his property as security for the loan and thus created an equitable mortgage. The agent subsequently endorsed the pro-notes in favour of the creditors, in order to enable the creditors to sue on them. *Held*, that the transaction of the equitable mortgage was not affected by such endorsement as it was necessary in the case of the negotiable instruments to enable the endorsee to sue on them. The equitable mortgage created by delivery of title-deeds to the agent was really one in favour of the principal creditors and no formal transfer was necessary by the agent to the principal creditor in the case of the equitable mortgage. 1937 Rang.L.R. 303=1937 Rang. 154. *See also* 1934 Rang. 51. Where a promissory note secured by a deposit of title-deeds was endorsed to the plaintiff and the title-deeds were also delivered over to him, the equitable mortgage passed thereunder to the transferee under S. 8 of the Act. S. 54 applies only to transfers by act of parties and does not cover a statutory transfer as that provided in S. 8 in respect of transfer of the securities as attendant on the transfer of the debt. 1919 M.W.N. 613=52 I. C. 879. *See also* 78 I.C. 668=1925 C. 485. Whether the acceptance of a fresh promissory note in lieu of the loan evidenced by the equitable mortgage amounts to a *novatio* depends on the facts of each case. 105 I.C. 765=1925 S. 17. Where one partner redeems a mortgage of partnership property entered into by another partner and takes back the title-deeds, it is only an advance from the one to the other to be paid off out of the profits and no equitable charge is created. 45 M.L.J. 776=1 R. 545=1923 P.C. 87 (P.C.). An equitable sub-mortgage by mere deposit without a registered document can be validly made even of an equitable mortgage particularly when the original mortgage, is by a registered deed. 164 I.C. 724=1936 Rang. 366. *See also* 14 Rang. 522; 1938 Mad. 865=(1938) 2 M.L.J. 534. *See also* 1937 Rang. 69.

SCOPE OF SECURITY.—The scope of security is the scope of title-deeds unless the contrary is proved. 43 C. 895=43 I.A. 122=31 M.L.J. 155 (P.C.); 1925 R. 250. In the case of a mortgage by deposit of title-deeds, neither the right to possession nor the right to the rents and profits of the property is part of the interest which is transferred to the mortgagee, unless an agreement to that effect is expressly made. The remedy of such mortgagee, on the failure of the mortgagor to fulfil his contract is to file a suit for sale of the property. 14 Rang. 292=163 I.C. 850=1936 Rang. 290. In the case of an equitable mortgage of land, house and godown, machinery and electrical equipments subsequently installed will also pass, if such things could pass as things attached to the earth under S. 8, *supra*; otherwise not. 88 I.C. 1011=1925 R. 250. A subsequent registered mortgage is not entitled to priority over a previous mortgage by deposit of title-deeds. 33 C. 410. *See also* Registration Act, S. 48.) As to *rights of an equitable mortgagee to ask for the appointment of a receiver* in his mortgage suit, *see* 54 M. 565=1931 M. 626=61 M.L.J. 111. Where a Receiver is appointed at the instance of an equitable mortgagee, the income realised from the mortgaged properties should in law be considered as earmarked for his use and treated as additional security for the amount due to the mortgagee, and the latter is entitled, when

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he is not able to realise his decree amount by the sale of the mortgaged properties, to proceed against the income in the hands of the Receiver in preference to the Official Assignee in whom the properties of the mortgagor might have subsequently vested. 61 M.L.J. 111=1931 Mad. 626.

PLACE WHERE PROPERTY IS SITUATE AND PLACE OF EXECUTION OF DEED.—Deposit of title-deeds in a town not mentioned in the section gives no right to the mortgagee. It does not even operate as further security. 97 I.C. 391=8 Pat.L.T. 85=1927 P. 41 ; 1932 A. 451. It is necessary that the deposit must be in the towns mentioned in the section, no matter where the properties are situate. 38 B. 372=16 Bom.L.R. 35 ; 1930 L. 920 ; 166 I.C. 974=38 Bom.L.R. 1222=1937 B. 39. The High Court of Bombay can enforce an equitable mortgage entered into in Bombay of properties situated in Baroda by means of a personal decree for sale in the event of default. 34 Bom.L.R. 1384=1932 B. 642. A mortgage of immovable properties in Bangalore effected by a deposit of title-deeds in Madras is valid and operative as the Act is made applicable to the Civil and Military Station of Bangalore by Government of India Notification, dated 16th January, 1917. 35 C.W.N. 1061=61 M.L.J. 408=1931 P.C. 239 (P.C.). *See also* 11 I.C. 721 =6 L.B.R. 23 ; 13 I.C. 429=38 C. 824 ; 48 M. 454=48 M.L.J. 423. But *see also* 3 Lah.L.J. 373 (principle of section applied to Punjab). Where the T. P. Act has not been extended a valid mortgage can be effected by deposit of title-deeds. 12 Bur.L.T. 217=55 I.C. 248. *See also* 34 I.C. 937; 3 Lah.L.J. 373=31 P.R. 1916. A promissory note and a memorandum of deposit of title-deeds were handed outside the limits of the presidency-town to the agent of a solicitor who was acting both for the debtor and creditor with instructions to the solicitor to deliver the title-deeds to the creditor. No such delivery was, however, proved. *Held*, that the requirements of a valid equitable mortgage were not satisfied as the delivery took place outside the presidency-town and further delivery to the common solicitor was not sufficient, as delivery was not made to him as agent of the creditor. 36 C.W.N. 1028=1932 C. 823.

TITLE-DEEDS.—Where there is a loan, and document or documents relating to the property alleged to have been mortgaged are deposited, the only other fact that need be established for the purpose of proving an alleged equitable mortgage is that such document or documents have been deposited with the intention of creating a security on the property mentioned therein. It is not necessary that document or documents should disclose a title in the depositor. 182 I.C. 564=1939 Rang. 185. Machinery which has been firmly fastened to the earth and has been continuously worked for several years is immovable property and the deposit of the documents of title of such machinery creates an equitable mortgage. 186 I.C. 317=1939 Lah. 398. Where the documents which were deposited included the "sold notes" by firms from whom machinery of the factory was purchased, the drafts for the purchase price, freight, etc., and the receipts by the firms for the amount paid and also included the insurance certificates, papers relating to the clearance of the goods at the port, and the specifications and other particulars for various pieces of machinery received & installed in the premises. *Held*, that these documents were "documents of title" of the factory as distinct from the building and the site underneath it and by their deposit an equitable mortgage was created. 186 I.C. 317=1939 Lah. 398. Map of properties and other documents consisting of unimportant and useless letters cannot be recognized as title-deeds the deposit of which cannot create any equitable mortgage. 186 I.C. 317=1939 Lah. 398. Patta of lands in the mofussil is a document of title. 48 M. 454=1925 M. 723=48 M.L.J. 423. But a tax receipt and a copy of a map are not documents of title. 10 R. 403=1932 R. 185. Deposit of title-deeds of a share in an indigo concern can create an equitable mortgage. 7 P. 520=1928 P. 304. Deposit of copies will be sufficient when originals are not available. 31 P R. 1916=34 I.C. 937 ; 36 C.W.N. 420 (attested copy). *See also* 1935 L. 10. It is not necessary to deposit all the material documents with respect to the property. It is sufficient if the principal documents of title are deposited. 11 L. 564=1930 L. 920 ; 2 Pat.L.J. 293=39 I.C. 564 ; 1929 R. 65 ; 36 C.W.N. 420=59 C. 781 =1932 C. 589; (1938) 2 M.L.J. 534 ; 1938 Rang.L.R. 316. But an equitable mortgage is not effected by the deposit of a deed which does not establish the title set up by the mortgagor when there are other documents not deposited, showing such title. 21 M.L.J. 454=9 I.C. 309. Deposit of deed of relinquishment evidencing property obtained in exchange is sufficient. 11 L. 694=1930 L. 731. A mortgage deed executed by the owner in favour of a third person cannot be deemed to be title-deed of the mortgagor. 94 I.C. 427=1926 M. 743. The intention to create a mortgage operates as a constructive delivery of title-deeds, even though they may have already been in the possession of the mortgagee. 118 I.C. 407=1929 R. 107 : 1928 S. 179.

WRITTEN MEMORANDUM.—If there is a written memorandum along with the deposit, the terms of the memorandum are conclusive evidence of the terms of the mortgage. 43 C. 895 =31 M.L.J. 155 (P.C.). *See also* 24 Bom.L.R. 502=1922 B. 440; such memorandum must indicate whether an equitable mortgage was intended by such deposit and the extent of the security. *See* 43 C. 895 (P.C.). The memorandum must be registered in order to be admissible in evidence. 138 I.C. 247 ; 34 Bom.L.R. 748 ; 163 I. C. 195=1936 M. 256. As to a memorandum which was held to be only the record of an entirely completed transaction and so not to require registration, *see* 36 C.W.N. 420=59 C. 781. It is settled law that when a deposit of title-deeds on collateral security for a loan is evidenced by a writing which is not intended to be itself the embodiment of the contract, but is a mere memorandum of a previously completed transaction, that writing is not an instrument affecting immovable property and need not be registered. In deciding whether the writing is such a memorandum of a completed transaction or the embodiment of the actual contract, the use of the past or present tense in reference to the deposit may be an indication of the

59. Where the principal money secured is one hundred rupees or upwards, a mortgage [1][other than mortgage by deposit of title-deeds] can be effected only by registered instrument signed by the mortgagor and attested by at least two witnesses.

Mortgage when to be by assurance.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by [2][a registered instrument] signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

[3][* * * *]

LEG. REF.

[1] Inserted by Act XX of 1929, S. 20.

[2] Substituted for "an instrument" by Act VI of 1904, S. 3.

[3] 3rd para. repealed by Act XX of 1929, S. 20.

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intention of the parties, but cannot of itself be the sole criterion of the nature of the document. 48 L. W. 119= 1938 Mad. 547. Where monies are advanced by the creditor to the debtor on various dates and the debtor deposits title-deeds with the creditor on different occasions, and after all these are done the debtor executes a memorandum to the effect, "we have pledged with you as equitable mortgage as agreed with you the following title-deeds, etc."; the equitable mortgage is completed before the memorandum is written and the memorandum does not require registration. 48 L.W. 292=1938 Mad. 865= (1938) 2 M.L.J. 534.

Sec. 58 (g).—*See* 54 C. 687. A mortgage for a fixed term without any provision for accounting is in the nature of an anomalous mortgage and it automatically redeems itself at the end of the fixed period. 19 N.L.R. 1= 1923 N. 60. In determining whether a mortgage is anomalous or not, it is not merely the language in which the deed is worded, and the name by which it is called is to be taken into consideration; but also the substance of the transaction and the intention of the parties as disclosed in the document. 43 M. 589. An undertaking by the mortgagor contained in the deed of mortgage to redeem the mortgaged property, if the mortgagee requires redemption to be made, imports a personal obligation to pay the mortgage debt. 14 R 685=1937 R. 151. As to *dekhali-rehan* deed, *see* 1937 P. 261; as to *Lahan gahan* mortgage, *see* 20 N.L.J. 285.

Secs. 58 and 100.—Where a document simply creates a lien on property for the realisation of a monthly allowance and does not contain words showing either expressly or impliedly that there is a transfer of any interest in the property, and there is no question of redemption, the document does not constitute a mortgage but merely creates a charge. 1935 O.W.N. 871. *See also* 1941 Cal. 436. Absence of a personal liability is the principal test that distinguishes a charge from a simple mortgage. 38 P.L.R. 8=1936 L. 482. *See also* 164 I.C. 381. In India a mere agreement to mortgage cannot create an interest in the mortgaged property in favour of the party to whom the property is agreed to be mortgaged, nor does it create any charge. Assuming, that a decree for specific performance such agreement is properly made in a suit between the parties, it cannot relate back to the date of the agreement, so as to confer a right of priority over a mortgage created on the same property subsequent to the agreement and before the suit for specific performance. 40 Bom.L.R. 545=1938 Bom. 357. The question whether a sale-deed and a contemporaneous agreement record an out-and-out sale with a condition for repurchase or record a transaction of mortgage, is in the first instance one of construction of the deeds in question. But surrounding circumstances can be taken into consideration by Court. The crucial test, in such cases, is the intention of the parties. It is not satisfactory to apply the test whether the relationship of debtor and creditor is created by the document. 16 Luck. 789=1941 Oudh 479. Where, on the cattle of a judgment-debtor being attached in execution of a decree, a person executes a security bond, which provides that the executant stands as surety on behalf of the judgment-debtor, mortgaging certain properties, and covenants that the attached cattle shall be produced before the Court, when required and on failure to do so binds himself to forfeit sum of Rs. 90, the value of the cattle, the document in question is not a mortgage nor does it create a charge within the meaning of S. 100. 164 I.C. 52=1936 R. 303.

Secs. 58 and 105.—DESCRIPTION AS LEASE BUT REALLY A MORTGAGE.—A document, which purports to be a lease but fulfils the definition of a usufructuary mortgage, is a mortgage and the mere fact that it describes itself as a lease does not make it a lease. 1939 N.L.J. 308= 1939 Nag. 166=I.L.R. (1941) N. 203.

Sec. 59.—Whether S. 59 applies only if in pursuance of the mortgage possession is delivered. 1941 R.D. 718 (2)=1941 O.A. (Supp.) 621 (1)=1941 A.W.R. (Rev.) 681 (1). "Signed" for definition of "signed." *See* General Clauses Act, S. 3, cl. 52. *See also* 41 B. 384. S. 4 properly read means so far as it is applicable to the case of mortgages that if and when a document of mortgage is executed, it must be registered as provided, in the Registration Act, but this section does not in any way do away with the effect of S. 59, which expressly provides that in certain areas a mortgage can be only by means of an instrument in writing. 1933 L. 972.

ATTESTATION.—Prior to T. P. Act it was enough if some one has signed the mortgage deed as attestor at mortgagor's instance. 75 I.C. 931=1924 A. 832; 34 C. 227. *See* now the amended definition of "attested" in S. 3, *supra* and cases cited thereunder. *See also* 55 M.L.J. 794. A mortgage-deed is admissible in Punjab

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where the Act is not applicable even without attestation. 1920 L. 495=116 I.C. 610. Even though it may include properties situate in a place where the Act is in force. 17 L. 686=1936 L. 946=39 P.L.R. 946. The provision regarding attestation in S. 59 is not applicable to a case of hypothecation of movables and therefore a registered bond hypothecating a fund in Court executed, but not properly attested, would operate as a valid hypothecation. 1941 M. 805 (2)=(1941) 2 M.L.J. 293.

KANOM, MELKANOM AND MELCHARTH.—Deeds require attestation as mortgage deeds. 40 M.L.J. 282=44 M. 344. Even an anomalous mortgage requires attestation. (*Ibid.*) As to what amounts to attestation, *see* 62 I.C. 668; 49 C. 438; 46 C. 522 and S. 3, *supra*. The mere endorsement by the Sub-Registrar of admission of execution and the signature of the witnesses present at that time are not sufficient to satisfy the requirements of S. 59, where there is no evidence to the effect that the signatures of the witnesses to the admission were affixed to the document in the presence of the admitting executants, nor any endorsement to that effect. 131 I.C. 840=60 M.L.J. 302. *See also* 8 O.W.N. 194=132 I.C. 337; 61 C. 525=38 C. W.N. 753=150 I.C. 762. But *see* 1932 A.L.J. 653=1932 A. 527 (F.B.). Signature of the Sub-Registrar affixed in the presence of the executant may be attestation. 1930 C. 750. Attestation is an act done after execution and until the deed has been executed, there can be no attestation. 68 I.C. 198=1923 N. 45. *See also* 1927 C. 926=45 C.L.J. 577. Two persons must have subscribed as witnesses. 83 I.C. 170 =1925 P.C. 89 (P.C.). Where the attestors validly attested a document but did not attest a subsequent addition of a few more properties, the attestation was held sufficient. 43 M. 405 =38 M.L.J. 251; 60 I.C. 736. Where unnecessary interpolation of survey numbers was made after attestation and the attestor did not sign the document once again, the document was not rendered defective. 97 I.C. 676=1926 M. 1060.

WHO CAN ATTEST.—A marksman may be an attesting witness. 26 I.C. 84=12 A.L.J. 1114; 41 B. 384=39 I.C. 61; 1 N.L.R. 14; 131 I.C. 241=1931 A. 101; 18 A.L.J. 105=55 I.C. 230; 91 I.C. 507=1926 O. 266. The executant himself cannot be an attestor. 15 I.C. 666=16 C.W.N. 1075; 37 C. 526=14 C.W.N. 974. Scribe can also be an attestor. 1940 Rang.L.R. 199. When a mortgage is executed benami the person who actually advances the money is actually not a party to the mortgage deed as it stands. If he attests the deed, his attestation is sufficient for purposes of S. 59. Per *Curiam*.—The old English law in this respect has been modified even in England and is wholly inapplicable to conditions in India. 8 O.W.N. 660 (F.B.).

EFFECT OF ATTESTATION.—The signature of an attesting witness does not fix that witness with knowledge of the contents of the document or with any liability under its terms. 42 C.L.J. 215=90 I.C. 534. Effect of witnessing execution and attesting. 66 I.C. 589; 34 I.C. 397; 1922 P. 49. Person signing merely to show approval of transaction is not necessarily an attesting witness 26 Bom.L.R. 737=83 I.C. 170=1925 P.C. 89 (P.C.); 62 I.C. 668=1922 P. 49.

INVALIDLY ATTESTED DOCUMENTS.—Where a mortgage deed is not properly attested, it is not admissible in evidence as a mortgage deed but may be admissible in evidence as a simple bond. 20 I.C. 364=13 A.L.J. 553; 66 I.C. 680; 66 I.C. 589; 92 I.C. 948=1926 C. 637; 32 M. 410=19 M.L.J. 584; 34 I.C. 397=3 O. L.J. 164. *See contra* 35 C.L.J. 473=27 C.W.N. 134. It is enforceable only against those who are personally liable under it. 20 C.W.N. 989 =34 I.C. 900=31 M.L.J. 251 (P.C.). *See also* 38 I.C. 932=44 C. 388 (P.C.); 46 M. 64=43 M L.J. 745=1923 M. 36. A loan *prima facie* involves a personal liability to pay. The money can be claimed against the mortgagee personally when the mortgage is invalid for want of attestation. 44 C. 388=44 I.A. 87= 32 M.L.J. 39 (P.C.). *See also* 1931 M. 124=60 M.L.J. 309; 54 M. 163=1931 M. 140=60 M. L.J. 56. Admission of execution was held not sufficient to validate a mortgage deed which had not been duly attested. 104 I.C. 386=5 R. 561=1927 R. 233. *See also* 1927 C. 926= 105 I.C. 28. *See* now the amendment of Evidence Act, S. 68. 1929 M. 881=57 M.L.J. 588; 44 C. 345.

PROOF OF ATTESTATION.—"Attesting witness" in S. 68 of the Evidence Act means the same thing as "attesting witness" in S. 59, when the question is as to the proof of a mortgage. 62 I.C. 97=48 C. 61. The proviso to S. 68 only removes the necessity of calling an attesting witness to prove the execution of the documents therein referred to and does not purport to relieve the party of the necsesity of proving a mortgage in the form prescribed under S. 59. 11 R. 26=1933 R. 6=141 I.C. 700. Where a witness states a mortgage bond was executed in the presence of himself and others and that he signed after seeing it executed, it is sufficient proof that he signed as attesting witness. 1924 P. 317. It is sufficient if the attestors saw the hand executing and heard the voice assenting and need not have seen the executant's face. 37 A. 474=42 I.A. 163=29 M.L.J. 159 (P.C.). Where there is no proper attestation by reason of the execution not having taken place in the presence of the attestors, evidence of the witnessing of the execution by some other person is not sufficient. 34 I.C. 397. *See also* 1925 C. 318. (*See* now the amended S. 68 of the Evid. Act.) The evidence of plaintiff that the executant signed in the presence of the attesting witnesses was held insufficient. 131 I.C. 557=1931 A.L.J. 342. No proof by an attesting witness is necessary when the executant himself admits a document. 44 C. 345=20 C.W.N. 1044; 62 I.C. 540; 47 B. 137=1923 B. 90. *See also* 1936 O. W.N. 354. Even where a document is admitted to have been executed, Court may require strict proof of valid attestation. *See* 9 L.W. 5=49 I.C. 278. *Also* 98 I.C. 280; 5 P. 58=30 C.W.N. 364=1925 P.C. 203 (P.C.); 6 L.W. 147=41 I.C. 585; 42 I.C. 290; 1936 O.W.N. 354. A document not validly attested as required by law, though its execution is admitted, is altogether of no effect. 52 I.A. 362=

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1925 P.C. 203=49 M.L.J. 240 (P.C.). Proof by one attesting witness is sufficient. 60 I.C. 554=39 M.L.J. 463. He need not depose that the other attestor witnessed the execution. 39 A. 109; 39 A. 241; 58 I.C 801; 39 I.C. 274. But if the validity of the mortgage be specifically denied in the sense that the document did not effect a mortgage in law, then it must be proved by the mortgagee that the mortgage deed was attested by at least two witnesses. 1932 A.L.J. 653=1932 A. 527 (F B). The question of valid attestation cannot be raised for the first time in appeal. 46 M.L J. 56; 51 I. C. 378; 1924 M. 513. But *see* 101 I.C. 277= 1927 P. 131. Even though a document has not been registered or attested, the long course of conduct on the part of the executant may prevent him from disputing its validity. 45 A. 388=21 A.L.J. 294 (case of a transaction before T.P. Act). An allegation of proper attestation of a mortgage in a plaint not denied specifically or by necessary implication by the defendant must be taken to have been admitted by him. Consequently it need not be proved. 39 M L.J. 453=58 I.C. 801. One of the attestors to a mortgage deed was dead at the time of the suit and the other was unable to say if the deed was the one he attested. Evidence of the scribe was let in to prove execution. *Held*, it was sufficient under the circumstances. 90 I.C. 630 =1925 C. 318. Where a person who has signed a deed as a scribe subsequently asserts that he signed, as a witness, the onus of proving this assertion lies heavily on the party so asserting. 4 Pat. L. J. 511=53 I.C. 79.

PARA. 2.—Delivery of possession is sufficient and necessary in the case of unregistered mortgages below Rs.100. 62 I C. 859; 1922 O. 123; 66 I.C. 360; 31 I.C. 87 (Bur.). Where a mortgagor has given possession under an invalid mortgage for above Rs 100, he can maintain a suit for recovery of possession and the Court will decree the suit conditional on his repaying the money advanced. 98 I.C. 195=1927 M. 92; 2 R. 313=1925 R. 1. But *see* 100 I.C. 733 (1)= 1927 A 441. (*See* now S. 53-A.) The delivery of possession is to be contemporaneous with the execution of the bond. 41 I.C. 455=4 O.L.J. 446. *See also* 46 L.W. 742=1938 Mad. 85

USUFRUCTUARY MORTGAGE FOR Rs 100 UNREGISTERED —An unregistered deed of usufructuary mortgage for Rs 100 is invalid and no suit for redemption could lie. Yet there is nothing against the mortgagor claiming a decree for possession, if he could prove his title independently of the mortgage. The mortgage being invalid, the mortgagor is entitled to possession of the property on proof of title, but if the usufructuary mortgagee has been in possession for more than 12 years as such, he must be deemed to have acquired mortgagee's rights and thus there comes into existence a legal operative mortgage which the mortgagor must redeem as a condition precedent to a decree for possession. 1935 A.W.R. 705.

REGISTRATION.—The! exception in S. 59 of the Act (that there need not be a registered instrument to evidence an equitable mortgage) remains subject to an exception that has a twofold effect. First, that if the terms of the contract relating to the equitable mortgage have been reduced to the form of a document —if the intended equitable mortgage is created by contract whieh is reduced to the form of a document—no evidence shall be given in proof of the terms of such contract except the document itself (or secondary evidence of its contents). Secondly, since the object of such a document is to create a security, *i.e.*, to create an interest in immovable property, the document itself shall not affect the property, nor be received as evidence unless it has been registered; Registration Act, Ss. 17 and 49. 34 Bom.L. R. 741=1932 B. 401 (2). Mortgage for Rs. 80— Subsequent advance of Rs. 80 on the same security requires registration—1918 R. 242. *See also* 1930 A. 431=126 I.C. 17. In a suit in ejectment, the defendant can set up even an unregistered mortgage deed to show that he was in possession as mortgagee and not as tenant. 1924 A. 837=78 I.C. 955. An agreement to execute an usufructuary mortgage deed need not be registered. It is specifically enforceable and where the mortgagee had been put in possession, it can be set up as a defence to a suit for redemption 1930 P. 479=126 I.C. 854. Where a transaction was entered into prior to the T.P.Act and a long course of conduct by the mortgagor showed that he treated it on the basis of a mortgage, and where the defendant was in possession, the mortgagor cannot quest on an unstamped and unregistered document. 45 A. 388=1923 A. 433 (2).. Mortgagee need not advance money before registration and so a creditor of the mortgagor cannot attach the money in the hands of the mortgagee before registration. 1922 A. 384. Where a non-existent property or a property not belonging to the mortgagor is included in the document, with a view to registration in a particular office, the registration is futile and the security unenforceable. 38 C.L.J. 355=1924 C. 348. Where a deed is invalid for want of registration, the creditor can obtain a money decree on the covenant to repay. 66 I.C. 680. *See also* 1931 M. 124=60 M.L. J. 309. But *see* 1926 O. 138; 21 O.C. 347. Interest in royalty is not immovable property and no registration is necessary. 1922 P. 36. Registered mortgage deed—Alleged modification by subsequent verbal arrangement—Proof— Not permissible. 61 I.A. 185=13 P. 310=66 M.L.J. 662 (P.C). Unregistered mortgage —Notice given to subsequent mortgagee at time of registration—Priority. 1933 L. 609=146 I.C. 40 (1). Mortgage of fruit-bearing trees—Compliance with formalities prescribed by S. 59 if necessary. *See* 54 A. 437.

MORTGAGE BY DEPOSIT OF TITLE-DEEDS— WRITTEN MEMORANDUM.—The T. P. Act is not in force in the Punjab, and S. 59 does not prohibit the creation of a mortgage by deposit of title-deeds in the Punjab. [9 M.I.A. 307 (P.C.) and 31 P.R. 1916, Ref.] 1933 L. 972. A mortgage by deposit of title-deeds cannot be effected within the limits of a cantonment to which S. 59 has been extended. 1933 L. 972; 1933 L. 1001. Case of mortgage by lessee by depo-

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sit of title-deeds of the lease (though the lease had expired on the date of mortgage but the lessee continued in possession and lessor had accepted rent). 148 I.C. 721= 1934 R. 51. Case of mortgage by deposit of the *copy* of the partition award, on which a decree had been passed by Court. 1933 L. 972. An endorsee of a negotiable instrument, the payment of which is secured by a mortgage by deposit of title-deeds, can claim to enforce the mortgage, even though there is no registered instrument conveying the mortgage rights to him. 148 I.C. 721 =1934 R. 51. *See also* 1937 Rang. L. R. 303=1937 Rang. 154. A writing evidencing the terms of the equitable mortgage must be registered. Where, however, it was not registered but the title-deeds continue to remain with the mortgagee and later on the mortgagor told the mortgagee orally that the title-deeds would continue as security, *held,* a valid equitable mortgage was created. 109 I.C. 170=1928 M. 919. But *see* 59 I.C. 578 (see now the amendment of S. 59 in which the words *"other than a mortgage by deposit of title-deeds"* are newly introduced); 112 I.C. 491; 117 I.C. 59. Deposit of title-deeds by *unregistered* letter does not create an equitable mortgage. 112 I.C. 278=1928 M. 909; 24 C.W.N. 599. *See also* 94 I.C. 427=1926 M. 743; 108 I.C. 291=54 M.L.J. 109; 34 Bom.L.R. 748; 1936 M.W.N. 367=1936 M. 256. But when the letter records a previously completed transaction it does not require registration. 29 C.W.N. 784=88 I.C. 866. *See also* 61 C.L.J. 473; 1935 R. 333; 67 I.C. 421. When the deposit of title-deeds is independent of the memorandum, the deposit creates the mortgage and the memo. need not be registered. 16 L. W. 936=1923 M. 262; 37 I.C. 117=25 C. L.J. 160; 47 I.C. 133; 45 I.C. 918. *See also* 24 C.W.N. 599=31 C.L.J. 375; 3 R. 443; 84 I.C. 629=1924 M. 547; 54 M.L.J. 109=1928 M. 972. If such a document which requires registration is not registered, it cannot be used in evidence at all and the transaction itself cannot be proved by oral evidence either. I.L.R. (1937) 2 Cal. 586 =1938 Cal. 308. *See also* 43 C.W.N. 806 (P.C.). In a mortgage by deposit of title-deeds if there is a writing it must be considered whether it creates the mortgage or whether the mortgage is complete without the writing, the writing being merely the statement of fact which would evidence the mortgage. If the writing creates the mortgage it must be registered. 176 I.C. 580=1937 Cal. 741. A transaction whereby a tax receipt and a certified copy of a survey map relating to land in Rangoon were delivered to a creditor did not give rise to a mortgage by deposit of title-deeds (History of mortgage by deposit of title-deeds traced). 11 R. 239=1933 R. 299. Where an award has been filed in Court and a decree has been passed and the debtor failing to get the original award deposits a certified copy of the award as evidence of his title to the property mortgaged by him, the deposit creates a valid equitable mortgage. (1933 L. 972, Foll.) 1935 L. 640. A letter written by the mortgagor the next day after an agreement to deposit the title-deeds had been concluded ran as follows: "I am sending you the title-deeds with the intention of depositing the same with you as per the memorandum of yesterday executed by me" and then referred to the schedules annexed to the letter. *Held,* the two documents must be read together and, so read, they embodied the terms of the transaction and not having been registered, the mortgage was not valid. 129 I.C. 814=1931 M. 124=60 M.L.J. 309. An equitable mortgage can be created by the deposit of title-deeds alone, but where the title-deeds are handed over accompanied by a bargain, the terms of the bargain must prevail; and where it is reduced to writing, it and it alone must determine the scope and extent of the security. 141 I.C. 541=1933 Pesh. 35. The real test is not the exact moment at which the documents are handed over, and if they are handed over merely for purposes of inspection and not for the completion of the contract, then the terms of any subsequent document recording the terms of the contract must be regarded as the contract itself. (*Ibid.*) The debtor wanted a loan from the bank by depositing a mortgage-deed as security. The bank replied in the affirmative and thereupon the debtor wrote a letter and a pro-note on receipt of which the bank paid the loan. The letter described itself as one of hypothecation and contained the important terms of the transaction. *Held,* that the letter should have been registered. (*Ibid.*) A mere list of documents deposited or any entry in a voucher need not be registered. 1930 L. 920. At the time of making a deposit of title-deeds as security for money lent, the mortgagor gave a memorandum which contained a list of the title-deeds with the introductory words: "As agreed upon in person, I have delivered to you the undermentioned documents as security." *Held,* it was only a list of the documents and did not embody the terms of the agreement between the parties and therefore did not require registration. 58 I.A. 68=54 M. 257=60 M.L.J. 506 (P. C.). *See also* 11 R. 491=1933 R. 307. A mortgagee with deposit of title-deeds was acting as an agent of his mortgagor in arranging a loan for the mortgagor. At the same time he was also acting as agent of the mortgagee; but as agent of the mortgagor he sent a letter to the mortgagor containing the scope of the security and the term. *Held,* that the document was not the bargain between the parties to the mortgage subsequently effected but only one sent by agent of the mortgagor; that it did not require registration and that extraneous evidence was admissible to prove the scope of

References to mortgagors and mortgagees to include persons deriving title from them.

[1][59-A. Unless otherwise expressly provided, reference in this chapter to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them respectively.]

Rights and Liabilities of Mortgagor.

Right of mortgagor to redeem.

60. At any time after the principal money has become [2][due], the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (*a*) to deliver [3][to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee], (*b*) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (*c*) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished :

LEG. REF.

[1] This section is new and is added by Act XX of 1929.

[2] Substituted for the word "payable" by Act XX of 1929.

[3] Substituted for "the mortgage-deed, if any, to the mortgagor" by Act XX of 1929.

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the security. 148 I.C. 721=1934 R. 51. Though an agreement embodied in a written document requiring registration under S. 17 and not so registered cannot be proved by the written document or by oral evidence, yet where there is no written agreement, there is no reason why the intent to create a security by deposit of title-deeds under the exception provided for in S. 59, should not be evidenced by written as well as by oral evidence. (*Ibid.*) The Act, far from containing any general prohibition of mortgages by deposit of title-deeds, expressly exempts them when made in the specified places from the formalities prescribed for other mortgages. The onus is strongly on him who seeks to impugn the validity of such mortgage. 35 C. W. N. 1061=1931 P.C. 239=61 M.L.J. 408 (P. C.).

PLEADINGS AND PRACTICE.—If an oral mortgage for Rs. 100 or upwards a suit for redemption is not sustainable. The mortgagor can sue for possession on the basis of his title and the mortgagee cannot claim to remain in possession on the strength of the oral mortgage which could not be proved. 1939 Rang. L. R. 645=1940 Rang. 11 (F.B.). The fact that a mortgage-deed is not duly proved to have been executed and attested, as required by S. 59 is no bar to the Court passing a money decree on the personal covenant. 50 L.W. 524=(1939) 2 M.L.J. 664.

Sec. 59 (as amended in 1928), Ss. 59 and 100: SCOPE.—A debenture issued by a Limited company, the loan under it being stated to be on the security of specified immovable property, requires registration under S. 100 of the Transfer of Property Act read with S. 59 of the Act as amended in 1929, even when the amount of the loan is less than Rs. 100. If the debenture is not registered, the holder of a debenture cannot be regarded as a secured creditor, although the debenture has been registered with Registrar of Joint Stock Companies. I.L.R. (1939) Mad. 199=48 L.W. 952=1939 Mad. 202=(1939) 1 M.L.J. 185.

Sec. 59-A.—The Select Committee said: "Whether the words 'mortgagor' and 'mortgagee' as used in the various sections in this Chapter include all persons deriving title from them has given rise to some difficulties. (*See* 39 I.A. 7; 27 A. 223); in order to make this clear, we propose the addition of S. 59-A." *See* 1931 A.L.J. 273=1931 A. 277 (F.B.). Mortgage by Hindu father—Later mortgage by sons—Covenant against redemption without payment of both amounts—Mortgagee's right to consolidate—Redemption of one mortgage alone—Right to. 11 O.W.N. 1601=1935 O. 213. S. 59-A does not control S. 92—Purchaser of mortgaged property at sale in execution of money-decree—Payment of prior mortgage by—Right of subrogation. *See* 44 Bom.L.R. 20.

Sec. 60: SCOPE OF SECTION.—The rule in this section is to be applied even where the Act is not in force, as a rule of justice, equity and good conscience. 1 R. 419=1924 R. 83. It is not necessary for the application of S. 60, that the mortgage should be based upon a contract. It applies also to mortgage created by operation of law under S. 171, Bengal Tenancy Act. 15 P. 481=17 Pat.L.T. 726=1936 P. 629. Under S. 60 the integrity of a mortgage is not broken except where the mortgagee has purchased or otherwise acquired as proprietor a certain portion of the property mortgaged. Hence where the mortgagee has allowed the owner of one part of the

Provided that the right conferred by this section has not been extinguished by the act of the parties or by [1][decree] of a Court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Redemption of portion of mortgaged property.

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except [2][only] where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

LEG. REF.

[1] Substituted by S. 22 of Act XX of 1929 for "order".

[2] Inserted by S. 22 of Act XX of 1929.

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mortgaged property to redeem his part any separate owner of a portion of what remains cannot redeem his part on payment of its proportion of the debt. 1942 A.L.J. 463=1942 P.C. 50=(1942) 2 M. L.J. 390 (P.C.).

"MORTGAGE-MONEY" MEANING OF.—The expression "mortgage-money" is to be construed as the principal money and interest of which payment is secured for the time being. 1929 A. 411; 5 L. 425=1924 P.C. 183; 113 I. C. 750. (*See also* S. 58, *supra*). Sums received by mortgagee have to be credited in favour of mortgagor. 1931 A.L.J. 421. A mortgagee remaining in possession of the property and receiving profits in lieu of interest is in the absence of covenant by the mortgagor to add the deficiency in the profits to the principal or to pay it up at the time of redemption, entitled to redeem on paying the principal sum only. 14 A.L.J. 986=37 I.C. 95; *also* 98 P.R. 1917=41 I. C. 59. *See also* 53 C.L.J. 380, where there was express covenant for payment of principal and interest apart from rents and profits received by the mortgagee. The expression *"mortgage-money"* includes costs properly incurred by the mortgagee, such as costs of litigation which are allowed under the law of mortgage in England. 25 Bom.L.R. 839=1924 B. 264; 28 I.C. 184= 16 M.L.T. 365. In a redemption suit the mortgagee could not claim compensation for improvements made by him during the term of his tenancy, prior to the mortgage. 54 P.R. 1912=14 I.C. 78. *See also* 17 A. 282. Where certain properties were usufructuarily mortgaged but a portion was sold in execution of a prior mortgage and the mortgagee without taking any steps in respect of the property sold, remained in possession of the remaining property, in a suit for redemption by the mortgagor, the mortgagee is not entitled to claim loss of interest sustained by the deprivation of a portion of the properties and the mortgagor is not entitled to a reduction of the principal money because the mortgagee failed to deliver the entire properties. 13 I. C. 156. A mortgage bond executed on 12th May, 1912, provided that interest would be paid yearly and that the principal would be paid within five years. It further provided as follows: "In the case of default of payment at the time fixed or on the discovery taking place within the stipulated period of any act of bad faith, then the creditor would be entitled to recover his money, principal and interest, in any way by filing a suit." The mortgagor failed to pay interest in May, 1913, but the suit was not brought till April, 1929: *Held*, that the act of bad faith which the parties had in contemplation was not the mere default in the payment of the annual interest, that there was no default by the mortgagor which would entitle the mortgagee to realise the whole of the mortgage-money within the period of five years and that the suit having been brought before 12 years from the expiry of the period of five years was within time. 131 I.C. 547=1931 A. 537. Mortgage-money includes all moneys which may be properly allowed on taking account: 26 I.C. 184=16 M.L.T. 365; but not arrears of rent and interest for which a decree was obtained but allowed to get barred. 41 M. 1043=35 M.L.J. 414; 56 I.C. 743. The mortgagor is liable to pay at the time of redemption *gilandazi* expenses provided to be paid in the mortgage as such provision is not clog on redemption. 16 P.L.T. 21=1935 P. 157. An apportionment of a mortgage-debt cannot be made without the consent of all the parties interested. 1933 L. 129=143 I.C. 364.

WHEN MORTGAGOR CAN REDEEM.—A stipulation in the mortgage-deed that the mortgage will be foreclosed if the mortgage-money is not paid does not extinguish the mortgage on failure to pay the mortgage-money and the right of redemption is not lost. The equity of redemption can only be lost either by a fresh agreement between the parties or by foreclosure proceedings. In the absence of either, the entry recording

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mutation in the name of the mortgagee as owner is of very little help in the determination of the point. 11 O.W.N. 559=1934 O. 246. Where at the time the mortgage was entered into, there was no law of limitation for redemption existing, the right to redeem cannot be lost by lapse of time. 78 I.C. 358=1925 L. 105. If a person being a party to a suit on a mortgage prior to his own omits to claim his right to redeem such prior mortgage, he cannot afterwards sue on the mortgage. 79 I.C. 654=1924 O. 56. Until a mortgage has been extinguished, there is a repeated cause of action to sue for its redemption. It is only when it has been extinguished by a final decree in redemption suit or when the mortgagor fails to redeem and the property is sold that the rights of a mortgagor to redeem come to an end. 114 I.C. 186=1929 A. 231; 104 I.C. 358 (2)=1927 N. 345. *See contra* 70 I.C. 152=26 C.W.N. 532; 10 C.L. J. 115=1 I.C. 71. Even after it is extinguished by sale of the mortgaged property purchased by the mortgagee himself, it may be revived where a subsequent mortgagee who was not a party to the previous suit redeems the prior mortgagee purchaser under a decree of Court, the consequence of such redemption being that the prior mortgage was satisfied and the decree and sale were vacated. 1930 P. 570. *See also* 28 N.L.R. 247=1932 N. 154. A preliminary decree for foreclosure does not extinguish the right of the mortgagor to redeem the mortgage. 130 I.C. 196=1931 A.L.J. 265=1931 A. 223. Adverse possession against a mortgagee does not bar the mortgagor's right of redemption. 38 A. 411= 34 I.C. 171. In the mortgage-deed no period was mentioned for the mortgage, but it was provided that the principal amount of Rs. 1,400 "shall by 15 years' time be discharged by the seven instalments of not less than Rs. 200 each." *Held,* that "by 15 years' time" in the document means before the expiry of 15 years and hence a suit for redemption brought before the expiry of 15 years since the date of the mortgage was not premature. 1929 M. 339. *See also* 134 I.C. 459 (A.). A *kat kobala* provided that the lands were to be kept in *kat* for a period of 9 years and that during that time the mortgagees will be entitled on paying the rent to the landlord to appropriate the profits in lieu of the annual rent payable. It further provided that, on the expiry of 9 years, the mortgagors shall redeem the *kat kobala* after paying the entire amount due for principal and interest. It said "if we cannot pay the entire amount according to the stipulation then after the term this *kat kobala* itself will be regarded as an out-and-out sale and we shall cease to have any right." A suit having been filed for redemption, *held* (1) that the plaintiff could not redeem without paying the amount due for principal and interest, apart altogether from the amounts of rents and profits received by the mortgagees from the land, (2) that there was no case for rectification or cancellation on the ground of mistake, and (3) that the mortgagors could not ask for an account under Ss. 76 and 77. 134 I.C. 95=53 C.L.J. 380. (*See also* the new amendment of this section.) Where a mortgagee brings a suit for possession in pursuance of a condition in the mortgage-deed, that if principal and interest are not paid off in a certain period the mortgagee can take possession of the mortgaged property, the mortgagor or persons claiming through him cannot claim to redeem in such suit. 111 I.C. 519=1928 L. 668. The mortgagor cannot insist on redemption before the day fixed for payment as the right of redemption and foreclosure are co-extensive. 8 I.C. 707 (C.). *See also* 16 M. 486; 1928 A. 131; 42 C. 1146=19 C. W.N. 389=28 I.C. 450; 64 I.C. 780=17 N.L.R. 202; 79 I.C. 870=1925 N. 11; 43 M.L.J. 368=1925 M. 825; 1929 M. 339; 8 P. 243=113 I.C. 106; even though the period may be long. 80 I.C. 728=1925 A. 42; 116 I.C. 609=1929 L. 523 (and cases referred to therein), or even if the terms of the mortgage were unconscionable. 94 P.R. 1919=52 I.C. 542. *See also* 1929 L. 523; 4 Luck. 203=1929 O. 54 (Redemption rendered impossible owing to onerous condition in mortgage-deed. If condition is enforceable). (*See also* the Statement of Objects and Reasons to the new amending Act XX of 1929.) Contract to the contrary. *See* 25 A.L.J. 1051; 36 A. 195=41 I.A. 84=26 M.L.J. 474 (P.C.). Where mortgage was by conditional sale and no proceedings were taken to foreclose it, mortgage could be redeemed. 149 I. C. 969=1934 L. 242. On the breach of the condition of repayment, in a mortgage by conditional sale, the contract executes itself, and the transaction is closed and becomes one of absolute sale without any further act of the parties or accountability between them. 97 I.C. 725=1927 S. 46. An usufructuary mortgagee has no right to remain in possession of the mortgaged property after mortgage-money is satisfied from the usufruct though the parties may have miscalculated that the liquidation of the mortgage-money from the usufruct shall take a longer period. 5 O.L.J. 263=47 I.C. 161. When the parties to a mortgage agree to certain terms it is the duty of both parties to adhere to the terms of the mortgage but if the mortgagee commits breach, the mortgagor would be entitled to redeem the mortgage even before the expiration of the period fixed as the term thereof. 48 M. L.J. 338=1925 M. 825. *See also* 25 A. L.J. 658. If the parties agree that the mortgage-money should be paid in Jeth in a year and the property redeemed payment in any other month is not a good and valid tender. 1 O.L.J. 263=24 I.C. 874. *See also* 4 O.L.J. 334=40 I.C. 381. Where a mortgage-deed in respect of houses or groves provides for redemption in the fal-

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low season, such limitation has no significance and it is not necessary that a suit for redemption of such mortgage should be filed in the fallow season. 51 I.C. 880 (O.). Where on the same date when the mortgage was executed, a *varthamanam* was entered into which provided for extinguishment of the debt out of the rents, the sub-mortgagees holding under the mortgagee are bound by the *varthamanam*. 107 I.C. 808 =1928 M. 382. A transferee from the heirs of a benamidar mortgagor can maintain a suit for redemption. 29 C.L.J. 434 and 45 C. 909 (P.C.), Rel. on. 38 L.W. 266=1933 M. 635. A raiyati holding was mortgaged and the mortgagee undertook to redeem a prior mortgage and pay the rent of the holding, but he neither redeemed the mortgage nor paid the rent, and when the holding was sold for arrears of rent, including the rent for two years prior to the mortgage, he bought it in the name of another person. In a suit for redemption, *held*, that the fact that another person, who was not the mortgagor, shared responsibility with the mortgagee for a wrongful omission would not in the circumstances of the case give him a right to derive benefit from the omission at the expense of the mortgagor and the sale was no bar to the redemption. 151 I.C. 255=1934 P. 307. In order that the integrity of a mortgage may be broken, it is necessary that all the mortgagees should have purchased a share in the mortgaged property. Where a suit is brought for redemption by an heir who is interested only in a portion of the mortgaged property and though all the heirs were made parties, the suit as against one is found to be not maintainable, it is not open to the plaintiff to claim a decree for redemption of the remaining property by payment of the whole of the mortgage-money. Unless the whole of the mortgage-money is paid to all the mortgagees, the whole money due under the mortgage cannot be deemed to have been paid. 1939 A.L.J. 590=1939 All. 600.

INDIVISIBILITY OF MORTGAGE—(A) GENERAL.—The integrity of mortgage cannot be broken without the consent of the mortgagee. A person interested in a portion only of the mortgaged property is not entitled to redeem that portion alone. 102 I. C. 708; 2 I.C. 662 (C.). *See* on appeal 42 C. 801=28 I.C. 930 (P.C.). A mortgagor is entitled to redeem a portion of the mortgaged property on payment of the entire mortgage-money even though his claim against the remaining portion is time barred. Doctrine of indivisibility of mortgages discussed. 54 B. 625; 1930 A. 416. *See also* 43 P.L.R. 705=1941 Lah. 421. Exceptions to the doctrine stated. 59 C. 1374. A person who has any right at all to redeem has a right to redeem the whole of the mortgaged property and cannot be compelled to redeem only the part in which he may be interested. *See also* 57 C. 872= 129 I.C. 310=1930 C. 810; 1933 R. 392. The property, which was subject to two mortgages, was taken on lease by a Hindu father and a stranger. In a decree on one of the mortgages the father redeemed the mortgage with joint family funds the stranger contributing nothing. In suit on the other mortgage the son is entitled to redeem whole, and, not only one-fourth, although father declined to redeem. 29 N.L.R. 77=1933 N. 44 (2). So long as the integrity of a mortgage remains intact, each item of the property mortgaged, when there are distinct and separate items, is liable for the whole amount due under the mortgage. 164 I.C. 613=1936 A. L. J. 1116=1936 A.W.R. 788=1936 A. 595. *See also* 15 Pat. 481=1936 Pat. 621. S. 60 cannot be read subject to S. 82 and the fact of the purchase of several items piecemeal by different persons will not give them a right to redeem the properties piecemeal. There must be a redemption of all the items at once. 26 I.C. 194 (M.). But *see* 11 P.L.T. 595=1930 P. 579. A mortgagee can, however, allow redemption by a co-mortgagor of his share of the mortgaged property. 50 P.R. 1912=13 I.C. 539.

(B) ACT OF MORTGAGEE IN DIVIDING SECURITY.—The proposition that a mortgage is indivisible is one for the benefit of the mortgagee and it may be waived by him. 1928 L. 792. *See also* 10 C.L.J. 150=1 I.C. 264. Where the mortgagee has dealt with one of those entitled to the equity of redemption, persons entitled to the equity of redemption in the remainder may claim to redeem their shares. 38 M. 310=23 M.L. J. 576=17 I.C. 837; 1927 M. 1039 (2); 22 Bom.L.R. 1431=59 I.C. 762; 50 P.R. 1912=13 I.C. 539; 27 Bom.L.R. 1449=1926 B. 31; 59 I.C. 762=22 Bom. L. R. 1431. But *see contra* 45 A. 524=1923 A. 499. Where two of three mortgagors sold their interests in the equity of redemption and the purchasers executed a fresh mortgage-deed in favour of the mortgagee, the mortgage is split up and the third mortgagor is entitled to redeem his undivided one-third share. 1915 M.W.N. 189=28 I.C. 248; 1926 P. 94. The mortgagee's taking in lieu of his whole mortgage a portion of the mortgaged property does not affect the principle of indivisibility and does not entitle a party to redeem the portion so taken by paying a proportionate part of the mortgage-debt. 20 N. L. R. 115=1924 N. 266. *See also* 91 I.C. 978= 1926 B. 31. A zamindar made an usufructuary mortgage of his zamindari without *sir* in 1867. Subsequently in 1895 he executed an usufructuary mortgage of his *sir*. Plaintiff took an assignment of his first mortgage in 1900 and the defendant of the second mortgage in 1910. In 1913 plaintiff purchased the equity of redemption in the property covered by both the mortgages and instituted a suit against the defendant for redemption of the mortgage of 1895 relating

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to *sir*. *Held*, that the plaintiff was entitled to redeem. 1931 A.L.J. 162=1931 A. 238.

(C) PURCHASE BY MORTGAGE OF PART OF MORTGAGED PROPERTY.—The integrity of a mortgage can only be broken up in the case of a mortgagee acquiring a portion of the mortgaged property by purchase, inheritance or otherwise. 31 A. 335; 1925 O. 150 (2); 21 O.C. 172=47 I.C. 200; 53 I.C. 587 (C); 43 M. 372=38 M.L.J. 239 (F. B.); 8 M.L.T. 409=8 I.C. 153; 57 C. 872 =1930 C. 810; 1926 A. 601=1923 R. 61; 5 P.L.T. 312=75 I.C. 821; 62 P.R. 1911 =11 I.C. 100; 7 O.L.J. 585=58 I.C. 983. Where a mortgagor sells to a third person, a portion of the mortgaged property and then sells an item of the mortgaged property to the mortgagee, the result is to break up the integrity of the mortgage, and such third person can redeem his share in the mortgaged property on payment of a proportionate part of the amount due not in proportion to the value of different items of the property but in proportion to the liabilities of the parties under the sale-deed. 1937 A.L.J. 113=1937 A. 44. It is not open to the purchaser from some of the mortgagors to redeem more than the share purchased by him. 55 A. 359=142 I.C. 410=1933 A. L.J. 151=1933 A. 257 (F.B.). In spite of the integrity of the mortgage being broken by mortgagee, one of several mortgagors or a purchaser of a portion of the equity of redemption is entitled to redeem the whole of the property subject to the equities which other persons may have, due provision being made for their rights. 1936 M.W.N. 1005=1937 M. 136. As to whether one mortgagor must redeem the whole of the remaining shares, *see* 1929 A. 409; 50 B. 331=28 Bom.L.R. 588=96 I.C. 361; 59 C. 1372. "*Share of the mortgagor*" in the last clause of S. 60, can in the context only mean the interest of the mortgagor outstanding after the creation of the mortgage, (*i.e.*) the equity of redemption. The clause will apply only to cases where the mortgaged property is owned or becomes absolutely owned by several co-sharers or owned in distinct and separate ownership by more than one mortgagor. When a mortgagee purchases the property free of his mortgage and pays the full value of the property, the substance of the transaction is that the mortgagee gives up his mortgage right and purchases the property as if it were an unencumbered property, paying the full value therefor. The acquisition by the mortgagee in such a case would be not as a mortgagee. To such a case the last clause of S. 60 cannot apply. 51 L. W. 239=1940 Mad. 498=(1940) 2 M.L.J. 1003. *See also* (1941) 2 M.L.J. 520. One of two co-mortgagors sold his equity of redemption to five others, one of whom subsequently obtained an assignment of the entire mortgage rights from the mortgagee. The other mortgagor having sued to redeem his half share, alleging that the integrity of the mortgage had been broken up, *held* that S. 60 applied to the case, and that the plaintiff could be given a decree for redemption of his share in the mortgaged property. 11 O.W.N. 933=1934 O. 348. Where the first mortgagee obtained a decree on his mortgage without impleading the second mortgagee and purchased properties in execution including the one mortgaged to the latter and on failure to get possession, brought a suit against the second mortgagee, who claimed to redeem all the properties: *Held* that the integrity of the mortgage security having been broken up by the purchase of the mortgaged properties by the plaintiff he could not be compulsorily redeemed *in toto* and that the second mortgagee could only redeem the property mortgaged to him. 12 P.L.T. 769=1931 P. 434. Where a mortgage has been split up by reason of the mortgagee, having become the owner of two of the mortgaged properties, he is entitled to claim only a proportionate amount of the mortgage money from the other remaining property. 1931 M.W.N. 891; 151 I.C. 627=1934 R. 372. The passing of the *rajinama* and *kabuliyat* does not necessarily by itself amount to a transfer of the property so as to extinguish the equity of redemption. Each case depends on its own facts. 49 B. 847=27 Bom.L.R. 1253=1926 B. 40. Where without acquiring any interest himself the mortgagee merely allows some of the mortgagors to redeem their share without the consent of the other mortgagors, the integrity of the mortgage is not broken up and the remaining mortgagors can still redeem the whole of the unredeemed portion of the mortgaged property. 89 I.C. 574=1926 A. 136 (2). A purchase by some mortgagors of the interest of a mortgagee does not entitle the other mortgagors to claim apportionment of their debt for redemption of their share of the property. 27 C.L.J. 110=41 I.C. 269. When the mortgagee purchases in Court auction the equity of redemption and afterwards the sale is held partly invalid, the security is discharged only to the extent to which the sale is valid. 45 M.L.J. 719= 1924 M. 364.

(D) RELEASE BY MORTGAGEE OF PART OF MORTGAGED PROPERTY.—It is not competent to a mortgagee to release the share of an individual mortgagor by receiving from him what he may conceive to be his rateable share and any payment made by an individual mortgagor can only be properly treated as made for the whole body of mortgagors and should be credited in reduction of their joint debt. 59 C. 1372. If the mortgagee, with notice that the equity of redemption in a part of the mortgaged property has been conveyed, releases any part of the mortgaged

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estate, he must abate a proportionate part of the mortgage debt against such purchaser. 59 C. 1372. Where a mortgagee releases certain of the items of properties mortgaged to him a transferee of certain other items, who has no knowledge of the release on the date of the transfer, can apply for redemption of his items on payment of a proportionate part of the debt. Such a transferee is entitled to urge on equitable grounds that when he took the transfer, there was one indivisible mortgage and when after he got the transfer the integrity of the mortgage was broken behind his back, he was entitled to claim partial redemption. 37 C.W.N. 424=1933 C. 588. But notice or knowledge to the mortgagee of the transfer of equity of redemption is necessary; otherwise a release by the mortgagee will not give rise to any equities in favour of the transferee entitling him to partial redemption. 38 C.W.N. 833. *See also* 14 R. 198=1936 R. 266.

(E) MISCELLANEOUS.—The purchase of the equity of redemption by one of several co-mortgagees does not extinguish the right of the others. 9 I.C. 1026. Where one of the mortgagees has purchased a part of the mortgaged property, it cannot be said that the mortgage over that portion has merged in the sale and the purchaser-mortgagee cannot insist that the mortgagor should redeem only that part of the property which has not been purchased. 27 O.C. 360=85 I.C. 621=1925 O. 609. If the decrees for redemption of portions of property have to be maintained and cannot be touched, and the mortgagors have to be called upon to pay only the proportionate amount of the mortgage-money due on the portions, the case must be treated as if redemption is sought on the footing of the integrity of the mortgage being broken. 27 A.L.J. 217=114 I.C. 876; 20 A.L.J. 583 =44 A. 708.

SUBSEQUENT CONTRACT.—The doctrine as to clog on redemption (as to which see *infra*) relates only to dealings which take place between the parties at the time when the original contract of mortgage is entered into and they are at liberty to deal subsequently with each other so as to vary the terms upon which redemption of the original mortgage can be had. 9 O.L.J. 511=1923 O. 143. *See also* 43 I.C. 399 (N.). A mortgagor can sell the mortgaged premises to the mortgagee provided the sale is separate from the actual mortgage itself, *i.e.*, is not part and parcel of the mortgage contract. 1924 R. 89. *See also* 17 A.L.J. 117=49 I.C. 353. Though a mortgagee is not entitled to acquire absolute ownership under a forfeiture clause in the mortgage deed, if the clause is given effect to and acted upon with knowledge of mortgagor for over 12 years, a suit for redemption under the mortgage is then barred. 82 I.C. 829=1924 R. 290. Under the amendment to S. 60, T.P. Act, in 1929, the insertion of the word "only" after the word "except", in the last paragraph of the section, makes it clear that there can be a proportionate abatement of the mortgage debt only where the mortgagee has acquired an interest in the equity of redemption. 38 C.W.N. 833.

CLOG ON REDEMPTION—RULE OF JUSTICE, EQUITY AND GOOD CONSCIENCE.—In all mortgages except anomalous mortgages, clauses which take away the right of the mortgagor to redeem after stipulated period should be deemed to be clogs on the equity of redemption and as such not enforceable, even in those parts of India to which the T.P. Act has not been extended. 1 R. 419=1924 R. 83; 1925 M. 366. The provisions of this section are imperative and the right of redemption cannot be lost even in the case of an anomalous mortgage. 82 I.C. 809 =1925 M. 366; 39 I.C. 377=11 Bur.L.T. 36. But *see also* 39 M. 1010=29 M.L.J. 525=43 I.C. 989. As to what is a clog, *see* 25 A.L.J. 1086=108 I.C. 149; 53 A. 580=1931 A.L.J. 324. Where at the time when the transaction was entered into, there was no covenant which could necessarily postpone the mortgagor's right of redemption to a very indefinite period or which would create an insuperable difficulty in his way for redemption there is no clog on redemption. 90 I.C. 787=1926 A. 171. *See also* 1930 P. 121. But where subsequent to the mortgage, the mortgagor executed a permanent lease in favour of the mortgagee and it appeared that the terms of the lease were unfair as regards the heirs of the mortgagor; the permanent lease is a clog on the equity of redemption and consequently unenforceable. 53 B. 360=31 Bom.L.R. 229. Where the mortgagor stipulates that he would not be entitled to get possession of the property mortgaged under an earlier usufructuary mortgage unless he paid the sum due under the later mortgage deed, the second mortgage, in effect amounts to a usufructuary mortgage though the deed does not say so, and does not constitute a clog on equity of redemption. 1939 A.L.J. 1056=1940 All. 101.

WHEN AND AGAINST WHOM CAN BE RELIEVED.—Relief against an agreement forming a clog on the equity of redemption can only be obtained if it is challenged within a reasonable time. It is an equitable relief which cannot be granted as a matter of course. 19 N.L.R. 1=1923 Nag. 60. Subsequent mortgagees with notice of previous mortgage in favour of the plaintiff are not entitled to resist the suit upon the ground that the conditions entered in the plaintiff's mortgage operated as a clog: 75 I.C. 877=1925 L. 45; nor subsequent vendees: 20 A.L.J. 607=1923 A. 123

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(1).

EXAMPLES OF CLOGS—(1) ONEROUS CONDITIONS.—Redemption rendered impossible owing to onerous condition in mortgage deed would be a clog on redemption. 114 I.C. 811=1929 O. 54. The restriction in a mortgage by conditional sale that the money should be procured otherwise than by sale or mortgage of the property is a clog on the equity of redemption and is not enforceable. But a provision that there should be no redemption except in the month of Jeth is not a clog on the equity of redemption, inasmuch as the intention of the party obviously is to permit redemption at a time, when the crops are not standing. 1930 A. L.J. 610=1930 A. 283. Provisions in a mortgage conferring on the mortgagee on redemption an interest on the mortgaged premises are a clog on the equity of redemption and are void not only against mortgagor but also against purchasers of his interest. 57 I.A. 168=11 L. 251=58 M. L.J. 714 (P.C.).

(2) LONG PERIOD BEFORE REDEMPTION.—A stipulation for a long period before which redemption is not allowed is not by itself a clog, but coupled with other collateral covenants, may show an intention to make redemption extremely difficult, if not impossible, so as to make it a clog. 61 I.C. 962 =8 O.L.J. 136. *See also* 9 O.L.J. 365 =1922 O. 221; 9 O.L.J. 294=1922 O. 283; 26 O.C. 209=1923 O. 209; 27 O.C. 4=80 I.C. 213; 96 I.C. 467=1926 L. 457; 1926 O. 356=93 I.C. 329; *also* 90 I.C. 566 =1926 O. 38; 5 Lah.L.J. 394=1924 L. 129; 76 I.C. 336=1925 C. 105; 87 I.C. 30 =1925 A. 643; 113 I.C. 46 (2)=1929 O. 30; 110 I.C. 689=5 O.W.N. 525; 2 Luck. 588; 102 I.C. 160=1927 O. 224. The true test to see whether a clause in a mortgage deed amounts to a clog on the equity of redemption is not to look to the events as they have happened, but to see whether such events might have happened. Where a mortgage deed postponed redemption for 55 years and fixed the value at the time of redemption at a figure far in excess of the then probable value of the property and the deed was full of onerous covenants for the mortgagor: there is a clog on the redemption and the mortgagor is entitled to redeem before the expiry of the period fixed. 10 O.W. N. 973=1933 O. 460. Even 25 years would under certain circumstances be long. 88 I.C. 201=1925 O. 406; but for a case where the period was 99 years was held not to be a clog, *see* 5 O.W.N. 1091; *also* 5 O.W.N. 974; 9 M.L.T. 462=8 I.C. 1068. What has to be seen is whether the effect of such a covenant is to postpone redemption for an unduly long period without any corresponding advantage to the mortgagor, stipulation postponing redemption for 50 years may not be clog. 1933 L. 373=34 P.L.R. 902. Period such as forty years for redeeming a mortgage cannot be reduced by the Court where otherwise there is nothing unconscionable in the agreement. 130 I.C. 57=1930 L. 1060. Where a mortgage-deed of 1898 provided that the mortgagors could redeem only on one day during the sixtieth year and if they failed to do so their right should be extinguished and the assignee from the mortgagors sued for redemption. *Held*, the condition amounted to a clog, suit for redemption was not premature. 53 A. 580=1931 A.L.J. 324.

(3) FURTHER PERIOD IN DEFAULT OF REDEMPTION.—Where, under the terms of a mortgage if the amount was not paid at a certain time, the right to redeem was to be suspended for a further period; it offended against the statutory right of redemption. 42 M.L.J. 584=44 A. 185=49 I.A. 60 (P.C.); 87 I.C. 909=1925 O. 720; 13 O. L.J. 476= 1926 O. 38. But *see contra* 27 A.L.J. 606=1929 A. 388.

(4) ABSOLUTE SALE IN DEFAULT OF REDEMPTION.—A provision in a mortgage with possession that the mortgage should not be redeemable for five years and that if the mortgage is not redeemed within a period of 20 years, the mortgagee should have the land absolutely as on a sale, is a clog on the equity of redemption and unenforceable and no bar to redemption even after 20 years. 41 M.L.J. 563=68 I.C. 717. *See also* 12 O.L.J. 105=36 I.C. 68 ; 80 I.C. 944=1925 A. 34.

(5) STIPULATION FOR PERMANENT LEASE. —A stipulation in the morcgage-deed that the *raiyati* lands which formed part of the mortgaged property would remain in the possession of the mortgagee and would not be restored to the mortgagor on the redemption of the mortgage is a clog on the equity of redemption. 148 I.C. 429=1934 P. 397. Contemporaneous agreement to lease the land on permanent tenure and a mortgage of the property make the agreement of lease void as a clog on redemption. 46 B. 409=64 I.C. 612=23 Bom.L.R. 1268. *See* 1923 N. 115 (1); 47 A. 582= 1925 A. 497; 1910 M.W.N. 708=7 I.C. 698; 5 Pat.L.J. 423=57 I.C. 337; 11 N. L.R. 180=31 I.C. 869; 35 M. 744=21 M. L.J. 1010. *See also* 33 Bom.L.R. 755; 53 B. 360. (Even a subsequent permanent lease would be a clog.) The mortgagee is not entitled to enforce a permanent lease executed in his favour by the mortgagor, where the terms of the lease were unfair and the bargain unconscionable or oppressive. 33 Bom.L.R. 755. But *see* 16 Pat. L.T. 119, where it was held that a permanent lease by mortgagor to mortgagee was not necessarily or always void but on the contrary, the proviso to S. 60, T.P. Act, contemplated that the equity of redemption might be extinguished without limiting the method of extinguishing it by sale of the

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equity of redemption to the mortgagee.

(6) TACKING AND CONSOLIDATION.—Where subsequent advances are charged on the property covered by a previous mortgage, a covenant that the mortgagor shall not be permitted to redeem the earlier deed without redeeming the latter one is valid and enforceable, even against a subsequent transferee of the equity of redemption. 86 I.C. 932=1925 O. 458; 29 O.C. 118=92 I.C. 675; 25 O.C. 134=1922 O. 58; 65 I.C. 642=3 L.L.J. 432; 25 A.L.J. 1086 =108 I.C. 149; 125 I.C. 27=1930 A. 651; 75 I.C. 931=1924 A. 832; 9 O.L.J. 484 =1923 O. 24; 12 O.L.J. 382=1925 O. 505; 85 I.C. 328=1925 O. 593; 1 Luck. 92; 29 O.C. 15=1925 O. 451. *See also* 96 I.C. 844=1926 L. 633; 96 I.C. 197; 7 L. 297=1926 L. 494; 48 A. 292=1926 A. 506; 20 A.L.J. 86=65 I.C. 819; 1933 L. 864. But *see also* 1923 A. 454; 1930 A.L.J. 156=1930 A. 136 (F.B.). A mere undertaking by the mortgagor to pay money advanced on a later security between the same parties along with the former is not a consolidation of the debts. 16 O.C. 267=22 I.C. 132. Where in a subsequent document there is a stipulation that without payment of the two sums the property previously mortgaged is not to be redeemed, the effect of the clause is to create a further charge on the property. 90 I.C. 787=1926 A. 171. *See also* 5 Luck. 365=57 I.A. 173=59 M.L.J. 342 (P.C.). A simple money bond subsequent to the mortgage-deed is not a deed of further charge. 3 O. L.J. 402=36 I.C. 709. In a suit by a mortgagor for redemption of his possessory mortgage the mortgagee is entitled to insist on the payment of the sum due under the tacking bond, if he is otherwise entitled to it, regardless of the question whether his suit on foot of that bond if brought at the time of the redemption suit would be barred by limitation. 1932 A.L.J. 595=1932 A. 558.

(7) HIGH RATE OF INTEREST.—In no circumstances can a high rate of interest in the mortgage be construed as a clog on the equity of redemption, provided that the parties entered into the contract with eyes open and on equal terms, if the terms of the mortgage were clear and not equivocal. 1923 A. 411; 7 O.L.J. 389=58 I.C. 115.

(8) OTHER CASES.—Usufructuary mortgage—Usufruct not sufficient for interest on the whole amount—Provision for interest on remaining amount at rate fixed in the deed—Not a clog, when profits of mortgaged property not sufficient to cover interest on that portion of mortgage money. 1929 O. 30. *See also* 1927 O. 595=100 I.C. 180=4 O.W.N. 147. Where a mortgage-deed provided that it should not be redeemed until the expiry of 9 years and that the property should not be sold to a stranger unless the mortgagee is unwilling to purchase, such an agreement was not a clog on the equity of redemption or contrary to public policy and the same could be enforced against a purchaser with notice of the covenant. 9 P.L.T. 747=1928 P. 637. A provision in a mortgage-deed for the payment of *"deorha"* does not constitute a clog on the equity of redemption. 96 I.C. 538=1926 O. 502. A clause to the effect that the mortgagee would be free to build or rebuild the house and that in case of redemption, the mortgagor would pay the amount spent over the building or rebuilding with interest at 2 per cent. per annum does not amount to a clog on the equity of redemption. 1932 A.L.J. 1021. A provision that the property could be redeemed only when the entire mortgage-money is paid up by the appropriation of the profits, is a clog and property could be redeemed at any time the mortgagor finds convenient. 13 O.C. 128=6 I.C. 997. *See also* as to a condition in a compromise amounting to a clog on redemption. 5 P. L.J. 644=58 I.C. 129. Where a compromise decree in a mortgage suit provided the relationship of mortgagor and mortgagee to continue and the remedy of the parties, was to have recourse to execution of the decree: *Held*, that the provision as to remedy was a clog since it fettered the right of redemption with a larger period of limitation. 53 M. 805=1930 M. 305. *See also* 14 N.L.R. 184=48 I.C. 368. The English law regarding clog on redemption does not obtain in India. A provision that a mortgage shall not be redeemed so long as there are fruit trees planted by the mortgagee standing on the mortgaged land is not a clog, and a suit for redemption is premature if brought while such trees are standing. 45 B. 117=22 Bom.L.R. 1147. A condition in a mortgage of a house by a mother for her infant son, as to the liability of the minor for improvements, does not justify the demolition and reconstruction of the house and the condition for interest on the sum expended on improvements is most inequitable and unconscionable. 59 I.C. 764=43 P.W.R. 1921.

(*a*) REDEMPTION SUITS — NOTICE.—In England a mortgagee ordinarily has a right to six calendar months' notice of intention to pay off the mortgage or in default thereof is entitled to six months' interest in advance in lieu of notice; but if the mortgagee has given notice calling in the debt, the mortgagor even though he is a few days late in complying with the notice and tendering the money is not bound to give six months' notice before redeeming. 25 Bom.L.R. 839=1924 B. 294. This rule has no application to India or to cases under T.P. Act.

(*b*) TENDER.—Tender of mortgage-money is a condition precedent to institution of a suit for redemption. 38 A. 148

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=14 A.L.J. 55=34 I.C. 183. *See also* 97 I.C. 348=1926 P. 512. Where the mortgage-money is stated to have been satisfied out of the usufruct, a tender would obviously be out of question. 43 A. 95=59 I.C. 92=18 A.L.J. 947. A suit for redemption cannot be dismissed merely because the amount tendered falls short of the amount actually payable or there is no tender owing to the existence of disputes about the amount. 92 I.C. 665=13 O.L.J. 330. Redemption will not be allowed unless the amount found due is paid or tendered within the time fixed by the Court. 43 A. 638=61 I.C. 812=19 A.L.J. 573 (F.B.).

(*c*) DEPOSIT OF AMOUNT.—In a suit for redemption deposit of mortgage amount is not a condition precedent. 6 P. 102.

(*d*) PROOF OF RIGHT TO REDEEM.—Where, in a suit to redeem occupancy lands, the defendant in possession alleges that he has been in possession for a long period of time as owner, the Court need not enquire as to when the defendant's possession became adverse; the plaintiff must prove he has a subsisting right to redeem. 89 I.C. 788=1925 L. 632. Plaintiff must prove subsistence of mortgage on date of suit—Defendant recorded as mortgagee in partition papers is not sufficient. 96 I.C. 253 (2)=1926 O. 546. No suit is maintainable for the redemption of a mortgage unless the plaintiff produces *prima facie* evidence of that right. 34 I.C. 207 (A.); 12 A.L.J. 102=22 I.C. 574.

(*e*) DEFENCES.—Where there is only a partial failure of the consideration payable for a mortgage, the loss occasioned in consequence of that failure can only be recovered by a separate suit, and cannot be set off in a suit for redemption. 6 O.L.J. 519=54 I.C. 313. A suit under this section, which is absolute in its terms and applicable to all mortgages and which gives an absolute right to redeem, cannot be met by an agreement of pre-emption. 46 M.L.J. 389=1924 M. 57. In India, as in England, a mortgagor is entitled to compensation from his mortgagee for the loss of title deeds. He will have his remedy by way of a separate suit for damages, or even under the mortgage decree where the latter contains provision for it. 42 M.L.J. 356=1922 M. 299.

(*f*) SECOND SUIT.—There can be no second suit for redemption when once a decree has been passed, though it does not fix time for payment and the consequences of non-payment. 5 O.L.J. 698=48 I.C. 922. But *see* 33 Bom.L.R. 844. If the decree in a redemption suit departs from the form required by S. 92, T.P. Act, and simply provides that in case of default by the plaintiff in payment "his case will stand dismissed" and no payment of the mortgage-money is made, the decree cannot be construed to be an order of a Court extinguishing the right to redeem within the meaning of the proviso to S. 60, and a second suit for redemption is properly maintainable. 61 I.A. 362=56 A. 561=67 M.L.J. 813 (P.C.). A mere dismissal of a redemption suit for default without going in any way into the merits of the case or perhaps even appreciating that the suit was one for redemption could not be said to be an order extinguishing the right of redemption. 52 B. 111=30 Bom. L.R. 34=1928 B. 67. *See also* 16 Bom.L.R. 687; 22 Bom.L.R. 939; 30 Bom.L.R. 1089.

(*g*) LIMITATION.—Where a mortgage provided for redemption after a period of two years and further provided that in default the mortgagee could enter into possession of the property and retain it until the money was paid and appropriate the profits first towards interest and the balance, if any, towards principal and the mortgagee enters into possession when there was the default in payment, the limitation of 60 years for the purposes of redemption of such mortgage would run from the expiry of the two years period fixed in the deed. 1940 Oudh 428.

Secs. 60, 65 (a) and 82.—Suit to enforce subsequent mortgage—Duty to redeem prior mortgage on whom lies—Loss of mortgaged property in respect of prior mortgage—Apportionment of liability. 1942 N.L.J. 389.

Secs. 60 and 81.—Under S. 60 when a person having a second mortgage on part of the property covered by the first mortgage acquires the mortgagor's right in that part, he may redeem that part from the first mortgagee on payment of a proportionate part of the amount due to the first mortgagee. The second mortgagee is entitled to a marshalling of the securities by virtue of S. 81. 1937 Rang.L.R. 13=1937 Rang. 220.

Secs. 60 and 82.—A purchase by a mortgagee of a part of the mortgaged property has the effect of discharging and extinguishing that portion of the mortgage debt which is chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole of the property comprised in the mortgage. The entire mortgage is not extinguished in such a case. 19 Pat. 524=21 Pat.L.T. 227=1940 Pat. 420. A suit for partial redemption under S. 60 of the T.P. Act is a combination of a suit for redemption and one for contribution under S. 82 of the Act. Under S. 60 a person entitled to a share only of the mortgaged property cannot redeem his share only on payment of his proportionate share of the mortgage money except in the only case where the mortgagee or where there are more mortgagees than one, all of them has or

[1][60-A. (1) Where a mortgagor is entitled to redemption, then, on the fulfilment of any conditions on the fulfilment of which he would be entitled to require a re-transfer, he may require the mortgagee, instead of re-transferring the property to assign the mortgage-debt and transfer the mortgaged property to such third person as the mortgagor may direct; and the mortgagee shall be bound to assign and transfer accordingly.

Obligation to transfer to third party instead of re-transference to mortgagor.

(2) The rights conferred by this section belong to and may be enforced by the mortgagor or by any encumbrancer notwithstanding an intermediate encumbrance; but the requisition of any encumbrancer shall prevail over a requisition of the mortgagor and, as between encumbrancers, the requisition of a prior encumbrancer shall prevail over that of a subsequent encumbrancer.

(3) The provisions of this section do not apply in the case of a mortgagee who is or has been in possession.]

[2][60-B. A mortgagor, as long as his right of redemption subsists, shall be entitled at all reasonable times, at his request and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of, or extracts from, documents of title relating to the mortgaged property which are in the custody or power of the mortgagee.]

Right to inspection and production of documents.

[3][61. A mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately, or any two or more of such mortgages together.]

Right to redeem separately or simultaneously.

LEG. REF.

[1] S. 60-A was newly added by Act XX of 1929.

[2] S. 60-B was newly added by *ibid.*

[3] Substituted by Act XX of 1929, and the Illustration is omitted also by the same Act.

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have acquired in whole or in part the share of a mortgagor. This is a special privilege conferred in that limited class of cases to avoid multiplicity of suits. S. 60 applies equally in suits for sale or foreclosure also. Once a case falls within the above exception then in order to determine the price of redemption it is necessary to have recourse to the principles of S. 82. 1942 N.L.J. 289.

Sec. 61: LAW BEFORE AND AFTER AMENDMENT.—Under S. 61 as it existed prior to the Act of 1929, where property is mortgaged again under a second mortgage with other properties to the same mortgagee, the mortgagee has a right to consolidate the mortgages. 15 P. 742=1937 P. 156. The effect of S. 61 as substituted by Act XX of 1929 is to abolish the consolidation of mortgages whether in respect of the same property or different properties. This must now be considered to be the general rule subject, of course, to a contract to the contrary. 168 I.C. 40=1937 O.W.N. 337=1937 Oudh 321.

SCOPE OF SECTION.—The doctrine of consolidation can only apply where a mortgagee holds a mortgage on property *A* and also a separate mortgage on property *B* belonging to the same mortgagor. In such a case after the expiry of the legal right of redemption the mortgagor in cases where the right of consolidation is still applicable, is only allowed to exercise his equitable right of redemption of the one property on the terms of redeeming the other. In the case, however, of a mortgagee holding a first mortgage on property *A* and a second mortgage on the same property, the mortgagor cannot on payment of the first mortgage redeem the property, unless he repays what is due on the second mortgage. But this is not because of the dectrine of consolidation but by reason of the fact that he had a second mortgage on the property. 67 I.A. 82=I.L.R. (1940) 1 Cal. 291=1940 P.C. 38=(1940) 1 M.L.J. 446 (P.C.). Redemption of every separate mortgage should be permitted unless there is clear and unequivocal evidence to prove a contract between the parties to the contrary. 90 I.C. 613=1926 O. 59 (2). *See also* 44 M. 301; 27 A. 301; 3 P. 829=1925 P. 59; 14 N.L.R. 184=48 I.C. 368; 40 M.L.J. 236. [The following cases in which the contrary rule was laid down are not now good law. 54 I.A. 68=50 M. 180=52 M.L.J. 338 (P.C.); 3 Luck. 459=1928 O. 273; 112 I.C. 481. *See also* 23 M.L.J. 475; 15 I.C. 605; 1927 M. 1039; 52 B. 111=1928 B. 67.] Where there is no specific contract on behalf of the parties with regard to consolidation, the consolidation of several mortgages and amounts due under them in the same decree

62. In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property [1][together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee],—

Right of usufructuary mortgagor to recover possession.

LEG. REF.

[1] Inserted by S. 25 (*a*) of Act XX of 1929.

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is illegal. 3 P. 829=1925 P. 59. Both under the old S. 61 and the law prior to its enactment, it was necessary for the consolidation of mortgages, that the two mortgages to be consolidated should have become united in title or come into the same hand. 23 M.L.J. 475=15 I.C. 605. The expression "mortgagor" includes also his heirs and survivors. 11 O.W.N. 559=1934 O. 246. The English doctrine that a right of consolidation can only arise only when all the mortgages are made by the same mortgagor cannot be applied to India. 11 O. W.N. 1601=1935 O. 213. The mortgagors as a body could not be precluded from exercising their right to redeem the entire property mortgaged just because some of the mortgagors had executed deeds of further charge in favour of the mortgagee. The mortgagee has no case for making the plaintiffs pay off the deeds of further charge in that suit but he should enforce them by separate proceedings. 1936 O.W.N. 230= 1936 O. 202. Where the father of a Hindu joint family executed a mortgage of family property by way of conditional sale and after his death, his sons, one of them being the manager, executes another mortgage expressly stipulating that they will have no power to redeem the property without payment of the previous mortgage-money and the amount of the later in a lump sum, the mortgagee has a right to consolidate the two mortgages and insist on payment of both before redemption, as the stipulation for simultaneous redemption amounts to a contract for consolidation. The fact that a suit on one of the mortgages could be barred by limitation on the date does not defeat the mortgagee's claim to consolidation, because there is no limitation to a claim pleaded in defence, and because the mortgagee's claim cannot be extinguished so long as his lien by possession exists. 11 O.W.N. 1601 =1935 O. 213. A contract that, of two mortgages in favour of the same party, the later one should be redeemed first is not to consolidate both. 38 A. 393; 1926 O. 59. In such a case if the latter becomes barred and irredeemable, the former can be redeemed. 37 A. 634; 52 I.C. 622 (M.); 32 M. L.J. 317; 19 A. 496; 33 M.L.J. 581; 40 I.C. 404. Where a mortgagor subsequent to the execution of the mortgage deed takes a further loan on a simple money bond or on a subsequent mortgage and agrees that he will not redeem the mortgage without discharging the subsequent loan, such an agreement can be enforced by the mortgagee. *See* 26 A. 559; 18 M. 368; 1925 O. 593; 31 A. 482; 1925 O. 506; 3 L. 459; 92 I.C. 772; 48 A. 292; 1928 P. 582; 3 A.L.J. 768; 25 I.C. 905; 5 Luck. 365=59 M.L. J. 342=1930 P.C. 176; 1922 A. 403 (1); 18 I.C. 718; 9 I.C. 52; 55 I.C. 509; 64 I.C. 830; 1926 O. 59; 55 A. 359=1933 A. 257 (F.B.); 47 L.W. 686=1938 Mad. 862. Consolidation in the same decree of amounts due under several mortgages in the absence of a contract to that effect is illegal. 1925 P. 59. The contract should be clearly made out. 90 I.C. 613=2 O.W.N. 753. The rule of consolidation is not applicable against purchasers of the equity of redemption. 44 M. 301=40 M.L.J. 236. But *see* 24 O.C. 240=64 I.C. 83; 51 I.C. 897. It is applicable only where the equity of redemption is not severed. 58 I.C. 129=5 Pat.L.J. 644; 50 I.C. 897. A provision in a mortgage bond that the money would be paid along with the money due under an earlier mortgage without any words restraining the mortgagor from redeeming the earlier mortgage without payment of the money under the later mortgage, is not sufficient to constitute a contract to the contrary within the meaning of S. 61, and the deed is, therefore, governed by the general rule contained in the section. 168 I.C. 40= 1937 O.W.N. 337. (*See also* under S. 60.)

Sec. 62.—This section is to be read as supplemental to and along with S. 60; *see* 43 A. 95. S. 62 applies only to usufructuary mortgages, pure and simple, and not to anomalous mortgages; and is not in any way inconsistent with the provisions of S. 61. 54 I. A. 68=50 M. 180=52 M. L.J. 338 (P.C.); 3 Luck. 459. Though the Act does not apply in terms to a transaction prior to the passing of the Act, the rules in S. 62 might be applied in a proper case, as the general law in force before the Act was passed. 86 I.C. 353=1925 C. 862. Usufructuary mortgagee of a house cannot claim sums spent by him for ordinary repairs, because he is bound to pay all normal expenses from rents and profits. 1929 A. 348. The section cannot apply to a case, where from the conditions of the mortgage, accounts have to be taken between the parties. 27 I.C. 427=17 O.C. 388. When the right to possession has automatically determined by the terms of the mortgage, the mortgagor can maintain a suit in ejectment. 46 I.C. 743=15 N.L.R. 101. Section does not apply to a case where there is a usufructuary mortgage and also

(*a*) where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property,—when such money is paid ;

(*b*) where the mortgagee is authorized to pay himself from such rents and profits [1][or any part thereof a part only of the mortgage-money]—when the term, if any, prescribed for the payment of the [2][mortgage-money has expired and the mortgagor pays or tenders to the mortgagee the mortgage-money or the balance thereof] or deposits it in Court as hereinafter provided.

Accession to mortgaged property.

63. Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession.

LEG. REF.

1 Substituted for the words "the interest of the principal money" by S. 25 (*b*) of Act XX of 1929.

2 Substituted for the words "the principal money," by S. 25 (*c*) of Act XX of 1929.

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a simple mortgage on the property sought to be redeemed. 1928 O. 273=3 Luck. 459.

Sec. 62, Cl. (a).—Cl. (*a*) applies where mortgagee is to pay himself the principal and interest out of the rents and profits of the mortgaged property and the mortgage debt is discharged from such rents and profits; until the discharge of the debt the mortgagee can remain in possession. 48 M.L.J. 363=1925 M. 825. *See also* 16 M. 486; 6 C.P.L.R. 43 (Even if the deed fixes a time for redemption, time is not of the essence of the contract; and if the debt is discharged before that time out of rents and profits mortgagor would be entitled to redeem and get possession. *See also* 35 M. 744; 5 O.L.J. 263).

Sec. 62 (b).—A mortgagor can redeem a usufructuary mortgage and get possession without redeeming a prior simple mortgage. 44 M. 301=40 M.L.J. 236. S. 62 does not limit the right of the mortgagor to proceed only against the mortgagee in a redemption suit, and to avoid multiplicity of proceedings: the Court is not debarred from giving a decree in a redemption suit against persons who have derived title from the mortgagee. 101 I.C. 728=1927 M. 703. The word *'term'* in S. 62 (*b*) must be read to mean a reasonable term or a term which does not amount to a denial of the right to redeem. 131 I.C. 520=1931 A.L.J. 324. On this clause, *see also* 24 A. 521 (P.C.); 48 M.L.J. 363.

Sec. 63: SCOPE.—Where an accession is capable of severance, upon redemption a mortgagor is entitled to take over the accession to the mortgaged property on payment of the cost of the acquisition but he is not obliged to take them. 163 P.W.R. 1917=42 I.C. 468. *See also* 10 C.L.J. 83; 4 I.C. 357. For the purpose of this section the accession should have taken place before the mortgage becomes extinguished. 41 M.L.J. 490=70 I.C. 367; 10 C.L.J. 83. *See also* 1935 P. 360. *Accession by alluvion* is a natural accession under this section and can be redeemed by the mortgagor along with the other property without payment of any additional moneys. 11 Bom.H.C.R. 32. It is doubtful whether the planting of trees can come under any circumstances within the phrase *'any accession'* except it may be in those cases in which the planting of trees is a step taken to preserve the property, *e.g.*, to prevent erosion by water. 113 I.C. 405=1929 A. 330. *See also* 92 I.C. 262=13 O.L.J. 243; 48 A. 70=1926 A. 67; 22 A. 83. Fruit trees planted on land by mortgagee are not capable of separate enjoyment and mortgagor is not liable for compensation if they are not planted with his assent nor for preservation of land. 8 R. 233=1930 R. 63. Planting of groves by mortgagee without mortgagor's consent. 1925 A. 748; 92 I.C. 268. Rebuilding fallen house is not accession. 1929 A. 348; 37 A. 81; 20 A. L.J. 887. *See also* A.W.N. (1883) 201 (construction of building by mortgagee without consent of mortgagor); 26 I.C. 712 Digging a well on the mortgaged property.) Where only a temporary structure is put up to the land it would be difficult to call it an accession to the mortgaged property within the meaning of S. 63 or S. 70. 1931 A.L.J. 273=1931 A. 277 (F.B.). Where the *kachcha* house which stood on the site mortgaged fell and the mortgagees put up a valuable building on the land, held the accession was capable of separate enjoyment without detriment to the principal property. 26 A.L.J. 887=1928 A. 381. As to machinary in the building, *see* 1933 Rang. 195; 1939 Mad. 684=(1939) 1 M.L.J. 692 cited under S. 70. Where a stable was built on the mortgaged property by the possessory mortgagee the mortgagee could remove the materials of the stable without injuriously affecting the other property. 1932 A.L.J. 493=1932 A. 500. Where it appeared that the rebuilding was within the contemplation of the parties when the mort-

Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property; the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money [1][with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent. per annum].

Accession acquired in virtue of transferred ownership.

In the case last mentioned the profits, if any, arising from the accession shall be credited to the mortgagor.

Where the mortgagee is usufructuary and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession shall, in the absence of a contract to the contrary, be set off against interest, if any, payable on the money so expended.

LEG. REF.

[1] In S. 63 for the words "at the same rate of interest" the words "with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent. per annum" were substituted by Act XX of 1929.

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gage was executed the mortgagee can recover the value of the improvements. 7 O.W.N. 488=1930 O. 337. An extension into adjoining Government waste land made by the mortgagee is not an accession to the mortgaged property. 76 I.C. 816=1924 R. 131; 1 Bur.L.J. 262=1923 R. 127; 162 I.C. 383=1936 R. 127. (But *see* 4 Bur. L.T. 167=11 I.C. 808, where a recent extension of a small area was treated as an accession.) *See also* 1 L.W. 102=22 I.C. 609. Where the mortgagee had been in possession of extra land, not as if it were an accretion to the property in the original mortgage, but as a substitution through mistake, the mortgagor in a suit for possession would be entitled to recover that property. 1923 B. 42 (1). Though the general rule is that accretions to the mortgaged properties are subject to redemption, mortgagee may, if he chooses, keep them for his benefit and distinct from the mortgaged property (*i.e.*) in cases where the accession is separable from the main property. 2 Pat.L.T. 225=60 I.C. 308. S. 63 cannot be read as entitling the mortgagor to recover on redemption acquisitions made by the mortgagee for his own benefit in circumstances which do not bring him within S. 90 of the Trusts Act. The mortgagor is not entitled on redemption to treat subordinate tenures acquired by the mortgagee for his own benefit as accessions to the mortgaged property, without regard to the question whether the mortgagee had any special advantage by reason of his position as mortgagee in acquiring them. 34 Bom.L.R. 1310=63 M.L.J. 116 (P.C.). As to what amounts to accession to mortgaged property, *see* 118 I.C. 314. New area covered up by extensions is not an accession. 11 I.C. 808=41 Bur.L.T. 167. *See also* 85 I.C. 690=1925 A. 794; 86 I.C. 929=1925 A. 748; 47 A. 307=1925 A. 427. A mortgagee in possession has a right to the value of any additions reasonably made for the benefit of the property and which added to the selling value of the property. 16 I.C. 635=10 A.L.J. 124. *See also* 47 I.C. 751=5 O.L.J. 513; 26 I.C. 712=10 N.L.R. 166. New shares purchased out of dividends of old shares mortgaged are accessions to which the mortgagor is entitled. 23 Bom.L.R. 1279. *See* 87 I.C. 269= 1922 B. 370. The mortgagor is entitled to only so much of the acquisitions as were made as mortgagee. 44 I.C. 266. Where a mortgagee executed on behalf of a minor by the certificated guardian without the permission of the District Court was declared void, there is *ab initio* no relationship of mortgagor and mortgagee. Ss. 63 and 72 are not therefore applicable and the so-called mortgagee is not entitled to add the cost of any improvements made by him to the mortgage-money. 124 I.C. 731= 1931 A. 201. *See* 19 I.C. 90=17 C.W. N. 586; 63 P.R. 1918=44 I.C. 266; 23 A.L.J. 915=1926 A. 67; 56 I.C. 193. Where the mortgagee allows mortgagor to remain in possession of the accession as occupancy tenant a subsequent mortgagor cannot claim it as accession. 8 Pat.L.T. 23=1926 P. 572. Co-sharer—Some holding mortgage in respect of sharers of rest and in possession—Eviction of tenants and bringing holding under own cultivation Holdings recorded as *sir* and *khudkasht*—If accretion—Right of the other co-sharers. 1937 A. 321. During the currency of a mortgage of *khoti* lands, the mortgagee purchased *khoti nisbat* lands in the village from the occupancy tenants without the

[1][63-A. (1) Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, been improved, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled to the improvement; and the mortgagor shall not, save only in cases provided for in sub-section (2), be liable to pay the cost thereof.

Improvements to mortgaged property.

(2) Where any such improvement was effected at the cost of the mortgagee and was necessary to preserve the property from destruction or deterioration or was necessary to prevent the security from becoming insufficient, or was made in compliance with the lawful order of any public servant or public authority, the mortgagor shall, in the absence of a contract to the contrary, be liable to pay the proper cost thereof as an addition to the principal money with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent. per annum, and the profits, if any, accruing by reason of the improvement shall be credited to the mortgagor.]

Renewal of mortgaged lease.

64. Where the mortgaged property is a lease [2][* * *] and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease.

Implied contracts by mortgagor.

65. In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee—

(*a*) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same;

LEG. REF.

[1] S. 63-A is newly added by Act XX of 1929.

[2] The words "for a term of years" in this S. 64 and in Ss. 65 (*d*) and 71 are unnecessary and should be omitted.—(*Statement of Objects and Reasons.*)

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permission of the mortgagor. The mortgagors sold the equity of redemption to the mortgagee and two years later sold a share in the *khoti nizbat* lands, purchased by the mortgagee, to the plaintiff: *held*, that, whether the lands are regarded as *khoti khasgi* land or as *khoti nizbat*, they should be treated as an accretion to the mortgaged property which vested in the mortgagors on redemption and were included in the sale of all the "privileges and rights" of the mortgagor to the mortgagee and that the plaintiff acquired no right to the same by his subsequent purchase. (20 Bom.L.R. 68:, Foll.) 34 Bom.L.R. 855.

Sec. 63-A.—[*N.B.*—This section has no retrospective operation. (*See* S. 63 of Act XX of 1929.)] Mortgagee is not entitled to compensation for the "kacha" kotha built by him on the mortgaged property. He can only remove the material. 149 I.C. 969=1934 L. 242.

Secs. 63 and 63-A: RENTS AND PROFITS.—The property is mortgaged only as a security for the mortgage debt and rents and profits received, must be applied towards the mortgage debt. If the mortgagee has incurred the cost of improvements which have yielded the rents and profits, he is of course entitled to claim the cost with interest, but there is no justification for allowing the mortgagee to retain anything more out of the profits over and above his outlay on the improvements and interest thereon. 42 P.L.R. 196=1940 Lah. 199. Under S. 63-A (2) and 72 a mortgagee can add to the principal the cost of improvements only where they have been necessary to preserve the property from destruction or deterioration, or to prevent the security from becoming insufficient. 41 P.L.R. 80=1939 Lah. 129.

Sec. 64.—The principle of this section is that where trustees, mortgagees and other persons get a renewal of a lease the benefit of such renewal would accrue to the benefit of the beneficiary or mortgagee. 6 C.W.N. 372. The presumption is that the renewal of a lease by the mortgagee is made for the purpose of keeping alive the security. 5 C. 198.

Sec. 65.—Section enumerates implied contracts by mortgagor and does not cast any duty upon him to make any disclosure of previous encumbrances. 30 N.L.R. 303=150 I.C. 20=1934 N. 149. Section applies only "in the absence of a contract to the contrary". *See* 1 B. 45. And it may be either express or implied. 4 M.L.T. 437. A mortgage-deed executed by manager appointed under the Guardian and Wards Act limits the ordinary rights of a mortgagor in possession. 1 Pat.L.J. 563.

Sec. 65 (a).—The estoppel referred to in S. 65 (*a*) operates not only personally

(*b*) that the mortgagor will defend, or if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto ;

(*c*) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property ;

(*d*) and, where the mortgaged property is a lease [1][* * *], that the rent payable under the lease, the conditions contained therein and the contracts binding on the lessee have been paid, performed and observed down to the commencement of the mortgage ; and that the mortgagor will, so long as the security exists and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, or, if the lease be renewed, the renewed lease, perform the conditions contained therein and observe the contracts binding on the lessee, and indemnify the mortgagee against all claims sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts ;

(*e*) and, where the mortgage is a second or subsequent incumbrance on the property, that the mortgagor will pay the interest from time to time accruing

LEG. REF.

[1] *Vide* foot-note (2), at p. 5147, *supra*.

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against the mortgagor but also against a subsequent transferee of the mortgagor. 1929 M. 483. *See also* 1925 R. 130=85 I.C. 223 (Covenant for title runs with the land). A mortgagee can sue on his mortgage to enforce his charge on lands belonging to mortgagor who had by mistake included in the deed some lands which he had no power to charge. 19 I.C. 423 (C.); 73 I.C. 902=1923 A. 584. (*See* 25 W.R. 51 for case where subsequent mortgagee was not informed of the existence of prior mortgage.) The mortgagee is not entitled to compensation when he is aware of a defect in title of the mortgagor. 35 A. 48=40 I.A. 31=25 M.L.J. 91 (P.C.). The right of compensation for breach of covenant could not be taken away except by express release or an implied acquiescence. 28 M.L.J. 184=27 I.C. 989. Mortgagee purchasing property at Court-sale can sue for refund of excess price paid if mortgagor had no title as to portion of property. 85 I.C. 223=1925 R. 130. The interest of both the mortgagor and mortgagee passes to the purchaser at the sale of the mortgaged property in execution of a decree obtained by the mortgagee against the mortgagor on the mortgage. The mortgagor must consequently make good to the mortgagee, where he is the purchaser at the execution sale, loss sustained by him for breach of the covenant of title involved in the contract of mortgage. 43 L.W. 627 =1936 M. 433. A purchaser of mortgaged property at a sale in execution of a decree is estopped from denying the validity of the mortgage. 139 I.C. 695 (A.).

Sec. 65 (b).—A mortgagee in possession must give notice to the mortgagor to enable him to defend his rights if he is threatened or obstructed by any person claiming as true owner. 36 B. 185=12 I.C. 913=13 Bom.L.R. 1200; *see also* 9 B. 435; where mortgagee is deprived of a portion of the security by act of the mortgagor, he is entitled to get additional security or to sue for the mortgage-money; *see* 54 I.C. 785.

Sec. 65 (c).—The mortgagor is bound to pay the land revenue on the mortgaged property and the mortgagor's heirs are also bound by the implied terms as well as by the express terms of the mortgaged deed. 1937 Nag. 225. Duty to pay public charges is in the nature of a personal covenant not running with the land. 39 M. 959 =30 M.L.J. 331; 30 M. 67. The liability extends to the purchaser of the equity of redemption. 17 I.C. 878=5 Bur.L.T. 268; 39 M. 959. Where the mortgaged land is sold for arrears of revenue and repurchased by the mortgagor, the mortgage is not extinguished. 51 I.C. 574=12 Bur. L.T. 41; 17 I.C. 878=5 Bur.L.T. 268. *See also* 26 M. 385. Prior to amendment of 1929, where only part of the rents and profits were to be adjusted towards the mortgage-money and the balance to be paid to the mortgagor, it is not an usufructuary mortgage but an anomalous mortgage. Where, service inam, was enfranchised and converted into ryotwari land assessed to revenue, the assessment should properly be paid by the mortgagor. 1931 M.W.N. 595.

Sec. 65 (d).—Where the mortgagee enters into possession, he becomes liable to pay the rent. 29 B. 391. (*See* 2 C.L.R. 323, where the mortgagee was deemed to be in possession having collected rents from the subordinate holders); it would be otherwise if the mortgagee is not in possession. 13 M. 193.

Sec. 65 (e).—Where the mortgagor does not pay off a prior mortgage debt on its becoming due, there is a breach of the im-

due on each prior incumbrance as and when it becomes due, and will at the proper time discharge the principal money due on such prior incumbrance.

[1][*Omitted.*]

The benefit of the contracts mentioned in this section shall be annexed to and shall go with the interest of the mortgagee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

[2][65-A. (1) Subject to the provisions of sub-section (2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.

Mortgagor's power to lease.

(2) (*a*) Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage.

(*b*) Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance.

LEG. REF.

[1] Paragraph omitted by Act XX of 1929.

[2] S. 65-A newly inserted by Act XX of 1929.

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plied covenant contained in Cl. (*e*); and if on that account the subsequent mortgagee is deprived of his security, the mortgagee would be entitled to a personal decree against the mortgagor on account of the breach of this covenant, although there was no personal covenant to pay in the deed of mortgage. 13 M. 92; 25 W.R. 51. A prior mortgagee can add the necessary expenses of repairs to the amount of his mortgage as against the second mortgagee. 16 I.C. 877=38 M. 18.

Sec. 65 and 82.—A subsequent mortgagee is given an opportunity to redeem a prior mortgage but he is not bound to avail himself of it. If he does, he steps into the shoes of the prior mortgagee and himself forecloses. He thus recovers the property freed from his own mortgage and still has the privilege of placing the whole burden of the debt due on his own mortgage on the rest of the property. S. 65 (*e*) recognises this and so places the duty of redemption on the mortgagor. If he fails in this duty such loss as may ensue would fall on the mortgagor or those who represent him and not on the mortgagee. The mortgagee's position cannot be worsened by anything done by the mortgagor behind his back and subsequent to his mortgage. In such cases the whole of the debt after deducting the subsequent mortgagee's share should be spread over the remaining items of property and this share should be determined by taking the whole of the mortgaged property as existing at the date of the mortgage into consideration. 1942 N.L.J. 289.

Sec. 65-A.—[This section has no retrospective operation.] 1936 M. 942=71 M. L.J. 638. *See* 10 P. 332=12 Pat. L. T. 206; 1940 Mad. 669=(1940) 1 M. L. J. 601 (*see* notes under S. 66). As to lease granted by a mortgagor who has created an English or anomalous mortgage without the concurrence of the mortgagee, *see* 128 I.C. 655=1930 P.C. 290 (P.C.). A lease by a mortgagor in possession subsequent to a decree on the mortgage and pending execution cannot bind the mortgagee or the auction-purchaser who stand in his shoes. 33 Bom.L.R. 1123=1931 B. 539.

Secs. 65-A and 66.—Principle of the section also applies to Punjab and places where the Act is not in force. 124 P.L.R. 1902. The mortgagor in possession may create a tenancy from year to year in the case of agricultural lands or from month to month in the case of houses. But it is not competent to the mortgagor to grant a lease on unusual terms or to alter the character of the land or to authorise its use in a manner or for a purpose different from the mode in which he himself had used it before he granted the mortgage. This view is now embodied in S. 65-A. 10 R. 210=1932 R. 113. So a lease by mortgagor for three years is not binding on the mortgagee. 10 R. 210. Conditions for the exercise of the right to lease by the mortgagor. 1933 M. 876=65 M.L.J. 826. Mortgagor in possession can *prima facie* exercise the ordinary rights of an owner in possession. 34 I.C. 24. *See also* 1938 Pat. 189. Where a mortgagor in possession commuted the produce rents due from his tenants into cash rents, the mortgagee cannot impeach the commutation or set it aside at least so long as it was an honest conversion at a fair and reasonable rate. 12 P.L.T. 121=1931 P. 193. The onus of proof of waste or prejudice under S. 66 lies on the mortgagee. 24 I.C. 758=16 Bom.L.R. 178. But *see* 124 P.L.R. 1902. A simple mortgagor can create a lease but not so as to impair its value or impede the operation of the mort-

(*c*) No such lease shall contain a covenant for renewal.

(*d*) Every such lease shall take effect from a date not later than six months from the date on which it is made.

(*e*) In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years, and the lease shall contain a covenant for payment of the rent and a condition of re-entry on the rent not being paid within a time therein specified.

(3) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed ; and the provisions of sub-section (2) may be varied or extended by the mortgage-deed and, as so varied and extended, shall, as far as may be, operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that sub-section.]

Waste by mortgagor in possession.

66. A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate; but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act.

Explanation.—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

NOTES.

gage. 32 I.C. 195=20 C.W.N. 350; 88 I.C. 947=1925 O. 542; 15 O.C. 239=16 I.C. 476; 17 I.C. 1=17 C.L.J. 384. (*See* now S. 65-A.) Prior to the introduction of S. 65-A in 1929 the mortgagor in possession of the property in the case of a simple mortgage was entitled to transfer or deal with the property in any way he liked provided the mortgagee's security was not rendered insufficient. He could grant permanent leases subject to the same condition and so the mortgagee who purchases the property in execution of his own decree is not entitled to eject the *mokarrari* lessee without showing that his security was prejudicially affected. 10 P. 332=12 P.L.T. 206. *See also* 8 O.W.N. 131=1931 O. 256; 1935 A. L.J. 360=1935 A. 511. S. 65-A has no application to a lease executed prior to its enactment. Such a lease is governed by S. 66. Where the mortgage security becomes insufficient ultimately on account of the lease, though not at the time of its execution, the lease cannot be enforced against the mortgagee auction-purchaser, especially when its terms are so prejudicial to the interests of the mortgagor himself that it is impossible to consider it as given in the ordinary course of management. 162 I.C. 225 =1936 O.W.N. 399=1937 Oudh 146. Mortgage by *jenmi* of equity of redemption —Subsequent renewal of *kanom* demise by *jenmi*—Not binding on mortgagee. 1933 M. 876=65 M.L.J. 826. A mortgagor who has created an English mortgage or anomalous mortgage cannot grant a lease without the concurrence of the mortgagee. 128 I.C. 655=1930 P.C. 290 (P.C.). *See also* 57 C. 82=1930 C. 335. Tenants who are settled on the land by the mortgagor after the mortgage can keep their lands against the mortgagee upon proof, that the leases were granted on the usual terms in the ordinary course of management. 7 P. 349=1928 P. 372; 12 C.L.J. 384=17 I.C. 1; 1 P.L.T. 392=56 I.C. 805; 1 P. L.J. 563=38 I.C. 37. The test by which the mortgagor's lease should be judged is that stated in S. 66, *i.e.*, whether they were destructive or permanently injurious to the property, likely to render the mortgagee's security insufficient and a permanent lease of *bakasht* lands to a tenant may not be outside the scope of the authority of the mortgagor in possession. 107 I.C. 156=1928 P. 238. *See also* 12 O.L.J. 276=30 I.C. 258. (*See* now S. 65-A.)

Sec. 66.—A mortgagor creating a simple mortgage does not part with possession, and the right of the mortgagee is only to cause the mortgaged property to be sold for the payment of his debt. Where leases executed by the mortgagor are questioned by the mortgagee, the burden is not on the lessees to prove that the leases were usual and given in the ordinary course of management, especially where the mortgagee's dues are satisfied by sale of the mortgaged property. A lease granted by the mortgagor cannot be presumed to be bad under S. 66 of the T.P. Act, S. 66 is intended to apply generally to all cases where a mortgagor has done acts which either destroyed or injured the property in his possession, and if by such act on his part the security is rendered in-

Rights and Liabilities of Mortgagee.

67. In the absence of a contract to the contrary, the mortgagee has at any time after the mortgage-money has become [1][due] to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court [1][a decree] that the mortgagor shall be absolutely debarred of his right to redeem the property, or [1][a decree] that the property be sold.

Right to foreclosure or sale.

A suit to obtain [1][a decree] that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

Nothing in this section shall be deemed—

LEG. REF.

[1] *See* Notes under S. 60, substituted by Act XX of 1929.

NOTES.

sufficient and applies to a lease granted by a mortgagor in possession. 1938 P.W.N. 177=19 Pat.L.T. 95=1938 Pat. 189.

Sec. 67.—The amendment of 1929 did not import new principles. It was introduced not to alter the law but to make it more clear. 161 I.C. 155=1936 Pesh. 48. S. 67 does not apply to securities created by operation of law, and thus the owners of such securities cannot avail themselves of the benefit of the section. But the Act is not exhaustive and does not deal with a charge under S. 205, Calcutta Municipal Act. That will be governed by rules of English law, and the holder of a statutory charge is entitled to a decree for sale. 38 C.W.N. 917=1934 C. 862. Section is mandatory. 112 I.C. 501=1928 M. 933. A mortgage cannot be enforced nor can the lands attached be brought to sale otherwise than in accordance with S. 67. 6 M.L.T. 154=2 I.C. 980. Where the mortgage deed provided that if the interest for two instalments be not paid in full, the mortgagees will have the option before the expiration of the period fixed to recover the whole of the amount due through Court, the mortgagee could exercise the option. 8 Luck. 488=1933 O. 237. The option given to the mortgagee did not contravene the provisions of S. 67. 11 O.W.N. 1141=1934 O. 473. A mortgagee can sell the property as it stands at the date of his mortgage. A decree is based on a puisne mortgage is subject to prior incumbrances existing at the date of the second mortgage. 8 O.W.N. 179=1931 O. 157. Even though a puisne mortgagee is not a party to a decree obtained by the prior mortgagee, yet it is open to the prior mortgagee, when he has obtained possession under a sale in execution of a decree in his favour in a mortgage suit to set up his rights under the prior mortgage as a shield against a puisne mortgagee. 1931 Oudh 157. A decree for sale cannot be passed on a mortgage by *conditional sale*. 27 A.L.J. 448=1929 A. 421. The only decree that can be made is one for foreclosure. 11 M. 88. A usufructuary mortgagee cannot as such sue for sale, but he can do so if the document allows him to do so. 33 C.W.N. 279=1929 C. 304; 56 M. 892=1933 M. 613=65 M.L.J. 194. *See also* 11 P.L.T. 74=1930 P. 152; 63 I.C. 297=2 P.L.J. 229; 34 P.L.R. 245=1933 L. 151; 19 O.W.N. 1027. Usufructuary mortgagee looks to the rents and profits for the satisfaction of his advance and inasmuch as no time is fixed for payment there can be no forfeiture, which alone gives right to the remedies of closure and sale and in its absence the mortgagee is not entitled to the remedies that spring out of it. 181 I.C. 620=1938 Lah. 145. *See also* 161 I.C. 155=1936 Pesh 48. Usufructuary mortgagee empowered to sue for mortgage-money if possession interfered with—Initial failure of mortgagor to deliver possession of part of mortgaged property—Mortgagee entitled to sue only for recovery of possession *plus* mesne profits, for three years and not for sale. 1932 A.L.J. 1092=1933 A. 97. Where in combination of a simple and a usufructuary mortgage, the mortgagors failed to make over possession to the mortgagee and thereby deprived the mortgagee of part of his security, the money becomes payable and the mortgagees are entitled to a money decree for the same and under S. 67 a decree for sale can be made. 58 M.L.J. 401=33 C.W.N. 693; 56 I.A. 299 (P.C.). *See also* 34 Bom.L.R. 984=1932 B. 558; 20 N.L.J. 145 (Anomalous mortgage—Remedy by way of sale). Mortgage can be fore closed even if fraction of debt remains unpaid. 1930 N. 166. It is the duty of the mortgagees who take possession to keep clear, full and accurate account of all amounts received as mortgagees. Mere oral evidence would be wholly inconclusive. 115 I.C. 137=1929 A. 384. The stipulation in a mortgage-deed that, if the profits of the property mortgaged be found to be insufficient, the mortgagor shall pay the deficiency in interest from year to year, cannot apply to a case where the profits have not in fact decreased, but the mortgagees have, owing to their own default, failed to recover them. 114 I.C. 876=1929 A. 260 (2).

[1][(*a*) to authorize any mortgagee other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or an usufructuary mortgagee as such or a mortgagee by conditional sale as such to institute a suit for sale ; or]

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[1] Substituted by Act XX of 1929.

NOTES.

Where a mortgagee holds several mortgages from the same person and is paid out of the sale proceeds of one security, he must apply the amount in reduction of the amount under that security and cannot apply it to unsecured debt or debts secured on other securities so as to affect other mortgagees. 40 M.L.J. 126=62 I.C. 833. In a decree for foreclosure after expiration of the period of grace, property passes to the mortgagee. In a decree for sale the mortgagor has time till the sale is held and afterwards confirmed by the Court. 46 A. 864=1924 A. 818 (2). The Court has the power to appoint a receiver even in a suit by a simple mortgagee if the property is insufficient to meet the decretal amount. 34 P.L.R. 950 (1). But where there is no personal covenant to pay, or the covenant has become barred or the simple mortgagee has deliberately given it up and the decree does not and cannot contemplate a personal decree for any deficiency the Court has no power to appoint a receiver. 1933 M.W. N. 29=1933 M. 447. A sub-mortgagee may sue his mortgagor or mortgagor's mortgagor, whether it is a simple debt or mortgage debt. 14 C.W.N. 165=3 I.C. 311. Where the mortgagee assigns his interest for a lesser amount than that due to him, the assignee cannot recover from the mortgagor more than what he paid and reasonable interest thereon. 8 M.L.T. 420=7 I.C. 871. Properties covered by security bond given for stay of execution of a decree can be proceeded against in execution without instituting a suit under S. 67. 51 C. 150=81 I.C. 734. There need be no assignment to the person for whose benefit the bond is intended. 60 C. 1298=37 C.W. N. 973. Decree-holder can proceed against the properties secured by a surety, when the original party makes default. 38 A. 327. The mortgagee has always a personal remedy against the mortgagor. 10 I.C. 975. Mortgagee can bring properties to sale in any order he pleases. 22 L.W. 389=1925 M. 1214; 92 I.C. 593. The right of suit in mortgagee is not lost by a third party claiming title by adverse possession against the mortgagor. 44 C. 425=21 C.W.N. 177; 27 C.L.J. 212=37 I.C. 277. Maintenance decree-holder with a charge on the property can enforce the charge in execution of the decree. 59 I.C. 282=1 Pat. L.T. 647. The mortgagee may release his rights over any one of the mortgagors claiming only proportionate share of the mortgage debt. 36 I.C. 530; 10 P. 341 =12 Pat.L.T. 28=1931 P. 164. But the mortgagee is not bound to abate a proportionate part of the debt and is entitled to recover the whole amount against any portion of the mortgaged property. 130 I.C. 809=1931 N. 44. *See also* 1929 A. 380 and cases cited under S. 82. But the released mortgagor is a necessary party to a suit. 36 I.C. 530. Though the principal may be payable at some date, for payment of interest shorter dates may be fixed and suits for interest alone can be maintained. 31 M.L.J. 437. *See also* 35 I.C. 104; 26 B. 241; 27 C. 938. The enforcement of the right to foreclose is controlled by any contract to the contrary. If the effect of the deed be that neither the mortgagor had the right to re-pay and redeem the mortgaged property nor the mortgagees had the right to recall the money and to sue for foreclosure before the expiry of five years, limitation for a suit for foreclosure runs from the first date after the expiry of the five years and not earlier even if the mortgagees had bargained for possession and never got it. 9 O.W.N. 280=1932 O. 178. As to right of suit for sale under S. 67 where mortgage in respect of properties in Burma and Br. India executed prior to separation of Burma. *See* 1939 Ran.L.R. 372=1938 Ran. 459.

Sec. 67 (a), Cl. (a) newly substituted in 1929 is not retrospective. A decree for sale can be passed on an English mortgage. 26 C.W.N. 318=1922 C. 52. A simple mortgagee is always entitled to a decree for sale even though he has a right of possession on failure to pay interest. 15 C.W.N. 441=10 I.C. 272=21 M.L.J. 1147 (P.C.). *See also* 19 M. 239. There is nothing to prevent the parties agreeing to allow a foreclosure for interest only or for part of the mortgage-money. 48 A. 171=24 A.L.J. 88=1926 A. 46. Even an usufructuary mortgagee can bring a suit for sale when a time for payment has been fixed and there is a personal covenant to pay. 1 P. 350 =3 P.L.T. 332. But if there is a further stipulation that, if the mortgage amount is not paid, mortgagee would continue in possession, the mortgagee is not entitled to sue the mortgagor for sale of the property on failure to pay the mortgage money on the fixed day. 120 I.C. 308=1930 P. 152. This would be so even where it was further provided that, if the mortgagor did not exercise his right to redeem during the 16th

(*b*) to authorize a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure ; or

(*c*) to authorize the mortgagee of a railway, canal or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale ; or

(*d*) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

NOTES.

year, he would have to pay certain interest on the principal sum from the date of the mortgage up to the date of redemption, in addition to repaying the principal and costs of improvement. 161 I.C. 155=1936 Pesh. 48. Where a mortgage is a *combination of usufructuary and simple* ones, the two rights are independent, and the mortgagee may sue for sale, though he may have given up possession. 6 I.C. 153 (C.). *See also* 14 M. 232; 26 M. 526; 34 B. 462; 26 M.L.J. 514; 1 P. 350. In such a case, it was held that the mortgagee can bring the property to sale only according to the conditions set out in the deed. 6 N.L.R. 20=5 I.C. 701. A usufructuary mortgagee cannot sue either for sale or foreclosure. 41 M. 259; 12 M. 109; 63 I.C. 297=2 P.L.T. 229; 27 I.C. 800. A suit for sale can however be maintained if the mortgagor fails to deliver possession to the mortgagee. 41 M. 259. The effect of S. 31 (*c*), read with S. 63, of Act XX of 1929 is that so far as English mortgages executed prior to the 1st April, 1930, are concerned, they must be deemed to be outside the scope of the amendment made by substitution of the new Cl. (*a*) in S. 67 of the T.P. Act. This being so, suits on such mortgages must be held to be governed by Art. 147 and not by Art. 132 of the Limitation Act. 1942 C. 153=46 C.W.N. 33. *See also* 41 I.C. 406; 1929 C. 304; 30 A. 162.

Cl. (b).—The remedy of the mortgagee of a railway, etc., is to apply for the appointment of a receiver.

Cl. (d).—Where a property is mortgaged to two persons as tenants in common and there is no covenant to re-pay each separately a moiety of the amount, the right of either mortgagee who desires to realise, failing the consent of the co-mortgagee, is to sue for a mortgage-decree *in respect of the whole sum* secured, joining his co-mortgagee as a defendant. In such a case the decree should provide for all necessary accounts and payment, except that there can be no judgment for a sum of money entered as between the mortgagee defendant and the mortgagor. 46 I.A. 272=37 M.L.J. 483 =53 I.C. 131 (P.C.); 1930 M. 985=59 M. L.J. 928. He cannot get a decree for his share of the mortgage-debt or a sale of a part of the mortgaged property. The same principle applies even where one of the mortgagees chooses to abandon the security. 1935 A.L.J. 198=1935 A. 263. But if the mortgage deed itself states that specified sums have been borrowed from each of the mortgagees, then a suit by any one of the mortgagees may be laid *for his share* of the mortgage money alone. 154 I.C. 537=1935 A.W.R. 169=1935 A. 391. Where the plaintiffs sue for their proportion of the mortgage money, the other persons who could have any possible interest in the mortgage security being added as party defendants, there is nothing in S. 67 (*d*), which prevents the passing of a decree in favour of the plaintiffs. 1932 C. 34= 54 C.L.J. 113. Where one of two co-mortgagees accepted in full satisfaction of the debt an amount less than the actual amount due on the mortgage, and the other co-mortgagee did not consent to such arrangement, and the latter filed a suit to enforce his share of the debts against the whole of the mortgaged property, there is no severance of the mortgage within the meaning of S. 67 (*d*) and the suit is maintainable did not offend against S. 67 (*d*). S. 67 is not mandatory. 1928 M. 933= 112 I.C. 501. Where one of two mortgagees took a further mortgage in supersession of his right under the prior one, the right of the other mortgagee is unaffected. 41 A. 631=17 A.L.J. 731. One of two mortgagees can bring a suit to recover his share when the other mortgagee was allowed to obtain a decree on his share alone. 25 I.C. 91=39 M. 17; 1928 M. 933. Where the parties are Mahomedans the share of each of the heirs of the original mortgagor is defined by law and the mortgagee can, in such a case, give up his mortgage lien on the share of any one of the mortgagors by making a proportionate reduction and enforce his mortgage for the balance against the shares of the other heirs. 10 P. 341= 1931 P. 164 and cases cited therein.

Secs. 67 and 68.—If a person mortgages with possession his *sir* land and fails to deliver possession of the mortgaged property to the mortgagee the mortgage money becomes payable under S. 68 and the mortgagee is entitled to a money decree for the same. But if the time stipulated for redemption expires, the mortgage money becomes due to the mortgagee under S. 67 and

[1][67-.A A mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right to obtain the same kind of decree[2] under section 67, and who sues to obtain such decree[2] on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage-money has become due.]

Mortgagee when bound to bring one suit on several mortgages.

LEG. REF.

[1] Added by Act XX of 1929.

[2] "Decree", *see* Notes under S. 60.

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a decree for sale can be made under that section. 157 I.C. 657=1935 O.W.N. 924. Where a mortgage comprises the features of simple and usufructuary mortgages and the mortgagor deprives the mortgagee of part of his security by failing to deliver up possession, the mortgagee has a right to sue for the money under S. 68 (*c*) and also for sale of the mortgaged property under S. 67. I.L.R. (1938) All. 714=1938 A.L.J. 746=1938 All. 418 (F.B.). A mere covenant to repay does not take what would otherwise have been a usufructuary mortgage out of that category. The mortgagee could not be allowed in his suit to claim a decree for sale on the ground that he had been deprived of his security or possession of the property. 1942 A.W.R. (H.C.) 158=1942 A.L.W. 370.

Secs. 67 and 100.—Where the future maintenance accruing to a widow was declared by the decree a charge upon a house, the house is not made security for the repayment of money of the widow *'by any act of parties'* or *'by operation of law'* within the meaning of S. 100. It is only by virtue of a decree that a charge is created on certain specified immovable property. Where the house is sold in execution of the maintenance decree subject to the right of future maintenance and there is subsequently default in payment of the maintenance instalments, it is not necessary for the widow to bring a suit under S. 67. O. 34, R. 14, C.P. Code, cannot be a bar for the enforcement of the decree otherwise than by suit. The effect of the change in the provisions of O. 34, R. 14 is that a mortgagee can have the mortgaged property sold in execution of the decree on a claim which is not connected with the mortgage. 1939 A.L.J. 542=1939 All. 579.

Sec. 67-A.—The section came into force on 1st April, 1930, and therefore is not applicable to a mortgage executed before that date. 1936 L. 1020; 131 I.C. 725 (R.); 1933 R. 377; 1940 Pat. 65; 1938 Bom. 196=40 Bom.L.R. 109. The intention of S. 67-A is to compel a mortgagee who is entitled to the same kind of decree in respect of several mortgages over the property of the same mortgagor to consolidate the mortgages and enforce them in a single suit provided he has not contracted out of his obligation. The same obligation is placed upon a charge-holder under S. 100; and the words "so far as may be" are inserted there, because the legislature realised that some of the provisions dealing with mortgages may be inapplicable to charges. The proviso that there may be a contract to the contrary is applicable to a charge by act of parties, though it is inapplicable to a charge by operation of law. 60 C. 1470 =38 C.W.N. 153=1934 C. 325. The principle of S. 67-A cannot be applied unless there are either two mortgages or two separate portions of the same mortgage which are payable. Where under a mortgage bond the amount is made payable in instalments with a provision that in case of default of payment of two consecutive instalments, the mortgagee might treat the whole of his mortgage as payable, if he chooses to waive the penalty and sue merely on those instalments which are due, the mortgagor cannot be heard to say that the mortgagee is bound to sue for the whole amount of the mortgage and to enforce a penalty against himself. 1940 Mad. 296=(1939) 2 M.L.J. 924. The section does not apply when the parties to the mortgages are not the same. 1937 N. 99; 1933 R. 377; 1938 Bom. 196=40 Bom.L.R. 109. Where there were two successive mortgages in favour of the same mortgagee, but the money on the second became due earlier than that on the first and hence a suit was brought on the second mortgage and decree obtained and property sold subject to the first mortgage (on which by that time a decree had also been obtained) S. 67-A did not apply and that what was sold in the suit on the second mortgage was the equity of redemption and there could be no objection to the property being sold again in the suit on the first mortgage. 1940 N.L.J. 563=I.L.R. (1942) Nag. 172=1941 Nag. 3, nor to securities created by operation of law, such as statutory charges under S. 205, Calcutta Municipal Act. The Corporation of Calcutta is not therefore bound to enforce all such charges which it has for the consolidated rates due from the same person in respect of different properties in one suit. 38 C.W.N. 917=1934 C. 862. The words "all the mortgages in respect of which the mortgage money has become due" must be limited to those mortgages which the Court, in which the mortgagee sues has jurisdiction to en-

Right to sue for mortgage-money.

[1][68. (1) The mortgagee has a right to sue for the mortgage-money in the following cases and no others, namely :—

(*a*) where the mortgagor binds himself to repay the same ;

(*b*) where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property is wholly or partially destroyed

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LEG. REF.

[1] Substituted by Act XX of 1929.

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force. 41 C.W.N. 854; 1939 Rang.L.R. 207 =1939 Rang. 247. The section restricts the rights of mortgagees and therefore must be construed strictly. 38 C.W.N. 917=1934 C. 862. A person who holds two mortgages of different dates must file a consolidated suit on both and omission to sue precludes filing of a second suit. 1933 N. 171=144 I.C. 326. Where a suit is filed in respect of more than one mortgage, for purpose of determining the court-fee, it was the suit could not be taken to comprise only one single subject by reason of the principle of consolidation applied by S. 67-A. 1935 M. 62 (1)=68 M.L.J. 316. *See also* 1940 Rang.L.R. 767.

Sec. 68.—The amendment of section is not retrospective. Section applies only to mortgages and not to charges. 15 C. 492. A purchaser from the mortgagor cannot be made personally liable under this section. 26 N.L.R. 312=1930 N. 139 (2). Provisions of this section are not applicable to anomalous mortgages. 9 O.W.N. 280. By instituting a suit for mortgage money under the circumstances enumerated in S. 68, a mortgagee does not lose his right to proceed against the security. The legislature could never have intended that if a mortgagor by his own default brings about deterioration of the mortgaged property and thereby forces the mortgagee to bring a suit for money, he can thereby deprive the mortgagee of what little security he has. 162 I.C. 15=1936 P. 439. The mortgagee should not enforce the personal liability before exhausting his remedy against the property except in cases where the mortgagee is prepared to abandon the security. But this can only apply as between the mortgagor and the mortgagee. 1937 M.W.N. 373.

Sec. 68 (a): PERSONAL LIABILITY.—Where the mortgagors covenant to repay the principal and interest within a time fixed and that in default of such payment, the mortgagee would be entitled to sue for foreclosure, there is no personal covenant in the deed, binding the executant to repay, on which personal decree could be passed. (1939) All. 313=1939 A.L.J. 362=1939 All. 260. *See also* 17 Pat. 737=19 Pat. L.T. 737=1938 Pat. 585. Any action claiming the mortgage moneys *simpliciter* must be made under S. 68 (*a*) if at all and there is no implied covenant creating personal liability. 152 I.C. 897=1934 Pat. 624. Existence of personal covenant depends on the facts of each case. 86 I.C. 481=1925 M. 991; 1941 Pat. 486. Personal covenant can be enforced though mortgage fails. (*Ibid.*) *See also* 23 O.C. 145=57 I.C. 967. Where in a usufructuary mortgage there is express provision entitling the mortgagee to recover his money on the expiry of the term fixed, mortgagee is entitled to sue for and obtain decree for sale under S. 68 (1) (*a*) read with S. 67. I.L.R. (1938) All. 218=1938 A.L.J. 18=1938 All. 188; *see also* 1937 M.W.N. 81; where an usufructuary mortgage is void as effecting a transfer of occupancy holding, the personal covenant in the mortgage is also void and unenforceable. 44 A. 486=22 A.L.J. 318; 57 I.C. 445=43 A. 81. *See contra* 86 I.C. 481=1925 M. 991. Where an application for personal decree is dismissed, no separate suit for personal remedy is maintainable. 22 O.C. 145=57 I.C. 967. An usufructuary mortgage does not in itself imply any personal liability. 85 I.C. 326=1925 O. 628; 10 N.L.R. 9=23 I.C. 131. *See also* 31 Bom.L.R. 825=1929 P.C. 139. In the absence of an express contract to pay a personal decree cannot be passed. 57 I.C. 680. *See also* 12 N.L.R. 19=33 I.C. 753. But *see* 13 L. 259 =1932 L. 164. Where the mortgage was partly usufructuary and there was an express promise to pay the sum on a particular date and to redeem the land on that date: *Held*, that the mortgage was an anomalous one and that as the land could not be sold under S. 15, Land Alienation Act, in execution of any decree the mortgagee was entitled to give up the security and to obtain a simple money decree for the sum sued for. 1935 L. 103. Where a mortgage-deed contained a personal covenant to pay interest independently of the principal, a suit for interest will lie, even though the personal remedy for principal may be barred. 41 I.C. 72. *See also* 1924 N. 83; 39 I.C. 852. A simple mortgage carries with it a personal covenant to pay the principal and interest. 13 L. 508= 1932 L. 630.

Sec. 68 (b) and (c).—The section is applicable only when the property is lost owing to the fault of the mortgagor and not that of the mortgagee, and only where the mortgage is not void. 85 I.C. 802=1923 L. 357. But *see contra* 21 I.C. 581. There

or the security is rendered insufficient within the meaning of section 66, and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render the whole security sufficient, and the mortgagor has failed to do so ;

(*c*) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor ;

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must be proof that the reduction in the security was caused by the wrongful act or default of the mortgagor. 133 I.C. 402 (A.). A mortgagee who has been induced to enter into an invalid transaction through the deceit of the mortgagor can recover the money paid by him and his suit cannot be resisted as not maintainable because the transaction was invalid. 25 A.L.J. 37=1927 A. 190. Where, by a mistake of law, a subsequent mortgagee entered into the transaction and subsequently found that he could not claim priority and he thereupon sued for the recovery of the money. S. 68 has no application as it is applicable only to cases where the security was lost to the mortgagee otherwise than by his own fault. (7 I.C. 251, Dist.) 1933 L. 836. 'Insufficient' does not mean misdescription of property, nor does it cover a case of inclusion of property as mortgagor's while it does not belong to him. 70 I.C. 423=1922 B. 217. The word "mortgagor" includes the assignee of the equity of redemption. 1932 P. 273. S. 68 (1) (*c*) only speaks of the 'mortgagor', but in view of S. 59-A, that word must include the subsequent purchaser of the mortgaged property. I.L.R. (1940) Nag. 63=1939 N.L.J. 338=1939 Nag. 256. The mortgaged property is 'destroyed' when it is taken under the Land Acquisition Act. 42 I.C. 793=20 O.C. 256; or when the mortgagee is dispossessed through adverse possession. 2 Bur.L.J. 47=1924 R. 143. S. 68 (*c*) is sufficiently general to cover a case where the mortgagee of an undivided share of a co-sharer is dispossessed of the property by the co-sharers of the mortgagor who have been allotted that property at a subsequent partition. 1936 O.W.N. 21=1936 O. 174. *See also* 13 P.L.T. 373=1932 P. 273. Where in a mortgage there is no personal covenant to pay, yet, if the mortgagee is dispossessed, a suit for money is maintainable though the mortgage was unattested and invalid. 44 C. 388=44 I.A. 87=32 M.L.J. 39 (P.C.). *See also* 1941 P.W.N. 506=1941 Pat. 301. Such a suit may be maintained either against the mortgagor or the purchaser of the equity of redemption. 1932 P. 273. '*Security*' must be one effected by a mortgage under the Act. 33 I.C. 753=12 N.L.R. 19. If the mortgaged property is diminished, the mortgagee can insist on the mortgagor giving another security. 45 A. 388, or sue for mortgage-money: 51 I.C. 785. To ask for fresh security is condition precedent to a suit for the money. 42 M. 578=36 M.L.J. 286. *See also* 1938 All. 221=1938 A.L.J. 313 (F.B.) (Withdrawal of compensation money by mortgagor—Mortgagor not entitled to sue to enforce his security). Mortgaged property not in possession of mortgagor—Suit pending in respect of it—Mortgagee aware of such circumstances—Mortgagor found not entitled to such property—Suit by mortgagee before expiry of stipulated period for mortgage-money—If lies. *See* 1938 Cal. 48. Art. 97 of the Limitation Act applies to a suit for money under this section. 21 I.C. 581. But *see also* 3 R. 60=89 I.C. 56=1925 R. 223; 1936 R. 80. Where an usufructuary mortgagee is dispossessed, but his right to sue for the mortgage-money on such dispossession is allowed to be barred by time, he has no further cause of action to sue for the mortgage-money. 152 I.C. 897=1934 P. 624. Where the mortgagee is deprived of his security in consequence of the default of the mortgagor in paying the land revenue due on the land, time would not begin to run against the mortgagee until the default in payment of land revenue, which resulted in the sale of the land, took place. Inability of the mortgagor is a default within S. 68 (*c*). 151 I.C. 426=1934 R. 227. Mortgage—Provision for three months' notice for re-payment—Power of sale on default—Sale of property by prior mortgagee—Deficiency—Suit by subsequent mortgagee—Limitation—Cause of action. *Held,* that though under S. 68 (*b*) the mortgagee may require the mortgagor to give sufficient security for his debt, and on default of the mortgagor, to sue for the mortgage-money, yet there was a condition precedent to such a suit, namely, a notice to the mortgagor requiring him to furnish another sufficient security for the debt; and in the absence of proof of such a notice, it cannot be held that limitation did not arise until the property was sold in exercise of the power of sale conferred on the mortgagee, the bond being only an on demand bond. 1934 M. 644=67 M.L.J. 499. Under Cl. (*c*) of S. 68 (1) no question of the security becoming insufficient within the meaning of S. 66 arises and the only question is whether or not the mortgagee has been deprived of the whole or part of the security by or in consequence of any wrongful act or default of the mortgagor or his representative in interest. Where in the case of an usufructuary mortgage of a house, it is found that owing to want of repairs, the house had become uninhabitable

(*d*) where, the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor :

Provided that, in the case referred to in clause (*a*), a transferee from the mortgagor or from his legal representative shall not be liable to be sued for the mortgage-money.

(2) Where a suit is brought under clause (*a*) or clause (*b*) of sub-section (1), the Court may, at its discretion, stay the suit and all proceedings therein, notwithstanding any contract to the contrary, until the mortgagee has exhausted all his available remedies against the mortgaged property or what remains of it, unless the mortgagee abandons his security and, if necessary, re-transfers the mortgaged property.]

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and that while a tenant had left the house, another had his rent reduced by half, it was held that it showed that the value of the security had diminished and that it amounted to a deprivation of part of the security entitling the mortgagee to sue for his money. 1938 O.W.N. 806=1938 Oudh 210. Where a mortgagor is left in possession of the mortgaged property as a tenant of the mortgagee, mere non-payment of rent by him, cannot be considered to be a wrongful act on the part of the mortgagor depriving the mortgagee of the possession of the lands mortgaged. So long as the tenancy is not disputed any dispute as to the nature of tenancy cannot be said to deprive the mortgagee of part of his security. I.L.R. (1938) All. 218=1938 All. 188. Where a mortgagee is presumably aware that the security which he was accepting for his loan belonged to a joint Hindu family and he advanced the loan knowing that it was not for legal necessity, he takes a risk and loses. It cannot be said that the mortgagee was deprived of the security by or in consequence of the wrongful act or default of the mortgagors. Even if the result appears to be somewhat inequitable, no principle of equity can prevail where the law is clear. I.L.R. (1939) All. 313=1939 A.L.J. 362=1939 All. 260; *see also* 1936 Oudh 174=1936 O. W.N. 21.

Sec. 68 (d).—The section will apply when the mortgagee is dispossessed by person holding better title than mortgagor. 43 A. 484. *See also* 27 A.L.J. 581=1929 P.C. 139; 15 M. 304; 19 A. 191; 42 M. 578. The mortgagor cannot be held liable for the tortious acts of strangers. 32 P.L.R. 561 =1931 L. 694. Where dispossession is caused by one who is not claiming under any title superior to the mortgagor, or where it is caused by mortgagee's own default, the mortgagee cannot invoke the aid of Cl. (*d*) of S. 69. 161 I.C. 821 (2)=1936 O. 263. The sub-mortgagee can sue his mortgagor for money when possession is not delivered. 87 I.C. 439 (1)=1925 A. 736. Usufructuary mortgagee can sue for sale if possession is not delivered. 41 M. 259=33 M. L.J. 623 (F.B.); 8 P.L.T. 355=103 I.C. 592. As to his powers of sale when the mortgagee retains possession over a portion of the mortgaged property and when the other properties have been transferred to another, *see* 84 I.C. 26=1924 A. 877. In a mortgage by conditional sale, it is not the duty of the mortgagor to put the mortgagee in possession of the property after the expiry of the stipulated period and the mortgagee is not entitled to sue for the mortgage-money for the failure of the mortgagor to do so. 1933 L. 174=145 I.C. 159. The remedy under the section is not a suit for foreclosure or for sale, but only a money decree. 41 I.C. 406; 13 I.C. 336. A mortgagee cannot be compelled to enforce the mortgage against the properties. It is open to the mortgagee to sue limiting his claim to a money decree on the personal covenant. 175 I.C. 593=1938 Mad. 132= (1937) 2 M.L.J. 920. *See also* 1937 A.L.J. 815=1937 A. 711. Where an occupancy tenant has alienated the occupancy tenancy without the consent in writing of the landlord and the alienation has been set aside at the instance of the landlord in a suit brought under S. 60 of the Punjab Tenancy Act, the mortgagee is entitled to sue the mortgagor for refund of the mortgage-money. 36 P.L.R. 233=1934 L. 853 (2) (F.B.). As to suit for money by usufructuary mortgagee who was not placed in possession of the property at all, *see* 7 O. W.N. 1045=1931 O. 5. If the mortgagee demands substitution in the place of the properties which were destroyed, he must show circumstances so as to raise an equity in his favour. 10 I.C. 689=7 N.L.R. 2. An usufructuary mortgagee can claim interest as well when he was kept out of possession by the mortgagor and also on money paid to avert a rent sale. 52 I.C. 433=46 C. 448. Before the statutory right given to a usufructuary mortgagee by S. 68 (1) (*d*), can be enforced, the mortgagee has to prove his mortgage. If the mortgage document cannot be tendered in evidence for want of registration, the mortgagee cannot

69. [1][(1)] [Notwithstanding anything contained in the Trustees' and Mortgagees' Powers Act, 1866, a mortgagee, or any person acting on his behalf, shall, subject to the provisions of this section, have power to sell or concur in selling the mortgaged property, or any part thereof, in default of payment of the mortgage-money, without the intervention of the Court, in the following cases, and in no others, namely] :—

Power of sale when valid.

LEG. REF.

[1] S. 69 was numbered as sub-S. (1) by Act XX of 1929.

[2] Substituted by *ibid*.

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obtain the remedy given by the clause or recover his money. 1937 A.L.J. 815= 1937 All. 711. *See also* 1938 Mad. 132= (1937) 2 M.L.J. 920; 54 I.C. 814; 8 O.L.J. 660=1922 O. 102; 41 I.C. 55.

Sec. 69.—Section does not apply to places where Act is not in force. *See* 1933 P.C. 114=4 L. 284 (P.C.). S. 69 does not purport to confer any power upon mortgagees, but it is intended when a power is actually conferred by a mortgage-deed to prescribe the procedure to curtail unfettered exercise of the power and to determine the rights of the purchaser at such a sale. Consequently, a sentence in a mortgage-deed that "the mortgagee, his heirs, representatives and assigns shall have all the rights, powers, remedies and privileges conferred upon the mortgagee by Act IV of 1882" does not confer on the mortgagee a power to bring the mortgaged property to sale without the intervention of Court. 6 R. 134=1928 R. 128. *See also* 13 A. 28. The words "power of sale" in S. 69 (*c*) refer to a clause to be expressly included in the mortgage and must be understood to mean what is ordinarily known and understood in conveyancing by that expression. 1942 Bom. 46=43 Bom.L.R. 890. A power to sell is a power to sell either now or at a later date; and a clause which gives power to postpone the sale is not against the words of S. 69, and is not illegal. Nor is a power "to buy in or rescind or vary any contract of sale" bad and against the words of S. 69. 1942 Bom. 46=43 Bom.L.R. 890. The right conferred by S. 69 (2) on the mortgagee is the right to exercise his power of sale only upon fulfilment of one of the two conditions mentioned in S. 69 (2). The notice required by S. 69 (2) (*a*) is not only necessary but imperative, and even the period of three months cannot be curtailed by agreement of parties. 43 Bom.L.R. 553=I.L.R. (1941) Bom. 506=1941 Bom. 339. In a case where there is no time fixed for the re-payment of the principal amount in a mortgage-deed and where the amount is made payable on demand, before there can be said to be a "default", there should be a demand. 23 L.W. 476=1926 M. 841. Default in payment of interest alone does not justify the exercise of the power of sale where that power was to be exercised on default in payment of even a part of the principal sum. Parties could contract specifically that, if interest remained unpaid for three months, the whole of the principal would become payable and that the mortgagee could exercise his power of sale. 64 I.C. 634=23 Bom.L.R. 1241. Under S. 69 if interest amounting to Rs. 500 is in arrears and unpaid for three months, the mortgagee can exercise the power of sale without notice to the mortgagor. 94 I.C. 860=1926 M. 841. Even in cases where this section does not apply, the mortgagee can have a power of sale. There is no positive enactment prohibiting such stipulation being annexed to a mortgage. 45 M.L.J. 497=50 I.A. 162=4 L. 284 (P.C.). *See also* 94 I.C. 860=23 L.W. 476. Under Cl. (*b*) of sub-S. (2) if interest has amounted to Rs. 500 and not been paid for three months after becoming due, power of sale can be exercised even if there is no default in payment of the principal money. 11 Bur.L.T. 147=43 I.C. 921. It would be otherwise if the mortgage-deed specifically provides that the power could be exercised only when the principal money is unpaid. 64 I.C. 634=23 Bom.L.R. 1241; 23 L.W. 476. The mortgagee is a trustee for the mortgagor for the surplus amount, and the trust is not lost by his mixing the surplus with his private moneys. Such surplus is movable property. 40 M. 767=38 I.C. 986. A Court will not interfere with a *bona fide* exercise of a power of sale, unless the price is so low as in itself to be evidence of fraud. The mortgagee is not however a trustee of the power of sale. 13 I.C. 261=10 M.L.T. 554 (P.C.). If the property is purchased by the mortgagee himself *benami*, the sale is void. 1929 B. 24=30 Bom.L.R. 1519. S. 69 applies to Hindus and the manager of an undivided Hindu family in creating for a family purpose a mortgage of immovable property belonging to the family in Madras City may confer on the mortgagee a power of sale which can be exercised without recourse to the Court. There is nothing in S. 69 to prevent a mortgagor giving to a second mortgagee, a power of sale, even when he has not given a similar right to the first mortgagee. 54 L.W. 656=1942 Mad. 232 =(1941) 2 M.L.J. 923.

NOTICE.—The three months' notice provided for by this section [*see* sub-S. (2), Cl. (*a*)] cannot be curtailed by agreement of parties. 11 M. 201. Where the mortgagor has assigned his interest in the mortgaged property, of which the mortgagee is

(*a*) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist [1][or a member of any other race, sect, tribe or class from time to time specified in this behalf by the Provincial Government [2][* * *] in the Official Gazette] ;

(*b*) where [3][a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed, and] the mortgagee is the [4][Crown] ;

(*c*) where [3][a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed, and] the mortgaged property or any part thereof [5][was, on the date of the execution of the mortgage-deed], situate within the towns of Calcutta, Madras, Bombay, Karachi, [6][* * *] or in any other town [7][or area] which the [8][Provincial Government] may, by notification, in the Official Gazette specify in this behalf.

[9][(2)] [10][*] no such power shall be exercised unless and until—

[9][(*a*)] notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such serivce ; or

[9][(*b*)] some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

[9][(3)] When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised ; but any person damnified by an unauthorized or improper or irregular exercise of the power, shall have his remedy in damages against the person exercising the power.

[9][(4)] The money which is received by the mortgagee, arising from the sale after discharge of prior incumbrances, if any, to which the sale is not made subject, or after payment into Court under section 57 of a sum to meet any prior incumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale ; and, secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage ; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.

LEG. REF.

1 Inserted by Act III of 1885.

2 Words 'with the previous sanction of the Governor-General in Council' omitted by A.O., 1937.

3 Substituted by Act XX of 1929, S. 34 (*b*) (*ii*).

4 Substituted for 'Secretary of State for India in Council' by A.O., 1937.

5 Substituted for the word "is" by S. 34, Cl. (*b*) (*iii*) of Act XX of 1929.

6 Words 'Rangoon, Moulmein, Bassein, Akyab' omitted by A.O., 1937.

7 Inserted by Act XX of 1929, S. 34, Cl. (*b*) (*iii*).

8 Substituted for 'Governor-General in Council' by A.O., 1937.

9 This part was numbered by Act XX of 1929.

10 The word "but" was omitted by S. 34, Cl. (*c*) of Act XX of 1929.

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aware, the notice must be served on the assignee. 17 B. 711. If the sale is held before the expiry of three months from the date of notice, the sale is not liable to be set aside; but the mortgagor will be entitled to sue for damages. 11 M. 201. (*See* 6 Bom.L.R. 557. Case of improper exercise of power of sale. *See also* 2 B. 252).

Sec. 69 (4).—Surplus sale proceeds after meeting the costs of sale, etc., must be refunded to the mortgagor. The mortgagee holding such surplus sale proceeds is in the position of a trustee for the mortgagor or other persons entitled to them. 40 M. 767; 16 B. 141; 38 I.C. 986.

Secs. 69 and 69-A.—S. 69-A introduced by the amending Act XX of 1929 has not repealed or modified S. 12 of the Trustees' and Mortgagees' Powers Act. The only effect of the amendment is that S. 12 of the latter Act is not to be deemed to be incorporated in an English mortgage *proprio rigore* executed after the amending Act came into force. But, in the case of an English mortgage executed before Act XX of 1929,

[1][(5) Nothing in this section or in section 69-A applies to powers conferred before the first day of July, 1882.]

[2][*Omitted.*]

[3][69-A. (1) A mortgagee having the right to exercise a power of sale under section 69 shall, subject to the provisions of sub-section (2), be entitled to appoint, by writing signed by him or on his behalf, a receiver of the income of the mortgaged property or any part thereof.

Appointment of receiver.

(2) Any person who has been named in the mortgage-deed and is willing and able to act as receiver may be appointed by the mortgagee.

If no person has been so named, or if all persons named are unable or unwilling to act, or are dead, the mortgagee may appoint any person to whose appointment the mortgagor agrees ; failing such agreement, the mortgagee shall be entitled to apply to the Court for the appointment of a receiver, and any person appointed by the Court shall be deemed to have been duly appointed by the mortgagee.

A receiver may at any time be removed by writing signed by or on behalf of the mortgagee and the mortgagor, or by the Court on application made by either party and on due cause shown.

A vacancy in the office of receiver may be filled in accordance with the provisions of this sub-section.

(3) A receiver appointed under the powers conferred by this section shall be deemed to be the agent of the mortgagor ; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage-deed otherwise provides or unless such acts or defaults are due to the improper intervention of the mortgagee.

(4) The receiver shall have power to demand and recover all the income of which he is appointed receiver, by suit, execution or otherwise, in the name either of the mortgagor or of the mortgagee to the full extent of the interest which the mortgagor could dispose of, and to give valid receipts accordingly for the same, and to exercise any powers which may have been delegated to him by the mortgagee in accordance with the provisions of this section.

(5) A person paying money to the receiver shall not be concerned to inquire if the appointment of the receiver was valid or not.

(6) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges and expenses incurred by him as receiver, a commission at such rate not exceeding five per cent. on the gross amount of all money received as is specified in his appointment, and, if no rate is so specified, then at the rate of five per cent. on that gross amount,

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LEG. REF.

1 Substituted by Act XX of 1929.
2 Omitted by Act XX of 1929.
3 Inserted by Act XX of 1929, S. 35.

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the terms and incidents thereof including the terms and conditions introduced into the deed by virtue of S. 69, before its amendment, including a term about the appointment of Receiver by the mortgagee without recourse to Court, should not be taken to have been modified or affected by reason of the amending Act of 1929, which has taken out the last paragraph of the old S. 69. 40 C.W.N. 1270=1936 C. 646.

Sec. 69-A.—A provision in a deed appointing a receiver under S. 69-A, which entitles him to carry on the business of the mortgagor as before, does not carry with it an implied authority to meet the liability which the mortgagor himself had incurred in respect of transactions which took place prior to the date of his appointment. The receiver has all the rights and liabilities arising out of the new transactions into which he enters and he is not in any way affected by any equity which may be enforced against the mortgagor. 45 C.W.N. 169=1941 Cal. 308. A receiver appointed under S. 69-A is undoubtedly an agent of the mortgagor as laid down in Cl. (3) as the mortgagee is not liable in respect of any default committed by the receiver and the sole responsibility for acts and omissions on the part of the receiver rests on the mortgagor alone. But that does not entitle the receiver to pay out of the funds in his hands an unsecured creditor of the mortgagor before the dues of the mortgagee are satisfied. 195 I.C. 141=45 C.W.N. 169=1941 Cal. 308.

or at such other rate as the Court thinks fit to allow, on application made by him for that purpose.

(7) The receiver shall, if so directed in writing by the mortgagee, insure to the extent, if any, to which the mortgagee might have insured, and keep insured against loss or damage by fire, out of the money received by him, the mortgaged property or any part thereof being of an insurable nature.

(8) Subject to the provisions of this Act as to the application of insurance money, the receiver shall apply all money received by him as follows, namely :—

(*i*) in discharge of all rents, taxes, land revenue, rates and outgoings whatever affecting the mortgaged property ;

(*ii*) in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver;

(*iii*) in payment of his commission, and of the premiums on fire, life or other insurances, if any, properly payable under the mortgage-deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee ;

(*iv*) in payment of the interest falling due under the mortgage ;

(*v*) in or towards discharge of the principal money, if so directed in writing by the mortgagee ;

and shall pay the residue, if any, of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of which he is appointed receiver, or who is otherwise entitled to the mortgaged property.

(9) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed ; and the provisions of sub-sections (3) to (8) inclusive may be varied or extended by the mortgage-deed, and, as so varied or extended, shall, as far as may be, operate in like manner and with all the like incidents, effects and consequences, as if such variations or extensions were contained in the said sub-sections.

(10) Application may be made, without the institution of a suit, to the Court for its opinion, advice or direction on any present question respecting the management or administration of the mortgaged property, other than questions of difficulty or importance not proper in the opinion of the Court for summary disposal. A copy of such application shall be served upon, and the hearing thereof may be attended by, such of the persons interested in the application as the Court may think fit.

The cost of every application under this sub-section shall be in the discretion of the Court.

(11) In this section, "the Court" means the Court which would have jurisdiction in a suit to enforce the mortgage.]

Accession to mortgaged property.

70. If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession.

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Sec. 70: QUAERE.—Whether the words 'any accession is made to the mortgaged property' in S. 70 bear the *prima facie* meaning and include any accession to the property, or whether any building erected upon the property or any other accession thereto by a stranger 'under a colour of title' or under a *bona fide* title or claim of title is excluded from the ambit of the section. 14 R. 86=1936 R. 65. S. 70 regulates not only the rights and liabilities of mortgagors and mortgagees personally, but also the rights and liabilities of the representatives or successors-in-interest of the mortgagors and mortgagees respectively. The section, however, does not apply to the case of strangers. 53 A. 334=1931 A. 277 (F.B.). The provisions of this section in no way conflict with the principle underlying S. 51. (*Ibid.*) Acquisitions by the mortgagor mostly enure for the benefit of the mort-

Illustrations.

(*a*) *A* mortgages to *B* a certain field bordering on a river. The field is increased by alluvion. For the purposes of his security, *B* is entitled to the increase.

(*b*) *A* mortgages a certain plot of building land to *B* and afterwards erects a house on the plot. For the purposes of his security, *B* is entitled to the house as well as the plot.

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gagee, thereby increasing the extent and value of the security; similarly acquisitions by the mortgagee are generally deemed to be accretions to the mortgaged property and subject to redemption by the mortgagor. 5 C. 198 (210) (P.C.). The superstructure built on the mortgaged site is an accession within the meaning of S. 70 available to the mortgagee. 195 I.C. 322=1941 Pesh. 49. The section does not apply to accession after decree on the mortgaged property. 63 I.C. 552=2 P.L.T. 665. *See also* 41 M.L.J. 490=14 L.W. 449. (Acquisitions after decree and sale of mortgaged property do not form accretions to the mortgaged property.) Mortgagor's share enhanced after mortgage—Right of mortgagee. 45 C.L.J. 571. Mortgagee of a grove or garden is entitled to enjoy even newly planted trees. 6 O.W.N. 832. *See also* 29 C. 803. (Trees growing on land after mortgage.). Mortgage of entire mouza—Mortgagor having title only to portion but adversely possessing whole—Mouza subsequently diluviated by river and reforming with additional land—Mortgagor's title perfected by adverse possession—Enlarged area, goes as security to mortgagee. 1939 Cal. 275. If a lessee of a land which is subject to a mortgage created by the landlord acquires the equity of redemption, the acquisition is not an accession to the mortgaged property under S. 70 of the Act. I.L.R. (1939) 2 Cal. 551=43 C.W.N. 1126=70 C.L.J. 415=1939 Cal. 692. Where goodwill and stock in trade are mortgaged, the mortgagee cannot have the benefit of stock acquired after the mortgage. 37 A. 350. Fixtures attached to the land even subsequently will pass under the mortgage rights. 45 C. 653 =22 C.W.N. 793. So also is the casual increase or decrease in the extent of the boundaries of a mortgaged land or village. 11 B.H.C.R. 39; 2 A. 787. As to houses or other building built upon land mortgaged after the mortgage, being treated as accession to the property, *see* 29 C. 803; 30 B. 250; 1 C.P.L.R. 83. Improvements, *e.g.*, *electric installation* effected on the mortgaged property which are in the nature of fixtures and immovable, are accession to the mortgaged property and are liable for the mortgage charge. 1935 L. 350. When the accretion to the original holding by clearing new land is considerable, the new clearing is not an accretion within the meaning of S. 70: 1933 R. 81=146 I.C. 674. Where the land containing a building is mortgaged and machinery is subsequently planted in the building for permanent use, such machinery is an accession to the mortgaged property within the meaning of this section. 11 R. 322=1933 R. 195. In certain circumstances machinery existing in the mortgaged premises on the date of the mortgage and even machinery subsequently installed there may pass under a mortgage of the premises. But when the site itself is not comprised in the mortgage security machinery would not become part of the security merely by its being subsequently fixed up on the site, when what is mortgaged is a building constructed or being constructed on the site. 49 L.W. 578=1939 Mad. 684=(1939) 1 M.L.J. 692. A temporary structure put up without any intention that it should be a permanent fixture to the land, cannot form an accession to the mortgaged property within the meaning of S. 63 or 70. 1931 A.L.J. 273=1931 A. 277 (F.B.). Where after a mortgage of undivided share different shares are allotted to mortgagor in partition the improvements effected and new buildings constructed on properties allotted to the mortgagor or his transferees must be treated as accessions to mortgaged properties and as such available for the satisfaction of the mortgage-debt under S. 70 (*b*). 14 L. 749=1933 L. 771. The question of want of notice is of no significance so far as S. 70 is concerned. (*Ibid.*) An auction-purchaser at a sale held in execution of a decree passed on foot of a prior mortgage, to which the second mortgagee was no party, is not entitled to remove the materials of the building erected by him on a site included in the mortgaged property purchased by him, and the building is liable to be sold as an accession to the mortgaged property for satisfaction of the second mortgage. (*Ibid.*) Where a *service inam* land is enfranchised and assessed to revenue and a ryotwari patta is granted, the enlargement of the inamdar's interest is "accession" to the property, which adds to the mortgagee's security. 1931 M.W.N. 595. A surrender of his interest by an occupancy tenant in mortgaged property, which enhances the value and increases the interest of the landlord, is also treated as an accretion to the property. 1929 N. 225=25 N.L.R. 12. *See also* 1941 N.L.J. 35. Where after a mortgage of certain *warg land* and the *kumaki* land adjoining it, the Government assigns the *kumaki* lands on dharghast to the *wargdar*, the lands so assigned do not form an accession to the mortgaged property, as they were at the absolute disposal of the Government at the time of mortgage. 35 M.L.J. 120=49 I.C. 147. *See also* 7 M.L.T. 148

71. When the mortgaged property is a lease, [1][* *] and the mortgagor obtains a renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to the new lease.

Renewal of mortgaged lease.

72. [2][A mortgagee] may spend such money as is necessary—

Rights of mortgagee in possession.

(*a*) [3][* * * *].

(*b*) for [4][the preservation of the mortgaged property] from destruction, forfeiture or sale ;

LEG. REF.

[1] The words "*for a term of years*" were omitted by Act XX of 1929.

[2] Substituted by S. 37 (*a*) of Act XX of 1929 for "When during the . . . property, he."

[3] Omitted by S. 37 (*b*) of Act XX of 1929.

[4] In Cl. (*b*) substituted for "its preservation" by S. 37 (*c*) of Act XX of 1929.

NOTES.

=4 I.C. 357. Land mortgaged as *khudkasht* subsequently becoming *sir*—Foreclosure—Mortgagee gets only proprietary rights—Cultivating rights continue with mortgagor. 1933 N. 104=142 I.C. 603=29 N.L.R. 142.

Sec. 71.—Even where a lease is renewed on forfeiture of the original term or even when the new lease covers additional area, the mortgagee will have the benefit of it. 2 A. 538; 18 A. 34. *See also* 1 B.H.C.R. 22; 4 N.W.P. 11.

Sec. 72.—For scope, *see* 20 S.L.R. 277. Section is based on the fiction of an implied request by mortgagor. 11 A. 234; 23 W.R. 305; 27 I.A. 989. As to *right of mortgagee to recover amounts spent in necessary repairs*, see 118 I.C. 186=1929 A. 777. Question of necessity for repairs is one of fact. 1925 O. 429=87 I.C. 829. Usufructuary mortgagee can lease the property to the mortgagor and sue him for rent. *See* 49 A. 658=101 I.C. 516=1927 A. 552. The value of improvements is to be made on the money spent and not on the appreciated value of the property on the date of redemption. 70 I.C. 1. A prior mortgagee, setting aside a sale by the puisne mortgagee by deposit of the sale amount, can only add it to his mortgage amount and cannot get a money decree. 87 I.C. 829=1925 O. 429. The puisne mortgagee is entitled to add the money paid for the redemption of a prior mortgage. 69 I.C. 578=1924 L. 154; 22 O.C. 32=51 I.C. 549. Mortgagee is entitled to recover revenue newly assessed and paid. 1925 L. 76. The mortgagee has a right to add to the principal money payments made by him towards rent which the mortgagor was bound to pay. This statutory right is not affected by the fact that he professed to make those payments not as mortgagee but as owner under a purchase found by the Court to be invalid. As soon as the conveyance failed, the only capacity he could have occupied was that of a mortgagee. 10 P. 210=1931 P. 325. Zamindar's rent paid by mortgagee can be legally added to principal sum. 72 I.C. 391=1924 P. 372. As regards *payment of arrears of Government revenue*, see 5 Pat.L.J. 248. Mortgagee is entitled to interest as well along with the excess revenue paid by him. 90 I.C. 184=1925 O. 678. When on account of the improvements, the mortgagee receives increased rent from tenants, he cannot ask for the money spent on the same. 1924 A. 47; 30 I.C. 234. *See also* 54 I.C. 112; 29 Bom. L.R. 215=1927 B. 145. Money spent on repairs will carry interest if the improvements add to the letting value, but not otherwise. 1922 N. 262. *See also* 67 I.C. 132 =3 Lah.L.J. 184; 1925 O. 678=90 I.C. 184. Where an usufructuary mortgagee of certain properties was dispossessed from some of the items, but he did not take steps to obtain additional security for the debt; the mortgagee is not entitled to claim interest on the mortgage money on account of such dispossession. 37 C.W.N. 1162=58 C.L.J. 80. Courts will reduce value of excessive or unreasonable improvements when they hamper redemption. 45 B. 1301. Parties may specifically agree that certain specified amounts should be spent annually for certain specified purposes and charged on the property, and Courts will uphold such covenants. 50 I.A. 41=46 M. 108=44 M. L.J. 631 (P.C.).

Sec. 72 (a).—The provisions have now been included in S. 76, *infra*.

Sec. 72 (b).—Interest on costs of improvements effected can be claimed, even though interest is not specifically allowed by the document. 16 I.C. 635=10 A.L.J. 124. Forced payment of the call by holders of shares holding them as security is not an expenditure for preservation of the security. 42 B. 159. A mortgagee can add the amount deposited to set aside a sale in execution of a rent decree and acquire a lien for that amount on the property, even though such deposit may be after the preliminary decree in the mortgage suit. 28 I.C. 571 =21 C.L.J. 284; 14 I.C. 718. Sums paid

(*c*) for supporting the mortgagor's title to the property ;

(*d*) for making his own title thereto good against the mortgagor ; and,

(*e*) when the mortgaged property is a renewable lease-hold, for the renewal of the lease ;

and may, in the absence of a contract to the contrary, add such money to the principal money, at the rate of interest payable on the principal, and where no such rate is fixed, at the rate of nine-per cent. per annum :

[1][Provided that the expenditure of money by the mortgagee under clause (*b*) or clause (*c*) shall not be deemed to be necessary unless the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property or to support the title.]

LEG. REF.

[1] In Cl. (*e*) the proviso in brackets were added by S. 37 (*d*) of Act XX of 1929.

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for arrears of Government revenue on the mortgaged property as well as other payments which the mortgagee was compelled to pay to save the mortgaged property, from forfeiture or Court sale or revenue sale would be a charge on the property and be recoverable as mortgage-money. *See* 10 A. 61; 40 M.L.J. 524; 31 C. 975; 57 I.C. 653; 43 I.C. 190. *See also* 54 I.C. 264; 1931 M.W.N. 595. The mortgagee has the right to the charge, even though the payments were made subsequent to the decree obtained by him. 35 C.W.N. 1040=1931 P.C. 226=61 M.L.J. 343 (P.C.). Mortgagee has a charge on repairs necessary to keep a house from falling down as well as interest thereon. 14 B. 28. Where the mortgaged *katcha* house fell down during rains and was rebuilt into a *pucca* house by the mortgagee and it appeared that the rebuilding was within the contemplation of the parties when the mortgage-deed was executed, the mortgagee's claim to recover the value of the improvements is quite fair and it should be allowed. 7 O.W.N. 488=1930 O. 337. Where the mortgagee, in addition to repairs, extended the buildings not unreasonable, he is entitled to be compensated: 75 I.C. 185=1923 L. 587; 52 I.C. 862=78 P.R. 1918; but cannot claim interest on such improvements: 67 I.C. 132 =3 L.L.J. 184. But *see also* 4 B. 584. Where the mortgage-deed permits repairs to be effected by the mortgagee, no notice to mortgagor is necessary to effect the repairs. 51 I.C. 979. "*Sale*" in this section does not include sale of equity of redemption, as such sale is made without endangering the security of the mortgagee. *See* 40 M.L.J. 524; 19 I.C. 744=16 O.C. 48; 1 Pat.L.J. 589=38 I.C. 232. *See also* 29 O.C. 336 =1 Luck. 367. It is only when the security would be impaired by the sale that the mortgagees may spend money to avoid such sale under this section. 40 M.L.J. 524; 1 Luck. 367=29 O.C. 336; 1925 O. 421=2 O.W.N. 242; 51 I.C. 549; 30 C. 794; 31 M. 18 (money paid by mortgagee for municipal tax, for non-payment of which only movables of the mortgagee can be attached and sold and not the house or land mortgaged cannot be a charge on the property). Under S. 69, Contract Act, the mortgagee is clearly entitled to be reimbursed by the mortgagor for the money spent by him on revenue and land taxes paid in order to save the property from forfeiture and sale. S. 72, T.P. Act, is clearly permissive. A mortgagee is not obliged to add the money so spent by him to the principal money of the mortgage. He can still make his claim under S. 69, Contract Act. O. 34, R. 14 is no bar to the mortgagee bringing the mortgaged property to sale in execution of a decree obtained in such a suit. 161 I.C. 626=1936 R. 47.

Sec. 72 (c).—The money spent in protecting the mortgagor's title can be recovered by a separate suit or be added to the mortgage amount. 45 I.C. 949=34 M.L.J. 177. An express agreement is not necessary for this purpose. 58 I.A. 254=10 P. 654=61 M.L.J. 489 (P.C.). *See also* 21 M. 32 (as to costs, charges and expenses of necessary litigation properly incurred by the mortgagee); 1924 B. 264=25 Bom.L.R. 839 (even if such expenses be incurred in criminal proceedings); 34 M.L.J. 177. But charges not *bona fide* incurred by the mortgagee cannot be claimed from the mortgagor. 167 P.W.R. 1912.

Sec. 72 (d).—Expenses incurred in defending an unsuccessful suit for redemption by the mortgagor can be added to the mortgage amount. 26 I.C. 184=16 M.L.T. 365. Where to work out his rights under a deed of mortgage, the mortgagee has to sue for possession, the amount spent in such suit in getting a decree for possession is money spent in making good his title against the mortgagor which he is entitled to spend under S. 72 (3). 1941 O.W.N. 768=1941 Oudh 498.

Sec. 72 (e).—The mortgagee is not entitled to enforce a permanent lease executed in his favour by the mortgagor, where it is found that the terms of the lease were unfair and the bargain was unconscionable or oppressive. 33 Bom.L.R. 755=1931 B. 399.

Where the property is by its nature insurable, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property; and the premiums paid for any such insurance shall be [1][added to the principal money with interest at the same rate as is payable on the principal money, or, where no such rate is fixed, at the rate of nine per cent. per annum]. But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage-deed or (if no such amount is therein specified) two-thirds of the amount that would be required in case of total destruction to reinstate the property insured.

Nothing in this section shall be deemed to authorize the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorized to insure.

Right to proceeds of revenue sale or compensation on acquisition.

[2][73. (1) Where the mortgaged property or any part thereof or any interest therein is sold owing to failure to pay arrears of revenue or other charges of a public nature or rent due in respect of such property, and such failure did not arise from any default of the mortgagee, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of any surplus of the sale-proceeds remaining after payment of the arrears and of all charges and deductions directed by law.

LEG. REF.

[1] Substituted by Act XX of 1929, S. 37 (*e*).

[2] Substituted by Act XX of 1929.

NOTES.

Sec. 73.—Under the law as it stood before the amendment of 1929, the mortgagee had the right to the surplus sale proceeds only in a case where the whole of the estate has been sold for arrears of revenue; but under S. 73 as it now stands the right of substitution has been conferred on him even where a portion only of the property has been so sold. 15 Pat.L.T. 95=1934 P. 209. But there is nothing in the section precluding the right of mortgagee to proceed against the mortgaged property also where by reason of S. 54 of the Beng. Rev. Sale Act, the sale of a portion of the estate was subject to encumbrance and the mortgage rights still subsisted. 1934 Pat. 209. S. 73 contemplates only those cases where the property has been sold free of all incumbrances under the provisions of the Land Revenue Act for recovery of arrears of revenue or rent due, but it does not apply where property is sold not by the Collector but by a decree-holder under the provisions of Rent Act, which would not be a sale free of the encumbrances. 5 O.W.N. 791=1928 O. 442. *See also* 3 Luck. 719; 51 I.C. 333 (C.); 9 C.W.N. 117; 22 C.W.N. 139=43 I.C. 996; 24 C. 746; 20 C. 241; 15 C. 546; 33 C. 878. If portions of the property are converted into cash, that cash also should be available as a part of the security, because S. 73 says that if any part of the property or interest in the property is sold the mortgagee's right comes into play to realize the money. If any portion of such surplus is taken away by any one else, the mortgagee has got a right to follow it. 169 I.C. 805=1937 Pat. 307. S. 73 merely gives effect to the old law of substitution. The amendment extended the section so that it deals not only with the sale of the mortgaged property at a revenue sale, but also sale of any part thereof or any interest therein. The section has no application at all to a case where the mortgagee's security is not diminished by the revenue sale at all and he has his full rights to put the mortgaged property to sale in spite of the revenue sale. Where a residuary share in a tauzi including properties subject to a mortgage is put up for sale for arrears of revenue, the sale being subject to the mortgagee's right, the sale does not in any way diminish the security and S. 73 has no application. 16 Pat. 299=18 Pat. L.T. 566=1938 Pat. 179. *See also* 1939 Mar.L.R. 131 (Civ.). But *see* 1937 P. 307. The principle of the section is one of substitution of one security or property for another. 39 M. 283; 9 C. W.N. 117. *See also* 1939 Mar.L.R. 131 (Civ.). The surplus sale proceeds in the hands of the Collector represents the mortgaged security. *See* 20 C. 241; 24 C. 746; 6 C. 142. A mortgagee in cases where the mortgaged property is sold for arrears of rent, is not only entitled to proceed against the surplus sale proceeds but can follow the property itself. The section only governs cases where the law has otherwise provided that the effect of a sale for arrears of rent should nullify a mortgage. 113 I.C. 904=1929 C. 392. A new cause of action does not arise by such substitution. Only the security is shifted from one item to another. 34 I.C. 704=12 N.L.R. 20. *See also* 86 I.C. 882=1925 C. 1145. As the surplus proceeds or compensation award-

(2) Where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Act, 1894, or any other enactment for the time being in force providing for the compulsory acquisition of immovable property, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of the amount due to the mortgagor as compensation.

(3) Such claims shall prevail against all other claims except those of prior encumbrances, and may be enforced notwithstanding that the principal money on the mortgage has not become due.]

[1]74. } [1]75. } [*Omitted.*]

Liabilities of mortgagee in possession.

76. When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property,—

LEG. REF.

[1] Omitted by S. 39 of Act XX of 1929 and re-enacted with necessary alterations in Ss. 92 and 94.

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ed under the Land Acquisition Act represent the mortgaged property in a new form, the mortgagee is entitled to recover the same in enforcement of his security. The omission of the word 'charge' from Cl. (1) of S. 73 is attributable to the recognition by the Legislature of the fact that even apart from any statutory provision, the mortgagee has in accordance with the principle of substituted security, a charge on surplus sale proceeds. I.L.R. (1938) All. 513=1938 A.L.J. 313=1928 All. 221 (F.B.). When the mortgaged land is acquired under the Land Acquisition Act during the pendency of the mortgage suit, the mortgagor can be restrained from drawing the compensation amount. 5 Pat.L.J. 650=59 I.C. 513. Compensation amount would be substituted security. 22 O.C. 342=54 I.C. 535. *See also* 42 P.L.R. 40; 20 O.C. 256; 6 A. 78; 6 M. 344; 7 O.W.N. 217=1930 O. 292. A mortgagee has a charge on the surplus sale proceeds after the sale of the mortgaged property for arrears of Government revenue. But he is not bound to follow the surplus sale proceeds of the property and the existence of the statutory charge is no bar to his seeking a decree against the successors of the mortgagor. 3 P. 581=1924 P. 586. *See also* 1937 Pat. 307=169 I.C. 805; 7 Cut.L.T. 49. Landlord had a first charge for rent. The leasehold was mortgaged by the lessee. The landlord enforced his charge for rent, got a decree and the leasehold property sold in execution of a decree was purchased by the mortgagee. The landlord claimed out of the surplus sale proceeds rent up to date of sale. *Held*, that the relationship of landlord and tenant continued up to the date of sale and not merely till the date of suit and he was entitled to rent up to the date of sale for which he was a prior encumbrancer within the meaning of S. 73 (3). 1933 P. 257=144 I.C. 760. Where the mortgagor himself purchased in the revenue sale but *benami* in the name of a third party, the mortgagee can bring property to sale again for balance of debt due after taking out the surplus sale proceeds of the previous revenue sale. 25 A. 371. *See also* 26 M. 385; 14 C.W.N. 186. The charge on the surplus continues, even though the mortgage debt is converted into a decree-debt. 20 C. L.J. 1=19 C.W.N. 1001. The principle of this section is applicable to a case where the auction-purchaser is deprived of crops on the land by a lessee *pendente lite*. He can claim the rent due from the lessee to the judgment-debtor. 28 I.C. 232=39 M. 283. Where the surplus after sale in execution of a first mortgage, is drawn out by a third mortgagee, the second mortgagee can recover back the amount. 41 C. 654=41 I.A. 45=26 M.L.J. 243 (P.C.); 51 I.C. 333; 19 I.C. 226=19 C.W.N. 535. *See also* 20 C. 241. Where in a mortgage of share of landed property the deed provided for the substitution of property allotted on partition, the whole share allotted would be subject to the mortgage. 19 C. W.N. 162=23 I.C. 642=27 M.L.J. 13 (P.C.) Mortgagee of chattels cannot follow a chattel purchased with sale proceeds of mortgaged chattel. 1925 M. 275=47 M.L.J. 704. Effect of revenue sale being set aside—Mortgagee can fall back on his original security. *See* 1925 C. 1145.

Sec. 74 (Old).—*See* 1937 Mad. 826; 1936 Rang. 152.

Sec. 76: SCOPE.—The principles enunciated in Ss. 76 and 77 are a mere codification of the existing law and are applicable to mortgages executed before Act came into operation with regard to the liability of a usufructuary mortgagee to account for

(*a*) he must manage the property as a person of ordinary prudence would manage it if it were his own ;

(*b*) he must use his best endeavours to collect the rents and profits thereof ;

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the rents and profits. 17 Pat.L.T. 684=1936 Pat. 583. *See also* 1940 Pat. 627. A person entering into possession as mortgagee, is liable under S. 76, to maintain accounts, in every mortgage, whether usufructuary or otherwise. 1940 O.W.N. 1205. =191 I.C. 716=1941 O. 84. *See also* 1941 Pat. 296. Before liability to account can be enforced in favour of the mortgagor, it must be proved that the mortgagee received possession by virtue of the mortgage. The mortgagee can only be charged in respect of that part of which he had taken possession. The fact that the mortgagee has been in receipt of the rents and profits of the mortgaged estate does not necessarily make him chargeable as a mortgagee in possession; for that purpose it must be shown that he took out of mortgagor's hands the power and duty of managing the estate and dealing with the tenants. 39 Bom.L.R. 795=1937 Bom. 483, *see also* 1939 Mar.L.R. 153 (Civ.); 22 Pat.L.T. 230=1941 Pat. 296. Section does not apply to usufructuary mortgagee, and applies only when possession is taken during mortgage and not at inception. 1929 A. 348. But *see also* 26 L.W. 450=105 I.C. 419=1927 M. 964; 25 C.L.J. 560=40 I.C. 371; 9 O.W.N. 60. Section does not apply to a case where the mortgage has become extinct: 47 I.C. 224; nor to a mortgage by the lessee. 1925 B. 330=27 Bom.L.R. 553. As to the meaning of the expression "*during the continuance of the mortgage*," see 9 O.W.N. 60. As between a mortgagor and mortgagee attornment by the latter to a superior landlord cannot in any way prejudice the rights of the former, *see* 29 I.C. 746. Mortgagee taking possession otherwise than as mortgagee—Rent can be set-off towards interest due on mortgage debt. 105 I.C. 419=1927 M. 964. As to the *right of the mortgagee in possession to cut trees* planted by him, *see* 99 I.C. 400; 112 I.C. 434. After redemption the position of a mortgagee in possession is only that of a tenant: 49 I.C. 179=8 L.W. 599; and a mortgagor taking a lease from the usufructuary mortgagee is a tenant until the mortgage is redeemed: 17 I.C. 424; 17 I.C. 265=1912 M.W.N. 907. Where the mortgagee takes possession of the mortgaged property with or without the consent of the mortgagor, his possession cannot be adverse to that of the mortgagor. 46 I.C. 872. *See also* 25 C.L.J. 560=40 I.C. 371; 8 P.L.T. 92.

Sec. 76 (a).—The *measure of prudence* required under this section is that of a trustee under S. 15 of the Trust Act, and that of a bailee under S. 151, Contract Act. Lease created by mortgagee being an act in the course of management is binding on the mortgagor even after redemption. 11 I.C. 817; 31 I.C. 630; 52 I.C. 472; 97 I.C. 852=1926 P.H.C.C. 300; 1 U.B.R. (1910) 14=8 I.C. 466. *See contra* 44 I.C. 839; 10 P.L.J. 625=1929 P. 630. He must put the land to the best use so that a fair amount of profits may be realised. 1923 L. 71 (2). *See also* 1941 O.A., (Supp.) 960=1941 A.W.R. 1212. *Tadi* from trees on the land is not to be accounted as a source of income unless the trees were leased for the purpose. 6 N.L.J. 93 =1923 N. 137 (2). The mortgagee in possession can settle *bakasht* lands. The tenant is a non-occupancy tenant. 1925 P. 198. The mortgagee need not look up to mortgagor's consent as to what rent should be collected or as to whom the property should be let out. 1927 B. 145=29 Bom. L.R. 215. *See also* 49 A. 658=1927 A. 552. A lessee for a term admitted into possession by the mortgagee cannot be ejected on redemption where there was nothing to show want of good faith in granting the lease. 52 C.L.J. 142=1930 C. 738; nor is the mortgagee required to take any special trouble to make the best of the property. 2 Bom.H.C.R. 211. A mortgagee cannot give a permanent lease. 14 R.D. 585. *See also* I.L.R. (1937) 2 Cal 181. A mortgage with possession providing for the appropriation of profits of land mortgaged in lieu of interest, no rate of interest being mentioned in the bond, which is governed by S. 13 of the Dekhan Agri. Rel. Act, is one to which S. 76 of the T.P. Act does not apply. Consequently, the rule that the mortgagee is bound to manage the property as a person of ordinary prudence would if it were his own and to use his best endeavours to collect the rents and profits does not apply. Accounts should therefore be taken on the basis of receipts shown as having actually come into the hands of the mortgagee. 58 B. 472=36 Bom.L.R. 633 =1934 B. 321.

Sec. 76 (b).—A person in possession under an invalid agreement of sale may be treated as a mortgagee in possession who has to account for rents and profits. 35 C.L.J. 58=1923 C. 114. The mortgagee is responsible for so much as he has actually collected and what he might have failed to collect through his negligence. 38 I.C. 537=3 O.L.J. 689. *See also* 25 A. 287 (P.C.). As to liability to keep accounts, *see* 1941 Oudh 84. Where a mortgagee in possession of *khudkasht* land cultivates it himself, he can be charged the net profits of his cultivation and he cannot claim that

(*c*) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature [1][and all rent] accruing due in respect thereof during such possession, and any arrears of rent in default of payment of which the property may be summarily sold ;

LEG. REF.

[1] Inserted by S. 40 of Act XX of 1929.

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he should be charged with a fair occupation rent. *See* 6 N.L.R. 109=7 I.C. 547. Mortgagor taking mortgaged property on lease from mortgagee—Mortgage-deed providing for payment of interest and also for crediting rent paid towards interest—Default in payment of rent and right to recover it time-barred—Mortgagee's right to recover interest. I.L.R. (1940) Lah. 658=1940 Lah. 333.

Sec. 76 (c): OTHER PUBLIC CHARGES.—S. 76 cannot confer on a landlord the right to proceed directly against a usufructuary mortgagee from his lessee for rent or jodi due to him. 1941 Mad. 401=(1941) 1 M.L.J. 225. *See also* 66 C.L.J. 10=41 C.W.N. 1141. Even under the old law, it was the duty of the mortgagee in possession to pay the rent of the mortgaged property. 19 Pat.L.T. 849=1938 Pat. 196. If in a suit for redemption of a mortgage with possession, the mortgagor calls upon the mortgagee to account for the amounts paid by him as rent which the mortgagee is under an obligation to pay either by reason of S. 76 (*c*) or by reason of contract, the mortgagor must establish a loss in view of the language of the last paragraph of S. 76 of the Act. The mortgagor would not be entitled, to have an account if he merely paid the amounts voluntarily. If the mortgagor had been obliged to pay the sums of money as rent, a loss has been occasioned to him which he is entitled to set off against his liability. But if the payment was voluntary, the mortgagor would be entitled to a money decree under S. 70 of the Contract Act for three years' rent, all other sums being barred by limitation. There is no liability on the mortgagee to pay interest. 1940 P.W.N. 1028=1940 Pat. 579. The word "summarily" occurring in the latter portion of S. 76 (*c*) implies that the proceedings for realization of rent by sale of the property are of a summary nature, for instance, as in the case of a certificate proceeding under the Public Demands Recovery Act. 19 Pat.L.T. 849=1938 Pat. 196. *Tacavi* advance granted by Government to the mortgagor is a charge of a public nature. 40 B. 483=37 I.C. 295. *See also* 27 M.L.J. 295. The mortgagee is liable to pay the enhanced rent and not the mortgagor. 1922 O. 91; 39 I.C. 437; 29 M.L.J. 772=29 I.C. 386; 16 I.C. 184; 14 I.C. 590; 12 I.C. 140=22 M.L.J. 151. But *see also* 17 A.L.J. 93=57 I.C. 774; also Government revenue on the land: 25 I.C. 641; 51 I.A. 157=46 A. 269=1924 P.C. 102 (P.C.); also enhanced assessment levied on the property in his possession. 91 I.C. 943=1936 M. 405; 34 L.W. 804. Mortgagee is entitled to add Government revenue paid by him to the mortgage amount. 56 I.A. 339=51 A. 686=1929 P.C. 243 (P.C.). A mortgagee cannot add expenses for payment of road cess to the sum due on the mortgage. The payment of a public charge for which the mortgaged property may not be summarily sold does not create a charge upon the property. 1 Pat.L.J. 589=38 I.C. 232. Unless the deed provides a fixed amount as Government revenue when such fixation would imply a contract to the contrary, the enhanced rent is payable by the mortgagor. 25 I.C. 641. *See also* 2 L.W. 118. The mortgagees should pay up even arrears of rent due prior to the mortgage and not allow the land to be sold away. 52 I.C. 902. If he pays revenue on other lands included in the same patta, but not mortgaged he is entitled to the amount on redemption. 25 I.C. 797=27 M.L.J. 295. But *see* 1925 A. 189=83 I.C. 188. Unless the mortgagees have actually collected rents or profits for a period prior to their getting into possession or unless they were so authorized to do, the mortgagor must pay the revenue on the property for period prior to the possession of the mortgagees. 10 Pat.L.T. 849=1938 Pat. 196. A mortgagee who escapes from payment of revenue for some years need not account that to the mortgagor, 10 I.C. 113. The mortgagee from a lessee will be deemed to covenant with the lessor for due payment of rent. 27 Bom.L.R. 553=1925 B. 330. *See also* 5 P.L.J. 492=1920 P. 277=58 I.C. 291. Where the mortgagee had undertaken the duty of meeting the Government revenue and the intention of the parties was that the mortgagor should be responsible for increase or decrease in the Government revenue, the mortgagee could not be allowed to throw the burden of his own laches on the property for which the revenue was not paid and any equity that might have been invoked against the mortgagor, who did not seek redemption, did not arise against the purchaser of the equity of redemption. 32 A. 612=20 M.L.J. 890=37 I.A. 182 (P.C.). *See also* 17 A.L.J. 93=57 I.C. 774. A mortgagee is not bound to pay the arrears of rent which accumulate in respect of that portion of a fixed rate holding which is not mortgaged to him. What he can be made liable for under that section is the rent or other charges which fall due in respect of

(*d*) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (*c*) and the interest on the principal money ;

(*e*) he must not commit any act which is destructive or permanently injurious to the property ;

(*f*) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy or so much thereof as may be necessary, in reinstating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money ;

(*g*) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported ;

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the mortgaged property after the date of the mortgage. 83 I.C. 188=1925 A. 189. Where the mortgage-deed provided that, if the revenue should be assessed in future, the mortgagor would pay it and would not be entitled to redeem without paying it, the intention of the parties is to make it a charge. Under S. 76 (*c*) the mortgagee in possession is primarily responsible for payment of the revenue. 25 O.C. 2=1922 O. 91. Mortgagee in possession failing to pay Government revenue—Mortgagor making payment—Liability of mortgagee to reimburse mortgagor. *See* 24 L.W. 657. Where the mortgagee in possession pays municipal taxes, and there is an agreement that the rent was to be set-off against the principal and interest, he is entitled to set-off the amount paid as municipal taxes in the mortgage accounts so that he can remain in possession till the liquidation of the sum paid as taxes. 163 I.C. 55=1936 P. 312.

Sec. 76 (d).—The duty to make the necessary repairs is a paramount one, and he will be held accountable to the mortgagor for loss caused by non-repair at time of redemption. 15 M. 290. Mortgagee can recover reasonable *costs for improvements* effected. 43 B. 69=20 Bom.L.R. 895=47 I.C. 751. *Failure to keep accounts* of repairs will not be fatal to a claim for compensation. 37 I.C. 125=99 P.R. 1916. The price of old materials should be reduced from the cost of improvements. 28 I.C. 375=105 P.L.R. 1915. Usufructuary mortgagee of a house cannot claim sums spent by him for ordinary repairs, because he is bound to pay all normal expenses from rents and profits. 1929 A. 348. An usufructuary mortgagee who claimed compensation in respect of improvements effected by him such as building of a granary, payment of increased water-tax and introduction of water pipes, is not entitled to the same as (1) the granary being a movable structure can be removed by him, (2) the increased water-tax paid would fetch an increased rent, and (3) the introduction of water pipes is not a '*substantial repair*' within the meaning of S. 76, Cl. (*d*), so as to make the mortgagor liable for the same. 15 M.L.T. 375=22 I.C. 635.

Sec. 76 (e).—The question of waste cannot be gone into in an application for restitution nor be the subject-matter of a separate suit. 88 I.C. 521=1925 O. 654. *See also* 8 I.C. 466 (Bur.). A mortgagee in possession is entitled to cut down trees which he had planted on the land after entering into possession, unless his act is destructive or permanently injurious to the property. 28 Bom.L.R. 1258=50 B. 692. Mortgagee cutting trees—Suit for damages by mortgagor—Maintainability. *See* 112 I.C. 434 (Oudh). This rule being based on equity and reason applies also to cases not governed by the T.P. Act. 24 M. 47 (F.B.).

Sec. 76 (f).—Section applies only where the insurance is made by the mortgagee, but where the insurance was effected by the Court through the receiver during suit on the mortgage, the money received may be directed to be laid out as Court pleases. 40 I.C. 623.

Sec. 76 (g): ACCOUNTS.—The liability of the mortgagee to render accounts is well recognized even before the coming into force of the T.P. Act. 155 I.C. 22=1935 P. 148. Cls. (*g*) and (*h*), S. 76, are not qualified by any such proviso as 'in the absence of a contract to the contrary'; therefore they apply in all cases, contract or no contract to the contrary, excepting those in which S. 77 makes them inapplicable. Hence every mortgagee in possession is bound to account under S. 76 (*h*), unless he establishes a contract in terms of S. 77. 1935 P. 148; 1942 O.W.N. 585;

(*h*) his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, shall, after deducting the expenses [1][properly incurred for the management of the property and the collection of rents and profits and the other expenses] mentioned in clauses (*c*) and (*d*), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest [2][* *] and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money, the surplus, if any, shall be paid to the mortgagor ;

LEG. REF.

[1] Inserted by Act XX of 1929.

[2] Omitted by Act XX of 1929.

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1941 O.A. 1062. But it cannot be laid down as a hard and fast rule that whenever a mortgagee has failed in the obligation imposed on him by S. 76 (*g*), he must necessarily be made liable on the basis of the gross rental, unless a presumption that all the tenants have paid their rents may not be justified. When the mortgagee is made liable for the rental, he should be allowed the costs of the collection. 9 Luck. 456=1934 O. 104. A mortgagee in possession in lieu of interest where the rate of interest is not specified is not liable to account. 1937 A.L.J. 304=1937 A. 317. *Nature and extent of mortgagee's duty to account.* 9 O.W.N. 60=1932 O. 123. As to presumption regarding the same, *see* 9 O.W.N. 253. Duty to keep accounts cannot be contracted against. 1923 A. 175. But *see* 25 M.L.J. 561; 47 I.C. 161=5 O.L.J. 263; 1924 O. 92. *See also* 28 O.C. 100=1925 O. 114; 2 Luck. 564=1927 O. 199. In the absence of accounts, every presumption will be made against the mortgagee. 44 I.C. 9; 47 I.C. 21; 37 P.L.R. 567. *See also* 30 Punj.L.R. 431. But this would not justify the Court in accepting without any examination any evidence which may be offered by the mortgagor. 63 I.C. 598. Mortgagees in possession cannot be deprived of their claim regarding expenses incurred even after a valid tender, because the tender was not accepted. 44 M.L.J. 534=1923 M. 533. So also they cannot be deprived of interest in cases where the mortgagee reasonably and *bona fide* does not accept a tender. 17 I. C. 368=1912 M.W.N. 1175. Where an usufructuary mortgagee failed to keep such accounts as are required of a mortgagee in possession, the Court is justified in view of the provisions of S. 76 (*g*) in disallowing *in toto* his claim for interest. 37 C. W.N. 420=1933 P.C. 85=64 M.L.J. 298 (P.C.). Although mortgagee may hold possession as lessee also, he is not absolved from duty of keeping accounts. 6 M.I.A. 393 (422). A person entering into possession of mortgaged property as a purchaser in an execution sale under a money decree against the mortgagor, is in possession under a title derived from the mortgagor whose title is divested; and if such a purchaser subsequently acquires the right of a mortgagee, he does not thereby acquire any right to possession *qua* mortgagee. So long as he does not enforce or execute the mortgage and is in possession throughout *qua* auction-purchaser, he is not liable to account for the profits of the property during the period he has been in possession. I.L. R. 1936 N. 19=1936 N. 293. The accounts must be separate for each mortgage. 14 B. 19. As to scrutiny and examination of accounts, *see* 26 B. 363; 11 B. 78.

Sec. 76 (h).—*See* 1941 Mad. 549—(1941) 1 M. L. J. 484; 1935 P. 148. For S. 76 (*h*), to be applicable the possession of the mortgagee must be *qua mortgagee*, and it must be proved that the mortgagee had received possession by virtue of the agreement of mortgage. It has no application where the mortgagee is in possession as a tenant on rent under a lease which has nothing whatever to do with the mortgage. 22 Pat.L.T. 230=1941 Pat. 296; 19 O.C. 328=37 I.C. 23; 5 Pat.L.J. 492=58 I.C. 291. The liability of mortgagee in possession under S. 76 (*h*) to give credit for the receipts after deducting the expenses and interest, in the account is absolute unless the case comes within the purview of S. 77 and the parties would not be at liberty to contract themselves out of the statutory liability. 1931 A.L.J. 977=1931 A. 562 (F.B.). Mortgagee in possession letting premises and making large profits is liable to account to mortgagor. 10 Pat.L.T. 487. *See also* I.L. R. (1937) 2 Cal. 181. Where a mortgagee in possession has to file suits for recovery of rent from tenants, it is an act of management and hence expenses incurred in connection therewith are recoverable under S. 76 (*h*). 16 Luck. 812=1941 O.W.N. 768=1941 Oudh 498. Ordinarily a suit for accounts upon a mortgage cannot be maintained by the mortgagor unless he asks for redemption. 47 I.C. 21. Where there is an agreement between the parties, the mortgagee is not bound to account for the profits. 25 M.L.J. 561=21 I.C. 701; 53 C.L.J. 380. When the mortgagee in possession has no accounts, he is to be debited with fair occupation rent and credited with simple interest on the mortgage-debt. 48 C. 22=39 M.L.J. 147=47 I.A.

(*i*) when the mortgagor tenders, or deposits in manner hereinafter provided, the amount for the time being due on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his [1][* *] receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of Court, as the case may be [2][and shall not be entitled to deduct any amount therefrom on account of any expenses incurred after such date or time in connection with the mortgaged property].

Loss occasioned by his default.

If the mortgagee fail to perform any of the duties imposed upon him by this section, he may, when accounts are taken in pursuance of a decree made under this chapter, be debited with the loss, if any, occasioned by such failure.

Receipts in lieu of interest.

77. Nothing in section 76, clauses (*b*), (*d*), (*g*) and (*h*), applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal.

LEG. REF.

[1] Repealed by Act XX of 1929.

[2] Inserted by Act XX of 1929.

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207 (P.C.). He is also liable to pay interest on surplus collection. 46 A. 897=1924 A. 881=22 A.L.J. 833. *See also* 7 O.L.J. 231=56 I.C. 692; 57 I.C. 294; 16 I.C. 217. Rents and profits have first to be applied towards the principal and then towards interest. 8 M.L.T. 420=7 I.C. 871. Mortgagee in possession as manager or receiver is not a trustee for the mortgagor, but he has to prove that his accounts are true. 24 C.W.N. 769=58 I.C. 13. He cannot charge for personal service. 10 I.C. 748=13 Bom.L.R. 161; 6 Bom.L.R. 590. But he can charge for agent's salary. 1 N.W.P.S.D.A. 447. As to case where agent was the son of the mortgagee himself, *see* 26 C. 1 (P.C.). Filing of suits to recover arrears of rent is an act of management. 23 I.C. 456=17 O.C. 47; 16 Luck. 812. No question of limitation arises as between mortgagor and mortgagee when accounts are taken at the time of redemption. 28 M.L.J. 184=27 I.C. 989; 1925 M. 825=48 M.L.J. 363. But if the suit for accounts is after redemption, it should be brought within three years from date of restoration of possession. 38 I.C. 610=20 O.C. 25. As to form of decree for accounts and mesne profits, order for costs *see* 16 I.C. 217 (M.). A *mortgage by the lessee* creates privity of estate, and the mortgagee is liable to the lessor on all covenants that run with the land including the covenants to pay rent. 27 Bom.L.R. 553 =88 I.C. 79. *See* 5 I.C. 26 (case of mortgagee tenant). Zarpeshgi thika *lease* —Mortgagee given possession on fixed rent to appropriate part for interest and pay fixed sum to mortgagor annually—Nature of transaction—Failure to make annual payment to mortgagor—Effect—Redemption—Accounts—Basis. 1939 Pat. 427.

Sec. 76 (i).—The conflict of rulings between the Madras and the Allahabad High Courts [*vide* 47 M. 7 and 5 I.C. 529] has been set at rest by the amendment in the section, favouring the Allahabad view that the mortgagee would not be entitled to the expenses incurred after tender of deposit. Even after a tender of deposit the mortgagee, continues as mortgagee, but with a statutory liability to account for the profits received by him from that date. The liabilities of the mortgagee in such a case have to be determined once and for all in the redemption suit and cannot be determined in a separate suit. A *second suit for mesne profits* is therefore not sustainable under S. 14, Explanation IV and O. 2, R. 2, C.P. Code, after a suit for redemption is brought. 2 R. 382=84 I.C. 395.

Secs. 76 and 77.—Applicability—Usufructuary mortgage—Stipulation for payment of rent to landlord by mortgagee out of rents and profits and for appropriation of balance towards interest—Non-payment of rent—Decree for rent obtained by landlord getting barred—Right of mortgagor to claim credit for unpaid rent in reduction of mortgage amount. 51 L.W. 617=1940 M. 686=(1940) 1 M.L.J. 693.

Sec. 77.—Section is to be construed strictly. *See* 6 M. 74; 53 I.C. 59. *See also* 5 A. 419. *Covenant for appropriation of the receipts of mortgaged property towards interest* ceases to operate after the deposit by the mortgagor of the money due into Court; and Cls. (*b*), (*d*), (*g*) and (*h*) of S. 76 become applicable to the mortgagee. 47 M. 7. As to application of the section to specific cases, *see* 82 I.C. 406=1925 O. 114; 7 A.L.J. 787. Under S. 77, the parties can enter into a contract that there is to be no accounting between them. In that case it is wholly unnecessary to mention the rate of interest. It would be suffi-

Priority.

78. Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

Postponement of prior mortgagee.

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cient to say that the profits will go in discharge of interest. 11 O.W.N. 524=1934 O. 220. But it does not necessarily follow that simply because the rate of interest is mentioned, the parties must have intended that there was to be accounting. Where the sub-mortgagor recited that he would repay the amount borrowed with interest at a certain rate, that he was put in possession, that after payment of Rs. 95 for Government revenue yearly out of the profits, he would appropriate the balance in payment of interest, the sub-mortgagor is not entitled to ask for an account. 1934 Oudh 220. *See also* 1929 P. 571. Where there is no provision in a mortgage-deed that the interest be not a charge on the property, but an undertaking is given by the mortgagor that he would make good to the mortgagee any deficiency in interest from his other properties, any shortage in profits, while the mortgagee is in possession of the property can be claimed by him but only he cannot claim interest on the shortage. 16 Luck. 812=1941 O.W.N. 768=1941 Oudh 498. S. 77 only comes in where the mortgagor is from the outset safe from being confronted at the time of redemption with a demand for anything more than the principal sum advanced. It does not cover the case in which only a part of the interest is to be paid out of the usufruct. 155 I.C. 22=1935 P. 148. A provision for payment of portion of income to mortgagor is valid, legal and binding. 41 M. 959=55 M.L.J. 489. So also a provision that the mortgagee must pay the land revenue whether profit or loss occurs. 23 I.C. 131 =10 N.L.R. 9. *See also* 46 A. 633. An usufructuary mortgage-deed provided that the mortgagee would be entitled to appropriate in lieu of interest the profits remaining after the payment of Government revenue and *malikhana* to the *malikhanadars* and that all profits from increased incomes would go to the mortgagee. The mortgagee made profits by not paying *malikhana* to the *malikhanadars*. In a suit for redemption of the mortgage, the mortgagee is not bound to account in respect of the *malikhana*. 7 P. 44. *See also* 46 A. 633 =12 A.L.J. 579=1924 A. 591; 114 I.C. 473=1929 P. 37 (as to taking of accounts in case of redemption of usufructuary mortgage). Undertaking by mortgagor—Covenant to pay amount of decree for profits—Stipulation regarding land acquisition amount—Whether can be taken into account. 37 C.W.N. 457=1933 P.C. 136 (P.C.).

Sec. 78.—S. 78 is an exception to the general rule that the prior mortgagee takes precedence over the subsequent mortgagee. The onus of proving gross neglect lies on the subsequent mortgagee who asserts exception to the general rule. 63 C. 880= 1936 C. 283. S. 78 applies in cases of prior and subsequent mortgagees, and not to the case of a prior mortgagee and subsequent purchaser. 150 I.C. 145=1934 O. 283. Principle of section is that where a person holding a prior title connives at or assists in a fraud for the creation of a subsequent title without notice of the prior estate, the prior title is postponed to the subsequent one. *See* 18 B. 444; 15 C.W. N. 813.

PRIORITY.—If priority could be pleaded as a defence, it could be claimed in a suit as well. 34 A. 102=12 I.C. 607=8 A.L.J. 1289. Fraud is not always necessary to bring a case under this section. 34 I.C. 115=43 C. 1052; 23 S.L.R. 97=112 I.C. 722; 6 R. 423=111 I.C. 105; 4 R. 238. As to failure to search in the Registration office, *see* 47 I.C. 774. "*Gross neglect*," meaning. 1928 R. 136; 56 C. 868; 63 C. 880=1936 C. 283. *Gross negligence* does not mean negligence amounting to fraud. 15 M. 268. Neglect is apparently something different from fraud; it may include honest inadvertence. Neglect is to be determined in every case on its own facts and no precedent can serve as a safe guide. 1940 Lah. 269; 43 C. 1052 (1083); 1929 Rang. 65; 12 M. 429; 15 M. 268; 1929 Lah. 314=118 I.C. 655. It would be 'gross neglect' within the meaning of S. 78, if a prior mortgagee has by any act or omission enabled the mortgagor to deal with the property as if it is not encumbered. Where a mortgagee has failed to secure the title-deeds and has permitted the mortgagor to delay the registration of his mortgage, a subsequent mortgagee who on the strength of the title-deeds produced, and on reference to the encumbrance certificate, advanced money is entitled to priority. 46 L. W. 778=1938 Mad. 87; 1938 M. 161. In proof of gross negligence, all that is necessary to show is not direct and positive fraud, but lack of good faith in the sense of due care and attention. 30 N.L.R. 196 =1934 N. 29. The mortgagee parting with the title-deeds relating to the properties when he had sufficient reasons to think that the mortgagor required them for the purpose of effecting a sale of the properties, is guilty of negligence under S. 78

79. If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to

Mortgage to secure uncertain amount when maximum is expressed.

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of the Act in having allowed the mortgagor to defraud a purchaser, but no estoppel under S. 115, Evidence Act, arose against the mortgagee in favour of the purchaser. 1936 M.W.N. 871=1937 M. 195. *Slight negligence* cannot be construed as gross negligence. 8 M. 200; 1929 L. 314. A mortgagee who allows the mortgagor to remain in possession of the mortgaged property as a tenant, is not guilty of gross negligence within the meaning of S. 78. 42 P.L.R. 265=1940 Lah. 308. It is not ordinarily obligatory for a person who takes a registered mortgage to secure the title-deeds of the properties mortgaged and ordinarily his registered mortgage is sufficient protection to him. 1935 R. 26. The omission on the part of a subsequent mortgagee who lends money *bona fide* in ignorance of the claim of a prior mortgagee, to call for the title-deeds is not by itself sufficient to postpone his claim to that of the prior mortgagee, when the latter has not the custody of the title-deeds. It is only in favour of the person in possession of the title-deeds that the doctrine of constructive notice can be invoked on the ground of the omission of the other party to call for the title-deeds. 47 L.W. 40=1938 Mad. 161. For the application of the section, it is necessary to prove that the fraud, misrepresentation or gross neglect of the prior mortgagee was the proximate cause for the advance of money by the subsequent mortgagee. 1933 A.L.J. 16=1933 A. 299=146 I.C. 488: 1935 L. 108. Failure to obtain possession of title-deeds by a first mortgagee cannot be held to amount to such "*gross neglect*" as would postpone him to a second mortgagee under S. 78. 1930 R. 246 (2); 1936 R. 152. Where the possession of the title-deeds is an essential part of the earlier encumbrancer's security, then, if he having got the title-deeds allows them by negligence to be again, without sufficient reason, in the possession of the mortgagor, he will be postponed to a subsequent encumbrancer to whom they are delivered. 63 C. 880=165 I.C. 332=1936 C. 283. The omission on the part of the prior mortgagee to enquire about the original redemption certificate cannot be deemed gross negligence. 36 C.W.N. 420=1932 C. 589. It is no part of the duty of a mortgagee to keep an account of what the mortgagor himself was doing with his equity of redemption. It is fundamentally erroneous to talk of a mortgagee who is out of time in discovering that the equity of redemption has been assigned, as a person who had been guilty of negligence or laches. 38 C.W.N. 124=1934 C. 421. Where in a mortgage created by deposit of title-deeds the mortgagor deposits all deeds showing his title but does not deposit other material deeds, the mortgagee cannot be held guilty of any gross neglect so as to postpone him to a subsequent mortgage. 1930 L. 920. Where a mortgage is prior in date and has been validly registered within the time allowed by the law, it cannot be postponed to a subsequent mortgage, merely because the prior mortgagee had omitted to get his mortgage registered until after the execution of a subsequent mortgage. 60 C. 225=1933 C. 398. Misrepresentation does not mean fraudulent misrepresentation. 43 C. 1052=34 I.C. 115. Section makes fraud, misrepresentation and gross negligence quite disjunctive; they are not in any way co-extensive. They are three different kinds of conduct, each of which would make the section applicable. *See* 43 C. 1052=34 I.C. 115; 15 M. 268 (275); 1928 S. 179. *See also* 1929 R. 298; 30 N.L.R. 196=1934 N. 29.

ABSTENTION FROM ENQUIRY FOR TITLE-DEEDS.—In a place where one knows that mortgages by deposit of title-deeds are legal and usual it would amount to notice of mortgage under S. 3 of the Act. Where the vendor on being asked to produce the title-deed by the vendee said he had not got it and the purchaser did not enquire what happened to the deed and it appeared subsequently that the title deeds had been deposited with another person in order to create an equitable mortgage, the vendee must be fastened with notice of the mortgage and the purchase is to be subject to the mortgage. 31 C.W.N. 703=1927 C. 538. *See* further 7 I.C. 810=20 M.L.J. 979. A mortgage executed in satisfaction of a prior mortgage decree has priority over a mesne incumbrancer. 33 A. 368=9 I.C. 205; 7 I.C. 468 =7 A.L.J. 984. A suit in respect of priority is governed by Art. 132 of the Limitation Act. 23 I.C. 448=17 O.C. 38. Where the first mortgagee of two villages did not appeal against a decree subordinating his rights over one of the villages to those of a second mortgagee, he is not prevented from enforcing his full rights over the other village. 37 A. 474=42 I.A. 163=29 M.L.J. 159 (P.C.). The prior mortgagee would lose his priority when he joins with the mortgagor to induce the second mortgagee to believe that the property was free from encumbrances. 15 C.W.N. 813=21 M.L.J. 936 (P.C.). *See also* 49 A. 233=1927 A. 211; 33 I.C. 112 (C.). The same principle would apply where a certain mortgaged property was described wrongly and was purchased by a third party. The purchaser will not be bound by the mortgage. 15 I.C. 335. *See also* on this section. 11 O.L.J. 381=1924 O. 85; 20 L.W. 651=1925 M. 129=82 I.C. 846.

Secs. 78 and 101.—*A* executing mortgage by deposit of title-deeds in favour of firm *D*—Similar mortgage subsequently executed in favour of Bank *E*, to pay off mortgage in favour of *D*—Amount on *D's* mortgage paid—Suit by *E* on basis of mortgage in favour of *D*—*E* also impleading *X*, who had meantime obtained registered mortgage of the property mortgaged to *E* —*E's* right to subrogation or to priority over *X*. 14 R. 494=1936 R. 152.

Sec. 79.—This section is an exception to

the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage.

Illustration.

A mortgages Sultanpur to his bankers, *B* & *Co.*, to secure the balance of his account with them to the extent of Rs. 10,000. *A* then mortgages Sultanpur to *C*, to secure Rs. 10,000, *C* having notice of the mortgage to *B* & *Co.*, and *C* gives notice to *B* & *Co.*, of the second mortgage. At the date of the second mortgage, the balance due to *B* & *Co.*, does not exceed Rs. 5,000. *B* & *Co.* subsequently advance to *A* sums making the balance of the account against him exceed the sum of Rs. 10,000. *B* & *Co.* are entitled, to the extent of Rs. 10,000, to priority over *C*.

80. [1][*Omitted.*]

Marshalling and Contribution.

Marshalling securities.

81. [2][If the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person, the subsequent mortgagee is, in the absence of a contract to the contrary, entitled to have the prior mortgage-debt satisfied out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties.]

LEG. REF.

[1] Omitted by Act XX of 1929. *See* now S. 93.

N.B.—"As the principle of 'tacking' is akin to subrogation, we propose to number S. 80 as S. 93, so as to place it after the section which relates to subrogation."—(*Statement of Objects and Reasons.*)

[2] Substituted by Act XX of 1929.

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S. 93. Under this section an intermediate mortgagee with notice of a prior mortgage is postponed so far as regards further advances which are subsequently made on the security of the prior mortgage, provided the prior mortgage expresses a maximum, which is not exceeded. 1 P.L.T. 582=58 I.C. 489=1920 P. 261; 17 I.C. 927=16 C.L.J. 394. For future advances to have priority there must be a maximum fixed and future advance must be limited to that maximum. 1 R. 635 =45 M.L.J. 505=51 C. 86=1923 P.C. 211 (P.C.). Where a mortgage is executed by way of continuing security for the payments of all debts due and thereafter may be due by the mortgagor and a subsequent mortgagee takes the mortgage of the same property with knowledge of the prior mortgage and the prior mortgagee thereafter does not make any advances, the prior mortgagee is entitled to priority not only in respect of principal sum but also interest accruing on it. As there are no advances by prior mortgagee after execution of subsequent mortgage, S. 79 does not apply and hence a statement that the maximum principal amount secured by the prior mortgage was not fixed at certain amount for purpose of S. 79 will not disentitle the first mortgagee to priority in respect of interest on that sum. 1938 A.L.J. 658=1938 A. 473. The maximum amount may either be express or gathered by implication. 17 I.C. 927. Where a deed states that a lease has been granted for a number of years upon an annual rent and recites that the lessees hypothecated the properties for the payment of the rent, "till the subsistence of the aforesaid *thica*" the aggregate rent payable under the lease can be determined by a simple calculation and the deed expresses the maximum to be secured thereby within the meaning of the section. 9 P. 816=1931 P. 33. Where in a family partition certain debts were allotted to the share of each member, creating a charge over the share of each to a fixed maximum and subsequently one member mortgaged his share, the mortgagee could sell the share only subject to the prior charge created by the partition deed. 70 I.C. 362=41 M.L.J. 282. Section applies to a mortgage as well as charge. *See also* 14 L.W. 559.

Sec. 81: SCOPE.—*See* 1941 Pesh. 49 (applicability of section to N.W.F. Province). As to applicability, *see* 9 I.C. 725; 38 I.C. 542. Under S. 81 a subsequent mortgagee has the right to claim marshalling against the prior mortgagee. 1935 R. 139. Object of section is to protect subsequent mortgagees in respect of properties mortgaged to them being sold to satisfy a prior mortgage, when the prior mortgagee has other properties also mortgaged to him which could be sold to satisfy his dues. *See* 1924 P. 459=3 P. 522=78 I.C. 796. The undoubted right of a mortgagee to release any part of his security cannot be lost or be made subject to the right of marshalling given by S. 81. The right given by S. 81 is expressly made subject to the condition that there should be no prejudice to the rights of the first mortgagee. Where the first mortgagee releases one of two properties mortgaged to him and subsequently sues for the amount due to him by sale of the other property included in his mortgage, the subsequent mortgagee of the latter property is not entitled to invoke the doctrine of marshalling and to ask the other property not mortgaged to him to be sold before the property mortgaged to him, because it is impossible for the first mortgagee to ask for the sale of the released item of property, it being no longer subject to his mortgage. 1938 M. 503=(1938) 1 M.L.J. 310. Where two properties have been mortgaged to a person who has obtained a decree on the mortgage, and one of them has been subsequently mortgaged to another, the latter would come within S. 81, and can claim a right to marshall provided the exercise of such right is not to the prejudice of the prior mortgagee or of any other person having interest in any of the properties. But where the property is found

82. [1][Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on that date.]

Contribution to mortgage-debt.

LEG. REF.

[1] Substituted by Act XX of 1929.

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not to be worth anything like the amount due under the mortgage, the subsequent mortgagee has no right of marshalling, because to compel the prior mortgagee to sell that property first would be prejudicial to him. 1941 P.W.N. 582. S. 81 applies to mortgages of immovable property and not to the hypothecation of movables. 14 R. 198=1936 R. 266. Second mortgagee of part of property covered by first mortgage, acquiring mortgagor's right in that part—His right of marshalling. 1937 Rang.L.R. 13. The section applies only to subsequent mortgagees and not to subsequent *purchasers*. 130 I.C. 817=1931 N. 91. *See also* 1930 A. 634 (as to auction-purchasers seeking to preserve mortgaged property from sale). In the case of the representative of the mortgagor himself no question of contribution arises. 79 I.C. 69 =1924 A. 929. Decree-holder mortgagee can sell in any order in the absence of direction in the decree. 45 M.L.J. 722=47 M. 688=83 I.C. 852. *See also* 1930 M. 178. The Court has a discretion to make orders for exclusion of any property from Court-sale, if the circumstances of the case require. 41 C. 418. The words " but not so as to prejudice the rights of the prior mortgagee " cannot be construed as giving the prior mortgagee a right to have the properties mortgaged to him sold in any order that he may prefer. 40 C.W.N. 1173. The purchaser of the property in execution of his mortgage decree is entitled to enforce the rights of marshalling against a prior mortgagee so long as that prior mortgage is not extinguished. 3 P. 522=1924 P. 459. *See also* 1929 M.W.N. 629; 42 C.W.N. 502. But *see* 1929 A. 309 following 22 A. 284. Certain property consisting of two items was subject to successive mortgages. One of the puisne mortgagees brought a suit and purchased one item in execution. He subsequently obtained an assignment of a decree passed in favour of a prior mortgagee in respect of the other item. As assignee decree-holder, he applied for execution against the other item alone. By the purchase of one of the items, the mortgage had been discharged *pro tanto* and the assignee-decree-holder could proceed against the other item, only for the proportionate value of the debt in relation to the mortgage-debt; and an objection of this nature could be taken in execution by the puisne mortgagee. 141 I.C. 366 (M.); 69 M.L.J. 303; 42 C.W.N. 502. The provisions of this section as to marshalling cannot be availed of to the prejudice of the prior mortgagee, so as to defeat or unduly delay or prejudice his rights. *See* 29 M. 217 at 223-4; 18 B. 160; 1930 L. 731; or to the prejudice of third parties. 18 B. 160. The material time for the exercise of the right of marshalling is the time when the prior mortgagee seeks to realise his mortgage amount. If at that time there is already a person who has acquired for valuable consideration an interest in the property not mortgaged to the second mortgagee then the right of marshalling does not exist. Primarily the right of marshalling is a right given against a mortgagor. The right is not enforced against a mortgagee or purchaser of the other estate and the right of such a mortgagee or purchaser not to be marshalled does not depend upon whether he had notice of the second mortgage. 54 M. 59=60 M.L.J. 69.

NOTICE.—Under this section as amended, it is not necessary that the subsequent mortgagee should have no notice of the prior mortgagee to exercise the rights under the section. 23 C. 790; 33 I.C. 815; 34 I.C. 338; 31 M. 419; 1925 P.H.C.C. 239; 1926 P. 94; 1929 A. 309; 1930 P. 442 and 51 M. 648=55 M.L.J. 358 are not now good-law.

Secs. 81, 82 and 101.—Under S. 81 before the amendment, a subsequent mortgagee who has notice of a prior mortgage, cannot claim marshalling as against the prior mortgagee who is entitled to recover the entire mortgage debt from every item of the properties mortgaged to him. A puisne mortgagee who is not entitled to claim the benefit of marhsalling does not get any higher rights than the mortgagor, under S. 75 of the Act, before the amendment. 46 L.W. 555= 1937 M. 965.

Sec. 82: OBJECT.—Where several properties are mortgaged to secure one debt, such properties should contribute rateably for payment of such debt, the valuation for such purpose being made after deducting from each property or estate the amount of any other encumbrances by which such estate is affected at the date of the mortgage. In such cases the law requires equality. *See* 26 A. 407 (pp. 416, 436-7). S. 82 can apply while the mortgage is still subsisting; but it applies even more when the mortgage has been paid off out of some only of the properties mortgaged, and the owner or the person interested in the properties from which the mortgage has been paid off has a right to claim contribution from the owner of other properties which were liable under the mortgage but which were not called upon to pay it off. 44 Bom.L.R. 15. The English rule of equitable apportionment which is a rule between subsequent mortgagees can have no application to a case where the parties are a subsequent mortgagee and a purchaser of a property for valuable consideration free from encumbrances. 1941 P.W.N. 582.

SCOPE.—A mortgage by seven persons of their shares in different properties cannot be treated

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid.

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as seven entirely separate mortgages. It is open to the mortgagee to recover his debts from any one or more of the shares. The mortgagee does not owe a duty to each mortgagor to sue all other mortgagors or their assignees. 38 C.W. N. 124=1934 C. 421. This section only defines and declares the relations of mortgagors *inter se*, and does not affect the mortgage-decree-holder's right of selling any one item for the whole amount and realising the same. 45 I.C. 862=20 Bom. L.R. 175; 23 C.W.N. 308=29 C.L.J. 297; 16 O.C. 199=20 I.C. 765. *See also* 31 A. 65=1 I.C. 5; 35 I.C. 43 (P.); 1935 R. 26; 1932 M.W.N. 1343. [82 I.C. 2=1925 N. 160 (1), holding that relation between co-mortgagors is dealt with in S. 95 (old) and this section deals with relations between mortgagor and mortgagee, is not in accordance with the various amendments to the Act.] 1928 S. 101; 18 C. 320; 29 M. 217=7 C.L.J. 274. A co-mortgagor by paying the mortgage money acquires a charge in regard to the amount paid by him in respect of his co-mortgagors over their shares independently of S. 95, T. P. Act. He gets the rights of the original mortgagee under S. 92 and acquires a charge under Ss. 82 and 100 of the Act. 1942 O.A. 413 (F.B.). Courts cannot introduce any extraneous principle to modify the liability to contribution imposed by S. 82. 16 P. 557=18 P.L.T. 787=1937 P. 628. Where several properties are mortgaged and the sum actually advanced is less than that mentioned in the deed, the equitable method of dealing with this would be to distribute the reduction of principal over each item of property specified at the foot of the mortgage. 33 C.W.N. 1091=1929 P.C. 243 (P.C.). The release of part of the mortgaged property by the mortgagee does not take away as regards that part the liability to contribute which S. 82 imposes upon the different parts. 1942 A.L.J. 463=1942 P.C. 50=(1942) 2 M.L.J. 390 (P.C.). A mortgagee must not release the properties of one of the mortgagors to the detriment of the others. If the mortgagee relinquishes a valuable property for an inadequate consideration, he would not be allowed to throw the burden of the balance upon the other properties. 16 C.L.J. 401=17 I.C. 931; 44 B. 223=55 I.C. 327; 23 C.W.N. 308=50 I.C. 790. *See also* 15 C.W.N. 800=6 I.C. 842. But *see contra* 40 M. 968=33 M.L.J. 211 (F.B.); 39 M. 419=29 M.L.J. 319; 25 A. 79; 28 A. 194; 28 A. 19; 29 A. 369, not approved; 19 C.L.J. 590=23 I.C. 426; 43 I.C. 915; 1 P.L.J. 228=36 I.C. 208. (*See also* cases cited on the point under S. 67.)

APPLICATION OF SECTION.—*See* 1942 M. 44=(1941) 2 M.L.J. 520. There can be no contribution if the encumbrance is discharged by the very person who is liable for the debt; in such a case he merely pays his own debt as he is bound to. The right to resist the claim to contribution in such a case is expressly saved by the words "in the absence of a contract to the contrary" in S. 82. The section deals with the rights of owners *inter se* and therefore the contract to the contrary is a contract between them, that is, those liable to contribute. Where one of two persons owning mortgaged properties receives the whole amount to the exclusion of the other, there arises a contract, which need not be express, that the other shall not be liable to contribute. Similarly when each of them receives an equal moiety, a contract must be implied that they shall bear the burden equally. The question how much money one man owes to another must be first determined with reference to the transaction between them, and after that question is determined, one has next to see on which item it can be made a charge with reference to the section. 69 M.L.J. 303. *See also* 1933 A. 929; 1939 A. 86; 21 P.L.T. 227; 42 C.W.N. 1004=1938 C. 618. But *see* 131 I.C. 545. The right to contribution presupposes the existence of joint liability. 1933 A. 929. The question of contribution between several subsequent mortgagees can be decided only in a properly framed suit for contribution. 4 P.L.J. 91=1923 P. 199. Plaintiffs who did not ask for a definement of the respective liabilities of the several defendants, are not entitled to a decree for a consolidated amount against the defendants jointly. The defendants could be rendered liable only in proportion to the properties held by them. 1931 A.L.J. 349. The plaintiff cannot claim to fix the whole liability for contribution on only a portion of the mortgaged property. 1930 M. 644. Mortgage over three properties—Mortgagor selling property No. 3 to *X*—*X* retaining consideration agreeing to pay off entire mortgage—Mortgagee subsequently buying property No. 1—Liability of property No. 3 for entire mortgage-debt—*X* not personally liable. 42 C.WN. 1004=1938 C. 618.

PRINCIPLE AND APPLICATION OF SECTION.—The first paragraph of S. 82 enunciates the general rule as regards the apportionment of liability between the several properties whether belonging to one or several owners when they are mortgaged to secure one debt. The provision that the properties are liable to contribute rateably to the debt secured by the mortgage clearly implies that this liability constitutes a charge upon the properties. Further, S. 82 read with S. 100 clearly give rise to a charge against such portions of the mortgaged property as have not discharged their proportionate share of the liability. 1935 O.W.N. 278=1935 O. 245. The equitable *doctrine of rateable apportionment*, is not excluded by any statutory provision and is applicable in India. 61 M.L.J. 512. The general principles underlying this section are applicable to the Punjab. 1933 L. 374=34 P.L.R. 532. Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, *in the absence of a contract to the contrary*, liable to contribute rateably

Nothing in this section applies to a property liable under section 81 to the claim of the [1][subsequent] mortgagee.

LEG. REF.

[1] Substituted by Act XX of 1929.

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to the debts secured by the mortgage. 102 I.C. 708. *See also* 33 A. 708=11 I.C. 145; 44 B. 223 =22 Bom.L.R. 68=55 I.C. 327; 1924 P. 530. Where such a contract exempting the owner of one property from liability to contribute exists, the other parties are bound by this contract. 101 I.C. 833=1927 M. 1086; 46 A. 286=22 A.L.J. 193. *See also* 50 A. 569=1928 A. 241; 24 M. 85. All the elements of contract are as much present when a sale takes place in execution of a decree as in ordinary sale. Hence there can be a contract to the contrary even in a sale held in execution of a decree. (27 B. 334, Ref.) 1933 A. 929. Contract to the contrary is not between the mortgagor and one of the purchasers of the equity of redemption, but between the parties liable to contribute. 39 I.C. 405; 20 I.C. 765 =16 O.C. 199; 24 A.L.J. 401=1926 A. 352. *See also* 96 I.C. 765=24 A.L.J. 714; 46 A. 286 =22 A.L.J. 193: 27 N.L.R. 258. Such a contract should be specifically alleged and proved. 131 I.C. 545. The expression "*contract to the contrary*" means contract between mortgagor and mortgagee, and not between the mortgagors themselves, nor a subsequent contract between the mortgagors. 35 L.W. 145=1932 M. 218. The expression "contract to the contrary" includes also a contract between the mortgagor and a purchaser of the equity of redemption and can be enforced by the mortgagor or a subsequent purchaser of the equity of redemption or of another portion of the equity of redemption, if the benefit of the contract has been assigned by him. 44 L.W. 447=1936 M. 901: 1936 M. 898; (1940) 2 M.L.J. 484=1941 Mad. 66. But *see* 160 I.C. 686=1936 M. 113. Sale of zemindari villages belonging to different owners for arrears of revenue—Payment of entire arrears by owner of one village to set aside sale—Claim to reimbursement—Liability of other villages—Plaintiff not liable to pay revenue as between himself and zemindar—If "contract to the contrary." 44 L.W. 214. Rateable contribution is a charge on property mortgaged and cannot be enforced against the person. 27 A.L.J. 1162=1929 A. 696. It is essential to the accrual of the right of contribution that the whole of the debt in respect of the payment of which contribution is claimed should have been satisfied. 7 O.W.N. 401=1930 O. 260. S. 82 lays down that *inter se* mortgagors are liable for contribution in proportion to the value of their property which has been included in the joint mortgage, and not merely to the extent of the benefit received. 131 I.C. 545. *See also* 1942 A.L.W. 500. Where S. 82 governed it is not proper to introduce any extrinsic principle to modify the statutory provisions. 57 I.A. 189= 52 A. 358=59 M.L.J. 177 (P.C.). The right to contribution rests upon the principle that a property which is equally liable with another to pay a debt shall not be relieved of the entire burden of the debt because the creditor has been paid out of that other property alone. There is no distinction in principle between a case where the payment in respect of which contribution is claimed is made to avert a legal process and a case in which payment is enforced by the sale of the property itself. The liability to contribute is imposed upon the property and is not personal. (1942) 2 M.L.J. 525 (F.B.). Value for purposes of contribution—Mode of ascertainment. 59 I.A. 106=62 M.L.J. 492 (P.C.).

"ENCUMBRANCE".—"*Amount of any other encumbrance*"—Meaning of.—26 A.L.J. 298=109 I.C. 38=1928 A. 241. *See also* 6 I.C. 150 (A.); 1929 P.C. 243=33 C.W.N. 1091 (P.C.); 1930 P. 607. Purchasers of the property in execution of the mortgage decree take the property free of subsequent liability or equities. 20 A.L.J. 337 =44 A. 488; 43 A. 42=58 I.C. 414; 43 I.C. 915. *See also* 6 R. 417; 1922 A. 495.

ILLUSTRATIVE CASES.—Where a purchaser of part of the mortgaged properties pays off a mortgage debt to which all the properties are subject, the owner of another part of the mortgaged properties, who seeks to redeem his share of the properties, is liable to contribute the proportionate share of the debt. But a claim to such contribution which is barred by limitation cannot be pleaded in bar of redemption. 41 L. W. 730=68 M.L.J. 362. Where the equity of redemption vests partly in a prior and partly in a subsequent mortgagee, neither the former can be compelled to redeem the whole nor the latter to give up his interest in the share of the mortgage. 20 A.L.J. 583=44 A. 708. Where the owner of one of the items pays up the whole mortgage amount, the owners of the other items must contribute rateably. 36 A. 272=23 I.C. 339; 35 I.C. 43; 159 I.C. 1049=1936 O. 169. So also in the case of a charge. 162 I.C. 304= 1936 M. 293. Where the mortgagee recovers the entire debt out of one item, an alienee from the mortgagor of that item can recover contribution from the persons who hold the other items included in the mortgage. 1931 A.L.J. 1073. Where properties belonging to different owners are subject to the same mortgage and one owner pays the whole, he is entitled to a charge over the other properties for amounts of the debt in proportion to their value. 43 A. 589=63 I.C. 209; 40 M. 968=33 M.L.J. 211 (F.B.); 7 O.W.N. 401=1930 O. 260; 51 I.C. 49 (Pat.). On this point, *see* S. 92. Where both the mortgaged items belonging to two persons are sold and one contributes more than its rateable proportion, its owner has a personal remedy against the other to the extent of any surplus sale proceeds received by the other. 33 A. 708=11 I.C. 145. Where the mortgagee of certain items buys the equity of redemption in one of them to that extent his mortgage is discharged. 10 I.C 235; 43 M. 372=38 M.L.J. 239 (F.B.); 29 I.C. 124; 20 I.C. 825=25 M.L.J. 16; 1 P.L.J. 228=36 I.C. 208: that is, the portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole property: 131 I.C. 152=1931 M. 552. Sale in execution of mortgage-deed—Purchase of part of property by mortgagee—Effect of

Deposit in Court.

Power to deposit in Court money due on mortgage.

83. At any time after the principal money [1][payable in respect of any mortgage has become due] and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit, in any Court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage.

LEG. REF.

[1] Substituted by Act XX of 1929.

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6 R. 417=1928 R. 266. *See also* 61 I.A. 185=13 P. 310=66 M.L.J. 662 (P.C.). Mortgage of land and house on it—Subsequent purchase of house alone and removal of materials by another—Suit on mortgage—Liability of purchaser. 5 R. 764=1928 R. 68. (As to apportionment of liability between life-tenant and remainderman *see* 36 I.C. 292 (C.). *See also* 9 P.L.T. 573. Where the mortgagee purchases at sale in execution of his decree on his second mortgage one of the two properties mortgaged to him, the equity of redemption in that property becomes vested in him and such purchase has the effect of discharging and extinguishing a portion of the mortgage debt, which is chargeable to the property purchased by him. 59 C. 76. *See also* 1933 L. 374=34 P.L.R. 532. Where, in a suit on a mortgage comprising several items, the Court directed the properties to be sold in a certain order, in the event of the decretal amount being satisfied by the sale of only one property, the remaining mortgagors are not released from all liability to contribute to the mortgagor whose property alone has been sold, unless there is an indication of an intention in the mind of the Court to release them. 51 I.C. 49 (P.) ; 41 L.W. 416. A co-sharer who, to prevent arrest for a decree against himself and another co-sharer for arrears of rent due by both under the Estates Land Act, pays the whole rent is entitled to contribution from the other and to a charge for his excess payment on the co-sharer's share of the property, as it stood on the date of payment. It cannot avail retrospectively against prior mortgagees and others who have in good faith advanced money on the property.. 55 M. 468 =62 M.L.J. 31. Subsequent mortgagee is not liable to contribute to person interested in mortgaged property satisfying prior mortgagee's decree barred by limitation. 115 I.C. 552= 1929 P. 94. Mortgage of several items—Sale to different persons—Items sold in execution of the mortgage decree obtained by the prior mortgagee—Plaintiff, a subsequent purchaser of one of the items deposited the amount under C. P. Code, O. 21, R. 90, and got sale set aside —Plaintiff's suit for contribution against purchasers of other items is competent and he is entitled to recover poundage and interest on the debt but not the 5 per cent. compensation paid to the disappointed buyer. 1934 M. 189=66 M.L.J. 308. Though ordinarily interest ought to be allowed from the date of payment, if the person entitled to claim contribution unnecessarily delays to claim or sue for contribution, he will not be entitled to interest from that date, but only from the date on which he makes a demand for payment. The Court will allow interest at 6 per cent. 1936 M. 910=71 M.L.J. 651.

RELEASE BY MORTGAGEE.—As to what amounts to a release by the mortgagee, *see* 1929 A. 889. The owners of parts of the equity of redemption cannot be deprived of their right to contribution under S. 82 by the action of the mortgagee in releasing another portion of the mortgaged property. 162 I.C. 304=1936 M. 293.

Secs. 82 and 60.—If a mortgagee happens to purchase a portion of the mortgaged property, there would be a merger and extinction of liability under the mortgage to that extent, and in the absence of any other circumstances showing that it is for the benefit of the mortgagee to keep his mortgagee's rights alive or that he declares his intention either expressly or by necessary implication that he would keep his subsequently acquired rights distinct from his prior rights which he held as a mortgagee, his right to recover his money under the mortgage, is, on his purchasing the equity of redemption in a portion of the property mortgaged with him, extinguished *pro tanto to* recover only a porportionate part of the amount due on the mortgage. The principle of S. 82, T. P. Act, should be applied to such a case and the mortgagee should not by his purchas be permitted to improve his position and should be treated in the same manner as stranger would be if he happens to purchase the property and the value of t e property to be taken into account is the value of the property, as it existed on the date of the mortgage unaffected by any subsequent increase in the value on account of improvements or any subsequent decrease in value. The words "remaining due" in the last paragraph of S. 60, T. P. Act, are, to some extent, misleading, and must not be taken too literally. 1942 M. 41=(1941) 2 M.L.J. 520.

Secs. 82 and 100.—Where the payment of certain maintenance allowances are charged upon two properties and by their own negligence the charge holders allow their remedy to be lost as against one of the properties, they could not claim as against the other property to recover anything more than a proportionate share of the original maintenance charge. 192 I.C. 327= 1940 O.W.N. 1249=1940 O. 203.

Sec. 83.—[*See also* Notes to S. 84.] S. 83 deals with the right to deposit in Court and not with the right to redeem by payment direct to the mortgagee or the right to bring an action for redemption. A purchaser of the mortgaged property from the widow of the mortgagor, whose sale is not effective on account of invalid registration, although precluded from proving his purchase, may establish his undertaking to pay off the subsisting mortgage by the deed. 13 P. 111 =1934 P. 127. S. 83 provides a special privilege and in order to claim its benefit, the mortgagor

The Court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition (verified in manner prescribed by law for the verification of plaints) stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same Court the mortgage-deed [1][and all documents in his possession or power relating to the mortgaged property], apply for and receive the money, and the mortgage-deed [2][and all such other documents] so deposited shall be delivered to the mortgagor or such other person as aforesaid.

Right to money deposited by mortgagor.

[3][Where the mortgagee is in possession of the mortgaged property, the Court shall, before paying to him the amount so deposited, direct him to deliver possession thereof to the mortgagor and at the cost of the mortgagor either to re-transfer the mortgaged property to the mortgagor or to such third person as the mortgagor may direct or to execute and (where the mortgage has been effected by a registered instrument) have registered an acknowledgment in writing that any right in derogation of the mortgagor's interest transferred to the mortgagee has been extinguished.]

LEG. REF.

[1] Substituted by Act XX of 1929.
[2] Added by Act XX of 1929.
[3] Inserted by Act XX of 1929..

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must come strictly within the provisions of that section. Thus the deposit has to be made to the credit of the mortgagee or mortgagees. Such deposits would be invalid if the mortgagor associates with the real mortgagee, some third person who is not entitled to any share in the mortgage-money. 50 A. 655=1928 A. 311=26 A.L.J. 394. Interest has got to be calculated only up to the date of the deposit, and not till the date when the notice required by the section might be served on the mortgagee. 1937 A.L.J. 757=1937 A. 706. In cases where the mortgage-deed provides for a rate of interest which is penal and unenforceable, the mortgagee would be entitled to a reasonable compensation, and the amount legally due is only what the Court finds it to be. If amount deposited is found to be what the Court thinks reasonable, then the deposit is valid and interest ceases to run. The mortgagee always acts in peril in such cases in declining to receive the amount deposited. The mere fact of the withdrawal of the amount deposited by the mortgagor when the mortgagee declines to accept it does not *per se* prevent interest from ceasing to run unless the mortgagee shows that the mortgagor was either not willing or not able to pay because he had utilised the moneys for other purposes. 1939 M. 503=(1939) 1 M.L.J. 324. A deposit after a suit on the mortgage has been instituted with an insufficient court-fee and before the plaint has been re-presented with sufficient court-fee is not a good and valid deposit. 48 L.W. 929=1939 M. 200. Where the mortgage-deed contains a stipulation that the mortgage could be discharged only beyond the fruit season, a deposit while the fruit season is still on is not invalid, when the mortgage is in lieu of interest, and the mortgagor does not make a condition of the deposit that the mortgagee is to take out the money forthwith in satisfaction of his dues. 45 C.W.N. 174=1941 C. 18. A deposit does not cause an extinction of the security as if there has been valid satisfaction. That result can follow only when the mortgagee applies for and receives the money. If, therefore, the deposit made by the mortgagor is drawn out by somebody who is not entited to it and is not available to the mortgagee when he applies for its withdrawal the deposit does not extinguish the mortgagee's right to enforce the mortgage. 45 C.W.N. 174 =1941 Cal. 18. Where the defendants 1 and 2 had allowed the property to stand benami in the names of defendants 3 to 7 in the record of rights and the mortgagor made the deposit to the credit of not only defendants 1 and 2 but also defendants 3 to 7, the deposit is valid and he is entitled to mesne profits from date of deposit. 15 P.L.T. 689=1934 P. 622. The deposit must be unconditional. 14 M. 49; 22 B. 761; 29 I.C. 586. Demand of receipt for moneys paid and delivery of title-deeds to which mortgagor would be entitled on payment of the debt would not make the deposit conditional or invalid. 17 M. 267. *See also* 4 O.C. 355. Even if the deposit be considered as valid, it cannot be treated as if the condition attached to it does not exist. The mortgagee is entitled to accept the money only subject to the condition. 184 I.C. 225=1940 P. 18. Deposit must be made in the Court in which suit for redemption can be instituted or suit for enforcement of the security can be laid. 35 M. 209=10 I.C. 393. *See also* 4 O.C. 307. S. 83 applies not only to a suit on a mortgage, but also to a suit to enforce a charge, such as for arrears of maintenance. 11 O.W.N. 1550 =1935 O. 93.

WHO CAN MAKE DEPOSIT.—Deposit may be made by mortgagor or any person who can institute a suit for redemption, as owner of part of the mortgaged properties can make the deposit. 47 M. 7=44 M.L.J. 534. Agreement to sell does not entitle vendee to deposit mortgage amount. 1926 M.W.N. 459=1926 M. 597. *See also* 16 M.L.T. 365=26 I.C. 184 (at any rate if the intending purchaser makes the tender conditional on the delivery to him of the title-deeds). Deposit of mortgage amount without decree and

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deposit under C. P. Code, O. 34, R. 7—Distinction. *See* 1926 O. 113=2 O.W.N. 826. As to persons entitled to sue for redemption, *see* S. 91.

JOINT MORTGAGORS.—Where two mortgagors jointly and severally liable to pay the mortgage debt make a deposit under S. 83 to save their property, there is no presumption either that both the mortgagors paid equally or that one paid the whole amount or a portion of it. 1935 C. 728.

TENDER AND DEPOSIT.—In a tender the party decides who is to receive the amount. He should offer it to the right person. In a deposit the Court ought to decide the right person. 40 M. 80 =31 M.L.J. 548. *See* 1926 O. 113=2 O.W. N. 826. Tender need not always be through Court. Interest will cease to run from the time of a valid tender which was refused. 38 I.C. 295=5 L.W. 718; 1929 P. 397. Formal offer or tender is not necessary where it is apparent that the mortgagee would have refused it. 41 M.L.J. 631=46 M. 108=50 I.A. 41 (P.C.). It is necessary that a mortgagor should after tender keep the money ready for payment. 1 P. 350; 1922 O. 17; 1926 O. 113. *See also* 1 L.W. 595=25 I.C. 96. Tender before due date is not valid. *See* 31 C. 183; 26 B. 312; 44 A. 185. *See also* 39 I.C. 377. Where the mortgagor deposits an amount which is adequate except to cover the penalty, the tender is not bad. 28 N.L.R. 149. A deposit made after institution of suit by mortgagee is invalid to reduce previous interest or avoid costs. 48 I.C. 693=35 M.L.J. 605; 35 M. 209; 50 I.C. 332; 40 M. 444. *See also* 153 I.C. 263=11 O.W.N. 1550=1935 O. 93. Interest will cease only on the actual deposit of the full amount due. 29 I.C. 145= 2 L.W. 108. Even a small deficiency of a few annas due to a *bona fide* miscalculation will make the tender bad and will not stop the running of interest: 30 M.L.J. 607=34 I.C. 825; 19 A.L.J. 582=63 I.C. 563. *See also* 33 C.W.N. 279; 1941 M. 484=(1941) 1 M.L.J. 788 (F.B.); also tender of principal alone without interest: 20 A.L.J. 401=44 A. 462; 33 C.W.N. 279; 18 N.L.R. 47. Non-payment of penal interest which was also subsequently disallowed by the Court will make the tender good. 39 M. 579=30 I.C. 497. Tender of greater sum than is due is valid. 51 I.C. 13=29 C.L.J. 256: 45 I.C. 638=34 M.L.J. 439. Even where the mortgagee has purchased a part of the mortgaged property, the deposit must be of the whole amount, where proportionate reduction of the mortgage debt has not been ascertained. 44 M.L.J. 534=1923 M. 533. Deposit of mortgage amount—Suit for redemption—Subsequent withdrawal of mortgage amount—Decree for redemption in appeal—Liability of mortgagee for mesne profits. *See* 99 I.C. 147=1927 O. 103=3 O.W.N. 942; 49 M. 609. It is the duty of the Court and not that of mortgagor to see that due notice of the deposit is served on the mortgagee. 60 I.C. 454. *See also* 43 A. 424=60 I.C. 760=19 A.L.J. 259. When the mortgagee is a minor, interest on the deposit will not cease to run till a proper guardian is appointed. 21 A.L.J. 39=45 A. 273; 64 I.C. 413=19 A.L.J. 852; 1922 A. 147; 49 M.L.J. 327=1925 M. 1017; 48 A. 611=96 I.C. 1= 1926 A. 665. *See also* 22 I.C. 245=16 O.C. 261; 27 B. 23; 44 A. 102. In order to entitle the mortgagor to claim mesne profits from the date of deposit, he has to see that a proper guardian is appointed for minor mortgagees. 124 I.C. 191=1930 A. 609; 1938 M. 405. A mortgagor should not withdraw the deposit till the heirs of the deceased mortgagee are ascertained. 40 M. 807=31 M.L.J. 548. *See also* 97 I.C. 735=1926 M. 1087. Acceptance of deposit by the mortgagee must be deemed to be acceptance of the amount in full discharge of the mortgage debt. 25 A. 179; 36 C. 840. As to effect of withdrawal by mortgagee's agent, *see* 36 C. 840=36 I.A. 85 =19 M.L.J. 419 (P.C.). Deposit under this section though refused by the mortgagee does not extinguish the mortgage debt and only interest ceases. 1926 A. 26; 26 B. 643. As to *invalid tender*, *see* 30 I.C. 769=1915 M.W.N. 763.

EFFECT OF REFUSAL OF DEPOSIT.—Where the mortgagee refuses to accept the deposit, the mortgagor may apply to and withdraw the money from Court; 73 I.C. 1053=1924 P. 41; 1937 P. 253=170 I.C. 99. Mortgagee cannot change his mind and ask for permission to take out the money as the tender is no longer open. 1923 P. 256=73 I.C. 1053. *Interest on deposit* will cease to run from the date of deposit even though the mortgagor withdraws the amount on refusal of mortgagee to draw the amount. 44 A. 198= 20 A.L.J. 7. But *see contra* 1 L.W. 595=25 I.C. 96, or when it could not be drawn, because there are disputes between the mortgagee's heirs. 44 M.L.J. 362=1923 M. 354 (1); 56 I.C. 814=19 O.C. 145. *See also* 36 M.L.J. 497=1924 M. 559; 46 M.L.J. 74=1924 M. 453. (*But see now the proviso added to S.* 84). When a deposit has been made in a redemption suit, after decree, the mortgagee must draw the amount, even though an appeal from the decree is pending. The mortgagee must bear the loss if the money lapses to the Government. 16 C.W.N. 793=16 I.C. 830=23 M.L.J. 738 (P.C.). A mortgagee who wrongfully refuses to accept a valid deposit would also be liable to account for rents and profits collected by him. 47 M. 7; 2 R. 382=1925 R. 13. But *see* 40 C.W.N. 627=1936 C. 200. The relationship of mortgagor and mortgagee subsists even after deposit till the decree in a suit for redemption. 45 A. 592=21 A.L.J. 545. *See also* 31 B. 527; 1925 R. 13; 40 C.W.N. 627= 162 I.C. 709=1936 C. 200. A mortgagee in possession cannot by merely guessing as to the income he has derived from the property, refuse the tender made by the mortgagor, on the ground that it is a little less than the actual amount due, if he had refused to give accounts to the mortgagor before he made the tender. 99 I.C. 630=1927 N. 138; 1924 P. 41.

SECURITY.—There is no power under this section for the Court to ask for security from any party before allowing him to draw the money from the Court. 1924 P. 41=73 I.C. 1053. Where the mortgagee under a usufructuary mortgage is a member of a joint family consisting of himself, his brothers and his nephews, and the mortgage-money is money belonging to the joint family, the amount must, if the mortgagee is dead, be deposited in the names of the survivors. A deposit in the names of the brothers and nephews who are really interested, as also in the name of the widow of the deceased, is not a good deposit

84. When mortgagor or such other person as aforesaid has tendered or deposited in Court under section 83, the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or [1][in the case of a deposit, where no previous tender of such amount has been made], as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, [1][and the notice required by section 83 has been served on the mortgagee :

Cessation of interest.

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[1] Inserted and substituted by Act XX of 1929.

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because the survivors of the joint family cannot withdraw the money without the permission of the widow, though she had no interest in the mortgage-money. 20 P.L.T. 167=1939 P. 415. Where after the death of one of the mortgagees, the mortgagor makes a deposit to the account of the surviving mortgagee and the estate of the deceased mortgagee expressly or by necessary implication, impleading his sons and his heirs and it is subsequently found that one of the sons had no right to any part of the mortgage-money, interest ceased to run from the date of the deposit. On the other hand, if the deposit was made to the account of certain persons named and not to the estate of the deceased mortgagee in such a way that only the persons named could recover the amount deposited, interest would not cease to run if some of the persons named were not entitled to the money. I.L.R. (1938) A. 767=1938 A.L.J. 617=1938 A. 423 (F.B.). Where a subsequent mortgagee retains a part of the consideration to discharge a prior mortgage and deposits that amount in Court to the credit of the prior mortgagee, that amount does not become the property of the prior mortgagee unless he complies with the terms of the section and states his willingness to accept it in full discharge of his dues. If he does not do so, the subsequent mortgagee is at liberty to withdraw the money but is not entitled to interest on that amount from the prior mortgagee. 42 C.W.N. 1177.

Sec. 84.—[*See* notes under S. 83 also.] The amendment of S. 84 has no retrospective effect. I.L.R. (1940) A. 79=1939 A.L.J. 1099=1940 A. 65. As to what is "*all that the mortgagor who deposits the amount into Court or tenders it to the mortgagee has to do*," *see* 35 M. 44 ; 27 B. 23 ; 46 M.L.J. 74 ; 44 A. 102 ; 30 I.C. 709. Interest ceases from the date of deposit, and not from the date of receipt of notice by mortgagee. 1923 A. 24. *See also* 30 M.L.J. 607 ; 70 I.C. 811 ; 50 M.L.J. 468. [The amendment effected by Act XX of 1929 now provide that interest would cease only on the service of notice.] The mortgagor must also see that a guardian of a minor mortgagee is appointed. 44 A. 102 =1922 A. 147 ; 71 I.C. 278=45 A. 273 ; 1925 M. 1017; 27 B. 23. *See also* 124 I.C. 191=1930 A. 609=1930 A.L.J. 120. The provisions of S. 84 apply, by analogy, to usufructuary mortgages, and a mortgagor on making a deposit of sufficient money due on the mortgage is entitled to recover profits and, simply because the decree for redemption was passed later on, he cannot be treated as trespasser during the dates between the deposit of mortgage-money and of the redemption. 113 I.C. 23=1928 A. 156. *Cf.* 124 I.C. 191=1930 A. 609 under S. 83. As to accountability, *see* 1924 N. 285. As to persons entitled to sue for redemption, *see* S. 91.

TENDER.—Tender must be of the *whole amount due on date of tender*. 25 Bom.L.R. 839=1924 B. 264. A mortgagee decree-holder is not bound to accept a part-payment of the amount under the decree, and interest does not cease to run by reason of deposit of such amount in Court. 34 P.L.R. 853=1933 L. 685. Where by a mortgage deed of 10—9—1926, the mortgagors covenanted to repay all principal and interest payable under the deed "by the 10th September, 1928," it must be taken to mean that it shall be payable on or before the 10th September, 1928, and therefore a tender of the amount, in June, 1927, of the principal and interest then due, is a valid tender. I. L. R. (1941) M. 767= 1941 M. 484=(1941) 1 M.L.J. 788 (F.B.). A subsequent transferee wanted the mortgagee to accept the sum of Rs. 1,000 either in full satisfaction of the amount due on the mortgage or to release the property sold to him out of the mortgaged property. The transferee had no right to demand either condition and such a conditional tender would not amount to a valid tender. 130 I.C. 817=1931 N. 91. Where the mortgagee refuses to accept a tender not because the amount offered is short but because he maintains that the time for payment has not yet arrived, he must be deemed to have waived the objection as to the correctness of the amount, and cannot later on object on that ground. I.L.R. (1941) M. 767=1941 M. 484=(1941) 1 M.L.J. 788 (F.B.). Offer to give cheque or cash by cashing it, when valid tender. 52 M. 322=56 M.L.J. 255. Mortgagor need not always keep money for payment even after a wrongful refusal of a valid tender. 33 M. 100 (*see* now proviso to first para., relating to deposits). *An offer without production of money* is not a good tender. 55 I.C. 991=18 A.L.J. 440 ; 36 A. 139=22 I.C. 659 ; 45 I.C. 106 ; 42 A. 420 ; 22 B. 440. *See also* 4 L. 406=1923 L. 632. But *see* 1930 R. 255 holding that where on the mortgagor asking the mortgagee to accept the money and the latter refuses to accept it, there is a valid tender although money would not be actually offered. *See also* 33 I.C. 735. In a suit upon the mortgage if the mortgagor desires to plead that interest had ceased to run, because of a previous tender that plea must be accompanied by payment into Court but, in a suit for the recovery of interest only, the payment of interest into Court would not raise the inference of readiness to pay the whole amount due on the mortgage, nor would the failure to pay this amount into Court raise the contrary inference that the mortgagor was not prepared to pay. 1934 R. 316. Tender to be

Provided that, where the mortgagor has deposited such amount, without having made a previous tender thereof and has subsequently withdrawn the same or any part thereof, interest on the principal money shall be payable from the date of such withdrawal.]

Nothing in this section or in section 83 shall be deemed to deprive the mortgagee of his right to interest when there exists a contract that he shall be entitled to reasonable notice before payment or tender of the mortgage-money [1][and such notice has not been given before the making of the tender or deposit, as the case may be.]

Suits for Foreclosure, Sale or Redemption.

85. [Parties to suits for foreclosure, sale and redemption.] *Repealed by the Code of Civil Procedure (Act V of 1908), S. 156, and Sch. V.*

Foreclosure and Sale.

[86 to 90.] *Repealed by the Code of Civil Procedure (Act V of 1908), S. 156 and Sch. V.*

Redemption.

Persons who may sue for redemption.

[2][91. Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely :—

I.EG. REF.

[1] Added by Act XX of 1929.
[2] Substituted by Act XX of 1929.

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valid must be made to the rightful person. 32 B. 521. Not only readiness and willingness to pay must be shown, but also present ability to pay immed'ately must appear. 45 I.C. 106 ; 5 Bom.L.R. 387 : 34 M.L.J. 488=45 I.C. 437. But *see also* 30 M. 865. Money must be kept ready for immediate payment if mortgagee was willing to receive. 1922 P. 167. But it is unnecessary to keep the money immediately at the disposal of the mortgagee, provided that it can be found whenever the mortgagee sees fit to demand it. 1934 R. 316. A mortgagor, in a usufructuary mortgage, making a valid deposit, would be entitled to mesne profits from the mortgagee in possession if the latter refuses to accept the deposit and surrender possession of the properties. But if the mortgagor after keeping the money in deposit for some time, subsequently withdraws the deposit from Court and does not again produce it during the hearing of the suit or appeal, an inference against his willingness and ability to pay should be drawn and he is not entitled to mesne profits from the date of such withdrawal. 182 I.C. 287=1938 M. 405. Tender—Disputes between claimants to mortgagee's estate—Withdrawal by depositor—Redeposit in suit by claimant for declaration of title—Interest, when ceases to run. I.L.R. (1940) A. 79=1939 A.L.J. 1099=1940 A. 65 (Case prior to amendment of S. 84). A *tender of more than the amount due* is not invalid. 29 C.L.J. 256. A person denying tender cannot question its sufficiency or validity. 25 I.C. 93. A mortgagee absolutely refusing a proposed payment cannot be heard to say that there was no formal tender and that mortgagee had no ready money for payment. 46 M. 108=1923 P.C. 26 (P.C.); 1934 R. 316. Refusing to settle accounts on mortgagor's tender—Mortgagee is not entitled to interest subsequently accruing. 1929 P. 397. To constitute *valid tender*, actual readiness and willingness to pay is essential—Mere telegram expressing willingness to pay is not tender , but if followed by actual offer constitutes valid tender. 1929 P. 397. *See also* 1923 P.C. 26. *Offer of part payment* is not a sufficient tender. 45 I.C. 175. *See also* 1922 N. 174. An assertion of an absolute title by mortgagee coupled with a statement of the amount due—*Effect of tender*. 4 L. 406=1923 L. 632 ; 45 I.C. 437=34 M.L.J. 488. Tender of mortgage amount—*Right of purchaser of equity of redemption after tender*. 52 M. 322=56 M.L.J. 255. Subsequent mortgagee seeking to redeem prior mortgagee can take advantage of a tender of mortgage-money made under S. 84 to the first mortgagee and so would not be liable to pay interest from the date of such tender. 1930 R. 255. A *tender before due date* is of no effect. 39 I.C. 377. A tender is not rendered invalid because a receipt for the amount is asked for : 34 C. 305 ; or that it was by way of a cheque, if the objection of the mortgagee was not as to the form of payment : 56 M. L.J. 255=1929 M. 230. *See also* 34 C. 305. In a deposit interest accruing due for the day of deposit should also be included. 34 I.C. 825=30 M.L.J. 607.

Sec. 91.—The amendment is not retrospective. [39 A. 536=41 I.C. 190 ; 1923 N. 311 ; 43 M. 696 are not now good law.] As to applicability of section to charge, *see* 1933 A. 934.

Secs. 91, 92, 95 and 101 : SCOPE OF.—The entire law regarding the rights of subrogation is now contained in Ss. 91 and 92 and also in Ss. 95 and 101, T. P. Act, as amended by Act XX of 1929. A reference to S. 59-A which, whether it is to be regarded as defining " mortgagor " in S. 92 or not, has to be borne in mind in construing this group of sections. I.L.R. (1938) N. 206=1937 N. 372 (F.B.). A puisne mortgagee, who has been unsuccessful in a suit for possession and who fails to enforce his mortgage by foreclosure or sale within the prescribed period, is not a person who has any

(*a*) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same ;

(*b*) any surety for the payment of the mortgage-debt or any part thereof ; or

(*c*) any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property.]

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subsisting interest in or charge upon the mortgaged property and is not entitled to sue for redemption under S. 91, although his right as a mortgagee cannot be said to have been extinguished. 153 I.C. 808=1925 O. 139. The interest can accrue either by succession, conveyance or contract. 1932 A.L.J. 605=1932 A. 643. If one of the coparceners, who is not a manager, mortgages coparcenary property, the mortgage is binding so far as the mortgagor's joint share in the property is concerned, but does not bind the other coparceners, who are not, therefore, entitled to redeem the mortgage. 122 I.C. 699=1930 N. 173. So also one tenant possesses no interest in the share of another in the common property. 1930 N. 173.

PERSONS INTERESTED IN REDEMPTION.—The smallest interest in the equity of redemption will suffice to entitle a person to redeem ; and it cannot be said that he is entitled to redeem only that part of the property in which he is interested and not the rest. 53 B. 353=1929 B. 139. *See also* 52 M. 322=56 M.L.J. 255=1929 M. 230 ; 82 I.C. 943=1925 M. 351 (1) ; 67 I.C. 737=22 C.W.N. 128 ; 44 I.C. 77 ; 84 I.C. 293=1925 P. 57 ; 48 C. 22 ; 22 M. 209 ; 22 C.W.N. 800=48 I.C. 669 ; 1924 O. 40 ; 39 A. 719=15 A.L.J. 791=42 I.C. 879 ; 39 M.L.J. 147=57 I.C. 535 (P.C.) ; 92 I.C. 261=1925 L. 651. One of several mortgagors is entitled to redeem the entire mortgage. 8 P.L.T. 81=97 I.C. 386=1927 P. 25. One of two *uralans* of a temple can redeem a *kanom* of the temple property without consulting the other *uralan*. 12 L.W. 425=61 I.C. 510=1920 M.W.N. 646. As to redemption by *co-trustee*, *see* 16 I.C. 435. As to redemption by a *zemindar's successors-in-interest*, see 1931 A.L.J. 914. A *daughter's daughter* should show that she has a preferential right of succession to redeem the mortgage over that of any other collaterals. 1923 L. 222. A *daughter-in-law* merely entitled to a right of maintenance has not sufficient interest to entitle her to redeem. 20 O.C. 37=1 I.C. 690. A *legatee* who is to take the estate after the death of the testator and his wife can also redeem. 112 I.C. 248=1929 N. 27 : also a *donee of the equity of redemption*, 2 Luck. 564=1927 O. 199. *See also* 40 C.W.N. 974. A *mortgagor* or his heir in possession has a preferential right to redeem over other joint owners of the estate. 56 P.L.R. 1916=30 I.C. 389. A *landlord* can redeem a mortgage effected by his permanent tenant who died without leaving any heirs. 57 B. 194=35 Bom.L.R. 60=1933 B. 97. *See also* 1932 A.L.J. 474. A *person in joint possession of occupancy holding* can also redeem 74 I.C. 755=1924 A. 147. Recognition of occupancy rights by landlord only does not give a person the right of redeeming. 1925 A. 15 *See also* 19 M. 151. A person in whose favour there is an agreement to sell is not entitled to redeem. 92 I.C. 715=1926 M. 597. A *prior mortgagee*, who is also the purchaser of the equity of redemption, can redeem the puisne mortgagee. 14 L.W. 355=69 I.C. 942. *See also* 29 I.C. 794 (A.) ; 47 A. 751 ; 86 I.C. 193=1925 C. 59 ; 1938 O. 10=1937 O.W.N 1118. A *purchaser of the equity of redemption* not impleaded in a suit on the mortgage may redeem. 1927 P. 25=95 I.C. 386. A *mere volunteer* cannot take the benefit of payment for another. 1928 M. 541. As regards the purchaser of the mortgaged property, *see* 39 A. 536=41 I.C. 190. *See also* 13 I.C. 299 ; 1931 A. 238. A compromise by some of the mortgagors will not bar the others who were not parties to it from redeeming the property. 5 P.L.J. 644=58 I.C. 129. A mortgagor who has sold his equity of redemption but who has reserved a part of the consideration with the vendee can redeem. 1925 M. 778=48 M.L.J. 213. The *puisne mortgagee* can redeem. The prior mortgagee cannot impugn it as invalid ; only the mortgagor can impugn it. 22 I.C. 907. *See also* 101 I.C. 324=1927 L. 81. A *sub-mortgagee* may redeem a prior mortgage. 27 A. 472 ; 20 M. 35 ; 1913 M.W.N. 903. *See also* 54 C. 424 ; 8 B. 168 ; 22 I.C. 907 ; I.L.R. (1940) Kar. 447. As to prior mortgagee claiming to redeem a puisne mortgagee in possession, *see* 1923 N. 24. Where a Hindu widow surrenders her property to the next reversioner on condition of her receiving a fixed annual maintenance, the *reversioner* can sue to redeem a mortgage of that property created by her. 178 P.W.R. 1918=50 I.C. 868. A present right to possession is not essential. Even a reversioner can redeem a mortgage. 112 I.C. 248=1929 N. 27. But *see* 35 M. 426=22 M.L.J. 364 ; 123 I.C. 211=1930 O. 294. *See also* 1925 O. 311. An *assignee of the mortgagor's interest* after passing of the preliminary decree cannot redeem the mortgage. 33 I.C. 486=12 N.L.R. 50. But *see* 26 C. 960. A holder of *zaripeshgi* lease of mortgaged property. 162 I.C 225=1936 O.W.N. 399=1937 O. 146. A *permanent lessee* of the mortgagor (29 A. 679 ; 47 I.C. 99=14 N.L.R. 117) ; *or lessee for a term of years* can redeem: 1926 N. 496 ; 50 I.C. 511 ; 23 N.L.R. 128 ; 29 N.L.R. 77=144 I.C. 521=1933 N. 44 ; but not a mere *tenant* : 1925 O. 270 ; nor a person who is a holder of a mere raiyati interest : 5 C.W.N. 83 ; *purchaser of a portion of mortgagor's interest* in Court-auction : 7 M. 423 ; or *purchaser pendente lite* can redeem. 26 C. 960. But *see* 33 I.C. 496=12 N.L.R. 50. A person who has no present or existing interest cannot redeem. 30 A. 497 ; 36 M. 426. A *surety* of the principal debtor can redeem. 21 W.R. 347. A mortgagee can question the right of a person seeking to redeem, whether his co-mortgagors acquiesce in his claim or not. 34 M. 406=20 M.L.J. 951. The right accrued to an attaching creditor under S. 91 (*f*) of the Act of 1882 is not destroyed by the amending Act of 1929. I.L.R. (1936)

[1][92. Any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

Subrogation.

The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated.

Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.]

LEG. REF.

[1] Inserted by Act XX of 1929.

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N. 127=1936 N. 209=1937 N. 400; 1936 A. 512. He has no right to redeem under the amended section, cl. (*f*) of the old section being omitted in it. 43 M. 696=39 M.L.J. 456; 64 I.C. 525=13 Bur.L.T. 221; 15 I.C. 334; 1926 N. 67; 37 M. 418; 1923 N. 311; 89 I.C. 444; 1925 M. 266. *See also* 53 M. 881=1930 M. 801=59 M.L.J. 634 (F. B.); 58 C. 598. As to whether attaching creditor is a necessary party to mortgage suit, *see* 1936 A.L.J. 708=1936 A. 512.

Secs. 91 and 92.—A person holding an invalid mortgage does not come within Cl. (*a*) of S. 91 and he is not entitled to be subrogated to the rights of a prior mortgagee whose mortgage has been redeemed with the money advanced by him. 42 C.W.N. 1106.

Sec. 92.—This section takes the place of repealed Ss. 74 and 75 and is retrospective. 1932 A.L.J. 627=1932 A. 489 (F.B.); 59 M. 359=70 M.L.J. 1 (F.B.); 160 I.C. 933=1936 P. 60; 39 Bom.L.R. 1309=1938 B. 115; 1937 A. 588; 1940 A. 237; 44 Bom.L.R. 415; 1940 A. 75; 1936 M. 171; 1938 O.W.N. 401=1938 O. 127; 42 C.W.N. 1106; 1938 B. 508=40 Bom.L.R. 1001. But *see* 1938 Rang. 306; 1936 R. 512; 1938 M. 779; 1940 P. 385; 40 Bom.L.R. 517=1938 B. 386. Question left open in 67 I.A. 82=I.L.R. (1940) 1 Cal. 291=44 C. W. N. 261=1940 P. C. 38=(1940) 1 M. L. J. 446. *See contra* 14 R. 494=163 I. C. 645=1936 R. 152; 155 I.C. 905=1935 O. W. N. 622. Act XX of 1929 did not clothe persons who under the previous law obtained only a charge with the rights of a mortgagee. 30 N.L.R. 1=1934 N. 97. Before the new S. 92 came into force an intention to keep alive a prior incumbrance was presumed. But by the amended section, the law has been changed and now there can be no presumption, and the person who has advanced money to a mortgagor, money with which the mortgage has been redeemed, has to prove the existence of a registered agreement of subrogation before he can claim that relief. 11 O.W.N. 618=1934 O. 213. *See also* 155 I.C. 905=1935 O.W.N. 622. The principles underlying S. 92 ought to be taken as a guide for determining when there is a conflict of authority, what equitable rules with reference to subrogation should be adopted in cases arising prior to the amendment. 39 Bom.L.R. 1309=1938 B. 115. Where there are three successive mortgages, two simple, and a third usufructuary, in favour of the first mortgagee himself and a purchaser of the equity of redemption of such a mortgagor pays off the amount of the decree obtained by the second mortgagee, he is not entitled to claim to be subrogated to the rights of such mortgagee under S. 92. S. 92 uses language which appears to postulate an existing mortgage and not a mortgage which has merged in a decree. I.L.R. (1939) A. 185=1939 A.L.J. 228=1939 A. 190.

SCOPE AND APPLICATION.—The doctrine of subrogation is an equitable doctrine founded on principles of natural justice, by no means confined to S. 92. 9 O.W.N. 387. *See also* 41 C.W. N. 472=1937 C. 194. The section does not cover the case of a mortgagee paying up his own earlier mortgage but the doctrine is wide enough to govern such a case. 1937 C. 194. Section 92 contains a principle of equity, applicable to N.W. F. Province. 183 I.C. 833=1939 Pesh. 34. Section applies in the case of a co-mortgagor who redeems property subject to the mortgage. 178 I.C. 974=40 Bom.L.R. 1001=1938 B. 508. The principle is that he who removes another's burden steps into the shoes of the person whose rights constitute the burden. 28 N.L.R. 247. Even if general principles of subrogation are applicable in the Punjab, the principle is now embodied in S. 92 and must be applied on the lines indicated there. 42 P.L.R. 812=1941 L. 53. S. 92, T. P. Act, applies only when some one other than the mortgagor has in fact redeemed the property. 1937 C. 336. The "mortgagor" in S. 92, as amended is not limited to person who effected the mortgage but includes those deriving title from him by transfer of his equity. I.L.R. (1938) N. 206=20 N.L.J. 253=1937 N. 372 (F.B.). The doctrine of subrogation has no application when a person simply performs his own obligation, and pays off a charge which he has undertaken to satisfy. 110 I.C. 441=1928 N. 230. *See also* 43 C. 69=20 C.W.N. 601; 11 O.W.N. 139=1934 O. 129; 1918 M.W.N. 251=44 I.C. 753; 45 M.L.J. 693=1924 M. 103; 1930 A.L.J. 1222

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=1931 A. 76. It proceeds upon principles of equity and cannot be availed of by a person who has not performed his own obligation. 146 I.C. 679=1933 L. 810. *See also* 155 I.C. 905=1935 O. 622. Sale of property subject to two mortgages —Bulk of purchase-money left with vendee to pay off mortgages—Payment of prior mortgagee by vendee cannot be used as shield against claim of second mortgagee. (*Ibid.*) A purchaser from such purchaser with notice of the covenant cannot also claim any right of subrogation. 1933 M. 715 =65 M.L.J. 390. In order to support a claim of subrogation under this section, there should be a registered instrument to that effect. 134 I.C. 1093=8 O.W.N. 1105. Where full payment of the decretal debt due to the prior mortgagee has not been made by the puisne mortgagee, the question of subrogation and the latter stepping in the shoes of the former cannot arise. 110 I.C. 441=1928 N. 230. *See also* 27 L.W. 544=1928 M. 713 (F. B.); 43 C. 69; 79 I. C. 766=1924 R. 204; 1926 P. 23; 43 M.L.J. 284=95 I.C. 689; 35 M. 183=22 M.L.J. 12; 36 C. 193; 38 A. 502; 1926 N. 21; 29 I.C. 583 (M.); 29 I.C. 511 (M.); 55 I.C. 658 (M.); 38 M. 548=28 M.L.J. 484; 1930 N. 166; 8 P.360=1929 P. 325. (*See* now last para. of S. 92.) A right of subrogation cannot be claimed unless the prior mortgage has been redeemed in full. It does not mean that the redemption must be effected entirely by the person claiming subrogation. 18 P. 342=1939 P.W.N. 8=1939 P. 375; 1937 A. 588=1937 A.L.J. 659=I.L.R. (1937) A. 880. A person who claims to be subrogated to the rights of a mortgagee must pay the entire amount of the incumbrance in question. Whether the right be claimed under the statute or under the pre-existing law. 67 I.A. 82=I.L.R. (1940) 1 Cal. 291=44 C.W.N. 261=1940 P. C. 38=(1940) 1 M. L. J. 446 (P.C.). If the mortgage has been paid off by two persons neither of whom would have been able to pay it off without the help of the other, there is no principle on which one of them should be granted and the other denied the right of subrogation. Both of them would be entitled to the right of subrogation. I.L.R. (1941) M. 924=1941 M. 563=(1941) 1 M.L.J. 519. *See also* 42 C.W.N. 1106. A person who advances money on a subsequent mortgage for the discharge of a decree, obtained by a prior mortgagee is also entitled to priority over an intermediate mortgagee, to the extent of the amount paid for satisfying the prior mortgagee's decree. 97 I.C. 594=1927 A. 28. *See also* 42 M.L.J. 15=48 I.A. 465 (P. C.). But *see* 40 A. 407; 45 I.A. 130; 41 A. 456=51 I.C. 155; 41 M.L.J. 399 (413 & 420); 24 A.L.J. 570; 58 I.C. 813=39 M.L.J. 445; 26 M.L.J. 94=21 I.C. 971; 1933 M. 715=65 M.L.J. 390. Where a subsequent mortgagee after a preliminary decree in the suit by the first mortgagee, pays off the decretal amount, he is entitled to be substituted for the first mortgagee as a plaintiff. As the Court has to pass a final decree, it is clear that the Court is not *functus officio* when the payment is made and accepted. 146 I. C. 514=29 N.L.R. 183=1933 N. 163. All that is necessary is that the mortgage in respect of which the right is claimed should have been redeemed in full. It is not necessary that the entire amount due on the basis of the mortgage should be paid if the mortgagee agrees to let the mortgage be redeemed on payment of a smaller amount. 158 I.C. 643=1935 A.L.J. 1129. Every subsequent mortgagee who pays off the previous mortgagee succeeds to the entire rights possessed by his predecessors in interest and if those rights include a right of priority, he will be clothed with that right too. 190 I C. 599=1940 L. 269. Where a descendant of a mortgagor is liable at least for a portion of the debt due on that mortgage, and his mother has executed a mortgage as his guardian, during his minority to pay off the entire mortgage-debt, the subsequent mortgagee's right of subrogation is not affected in a prejudicial manner. 171 I.C. 423=1937 O.L.R. 551=1937 O.W.N. 1107. Subsequent mortgagee—Money retained for paying off prior mortgage—Excess, if any, to be paid by mortgagor—Excess paid by mortgagee—Priority. 9 O.W.N. 253. A puisne mortgagee who pays off a prior mortgage as part of the consideration for the puisne mortgage gets no right of subrogation by his payment, because he is using the mortgagor's money and not his own in so paying off the prior mortgage. 44 Bom. L.R. 20. *See also* 44 Bom.L.R. 415. A subsequent mortgagee who redeems a prior mortgage with money left with him for that purpose by the mortgagor is subrogated to the rights of the prior mortgagee under S. 92, though the mortgagor has not by a registered agreement agreed that he shall be so subrogated. 1942 O.W.N. 165=1942 O. 260 (F.B.). Where a person himself redeems a mortgage, that is to say, pays the mortgage-money out of his own pocket and not merely discharges a contractual liability to make the payment, he is entitled to the right of subrogation under the first paragraph of S. 92, if he is one of the persons, other than the mortgagor, enumerated in S. 91. But where such person does not himself redeem the mortgage, that is to say, does not himself pay the money out of his own pocket in excess of his contractual liability but advances money to a mortgagor and the money is utilized for payment of a prior mortgage, whether the money is actually paid through the hands of the mortgagor or is left for such payment in the hands of the person advancing the money and it is then paid to the prior mortgagee through the hands of that person, the latter acquires the right of subrogation under the third paragraph of S. 92, only if the mortgagor has by a registered instrument agreeing that he be subrogated. 44 Bom.L.R. 415. *See also* 1940 A.L.J. 234=1940 A. 237. The doctrine has been applied for the *benefit* of a party making the payment in suitable cases and cannot be applied to the *disadvantage* of that party. 50 A. 569=1928 A. 241. Purchaser under sale-deed—Discharge of vendee's liabilities—Sale void for want of title in vendor—Vendee's right to subrogation. 12 Mys.L.J. 288 =39 Mys H.C.R. 374. A person who has paid off amount of a maintenance charge decree becomes subrogated to the decree-holder's rights 30 N.L.R. 148=148 I.C. 815=1934 N. 84. But the charge which is created by the decree for rent obtained by the landlord is a right to which the landlord alone is entitled, and there is no right of subrogation in the person advancing money to the mortgagor to pay off the rents. 1934 P. 70. The circumstances under which rights are

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claimed on the ground of subrogation must be such as to leave no doubt as to the intention of the parties and also as to the possibility of an assignment if contemplated. 27 L.W. 544=1928 M. 713 (F.B.). It is open to the mortgagee to abandon his lien under the mortgage and bring a simple suit for the recovery of the money. The puisne mortgagee will be entitled to reimbursement under S. 69 of the Contract Act. 54 C. 424 =101 I.C. 130=1927 C. 393. As to mortgagee himself taking renewal of previous liabilities claiming subrogation, *see* 6 O.W.N. 718. Subsequent mortgagee paying off prior mortgagee has priority over intermediate mortgagee. 27 A.L.J. 750=1929 A. 621. *See also* 54 C. 424=1927 C. 393; 1930 A.L.J. 890=1930 A. 561; 1933 N. 163; 1933 N. 155=144 I.C. 969. Where a purchaser of a portion of the equity of redemption retains at the time of his purchase a part of the price and expressly agrees to discharge the prior mortgage debts out of the same, he is not entitled to subrogation by paying off those debts as he simply discharges his obligation under an express contract. 62 C. 677. *See also* 1939 N.L.J. 369= 1939 N. 215. As to the rights of the second mortgagee who purchases at a sale held in pursuance of a decree passed in a suit on a prior mortgage, *see* 35 C.W.N. 877. An officious or voluntary payment carries with it no right of reimbursement or of subrogation. 192 I.C. 712=1941 O. W.N. 204=1941 O. 226. Section does not embrace strangers who pay off part of the mortgage decree. 27 L.W. 544. *See also* 22 M.L.J. 364=15 I.C. 206; 1927 M. 204=52 M.L.J. 33; 32 A. 25; 36 M. 426 (432-434); 31 M. 439; 1929 M. 860; 1929 R. 298; 26 M.L.J. 74=22 I.C. 253; 54 M. 708=1931 M. 592. But where a stranger pays up the prior mortgage with the consent of the puisne mortgagee he is entitled to subrogation and priority. 44 I.C. 726; 1931 M. 720. *See also* 12 I.C. 805=4 Bur.L.T. 127. Where a person *bona fide* thinking he is the heir of a deceased person spends money in freeing the estate from debts, he is entitled to relief. 42 I.C. 428=4 O.L.J. 514; *also* 9 I.C. 789=(1911) 1 M.W.N. 197; 10 I.C. 556=8 A.L.J. 663; 37 M.L.J. 113=51 I.C. 57; 1937 M.W.N. 582. A third party paying off a mortgage debt in the *bona fide* belief that he is entitled to do so, is entitled to subrogation of the mortgagee's rights. But he does not thereby extinguish the mortgage, so as to enable him to claim, if in possession, that he has acquired a title to the property by adverse possession by remaining in possession for over 12 years. 40 L.W. 300. *See also* 45 L.W. 300= 1937 M. 451=1937 M.W.N. 582. As to whether a purchaser under a sale fraudulent under S. 53, may claim subrogation in respect of a mortgage satisfied by him, *see* 1936 N. 207=I.L.R. (1936) N. 183. The section does not apply to a case where a purchaser from the widow having no interest in the equity of redemption pays off a mortgage on the property which has been subsequently sold to a third person by the mortgagor. 130 I.C. 506=1931 M. 110. Where a purchaser of a property from the widow holding a life-estate discharges a mortgage out of the consideration for the purchase and on the death of the widow the reversioner sues for possession, credit should be given to the mortgage amount paid by the purchaser. If the reversioner does not impute bad faith on the part of the purchaser, he is not bound to allege or prove good faith. 1934 P. 681. An alienee from manager of joint Hindu family can be subrogated to the rights of the previous mortgagee whom he has paid, though the legal necessity in his favour has not been established. 8 O.W.N. 222=1931 O. 144 (2). Where the defendant executed an equitable mortgage in the plaintiff's favour authorising the latter to pay off an earlier mortgage on the plaintiff paying off the prior mortgage is entitled to subrogation. 107 I.C. 417 (2)=1927 M. 1180 (2). *See also* 1931 N. 138. Properties subject to two mortgages were sold by the mortgagor. The purchaser subsequently paid the first mortgage, got an assignment of it in favour of a third party, and then sold the property and part of the consideration was applied towards the discharge of the first mortgage. *Held*, the second vendee was subrogated to the rights of the first mortgagee and his right was upheld, in a suit by the second mortgagee and the purchaser in execution sale could not question vendee's rights. 5 L.W. 360=38 I.C. 715. *See also* 42 P.L.R. 139=1940 L. 201. *Mortgagee of undivided share* redeeming prior mortgage—Rights of—Subrogation and contribution. *See* 9 P.L.T. 313. Sale under prior mortgage decree—Surplus sale proceeds go not to owner or transferee of his rights but to puisne mortgagee. 1928 N. 34. On this section, *see also* 52 M.L.J. 532; 104 I.C. 358= 1927 N. 343; 103 I.C. 703=1927 P. 379; 25 A. L.J. 20=31 C.W.N. 538 (P.C.). Meaning of. "*To redeem up; to foreclose down.*" 10 I.C. 748 =13 Bom.L.R. 162. *See also* 90 I.C. 410. For *difference between equitable and statutory subrogation*, see 20 I.C. 458=16 O.C. 148. *See also* 1925 M. 80=47 M.L.J. 316; 11 O.W.N. 619=1934 O. 213. Legal and conventional subrogation, difference between. 31 N.L.R. (Supp.) 169=161 I.C. 551=1936 N. 32. The law relating to legal subrogation is now contained in para. 1 of S. 92, and the law relating to conventional subrogation in para. 3. S. 92 as it stands after the amendment of 1929 does not recognise any doctrine of agency. 1936 N. 32. So, where a purchaser of the mortgaged properties as part of consideration for the sale pays off and thus redeems a prior mortgage, he is entitled to be subrogated to the rights of the prior mortgagee under para. 1 of S. 92, as he is one of the persons referred to in S. 92 and is entitled to set up the prior mortgage as a shield against the subsequent mortgagee, although there is no registered agreement that he should be so subrogated. 1936 N. 32. [*See* 1936 A.L.J. 281=1936 A. 336. Case of subsequent mortgagee redeeming earlier mortgage.] Where a person buys property in good faith and discharges a mortgage binding on that property, he becomes an equitable assignee of the mortgage if it subsequently turns out that the vendor had no right to convey. 37 M.L.J. 113=51 I.C. 57. *See also* 7 O.W.N. 610=1930 O. 397. Where a person alleging that he is the real purchaser in a Court-auction sale has on the basis of his supposed title paid off a binding mortgage debt and his conduct is shown to be *bona fide*, he is entitled to remain in possession of the property till the certified purchaser pays him the amount and redeems the property. 1931 A.L.J. 601. An auction-purchaser who redeems a mortgage could be subro-

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gated to the rights of the mortgagee under S. 92. 13 Luck. 484=1937 O.W.N. 944=1937 O. 493. *See also* 44 Bom.L.R. 20. Purchaser of property charged to Government for a tagai loan after attachment in execution of money decree—Part consideration retained for payment to Government—Sale in execution—Claim to subrogation—Maintainability—Absence of registered agreement of subrogation—Effect of—Claim to recover amount under S. 69, Contract Act. 43 Bom.L.R. 225=1941 B. 153. To exercise right of subrogation, one must have interest in redeeming the prior mortgage. 1 P. 780; 3 P.L.T. 232. A mortgagee claiming *under a void mortgage* has no interest to protect by the payment of a prior mortgage decree, and where he does not obtain any covenant entitling him to the rights of the prior mortgagee there is no equity in his claim for a new security based on the prior mortgage. 1936 O.W.N. 489=1936 O. 280. But *see* 1925 M. 80 =47 M.L.J. 316; 89 I.C. 116. A puisne mortgagee can always pay off a prior encumbrance: 35 I.C. 87: 56 I.C. 717=15 N.L.R. 134; even after a decree on the prior mortgage: 24 I.C. 754. [*See* 131 I.C. 599=1931 A. 40. *Principles of subrogation discussed*]:. [8 O.W.N. 541, prior mortgage not extinguished by the decree]. A subsequent mortgagee suing for redemption of an earlier mortgage is not an agent of the mortgagor. Rights on redemption discussed. 129 I.C. 378= 1930 A. 869. His remedy to recover that amount is not by execution of the decree but by separate suit: 1925 M. 129; 1925 M. 80=47 M.L.J. 316; and he is presumed to keep it alive (under amended section it is deemed to be kept alive) for his benefit. 17 L.W. 14=1923 M. 349; 11 I.C. 469; 21 I.C. 560; 45 B. 1112=62 I.C. 477. There is a presumption that the holder of a subsequent mortgage who has prior mortgages on the same property would keep alive the prior mortgages if they are for his benefit. But the presumption can be rebutted if the circumstances are such that he could not have intended to hold the prior mortgages alive. The question whether such keeping alive would be for his benefit has to be decided in the light of circumstances existing at the time of the transaction, the onus being on him to prove circumstances leading to the inference that it was in his interest to keep the charges alive. 153 I.C. 870=1935 L. 203. His right to reimbursement arises on the date on which he pays off the prior mortgage. 51 I.C. 549=22 O C. 32; 63 I.C. 604=19 A.L.J. 840. *See contra* 42 I.C. 496=13 N.L.R. 217. On such redemption, subsidiary rights such as leases created by the prior mortgagee come to an end *ipso facto* and any tenant continuing in possession is a trespasser. 69 I.C. 651=41 M.L.J. 462. Where in a suit by a prior mortgagee the puisne mortgagee is not a party, the latter's right to redeem is unaffected. 39 C. 527=39 I.A. 68=22 M.L.J. 468 (P.C.); 1923 A. 457; 40 M. 77=30 M.L.J. 347; 1926 M. 101; 44 A. 418=1922 A. 104; 1928 P. 589; 34 Bom.L.R. 1519. *Obiter*: A puisne mortgagee whose right to enforce his mortgage is barred under Art. 132, Limitation Act, may nevertheless be entitled to redeem a prior mortgage under S. 92. 34 Bom.L.R. 1519. As between a first mortgagee auction-purchaser and the puisne usufructuary mortgagee who renewed his mortgage after decree in the first mortgagee's suit to which he was not a party, he is deemed to keep alive his rights under the first deed in his favour. 37 I.C. 456=4 L.W. 477. A *purchaser of a portion of the mortgaged property* by paying the amount to the first mortgagee acquires the rights of the first mortgagee, and he is entitled to use the first mortgage which he has satisfied as a shield against the second mortgage. 144 I.C. 326=1933 N. 171; 13 Luck. 761=1938 O.W.N. 489=1938 O. 127. And no restrictions are placed on the applicability of that section to cases where the money is paid out of the sum left in the hands of the transferee or cases where he has undertaken liability to discharge the previous debt. 1934 A.L.J. 887= 1934 A. 1035. But *see* 62 C. 677. Sale of mortgaged property by mother for herself and on behalf of ward—Purchaser directed to pay off two mortgages—Earlier mortgage alone paid—Suit by subsequent mortgagee—Purchaser's right to sue prior mortgage as a shield—Avoidance of mortgage on behalf of minor—Restitution of benefit. 108 I.C. 728=1928 A. 77. A subsequent mortgagee who advances money or covenants to discharge three prior incumbrances on the property, but pays off only two of them, is not entitled to avail himself of such payment so as to resist the claim of the encumbrancer whom he has not paid off. The covenant indicates an intention that the whole debt was to be extinguished; and since he breaks his contract and pays only two of the three mortgages, he cannot claim subrogation. Under S. 92, there is no right of subrogation unless the mortgagor has, by registered agreement, agreed that the person advancing the money shall be subrogated in respect of the mortgage or mortgages discharged; and when no such agreement is forthcoming, the right of subrogation cannot be allowed. 59 M. 359=70 M.L.J. 1 (F.B.). Where the purchaser of the equity of redemption is made to pay off a first encumbrance which a puisne mortgagee ought to pay as per terms of the puisne mortgage, he can sue the puisne mortgagee for such amount. 19 I.C. 676=11 A.L.J. 478. Where a vendee who had undertaken to pay off prior mortgage under his sale-deed, and obtained possession delayed payment, in consequence of which further interest accrued, the vendee can claim credit for the extra interest when a suit is brought by the subsequent mortgagee. The subsequent mortgagee was not privy to the contract between the mortgagor and the vendee and could not be allowed to take advantage of terms of that contract. 1934 A.L.J. 887=1934 A. 1035. Where there was a prior and later mortgage, and a vendee undertakes to pay off a portion of the prior mortgage, a right to subrogation cannot arise until and unless he proves that he has made the payments undertaken by him to be paid and that the rest of the amount due under the prior mortgage has also been paid. 172 I.C. 301=1938 O. 22. As regards conflict of titles of purchasers in sales in execution of decrees of both prior and puisne mortgages, *see* 37 I.C. 343=14 A.L.J. 1146; 14 I.C. 449=22 M.L.J. 129: 1933 C. 181. As between two purchasers of mortgaged property the title to the outstanding equity of redemption is determined by the priority, not of the respective mortgages but of the respective sales and the person who first buys the equity of redemption whether he be

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the mortgagee himself or a stranger would be entitled to redeem all the subsisting mortgages on the property and thus acquire an absolute title. 145 I.C. 575=1933 C. 181. Where the puisne mortgagee obtained a decree for sale subject to a prior mortgage, and the mortgagor inherited the rights of the prior mortgagee, he cannot set up the prior mortgage as a shield, but the property will be sold free of incumbrance. 37 A. 309=28 I.C. 973. *See also* 52 I.C. 159=22 O.C. 72.

RIGHT OF SUBROGEE.—The remedies of the subrogee are not co-extensive with those of the original creditor. The subrogee's remedy is not to bring a suit on the original mortgage. His cause of action for a suit to enforce the right of subrogation would arise from the date when the mortgage or mortgage decree was paid off. 18 Pat. 342=1939 P.W.N. 8=1939 P. 375. It is clear from the first two paragraphs of S. 92, as amended, that the person who is subrogated to the position of a prior mortgagee has the same rights as that mortgagee. He cannot only use the earlier mortgage as a shield but also enforce the rights of the earlier mortgagee. If the case, however, falls under the third paragraph of S. 92, then all that is necessary is that the mortgagor should have agreed by a registered agreement that the person advancing money to him should be subrogated to the position of an earlier mortgagee. Section has merely crystallised the existing law on the subject with this difference that now subrogation will not be granted unless the mortgagor has by registered instrument agreed that the person who has advanced money to him with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed. 19 P. 752=21 P.L.T. 453=1940 P. 385 (F.B.).

RIGHT OF CO-MORTGAGOR REDEEMING THE WHOLE MORTGAGE.—A co-mortgagor redeeming the mortgage has now the same rights as the mortgagee whose debt he has paid. *See* for decisions prior to the amending Act. 31 A. 166; 46 B. 213. *See also* 1927 P. 379; 1927 P. 117; 4 O.C. 273; 55 M.L.J. 326; 50 A. 569; 1941 P.W.N. 667; 1938 L. 184=42 P.L.R. 546; 1923 L. 129; 69 I.C. 643; 49 I.C. 416=9 L.W. 120; 38 A. 138=34 I.C. 244; 38 A. 92=32 I.C. 177; 41 M. 650=34 M.L.J. 528; 12 O.L.J. 313=1925 O. 613; 11 O.L.J. 381=1924 O. 85; 60 I.C. 213=23 O.C. 384; 53 B. 353=31 Bom.L.R. 129; 26 B. 379; 12 A. 110; 45 I.C. 904 (Payment need not be in Court). The Legislature by the amendment has simply classified the position o the co-mortgagor holding a charge within S. 95 read with S. 100. 127 I.C. 889=1930 N. 300. Distinction between the right of subrogation conferred on the puisne mortgagee and co-mortgagor (prior to the amendment) pointed out in 58 C. 1167=35 C.W.N. 409=1931 C. 251 (F.B.). Where a dispute relating to a mortgage executed by five brothers was referred to arbitration and an award was passed, if the award be treated as tantamount to a decree of Court superseding the mortgage, the mortgagors become co-judgment-debtors and if one of them has paid off the mortgage debt, he would acquire a right similar to that of a co-mortgagor paying off the mortgage-debt. 127 I.C. 889=1930 N. 300. The redeeming co-mortgagor is entitled to priority over subsequent mortgagees from the other co-mortgagors. 31 A. 166. He can sue the other mortgagors for contribution in respect of the shares of each. 51 M. 810=55 M.L.J. 326=1928 M. 950; 4 O.C. 273; 1927 P. 117; 1927 P. 379. *See also* 22 I.C. 918=4 C.L.J. 79; 3 C. 397 (P.C.); 21 C.L.J. 104; 27 I.C. 780 (Decisions relating to the right of contribution under old S. 95). As to charge in favour of co-mortgagor redeeming whole mortgage under old S. 95, *see* 55 I.C. 450; 21 C.L.J. 104=27 I.C. 780; 11 C.L.J. 226=14 C.W.N. 617=5 I.C. 165; 46 C. 111=22 C.W.N. 637=45 I.C. 783; 57 I.C. 868; 31 Bom.L.R. 129; 1919 M.W.N. 467=49 I.C. 416; 12 A. 110; 60 I.C. 213; 45 C. 111; 12 Bur.L.T. 19 =47 I.C. 121. As to the *principles on which contribution is determined* see S. 82. Right of contribution does not depend upon whether redemption was voluntary or by coercive process. 57 I.C. 884; 27 I.C. 780 =21 C.L.J. 104. Principle of old S. 95 also applies where part of the mortgaged property has been purchased by mortgagee. 47 M. 4=44 M.L.J. 534=1923 M. 533; 51 M. 810=55 M.L.J. 326=1928 M. 950; 88 I.C. 544=1925 O. 629; 103 I.C. 84=1927 A. 626. A purchaser redeeming only a half share in the mortgage is not entitled to subrogation. 2 O.W.N. 559; 13 P.L.T. 686. A purchaser of part of the mortgaged properties who has a right to contribution in respect of mortgage debt paid off by him cannot use such right as a shield, or refuse to give up possession of the part belonging to another owner until payment of the amount of contribution, if such right is barred by limitation. Nor could such right be used as a sword against the owner's independent equity of redemption or as a shield to protect the possession obtained by reason of paying off the mortgage debt, when the right is barred by limitation. 41 L.W. 730=68 M.L.J. 362. A co-mortgagor who redeems and obtains possession can retain possession till the other co-mortgagors pay. 22 I.C. 918; 8 P.L.T. 81=1927 P. 25. The redeeming co-mortgagor cannot set up against the other co-mortgagors a covenant enforceable as between such other mortgagors and the mortgagee. 52 I.C. 91=22 O.C. 112. *Co-mortgagors* can bring a suit for redemption against the redeeming mortgagor in possession for redemption of their shares and possession 20 A.L.J. 611=1922 A. 410; 8 P.L.T. 81=1927 P. 25; 1930 A. 523. So also a *surety* who pays off the debt of the principal debtor gets all the rights of the original creditor. 21 W.R. 347. In the absence of an open disclaimer of hostile title by a co-sharer against the others, he cannot get title by adverse possession barring the other's right of redemption. 15 I.C. 500=14 Bom.L.R. 314, Limitation, *see* 41 M. 650=34 M.L.J. 528. Mortgagor must show that his suit is within limitation. 103 I.C. 215=1927 L. 574. Purchaser redeeming mortgage rights off, as against prior purchaser. 109 I.C. 777=1928 N. 246. A vendee of the equity of redemption paying off prior mortgages out of sale price left with him under an express covenant for such payment is not entitled to subrogation when there is no registered agreement conferring the right. 17 P. 666=19 P.L.T. 500 =1938 P. 532; 1937 N. 372. *See also* 1939 M. 949=(1939) 2 M.L.J. 533; 1937 O.W.N. 1107; I.L.R. (1937) A. 880=171 I.C. 153. Vendee of sham title of the mortgagor is not entitled to any

[1][93. No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security ; and, except in the case provided for by section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.]

Prohibition of tacking.

[2][94. Where a property is mortgaged for successive debts to successive mortgagees, a mesne mortgagee has the same rights against mortgagees posterior to himself as he has against the mortgagor.]

Rights of mesne mortgagee.

LEG. REF.

[1] Inserted by Act XX of 1929 for old S. 80.
[2] Added by Act XX of 1929.

NOTES.

rights under old S. 95. 17 L.W. 254=1923 M. 392. A purchaser under sale void *ab initio* is entitled to be subrogated to rights of mortgagee paid off to the extent of the purchase-money, applied in discharge of the mortgage. 1937 N. 330 =I.L.R. (1937) N. 111. But he is not entitled to use such payment as a shield and resist the plaintiff's claim for possession under a valid sale-deed. But he could enforce his rights in proper proceedings taken for the purpose. 1936 A.L.J. 1176=1937 A. 119. A lender might well have a statutory subrogation right under para. (1) as falling within the class delimited by S. 91 and not as being a person who has advanced money, or, he might only have a conventional right of subrogation. In this latter case he would come in only in virtue of para.(3) and then his contract must be in writing registered. I.L.R. (1938) N. 206=1937 N. 372 (F.B.). *See also* I.L.R. (1937) A. 880. The words in the section 'mortgage has been redeemed' refer merely to the payment off of the mortgage money and not to an extinction of the mortgagee's rights over the mortgaged property. If such rights had become extinguished there would be none to which the person advancing the money would be subrogated. 67 I.A. 82=I.L.R. (1940) 1 C. 291=1940 A.L.J. 550=44 C.W.N. 261= 1940 P.C. 38=(1940) 1 M.L.J. 446 (P. C.). *See also* 1940 P. 64. Since the amendment, a transferee discharging an incumbrance on the property cannot be subrogated to the rights of the mortgagee in the absence of a registered agreement between him and the transferee as required by para. (3) of S. 92. Nor can he get any equitable relief in the form of a charge. (1942) 2 M.L.J. 444. S. 92, para. 4 makes no exception in favour of a person who has been allowed by the mortgagee to redeem the mortgage in part and hence such a person cannot claim to be subrogated, to any proportionate rights. 187 I.C. 274=1940 A. 75.

Secs. 92 and 95.—A person who has acquired a portion of the equity of redemption is in the position of a co-mortgagor with the owner of the remaining portion. If such a person redeems the entire mortgage, he is entitled to the right of subrogation under S. 92 or 95. 188 I.C. 417= 1940 P. 620.

Secs. 92, 82, 85 and 100.—Subrogation being a mere substitution does not create any fresh rights but puts the claimant in the shoes of the cerditor. In a case of subrogation under S. 92, the mortgage that is redeemed is not extinguished but is regarded as assigned to the subrogee. The limitation would be that applicable to the original encumbrance irrespective of the date of its discharge. Right of subrogation may exist with and as a further security to the right of a simple action for reimbursement. The latter right arises not under S. 92 but under S. 82 and S. 85 read with S. 100. 1942 N.L.J. 267. *See also* 1937 N. 402.

Sec. 93.—The section prohibits tacking. 16 A. 295 ; 8 C.W.N. 699 ; 51 C. 86. This is new and takes the place of old S. 80 now repealed. The words " in the case provided for by S. 79 " do not really mean mortgages to secure future advances or the balance of a running account, but that the mortgages there referred to must express a maximum. The words " *to secure future advances, etc.* " denominate the different classes of mortgages, but to bring them under S. 79, they must have the common feature of a maximum expressed. The word '*subsequent*' means subsequent to the intermediate mortgage, and an advance made after another mortgage becomes a subsequent advance. 45 M.L.J. 505=50 I.A. 283=51 C. 86 (P.C.). An undertaking by a mortgagor who takes a fresh advance that he will not redeem the mortgage until he repaid the advance is legal and enforceable against himself and not against a purchaser. 9 O.L.J. 484= 1923 O. 24. Where a second mortgage provided that " the amount due on it would be paid along with the sum of the first mortgage " and that the second mortgage was to be tacked on to the first, the first mortgage could not be redeemed without redeeming the second. It is possible to tack a simple mortgage upon a usufructuary mortgage. 129 I.C. 550=1931 A. 197.

Sec. 94.—*See* 10 I.C. 748=13 Bom.L.R. 162 ; 90 I.C. 410 and also notes under S. 92. The latter mortgagee can always redeem the earlier ; but the prior mortgagee cannot redeem the later except with the consent of the latter. 1926 N. 21 ; 130 I.C. 301=1931 A. 347. Purchase by mortgagor of his own property in execution— Right of subsequent mortgagee. 1931 M. 642. A purchaser of mortgaged property who pays the prior encumbrances and subsequently claims interest on such payments should also account for corresponding proportion of the profits derived from the property. If interest he claims is less than the profits he need not account for surplus. But if the interest exceeds the profits, he will have to credit the profits towards interest and claim only the balance. 1935 M. 360=68 M.L.J. 717. A person, who is in the rights of a first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage, is entitled at the

[1][95. Where one of several mortgagors redeems the mortgaged property, he shall, in enforcing his right of subrogation under S. 92 against his co-mortgagors, be entitled to add to the mortgage-money recoverable from them such proportion of the expenses properly incurred in such redemption as is attributable to their share in the property.]

Right of redeeming co-mortgagor to expenses.

[2][96. The provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds.]

Mortgage by deposit of title-deeds.

97. [3][*Repealed.*]

Anomalous Mortgages.

98. In the case of [4][an anomalous mortgage], the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage.

Rights and liabilities of parties to anomalous mortgages.

LEG. REF.

[1] Substituted by Act XX of 1929.

[2] Added by Act XX of 1929.

[3] Repealed by C. P. Code. *Cf.* O. 34, Rr. 12 and 13.

[4] Substituted for "a mortgage not being a simple mortgage. . . . of such forms" by S. 49 of Act XX of 1929.

NOTES.

suit of a subsequent mortgagee who is not bound by the sale or the decree on which it proceeded to set up the first mortgage as a shield. 1934 P. 70.

Sec. 95.—Prior to the amendment, a co-mortgagor who redeems the mortgage is not subrogated to the rights of the mortgagee whom he redeems but has only the rights conferred on him by S. 95 as it stood then (*i.e.*), to contribution from each of his own co-mortgagors. I.L.R. (1941) N. 434=1941 N.L.J. 439. The section has been amended in such a way that Ss. 92 and 95 as they now stand make it clear that a co-mortgagor redeeming has the "same right as the mortgagee, whose mortgage he redeems may have against the mortgagor." In effect 25 C.W.N. 283 is now statute law. The amendment provides to the co-mortgagor the same security that proper conveyances would always have provided and not a form of charge which is different in some of its incidents. 35 C.W.N. 409=1931 C. 251 (F.B.). The application of S. 95 is not restricted to cases where the co-mortgagor cannot redeem his own share only and is compelled to redeem the whole property and will apply where a co-mortgagor redeems the whole property with the mortgagee's consent, although he might have compelled the mortgagee to permit the redemption of his own share only and the other co-mortgagors cannot recover possession of their share without payment of their proportionate amount. 1932 A.L.J. 986. Where there are several mortgages on a property the owner of the property subject to the mortgages may, if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor. Where it is manifestly for his benefit, it may be presumed that it was his intention to keep the prior mortgage alive, when S. 95 does not apply. 30 N.L.R. 1=1934 N. 97. Under the old section, the redeeming co-mortgagor is only given a charge for his portion for expenses properly incurred in so redeeming and obtaining possession of the mortgaged property. Consequently, his claim to interest on the expenses so incurred must arise, if at all, not from the section, but from some other ground, for instance, if he gave notice to the co-mortgagors. 49 B. 591=27 Bom.L.R. 629. *See also* 49 I.C. 230; 14 C.W.N. 617 (624); 4 C. L. J. 79; 13 P. 356=1934 P. 612. The expression "the expenses properly incurred in so redeeming" in the old section includes the mortgage debt. 35 C.W.N. 409=1931 C. 251 (F.B.). Now the right of the co-mortgagor to the mortgage security for the debt discharged is provided in S. 92. Section does not apply to a *member of a Malabar tarwad* redeeming a kanom by a previous karnavan. *See* 1929 M.W.N. 722=1929 M. 860. Mere mutation of names does not confer any title. 1933 O. 28=9 O.W.N. 923. Where the holder of a mortgage decree for sale assigns it to a person who acquires the interest of one of the judgment-debtors before the assignment and in execution poroceedings started by him the other judgment-debtors object to the execution and challenge the assignment the rights of the parties cannot be determined in execution proceedings but must be left for determination in a proper suit for contribution. 1939 C. 425. Purchaser of equity of redemption—Redemption of mortgage—Suit by owner to recover possession—Limitation. 57 B. 134=35 Bom.L.R. 48. A joint mortgagor redeeming the entire mortgage has a charge on the share of his co-mortgagor. The right to enforce such charge accrues on the date of payment. Art. 132 of the Limitation Act applies to claim. 1936 M. 500=70 M.L.J. 532. On the question of limitation, *see also* 1932 A.L.J. 19; 13 P. 356=1934 P. 612.

Sec. 96. *N.B.*—This section is new and makes the provisions as to simple mortgagesapplicable to mortgages by deposit of title deeds. Copies of the documents of title are not such substantial documents as may be regarded as documents of title for effecting a mortgage by deposit. 59 C. 586=36 C.W.N. 193. A mortgage by deposit of title deeds in Burma has ceased to possess, if it ever did possess the characteristics of an equitable mortgage in England which carries with it the remedies incident to an English mortgage. In this country it carries with it only the remedies to which a simple mortgagee may have recourse. 1939 Rang. L.R. 403=1939 R. 321 (F.B.).

Sec. 98.—The rights and liabilities of the parties to a mortgage must depend on the terms of the instrument as controlled by the T. P. Act.

Attachment of Mortgaged Property.

99. [1][*Repealed.*]

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100. Where immovable property of one person is by act of parties or ope-

LEG. REF.

[1]Repealed by C. P. Code. *Cf.* O. 34. R. 14, C P. Code.

NOTES.

An *anomalous mortgage* enabling a mortgagee after a lapse of time and in the absence of redemption to enter and take the rents of the property in satisfaction of interest, will be valid if it does not also hinder an existing right to redeem. A hindering of such right existing in the mortgagor will be invalid and ineffectual. 30 M.L.J. 584=44 A. 185=49 I.A. 60 (P.C.). *See also* 1 R. 419=1924 R. 83; 28 I.C. 161; 54 I.C. 687; 1928 M. 226; 10 L.L.J. 198. An anomalous mortgage is governed by the deed itself. But the principle of substitution of some other property for the mortgaged property, being a general principle of law not provided for in the T. P. Act, is not affected by S. 98. 1937 P. 345=18 P.L.T. 523. A mortgage containing a clause to the effect that after the expiry of the due date the mortgagee shall have power to realise the entire amount found due by sale of the mortgaged property or enter into possession of the mortgaged property by having it foreclosed is clearly an anomalous mortgage. 115 I.C. 839 (2)=1929 O. 282. A mortgage partly of the nature of a simple mortgage and partly of the nature of an usufructuary mortgage, does not fall within "anomalous mortgages" as described in S. 98 as it stood before the amendment. The rights of the parties have to be determined with reference to the terms of the deed. 182 I.C. 132=1939 P. 540. Where the mortgage deed stated that the mortgagee had been put in possession of the mortgaged property and further provided that in case of the mortgagee's failure to get possession, he would be entitled to interest on the principle amount at a certain rate, but the mortgagee was not put in possession of the property, the plaintiff is entitled to a decree for sale in respect of the mortgage money. 1935 O.W.N. 221=1935 O. 254. In considering an anomalous mortgage, if the intention appears that sale was not contemplated, the mortgagee has no right to a judicial sale. 15 N.L.R. 134=56 I.C. 717 (P.C.). *See also* 18 I.C. 24; 8 P. 585=1929 P. 664, where it was held that, if the area put in possession of the mortgagee in lieu of interest is reduced along with the consideration money, and the document also gives the creditor a right of sale, it would be anomalous mortgage. *See also* 8 P. 16=1929 P. 635. A simple mortgage which was to be converted into usufructuary after some period, continues to be simple, until the mortgagee expressly or impliedly signifies his intention to convert to the mortgagor. 50 I.C. 332 (O.). *See also* 18 I.C. 286 (O.). Anomalous mortgage—Mortgage to be simple one in first instance and to be usufructuary one on non-payment of principal sum on fixed date—Separate covenant to pay interest yearly—Suit for interest alone—Maintainability. 152 I.C. 494=1934 R. 159. Kanom is an anomalous mortgage. 44 M. 344=40 M.L.J. 282. As to *arakkattu otti*, *see* 21 M. 1. A mortgage for a fixed term without any provision for accounting is in the nature of an anomalous mortgage. 12 N.L.R. 1=1923 N. 60. Even in an anomalous mortgage clog on redemption is invalid. 44 A. 185=42 M.L.J. 584=49 I.A. 60 (P.C.); [1 R. 419; 1918 M. W.N. 235; 43 M. 589; 39 M. 1010; 43 I.C. 989 are not now good law after the decision of the Privy Council in 49 I.A. 60.] Stipulations in the nature of penalty in anomalous mortgage would be relieved against. 6 M.H.C.R. 258. Where the anomalous mortgagee remains in possession even after the mortgage term, he becomes a tenant by implied consent and is entitled to notice to quit. 87 I.C. 669=1925 M. 881; 16 O.C. 90=19 I.C. 748. Mortgagee placed in possession for interest—No right to bring property to sale. 107 I.C. 511=1928 M. 226; 8 P. 16. Mortgagee in possession given right of sale—Preliminary and final decree—Procedure. 10 A.L.J. 198. As to covenant for payment in an anomalous mortgage, *see* 21 O.C. 341=50 I.C. 220; 18 I.C. 24 (O.). It is not necessary for a simple mortgage that there should be an express provision giving the mortgagee a power of sale. Where a mortgage deed contains a personal covenant, under which the mortgagor undertakes to pay the mortgage money on the due date, the personal covenant carries with it by necessary implication, a power of sale. 11 O.W.N. 760=1934 O. 255. The fact that the deed authorises the mortgagee in case of default to enter into possession of the mortgaged property, cannot take away the power of sale implicit in the personal covenant, more particularly when the mortgagor has failed to put the mortgagee in possession. Such a mortgage is not an anomalous mortgage within the meaning of S. 98. (*Ibid.*) Provision for reduction of mortgage debt—Creditor given right of sale and possession—Anomalous mortgage made out. 8 P. 585. Where during the period of the mortgage the land which was service inam land was enfranchised and assessed to revenue as ryotwari land, the assessment should properly be paid by the mortgagor. 1931 M.W.N. 595.

Sec. 99.—A sale held in contravention of S. 99 (O. 34. R. 14, C. P. Code) is not void, but only voidable, and if not set aside within the period of limitation, cannot be impeached afterwards. 11 O.W.N. 1403=1935 O. 183; 38 Bom.L.R. 242=1936 B. 177. S. 99 does not apply to a sale held prior to the enactment of the Act. 152 I.C. 839=11 O.W.N. 1403=1935 O. 183. A maintenance decree cannot be brought within the ambit of R. 14, O. 34. A decree-holder attaching such decree is entitled to bring to sale the property which is charged as security for arrears of maintenance. 148 I.C. 196=1934 N. 83.

Sec. 100.—The amendment to S. 100 introduced no change in the law and was intended merely to clarify the legal position. 1940 A. 456. S. 100 as amended has retrospective operation. I.L.R. (1939) A. 885=1939 A.L.J. 849=1939 A. 687. S. 100 purports primarily to deal with the

Charges.

ration of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained [1][which apply to simple mortgage shall, so far as may be, apply to such charge].

Nothing in this section applies to the charge of a trustee on the trust property for expenses proprely incurred in the execution of his trust, [2][and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge].

LEG. REF.

[1]Substituted for the words "as to a mortgagor . . . apply to such charge" by S. 50 (*a*) of Act XX of 1929.

[2] Added by S. 50 (*b*) of Act XX of 1929.

NOTES.

incidence of security, and not with the method of enforcing it; the words "all the provisions hereinbefore contained," do not however mean that all those provisions refer to charges, and the section itself is not intended to apply to certain statutory charges. 38 C.W.N. 917=1934 C. 862. Where the first part of S. 100 deals with substantive rights, the second part deals with procedural law and so the latter cannot be said to govern the former. So when an agreement clearly falls within the definition it cannot be invalidated altogether simply because it contains provisions which offend against procedural law. Where an agreement was that in default of payment of an agreed amount of maintenance the other party was to be at liberty to enter into possession and cultivate the land, that clearly creates a charge and does not amount to a mortgage. 1939 N.L.J. 129=1939 N. 132. In a charge there is no transfer of interest in the property as in a mortgage but only the creation of a right of payment out of the property specified. 1939 N.L.J. 121=1939 N. 118. *See also* 1940 N. 163; 38 P.L.R. 8. For a charge immovable property must be made a security for the payment of money in such a way that the transaction does not amount to a mortgage. 1940 N.L.J. 651. Unless given by statute, a charge on immovable property can only be created by a registered instrument, executed by the person creating the charge, and attested by at least two witnesses. I.L.R. (1940 M. 306=50 L.W. 844=1940 M. 140=(1940) 1 M.L.J. 922. A sale in execution is not a "transfer" and what is sold in a Court-sale is merely the right, title and interest of the judgment-debtor, and auction-purchaser cannot claim to have purchased the property free from the maintenance charge on the ground that he has purchased it *bona fide* without notice. 1940 M. 701=(1940) 1 M.L.J. 831. *See also* I.L.R. (1939) A. 885=1939 A.L.J. 849=1939 A. 687; (1940) 1 N. 8; 1938 O. W. N. 62=1938 O. 84. The provision in S. 91 is in the nature of an exception specially applied by the legislature to the case of mortgages. And this exception should not be extended to a charge in perpetuity. 147 I.C. 302=1933 A. 934. An agreement to pay maintenance allowance to a person and to continue to pay to his descendants from generation to generation making it a charge over property, creates a charge and not a mortgage. The rule against perpetuity would not apply to a charge of this kind which does not amount to a transfer of interest within the meaning of Ss. 13 and 14. [19 I.C. 661 and 42 M. 581 (P.C.), Rel. on.] *See also* 1939 A.L.J. 542. Where the Act does not apply the principles of justice, equity and good conscience applicable in the determination of the question whether a particular transaction created a charge or not may be taken to be identical with the provisions in the Act. 57 I.A. 173=5 Luck. 365=59 M.L.J. 342 (P.C.). The definition of charge in S.100 does not create a personal liability. But where a charge is the result of a contract, there may also be a personal remedy. 52 A. 901 =130 I.C. 198=1931 A. 99. The question whether a particular document does or does not create a charge depends on its particular terms, and therefore cases as regards other documents are not always a good guide. 90 I.C. 787=1926 A. 171; 1929 O. 539. An intention to create a charge is to be gathered from the document. 32 I.C. 748=2 O.L.J. 601. There must be the expression of a present intention coupled with the necessary words of hypothecation, to constitute a charge. 1924 N. 360. *See also* 14 C. 687; 3 A.L.J. 220 (a document which merely contemplates the future possibility of a charge being created. *See also* 67 I.C. 939). No particular form of words is necessary, but there must be a clear intention to make the land a security for payment of money. 44 C.W.N. 221=1940 C. 93. *See also* 1939 N.L.J. 121=1939 Nag. 118. A valid charge on immovable property could be created to secure a contingent liability or to take effect on a future contingency. 1938 R. 145. A declaration of lien on all assets now existing or to be brought hereafter creates immediate charge. 1939 S. 100. In order to make the property security for payment of money, the property must be specified with particularity. 36 C.W.N. 153. Usufructuary mortgage of transferable holding—Subsequent bonds for further advances stipulating not to redeem unless both bonds are paid for—This creates charge and not a mortgage. 52 A. 281=1930 A. 136 (F.B.). *See also* 1935 N. 129. In order to create a valid charge, the beneficiary must be specially named. 27 A.L.J. 902=119 I.C. 81=1929 A. 834. *See also* 91 I.C. 507=1926 O. 209; as well as the property or fund on which the charge is created: 1924 N. 360; 34 M. 47; 91 I.C. 1009=1926 O. 230; but no writings is necessary: 23 I.C. 867; 123 I.C. 297=1930 S. 377; nor registration: (*ibid.*); 142 I.C. 376 (N.) (but *see also* 10 C. 315; 28 A. 655); but if a charge is created by a document, it must be registered when the charge is for a sum in excess of Rs. 100: 44 L. W. 438=1936 M. 865; the

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fact that it was registered cannot by itself amount to notice to a transferee for value. 142 I.C. 376 =15 N.L.J. 41 nor attestation, 66 I.C. 554. [*See* 130 I.C. 489=1931 A. 62, as to the requisites for creation of a charge.] A document executed by the creditor, such as a release deed, and accepted by the debtor is sufficient to create a charge. 44 L.W. 438=1936 M. 865. S. 100 is limited in its application to charges created by act of parties or by operation of law and it cannot apply to a charge created by a decree. 1940 N.L.J. 1= 1940 N. 163. *See also* 1941 P. 95. Where a decree directs that all the property of the defendant, both movable and immovable, should be charged for the amount due, it cannot be said that the charge is void for uncertainty or that the property to which the charge relates is not specific. There is no reason why description of property by survey number, extent, boundaries, etc., should be insisted upon on pain of the charge being held to be void for uncertainty. 1941 M. 794=(1941) 2 M.L.J. 386. Where in a *compromise decree* the defendant undertakes not to alienate certain property till decree is discharged, it creates a charge on the property. 6 O.W.N. 903 =1929 O. 539; but *see* 19 I.C. 478=24 M.L.J. 474; 55 M. 436=62 M.L.J. 533. Attachment before judgment—Compromise decree providing that property should remain under attachment till payment—No charge is created. 164 I.C. 940=1936 L. 610; 164 I.C. 463=1936 L. 508. Where a charge is created subsequent to 1929, the question of notice is material in considering whether the charge is to be enforced against the property in the hands of a transferee. The fact that a charge is created by a decree of Court makes no difference. A charge created by a decree in pursuance of an agreement between the parties would be a charge created by act of parties contemplated by S. 100 and the question of notice is relevant and material. 21 P.L.T. 783 =20 P. 86=1941 P. 95. *See also* 1940 R. 163; 40 P.L.R. 429=1938 L. 509 (Compromise in execution proceedings). Where a decree creates a charge on specified properties, a decree-holder is entitled to realise the maintenance by executing the decree without having recourse to any suit. 33 L.W. 109=1931 M. 120. Where a decree mentioned that the arrears of maintenance have been made a charge on the property described in the plaint, and with reference to future maintenance it stated that plaintiff was to recover the value thereof at a particular rate by executing the decree and selling the plaint-mentioned property. It is sufficient to create a charge in respect of future maintenance as well. 39 C.W.N. 725. *See also* 1936 S. 16; 71 M.L.J. 538. A covenant in a document that the obligee could recover the debt from the estate and heirs of the debtor does not amount to charge on the property. 1924 M. 360. Where a will gives details of particular estates out of which certain allowances should be met, the allowance constitutes a charge on those estates. 1937 O.W.N. 188=1937 O. 420. A provision in an agreement for sale: "I the declarant mortgaged, hypothecated, and pledged the land in this deed of contract, so that should I execute any deed of any kind whatsoever, deed of sale, *rehan*, etc., in respect of the land entered in the deed of contract, the same shall be treated as null and void and inoperative, etc.," does not amount to a "charge" nor could it be construed as a mortgage; the intention was merely to covenant, against encumbering or selling the land, after once having sold it under the agreement. 13 P. 620=1934 P. 495. *P* advanced a sum of money to *U* who agreed to pass a document in the form of a sale-deed, and *P* agreed to pass an agreement to reconvey. *U* executed his deed, but *P* failed to execute the agreement to reconvey. In a suit by *P* to enforce the sale-deed, it was found that the transaction amounted neither to a sale nor to a mortgage. Whatever the intention of the parties, the failure to carry it out was due to *P's* own default and no charge could therefore be created in favour of *P*. 35 Bom.L.R. 1138=1934 B. 24. A letter was addressed to the Bank by a customer undertaking not to alienate certain properties and some time after the letter moneys were lent by the Bank to the customer. Such a letter does not amount to a charge. 40 L.W. 677=1934 M. 713. When parties refer in a document to particular properties as the source from which a debt is to be paid that can ordinarily be taken as an indication to make the property more directly liable than on a mere personal liability. But where the facts recited in the document clearly show why the properties are referred to in the document and in what manner the properties are to be made available for the obligations arising under the document, it will not be right to ignore these circumstances and imply a general intention to create a security. 40 L.W. 883=67 M.L.J. 801=1935 M. 17. Where the debtor has a running account with the creditor on cash credit system and for repayment of all advances in this account, the shop of the debtor is made collateral security, subject to the maximum not exceeding Rs. 4,000, the charge is limited to the first advance of Rs. 4,000, but is to include all advances in the account. 1934 L. 765. The landholder's *claim to recover rent* under the Madras Estates Land Act cannot be said to be one to enforce a charge within this section, whatever might be the result of the sale of the holding by the Revenue Court in execution of decree for arrears of rent passed by it. 1932 M. W.N. 1287=1932 M. 716. Where a mortgagee has paid the revenue and land tax in respect of the mortgaged property, S. 100 can have no application unless the mortgagee elects to have the money spent by him added to the principal. (54 I.C. 616; 43 I.C. 190, Dist.) 161 I.C. 626 =1936 R. 47. An agreement that a person will execute a mortgage in favour of another on the latter discharging a prior mortgage does not confer a charge on the property when the payment is so made. 134 I.C. 1093=8 O.W.N. 1105. Where in making a partition, in order to equalise the shares, one of the sharers is asked to pay some money compensation to the other, it does not create a charge over his share. 91 I.C. 1009= 1926 O. 230. But *see also* 33 M.L.J. 58; 39 I.C. 867. *See* 96 I.C. 39=24 A.L.J. 649=1926 A. 527 (in which it was held that the arbitrator who effected a partition had power to create such a charge on the properties allotted to one sharer). A partition deed provided as follows: "Each of us shall discharge the debts falling to his share from the property which has fallen to his share. If otherwise the properties falling to the share of one person are made liable for the debts due by other sharers, the other sharers and the properties

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allotted to their shares shall be liable for any loss caused thereby." The clause created a charge in favour of the person for any excess paid by him over and above his share of the debt on the other's properties in proportion to the sums which they should have paid but defaulted to pay. 1933 M. 715=65 M.L.J. 390. Plea of *bona fide* purchaser—Circumstances amounting to constructive notice. 65 M.L.J. 390. A *co-owner paying the full revenue* on an estate to save the same from revenue sale, does not merely by such payment get a charge on the shares of the other co-sharers. *See* 15 C. 542; 22 C. 800; 14 C. 809; 1928 P. 641; 1928 R. 278; 15 M. 258. *See contra* 28 M. 493; 26 M. 493; *also* 36 M. 493 =24 M.L.J. 548. *See* 9 P.L.J. 573; 27 L.W. 544=109 I.C. 872=1928 M. 713 (F.B.); 8 P. 585. A co-sharer who, to prevent arrest for a decree against himself and another co-sharer for arrears of rent due by both under the Estates Land Act, pays the whole rent, is entitled to contribution from the other and to a charge for his excess payment on the co-sharer's share of the property. 34 L.W. 889. A *co-heir* paying a decree amount to set aside an execution sale of property of deceased judgment-debtor does not get a charge in respect of the shares of the heirs. 6 R. 500=113 I.C. 801=1928 R. 278. A *contingent charge* is not a charge within S. 100. 91 I.C. 507=1926 O. 209. *See also* 7 P. 584=1928 P. 587; 36 C.W.N. 153 =1932 C. 457. But *see contra* 1937 Pesh. 76. A charge may be created on the happening of a condition. *See* 21 M.L.J. 562=11 I.C. 629; 12 M. 69. *See also* 110 I.C. 526=9 P.L.J. 743. A *charge to create future liability* is valid. 39 I.C. 867. =33 M.L.J. 58. *See also* 1934 L. 765. A *floating charge* is a present charge, though it does not finally attach or crystallise upon any specific property until the happening of some event which puts an end to the right of the company to deal with the property in the course of the business. 58 C. 136. As to *requisites of a floating charge*, see 59 C. 1372. As to its distinction from *specific charge*, see 10 Mys.L.J. 16. Decree for dower obtained by a widow of a Mahomedan—If charge against estate. *See* 1939 O.W.N. 1010. Property subject to recurring charge—Sale in execution for arrears—Liability for future payments—If extinguished. 1940 C. 60.

TRANSFEREE WITHOUT NOTICE: *Quaere.*—If the law was not the same even before the amendment. 152 I.C. 267=36 Bom.L.R. 277=1934 B. 189. S. 100, even with its amendment in 1929, does not apply to a charge for maintenance *created by a decree of Court.* A decree binds not only the parties to the suit, but also their privies, and a charge created by a decree must necessarily bind a subsequent transferee who claims through the judgment-debtor, though he may be a transferee for value without notice. 19 N.L.J. 254. *See also* 1936 C. 112; 1941 P. 95; 39 C.W.N. 725; but *see contra* 1937 O.W.N. 25=1937 O. 217 (F. B.). Where it was held that a right by a decree of Court cannot be enforced against a subsequent transferee for valuable consideration and without notice of the charge, even in a case where the charge was created before S. 100 was amended. An execution purchaser is affected by a charge decree in respect of the property, though he has no notice of it, because notice is not necessary in the case of a purchaser at an execution sale. I.L.R. (1937) 1 C. 203=1937 C. 129. Charge of buyer under S. 55 (6) (*b*)—Enforceability against purchaser for value without notice. I.L.R. (1937) B. 140=1937 B. 142=38 Bom.L.R. 1200. Person purchasing property with notice cannot be allowed to set up a defence that although he knew of those alleged charges, he did not believe them to be valid and binding. 167 I.C. 52=1937 O.W.N. 188. Whether the matter falls squarely within S. 100 or whether it comes under a more general rule of law, the burden is on the transferee to establish that he is a *bona fide* transferee for value without notice. 1939 N.L.J. 129=1939 N. 132.

OTHER INSTANCES OF CHARGES.—The mere fact that the charge does not come within the meaning of S. 100 does not necessarily imply it is not a charge within the meaning of Art. 132, Limitation Act. 42 M. 114 and 43 M. 786, Expl. 49 M.L.J. 117=1926 M. 41. Cost awarded to mortgagee in redemption suit by mortgagor is a charge on the mortgaged property. 48 A. 425 =1926 A. 424. This is an instance of a *charge created by operation of law.* Other instances of such charges being created by operation of law are the vendor's lien for unpaid purchase money under S. 55, and a Hindu widow's claim for maintenance charged on the family properties by a decree of Court. 28 A. 743; 130 I.C. 66=1931 M. 120. Unless fixed and charged on such estate by decree or agreement, a Hindu widow has no charge for maintenance on her husband's estate. 36 C.W.N. 153. Maintenance charged on two properties—Loss of remedy against one—Extent of liability of the other property. 1940 O.W.N. 1249=1941 O. 203. A transaction intended to be a mortgage and not reduced to writing or registered, so that it cannot operate as a mortgage, is not a charge under S. 100. 2 R. 429=1925 R. 55. *See also* 2 R. 429; 1927 S. 66; 7 Bom.L.R. 934; 10 N.L.R. 81; 35 A. 164; 44 C. 388; 16 C.W.N. 1075; 31 M. 337; 32 C. 729; 10 I.C. 919; 18 S.L.R. 282=1926 S. 88; 36 I.C. 903=31 M.L.J. 133; 26 I.C. 601=10 N.L.R. 81; 9 Bur.L.T. 64=32 I.C. 595; 40 Bom.L.R. 545 (agreement to mortgage—if creates charge). An *invalid usufructuary mortgage* under which land has been given into the mortgagee's possession and the mortgagor has obtained a debt does not create a charge. 2 R. 313=1925 R. 1. In *cases of lease* the movables and immovables shall ever be regarded as security for the payment of the rent. If it creates a mortgage or a charge the difference is very little. 1 P. 387=1922 P. 529. A stipulation in a registered lease to the effect that the lessee should deduct from the annual rent certain portion as repayment of a sum of money already borrowed by the lessor from him, creates a charge on the property leased. 130 I.C. 489=1931 A. 62. Personal liability to pay interest does not in any way affect a valid existing charge. 96 I.C. 477=1926 L. 624. Charge under Land Improvement Loans Act—Enforceability against land in the hands of *bona fide* purchaser for value without notice. *See* 41 Bom.L.R. 257. Charge—Creation of—Payment by lambardar of the arrears of land revenue of defaulting co-sharers. *See* 1941 N.L.J. 311.

DIFFERENCE BETWEEN CHARGE AND MORTGAGE.—A charge is a liability to pay money laid

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upon a person or estate. Such a liability is created by every mortgage : so that every mortgage includes a charge, but the reverse is not always true. There is no personal covenant to pay in a mere charge and no transfer of any interest in the property, but merely an obligation imposed on the property with reference to the payment. It is difficult to conceive of a charge with a personal covenant to pay which does not amount to a mortgage. 36 B.L.R. 277=1934 B. 189. *See also* 38 P.L.R. 8 ; 1936 R. 303. There is very little difference between a charge and a simple mortgage. In both the creditor is entitled to follow the property for the satisfaction of his debt with this difference that a simple mortgage being a right *in rem* is good against subsequent transferees while a charge is only good as against a subsequent transferee with notice or a volunteer with or without notice. 1941 A.L.J. 518=(1941) O.A. (Supp.) 727=1941 A. 345 (F.B.). *See also* 1939 N. 118 ; 38 P.L.R. 8 ; 1940 N. 163. The distinction between a charge and simple mortgage is a very subtle one and to judge of the intention of parties, the language in which the intentions are expressed alone must be looked into. Where a person gave a statement in a proceeding instituted by him under S. 145, Cr. P. Code, in which he undertook to pay Rs. 750 to the respondent in that proceeding by a certain date and to give him the right of proceeding against the property in respect of which the proceedings were instituted and two other properties if he fails to pay and on the respondent agreeing to those terms the proceedings were dropped ; all the requirements of a mortgage are satisfied and as it was not attested or registered, it was invalid as a mortgage and could not be a charge either. 1937 M. 148. One obvious distinction is that a mortgage is for a fixed term whereas a charge may be in perpetuity. In the case of a mortgage it can be ultimately redeemed, whereas a charge in perpetuity cannot be redeemed at all. 1933 A. 934. *See also* 42 C. 625=19 C.W.N. 37 ; 23 I.C. 867 ; 1 P. 387. *See also* 6 O.W.N. 903=1929 O. 539 ; 9 O.W.N. 900. Provisions of Evidence Act relating to attestation do not apply to deeds creating charges. 66 I.C. 554=14 L.W. 99. Mortgage can be created only by the act of the parties ; charge can be created either by act of parties or operation of law. In a simple mortgage and generally in most other kinds of mortgages *also* there is a covenant to pay ; in a charge there is no such covenant. *See* 11 I.C. 629 ; 23 M.L.J. 131. Registration, attestation and other formalities required for the creation of a mortgage are not necessary for a charge. 35 C. 837. A charge cannot bind a *bona fide* purchaser for value who had no notice of the charge ; but in the case of a mortgage, the mortgagee can follow the property in the hands of any subsequent transferee for value or not, and whether with or without notice of the mortgage. 23 I.C. 867 ; 38 A. 254 ; 42 C. 625 ; 33 C. 985 ; 9 N.L.J. 130 =92 I.C. 25=1926 N. 262 ; 36 C.W.N. 153=1932 C. 451. A subsequent registered mortgage is entitled to priority over an earlier oral charge, not accompanied by delivery of possession, of which the mortgagee had no notice. 152 I.C. 267=36 Bom.L.R. 277=1934 B. 189. *See also* 5 Luck. 172=1929 O. 316 (a decision under the old section as to enforceability of a charge against execution purchaser without notice). The holder of a decree for arrears of maintenance charged upon certain properties is entitled to enforce the same against the transferee of the properties for value with notice of the charge, even though the transferee purchased only a part of the estate. If he is obliged to satisfy the full amount of the charge, his only remedy is a suit for contribution against the owners of the remaining portion of the estate. 9 O.W.N. 900=1932 O. 336 ; 167 I.C. 52=1937 O.W.N. 188. *See also* 161 I.C. 547 =1936 S. 16. Charge for rent—Mortgagee purchasing with notice—Enforceability of charge. 144 I.C. 760=1933 P. 257. As to the distinction between a *charge and lien*, *see* 13 A. 28. A charge in the nature of a mortgage cannot be created by implication. 18 I. C. 80=40 C. 514. Annuity payable creates a charge on the estate for the amount. 64 I.C. 518 ; 40 I.C. 865. For maintenance charges, *see* 14 C.L.J. 303=16 C.W.N. 99. An undertaking to pay Government revenue over lands granted for the maintenance of a junior member of a Taluqdar's family is personal and not a charge on the estate. 24 C.W.N. 929=47 I.A. 146 (P.C.) ; 18 C.W.N. 129 =19 C.L.J. 19. Portion of estate sold—Purchase-money applied in payment of allowances to other members, which are a charge on the estate—Purchaser has no charge over the estate. 27 L. W. 544=1928 M. 713 (F.B.). Further advance on same terms—New mortgage if created, *see* 13 L. 660=1932 L. 465 (F.B.). Agreement to make advances on the security of immovable property —Charge, if created to the extent of advances made. *See* 3 O.W.N. 315 (Supp.) as to when *equitable charge* is created. *See* 52 M.L.J. 33 ; 28 Bom.L.R. 939=1926 B. 495. When a subsequent mortgage of different property to the same mortgagee provided that the latter would be paid first, it did not create a charge on the former mortgaged property as well. 33 A. 393=9 I.C. 319. A charge on movable property not in existence is valid. 1923 A. 199 ; 89 I.C. 410 ; 59 C. 1372. As to future crops, *see* 1926 A. 164= 89 I.C. 410. A person can assign his fixed deposit in a Bank by way of charge. 36 A. 507=24 I.C. 385. Whether charge created by Court of foreign jurisdiction over the property outside its jurisdiction is on the face of it invalid and does not affect the mortgage security of subsequent mortgagee. 30 N.L.R. 303=150 I.C. 20=1934 N. 149. Bihar and Orissa Public Demands Recovery Act—Right of Secretary of State and purchaser at certificate sale. 13 P. 364=1934 P. 648. The intention of S. 67-A is to compel a mortgagee who is entitled to the same kind of decree in respect of several mortgages over the property of the same mortgagor to consolidate the mortgages and enforce them in a single suit, provided he was not contracted out his obligation. The proviso that there may be a contract to the contrary is applicable to a charge by act of parties, though it is inapplicable to a charge by operation of law. 60 C. 1470=38 C.W.N. 153. *See also* 1934 M. 353=66 M.L.J. 566. On this section, *see also* 1926 N. 262 ; 24 A.L.J. 424 ; 1926 A. 164 ; 1926 O. 209.

Secs. 100 and 39.—Distinction between. *See* 1940 N. 163; 1939 N. 118.

[1][101. Any mortgagee of, or person having a charge upon, immovable property, or any transferee from such mortgagee or charge-holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon, the same property; and no such subsequent mortgagee or charge-holder shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge, or otherwise than subject thereto.]

No merger in case of subsequent encumbrance.

LEG. REF.

[1] Substituted by Act XX of 1929, S. 51.

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Sec. 101.—The section is inapplicable to suit commenced two years prior to amendment. Nor is the amendment purely declaratory. (1942) 2 M.L.J. 47.

DOCTRINE OF MERGER.—In view of the amendment the older cases as to whether there was or was not any declaration or intention to keep alive the prior encumbrance are obsolete. But even under the old section, the tendency of Courts was in favour of an intention to keep alive the mortgage, rather than otherwise. This was on the principle that a man who has a right to act in one of two ways should be deemed to have acted in the way that would be to his interest. *See* 9 C. 961 (P.C.); 3 Luck. 472; 1929 O. 88; 13 P. 200=1934 P. 134; 26 M.L.J. 94; 49 M.L.J. 361; 1935 M. 1217; 74 I.C. 503; 18 I.C. 704; 23 I.C. 827; 1925 P. 605; 10 C. 1035; 29 C. 154; 94 I.C. 152; 39 I.C. 500; 1922 A. 394; 51 C.L.J. 565=1930 C. 572; 10 R. 465. Section is not exhaustive. 1929 M.W.N. 722. The amendment of 1929 is not retrospective in its operation, though S. 101 is not one of the sections which, S. 63 of the Amending Act declares, shall not be retrospective. 10 R. 465=1932 R. 197. *See contra* 1932 A.L.J. 627=1932 A. 489 (F.B.). As to *scope of the doctrine*, see 144 I.C. 736=1933 N. 241. It is not necessary for the owner of a charge or incumbrance that he must, simultaneously with his acquiring the equity of redemption by inheritance or otherwise, declare his intention to keep the charge or incumbrance alive expressly or by necessary implication in order to prevent the extinguishment of the charge or incumbrance. He can do so within a reasonable time. If he conveys the security to his wife benami for himself, that would be a sufficient expression of his intention to keep the charge alive. (1942) 2 M.L.J. 47. Under the law as it stood before the amendment on a merger of rights of mortgagor and mortgagee in one person absolutely, the mortgage would be extinguished, unless that person declares expressly or by necessary implication that it shall continue to subsist, or such continuance would be for his benefit. Though in cases of merger ordinarily it is the holder of a charge or an encumbrance who acquires the equity of redemption subsequently, there may be cases where a person may have acquired the equity of redemption by inheritance or otherwise first, and subsequently came to be the holder of a charge or an incumbrance. The existence of another encumbrance is only one of the reasons which could lead a person acquiring an absolute title to the property or a charge or an incumbrance, as the case may be, to keep the charge or incumbrance alive and not the sole reason for its continuance. It cannot therefore be said that a mortgagee or an owner of an absolute estate can be held to have kept alive the previous charge only when there are intervening incumbrances in existence. (1942) 2 M.L.J. 47. Where a mortgagee purchases from his mortgagor the mortgaged properties pending an attachment of the properties in execution of a money decree, it cannot be held that the sale extinguishes the mortgage. In such a case it must be presumed that it is to the advantage of the mortgagee to keep his interest as mortgagee and his interest as purchaser of the equity of redemption distinct, because of the intervening attachment against which his sale cannot be effective. The principle of S. 101 is not limited to cases where the rights of mesne incumbrancers come up for decision though the section has generally been invoked in such cases. The section only lays down a general rule of presumed intention, and where the later conveyance would be inoperative as against any intermediate right, whether founded on an incumbrance or an attachment, the principle must be held equally to apply. I.L.R. (1939) M. 600=1939 M. 393=(1939) 2 M.L.J. 72. Purchase by mortgagee of part of mortgaged property in full discharge of debt due under mortgage—Merger—Mortgagee not given possession of entire property sold—Mortgagee then brought a suit against *mortgagor* to enforce his mortgage. The purchaser can use his earlier mortgage only as a shield against any subsequent encumbrancer and not as a weapon to sue the mortgagor; there was a merger, and his remedy was only to sue as on breach of contract. 15 P. 120=1936 P. 404. A subsequent mortgagee seeking foreclosure under his mortgage is bound to redeem a prior mortgagee, who has already foreclosed and is in possession of the property, before he can take possession. There is no difference in principle between a mortgagee who has obtained possession under a sale in execution of the mortgage decree and one who has obtained possession by foreclosure of his mortgage. S. 101 allows a subsequent mortgagee two alternatives, either to redeem the prior mortgage or to take the property subject to that mortgagee; and the words, "otherwise than subject thereto" in the concluding part of the section, refer to the 2nd eventuality contemplated by the section, and not of his seeking foreclosure. A subsequent mortgagee, who has obtained a decree for sale, can avail himself of either of two alternatives. But a subsequent mortgagee seeking foreclosure cannot foreclose and get possession subject to the charge of the prior mortgagee already in possession. In such a case, the subsequent mortgagee has no option but to redeem the prior mortgage. 155 I.C. 498=1935 O.W.N. 684. *See also* 1939 A.L.J. 559=1939 A. 660. The doctrine laid down in *Toulmin* v. *Steere* (3 Mer. 210), that the

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purchaser of an equity of redemption cannot set up a prior mortgage of his own, or which he has got in, against subsequent incumbrances of which he had notice, is not to be regarded as a rule of justice, equity and good conscience and cannot therefore be applied in India. 33 Bom.L.R. 1238 *See also* 1938 M.W.N. 60. The principle contained in S. 101 can be applied to the Punjab as a rule of justice and equity. 130 I.C. 49=1930 L. 1063. Where there is no intermediate incumbrance, there will be a merger by the purchase of the equity of redemption by the mortgagee. 128 I.C. 296=1930 L. 620. It was held that the section (old) applied where the whole property subject to the encumbrance was acquired by the encumbrancer in full ownership : *See* 1930 A.L.J. 1222=1931 A. 76. The section was held inapplicable where the incumbrancer obtains only a limited interest. *See* 57 C. 473=126 I.C. 413 =1930 C. 530. Certain property consisting of two items was subject to successive mortgages. One of the puisne mortgagees brought a suit and purchased one item in execution. He subsequently obtained an assignment of a decree passed in favour of a prior mortgagee in respect of the other item. As assignee-decree-holder, he applied for execution against the other item alone. On objection by another puisne mortgagee, *held*, that, by the purchase of one of the items, the mortgage had been discharged *pro tanto* and that the assignee-decree-holder could proceed against the other item, only for the proportionate value of the debt in relation to the mortgage debt; and that an objection of this nature could be taken in execution by the puisne mortgagee. 141 I.C. 366 (M.). Purchase by mortgagee of a part of the mortgaged property does not extinguish the debt *pro tanto*. 39 A. 74=14 A.L.J. 1025=37 I.C. 4. *See also* 1931 A.L.J. 153=1931 A. 154. As to the effect of the proviso to the old section, *see* 57 C. 473=1930 C. 530. Where a mortgagee holding two different mortgages over the same property sues and obtains a decree on the first and purchases the property himself " subject to his second mortgage " the second mortgage is extinguished. 38 B. 369=16 Bom.L.R. 26. (*See also* change in the present section). Under S. 101 prior to amendment, the purchase by the mortgagee of an undivided share in the mortgage properties does not extinguish the mortgage. 1932 C. 772=36 C.W.N. 696. Whether a mortgage paid off is extinguished or kept alive depends upon the intention of the parties. (11 I.A. 126, Foll.) 33 Bom.L.R. 1238. *See also* 144 I.C. 736=1933 N. 241. Where a mortgagee obtained a decree on his mortgage and in execution thereof purchased the property in Court auction himself he becomes the owner of the property from the date of the purchase, and he cannot maintain as against himself or third parties unconnected with the mortgage transaction on the property, the position that his mortgage remained an incumbrance thereon after that date. 40 C. 89=39 I.A. 228= 23 M.L.J. 311 (P.C.). *See also* 31 I.C. 891 (A.); 44 Bom. L. R. 15. *Also* 59 P.R. 1909. Where the mortgagee decree-holder has purchased at the auction-sale in execution of his decree of his second mortgage, one of the properties mortgaged to him, the equity of redemption in that property becomes vested in him and such purchase has the effect of discharging and extinguishing a portion of the mortgage debt, which is chargeable to the property purchased by him. (22 A. 284, Foll.) 59 C. 76=1932 C. 319. Even where a third mortgagee agrees by his mortgage deed to discharge the first mortgage, he can use the first mortgage as a shield against the second mortgagee, because his intention in paying off the first charge is to keep it alive for his own benefit and not for the benefit of intermediate encumbrancer or any other party. 144 I.C. 969=1933 N. 155. Where there is a pusine encumbrancer, the mortgagee purchasing the equity of redemption can use his mortgage as a shield against him. 51 I.C. 728; 4 I.C. 810; 38 M. 18; 16 I.C. 877. *See also* 9 O.W.N. 557; 1933 N. 155; 144 I.C. 736 =1933 N. 241. The fact that he has taken no distinct steps to keep his mortgage alive does not necessarily create a merger. 57 C. 82=1930 C. 335. [This is now made plain by the amendment]. But where the acquirer was bound to discharge the subsequent mortgage by covenant or by law, he cannot have such a right. 43 C. 69 =20 C.W.N. 601; 1918 M.W.N. 251=44 I.C. 753; 45 M.L.J. 693=1924 M. 103. Where a person purchases a property in execution of a charge decree and a mortgagee of the property subsequent to the charge decree and before the Court auction, sues on his mortgage, the purchaser under the charge decree cannot claim priority to the extent of the charge. S. 101 has no application. In the cases governed by the section, the one having his own interest to protect buys out the interest of the other, that is to say, the owner buys up the charge, or the chargeholder buys up the property and steps into the shoes of the owner. But each has an interest to protect at the date of the purchase. That is not the position where a stranger having no interest to protect, deliberately, with eyes open, purchases in order to enable the owner and chargeholder to extinguish the charge between them. In such a case the stranger purchaser is not in a position to act in either of two ways. He is not protecting his interest and is only in the position of a money-lender who advances to pay off the charge and then after the charge is extinguished, purchases in lieu of his own debt. 1941 N.L.J. 634=I.L.R. (1942) N. 309=1942 N. 33. Subrogation—Debt due to bank—Third party paying debt and taking back title-deeds—Right to be subrogated. 34 P.L.R. 477=1933 L. 416. Where the purchaser of mortgaged property undertook to discharge two mortgages on the property, but in fact discharged only the prior mortgage and not the later mortgage in favour of the plaintiff, *held*, that it was to the benefit of the purchaser to keep alive the first mortgage, which he discharged out of the purchase money and that he was therefore entitled to be subrogated to the position of the prior mortgagee. 37 L.W. 751=64 M.L.J. 606. But *see* 33 A. 101 and 74 I.C. 640. Rel. on ; 1932 A.L.J. 413. Where the puisne mortgagee obtained a decree for sale subject to the prior mortgage, and mortgagor inherited the rights of the prior mortgagee, he cannot set up the prior mortgage as a shield, but the property will be sold free of encumbrance. 37 A. 309=28 I.C. 973. *See also* 52 I.C. 159=22 O.C. 72. But *see* 8 O.W.N. 541 =1931 O. 295. If a mortgagee of two properties purchased one of them in discharge of his mort-

Notice and Tender.

Service or tender on or to agent.

102. Where the person on or to whom any notice or tender is to be served or made under this Chapter does not reside in the district in which the mortgaged property or some part thereof is situate, service or tender on or to an agent holding a general power-of-attorney from such person or otherwise duly authorized to accept such service or tender shall be deemed sufficient.

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gage, unaware of a subsequent mortgage of both the properties in favour of the plaintiff, he must be deemed to have kept his own mortgage alive and is entitled to use it as a shield against the subsequent mortgagee. [10 C. 1035 (P.C.) ; 39 C. 527 (P.C.) ; 47 M. 190 (P.C.) ; 49 M.L.J. 361, Rel. ; 30 M. 67, Not foll.] 34 L.W. 715 =61 M.L.J. 857. *See also* 8 O.W.N. 522 ; 1932 L. 237. Where a purchaser of the mortgaged property, who has discharged a prior mortgage which he thinks is the only mortgage, is ousted by a later mortgagee whose mortgage was not disclosed to him at the time of his purchase, he is entitled to claim the right of subrogation in respect of the mortgage he has discharged, and to sue to enforce that mortgage by sale of the mortgaged property. S 101 is no bar to the maintainability of such a suit. 59 M. 1042=70 M.L.J. 719=1936 M. 814. If in execution of a decree for sale of mortgaged property, the mortgagor purchases the property himself, it passes into his hands subject to the right of the subsequent mortgagee, it being his duty as owner of the estate to discharge the debt of the subsequent mortgagee, for which he had pledged the estate. The same principle would apply even if there had been intermediate purchasers of the property before it came into the hands of the mortgagor. 132 I.C. 290 (M.). When the new mortgage taken in supersession of the old one proves invalid, he can fall back on the old one. 39 A. 178=44 I.A. 60=32 M.L.J. 241 (P.C.). *See also* 38 I.C. 468 ; 35 A. 211=25 M.L.J. 111 (P.C.). One of two brothers executed a mortgage in respect of the shares of both of them in certain agricultural land. The mortgagee paid off prior encumbrance on the share of the brother, who had neither joined in the execution of the mortgage nor ratified the action of his brother, and also some of his debts. The mortgage is invalid, but the mortgagee should be presumed to have intended to keep alive for his own benefit the prior mortgages and debts which were redeemed by the invalid mortgage, and the brother's share was liable to the extent of the prior incumbrances on his share and his debts which had been paid off. [10 C. 1035 (P.C.) : 38 P.R. 1894 ; and 1922 L. 275, Ref.] 34 P.L.R. 864=1933 L. 1000. Extent of land erroneously stated in first mortgage—Fresh deed correcting the error executed after second mortgage—Right of prior mortgagee not extinguished. 1934 R. 7. The conversion of an usufructuary mortgage into a simple one by the execution of a second bond indicates a change in the form of security and does not extinguish the former. 25 I.C. 500 ; 38 I.C. 240=32 M.L.J. 263. Where the prior mortgagee has obtained a decree without impleading the puisne mortgagee, he can use his mortgage rights as a shield when the puisne mortgagee sues. 43 A. 469=48 I.A. 465=42 M.L.J. 15 (P.C.) ; 41 M.L.J. 399 =1922 M. 249 ; 20 A.L.J. 596=44 A. 659. Several mortgages—Payment of prior mortgage—Subrogated right as against intermediate mortgagee. 1932 A. 489 (F.B.). *A* firm as a prior mortgagee sued the mortgagors and joined *S* firm as a subsequent mortgagee. The suit was decreed in terms of agreement arrived at between the mortgagors and *A* firm. The Court added as part of the decree a note dismissing the case as against *S* firm who did not put in appearance. In execution of the decree the property was sold to *A* firm. Meanwhile *S* firm also obtained a decree on the mortgage. *A* firm is entitled to keep their first mortgage as a shield. 9 R. 1=1931 R. 105. Mortgagee paying up his own earlier mortgage in consideration of a fresh mortgage—Priority, 7 Luck. 655=1933 O. 9. Where a person buys property while it is under attachment and redeems the mortgage, the presumption is that he intended to keep the encumbrance alive for his benefit. 18 I.C. 704=11 A.L.J. 727. Where in the course of execution proceedings under a money decree, the mortgagee made a statement that the equity of redemption may be sold subject to the mortgage charge but the mortgage charge was not mentioned in the proclamation of sale and the sale certificate and the mortgagee purchased the property himself ; the purchaser could be taken to have intended to keep the mortgage charge alive, even though it was not mentioned in the sale proclamation and sale certificate. (43 A. 703, Ref.) 32 P.L.R. 759. Mortgage to plaintiff in 1913—Subsequent sale to plaintiff in 1919—Attachment of property in execution by creditor of vendor—Mortgage of 1913 mentioned in execution petition—Plaintiff's claim under his sale under O. 21, R. 58, C.P.C., dismissed as filed late—No suit brought by plaintiff within 1 year to set aside claim order—Creditor purchasing property in his execution sale—Creditor's suit against plaintiff for mesne profits—Plaintiff contesting the same on the strength of the sale in his favour, but not successfully—Subsequent suit by plaintiff to recover money due under mortgage of 1913 cannot succeed. 1933 M. 879=65 M.L.J. 819. Subsequent equitable mortgage to discharge prior mortgage—Prior mortgage paid—Security not transferred to the second mortgagee—Right of the second mortgagee to sue on the first mortgage. 14 R. 494=1936 R. 152.

EXTINCTION OF MORTGAGE.—A mortgage debt is not extinguished by a fraudulent revenue sale. 24 C.W.N. 662=55 I.C. 689.

Secs. 101 and 92 : SUBROGATION.—A right of subrogation cannot be claimed on the strength of a partial discharge of a prior mortgage. But a prior mortgagee who has purchased portions of the mortgaged property in part satisfaction of the mortgage debt by piece-meal purchases is entitled to claim the benefit of S. 101, as against a subsequent mortgagee, and his claim cannot be resisted on the ground that his debt has not been fully

[1][Where no person or agent on whom such notice should be served can be found or is known] to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property, and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient :

[2][Provided that, in the case of a notice required by section 83, in the case of a deposit, the application shall be made to the Court in which the deposit has been made.]

[3][Where no person or agent to whom such tender should be made can be found or is known] to the person desiring to make the tender, the latter person may deposit [4][in any Court in which a suit might be brought for redemption of the mortgaged property] the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount.

Notice, etc., to or by person incompetent to contract.

103. Where, under the provisions of this Chapter, a notice is to be served on or by, or a tender or deposit made or accepted or taken out of Court by, any person incompetent to contract, such notice may be served [5][on or by] or tender or deposit made, accepted or taken, by the legal curator of the property of such person ; but where there is no such curator, and it is requisite or desirable in the interests of such person that a notice should be served or a tender or deposit made under the provisions of this Chapter, application may be made to any Court in which a suit might be brought for the redemption of the mortgage to appoint a guardian *ad litem* for the purpose of serving or receiving service of such notice, or making or accepting such tender, or making or taking out of Court such deposit, and for the performance of all consequential acts which could or ought to be done by such person if he were competent to contract ; and the provisions of [6][Order XXXII in the First Schedule to the Code of Civil Procedure, 1908] shall, so far as may be, apply to such application and to the parties thereto and to the guardian appointed thereunder.

Power to make rules.

104. The High Court may, from time to time, make rules consistent with this Act for carrying out, in itself and in the Courts of Civil Judicature subject to its superintendence, the provisions contained in this Chapter.

LEG. REF.

[1] Substituted for the words "Where the person or agent . . . or is unknown" by S. 52 (*a*) of Act XX of 1929.

[2] Added by S. 52 (*b*) of Act XX of 1929.

[3] Substituted for the words "Where the person or agent . . . . or is unknown" by S. 52 (*c*) of Act XX of 1929.

[4] Substituted for the words "in such Court as last aforesaid" by S. 52 (*d*) of Act XX of 1929.

[5] Inserted by S. 53 of Act XX of 1929.

[6] Substituted for the words and figures "Chapter XXXI of the Code of Civil Procedure" by S. 53 of Act XX of 1929.

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discharged. Whatever the difficulties may be when a stranger invokes the benefit of the doctrine of subrogation, no such difficulty arises where the claim is made by the prior mortgagee himself under the terms of S. 101. 1936 M. 473=70 M.L.J. 506.

Sec. 103.—As to persons competent to contract, *see* Ss. 11 and 12 of the Contract Act. It is proper to get the Court to appoint a guardian *ad litem* when the mortgagee is a minor. 16 O.C. 261=22 I.C. 245. Mere making of the application will not be sufficient. Interest will not cease on a deposit till one is appointed. 21 A.L.J. 39=45 A. 273. *See also* 44 A. 64 ; 48 A. 611 ; 49 M.L.J. 327 ; 22 I.C. 245 ; 1922 A. 355 ; 44 A. 102=64 I.C. 907=19 A.L.J. 893 (Stuart and Lindsay, JJ., dissenting). S. 103 clearly provides that where the party on whom notice is to be served and by whom deposit has to be accepted or taken out of Court, happens to be a person incompetent to contract, the provisions of O. 32 of the Code shall apply. If the point as to the minority of the person is in dispute the Court has to be satisfied of the fact of minority, and this cannot happen unless the Court enquires into the matter. 50 A. 655=1928 A. 311. The procedure mentioned in S. 103 is consequent upon the deposit having been made and not precedent to an intention to make the deposit. 50 A. 655=1928 A. 311.

Sec. 104.—For rules made by—(1) the High Court at Bombay, see *Bombay Government Gazette*, 1904, Pt. I, p. 1001 ; (2) the Chief Court of Burma, see *Burma Gazette*, 1904, Pt. IV, p. 437. The section is directory. If no rules are made, the rules in the C. P. Code would apply. 19 A. 205 ; section is an enabling one, *i.e.* it gives a

CHAPTER V.

OF LEASES OF IMMOVABLE PROPERTY.

Lease defined.

105. A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service, or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

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power to the High Court to make rules; it is not compulsory on the High Court to make such rules. 25 M. 244. As to how far the rules made under this section are binding on the High Courts in the exercise of their ordinary original jurisdiction, *see* 1 C.L.J. 31.

Sec. 105.—The Act uses the word '*lease*' not merely for interests which can be created only by registered instrument but for all interests of the character defined in S.5. 54 C. 813=1927 C. 725. To determine whether a document is a lease or not, the name of the document is nothing. Contents must be looked into. 82 I. C. 949=1925 C. 370. Lease of an immovable property is a transfer of a right to enjoy such property. A lessee who allows a man to work the premises cannot be said to transfer an interest in the leased properties. Where the lessee agrees to sell the lease to another and allows the prospective assignee to enter upon the premises and to work them pending the grant of consent by the lessor to the transfer, the transaction does not amount to a sub-lease. 15 P. 460=1936 P. 372. Even if a transaction does not amount to a lease under S. 105, it may nevertheless be a lease for the purposes of the Stamp Act. An agreement by which an oil company was permitted to occupy a portion of the Railway premises for the construction of a petroleum installation is a "lease" within the meaning of the Stamp Act, even though by reason of the several conditions and limitations on the enjoyment of the property by the oil company and the fact that there was no transfer of a right to enjoy the property for a certain time, it may not amount to a "lease" within the meaning of the T. P. Act. 1933 A.L.J. 749=1933 A. 735 (F.B.). The 'right to enjoy such property' which is spoken of in S. 105 means the right to enjoy the property in the manner in which that property can be enjoyed. If the subject-matter of the lease is coal land it can only be enjoyed and occupied by the lessee by working it as indicated in S. 108, T.P. Act, which regulates fully the rights and liabilities of lessors and lessees in India. 21 P.L.T. 897=1940 P. 633=20 Pat. 13 (F. B.). Under S. 105, there can be a lease of immovable property by virtue of a registered document executed by the lessee in favour of the lessor. The subject-matter of the lease must be immovable property and the immovable property may be actual land or may be a reversion upon an existing term. There is nothing in the Act to preclude the lease of a reversion. Under the English Law it is always open to a landlord to create concurrent leases, that is, he can execute a lease to-day for a term, and to-morrow he can execute another lease for another term to run from the date on which he executed the latter lease. Such a lease has always been held to be valid, and in law would operate as an assignment upon the existing term. There is nothing to preclude the applicability of this principle in India, and indeed it has been adopted by the Indian High Courts. There is always a *distinction between an assignment of the rents and profits and a lease of a reversion.* In the case of an assignment of rents and profits, all that the assignee will be entitled to is the right to realise the rents and profits by virtue of the assignment in his favour, but in the case of a reversion, it is not merely the right to recover the rents and profits that is transferred to him, but also the rights which the lessor had on the date of the reversion, for example his right to recover possession immediately on the expiry of the previous term, and also the right of re-entry, if any, on forfeiture. 46 L.W. 730=1938 M. 100=(1937) 2 M.L.J. 871. Definition of lease contained in this section compared with the definition contained in the Registration Act. 5 R. 95. *Lease and mortgage*, distinguished. 1927 M.W.N. 556; 1933 L. 786; 1934 P. 217. The question whether there is a relationship of landlord and tenant is to be determined first according to this Act and not English decisions. 57 C. 1176=57 I.A. 110=58 M.L.J. 293 (P.C.). Land titles in Berar cannot always be compared to leases under the Act. 98 I.C. 16=1927 N. 50. A mere *agreement to lease* does not operate as a lease; nor does it affect the land until the agreement is specifically enforced on a suit. 19 C.W. N. 347=28 I.C. 879; 30 C. 831. Where the lessee actually takes possession of the property on the very day of the agreement and pays rent, the agreement certainly amounts to a lease and to that extent it is void if not in writing registered. But the agreement would still be an agreement for a lease, and in so far as it is an agreement for a lease, it is not void, merely because regarded as a transfer of property, it is void. 38 Bom.L.R. 486=1936 B. 246. *See also* 1939 L. 162; 1938 M. 746. A mere writing to the effect that a person has taken a certain bungalow at a certain rent for one year and not signed by the owner is not a lease. 148 I.C. 548 (1)=1934 Pesh. 81 (1). A lease may come into operation and commence on a future date. The transfer of interest in the land is the test. 18 I.C. 496=97 P.L.R. 1913; 42 I.C. 372. *See also* 1 M.H.C. 153. The mere execution of the *kirayanama* cannot entitle the person executing the deed to continue in possession of the premises covered by the deed. 102 I.C. 123 (1). A *patta* tendered to, but not accepted by, a tenant is not a lease for the purposes of the Registration Act. 8 M.L.T. 371=7 I.C. 750. A tenancy in respect of a fractional share of a field or fields not defined by metes and bounds is impossible. Therefore a *suit for joint possession of an undivided share* on the basis of a lease is not maintainable. 78 I.C. 636=1926 N. 120.

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service, or other thing to be so rendered is called the rent.

Lessor, lessee, premium and rent defined.

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See also 51 B. 274=1927 B. 115; 25 Bom.L.R. 84=1923 B. 228. As to applicability of this section to *mining leases*, *see* 36 C.W.N. 709=1932 C. 775. Inclusion of lands not belonging to the lessor would not make the lease void, if there was no fraud or misrepresentation. There could be an apportionment of rent for the remaining lands. 39 C. 1016=16 C.W.N. 606. An agreement between the co-sharers that each party should take the profits for years in turn, is not a lease: 25 O.C. 39=1922 O. 201 (1). "*Yajman vrithi*"—Whether amounts to lease. 25 S.L.R. 451.

DISTINCTION BETWEEN LEASE AND LICENSE.—There is a transfer of an interest in land in a lease. Grant of exclusive possession is necessary, whereas in the case of a license there is no transfer of interest, although the licensee acquires a right to occupy the land. 16 I.C. 703=17 C.W.N. 166; 48 M. 368=48 M.L.J. 161 (F.B.). *See also* 51 B. 274=29 Bom.L.R. 78; 35 C. 82 (F.B.); 1925 M. 434; 29 M. 353; 1926 N. 174; 48 M. 368; 32 Bom.L.R. 332=1930 B. 165. *See* 25 Bom. L. R. 85=1923 B. 228. In deciding whether a document amounts to a lease or is only a license, the recitals therein can never be conclusive; the Court has to look to the substance of the terms agreed upon and not to the nomenclature given to the deed by the parties. 1933 A.L.J. 749=1933 A. 745 (F.B.). The definition of a lease in this section does not apply to a restricted use of a portion of a house. 51 B. 274 =1927 B. 115. Permission to build on payment of rent without lease deed amounts only to a license. 38 A. 178=32 I.C. 346. An agreement to pay a certain quantity of grain to another for being allowed to take his cattle or cart along a definite strip of land amounts to a lease under S. 105. It is not a license. A suit for the recovery of such grain is a suit for rent and is exempted from the cognizance of the Small Cause Court. 92 I.C. 683=1926 N. 174. A kabuliyat executed by a person occupying certain premises and accepted by the owner of the premises can in no way be considered to be a lease as defined by S. 105, and is not sufficient to bestow title on the occupant of the premises. But though it does not operate as a lease it is not on that account inadmissible against the executant himself when the kabuliyat contains a statement against his own interest. 1937 A.L.J. 1297=1938 A. 32.

LEASE AND FAMILY ARRANGEMENT.—If a transaction is in fact a lease as defined by S. 105, the requirements of law regarding registration cannot be evaded merely by calling it a family arrangement. (1937) 1 M.L.J. 679=1937 M. 882 (F.B.). A transfer of the right to enjoy immovable property in perpetuity made by the holder of an impartible Zamindari to a junior member on terms, or in pursuance of an agreement, that the junior member will give up all claims for present or future maintenance and will pay annually to the Zamindar a sum of money, which is called *poruppu*, is not a lease within the meaning of S. 105, and is effective, though oral and not in writing registered. (1937) 1 M.L.J. 679 (F.B.)=1937 M. 882.

CONSTRUCTION OF LEASE-DEEDS.—*See* 1922 P. 75.

RENT.—Rent may be in money (22 C. 680); or by way of service rendered (15 C.P.L.R. 42; 32 C. 243); or by way of royalty (as) in the case of mines: *see* 5 C.L.J. 148 (172). The word used in a rent-note to denote the duration of the lease was *aniyamit* which means indefinite or unrestricted or unlimited. But reading the rent note as a whole, it appeared that the period of the lease was to extend so long as the *Kesari* and *Maratha* institutions were in existence. *Held*, it was not a permanent lease and the lease was valid in law: 33 Bom.L.R. 590.

FRAUD OR MISTAKE.—In the absence of fraud or common mistake, a lessee is entitled to the possession of a plot of land described in the lease as boundaries. 16 C.W.N. 225=13 I.C. 481. A lease obtained by fraud is not void, but only voidable at the option of the lessor. 36 C. 675= 9 C.L.J. 523=1 I.C. 626. A lease by a minor is void; it is incapable of ratification express or implied by the acceptance of rent by the lessor on attaining majority. 33 Bom.L.R. 111=1931 B. 178. That it was executed by the lessee in favour of the minor lessor and not by the lessor does not cure its invalidity. A lease is essentially a bilateral contract: 1931 M. 147=59 M.L.J. 941.

MUNICIPALITY.—A municipality is not outside the provisions of the T. P. Act and, therefore leases by municipality are governed by Act. 26 A.L.J. 328=1928 A. 95.

Secs. 105 and 107.—The letting by a Municipal Council of the right to collect the fees of the municipal slaughter-houses and fish-bazaars is lease as defined by S. 105; the right to collect the said fees amounts to profit arising out of land, and is therefore immovable property. Under S. 107, such a lease must be executed both by the lessor and the lessee and a lease for one year reserving an yearly rent has to be made by a registered instrument. Where such a lease is executed by the lessee alone and registered, it is invalid under S. 107. Where it is not executed on behalf of the Municipal Council before registration, it is not in conformity with the requirements of S. 107, although subsequent to registration the President and some members of the Municipal Council put their signatures on it. If the lessee has had the advantage of the lease, the invalidity of the lease would not prevent the Municipal Council from recovering such amount as may be found reasonable under S. 65 of the Contract Act. 47 L.W. 668=1938 M. 746. *See also* 1936 B. 246. The plaintiff brought two suits for recovery of rent in respect of certain property. The leases were for a period less than one year. The plaintiff did not rely on any oral agreement. The suit was based merely on certain rent notes which were not registered and the plaintiff did not sue on the basis of his title for recovery of compensation for use and occupation. The defendants were already in possession before the

106. In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.

Decision of certain leases in absence of written contract or local usage.

Every notice under this section must be in writing signed by or on behalf of the person giving it, and [1][either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party], or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

LEG. REF.

[1] Substituted by Act XX of 1929.

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execution of the leases and there was no question of fresh delivery of possesion. The plaintiff could succeed only if she had sued for rent on the basis of registered leases. 41 P.L.R. 578=1939 L. 162. *See also* 1939 L. 423.

Secs. 105, 106, 108 and 111: LEASE, IF HERITABLE PROPERTY.—A lease for which no term is fixed is a lease running from month to month, terminable upon proper notice. Such lease is heritable property. I.L.R (1937) N. 406=1937 N. 321.

Sec. 106: SCOPE AND APPLICABILITY.— S. 106 does not apply to Punjab. 106 I.C. 537=1928 L. 348. *See also* 1923 L. 659. This section has no application to a notice under S. 108 (*e*) : 31 I.C. 697=19 C.W.N. 1019; section does not apply to *agricultural leases :* 20 I.C. 374=24 M.L.J. 571; 90 I.C. 51; *see also* 1929 N. 169=116 I.C. 662. (A notice asking agricultural tenant from year to year to quit immediately is not proper). 85 I.C. 339=1925 M. 346. S. 106 does not apply to a tenancy proved to have originated before the T. P. Act. 35 C.W.N. 1047; *see also* 25 C.W.N. 420=60 I.C. 826. The only leases recognised by S. 105 are leases for a eertain time, periodical leases, and leases in perpetuity. Where therefore the status of a person does not fall under any of these heads, he cannot be a lessee; and hence he cannot insist upon a notice to quit as contemplated by S. 106 : 151 I.C. 971 =1934 R. 291. The essence of a lease as defined by S. 106 is that the right to enjoy the property demised must be given for a certain period, express or implied or in perpetuity. The transaction is none the less a lease, because the interest may be determined before the expiry of the time fixed or after the expiry of the time fixed. I.L.R. (1939) B. 320=41 Bom.L.R. 297 =1939 B. 215. S. 106 is subject to the exception of being set aside in particular cases by proved usage or contract. 79 I.C. 106=1924 A. 726. *See also* 78 I.C. 416=1925 N. 48; 1924 N. 200; 84 I.C. 532=1924 O. 309. Thus, where the lessee of a house agrees to vacate the same whenever wanted, S. 106 cannot be made applicable and the omission to give notice cannot be regarded as fatal to a suit in ejectment. 79 I.C. 126=1924 A. 726. Section does not apply to the case of a *lessee for a fixed term* when the term has expired. 1931 A.L.J. 666. After the expiry of the period, the tenant is only a tenant at sufferance and is not entitled to any notice to quit. 1933 A.L.J. 682=1933 A. 756 (2). In the case of *utbandi* holdings, unless there is a special custom, to that effect, the right to occupy the land does not enure beyond a particular season or a particular year and the tenancy not being a lease from year to year, S. 106 does not apply. 60 C. 681=37 C.W.N. 335=1933 C. 609. A renting by the lessee for twenty years of shops at a fixed rent as long as the sub-lessee kept them and paid monthly rents, creates a monthly lease. 180 P.L.R. 1913=19 I.C. 493. Where tenant who originally came into possession of the demised land under an invalid lease for 10 years and continued in possession with the consent of the lessor paying rent at a monthly rate, the presumption is that a monthly tenancy was created between the parties by oral agreement, accompanied by possession. 33 M.L.J. 684=43 I.C. 310. *See also* 1933 P. 485=144 I.C. 781. To determine the nature of the tenancy, the length of possession, variation of rent, if any, manner of dealing by the tenants and other connected circumstances have to be considered. 12 I.C. 1 =21 M.L.J. 845. *See also* 28 C. 738; 11 C.W.N. 242; 8 C.W.N. 297; 32 C. 51; 34 C. 902; 32 C. 41; 5 C.W.N. 846. Where no term is mentioned in a lease, it must be regarded as a lease from year to year terminable by notice by either side according to law. 3 P.L.J. 576=43 I.C. 965. The *tenancy of a house* is presumed to be monthly. 61 I.C. 976=2 P.L.T. 178. If under a lease created after the T. P. Act, the tenant enters into possession on the basis of an oral agreement and continues in possession on payment of rent to the lessor, and the purpose of tenancy is neither agricultural nor manufacturing, the lease must be taken to be a lease from month to month under S. 106 of the Act. I.L.R. (1939) 2 C. 254=43 C.W.N. 797=1940 C. 89. Unless there is some indication to the contrary, the term 'ordinary tenant' would in Calcutta mean monthly tenant, even though there was no reference to payments of monthly rent, and such a tenancy would be terminable on 15 days expiring with the end of the month of the tenancy. 43 C.W.N. 309=41 Bom.L.R. 684=1939 P.C. 11=(1939) 1 M.L.J. 365 (P.C.). *See also* 42 C.W.N. 1115; 1939 P. 296. Where yearly rent is reserved, though payable in instalments, the tenancy may be presumed to be from year to

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year. 24 I.C. 183=19 C.W.N. 525; 23 C.W.N. 641=51 I.C. 415. There is no presumption, from the mere fact that a lease is for building purposes, that it creates a permanent tenancy. In the absence of anything in the lease itself the Court should infer a monthly tenancy only. 48 L.W. 894=1939 M. 247; 1941 A. 399=1941 A.L.J. 557. A tenancy may well be a monthly tenancy though the rent may be mentioned as so much per year. 1941 P.W.N. 513=1941 P. 488=194 I.C. 300. When a tenant under a lease of premises in Calcutta for a term of three years holds over after expiry of the term, he does so as a monthly tenant, and each month of the tenancy expires at midnight on the 1st day of the succeeding month. 38 C.W.N. 782=1934 C. 837. But when the contract is not registered, it will be monthly. 44 C. 403=33 I.C. 899; 26 I.C. 962. The mere fact that the rent is fixed for a year does not make the tenancy a yearly one: 51 I.C. 44; nor the fact that rent is payable yearly: 50 I.C. 918; 61 I.C. 976=2 P.L.T. 178. A provision for *enhanced rent* in a lease after the expiry of the term does not take away the landlord's right to eject the tenant after due notice. 23 C.W.N. 641=51 I.C. 415. Where enhanced rate of rent is proposed by a landlord and the tenant continues to occupy the property without any protest he should be deemed to have accepted he proposal. But when the tenant protests against the enhancement, the remedy of the landlord is ejectment and where he did not pursue that remedy, he cannot subsequently claim the enhanced rent. 10 O.W.N. 1000=1933 O. 465. The presumption of the section does not arise when there is a *contract to the contrary*. 32 I.C. 692. *See also* 42 C.W.N. 598=1938 C. 656.

CONTRACT FOR RENEWAL.—Contract of renewal of lease runs with the land and can be enforced against the lessor's transferee with notice. 89 I.C. 273=1925 N. 281. *See also* 19 C.W.N. 1197 =27 I.C. 397. No renewal can operate when its terms are undefined and are dependant upon the will of the lessor. 34 I.C. 92=21 C.W.N. 183. When the terms are undefined, it may be taken that the renewed lease is on the same terms as the old one. 33 I.C. 448=20 C.W.N. 948.

NOTICE TO QUIT.—The object of the legislature in providing for a notice to quit is to prevent the eviction of the tenant arbitrarily at any moment without giving him time to gather the produce of his labour, rendering his position very insecure. 2 C. 156. *Yearly tenant* is entitled to 6 months' notice and monthly tenant to 15 days' notice. 1919 P. 235=50 I.C. 8. *See*, as to tenant holding over, cases under S. 116. The provisions of the section as to notice to quit are subject to a contract to the contrary. 1923 L. 281; 34 I.C. 516; 47 I.C. 19; *see also* 32 I.C. 692. The words "in the absence of an agreement to the contrary" in S. 116 refer to an agreement as to the terms of the holding over. Where there was a term in a lease that the lessee would give up possession without notice and on the expiry of the lease, the lessee held over on payment of rent: The term as to notice is not carried over to the new lease and notice is necessary to terminate the later lease: 37 C.W.N. 971. *See also* 1938 N. 506=1938 N.L.J. 317. A notice to quit should not be construed with a desire to find faults in it, but with a view to its validity. A notice is good notwithstanding that the addressee is described therein as a trespasser. Nor does the fact that two months' time is given where only 15 days' time is necessary invalidate the notice. 36 C.W. N. 918. *See also* 68 C.L.J. 411. Where a person undertakes to surrender whenever required, no notice is necessary. *See* 110 I.C. 398=1928 M. 687: *see also* 1910 M.W.N. 794=8 I.C. 362. In the case of a lease for fixed period, notice of termination is not necessary. 1932 A.L.J. 126. In cases not governed by the T. P. Act, reasonable notice is sufficient. 23 C.W.N. 641=51 I.C. 415; 42 I.C. 375; 30 I.C. 886=22 C.L.J. 74; 20 I.C. 363=17 C.W.N. 1073; 57 I.C. 311. A person claiming from a *tenant at sufferance* is not entitled to notice to quit. 114 I.C. 725=1929 A. 610. In cases of *agricultural leases*, notice need not ask the tenant to quit exactly at the end of the year. 1925 M. 346=85 I.C. 339. A notice demanding an agricultural tenant from year to year, to quit the land immediately or forthwith is not proper, and reasonable notice is necessary. 1929 N. 169. If the notice makes it quite clear to him that the landlord intends to take possession of the whole of the *jama* the notice is valid although it contains an inaccurate description of the land. 68 C.L.J. 481=1939 C. 291. Permission to build on payment of rent without a lease-deed amounts only to a license and no notice is necessary. The remedy will be for wrongful revocation of license. 38 A. 178=32 I.C. 346. Where the lessee is allowed to construct a building on the land leased, and the lease is found to be one from month to month, it is unjust for the lessor to claim the structure to be demolished. He should give the lessee a notice to quit. 1939 P. 428. A tenant who holds against the wishes of the landlord is not entitled to notice to quit. 53 I.C. 180 (P.). A person not prepared to accept 15 days' notice is not entitled to ask the notice to be served under S. 106. 1927 S. 24=97 I.C. 577. Where according to the contract, a lease is terminable only on the happening of a particular contingency, a prior notice to quit will be of no avail. 53 I.C. 109. *Notice by some of the co-owners* is sufficient if others have consented to it by conduct. 34 I.C. 56. But *see* 9 I.C. 110. Where a *notice given by agent of a manager of temple property* is not headed as such, it is not bad. 1925 A. 199=78 I.C. 651. *Notice served by post* will be presumed to have been served. 46 C. 458=45 I.A. 222 (P.C.). [This was the law even before the present amendment of 1929. Now this has been specially provided for by the amendment]. "Sending by post" in S. 106 must mean sending by post to the tenant's proper address. 43 C.W. N.309=41 Bom.L.R. 684=1939 P.C. 11=(1939) 1 M.L.J. 365 (P.C.). Where a registered notice was returned with a note 'refused' in view of presumption that posting of a letter in due course raises, it cannot be said that there has not been a proper service of notice. 1938 A.L.J. 511 =1938 A.W.R. (H.C.) 328=1938 A. 388. Service on one of many joint tenants will be evidence of service on others. 46 C. 458=45 I.A. 222=35 M.L.J. 707 (P.C.); 37 C.L.J. 478=75 I.C. 105. *Notice must be served on all.* 29 C.W.N. 620. Service must be where the lessee resides and on the lessee. 13 I.C. 59=9 A.L.J. 574.

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Affixture is bad, unless tender or delivery is impracticable. 51 I.C. 44. As to *service of notice in the case of joint tenants, see* 87 I.C. 708=29 C.W.N. 620; 37 C.L.J. 478=75 I.C. 105. Where the lessee surrendered, the sub-lessee is not entitled to any notice. 20 I.C. 11=11 A.L.J. 951. A notice to be valid should be of a period terminating with the end of the month or year of tenancy. 18 A.L.J. 854=57 I.C. 593; 26 I.C. 962=19 C.W.N. 489. *See also* 27 Bom.L.R. 102 =1925 B. 167; 22 B. 241; 38 C.L.J. 177=1923 C. 524. Notice not bad by reason of its being too long by a few hours. "*The validity of a notice to quit ought not to turn on the splitting of a straw.*" 1931 M. 352=60 M.L.J. 293. If the tenancy is *per* Bengali year, the month and the period of the notice should be calculated as *per* Bengali calendar. 30 I.C. 887=22 C.L.J. 78; 30 I.C. 886=22 C.L.J. 74. Lease of house—Termination of—Notice asking lessee to vacate by midnight of the 31st July — Not necessary that lessor should send the notice on the 15th July or that he should ask the lessee to vacate on the expiry of the 1st August. 1937 A. 36. Notice to quit *by* a certain date, meaning of: 1937 N. 139. When a house is taken on rent and occupied in the middle of a month and rent is paid separately for the days during which the house has been occupied prior to the first of the following calendar month, the intention of the parties is that the tenancy should begin on the first of each calendar month. 1936 O.W.N. 514 =1936 O. 306. A notice was given on 9th November, 1927, to the lessee stating that he should vacate the land on 13th May, 1927. 1927 in the notice was a mistake for 1928 and parties were not misled. The notice is valid. 1934 A.L.J. 674=1934 A. 787. Objection to the legality of the notice is not to be raised on appeal for the first time. 1923 R. 13. In reckoning the period, the day on which the notice is served is excluded and the day on which it expires is included. 36 I.C. 962=19 C.W.N. 489. S. 106 implies the existence of a lease. Where the relationship of landlord and tenant between the parties has been created not by a lease but by a decision of a Court, the tenancy cannot be legally terminated by a notice to quit under this section. 46 C.W.N. 464.

NOTICE TO QUIT AND DEMAND OF ENHANCED RENT IN THE ALTERNATIVE.—Where a notice to quit or pay enhanced rent is issued to a tenant, and he refuses to quit, it does not necessarily follow that he is bound to pay the enhanced rent from the date of the termination of the tenancy. He may be entitled to remain for some reasonable time as in the case of a shop-keeper who has been in a particular place for a long time paying only the original rent. But where a tenant refuses to quit, he cannot also refuse to pay the enhanced rent. When he has been asked to quit or pay enhanced rent, if he does not quit, he must be deemed to have agreed to pay at the enhanced rent, if such rate is neither penal nor improbable. The Court has always a discretion in fixing the amount. 1940 N.L.J. 118=1940 N. 140. Where the notice was to quit or to pay rent at an enhanced rate, the tenancy is at an end, if the payment at enhanced rate is not agreed to. 43 A. 330= 19 A.L.J. 92; 19 I.C. 758. Where such a notice is invalid for want of proper period, the tenancy does not determine nor can enhanced rent be demanded. 62 I.C. 421=2 P.L.T. 282. *See also* 1926 N. 147. *See contra* 89 I.C. 578=1926 O. 79. Notice to quit—Construction—Offer to pay compensation to tenant—Lease silent as to payment of compensation—Right to eject without payment of compensation. 1936 C. 581.

PERMANENT TENANCIES.—The burden of proving permanency of tenure is on the lessees. Otherwise, the leases shall be presumed to be monthly or yearly as the case may be. 43 I.C. 643=35 M.L.J. 281. *See also* 13 C.W.N. 513= 9 C.L.J. 362. *Joint lessees* cannot object to partition on the ground that the permanent leases were granted by the lessors in excess of their powers and are liable to be set aside. 43 C. 1118 =53 I.C. 129. In case of *building leases* the presumption is in favour of permanent tenancies. 1 P. 717=1922 P. 258; 34 C. 358; 164 I.C. 1003. The lease of land for the purpose of putting up a permanent construction cannot be deemed to be a permanent lease. Such a lease in the absence of any contract or local law or usage must be deemed to be a lease from month to month. 1941 A.L.J. 557=1941 A. 399. *See also* 48 L.W. 894= 1939 M. 247; 23 P. 294. The use of the words *Istimrari Maurasi Mokurari* in a lease *prima facie* creates a heritable and permanent tenancy and not merely an estate for the life of the grantee. 41 I.C. 875; but the use of the word "*Istimrari*" or "*Istimrari Mokurari*" *prima facie* refers only to life estate. 56 I.C. 656; 30 C. 883. The following are presumed to create a permanent tenancy—*Patni tenure*, 3 B.L.R. (A.C.) 437; 25 C. 13; *Mulgini* tenure, 17 M. 218; *Mirasi* tenure, 1888 P.J. (B.) 304; *Kayam saswatha* tenure, 35 M.L.J. 129. *See also* 25 C. 13; 3 Bom.L.R. 437; 17 M. 218. A *forfeiture clause* in a lease deed does not derogate from the otherwise permanent nature of the tenancy. 34 C. 358. *Long and continued possession* coupeld with the tenants building on the land pucca structures from time to time would give rise to a presumption of permanent tenancy. *See* 28 C. 738; 32 C. 51; 34 C. 902. But *see* 15 B. 647; 31 B. 185. A permanent tenancy created before the passing of the Act to which, if created after its passing, its provisions would apply is transferable. 33 I.C. 502 (C.).

TENANT-AT-SUFFERANCE OR TENANT-AT-WILL. —The representative of a tenant at sufferance is a mere traspasser and his possession is not that of tenant entitled to receive a notice to quit as required by S. 106; 114 I.C. 725. It is doubtful if tenancy by sufferance exists after the passing of the Act. 39 M. 54=33 I.C. 705; *see also* 25 I.C. 109=1914 M.W.N. 728. But *see contra* 90 I.C. 98=1925 C. 1171. The defendants who were holding for a long time under yearly leases, and, on the expiry of the term under the last lease, were holding over on payment of rent to the lessor. There was no provision in the contracts between the parties what, if any, should be the notice in case the defendants held over. *Held*, that the tenancy should be deemed to be renewed from month to month (though rent was paid per year) and that fifteen days' notice ending with a month of the tenancy was sufficient. 36 C.W.N. 918. The defendant was a tenant for a term of four years commencing from the 1st June, 1921. After the expiry of his lease, he continued to hold over till 1928. A notice given on the 1st February 1928, of his intention to quit on the 1st March i

107. A lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

Leases how made.

[1][All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession].

[2][Where a lease of immovable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee] :

[1][Provided that the Provincial Government may [3][* * * * *] from time to time, by notification[4] in the Official Gazette, direct that leases of immovable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.]

LEG. REF.

[1] This paragraph and proviso and substituted inserted respectively by S. 5 of Act VI of 1904.

[2] Inserted by Act XX of 1929, S. 55.

[3] Words, 'with the previous sanction of the Governor-General in Council' omitted by A.O., 1937.

[4] For notification (1) by Govt. of Burma, see *Burma Gazette*, 1907, Pt. I, p. 226 ; (2) by the Govt. of the U. P. see *U. P. Gazette*, 1905, Pt. I, p. 410.

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valid and effective. The lease of 1921 expired at midnight on the 1st June, 1925, and the notice expired with the end of a month of the tenancy, *viz.*, the midnight of the 1st March, 1928 : 37 C.W.N. 1=1932 P.C. 279=63 M.L.J. 685 (P.C.). *See also* 16 Luck. 44. Where the tenants take possession under a document which clearly purports to be a lease for a term of years, but which is not duly stamped and registered, the tenants are only tenants-at-will. 90 I.C. 98=1925 C. 1171. But *see* 25 I.C. 109=1914 M.W.N. 728. Where the evidence showed that the defendant was the tenant of the predecessor of the plaintiff and that he had been paying rent for the possession : the plaintiff could not eject the defendant as a trespasser but only under the terms of the lease. 1930 A.L.J. 1409.

Secs. 106 and 111, Cl. (h).—Tenancies from year to year or month to month created after the passing of the T. P. Act are leasehold interests and are both transferable and heritable. Consequently a notice to quit served on the surviving tenants alone but not on the heirs of some of the tenants who are dead is not valid and sufficient in law to determine the tenancy. I.L.R. (1939) 2 C. 254=43 C.W.N. 797=1940 C. 89.

Secs. 106 and 116.—S. 106 applies only when there is a valid lease created as required by S. 107 and the tenancy is subsisting. Where a lease is not according to law, the tenant is only a tenant at will and if he continues in possession after the period fixed in the invalid lease, without the landlord's consent, he becomes a tenant at sufferance, and is not entitled to any notice to quit prior to ejectment. 1940 O.W.N. 586=1940 O. 401.

Sec. 107.—As to limitation to the territorial operation of S. 107, *see* S. 1, *supra*. S. 107 extends to every cantonment in British India—*see* the Cantonments Act, S. 32 (1).

CHANGE IN SECTION [BEFORE THE AMENDMENT THERE WAS A CONFLICT OF VIEWS]—The Allahabad High Court held that a lease must be by deed signed by the lessor also. 26 A. 368 ; 27 A. 190; 31 A. 276. This view was taken by the Madras and Calcutta High Courts in the earlier cases (30 M. 322 ; 32 M. 532 ; 14 C.W.N. 73), but abandoned in 35 M. 95=21 M.L.J. 202 (F.B.), 1 L.W. 236=24 I.C. 784 and 39 C. 1016. The Rangoon and Bombay High Courts adopted the Allahabad view (3 R. 379 ; 27 Bom.L.R. 626). Now a lease should be executed by both the lessor and the lessee. A registered kriyanama executed by the lessee only cannot operate as lease, but he is bound by its terms unless of course he proves fraud or coercion. Nor is the document a license. 1942 A.L.W. 373. Before the T. P. Act, for the execution of a permanent lease, the execution of a *patta* was not necessary and the acceptance of a *kabuliyat* was sufficient. 14 C.L.J. 614=10 I.C. 489.

AS TO SCOPE OF SECTION, *see* 3 P.L.T. 12=1925 P. 216 ; 1941 P. 577. The amendment of S. 107 which requires leases to be in a bilateral form applies to leases executed subsequent to April 1st, 1930, in pursuance of an agreement entered into before that date, although such agreement provides for two separate documents by the lessor and the lessee. 43 C.W.N. 956. S. 107 does not apply to agricultural leases. 11 O.W.N. 1565=1935 O. 90. Nor to any grant or other transfer of land or any interest therein made by or on behalf of the Crown in favour of any person. 6 P. 446=104 I.C. 209=1927 P. 319. 74 I.C. 369=1923 O. 114. But *see* 36 A. 176 ; 3 A.L.J. 129. By virtue of S. 287 of the Cantonments Act, S. 107 of the T. P. Act is made applicable to *cantonments*. 1931 L. 501. For purposes of registration the term of a lease means the length of time for which the lessee is entitled to undisturbed possession provided he himself fulfils all the stipulated conditions. 36 A. 176=12 A.L.J. 219=22 I.C. 933. A rent deed does not fall within the purview of S. 107. 42 P.L.R. 75. A rent note signed only by the intending lessee is not a lease under the Act and it would not require registration under S. 107. Further if it is neither from year to year nor for a term exceeding an year, nor reserving an yearly rent, it does not require registration, though it may amount to a lease under Registration Act, S. 2 (7). 1940 N.L.J. 110=1940 N. 143.

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THIRD PARAGRAPH.—Prior to the enactment of this paragraph, there was a conflict of decisions as to whether a *kabuliyat* or other document enacted by the lessee alone operated as a lease. For decisions holding that it did, *see* 55 C. 435 ; 39 C. 1016 ; 35 M. 95 ; 27 Bom.L.R. 626 ; 24 I.C. 784 (1) (M.) ; 24 N.L.R. 68. For decisions holding that it did not , *see* 26 A. 369 ; 27 A. 190; 31 A. 266 ; 1927 A. 729 ; 3 R. 379 ; 1925 N. 121 ; 1926 N. 391 ; 104 I.C. 410 ; 1924 A. 514; 46 A. 303 ; 27 A. 462 ; 9 O.C. 296 ; 14 C.W.N. 73 ; 1930 A. 678. The latter view is upheld by the amendment. Before a lease can be validly executed and registered, there ought to be a writing *signed by the lessor* when immovable property is leased out, and a mere kabuliyat *by the lessee* is of no avail. A lease for more than a year and continuing in perpetuity could not be given effect to without a registered document. The mere fact that the lessee obtains possession would not entitle him to force upon the lessor terms which would amount to grant in perpetuity. 166 I.C. 897=1937 A. 36. S. 53-A would not bind the lessee when there is no writing signed by the lessor containing any such condition. Again, the part performance of the contract would entitle the lessee to remain in possession until evicted on notice and would entitle the lessor to claim rent from the lessee, but, in the absence of a written contract signed by the lessor, would not grant to the lessee permanent rights as rights of a perpetual lessee. 1937 A. 36. *See also* 1939 O.A. 170=1939 O.W.N. 102. *Lease and agreement to lease*, see 11 C.L.J. 543=6 I.C. 632. S. 107 only prescribes the mode of creation of a lease. The effect of its non-compliance will be that the lease will be of no effect for the period. The statute does not say about the rights of the parties under the invalid lease and does not prevent the doctrine of holding over being applied, as that has been recognised by the statute itself. 144 I.C. 788=1933 P. 485. Where the lessee executes a registered *kabuliyat* in favour of the lessors and the lessors accept it by means of an unregistered *amalnamah* no valid lease is constituted, as the *kabuliyat* executed by the tenant is not a lease nor can the acceptance of the lessor be proved either by the *amalnamah* or by oral evidence. 1935 P. 291 (F.B.). Ss. 4 and 107 must be read together with S. 17 (*d*) of the Registration Act and instrument which does not fall under S. 107 is not compulsorily registrable. 32 M. 532=4 I.C. 1039. *See also* 39 M.L.J. 639. *infra* ; 21 M. 109 ; 44 M. 55 ; 11 I.C. 863 ; 1926 O. 609 ; 15 P. 460=17 P.L.T. 217=1936 P. 372 ; 1939 A.M.L.J. 148. The Act is inapplicable to *mulgeni* leases and registration is unnecessary. 28 I.C. 599=1915 M.W. N. 271 ; also to agricultural leases which may be made without a written instrument : 90 I.C. 51 =1926 N. 9. But where a lease is executed mainly with the object of making an arrangement for collection of rents and not with the object of cultivation, the lease cannot be regarded as *an agricultural lease* and is, therefore, subject to the provisions of S. 107. Such a lease is invalid, if the lessee is no party to it as required by that section. 164 I.C. 830=1936 O.W.N. 757=12 Luck. 514=1937 O. 151. *See also* 1940 O. 425. *Kabuliyat* need not be registered. 24 N.L.R. 68 =95 I.C. 183. But when an instrument is executed for that purpose, it is affected by the provisions of S. 17 (1) (*d*) of the Registration Act and must be registered ; and if it is not registered, it is inadmissible in evidence by reason of S. 49 of the Registration Act. 62 C.L.J. 534=1936 C. 770. *Lease for an indefinite period*, need not be registered : *see* 97 P.R. 1915=32 I.C. 35 ; nor a *tenancy at will* : see 44 C. 214=21 C.W.N. 206. Lac cultivation falls within the extended definition of agriculture given in S. 2 (2) of C. P. Tenancy Act and a lease for three years for working out lac bearing trees need not be in writing and registered. But if reduced to writing, it must be registered because lease of a lac jungle is "the right of planting lac on the trees," that is to say, the right of sowing, cultivating and harvesting the crop. I.L.R. (1938) N. 31=1937 N. 289. A lease for planting casuarina trees is not one for agricultural purposes and must be registered. 34 I.C. 539=3 L.W. 319. (*See also* under S. 117). Fishery rights constitute immovable property and the provisions of S. 107 excludes the possibility of an oral lease of such rights for a term exceeding one year. 1941 O.W.N. 1065=1941 A.W.R. 823 (Rev.). Where the lease of a rice mill is executed for one month with a condition that if there was paddy left unmilled at the expiry of the lease a fixed monthly rent would be paid every month for five years, the lease is a lease for over one year and requires registration. 194 I.C. 31= 1941 R. 117. Where rent is mentioned in a lease which is inadmissible in evidence on account of its being unregistered, though the figure as to the rent mentioned in the lease cannot be looked at in order to establish the rent fixed, it might be looked at to establish what damages the landlord suing for arrears of rent was entitled to by way of rent. 32 P.L.R. 361=1931 L. 501. Execution of a rent note by the tenant without delivery of possession does not transfer any interest in the property. 27 Bom.L.R. 626=88 I.C. 648 (1). A rent-note in respect of a house for a period of eleven months, which is unregistered cannot operate as a lease. A registered instrument is necessary in every case, except where the lease is by oral agreement accompanied by delivery of possession. 164 I.C. 557=1936 N. 174. Such an unregistered rent note is not receivable in evidence either for proving the duration of the lease or for proving the rent, in view of S. 49 of the Registration Act. 1936 N. 174. A perpetual lease of a plot of ground on an annual rent is not valid unless registered. 1936 N. 295. Whether a tenancy comes into existence before or after passing of T. P. Act, a landlord is *prima facie* entitled to possession of his *ghair mazrua* land subject, of course, to such right (if any) as the tenant may show to have been conferred upon him by the landlord. A permanent right can only be based either upon a contract express or implied, or upon some statement of fact grounding an estoppel. 23 P.L.T. 294. *Tenancy reserving yearly rent* must be registered. 59 I.C. 788. The fact that rent is reserved at a certain amount a year does not by itself show that it is a *tenancy from year to year*. A *tenancy at will* can be created orally. 44 C. 214=21 C.W.N. 206. *See also* 23 I.C. 318=18 C.W.N. 858 ; 32 I.C. 35. A *lease from month to month* which requires registration under S. 107, T. P. Act, but not under S. 17 of the Registration Act is admissible in evidence to

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prove the nature of possession under the instrument. Section 49 of the Registration Act applies only to instruments which are required to be registered by S. 17 of the Act. 1931 L. 501. An oral lease of property for a period of one year is valid. 146 I.C. 640=1933 R. 262; 63 C. 31. But if coupled with a covenant to renew it from year to year must be registered. 26 I.C. 962=19 C.W.N. 489; 18 I. C. 844=17 C.L.J. 167. *See also* 4 P. 139=84 I.C. 586=1925 P. 216. All leases for more than a year must be in writing and registered. A *lease for life* must be registered. 59 I.C. 893. Where possession had been delivered under an agreement, but documents have not been executed or registered, the position is the same as if they have been executed, only the party will have to file a suit for specific performance. 27 C.W.N. 159=1923 C. 130; 32 I. C. 692=8 L.B.R. 351; 5 I.C. 562 (C.); 14 A. 176; 31 A. 276; 1925 C. 1171; 35 M. 95; 11 I. C. 863. Under S. 107 a lease made by oral agreement should be accompanied by delivery of possession. Delivery of the key of a vacated bungalow is a sufficient delivery of possession. 148 I.C. 548 (1) =1934 Pesh. 81 (1). A *verbal lease* for more than one year is valid for one year if possession is delivered. 20 I.C. 715. An *oral contract of lease* for five years is invalid and the tenure would be presumed to be from month to month. 89 I.C. 1019=1926 N. 147. Where a lease, which would have been valid if it had been merely oral accompanied with possession, is reduced to writing and is accompanied by delivery of possession, the document does not require registration. 1937 O.W.N. 1030=1937 O. 505. If a lease for residential purposes reserving a yearly rent is not registered, the tenancy must in the eye of law be deemed to be a tenancy from month to month. 42 C.W.N. 771. Lease of house for 8 months in writing—Registration—Necessity. *See* 1938 O. W.N. 1080. Irregular arrangements between lessor and lessee pertaining to non-agricultural land purporting to be a lease for a period of years cannot be held to be a valid lease unless there is a written and registered document. 1937 R. 180. Lease deed being inadmissible in evidence—Proof of oral lease—Permissibility. 37 C.W.N. 473. Where a zamindar sells by auction his right to recover the rent due to him by the ryots, for a period of three years the transaction amounts to a lease of immovable property, the right to collect rents being a right to receive a benefit to arise in future out of land and therefore an interest in the land. The subject of the lease is not land itself and the object of it is not agricultural. Such lease must be effected by an instrument in writing registered; otherwise it is not valid or enforceable and no suit for rent on the basis of such lease can be maintained. 45 L. W. 387=1937 M. 656. When the lessee under such lease has, however, collected rents it has to be regarded as use and occupation, for which the lessee is liable for damages, the measure of which is the amounts actually collected by him from the ryots. 1937 M. 656=45 L.W. 387.

UNREGISTERED LEASE DEED—ADMISSIBILITY IN EVIDENCE.—When the origin of a tenancy is known and the document by which it purports to have been created and which is the primary evidence of the transaction is ruled out, oral evidence as to the terms of the tenancy is not admissible nor can attendant circumstances be looked in to find out its nature or incidents. 37 C.W.N. 473=1933 C. 612. But when possession of the leased property is admitted, the lessor could recover money for the use and occupation. 36 B. 500=15 I.C. 830; 18 I.C. 844=17 C.L.J. 167; 89 I.C. 1019; 29 P.W.R. 1922=1922 L. 329. [*See* now S. 53-A giving legislative recognition to the doctrine of part-performance. 27 A.L.J. 1134=1929 A. 831 is not now good law. *See also* 1923 C. 63.] But an unregistered lease deed is admissible in evidence for purposes other than to prove the lease: 44 M. 55=39 M.L.J. 639 (F.B.); 1942 O.W.N. 357=1942 O.A. 258. For instance that possession was permissive and not adverse: 39 M.L.J. 639=59 I.C. 330 (F.B.). *See also* 32 P.L.R. 361. Also reference may be made to the deed for ascertaining damages. 32 P.L.R. 361. If there was a letting by oral agreement and delivery of possession, the mere existence of an instrument which is inadmissible, for want of registration does not exclude other evidence of tenancy. 32 M. 532=4 I.C. 1039. The instrument itself is inadmissible, though it is in the form of a letter written to the lessee by the lessor after the grant of a lease. 37 C. 293=4 I.C. 713. But *see* 90 I.C. 51=1926 N. 9, holding that a letter written by lessor to lessee and referring to an already existing lease is evidence of the prior lease and is admissible without registration. A sub-lease which requires registration but which is not registered is void; and a condition in the original lease against transfer is not broken by the sub-lease or transfer which is void. Such an illegal sub-letting would not entail forfeiture for breach of condition against transfer. 15 P. 460 =1936 P. 372. A document given by the owner of land to his tenant or by the tenant to his landlord, varying the term of the tenancy with reference to the amount of rent to be paid requires registration. [2 I.C. 89, impliedly overruled by 39 C. 284 (F.B.); 24 C. 20 and 22 M. 217, Not Foll.]. 162 I.C. 33=40 C.W.N. 638=1936 C. 155.

ORAL AGREEMENT TO LEASE.—An oral agreement to lease, which contemplates specifically the formal execution of a deed can be specifically enforced, and S. 107 is no bar to the same. 100 I.C. 404=1927 C. 275. *See also* 1926 N. 147; 20 I.C. 715 (oral lease for more than one year accompanied by delivery of possession will be good for one year). 20 I. C. 715. *See also* I.L.R. (1939) 2 C. 854=43 C.W.N. 797=1940 C. 89; 63 C. 31; 19 P.L.T. 791=1938 P. 435. An oral lease of agricultural land cannot be complete or valid without delivery of possession. Where there has been no delivery of possession it can only be regarded as an agreement to lease. Such a lessee cannot alone maintain an action in ejectment against a person in possession and not claiming under the lessor. Where a written unregistered lease is inadmissible for want of registration, an oral lease cannot be allowed to set up. 20 P. 346=22 P.L.T. 971=1941 P. 577. But in the absence of a registered instrument, the verbal agreement alone could not create a permanent lease and the doctrine of part-performance could not be applied so as to modify or override the mandatory provisions of the Act, so as to nullify the statutory requirement of a registered instrument. 58 I.A. 91=35 C.W.N. 550= 60 M.L.J. 538 (P.C.). (*See* S. 53-A). Whether an oral agreement is a lease, or merely an agreement

108. In the absence of a contract or local usage to the contrary, the lessor and the lessee of immovable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased :—

Rights and liabilities of lessor and lessee.

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to let, is a question of intention of the parties. If the intention was not to create immediately the relation of landlord and tenant or something more had to be done before the relation commenced, it is to operate only as an agreement to let and not as a lease. 1933 R. 220. An oral agreement for a lease of three years, where the lessee was already given possession and rent was taken from him and only the formal execution of the deed was to be done later, amounts to a lease and not merely an agreement to lease and necessitates a registered document. 57 M. 760=1934 M. 418=67 M.L.J. 54. The requirements of the section cannot be evaded by the parties simply saying that the parties agree to be bound by the terms of an old lease which has become extinct by forfeiture. 126 I.C. 284 (2)= 1930 M. 272.

LEASE FOR ONE YEAR.—Though a Hindu *samvat* year is more than one year according to the British Calendar a lease for one *samvat* year is not compulsory registrable. 1924 N. 216 (1). A registered instrument is necessary under S. 107 for creating a lease for any term exceeding one year or reserving a yearly rent. 4 P. 139=84 I.C. 586. An unregistered lease for a term less than one year is invalid if possession is not delivered to the lessee. 96 I.C. 410=1926 O. 609. A rent deed for less than a year executed by the transferee and not the transferor of the interest to be conveyed by the lease is not a "lease" within the definition given in S. 105 of the T. P. Act requiring registration, and would, therefore, be admissible in evidence though unregistered. I.L,R. (1940) L. 70=41 P. L. R. 498=1939 L. 423. *See also* 1940 N. 143.

DELIVERY OF POSSESSION.—A lease can be created by the mere registration of the deed, without delivery of possession, and therefore a lessee or sub-lessee can maintain an action against the lessor for mesne profits as damages for keeping the lessee out of possession. 6 P. 94=96 I.C. 558. *See also* 1940 C. 89. The doctrine of privity of estate is applicable in India also ; for the application of the doctrine all that is necessary to be found is whether possessory title has passed or not, and the question whether possession has been taken is immaterial. The mere fact that an assignee from the lessee does not take any effective step to obtain possession or to realise his share in the profits of the estate is not sufficient to defeat the landlord's right to realise royalty or rent from the assignee. Actual possession is not necessary. 19 P. 433=1940 P. 516.

Secs. 107 and 117.—A *darpatni lease* is not a lease for agricultural purposes within the meaning of S. 117 and would accordingly be governed by S. 107. 65 C.L.J. 590=1938 C. 172. The criterion for distinguishing between a lease for agricultural purposes and one not for the agricultural purposes is whether the primary object of the transaction is agriculture. A combination of a lease of shops in Lucknow with a lease of zamindari rights rather than cultivatory rights, in a village cannot be a lease for agricultural purposes and therefore requires registration. 1940 O.W.N. 842=1940 O. 425. *See also* 1937 O. 151.

Sec. 108 : GENERAL.—S. 108 has no application to a tenancy at will. 14 P.L.T. 685= 1933 P. 561. Though S. 108 is not in force in the Punjab, the principle relating to covenant for quiet enjoyment, is of universal application and applies. Where a lessor covenants to indemnify the lessee against all persons, this is a covenant to indemnify against lawful title and not against unlawful acts of trespassers. 171 I.C. 114=1937 L. 930. The principle of this section may be applied to Crown grants regarding the nature of ordinary covenants between lessors and lessees : 40 M. 910=30 M.L.J. 575 ; also to agricultural leases as enunciating rules of justice, equity and good conscience : 25 I.C. 812 =1 L.W. 858 ; 40 I.C. 590 ; 26 M.L.J. 160 ; 22 I.C. 515 ; 38 B. 716=28 I.C. 140 ; 33 M. 253 ; 33 M. 499 ; 1940 M. 410=(1940) 1 M.L.J. 200. S. 108—Original lease for agricultural purposes—Under-lease by lessee for non-agricultural purposes—Law applicable. 22 P.L.T. 821. A lease by a usufructuary mortgagee will enure only for the duration of the mortgage and the lessee will be presumed to know the lessor's limited rights. 11 I. C. 817=8 A.L.J. 802. A lessee for a term has no right to avoid a lease on the ground of breach of covenants. His remedy is only by way of damages. 1923 M. 833=48 M.L.J. 397. A lessee cannot repudiate the lease and claim refund of deposit, merely because the lessors could not produce documents of title where it appeared that they had *prima facie* a good title. 57 C. 1189=1930 C. 561. Where lands held under an *agricultural lease* are silted up by floods, the tenant is not entitled to treat the lease as void on the analogy of S. 108 : 1929 M. 575. The landlord can claim *special damages* where a tenant holds over, either for breach of contract to yield possession or for possession. 50 C. 667=1924 C. 240. Lease drawn up so as to be collateral security for a mortgage also—Effect. *See* 44 M.L.J. 728=1922 P.C. 347 (P.C.). One of the joint lessors could not enforce the covenants of the lease where the co-lessor impleaded as party defendant comes forward to support an oral agreement which modified the lease set up by the lessee. 185 I.C. 284=1939 P. 428. In connection with proceedings for the determination of mesne profits, a receiver was appointed to auction the land and the respondent executed a security bond to raise the second crop and give a certain amount of paddy. *Held*, that though the T. P. Act did not apply, the principles of S. 108 applied and that the respondent's liabilities were those of a lessee subject to the same legal incidents. 1933 M. 465=38 L.W. 263.

(A) Rights and Liabilities of the Lessor.

(*a*) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover ;

(*b*) the lessor is bound on the lessee's request to put him in possession of the property ;

(*c*) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.

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Sec. 108 (a).—The 'defect' has reference to the nature and condition of he property and not defect in the lessor's title. 19 I.C. 815=17 C.W.N. 960. The obligation of a lessor is the same as that of a vendor so far as regards the duty to give a good title, though the obligation to give disclosure or to furnish proof thereof may be different. (57 C. 1189, Ref.) 38 C.W.N. 244=1934 C. 437.

Sec. 108 (b).—The lessee will be entitled to possession though the premium is not paid in the absence of a contract to the contrary. 42 M. 203=36 M.L.J. 313. The lessee is entitled to enforce his right to obtain possession by ejecting another in possession and he can enforce his right against person holding under his lessor, who is bound to put him in possession. 1932 A.L.J. 126; 43 I.C. 210=33 M.L.J. 684 ; 1931 A.L.J. 666. But *see contra* 53 I.C. 140=6 O.L.J. 378. The mere fact that the lessor in the course of the suit entered into a compromise with the former lessee, whose lease had expired, does not disentitle the latter lessee from obtaining a decree against former lessee. 1932 A.L.J. 126=1932 A. 314. Notice to tenants to attorn would amount to delivery of possession only when the transferor himself is in possession. 40 I.C. 684 =19 P.R. 1918. *See also* 33 M. 102=20 M.L.J. 20. Delivery of possession is a condition necessary for a suit for rent. 58 I.C. 186. Non-delivery of possession would be a good defence in suit for rent. 23 M.L.J. 119 ; 15 I.C. 711 ; 58 I.C. 186 ; 9 C.L.J. 595=4 I.C. 63 ; 34 M. 108 =6 I.C. 727. As to the effect of tenant taking possession before the actual execution of the lease deed, *see* 15 C.W.N. 976=9 I.C. 374. *See also* 7 M.L.T. 199. Where lessor fails to deliver possession lessee may recover damages. 34 M. 108=6 I.C. 727 ; 53 I.C. 140 ; 6 P. 94. A lessee to whom possession is not delivered on the agreed date can rescind the contract of lease. 110 I.C. 420=1928 N. 328. When the lessor, knowing he has no title fails to secure the lessee in undisturbed possession, he fails to carry out the obligations imposed by this section. 47 A. 63= 1925 A. 275 (1). Where the lessee undertakes to get possession from a third party, lessor cannot sue for possession, at any rate without joining the lessee in the suit. He would be only entitled to a mere declaratory decree. 119 I.C. 169= 1929 M. 611. Where there is no dispute as to the identity of the subjects let, but the tenant denies that he has ever got possession of the subjects, it is for the landlord to prove that he has discharged his obligation to put the tenant in possession before he can enforce the tenant's obligation to pay rent. The landlord must not only show that the tenant is in possession of the subjects of the lease, but that such possession was attributable to the lease or might be so. 59 I.A. 29=59 C. 1012=62 M.L.J. 336 (P.C.); 152 I. C. 231=1934 Pesh. 101. Where in a lease for term the lessee undertakes to surrender vacant possession on expiry of term and to remove structures erected by him a lessee vacating without removing structures retains no interest in land or structure. 43 Bom.L.R. 576 =1941 Bom. 337.

Sec. 108 (c) : SCOPE.—Where the lessee of a theatre grants a lease of the theatre to another for a certain period but before the expiry of the period, the original lessor, determining the lease, intervenes and prevents the sub-lessee from using the theatre and the latter is compelled to take a fresh lease from the proprietor on payment of an additional sum, there is a breach of covenant for quiet enjoyment, which entitles the sub-lessee to bring a suit for damages against the original lessee and recover from the extra amount which he was required to pay to secure a fresh lease from the proprietor over and above other damages. 181 I.C. 394=1938 N. 439. Where a stranger claims by paramount title, the lessee need not pay rent till the lessor proves his ability to secure quiet enjoyment. 63 I.C. 754. *See also* 12 W.R. 109 ; 23 W.R. 121 ; 13 W.R. 338 ; 15 W. R. 230; cases decided before the passing of the Act. 25 B. 269. "Interruption" includes disturbance by a person with a paramount title. 53 I.C. 754; 19 I.C. 815=17 C.W.N. 960 ; 63 I.C. 477 ; 50 C. 68=1923 C. 41. *Covenant for quiet enjoyment* is not conditional on payment of rent. 15 I. C. 711=23 M.L.J. 119. *See also* 39 M.L.J. 233. Provisions of Ss. 108 and 55 compared as regards *warranty of title* in cases of lease and sale. 57 C. 1189=128 I.C. 321=1930 C. 561=34 C.W.N. 347. This clause does not extend any protection to disturbance by mere trespassers, for against them the lessee has his proper remedy ; nor can he on account of being evicted by such person be relieved of his liability to pay rent. 50 C. 68 =1923 C. 41. *See also* 17 C.W.N. 960 ; 60 I.C. 477 ; 35 C.L.J. 292 ; 38 L.W. 263=1933 M. 465. Where the lessee's possession is disturbed for a few days and he gets back into possession before the term of the lease comes to an end, it is his duty at the termination of the lease peaceably to surrender the premises leased to him. 94 I.C. 121 (2)=1926 L. 371. But where the lessor has no title to the property and the lessee is ejected by the true owner, the lessee is not bound to pay any rent to the lessor. 47 A. 63=85 I.C. 756. Where a tenant is evicted of a portion of his holding, the fact that he was in enjoyment of

The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(*B*) *Rights and Liabilities of the Lessee.*

(*d*) If during the continuance of the lease, any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease ;

(*e*) if by fire, tempest or flood, or violence of an army or of a mob or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void :

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision ;

(*f*) if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor ;

(*g*) if the lessor neglects to make any payment which he is bound to make,

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another holding of the lessor which was not contiguous will not render him liable for the entire rent. 33 C.W.N. 106=1929 C. 272. Inclusion of the land not belonging to the lessor would not make the lease void if there was no fraud or misrepresentation. There could be apportionment of rent for the remaining lands. 39 C. 1016=16 C.W.N. 606=14 I.C. 540. As to the effect of lessee being evicted by an Act of the legislature or the executive, for instance under the Epidemic Diseases Act, *see* 23 B. 510. *See also* 8 W.R. 527 (Eviction on acquisition of land under the Land Acquisition Act). As to *measure of damages for breach of covenant for quiet enjoyment*, see 33 C.W.N. 106=1929 C. 272.

Sec. 108 (c) and (g).—Lease of property subject to maintenance charge—Lessor undertaking to pay maintenance—Sub-lease by lessee of remainder of term—Demand for arrears of maintenance left unpaid by lessor—Payment by sub-lessee entitles him to deduct from rent payable to immediate lessor. 1940 M. 410=(1940) 1 M.L.J. 200.

Sec. 108 (d).—The principle of this clause is applicable to cases not coming within the Act. The benefit of an encroachment by the lessee on the neighbour's lands enures to the lessor. 42 C.L.J. 276=1925 C. 1114. It enures for the benefit of the tenant for the period of the lease, and afterwards for the benefit of the landlord. 22 W.R. 246 ; 16 W.R. 96. *See also* 26 C. 739 ; 10 C. 820. A tenant (even with rights of permanent tenancy) cannot by prescription acquire a right of easement over the adjoining lands of the lessor. 14 A. 185 ; 29 C. 363.

Sec. 108 (e).—There is no justification for restricting the meaning of the word 'flood' in S. 108 (*e*), to flooding by other than sea water. 1936 M. 664=71 M.L.J. 352. Section applies even if there is no destruction of the leased premises, but it is rendered substantially and permanently unfit for occupation or the purpose of the lease : *see* 7 I.C. 201. Where the shed in which the plaintiff carried on business and which he had obtained under a lease for a period of three years was blown off, it is optional to him to avoid the lease, unless the contract had provided otherwise. 1933 L. 517. The lease determines *ipso facto* on the serving of the notice by the lessee of intention to determine the lease on the lessor. No time need be given as in a notice under S. 106. 31 I.C. 697=19 C.W.N. 1019. *See also* 17 M. 98 ; 7 I.C. 201. As soon as the lessee elects to avoid the lease, he must give vacant possession of the leased building or land to the landlord. 33 B. 333=12 Bom.L.R. 1055=8 I.C. 1049. If he gives notice of his intention to avoid the lease while keeping some of his goods or articles on the premises, that will not be an extinguishment of the lease. 35 B. 333. If rent had been paid in advance, the lessee would on the avoidance of the lease be entitled to the refund of excess rent paid. 25 B. 15. In *agricultural leases* tenant is entitled to proportionate abatement of rent when a portion of the land becomes unfit for cultivation. 43 M. 132=37 M.L.J. 654. As to applicability of S. 108-B to agricultural leases, *see* 71 M.L.J. 352. Trees perishing or decaying owing to natural causes—If ground for abatement of rent. (*Ibid.*) As to abatement of rent in a *permanent lease* on land being acquired by the Government, *see* 128 I.C. 899=1930 B. 992.

PROVISO.—*See* 59 I.C. 252=39 M.L.J. 233.

Sec. 108 (f)—In the absence of a contract to the contrary the lessor need not make any repairs. Even when there is a contract to effect repairs, the lessee is not entitled to terminate the lease. He can after notice make the repairs and deduct the amount from the rent. 38 C.L.J. 177=1923 C. 524. *See also* 51 B. 274=1927 B. 115. Tenant can deduct from the rent payable by him expenses incurred by him for necessary repairs to the leased premises : 6 I.C. 139 ; but only such repairs as the landlord would be bound to do, the burden of proof of which lies on the tenant : 3 A.L.J. 134. Though there is a contract to pay rent without deduction, the lessee may deduct the expenses of repairs. Such a deduction is in the nature of payment to the landlord and not in the nature of set-off. 12 C.L.J. 351=6 I.C. 131.

Sec. 108 (g).—*See* 6 C.W.N. 336. Where the lessee is threatened with disturbance or eviction

and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor ;

(*h*) the lessee may [1][even after the determination of the lease] remove, at any time [2][whilst he is in possession of the property leased but not afterwards] all things which he has attached to the earth : provided he leaves the property in the state in which he received it ;

(*i*) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them ;

(*j*) the lessee may transfer absolutely or by way of mortgage or sub-lease

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LEG. REF.

[1] Inserted by S. 56 (*a*) (*i*) of Act XX of 1929.

[2] Substituted for the words " during the continuance of the lease " by S. 56 (*a*) (*ii*) of Act XX of 1929.

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by the Act of the prior mortgagee, for payment of which debt the lessor has made himself liable by covenanting with some third party, such as the mortgagee or his own vendor of the leased premises, that threat amounts to a breach of covenant, for his enjoyment. If so, such a sum paid by the lessee to avoid eviction and disturbance must in reason be one which the lessor is bound to make good, and hence the lessee is entitled to recover the same from the lessor. 40 L.W. 545=1934 M. 658. *See also* (1940) 1 M.L.J. 200.

Sec. 108 (h).—The intention of cl. (*h*) of S.108 was to declare the law and to substitute a general principle inconsistent with the principle of *quic quid plantatur*, but it limited the tenant's right to remove as a right to be exercised during the term of the lease. 60 C. 1042=37 C.W.N. 791. When the terms of a lease do not allow compensation for superstructures on eviction the Court has inherent power to grant time for their removal. 41 M.L.J. 265=1922 M. 349. *See also* 37 M. 1 =7 I.C. 202. Where a lease deed provided that the lessee might remove the fixtures within a reasonable time, if he paid the rent and acted in accordance with the terms of the lease and the lessee having defaulted in paying rent the lessor entered into possession, the lessee is not entitled to remove them. 34 C.W.N. 785=1931 C. 133. When the lease is found to be invalid, the lessee is not entitled to compensation for superstructures except in the case of fraud, but he can remove them. 34 I.C. 1=(1916) 1 M.W.N. 180. Apart from contract or estoppel, a tenant is not entitled to compensation for the buildings erected by him. He cannot remove them after quitting the premises. 38 M. 710=25 M.L.J. 625. *See also* 27 M. 211 ; 19 C.W.N. 361. (The option is with the lessor either to take the building on payment of compensation, or if he was unwilling to pay compensation to allow the tenant to remove the superstructure : *see* 27 M. 211 ; 38 M. 710). A tenant should be awarded compensation under S. 108 (*h*) for the trees planted by him during the tenancy with the landlord's knowledge. (1914) 2 U.B.R. 11=24 I.C. 708. The mere fact that the landlord knew that improvements were being effected but did not interfere, does not entitle the tenant to compensation for improvements, unless the landlord has created or encouraged a hope in the tenant that he shall have a certain interest in land. 37 M. 1=7 I.C. 202. A permanent tenant can cut down and use trees which he had planted. 38 B. 716=28 I.C. 140 ; 31 I.C. 12=29 M.L.J. 314. Where the dispute related to right to trees in a non-permanent holding, if the tenancy is proved to have originated before the Act came into operation, the landlord will be entitled to the same, unless the tenant proves some custom to the contrary. But if the tenancy came into existence after the Act was passed, under S. 108 (*h*) the ownership of the trees grown by the tenant will be in the tenant., 32 C.W.N. 242. The prohibition against felling timber contained in cl. (*o*) of S. 108 applies only to timber that stood on the land at the time of the lease. 108 I.C. 242 =32 C.W.N. 366. Though S. 108 (*h*) does not by reason of S. 117 of the Act apply to an agricultural lease, it lays down a principle which does apply in the absence of any special custom to the contrary. The English law of fixture has no application to this country. It is wrong to hold that apart from special custom, the tenant has a right to cut trees planted by him on his holding. 25 O.C. 181=1922 O. 249 (1).

STANDING CROPS.—The landlord when his right to re-entry accrues is not only entitled to take possession, but can take the standing crops on it as the law of emblements is not in force in India. 11 C.L.J. 87=5 I.C. 306. Where, in a redemption suit of a *kanom* mortgage, the decree directs the mortgagor to deposit the decree amount within six months from the decree, the *kanom* mortgagee sought to be redeemed is deemed to hold the mortgaged property under a " lease of uncertain duration ". 26 M.L.J. 348=22 I.C. 515.

Sec. 108 (j).—Clause (*j*) does not apply to an assignee of the lessee. 18 I.C. 479=17 C.W.N. 813 ; 88 I.C. 79=1925 B. 330 ; 79 I.C. 557= 1925 C. 423 ; nor to leases created before the T. P. Act. 1924 C. 1012. (This clause. is not retrospective. 1924 P. 324). The rule as to alienability of leases laid down in this section is subject to the special agreement of parties. 26 M. 156 ; 33 I.C. 408. S. 108 (*j*) while giving the lessee the right to transfer his interest, also lays down that the lessee shall not by reason only of such a transfer cease to be liable for the obligations under the lease. This latter provision is for the benefit of the lessor and he has the option either to take advantage of it and to enforce his rights against his lessee alone or to accept the

the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease;

nothing in this clause shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee ;

(*k*) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest ;

(*l*) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf ;

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transfer and sue the transferee for the enforcement of his rights under the lease. Where a mortgagee from a lessee had not only notice of the terms of the original lease between his mortgagor and the lessor, but also actually undertook by an express term in the deed of mortgage in his favour, to pay the rent to the original lessor and did in fact pay it to him, such a mortgagee is a person claiming under a party, to the original lease, by a title arising subsequent to the contract of lease. As such the lessor is entitled to sue such a mortgagee for the rent fixed in the original lease. I.L.R. (1938) A. 288=1938 A.L.J. 66=1938 A. 167. An absolute demise by sub-lease for the unexpired residue of the term operates not as an assignment, but only as sub-lease and is not a breach of a covenant against assignment. 57 I.A. 110=57 C. 1176=58 M.L.J. 293 (P.C.). The lessee transferring a portion does not escape liability to pay rent under lease : 40 M. 1111=32 M.L.J. 442 ; 1924 C. 359 ; 88 I.C. 79=1925 B. 330 ; even though his transferee is willing to pay it : 49 I.C. 800 ; 1925 C. 423. Lessee is personally liable for rent—Prohibition of transfer, effect of. 33 C.W.N. 865 (P.C.); 47 I.C. 800 (C.). The lessor can proceed against the lessee or his transferee or against both, but he can have execution only against one. 87 I.C. 802=1925 S. 296. *See also* 1924 C. 859; 42 C.W.N. 1088. The *lessee of a homestead land* can transfer the lease. 46 I.C. 656. *See also* 37 A. 144=26 I.C. 446; 51 I.C. 953 (C.). The *under-lessee* is not liable for the rent reserved by nor on the covenants contained in the head-lease. 20 C.L.J. 551=19 C.W.N. 1197 ; 33 I.C. 408. But *see also* 55 I.C. 113=1 P.L.T. 84. There is *no privity of contract nor privity of estate between the head-lessor and under-lessee :* 19 C.W.N. 1197=27 I.C. 397. *See also* 1925 C. 423 ; 47 I. C. 800 ; 34 C. 902 (P. C.). *Lessee creating a mortgage*—Extinction of the lease by mortgage. 88 I.C. 224=47 A. 589. Mortgage by lessee—Liability of mortgagee for rent—Privity of estate—English doctrine of—Applicability to India. 58 B. 327=37 Bom.L.R. 197 =1934 B. 134 (F.B.). In the absence of a covenant to the contrary, the *lessee can sub-let.* 33 P.R. 1914=23 I.C. 395. When the lease is validly terminated, the sub-lessee becomes liable for mesne profits to the lessor. 2 L.W. 946=31 I.C. 211. A *sub-lessee* is affected with constructive notice of covenants of his lessor. 55 I.C. 113 =1 P.L.T. 84 ; 118 I.C. 682=24 M.L.J. 228 ; 1930 P.C. 59. *Permanent leases for purposes of habitation created before the Act* are not transferable. 29 C.W.N. 428=84 I.C. 28=1924 C. 1012. Homestead land created before the T. P. Act must be presumed to be non-transferable. 72 I.C. 662=1924 P. 324 ; 20 C.W.N. 322=33 I.C. 565 ; 23 I.C. 246 ; 54 C. 333 ; 46 I.C. 656 ; 1 P.L.J. 253=20 C.W.N. 1113=36 I.C. 126. Where the land in dispute or part of it is covered by a *kothi*, the presumption is that it was let for building purposes and the lessee of the land let for building purposes has a right of transfer. Where no part of the land in dispute forms site of the *kothi* and is merely appurtenant to it as part of its compound and was let as such the lessee should be deemed to possess a right of transfer of the nature described in S. 108 (*j*). 1932 A. L.J. 567. A *lease for a definite term* for general purposes is heritable, and when the conduct of the parties shows it to be transferable, it must be treated as such. 19 C.L.J. 448=25 I.C. 530. Although the provisions of the T. P. Act relating to leases do not apply to *agricultural leases*, yet, as a general rule, both in the cases of agricultural as well as non-agricultural leases, if a tenant is expressly authorised by the terms of the lease to make a mortgage of his land and thus to transfer his interest in the tenancy to a third party, the interest so transferred should not be allowed to be extinguished, *e.g.*, by the ejectment of the tenant, unless the person who has acquired that interest has had an opportunity to prevent that extinction. But the operation of this principle may be excluded by any statutory provision to the contrary. 47 A. 589=88 I.C. 224. When a landlord sues a person as a *trespasser* and that person sets up a transfer from a tenant, the latter must prove the tenancy and also the validity of the transfer. 20 C.W.N. 1113=36 I.C. 126. Lessee assigning his lease with lessor's consent—Subsequent assignment by lessor of his reversion to trustees under wakf-deed—Acceptance of rent from assignee by lessor and then by the trustees—Right of trustees to sue lessee for rent. 60 B. 394=161 I.C. 57=38 Bom.L.R. 34=1936 B. 88.

Sec. 108 (l).—Cl. (*l*) of S. 108 makes it obligatory on the tenant to pay or tender at the proper time and place the rent due to the lessor or his agent. There is nothing in the section to require the lessor to make a demand. 111 I.C. 530. *See also* 23 S.L.R. 29=1929 S. 13. But tenant's liability for rent commences only from the date on which he is put in possession of

(*m*) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition, and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left ;

(*n*) if the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor ;

(*o*) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own ; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell [1][or sell] timber, pull down or damage buildings [1][belonging to the lessor. or] work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto ;

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[1] Inserted by Act XX of 1929.

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the premises, and only in respect of the portion of which he has been put in possession : 5 C.W.N. 816 ; 12 C.W.N. 767. (*See also* 58 I.C. 186 ; 23 M.L.J. 119 ; 15 I.C. 711 ; 58 I.C. 186 ; 9 C.L. J. 595=4 I.C. 63 ; 34 M. 108=6 I.C. 727) ; and continues only for the period his possession is secured to him by the landlord. 23 M.L.J. 119; 19 M.L.J. 58. The *liability of co-sharer tenants* to pay rent is joint and several, and the onus of proving that the landlord agreed to receive proportionate rent from each lies on the person pleading it. 40 I.C. 590. A tenant holding over is liable to pay for use and occupation. 30 M.L. J. 492=34 I.C. 6 ; 83 I.C. 757=1924 C. 240. After termination of tenancy, the lessee is bound to pay rent at a fair rate by way of damages and not at the rate contracted for. 22 I.C. 7 (A.). Payment of premium and rent and possession are dependent on each other. 10 I.C. 392=9 M.L.T. 510 ; 6 L.B.R. 164=30 I.C. 675. A lessee who transfers his interest in a portion of the property leased does not thereby escape liability to pay rent to the landlord under the terms and covenant contained in the lease. 1924 C. 359 (1); 40 M. 1111=32 M.L.J. 442 ; 88 I.C. 79=1925 B. 330. A lease provided that the tenant would pay rent whether he got a crop or not : *Held*, that apart from the said covenant, the contract to pay rent did not become void if owing to a failure of rain the tenant had no crop. (1910) 1 U.B.R. 22=8 I.C. 471. On this sub-cl. (*l*), *see also* 12 Bom.L.R. 831=8 I.C. 411.

Sec. 108 (m).—A general *covenant to repair* includes not merely buildings existing when the demise is made, but all those which may be erected during the term. 32 C.W.N. 154=46 C.L.J. 607. The T. P. Act imposes no obligation on the landlord to repair. On the other hand a qualified obligation is imposed on the tenant by S. 108 (*m*) of that Act. 51 B. 274=29 Bom.L. R. 78. S. 108 clearly contemplates that a lessee should not be responsible for the consequences of fire, unless he has definitely and expressly taken that burden on his shoulder by his covenant. 51 M 994=55 M.L.J. 663. *See also* 43 I.C. 273 ; 43 I.C. 258. The lessee is however liable for damage caused by the negligence of his servant. 39 M.L.J. 233=59 I.C. 252.

Sec. 108 (m) and (o).—The liability of a lessee when the premises are destroyed or damaged by fire is to be determined with reference to S. 108, T. P. Act, Cls. (*m*) and (*o*). A lessee is not liable for damage caused to the leased property by fire while the property was in lessee's occupation unless negligence of the lessee was proved. The burden of proof is on the plaintiff to establish negligence of the defendant. Where a fire was proved to have started from a room used as a kitchen in the first floor (a pucca room) of a house and it was also definitely proved that the night of the occurrence was calm and that the fire was not an act of God or an act of an incendiary, it is for the occupant of the house to establish how the fire got into the room and how it burnt the house and in the absence of an explanation on the occupant's part it should be presumed that there must have been some negligence on his part. 1941 A.L.J. 361=1941 A. 327. *See also* 114 I.C. 234.

Sec. 108 (o).—The clause cannot be held to cut down the right to work a mineral expressly conveyed. 4 P. 224=52 I.A. 109=48 M.L.J. 328 =1925 P.C. 42 (P.C.). As to right to fell *timber*, see 108 I.C. 242=32 C.W.N. 366. Where property is leased for cultivation and settling tenants thereon, the lessee is only entitled to a reasonable right of user in the soil, but is not entitled to dig or quarry stone or to collect and sell surface stones. A right to collect and sell surface stones can be established only by custom, which must be pleaded and proved. 20 P. 96=22 P.L.T. 100 =1941 P. 13. Where the lessee of an oil-well uses gas set free by reason of the sinking of oil-well without detriment to the property leased there is nothing inconsistent with the terms of section. *See* 1929 P.C. 108=56=I.A. 140=7 R. 157.

(*p*) he must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes ;

(*q*) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.

Rights of lessor's transferee.

109. If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it ; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him :

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

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Sec. 108 (p).—*See* 20 A. 247 ; A.W.N. (1881) 144. Where a lease is granted merely for the purpose of laying out a flower garden, the lessee is not entitled to erect buildings on the land leased. If the lessee does so; the lessor is entitled to sue for and obtain a mandatory injunction requiring the demolition of the buildings. 1940 M. 32=(1939) 2 M.L.J. 773.

Sec. 108 (q).—The word "lessee" in S. 108 (*q*) includes joint lessees. All the lessees will be liable in damages for breach of the obligation to vacate. It is not necessary to make the lessees, who have vacated, liable, that the lessor should establish collusion between the lessee who holds over and those who have vacated or that they have assented to the holding over by the former. 30 S.L.R. 135=1936 S. 213. The lessee must surrender possession on expiry of lease. Else he would be liable to damage or to eviction. 50 C. 667=1924 C. 240. Possession surrendered by the lessee must be vacant possession. 22 B. 348 ; 12 Bom.L..R 474 ; and must also include lawful and proper accretions to the leased premises : 1925 C. 1114=87 I.C. 680. [*See also* under cl. (*d*).] A lessor, whose right has been foreclosed has, on the expiry of the lease, no right to eject or redeem the lessee who has redeemed the mortgage for his own benefit. 59 I.C. 511=16 N.L.R. 180.

RENEWAL OF LEASE.—Where a lease contains a condition that renewal of the lease would be dependent upon the performance of certain covenants during the term of the lease, that condition is deemed to have been satisfied if there is no subsisting breach at the time renewal is applied for, although there may have been breaches of covenants during the term of the lease. 89 I.C. 273=23 N.L.R. 26. The covenant for renewal of lease of land being a covenant running with the land, the assignee of the lease-hold is competent to enforce its terms even against lessor's transferee with notice of the lease, though the transferee be a minor. 89 I.C. 273=1925 N. 281. *See* 19 C.W.N. 1197=27 I.C. 397. For limitation for suit on breach of duty declared by section, *see* 101 I.C. 707=1927 P. 248.

Sec. 109.—S. 109 assumes a valid transfer. 1922 A. 45. The benefit of a contract can be assigned by one party without the consent of the other, but the liability cannot be so assigned. 7 Bur.L.T. 51=22 I.C. 940. Where there is a breach of the covenant for enjoyment and the lessee treats the transferee of the lessor as liable, he cannot turn round and charge the lessor in respect of the covenant. 40 L.W. 545=1934 M. 658. Transferee of any interest includes lessee. 53 I.C. 865 ; 1 L. 241 ; 6 I.C. 817. When the lease is terminated it is open to the lessee to question the lessor's title to the leased property. 1923 N. 91 (2). As to interpretation of section, *see* 60 B. 394=1936 B. 88. On an assignment of the reversion, the benefit of a personal covenant to pay rent does not pass to the assignee by operation of law. 1936 B. 88. If the lessor, the transferee, and the lessee have agreed as to the amount of rent payable to the transferee, there is no reason why the lessor or the transferee will not be entitled to sue for the rent payable to him without impleading the other. 1942 P. 120=196 I.C. 837. A *transfer of the reversion of a lease* carries with it the right to enforce forfeiture, even if the right accrued before transfer. 43 B. 28=47 I.C. 198. An *assignee of reversion* in a portion of the holding can for due cause eject the tenant from that portion, though the lessor cannot, but an assignee of a portion of the leased property cannot eject a tenant during the period of his tenancy. 42 M. 603=37 M.L.J. 47 (F.B.). Where the evidence showed that the defendant was the tenant of the predecessor of the plaintiff and that he had been paying rent the plaintiff could not eject the defendant as a trespasser but only under the terms of the lease. 130 I.C. 14=1930 A.L.J. 1409. A fresh attornment by the lessee to the lessor's assignee is not necessary. 41 P.L.R. 346=1939 Lah. 49. Mortgagee suing tenant of mortgagor for rent—Plea of no attorn-

110. Where the time limited by a lease of immovable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease.

Exclusion of day on which term commences.

Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

Duration of lease for a year.

Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option.

Option to determine lease.

Determination of lease.

111. A lease of immovable property determines—

(*a*) by efflux of the time limited thereby ;

(*b*) where such time is limited conditionally on the happening of some event—by the happening of such event ;

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ment set up as defence—Validity. *See* 28 Punj. L.R. 157. A usufructuary mortgagee of the lessor's right would be entitled to enforce a forfeiture clause in lease for non-payment of rent. 43 L.W. 518=1936 M. 116. A suit for rent cannot be dismissed *in toto* on the ground that the defendant was not a tenant of the plaintiff for the reason that the transfer of the property by defendant's lessor to the plaintiff was not notified to the defendant, as S. 109 provided no penalty for want of notice, except the loss of rent paid by the lessee to the original lessor. 23 P.W. R. 1923=1923 L. 389 (1) ; 17 C.L.J. 372=19 I.C. 865 ; 72 I.C. 86. Transferee is not entitled to arrears of rent accrued due before the date of the transfer. 19 I.C. 865.

Sec. 110, para. (1).—Unless otherwise stipulated, a lease takes effect from the execution of the instrument. 50 I.C. 177=22 C.W.N. 190. A lease may validly commence from a future date. 1 M.H.C.R. 153 ; 18 I.C. 496=97 P.L.R. 1913 ; 42 I.C. 372. Section applies not only for computing the duration of a lease, but also the time from which a notice to quit operates. 20 C. 118. If a tenant for a term of three years holds over, he does so as a monthly tenant, and each month of tenancy expires at midnight on the first day of the succeeding month. 38 C.W.N. 782=1934 C. 837. *See also* I.L.R. (1938) 2 C. 134=42 C.W.N. 443=1938 C. 358.

Sec. 110, para. (2).—From the fact that the rent is payable before seventh of the next month while the term of the tenancy is to expire on the first, no agreement to exclude the operation of the section can be inferred. 37 C.W.N. 1237= 1932 P.C. 279=63 M.L.J. 685 (P.C.). But *see* 19 I.C. 844.

Secs. 110 and 106.—If a lease is said to commence from a certain date, it means from the end of that date, and will have another day added on at the end. Where a monthly tenancy is expressed to commence from the 1st of a month, the notice to quit should be so framed as to expire at the end of the 1st day of the succeeding month. In such a case a notice to quit expiring at the end of the month is invalid. 42 C.W.N. 1115.

Sec. 111.—The amendment is not retrospective.

GENERAL.—Applicability of S. 111, Cl. (2) to Sind. *See* 21 S.L.R. 18. Principle of forfeiture applies to Berar : 98 I.C. 16=1927 N. 50 ; and to Sind, 1926 S. 71 ; 21 S.L.R. 185 : and also to Punjab : 70 I.C. 349. Section does not apply to agricultural leases : 24 M.L.J. 472=19 I.C. 563. *See also* 14 O.C. 204=11 I.C. 924 ; I.L.R. (1937) 1 C. 679=1937 C. 669. But the principle of the section can be applied even to agricultural leases : 42 M. 654 ; 41 M. 629. But *see also* 50 B. 450 ; 1926 B. 304. The doctrine that there can be no tenancy on sufferance as against the Crown has no application to the case of lands which are vested in a Municipality. 1937 A.M. L.J. 12. A denial of the title of the assignee of the landlord, in cases of agricultural leases before the T. P. Act, works a forfeiture, and no overt act is necessary for determination of the lease. 35 M.L.J. 129=46 I.C. 62. Though the effect of granting a registered lease would be to determine the unregistered 'lease' unexpired at such date, it does not cause it to disappear as though it had never been rendering acts done under it unlawful, as though done by a trespasser. I.L.R. (1939) N. 432=1938 N. 377.

Sec. 111, Cl. (a).—The position of a *lessee for a fixed term holding over after the expiry of the term* cannot be considered to be that of a tenant. The fact that the question whether the lease had or had not terminated was in dispute does not improve his position. 34 P.L.R. 262=146 I.C. 845=1933 L. 509. Where the tenancy has terminated and the defendants have been found to be in unlawful possession, they cannot rely on the terms of the tenancy. The compensation for "use and occupation" in such a case must be assessed on the basis of the normal rent realisable. 1933 L. 509. A *suit for ejectment* by the landlord, before the expiry of the period for which the lease is granted, will not lie, would have to be dismissed even if the period expires during the pendency of the suit, since the determination of the rights of the parties must generally be as on the state of affairs existing at the time of commencement

(*c*) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event ;

(*d*) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right ;

(*e*) by express surrender ; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them;

(*f*) by implied surrender ;

(*g*) by forfeiture ; that is to say, (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter [1][* * * *]; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself ; [2][or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event] ; and in [3][any of these cases] the lessor or his transferee [4][gives notice in writing to the lessee of] his intention to determine the lease ;

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[1] Omitted by Act XX of 1929, S. 57 (*a*).
[2] Inserted by Act XX of 1929, S. 57 (*b*).
[3] Substituted for "either case" by S. 57 (*c*) of Act XX of 1929.
[4] Substituted for the words "does some act showing" by S. 57 (*d*) of Act XX of 1929.

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of the suit. 21 M. 288. But *see* 6 A.L.J. 177 ; 18 A. 440.

Sec. 111, Cl. (d) : MERGER.—Where tenures are created before the passing of the Act, the acquisition of such tenures by holder of superior right cannot merge them in the superior right under the common law of this country. S. 111 (*d*) therefore cannot be applied to such tenures. 1938 C. 128. There must be the union of the entire interest of lessor and lessee to constitute merger, and the two interests must be co-extensive. 88 I.C. 495=1925 P. 530; 1922 C. 284. *See also* 39 C.W.N. 694; 28 I.C. 314=19 C.W.N. 435; 53 I.C. 16 ; 1926 C. 373 ; 107 I.C. 819=1927 P. 273 ; 58 I.A. 75=35 C.W.N. 502=1931 P.C. 63 (P.C.). When the same person on the same day takes a lease and a mortgage, there is *no merger of the leasehold interest in the mortgage.* 12 I.C. 734=7 N.L.R. 154 ; 24 A. 487. A mortgage involves a transfer of interest in the mortgaged land ; and as long as part of this interest remains with the mortgagees, it cannot be said that there has been a complete merger of the interests of the lessee and the lessor in the same person so as to attract the operation of S. 111 (*d*). Where the owners had notice of the mortgage effected by the occupancy tenants, the mortgagees being in possession : as they could not extinguish the mortgage by the payment of a small sum for the equity of redemption. 1935 L. 522. When the owner purchases leasehold rights, the latter are merged in the ownership. 89 I.C. 780=1925 N. 406. But *see also* 23 C.W.N. 830=51 I.C. 389 ; 48 I.A. 485=26 C.W.N. 565. Principle of section is applicable to Sind. 1926 S. 71. The principle of merger will apply even in cases where merger is effected by operation of law (as) by an execution sale. 28 C. 744. As to the law previous to the T. P. Act, *see* 88 I.C. 495=1925 P. 530.

Sec. 111, Cls. (e) and (f).—No writing is necessary for a surrender. But if the original lease is registered, the surrender can only be by a registered instrument. 63 I.C. 483 ; 14 C. 109 at p. 119. But *see* 52 I. C. 17. Nor is the surrender required in any particular form. 13 B. 294. The surrender of an unascertained, undefined portion of a holding by some of the tenants in favour of the landlord is valid and binding on the parties to it. 27 N. L. R. 116. Abandonment is not kind of implied surrender which must be mutual. 33 I.C. 98; 54 C. 948; 1928 C. 99. A lessee by accepting a new grant makes an implied surrender of his former lease. 18 P. 370=1939 P. 598. But the new lease should be a valid one. 71 I.C. 976. The grant of a lease to one of two joint tenants would not operate to divest the tenancy of the other. 3 U. P. L. R. (B.R.) 26. Surrender may also be implied from conduct of parties. 1 Agra H.C.R. 266 ; 24 W.R. 344. (Mere non-payment of rent does not imply an abandonment of land by the tenant). 14 C. 751. The section does not apply to a case where a surrender of the lease during the pendency of the period is prohibited by an express clause in the lease. 9 C.L.J. 632=2 I.C. 633. Where after a permanent lease had been granted the lessor mortgaged his interest in the property and the lessee subsequently surrendered the lease to the owner : the surrender is not valid without the concurrence of the mortgagee. 32 Bom.L.R. 679=1930 B. 329.

Sec. 111, Cl. (g) : SCOPE.—The only requirement of Cl. (*g*) is that the lessor does some act showing his intention to determine the lease. There is no reason why the lessor's election must be made at some time prior to the institution of the suit. (42 B. 195, Foll.) 58 C. 1359=35 C.W.N. 823. In cases to which S. 111 (*g*) applies, forfeiture is incurred only by breach of an express condition entitling the lessor to re-enter or for denial of the lessor's title, and in either case the lessor should give notice of his intention to terminate the lease. 62 M.L.J. 496. S. 111 (*g*) cannot be applied where the plaint does not set up that there had been any lease given by the plaintiffs or his predecessors to the defendant or his predecessors, and the allegations in the plaint do not amount to more than that the defendant was a licensee of the building site who paid rent. 1936 A.L.J. 201=1936 A. 385.

RELIEF AGAINST FORFEITURE.—Principle which

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should guide the Court in giving relief against forfeiture. *See* 54 C. 485 ; 50 B. 440=28 Bom. L.R. 527 ; 110 I. C. 872=1928 A. 716. Courts lean against forfeiture. 54 C. 948 ; 110 I. C. 872=1928 A. 716 ; 31 I. C. 454. A co-lessor cannot determine the lease. 24 I. C. 624 ; 11 I.C. 695 ; 39 M. 54. Although this section does not apply to agricultural leases, in a proper case Courts have power to relieve against forfeiture in the exercise of its equitable jurisdiction. 50 B. 450=1926 B. 304.

FORFEITURE CAUSED BY A BREACH OF CONDITION.—A permanent lease also is liable to be forfeited. Covenant of forfeiture for involuntary sale is valid. Forfeiture for voluntary sale does not include by implication a covenant against involuntary sale. 34 I.C. 833=21 C.W. N. 117. Forfeiture clause should be construed strictly. Alienation of portion or for part of term does not entail forfeiture under clause forbidding alienation. 1925 M. 57=47 M.L.J. 307. Mere stipulation of a condition without the forfeiture penalty clause will not entitle the lessor to eject the tenant. 24 I. C. 354 ; 23 I.C. 395=33 P.R. 1914. Where a tenant, who is entitled to notice, denies the title of the landlord, no notice, is necessary to eject him. 34 P.L.R. 884=1933 L. 377. Where there is a *covenant against alienation* and a clause for re-entry, mere creation of an usufructuary mortgage will not entail forfeiture, if the lessee remains in possession. 31 I. C. 454. *See also* 114 I. C. 786; 1928 C. 99 ; 36 C.W.N. 819. A penal provision without consideration will be relieved against. 36 M. 4 =10 J.C. 68. *See also* 110 I. C. 420=1928 N. 328 ; 47 I.C. 198=43 B. 28. As to whether the Act maintains the distinction between *nullity* and *forfeiture*, *see* 4 P.L.J. 292=1 P. 363. A disclaimer of the landlord's title made before the suit for ejectment, occasions a forfeiture of the tenancy permanent or otherwise. 13 L. 796= 1933 L. 221. Nature of denial of title that will work forfeiture of tenancy. 1927 A. 806 : 32 C.W.N. 391. There is no disclaimer of the title of the landlord when the lessee merely sets up higher rights under the lease than what the lessor accepts as granted to him. 14 Luck. 723 =1939 O.W.N. 825=1939 O. 257. The principle of this clause is applicable to cases not governed by the T. P. Act. 42 M. 589=36 M. L.J. 543=50 I.C. 631 (P. C.) ; 100 I. C. 771 ; 2 L.W. 483=29 I.C. 365 ; 42 B. 195=43 I.C. 851. Forfeiture on account of denial of title does not apply and extend to a licensee. 39 A. 621=40 I.C. 443. Denial of title by original lessee will not work a forfeiture against the assignee of the lessee's interest. 42 B. 734=47 I.C. 635. Denial must be clear and unambiguous. 43 M. 480=56 I.C. 13 ; 71 I.C. 270= 41 M.L.J. 525 ; 58 I.C. 226=22 Bom.L.R. 648 ; 101 I.C. 771 ; 35 A. 145=18 I.C. 728 ; 13 N.L.R. 11=39 I.C. 15. Denial must be unequivocal. *See* 98 I.C. 16=1927 N. 50 ; 100 I.C. 646. Denial must be brought home to the knowledge of the landlord, and if the landlord had no knowledge, the conduct of the tenants will not bring about a forfeiture of the tenancy. 34 Bom. L.R. 1287=1932 B. 599. A mere assertion not communicated to the landlord is not enough to work a forfeiture. 41 M. 629=34 M.L.J. 170 ; 43 M. 480=56 I.C. 13 ; 71 I.C. 270=41 M.L.J. 525. The mortgaging of premises by a tenant does not amount to an unequivocal and unambiguous denial of the landlord's title. 15 L. 683=1934 L. 282. Even a permanent lease is liable to forfeiture due to disclaimer of landlord's title. 42 I.C. 673 ; 26 C.L.J. 261 ; 43 M. 480 =56 I.C. 13 ; 51 I.C. 709=36 M.L.J. 532 ; 1930 A.L.J. 908=1930 A. 479. The tenant cannot escape from such liability, merely because a former decree for ejectment against him was allowed to lapse. 1930 A.L.J. 908=1930 A. 479. Wholesale denial of title is necessary. Setting up a right of a third party as co-sharer is not denial. 26 I.C. 619. Payment of rent to a third person would not amount to a denial of landlord's title by itself. 22 I.C. 796 ; 39 I.C. 15=13 N.L.R. 11. Acceptance by a tenant of a deed which described him as absolute owner does not operate as a denial of title. 43 M. 480 =56 I.C. 13. If a tenant honestly doubtful, puts a person, who has derivative title by acquiring the original landlord's interest, to proof of his title, such conduct does not amount to such disclaimer as to work forfeiture. 51 I.C. 709=36 M.L.J. 532 ; 1925 C. 1212. A person having substantial rights in the land does not deny the landlord's title of an attenuated character if he asserts a title as owner. 31 I.C. 184=2 L.W. 941. A lessee describing his holding as independent and permanent at fixed rent incurs no forfeiture. 2 L.W. 483 [affirmed on appeal by 42 M. 589 (P.C.)]. In a rent suit by the landlord, the tenant contended that the plaintiff was not his landlord and that he was nobody's tenant. This amounted to a disclaimer of landlord's title and the landlord is entitled to eject him. 149 I.C. 517=1934 A. 103. Setting up *jus tertii* and disputing the extent of a landlord's interest in a suit in which the landlord is not a party will not work a forfeiture. 25 I.C. 944=16 M.L.T. 442 ; 32 C.W.N. 391 ; 26 I.C. 619 ; 9 C.W.N. 928. *See also* 1928 C. 312 ; 113 I.C. 13. Merely setting up title in third person in a suit is not renouncing character of lessee as such. 101 I.C. 771. It is settled law that defendant's denial of plaintiff's title in the course of pleading cannot furnish a cause of action. 39 I.C. 15=13 N.L.R. 11 ; 6 N.L.R. 83=6 I.C. 927 ; 113 I.C. 84. *Denial of lessor's title during suit* is of no effect. 5 I.C. 336 (A.). *The denial must be before suit.* 113 I.C. 84 ; 42 M. 580. In order to relieve against forfeiture, the tenant must prove that the disclaimer was due to fraud, mistake or accident and that he was not careless or negligent. In other cases there is no relief against forfeiture for denial of title. 41 M. 629=34 M.L.J. 170. No forfeiture occurs by denial of title if landlord got derivative title from the person who introduced the tenant. 1925 C. 1212.

FORFEITURE FOR CESSATION OF SERVICE.—Forfeiture will not be produced merely by the unilateral act of ceasing to comply with the conditions upon which the property is held, but must involve also some expression of intention to enforce the forfeiture on the part of the lessor. Accordingly, the mere cessation of services by the *parakkudi* tenants would not determine the tenancy, in the absence of any act on the part of the landlord showing his intention to determine it. 163 I.C. 36=1935 M. 918.

FORFEITURE FOR NON-PAYMENT OF RENT.—In the absence of an express covenant to that

(*h*) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

Illustration to clause (*f*).

A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease determines thereupon.

Waiver of forfeiture.

112. A forfeiture under section 111, clause (*g*), is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting :

Provided that the lessor is aware that the forfeiture has been incurred :

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver.

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effect, non-payment of rent will not work forfeiture. 62 I.C. 850. Death of tenant, if causes forfeiture for non-payment of rent. 113 I.C. 543. As to relief against forfeiture for non-payment of rent, *see* S. 114 and notes thereunder.

NOTICE DETERMINING THE LEASE ON FORFEITURE.—Under the amended section, notice in writing is necessary to determine the lease by forfeiture. *See* 35 C.W.N. 823. There was some conflict of decisions under the old section as to whether filing of suit itself would be an overt act, within the meaning of the section [*vide* 60 I.C. 312 (C.); 1924 L. 281 ; 14 I.C. 747 (A.) ; 21 S.L.R. 185 ; 45 C. 469 ; 24 C. W .N. 1064 ; 16 I. C. 803 (M.) ; 43 M. 480 ; 39 I. C. 15 (N.) ; 1926 S. 71 ; 42 B. 195 ; I.L.R. (1937) 1 C. 203 =64 C.L.J. 208=1937 C. 129]. The *effect of the amendment* is pointed out in the decision in 35 C.W.N. 823. As to the state of the old law, *see* 1935 M. 454. Under the section as it stands it is necessary that notice should be given before the right to institute a suit can arise. 1935 M. 454. The act of the lessee renouncing his character as such makes the lease only voidable, but the lessor is not entitled to take possession until he actually avoids the lease by giving a notice as prescribed in the last portion of S. 111(*g*). 15 Luck. 92=1940 O. 92. It was held that no overt act was necessary in cases where section did not apply. 34 I.C. 833=21 C.W.N. 117 ; 51 I.C. 709=36 M.L.J. 532 ; 46 I.C. 62=35 M.L.J. 129 ; 38 M. 445=25 M.L.J. 315 ; nor in respect of leases executed before the T. P. Act : 34 M. 161=20 M.L.J. 933 ; nor in case of *agricultural leases*. *See* 21 I.C. 405=25 M.L.J. 486. It was held that specific notice to quit was not necessary and that demand of possession was sufficient. 40 I.C. 348=25 C.L.J. 332. Where, on breach of a covenant by a lessee, the lessors granted a fresh lease, the lessors clearly showed their intention to terminate the first lease. 126 I.C. 284 (2)=1930 M. 272. Both an election to forfeiture and to waiver of forfeiture are irrevocable. 15 I.C. 445=24 M.L.J. 263. Lease once forfeited cannot be revived by mere oral agreement. 126 I.C. 284 (2)=1930 M. 272.

Sec. 111 (h) : NOTICE TO QUIT.—S. 111 does not render it obligatory upon the lessor to serve a notice to quit upon the lessee who has forfeited his tenancy ; even a demand for possession is sufficient. (33 C. 339 ; 34 C. 57.) 25 C.L.J. 332=40 I.C. 345 ; 23 I.C. 803. Section has no application to lands held on *parakudi* service. 28 I.C. 915. There must have been service of notice before the suit for ejectment is filed. 51 I.C. 336 (A.). The validity of a notice to quit ought not to turn on the splitting of a straw. 1931 M. 352=60 M.L.J. 293. A suit by the landlord for eviction and its withdrawal with liberty to bring a fresh suit operates as a determination of the tenancy under S. 111. 1910 M.W.N. 484=6 I.C. 264. Tenant not entitled to notice as per terms of the lease—Notice is not necessary before ejectment. 1928 M. 687 ; 34 C. 57. A tenancy under joint receivers can be determined by a notice given by them jointly. 34 I.C. 221=23 C.L.J. 453. So also in the case of letting by joint landlords. 39 C.W.N. 246. The owner of an undivided share in a house cannot alone evict a tenant of the house. 24 I.C. 624. Where a *lease is for a fixed term* and the tenancy is terminable on notice thereafter, the notice cannot be given until after the expiry of the fixed term. 23 I.C. 572=26 M.L.J. 467. A notice unequivocally expressing an intention to determine the lease for forfeiture determines the tenancy, though the notice might not be adequate under S. 106. 66 I.C. 48=41 M.L.J. 265 ; 2 L.W. 946=31 I.C. 211. Even where no notice to quit is necessary, time to the lessee to remove buildings should be given. 23 I.C. 762=19 C.W.N. 361. *See also* 2 P.L.T. 282=62 I.C. 421. Where the lease for term originally fixed expired at midnight on the 1st April, 1921, thereafter the tenant held over as a monthly tenant, each month of the renewed tenancy expiring at midnight on the 1st day of the succeeding month ; and consequently the notice to quit expiring with the last day of a month was a bad notice and insufficient to determine the tenancy. 38 C.W.N. 782= 1934 C. 837.

Sec. 112 : WAIVER OF FORFEITURE.—A lessee by denying the title of the lessor incurs forfeiture ; but it is at the option of the landlord to take advantage of the forfeiture, and if he elects not to do so, the forfeiture is waived. The election may be express or implied. 1936 M. 252 ; 168 I.C. 1005. Both an election to forfeiture and waiver of forfeiture are irrevocable. 15 I.C. 445 =24 M.L.J. 263.

(1) ACCEPTANCE OF RENT.—Acceptance of rent due after forfeiture, even if coupled with the condition that the lessor may insist upon his forfeiture operates as a waiver. 1923 C. 663 ; 1935 M. 454. *See also* 43 C.L.J. 272=1923 C. 763 ; 20 B. 439 ; 12 C.W.N. 587 ; 28 C. 532 ;

113. A notice given under section 111, clause (*h*), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting.

Waiver of notice to quit.

Illustrations.

(*a*) *A*, the lessor, gives *B*, the lessee, notice to quit the property leased. The notice expires. *B* tenders, and *A* accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(*b*) *A*, the lessor, gives *B*, the lessee, notice to quit the property leased. The notice expires, and *B* remains in possession. *A* gives to *B* as lessee a second notice to quit. The first notice is waived.

114. Where a lease of immovable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

Relief against forfeiture for non-payment of rent.

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44 C.W.N. 1103; even if it be under protest. 9 C. 843; 59 I.C. 273. Acceptance of rent by one of the lessors might operate as a waiver of forfeiture. 31 I.C. 454. But if the co-lessors have subsequent to the lease become divided, any one can enforce forfeiture though the other has waived it. 38 M. 445=25 M.L.J. 315. Where in a suit for ejectment, it is proved that the lessor claimed rent for a period subsequent to default, non-payment of which gave him cause of action for ejectment, the suit must fail. 42 I.C. 614. When the landlord sues for rent, he will be deemed to have waived any cause of forfeiture up to that time. 69 I.C. 282=41 M.L.J. 127. Acceptance of rent for a period prior to date of forfeiture does not amount to waiver. 33 I.C. 331=22 C.L.J. 546; 6 I.C. 447; 34 M. 161; 26 I.C. 107=12 A.L.J. 1139. But acceptance of rent after forfeiture will not necessarily amount to waiver. 26 I.C. 107=12 A.L.J. 1139. Acceptance of rent after institution of suit is no waiver of forfeiture. 2 B.H.C. 66; 44 C.W.N. 1109. Calcutta Rent Act does not abrogate provisions of this section. 49 C. 150=1922 C. 394. Where, in a suit for ejectment on the ground of forfeiture of tenancy, the plaintiff makes an alternative claim that the notice given by him should be treated as a notice terminating the tenancy in suit, he is estopped from relying upon the forfeiture, since the claim amounts to an assertion that the tenancy is still subsisting and is therefore a waiver of forfeiture. 48 B. 541=26 Bom.L.R. 672=1924 B. 454. *See also* 1938 C. 589.

(2) BY OTHER ACTS.—Other acts from which waiver of forfeiture may be inferred are (*a*) allowing the tenant to continue in possession even after forfeiture has been incurred and treating him as tenant; 8 M.L.T. 238; (*b*) allowing tenant to pay Government revenue out of rent due; 28 C. 532; (*c*) where there is a condition that assignment by tenant of the leasehold interest will entail forfeiture, landlords treating the assignee as tenant; 20 B. 439; (*d*) demanding rent for period subsequent to forfeiture; 42 I.C. 614; 14 C. 176; 1928 C. 663; 69 I.C. 282=41 M.L.J. 127. Where the landlord definitely determines the lease for forfeiture a subsequent suit for rent does not operate as a waiver of forfeiture. 12 P.L.T. 225.

ONUS.—The onus is on the lessee to adduce some evidence of the lessor's knowledge of the act of the tenant constituting a breach of conditions of the lease and it is incumbent on him to prove positively that the lessor had knowledge of the breach and yet continued to recognise the tenancy. 36 C.W.N. 819=1932 C. 787.

Sec. 113.—Acceptance of rent after notice to quit, effect of. 43 C.L.J. 272=1926 C. 763=94 I.C. 156; 1923 C. 663; 2 P.L.J. 595.

ILLUSTRATION (*b*) TO S. 113 shows that if the tenant remains in possession after the expiry of the notice and a second notice to quit is given, the first notice is waived, but the doctrine would not apply where the landlord treats the tenant as a tenant from year to year and the tenant asserts a permanent tenancy. Moreover, waiver is an act on the part of the person pleading the waiver, showing an intention to treat the tenancy as subsisting. When there is a denial of the notice, which is said to be waived, it cannot be said that he had the intention to treat a determined lease, as still subsisting. 8 P.L.T. 633=1927 P. 305. Acceptance by landlord of rent for period after the institution of the suit for ejectment, paid by the tenant under a consent order of Court, does not constitute waiver of notice to quit, although the payments are made out of Court, and cannot nullify the proceedings or prejudice the landlord's rights. 38 C.W.N. 782=1934 C. 837.

Sec. 114.—This section is intended to relieve the defaulting tenant from the extreme penalty of forfeiture to which he may be otherwise subjected. This section gives a discretion to the Court to be exercised in proper cases. 24 I.C. 79=12 A.L.J. 650; 34 C. 458; 58 C. 311. It will not be given if the lessee has done something not to deserve any consideration in equity. 45 B. 300=59 I.C. 769; 19 N.L.R. 50=1923 N. 193. The discretion exercised by the trial Court should not be lightly interfered with, unless such discretion has been exercised in a capricious and whimsical manner. 1927 M.W.N. 305. S. 114 may be taken as a correct statement of the

[1][114-A. Where a lease of immovable property has determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing—

Relief against forfeiture in certain other cases.

(*a*) specifying the particular breach complained of; and

(*b*) if the breach is capable of remedy, requiring the lessee to remedy the breach; and the lessee fails, within a reasonable time from the date of the service of the notice, to remedy the breach, if it is capable of remedy.

Nothing in this section shall apply to an express condition against the assigning, under-letting, parting with the possession, or disposing, of the property leased, or to an express condition relating to forfeiture in case of non-payment of rent.]

115. The surrender, express or implied, of a lease of immovable property

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LEG. REF.

[1] This section is new and is inserted by Act XX of 1929. It has no retrospective operation.

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law even in cases of forfeiture not governed by the Act. 8 M.L.T. 250=7 I.C. 565. *See also* 98 I.C. 851=1927 M. 239. (Principle of section applied to agricultural leases. 18 N.L.J. 159. But *see also* 50 B. 450; 1926 B. 304.) The provision is a special one applicable to landlord and tenant and has no application to a maintenance deed alleged to contain a penal clause. 27 N.L. R. 24=1931 N. 60. The Calcutta Rent Act does not expressly exclude the operation of S. 114 of the T. P. Act and it cannot abrogate the provisions of the section. 49 C. 150=1922 C. 394. A sub-lessee is as much entitled to be relieved against forfeiture as the lessee. 25 I.C. 186=12 A.L.J. 1085. The Court cannot relieve against forfeiture for breach of a covenant against alienation. 42 M. 654=36 M.L.J. 367. The fact that on a previous occasion the landlord condoned a breach of covenant on receipt of consideration or otherwise cannot take away his right to enforce the covenant on a later occasion. No question of estoppel or waiver can arise. 15 P. 673=1936 P. 493. A provision enabling the landlord to re-enter on non-payment of rent would be regarded as a penalty: 15 M. 125; especially where a large premium was taken from the lessee: 1924 L. 49=5 L.L.J. 99; 1928 L. 937; 8 M.L.T. 238=8 I.C. 309; 113 I.C. 543. Relief against forfeiture for non-payment of rent applies to a suit to enforce a decree and to a proceeding in execution. 35 B. 239=10 I.C. 746=13 Bom.L.R. 154; 13 R.D. 20; 4 P.L.J. 292=69 I.C. 886. Relief should be given when the non-payment is due to fault of lessor. 85 I.C. 964=1925 M. 919. Where the tenant was bound by his lease to pay arrears of rent with interest with rent of the next year, and on default being made in that payment too, was bound to surrender the property, he cannot be relieved against forfeiture. 20 M.L.J. 785=6 I.C. 438.

"RENT IN ARREAR."—The expression includes all that is due to the lessor up to the date when the application for ejectment is heard and order for relief against forfeiture made on condition of the lessee paying the entire arrears of rent with interest and on payment of costs. 58 C. 311. The words are wide enough to cover a rent which is even barred by limitation. "Lessors" in S. 114 include the transferee of lessor. 43 L.W. 518=1936 M. 116.

PERIOD OF GRACE ALLOWED.—If on account of non-payment of rent within the period of grace allowed by the landlord, the tenancy is forfeited, such forfeiture will not generally be relieved against. 1912 M.W.N. 1135=16 I.C. 803; 15 M.L.J. 210; 28 M. 389=15 M.L.J. 208; 1923 N. 193; 20 M.L.J. 944. But *see contra* 22 Bom.L.R. 1439=59 I.C. 769=45 B. 300; 39 M. 834=30 I.C. 596; 32 I.C. 526. *See also* 1927 M.W.N. 305; 29 M.L.J. 381 =39 M. 834; 19 N.L.R. 50. But Courts have power to relieve against forfeiture, even when there is a period of grace allowed in the lease-deed. 39 M. 834=29 M.L.J. 381. *See also* 108 I.C. 273=1928 M. 250.

ENGLISH AND INDIAN LAW.—Under the Indian Law unlike under the English Law, relief from forfeiture cannot be claimed after the order for ejectment had been made. 58 C. 311. Under English law the condition of forfeiture is distinct from a clause of nullity. In T. P. Act, this distinction is not recognised and this has given effect to the existing law in the country. Still Courts have power to relieve against forfeiture. 1 P. 363=1922 P. 528.

Sec. 114-A.—Before the amendment of 1929 the only case in which relief against forfeiture was available was in respect of non-payment of rent. The new S. 114-A provides for relief in other cases also by providing for a notice to remedy the breach within a reasonable time. For cases regarding relief against forfeiture, *see* under S. 111, Cl. (*g*). Technical provisions, like the one enacted in S. 114-A, do not apply to the Punjab. 41 P.L.R. 895=1939 L. 330. The provisions have no retrospective effect. 1939 L. 330. Under Ss. 111 (*g*) and 114-A of the T. P. Act only one written notice is required and not two. In cases where the breach is not capable of remedy, all that the law requires is that a written notice should be given by the landlord before suit, conveying his election of forfeiting the tenancy. But if the breach is one capable of remedy, it is further necessary that he should require the lessee to remedy the breach and must give to the lessee reasonable time to do so from the date of service of notice. I.L.R. (1938) 2 C. 434=42 C.W.N. 761=1938 C. 589.

Sec. 115.—An under-lease is extinguished on forfeiture of the primary lease, but not on its surrender. 24 C.L.J. 40=34 I.C. 833=21 C.W.

Effect of surrender and forfeiture on under-leases.

does not prejudice an under-lease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease ; but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to and enforceable by the lessor.

The forfeiture of such a lease annuls all such under-leases, except where such forfeiture has been procured by the lessor in fraud of the under-lessees, or relief against the forfeiture is granted under section 114.

116. If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106.

Effect of holding over.

NOTES.

N. 117. *See also* I.L.R. (1939) Bom. 144=41 Bom.L.R. 25=1939 B. 98. An implied surrender is more analogous to the case of a forfeiture than to the case of a surrender, and therefore extinguishes the rights of persons deriving title through the tenant. 46 I.C. 244=14 N.L.R. 107. *See also* 14 B. 384. A mere repudiation of the lessor's title by the lessee will not work a forfeiture against the assignee of the lessee's interest. 42 B. 734=47 I.C. 635=20 Bom.L.R. 830. Actions for possession based on forfeiture should be brought against all the parties interested in the premises. But the landlord, who obtained a decree against the head-lessee alone without making the sub-tenant a party, can obtain possession of the premises by executing the decree against the tenant. 50 C. 419=1923 C. 691. Mortgage by tenant—Subsequent fraudulent and collusive surrender—If binding on mortgagee. 1936 M. 422.

CROWN GRANTS.—It is dobbtful whether the exception under S. 115 would apply to a lease coming under the provisions of the Crown Grants Act, 1895. Therefore, under the ordinary law, it certainly seems that the right of re-entry which Government has under a lease is one which does prejudice the duration of an under-tenure. The under-tenant is liable to disturbance by Government, and even if he is not disturbed, to being called upon to pay enhanced assessment. 25 Bom.L.R. 1192=1924 B. 212.

Sec. 116 : ESSENTIALS OF SECTION.—It is for the lessor to do some act, receive rent or otherwise to give consent, and not for the lessee to do anything under S. 116. 94 I.C. 308=1926 M. 566. For difference in the English Law, *see* 32 C. 123 ; 1923 C. 524 ; 53 I.C. 180.

SCOPE AND APPLICABILITY.—The principles of this section have been held to be applicable to the Punjab. 112 I.C. 651. S. 116 is not applicable to the case of a lease governed by S. 107 and not by S. 106 ; where there has been neither an acceptance of rent by the lessor nor any agreement by him that the former lessee should remain in possession without the execution of a lease. 196 I.C. 237=1941 O.W.N. 1065. Where a tenant holds over after the expiry of the lease on payment of rent to the landlord, he must be deemed to be a tenant from year to year or from month to month according to the object for which the property was leased, having regard to the provisions of S. 116 of the Act. 38 C.L.J. 177=1923 C. 524. *See also* 1923 P. 340 ; 11 P.L.T. 444 ; 1923 P. 201. The tenant continuing in occupation under a special agreement for a further lease is a different case from the tenant holding over merely by consent, but, if for any reason his agreement has to be disregarded, he can fall back on the landlord's mere consent and claim his rights under S. 116. 54 C. 813=1927 C. 725. Where a tenant took a lease for 10 years from the *muttawalli* of a mosque with a covenant for renewal, and it was found that the covenant for renewal was beyond the jurisdiction of the trustee, the lessee holding over must be deemed to be holding on a monthly tenancy. 27 C.W.N. 159=1923 C. 130; 155 I.C. 367=1935 P. 271. The Act uses the word 'lease' mot merely for interests which can be created only by registered instrument, but for all interests of the character defined in S. 105 of that Act. 54 C. 813=31 C.W.N. 973. It is doubtful if tenancy by sufferance exists after the passing of the Act. 33 I.C. 705=39 M. 54. *See also* 25 I.C. 109 (M.). A tenant on sufferance is one who entered by a lawful demise or title, and, after that has ceased, wrongfully continues in possession without the assent or dissent of the person next entitled. 8 P.L.T. 633=1927 P. 305 ; 31 C.W.N. 282 ; 48 B. 341. A verbal lease for more than one year is valid for one year if it is accompanied by delivery of possession. Where after the expiry of the term, the lessee continues in possession, he may be held to hold over and is liable for rent. 144 I.C. 788=1933 P. 482 ; 148 I.C. 684=1934 P. 369. Where the tenant in a lease for one year continued in possession after the expiry of one year and the landlord sued only for arrears of rent some years afterwards and not in ejectment, it amounted to a consent on the part of the landlord to the tenant retaining possession, and the tenant became a tenant from month to month and was not a tenant on sufferance. 112 I.C. 651. *See also* 48 B. 341 ; 1 N.L.R. 32 ; 31 C.W.N. 282 ; 27 B. 262 ; 4 P. 139=84 I.C. 586=1925 P. 216. Until ejectment, even a holding over tenant has right to remain in possession against the landlord.

Illustrations.

(*a*) *A* lets a house to *B* for five years. *B* underlets the house to *C* at a monthly rent of Rs. 100. The five years expire, but *C* continues in possession of the house and pays the rent to *A*. *C's* lease is renewed from month to month.

(*b*) *A* lets a farm to *B* for the life of *C*. *C* dies, but *B* continues in possession with *A's* assent. *B's* lease is renewed from year to year.

117. None of the provisions of this Chapter apply to leases for agricultural purposes, except in so far as the Provincial Government, [1][* * * *] may, by notification published in the Official Gazette, declare all or any of such provisions

Exemption of leases for agricultural purposes.

LEG. REF.

[1] The words "with the previous sanction of the Governor-General in Council" were repealed by Act XXXVIII of 1920, Sch.

NOTES.

43 B. 531=21 Bom.L.R. 261. Proper notice under S. 106 is necessary to terminate even a holding over tenancy. 43 C. 359=61 I.C. 503=25 C.W.N. 13; 38 C.L.J. 177=1923 C. 524; 7 C. 710; 26 I.C. 107=12 A.L.J. 1139; 27 C.W.N. 159=36 C.L.J. 48; 1923 P. 340=71 I.C. 1022 (23 C. 200; 10 M.L.J. 201 are not now good law). Agreement to the contrary means one as to the terms of the holding over. 26 I.C. 962=19 C.W.N. 489. Where there was a term in a lease that the lessee would give up possession without notice and on the expiry of the lease, the lessee held over on payment of rent, the term as to notice is not carried over to the new lease and notice is necessary to terminate the later lease. 37 C.W.N. 971. As to contracts for renewal of lease, *see* under Ss. 106 and 108 (*q*). "*Legal representative*" implies a person occupying the same position as lessor and does not include an intermediate lessee. 24 I.C. 183=19 C.W.N. 525. Expiry of the lease term does not terminate the tenancy and the holding over lessee can eject a trespasser. 22 I.C. 789=37 M. 281. Express or implied consent of the landlord to hold over is necessary; otherwise he is a trespasser. 4 P.L.T. 696; 80 I.C. 568; 6 P.L.T. 142. Mere assent to hold over is not sufficient to create yearly tenancy. 4 P. 139=84 I.C. 586=1925 P. 216. The position of a tenant after the determination of the tenancy is no better than that of a trespasser, and he is bound to pay rent at a fair rate by way of damages and not at the rate contracted for during the subsistence of tenancy. 22 I.C. 7 (A.). A lessee holding over in defiance of the lessor is not entitled to notice. 13 I.C. 59=9 A.L.J. 574; 53 I.C. 180. The section does not apply to lessee's heirs or assigns. 6 P.L.T. 98=88 I.C. 387. *Affirmed in* 55 I.A. 212=7 P. 649=55 M.L.J. 882 (P.C.). Holding over homestead lands within municipal area—Applicability of Bengal Tenancy Act. 31 C.W.N. 282=1927 C. 279. Where the successive leases for one year each were given to a lessee who is already in possession under a prior valid lease, in view of the lessee continuing in possession with the lessor's assent, they became lessees from year to year under S. 116, and a suit against raiyats for rents is maintainable. 18 C.W.N. 858=23 I.C. 318. Where a tenancy for a term of years was created in favour of *A* before the Act, and after his death his heirs remained in possession and paid rent down to 1914, the legal relation between the landlord and the heirs of *A* must be deemed to have come into operation after the passing of the Act, and as the tenancy was not an agricultural one within S. 117 of the Act, Chap. V was applicable and therefore on the expiry of the term, the heirs of *A* have a yearly tenancy capable of transfer, and notice is necessary to terminate the tenancy. 48 C. 359=61 I.C. 503=25 C.W.N. 13.

RENEWED LEASE, TERMS OF AND HOLDING OVER.—When lessees hold over after the expiry of the lease, they must be considered to hold on the terms stipulated for in the lease. 97 I.C. 412=1926 C. 1239. *See also* 81 I.C. 592=1925 O. 173 (1); 33 I.C. 448=20 C.W.N. 948; 1934 M. 458=67 M.L.J. 455. Where there has been no agreement as regards the terms of the holding over, then no matter what the terms were, which governed the original lease, it must be regarded as renewed from year to year or from month to month according to the purpose for which the property is leased. 49 I.C. 974 (C.). *See also* 12 O.C. 279. When a tenant under a lease for a term of three years of premises in Calcutta holds over after expiry of the term, he does so as a monthly tenant, and each month of the tenancy lasts up to, and expires at, midnight on the first day of the succeeding month. 38 C.W.N. 782=1934 C. 837. The option of giving an assent which will convert the holding over into a tenancy is one that is conferred on the lessor and not on the the lessee. Consequently, where a tenant after the expiry of his lease continues in possession of a godown with the consent of his lessor but without giving notice of his intention to quit on a specified day, he is liable to pay a full month's rent as well as the rent due for the prescribed period of a notice to quit, even though his occupation of the premises was for a very short time. 48 B. 341=26 Bom.L.R. 231=80 I.C. 507. *See also* 49 I.C. 974; 19 C.W.N. 525; 19 C.W.N. 489; 32 C. 123; 18 C.W.N. 858; 49 I.C. 974; 48 B. 38; 1926 C. 1239.

POWER OF COURT TO AWARD DAMAGES FOR USE AND OCCUPATION IN A SUIT FOR RENT.—Where after the termination of a lease the lessee intimated to the landlord that he was no longer a tenant but continued in possession of the land, notice was waived by the lessee's conduct and though he was not liable to pay rent as such, he had to pay the landlord damages for use and occupation. Even though a suit is framed as one for rent, it is possible for the Court to pass, in the alternative, a decree for damages for use and occupation. 97 I.C. 933 (2)=1926 M. 1071.

Sec. 117.—The object of the legislature in exempting agricultural leases appears to be to keep in full force the several provincial Rent Acts dealing with agricultural leases and the relations of such landlords and tenants. 1925 P. 421=4 P. 404; 1940 O.A. 801. Leases unless exempted specifically are governed by the Act,

to be so applicable [1][in the case of all or any of such leases], together with, or subject to, those of the local law, if any, for the time being in force.

Such notification shall not take effect until the expiry of six months from the date of its publication.

CHAPTER VI.

OF EXCHANGES.

"Exchange" defined.

118. When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange."

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

LEG. REF.

[1] Inserted by S. 6 of the T. P. (Amendment) Act (VI of 1904).

NOTES.

An agricultural lease is that whose object is agriculture or allied to agriculture. *See* 98 I.C. 92=1927 A. 78; 42 C.L.J. 520=1926 C. 312; 24 A.L.J. 489. It is not the actual use of the land but the original purpose of the tenancy which determines the question of applicability or otherwise of the Act. 46 C.W.N. 277. Some plots were leased out to the lessee by a permanent lease. It was stated therein that the lessee was a tenant of the said plots and the lease was heritable. The lessee was also given the right of transfer whether by way of gift or sale or otherwise. The lessee was also permitted under the lease to plant groves or to construct buildings on the leased land. The lessee did not however plant any grove on such land. *Held*, that the land being agricultural land and not grove land under S. 3, Agra Tenancy Act. S. 117, T. P. Act, applied to the lease. The interest of the tenant of such land was therefore not transferable in execution of a decree of a Civil Court by virtue of S. 23 of the Tenancy Act. 1937 A.L.J. 656=1937 A. 561. Lease of land permitting the lessee to gather *khar* or grass spontaneously growing on land is a lease for agricultural purposes and no registration is necessary. *See* 118 I.C. 841=1929 O. 529. *See also* 48 A. 385=95 I.C. 1048; 3 L.W. 485; 24 A.L.J. 489=1926 A. 432; 45 M. 710=43 M.L.J. 191 (if agriculture includes horticulture); 1926 C. 312; 24 M. 421; 1932 C. 715. Land let out for pasture, habitation of agriculturists for tying, ploughing cattle or storing manure, is for agricultural purpose. 34 I.C. 539 =3 L.W. 319. A lease for planting casuarina trees is not one for an agricultural purpose. 3 L.W. 319. But *see* 45 M. 710=43 M.L.J. 191. The Act applies to lease for residential purpose with right to take fruits from trees on the land and plant other fruit trees, it being not an agricultural lease. 92 I.C. 411=1926 C. 312. Agricultural leases may be oral or even by conduct. 1923 C. 433. If tenancy providing for collection of money rent, amounts to an agricultural lease. *See* 33 C.W.N. 865 (P.C.). Cases not governed by Act are covered by general equitable rules or principles of English law. 53 I.C. 545. The provisions of the Act do not as such govern agricultural leases. 39 M. 834=29 M.L.J. 381. *See also* 53 I.C. 180; 5 M.L.T. 222 =4 I.C. 1124. Still most of the provisions contained therein are applied even to such leases as being in accordance with justice, equity and good conscience. 42 M. 654; 8 M.L.T. 250=7 I.C. 565; 98 I.C. 851=1927 M. 239; 41 M. 629; 25 I.C. 812; 43 I.C. 970. In a document of lease, no reference was made to cultivation. Neither was there any stipulation as to payment of cesses and the true purpose of the lease, was preservation and rearing of fishes, grazing of cattle on the bank, being only a subsidiary one. *Held*, that the lease was for non-agricultural purposes governed by the provisions of T. P. Act and not by those of Bengal Tenancy Act. 1935 C. 638; 31 C. 937. A lease for bringing the leased land under cultivation and reclamation is an agricultural lease. 48 I.C. 354. A liberal interpretation of the words of the section should be given. 4 P. 404=86 I.C. 597. A lease granted for the conversion of jungle and wild land into agricultural land is a lease for agricultural purposes. 13 C.L.J. 318=7 I.C. 864. Lease of right to receive the refuse collection of a village: 5 O.C. 122; 48 A. 385=1926 A. 43; and *lease for building purposes:* 29 C. 489: are not leases for agricultural purposes.

Sec. 118.—A mutual transfer of immovable property between two persons amounts to an exchange and each party acquires, on execution of the deed of transfer in his favour, a good title to the property. 60 I.C. 725=7 O.L.J. 699. It is not necessary for a transaction of exchange that there should be two separate deeds by the two parties thereto; and an exchange cannot be inoperative, only because of a defect in the title of one of the parties to it. 113 I.C. 753= 1929 A. 63 (2). In a sale, the price is paid in money; in exchange by way of barter for other goods or property. 25 B. 696. Where what is exchanged for is both land and money, the transaction is an exchange and not sale. 50 I.C. 288; 199 P.L.R. 1913=19 I.C. 301; 86 I.C. 266=1925 L. 326. *See also* 3 N.L.R. 138; 1930 A. 426 (2). Transfer in consideration of forbearance to take certain legal proceedings is not an exchange. 54 M. 163=1931 M. 140= 60 M.L.J. 56. Where land is given in exchange for right of easement, registered document is not necessary. 92 I.C. 672=1926 M. 543. An exchange of property more than Rs. 100 in value must be by registered instrument; otherwise the parties can get back their respective lands, even though structures have been raised, after paying compensation. 40 M. 1134=33 M.L.J. 252. [But *see* S. 53-A.] *See also* 90 I.C. 131=49 M.L.J. 150; 25 C. 210; 38 M. 519; 1 M.H.C.R. 100

[1][119. If any party to an exchange or any person claiming through or under such party is by reason of any defect in the title of the other party deprived of the thing or any part of the thing received by him in exchange, then, unless a contrary intention appears from the terms of the exchange, such other party is liable to him or any person claiming through or under him for loss caused thereby, or at the option of the person so deprived, for the return of the thing transferred, if still in the possession of such other party or his legal representative or a transferee from him without consideration.]

Right of party deprived of thing received in exchange.

120. Save as otherwise provided in this Chapter, each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes.

Rights and liabilities of parties.

LEG. REF.

[1] Substituted by Act XX of 1929, S. 59. The amendment is not retrospective.

NOTES.

Where the exchange of land accompanied by delivery of possession was acted on for more than 30 years and there was nothing to show that the value of the land at the time of exchange was Rs. 100 or upwards, the exchange though not evidenced by a registered instrument, is valid under S. 118 read with S. 54, T. P. Act. 8 O.W. N. 1275. *See also* 30 I.C. 408 ; 38 M. 519 ; 29 Bom. 1419. Now under S. 53-A on the principle of the doctrine of part-performance, protection would be afforded to the party defrauded if the conditions of S. 53-A are satisfied. *See* 42 C. 801 (P.C.) ; 40 A. 187 ; 121 I.C. 765=1930 M. 1. In an exchange one is not the price of the other ; so pre-emption will not apply to exchanges. 18 O.C. 109=30 I.C. 232. Partition of joint family property is not an exchange. 10 C.L.J. 503. As to difference between partition and exchange, *see also* 25 C. 210. Gift of land to wife, limited to enjoyment for lifetime, in lieu of her maintenance right is not exchange. 45 M. 612. Where possession by one party is not delivered, the remedy of the other is not specific performance, but a suit for declaration of title and for possession of his own property. 33 I.C. 762=20 C.W.N. 657. Exchange—Absence of registered instrument—Delivery of possession—Suit for declaration of title on the basis of possession—Maintainability. *See* 31 C.W.N. 348. An exchange entered into by the manager of a joint Hindu family, which is not challenged by the other members of the family, is valid. 113 I.C. 753=1929 A. 63.

Sec. 119.—The law applicable to exchanges of immovable property prior to the passing of the T. P. Act is the Common Law of England and not the Real Property Act. Such an exchange implied a warranty of title, a condition for re-entry on the land given in exchange and also the right to certain compensation for breach of the warranty. S. 119 of the Act preserved to the parties in India the English Common Law right as to warranty. S. 119 embodies rules of "justice, equity and good conscience," and may apply to exchange effected prior to the Act. 31 M.L.J. 380 =35 I.C. 92. S. 119 before amendment related only to the rights of the parties to the exchange *inter se* and there is no reason for holding that it was intended to relate to a third person not bound by an exchange to which he was not a party. Therefore the principle of that section did not apply to an innocent transferee for value from one of the parties to the exchange. 1934 L. 934 (2). S. 119 does not exclude an innocent purchaser into whose hands the property exchanged might pass. (1940) 1 M.L.J. 248. S. 119, as it stood before the amendment of the Act in 1929, should not be interpreted in the light of the subsequent change in the law, and the fact that the dispossession of the plaintiff took place after the amendment would not make the amended section applicable, where the transaction of exchange was effected long prior to it. 1940 M. 426 =(1940) 1 M.L.J. 248. Section in effect declares that there is a warranty of title by each party in respect of the property he has parted with in exchange for the other man's property. 31 M. L.J. 380. But this is subject to the special terms of any contract which the parties may enter into in respect of the properties exchanged. 21 M. 69 ; 42 I.C. 248. On the completion of the transaction of exchange, right to the property becomes vested in the parties and he then gets a right to sue for recovery of possession ; and if thereafter a party is deprived of the property which he got in exchange, he will be entitled under S. 119 to compensation or to the return of the property in dispute transferred by him to the other party. 113 I.C. 753=1929 A. 63 (2). Where the guardian of a minor exchanges his property for another and he is subsequently dispossessed of it, his remedy is not to sue to set aside the alienation, but under S. 119 for compensation or for getting back his land. 1924 B. 517. For purposes of S. 43 an exchange stands on same footing as a sale. 60 I.C. 819=33 C.L.J. 184. In every exchange there is a warranty of title. Where part is lost, the whole exchange is to be avoided or compensation is to be recovered. But an equivalent portion alone cannot be recovered back. 51 P.R. 1917=41 I.C. 248. As to whether charge is created when the transaction is not valid in law, *see* 38 M. 519= 30 I.C. 408 ; 42 M. 690. Where the covenant provided for the return of the respective properties exchanged in the event of any one being obstructed in enjoyment of his exchanged lands, a vendee from one cannot plead *bona fides* and want of notice. Art. 148 of the Limitation Act would apply to the enforcement of the covenant. 51 I.C. 939=42 M. 690.

Sec. 120.—Ss. 118, 119 and 120 show that the legislature has put an exchange on the same

Exchange of money.

121. On an exchange of money, each party thereby warrants the genuineness of the money given by him.

CHAPTER VII.

OF GIFTS.

"Gift" defined.

122. "Gift" is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person called the donor, to another called the donee, and accepted by or on behalf of the donee.

NOTES.

footing with a sale in almost every respect. For example, a transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale. According to S. 120, each party has the rights and is subject to the liabilities of a seller as to that which he gives and has the rights and is subject to the liabilities of a buyer as to that which he takes. 1923 L. 456. S. 119 can have no reference to the case of a third person, who is not a party to the exchange and, who is not in any way bound by it. 30 N.L.R. 208=1934 N. 61. An exchange implies an inter-change of property with another and, except in so far as the price may not be payable in money, the rights and obligations attaching to an exchange are analogous to those of a sale, so far as the parties thereto are concerned. Third parties cannot be substituted in the place of either of them and as such cannot claim pre-emption. 22 A.L.J. 292=46 A. 359. But *see* 4 A.L.J. 756; 7 A. 626. Where an exchange transaction becomes invalid owing to some formal or other defect, no charge would arise for the value of the land exchanged. *See* 38 M. 519 =30 I.C. 408. The analogy of the provisions of S. 120 read with S. 55 (4) (*b*) cannot be invoked in the case of decrees based on award, which itself does not contain any declaration that a charge has been created. 1936 A.L.J. 1328= 1937 A. 39.

Sec. 122.—A Burmese Buddhist religious gift is not valid unless registered. 11 Bur.L.T. 259 =45 I.C. 925; 50 I.C. 809. *See also* 40 I.C. 54. The Courts in deciding as to whether or not a particular transaction is a gift according to Mahomedan Law, would look not to the provisions of S. 122, but to the rule of Mahomedan Law, on the point. 1936 A.L.J. 1027=1936 A. 600. The word "voluntarily" in S. 122 bears its ordinary popular meaning, denoting the exercise of an unfettered freewill and not its technical meaning of "without consideration." The donee of a mere special power of appointment, in exercising that power cannot be said to do it "voluntarily," as he is under both a duty and an obligation to appoint without consideration and by way of gift. The appointment, though it may be a "transfer", does not amount to a "gift" and therefore need not be effected by a registered instrument. 1938 Rang.L.R. 678=179 I.C. 903=1939 R. 76. Where a deed of gift was delivered over to the donee immediately after execution, it would be sufficient acceptance of the transfer by the donee under S. 122 and effective from that moment, although it was not duly stamped then and the stamp was paid after the death of the donor under orders of the Collector and the deed then registered. 46 C.W.N. 477.

GIFT MAY BE MADE to a minor: 39 I.C. 46; 32 C. 129; 11 M. 26; to an idol or deity or a temple: 32 C. 129; 3 P. 842; 37 C. 128; 32 C. 129; and to a Mutt. 28 B. 215. But the donee must be an ascertained person or persons, or capable of being ascertained. *See* 18 M.L.J. 364. As to gifts by pardanashin woman, proof would be required that it is her *bona fide* act as a free agent on independent advice and that the transaction was not tainted by fraud or coercion. 18 C. 548 (P.C.); 15 C. 584; 20 A. 447; 15 I.C. 529. Gift differs from sale or exchange in that there is no consideration for the gift. "Consideration "contemplated in this section is valuable consideration *i.e.*, consideration either in money or money's worth; consideration of love and affection or of moral or spiritual benefits are not contemplated by this section. 1929 P. 591. "Dan" is gift and is governed by this Act. 1929 P.591. In order to effect a valid gift, both a transfer and an acceptance is necessary. 1923 P. 165. *See also* 28 C. 720 (P.C.); 3 P. 842=80 I.C. 980 [in the case of a donee incapable of signifying acceptance (as minors, idiots or deity), the acceptance may be made by somebody competent to act on their behalf]. 11 M. 246: 32 C. 129: 27 B. 31. Acceptance may be express or implied. 1932 A.L.J. 335. The circumstances that the *bona fides* of the transaction is undisputed; that after a gift deed was obtained from the Registration Office it was made over to the elder of the two donees who was then a major and who kept it in a box used commonly by the donor as well as the donees; that the mutation of name was effected in the municipal registers; that the taxes were assessed in the names of the donees and were collected from them; and that the donees were in constructive possession inasmuch as they as well as the donor lived in the house constituted sufficient data from which acceptance can be inferred. 179 I.C. 730=1939 R. 49. Acceptance may be presumed until dissent is signified. 41 I.C. 389. There is no presumption of acceptance operating immediately upon the gift whether known or unknown to the donee. Actual or constructive possession is however proof of acceptance and in zamindari property, and especially in a case concerning husband and wife, mutation means delivery of possession and the acts of the husband after mutation are acts on behalf of his wife. (25 A.L. J. 69, Ref.) 54 A. 534=1932 A. 444. Where the gift is an interest in land, the donor is not required to transfer the corpus of the property, but only possession of the interest. If the interest is transferred, the omission to deliver the corpus is immaterial. 43 I.C. 857. A minor can accept a gift without the intervention of a guardian, provided it is not an onerous gift. 39 I.C. 46= 13 N.L.R. 18. Where a Hindu donor adopted between the date of handing over the deed of

Acceptance when to be made.

Such acceptance must be made during the lifetime of the donor, and while he is still capable of giving.

If the donee dies before acceptance, the gift is void.

Transfer how effected.

123. For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of movable property, the transfer may be effected, either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

NOTES.

gift of ancestral property and its registration, the adopted son cannot question the gift. 1923 M. 282=17 L.W. 232; 62 I.C. 280=13 L.W. 187. Release of security without consideration is not gift under this section. 42 C.L.J. 582=1926 C. 170. A gift once legally made is irrevocable. 1936 A.M.L.J. 118. *Gift of shares in a company* becomes complete only when there is a transfer of entry in the company's books. 66 I.C. 586=48 C. 986. Where a gift was made by a husband to his wife while he was in embarrassing circumstances and the gift was kept secret till he was declared insolvent, but the wife never obtained possession, title did not pass. 24 C.W.N. 145 =54 I.C. 700. But *see* 1928 L. 9; 3 P. 842=80 I.C. 980. It is not enough that there is a registered deed of gift. There must also be a voluntary giving by the donor and an acceptance by or on behalf of the donee. The registered deed of gift may be merely a nominal transaction without any intention on the part of the executant to give effect to its terms. 3 P. 842=80 I.C. 980. There is no authority for the view that for an acceptance of an onerous gift acceptance of the gift itself is not sufficient but an acceptance of the *onerous condition* also at the same time is necessary. 37 C.W.N. 149=1933 C. 438.

Secs. 122 and 123.—A gift of immovable property which has not been completed by acceptance though the deed is executed and registered may be revoked by the donor prior to its acceptance. 1939 M. 290=(1939) 1 M.L.J. 337.

Sec. 123.—As to limitation to the territorial operation of S. 123, *see* S. 1. S. 123 extends to every cantonment in British India—*see* Cantonments Act, S. 32 (1). A gift to God Almighty is not a gift to a living person and consequently does not require a registered instrument. 11 P.L.T. 658=1930 P. 610; 25 L.W. 806; 42 M. 440; 1926 N. 469. (It was held by the Allahabad High Court that section applies to gifts both for secular as well as religious objects. 33 I.C. 989.) *See also* 1941 P.W.N. 75=1941 P.L.T. 239. Section has no application to partition of joint property, the same not being a gift. 15 N.L.R. 93; 25 I.C. 498; 1925 M. 1174. But where a transaction is substantially a gift the formal requirements of this section cannot be avoided by calling it by a different name. 49 M.L.J. 150=1925 M. 1174. An *oral gift* though accepted by a document by the donee is invalid. 28 Bom.L.R. 421=1926 B. 261. Husband making a gift of the house to wife—Both living in the house before and after gift—Gift deed executed and registered—Gift is complete. *See* 111 I.C. 251=1928 L. 9. As to *gift by husband to wife* when donor was in pecuniary embarrassment, *see* 24 C.W.N. 145=30 C.L.J. 228=54 I.C. 700. *See also* 1928 L. 9; 11 P.L.T. 138=1930 P. 305. A fixed deposit was in the following terms:—" Mr. and Mrs. *H*, repayable to either or survivor." There was no evidence of any gift of his interest by the husband to the wife. *Held*, that Mrs. *H* was not entitled to more than half of the money deposited with the Bank. 1931 A.L.J. 417. On this section, *see also* 30 Bom.L.R. 451=1928 B. 250. Even prior to the amendment of 1929, section was held applicable to gifts under Hindu or Buddhist Law. 7 O.W.N. 953=1931 O. 14.

HINDU LAW.—A division of property by a father in his lifetime to his children is not a partition but a gift and must be registered. 1 Bur.L.J. 26. *Delivery of possession* is not necessary when the deed is registered. 83 I.C. 41=1925 N. 199. *See also* 95 I.C. 240; 22 N.L.R. 124; 1 R. 351 =1924 R. 13. Among Hindus, gifts made subsequent to the Act do not require delivery of possession if there is registration. Acceptance by the donee is essential under Hindu Law. It may be implied and may be presumed until dissent is signified. 41 I.C. 389 (P.). *See also* 1923 N. 199; 24 M. 513; 34 C. 853; 45 A. 115; 1922 A. 44; *ibid.*, 467; 4 A. 40; 27 A. 169; 23 B. 234. There is no real distinction in principle between the essential ingredients requisite for a valid gift or dedication in Hindu Law and those laid down in the T. P. Act. 3 P. 842= 1924 P. 657. A Hindu lady, who is the full proprietor of immovable property, can by a registered instrument duly signed and attested, validly make an immediate gift of it, although she reserves to herself the enjoyment of the usufruct or profits of a part of the property for her lifetime and without detaining any power of alienation over it. Delivery of possession is not essential to the validity of the gift. 20 A.L.J. 744=1922 A. 467 (F.B.). *See also* 1922 A. 44, following 27 A. 169; 25 A. 353; 83 I.C. 41=1925 N. 199. A gift of *immovable property by a Hindu father to his daughter at the time of marriage* by way of *sankalap* is not valid in law as a registered document is necessary under S. 123, T. P. Act: 26 A.L.J. 944=1928 A. 699. S. 123 applied to the Hindus even before the Amending Act XX of 1929 was passed. No gift *inter vivos* of any immovable property could, therefore, be validly made by a Hindu except by a registered document as contemplated by S. 123. 44 C.W.N. 357=1940 C. 254.

MUHAMMADAN LAW.—The section does not

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apply to gifts under the Muhammadan Law. 28 I.C. 180=18 O.C. 122 ; 38 A. 212=35 I.C. 14 =14 A.L.J. 119. *See also* 100 I.C. 296=1927 C. 197. But in Burma, a gift of immovable property by one Mahomedan to another must be made by a registered instrument, duly attested, in accordance with the provisions of S. 123 : 14 R. 439=1936 R. 430 (F.B.). As to the law when gift is in issue in High Court of Rangoon, *see* 14 R. 485=1936 R. 522. Under the Muhammadan Law to constitute a valid gift, there must be delivery of possession. *See* 38 A. 627 ; 31 I.C. 281 ; 36 B. 214 ; 29 M.L.J. 733 ; 29 I.C. 439 ; 28 I.C. 180 ; 35 M.L.J. 541. Registration alone will not do. Delivery of possession is also necessary. 26 I.C. 466=19 C.W.N. 1311. *See also* 16 L.W. 894=1923 M. 52 ; 23 B. 682 ; 30 M. 519 ; 11 B. 517 ; 23 I.C. 547. Transfer in lieu of dower is a sale and not a gift. 64 I.C. 126. *See also* 1936 A.L.J. 1027=1936 A. 600.

BUDDHIST LAW.—*See* 150 I.C. 966=1934 R. 129. As in the case of a Hindu after the passing of this Act, delivery of possession is not essential for a valid gift under Buddhist Law. *See* 1924 R. 309. The Buddhist Law cannot be applied to the case of a gift unless a question of marriage, inheritance, or religious usage is involved in it. A gift made during donor's last illness is not valid without delivery of possession. 40 I.C. 54. *See also* 1938 R. 303 ; 50 I.C. 809 ; 45 I.C. 925. Land allotted in partition by Burmese father—Father cannot afterwards allege the act to be gift. *See* 2 R. 649=88 I.C. 76. But *see also* 1 Bur.L.J. 26. If a rule of Buddhist Law requires delivery of possession to validate a gift of immovable property, such a rule must be held to be abrogated by S. 123 and S. 129 of the T. P. Act. 2 R. 131=83 I.C. 557 ; 1 R. 351=75 I.C. 166. But *see* 14 R. 439=1936 R. 430 (F. B.). (Case of Mahomedan gift). As per Burmese law, gift by bridegroom to the bride at the time of marriage must be in writing and registered. Otherwise it will revert to the husband on divorce. 33 I.C. 129=9 B.L.T. 87. Transfer of property of first wife and husband to daughter to prevent it from going to second wife, amounts to partition of inheritance and not a gift. 4 B.L.T 186=11 I.C. 855.

ATTESTATION.—The provisions of the section are mandatory and the requirements of the section have to be strictly fulfilled. The strict rule of attestation applicable to the case of mortgages is equally applicable to the case of gifts. 1930 A.L.J. 623=1930 A. 669. Want of attestation invalidates deed of gift. *See also* 86 I.C. 676=1925 P. 151 ; 9 M.L.T. 57=8 I.C. 887. *See also* 1924 M. 800. Before the endorsement by the Sub-Registrar can be treated as valid attestation, it must be proved that he signed in the presence of the executant. 1931 M.W.N. 1242 ; 61 C. 525=38 C.W.N. 753=1934 C. 772. In spite of denial of attestation by an attestor from other circumstances, Court can conclude that he had in fact attested. 1 R. 557=1924 R. 139. Whether scribe is an attesting witness, *see* 36 I.C. 272=10 Bur.L.T. 106. (*See also* notes under S. 59, *supra*.) *See also* 1931 M.W.N. 1242. A marksman can in law be a valid attestor to a gift deed. 58 M. 220=1935 M. 178 (2)=68 M.L.J. 191.

REGISTRATION.—Where there was no registered instrument in respect of the alleged gift, the subject-matter thereof being immovable property, the provisions of S. 123 are not complied with and the gift is not valid : 12 R. 238=1934 P.C. 67= 66 M.L.J. 144 (P.C.). ; 1939 Pat. 258 ; 1937 N. 1; need not be at the owner's instance or with his consent. 10 A.L.J. 300=35 A. 3. But *see* 14 I.C. 61=9 A.L.J. 300 ; 19 M. 433. Gift of mortgage can be only by a registered instrument. 44 M. 196=40 M.L.J. 25. Gift of mango tree must be registered. 90 I.C. 769. Registration can be after the donor's death without the consent of his legal representatives. 40 M. 204=31 N.L.J. 690. But *see also* 28 M.L.J. 378=28 I.C. 271. Registration is necessary even in case of religious gifts. 36 I.C. 280. Retiring gratuity is in the nature of a gift. The gift is completed only by a registered document or by payment. A transfer intended to operate as a gift, but invalid as such, will not constitute the donor a trustee (*i.e.*,) an imperfect gift cannot be construed as a declaration of trust. 25 Bom. L.R. 599=1924 B. 88. In the case of transfer by gift, the alienation is complete when the conveyancing document is completed, and is not postponed until date of registration. 167 I.C. 48=1937 N. 1. A registered deed of gift alone is not sufficient to operate as a gift. There must be a complete divesting of the ownership on the part of the donor and an acceptance of the gift by the donee. A registered deed of gift or any other document, may be merely a nominal transaction without any intention on the part of the executant to give effect to its terms. 3 P. 842=1924 P. 657.

DELIVERY OF POSSESSION.—In case of gift of insurance policy money, execution of assignment deed and transfer of name in the company's register are sufficient. No delivery of documents is necessary. 38 I.C. 248=4 L.W. 339. A gift of movable property, unless it is effected by a registered deed, can only be completed by delivery of property to the donee. (1940) 2 M.L.J. 963=1941 M. 154. A gift subject to a life interest of the donor is valid. 20 A.L.J. 744= 1922 A. 467 (F.B.) ; 1922 A. 44. A gift is void when the donee is an unregistered body which has no legal existence and is not capable of holding property. 38 I.C. 183=14 A.L.J 103. On this section, *see also* 28 Bom.L.R. 411=1926 B. 261. To constitute a valid gift of immovable property in place where the Act is in force, execution and registration of a gift deed would be sufficient. Delivery of possession need not be made. 3 Bur.L.J. 111=1924 R. 353 ; 1930 A. L.J. 623=1930 A. 669. But in determining the question whether the power of revocation for non-payment of debts had been contemplated, the fact that possession was not delivered cannot be lost sight of. 1930 A.L.J. 623=1930 A. 569. When the gift is complete the relationship of the donor in possession to the donee is that of a trustee. 87 I.C. 312=1924 B. 88. Where there is a deed of gift and before its registration an endorsement is made therein that possession is delivered to the donee and the deed is subsequently registered, the burden of proving that possession was not given and therefore gift is invalid is on those asserting its invalidity. Where there are tenants on the property, their attorn-

Gift of existing and future property.

124. A gift comprising both existing and future property is void as to the latter.

Gift to several of whom one does not accept.

125. A gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted.

When gift may be suspended or revoked.

126. The donor and donee may agree that on the happening of any specified event, which does not depend on the will of the donor, a gift shall be suspended or revoked ; but a gift which the parties agree shall be revocable wholly or in part, at the mere will of the donor, is void wholly or in part, as the case may be.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

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ment to the donee is sufficient delivery of possession. 16 L.W. 894=1923 M. 52. The mutation of names by itself creates no proprietary title. [31 A. 73 (P.C.), Ref.] 76 I.C. 218=1924 N. 214.

DEDICATION TO TEMPLE.—The provisions of S. 123 apply to gifts direct, as well as to gifts through the intervention of a trust. The title, therefore, in an endowed property passes to the idol, who must be treated as a juristic person, on the execution of a deed of endowment by the donor. 7 O.W.N. 953=1931 O. 14. Property may be dedicated to a temple in one of three modes, (1) by making a gift to trustees on behalf of the idol, (2) by a dedication to the idol itself, and (3) generally on occasions of death or marriage by taking a leaf of the tulsi plant in hand and with water offering the property in the presence of the persons assembled. Of these modes, (1) must comply with the provisions of S. 123 of the Act. In mode (2) if the dedication is in writing, it must be registered. In mode (3) the gift is not within the provisions of the Act, although the intention may be that embodiment of the universal soul worshipped in the particular temple should have the benefit of the dedication. 42 M. 440=36 M.L.J. 575. *See also* 1941 P.W.N. 75=1941 P.L.T. 239. A mere unexpressed intention to dedicate cannot operate as a formal dedication so as to invalidate a transfer of that property to a third person made after the idea of dedication had been formed in the mind of the transferor. 13 P. 356=1934 P. 612.

ESTOPPEL.—There can be no estoppel by conduct when requirements of the section are not satisfied. 45 B. 164=38 I.C. 403. But *see* 1 R. 557=1925 R. 139 ; 1 R. 651 ; 2 R. 549=1925 R. 184. Where there is a gift of lands in favour of minor under which the donors divested themselves of the ownership of these lands and the minor has alone been in possession since the date of the gift : in a suit by the donors or any person claiming through them, the minor can resist the claim on the ground of estoppel, even though there was no registered deed of gift. The T. P. Act was enacted in order to prevent fraud and deception and it is founded on the highest principles of justice, equity and good conscience. 1 R. 665 ; 1924 R. 200. [But *see* 1929 R. 316, holding that the doctrine of part performance has no application to the case of a donee. *See also* S. 53-A]. Where the transfer is made on the basis of an ante-nuptial agreement, and the donee is in possession for a number of years, the donor is estopped from urging that the transfer is invalid as not being evidenced by registered deed. 52 C. 425=85 I.C. 799. Where a donor made a gift of immovable property and transferred possession of the land without any registered deed and on the death of the donor the donee submitted a report to the revenue surveyor for mutation of names in the official record, the heirs of the donor attesting the report and being present when it was made the heirs are estopped from impeaching the gift thereafter. 1 R. 651 =1926 R. 105. Where a donee of property is in *bona fide* possession of it, though the gift had not been perfected by a registered instrument in accordance with law, the donor or his representative cannot oust the donee who had been in undisturbed possession of the property for a long period though such period falls short of 12 years. But this rule can have no application to a case where the person is a donee from the donee, neither of the gifts having been perfected by a registered instrument, and especially when it is proved that the ultimate donee was not in absolute and exclusive possession of the property. 101 I.C. 703=1927 R. 128.

Secs. 124 and 125.—" If an estate is limited to two jointly, the one capable of taking the other not he who is capable shall take the whole." *Humphrey* v. *Teyleur*, cited in 16 C. at p. 682. Where a gift was made by a Hindu to his daughter and her husband jointly, and the gift is found to be invalid as to the husband, the daughter would take the whole. 16 C. 677=16 I.A. 44.

Sec. 126.—*See* 14 Bom.L.R. 340=15 I.C. 529; 4 A.L.J. 708 ; 5 B.L.R. 522 ; 34 B. 607=12 Bom. L.R. 341=6 I.C. 513. A gift once validly made cannot be revoked at the mere will of the donor : 23 B. 131. *See also* 1 M.H.C.R. 393 ; 1933 R. 418. Once a gift deed is executed and has been delivered to the donee, the donor cannot revoke it even before its registration on the ground that the gift is not completed until the deed is registered. 52 B. 313=1928 P.C. 86=54 M.L.J. 573 (P.C.) ; 50 M. 193=54 I.A. 89=52 M.L.J. 346 (P.C.) ; 49 B. 388=87 I. C. 490 (F.B.), overruling 48 B. 435. *See also* 28 M.L.J. 378=

Illustrations.

(*a*) *A* gives a field to *B*, reserving to himself, with *B's* assent, the right to take back the field in case *B* and his descendants die before *A*. *B* dies without descendants in *A's* lifetime. *A* may, take back the field.

(*b*) *A* gives a lakh of rupees to *B*, reserving to himself with *B's* assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds good as to Rs. 90,000 but is void as to Rs. 10,000 which continue to belong to *A*.

Onerous Gifts.

127. Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

Onerous gift to disqualified person.

A donee not competent to contract, and accepting property burdened by any obligation, is not bound by his acceptance. But if, after becoming competent to contract, and being aware of the obligation, he retains the property given, he becomes so bound.

Illustrations.

(*a*) *A* has shares in *X*, a prosperous joint-stock company, and also shares in *Y*, a joint-stock company, in difficulties. Heavy calls are expected in respect of the shares in *Y*. A gives *B* all his shares in joint-stock companies. *B* refuses to accept the shares in *Y*. He cannot take the shares in *X*.

(*b*) *A*, having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term and which is more than the house can be let for, gives to *B*, the lease, and also, as a separate and independent transaction, a sum of money, *B* refuses to accept the lease. He does not, by this refusal, forfeit the money.

Universal donee.

128. Subject to the provisions of section 127, where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by [1][and liabilities of] the donor at the time of the gift to the extent of the property comprised therein.

LEG. REF.

[1] Inserted by Act XX of 1929.

NOTES.

28 I.C. 271 ; 6 A. 313 ; 1939 A.W.R. (H.C.) 102. S. 126 does not lay down that a gift can be revoked in the same manner as a contract can be rescinded. The right given thereunder is personal to the donor. 152 I.C. 146=1934 A.L.J. 817=1934 A. 507. (Agreement to revoke gift must be entered into at the time of gift ; if the term is added after the completion of the gift and subsequently, it is not valid. 6 A. 313). Right of rescission of a gift is limited to fraud, mistake, coercion, undue influence, misrepresentation or the like as would operate to invalidate a contract. 45 C. 434=22 C.W.N. 210. *See also* 42 C.W.N. 14=1938 Cal. 157 ; 7 L. W. 339 ; 44 I.C. 413 (undue influence) ; 15 I. C. 529. As to gift by an old and infirm woman and by pardanashin ladies, *see also* 18 C. 545. A gift voidable at the option of the donor can be avoided after his death by his heirs. 23 A.L.J. 376=1925 A. 437. But *see* 2 P. 52=1922 P. 514, holding that the right of a person to avoid a gift is one personal to donor and cannot be transferred. Where certain property was gifted subject to the condition that the donee should not transfer it without the consent of the donor, the restraint was a mere personal promise to the donor, and was enforceable unde rS. 126 and is not hit at by S. 10 of the Act. 7 R. 306=1929 R. 226. As to *power of revocation for non-payment of debts by donee,* see 1930 A.L.J. 623=1930 A. 669

Sec. 127.—The section is an application of the rule of election to gifts : 20 M. 147 ; and as embodying rules of justice and equity is also applied to Hindus and Muhammadans : 35 C. 767. In the case of disqualified donee accepting *onerous gifts*, the option to refuse is only to the donee but the gift is binding on the donor. 19 C. 236 ; 10 C. 1102. It has also been held that a *minor donee* can accept a beneficial gift personally without the intervention of a guardian. (33 M. 312 at 314, R.) 13 N.L.R. 18=39 I.C. 46. But a minor would not be bound during his minority by his acceptance of an onerous gift (*See* last para. of the section).

Secs. 127 and 68.—In the case of an onerous gift the donee is liable to meet the obligation incurred under the deed of gift. The fact that the mortgage which the donee is asked to discharge, was found to be void, cannot relieve him of his liability. Nor the fact, that the donee being a minor has under S. 127 an option of repudiation, exempt such a donee from liability till in fact the option is exercised. S. 68 of the T. P. Act cannot obviously apply as the claim is based on the deed of gift and not on the mortgage. Moreover S. 63 presupposes a valid mortgage. The donee is liable to the extent of the gifted property in his hands. 1937 O.W.N. 1096=1937 O. 517.

Sec. 128.—Section does not conflict with any rule of Muhammadan Law. Where a Muhammadan made a gift of all his property to his son

Saving of donations *mortis causa* and Muhammadan law.

129. Nothing in this Chapter relates to gifts of movable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law [1][* * * *].

LEG. REF.

[1] Omitted by Act XX of 1929.

NOTES.

and directed him to pay all his debts, the son is a *universal donee* and is liable to pay all the debts. 7 O.W.N. 523=1930 O. 268. *See also* 155 I.C. 308=1935 O.W.N. 589; 18 N.L.J. 179 (Surrender by Hindu widow of her estate to daughter and daughter's son). Section applies only to universal donee: 50 A. 818. As to who is a *universal donee*, see 50 A. 818=115 I.C. 114. A transfer in consideration of donee undertaking to pay the debts of the donor is a sale and not gift. 50 A. 818=115 I.C. 114. A deed executed by a husband in favour of his wife, under which he transfers to her absolute proprietary title in the whole of his immovable property in part payment of her deferred dower, is not a deed of gift, but a deed of *hiba-bil-ewaz* and the provisions of S. 128 have no application. The settlement of dower debt due to a wife is a legitimate settlement, and where it is conducted in a proper manner and there is nothing to show that the wife had any knowledge of the existence of a promissory note executed by her husband in favour of a third person, the property transferred is not liable to attachment and sale in execution of a decree obtained on the basis of the promissory note. 4 O.W.N. 456=1927 O. 176. A universal donee is, on the principle embodied in S. 128 liable to pay the debts of the donor out of the estate in his hands. 42 P.L.R. 307=1940 L.285. The essential condition to constitute a universal donee is that the gift must consist of the donor's whole property. If any portion of the donor's property, no matter whether it is movable or immovable is excluded from the operation of the gift, the donee is not the universal donee. 1930 A.L.J. 99=1930 A. 180; 8 O.W.N. 1291. But where the donee was in possession of all the properties except a small item which was given over to the donor under a lease for his lifetime: the donee is a universal donee liable for all the debts of the donor. If he found that the property was burdened with too much debts, he could throw away the property. 140 I.C. 120 (A.). Where a person sues another on the ground that the latter is a universal donee, the onus lies on the plaintiff to prove that the transaction amounted to a deed of gift and that the defendant was a universal donee. 26 A.L.J. 753 =50 A. 818. On this section, *see also* 4 L.W. 339 =38 I.C. 248. A creditor of the donor can tack the secured and unsecured debts of the donor together and insist, when the donee seeks to redeem the secured debt alone, that the unsecured ones should be redeemed at the same time. 7 B. 101. On the death of a tenure holder, the tenure devolved upon his daughters. A rent decree was obtained by the landlord against them. The daughters relinquished their interest in favour of the reversioners by a family arrangement and the reversioners had specifically taken over the liability to pay debts. Under S. 128, the reversioners as donees would be liable for the debts of their donor and the landlord can sue the reversioners on the basis of the family arrangement. (23 C. 454, rel. on.) 1937 C. 226. Where a person incurs a debt under a promissory note executed by him and then makes a gift of the whole of his movable and immovable properties, the donee is liable under S. 128 for the debt due by the donor. The fact that subsequent to the gift the donor renews the original promissory note makes no difference to the donee's liability, because it cannot be said that the debt in question was not a liability of the donor in existence at the time of the gift. 1937 M.W.N. 395. Where a donor at the time of gift still owns a house, holds certain ex-proprietary tenancy rights and has grains, bullocks, etc. and also has still vested in him the equity of redemption in respect of a property other than that gifted, the donee is not a universal donee. 1941 O.W.N. 56=1941 O. 205.

Sec. 129. *N.B.*—This amendment is not to have retrospective operation (Act XX of 1929, S. 63). In view of the amendment, the question raised in 104 I.C. 299=1927 O. 278, as to applicability of section to Hindus or Buddhists does not arise. S. 129 as it stood before the amendment of 1929 kept the rules of Hindu Law unaffected by anything contained in Chapter VII of the Act. 42 C.W.N. 14=1938 C. 157.

GIFTS IN CONTEMPLATION OF DEATH.—*See* 3 B.L.R. (O.C.J.) 113. (Gifts of Government Promissory notes made in contemplation of death passed by mere delivery without endorsement will constitute a legal and valid gift.)

MAHOMEDAN LAW.—The rules as to gifts under the Mahomedan law are contrary to the rules under the T. P. Act and the latter do not apply to a Mahomedan gift. 14 P.L.T. 599. *See also* 1937 R. 240. This section does not state that the provisions of this chapter shall not at all apply to Mahomedans, but it only lays down that its provisions shall not affect any rule of Mahomedan Law. Hence, in so far as the rules in this chapter are in consonance with justice and equity and do not conflict with any rule of Mahomedan Law, they would be applied to Mahomedans also. *See* 35 C. 767. *See also* 1936 R. 430; 1936 R. 522. Under Mahomedan Law registration alone is not sufficient. Delivery of possession also is essential. 38 A. 627=43 I.A. 212=31 M.L.J. 607 (P.C.). The power to extend any part of the T. P. Act given to the Local Government by S. 1 of that Act does not authorise the Local Government to extend particular sections of the Act so as to give those sections a different operation from that which they had in the Act itself, read as a whole; it cannot abrogate in the area to which the extension is made the existing rule of Mahomedan Law as to delivery of possession regarding gifts as to which the Legislature has expressly provided that it should remain unaffected by the Act. 54 I.A. 23=5 R. 7=52 M.L.J. 362 (P.C.). Oral gift by a Mahomedan in favour of his wife in lieu of her dower debt is *hiba-bil-ewaz*, which is pure gift and not sale.

[1][CHAPTER VIII.

OF TRANSFERS OF ACTIONABLE CLAIMS.

Transfer of actionable claim.

130. (1) The transfer of an actionable claim [2][whether with or without consideration] shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent, [3][* *] shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not :

LEG. REF.

[1] Substituted by Act II of 1900 for original Chapter VIII.

[2] Inserted by Act XX of 1929.

[3] Omitted by Act XX of 1929.

NOTES.

Being a valid gift under Mahomedan Law, provisions of Chap. VII, are not applicable and such gift can be made orally, without a registered instrument. 1936 A.L.J. 1027=1936 A. 600. The section does not apply to a transfer by way of gift governed by S. 130 : 38 I.C. 248=4 L.W. 339.

Sec. 130.—S. 130 contains a special schem- having some of the features both of the English Common Law and of the principles of equity. But it is unsafe, to decide a case under the section by any extensive reference to the English authorities. 38 C.W.N. 1190. There is a contradiction, between the provisions of S. 130 and those of S. 134. While S. 130 says " all the rights and remedies of the transferor vest in the transferee," the words in S. 134 are " the residue, if any, belongs to the transferor." The wording ought to be, " the residue, if any, shall be transferred by the original transferee to the original transferor." 38 C.W.N. 1190. As to applicability of section, *see* 1926 C. 447 ; 1928 M.W.N. 190. S. 130 applies to absolute transfers as well as to equitable charges in respect of future property. An equitable assignment of or equitable charge can only be created by a document in writing as provided by S. 130. A mere contract to assign future salary does not create an equitable charge. 23 P.L.T. 35. That S. 130 can be invoked to justify the assignment of a debt as an actionable claim even in Punjab. 43 P.L.R. 439=1941 L. 337. In provinces where the Transfer of Property Act does not apply, hundi can be assigned orally subject to all equities as a chose in action independently of the Negotiable Instruments Act so as to give the assignee a *locus standi* to sue thereon. 195 I.C. 185=1941 Pesh. 45. Section has no application to an assignment of a mortgage debt which is not an actionable claim under S. 3 : 123 I.C. 297=1930 S. 77. Section is not exhaustive. *See* 90 I.C. 111=1926 S. 78. The dedication of an actionable claim to a deity or god or temple is not covered by this section. *See* 96 I.C. 1004=1926 N. 469. *See also* 1927 M.W.N. 525 ; 9 M.L.T. 102=9 I.C. 287. Transfer of mesne profits along with land—Whether right of action continues with transferor. *See* 1927 M.W.N. 525. The transfer of an actionable claim whether as an outright transfer or by way of security is governed by S. 130. The deposit of the document creates no charge or lien at all on the debts. Where a letter of authorisation was given directing the addressee to draw out the money due to him from the P.W.D. but there was no assignment of the debt, the letter did not convey any rights to recover the debts. 7 R. 365. A debt secured on immovable property can be transferred apart from security. 35 C.W.N. 1034=1931 P.C. 245 (P.C.). An assignment of a debt to be valid must be of the whole debt. Where partners in a firm become insolvent and there is also a minor partner the assignment by the Official Assignee of a debt due to the firm cannot be said to be of the whole debt because the minor's interest in the partnership cannot be assigned. Even assuming that assignment of part of a debt can be made, assignment of part which is indefinite is invalid. 62 C. 510=1938 C. 377=39 C.W.N. 606. An assignment of a part of a debt is not invalid. 1939 M.W.N. 1054=1939 Comp. C. 262=1940 M. 258. In equity, a part assignment of a debt is valid and a suit brought thereon is maintainable provided the assignor and possibly other assignees, if any, are made parties to the suit. There is nothing in S. 130 to prevent the application of this equitable rule. 43 P.L.R. 439=1941 L. 337. *See also* 43 P.L.R. 444 ; 18 P. 839. Where a mortgage bond was transferred by an endorsement to the plaintiff who sued on it, the document on which suit was based cannot be regarded as a mortgage bond because the security had not been legally transferred. But there was no reason why the Court should not regard it as a simple money bond which had been transferred by the endorsement to the plaintiff and there was a legal transfer. 1935 A. 837. The transfer of a right to arrears of rent and current dues can only be made by an instrument in writing under S. 130 : 1923 P. 165. *See also* (1937) 2 M.L.J. 871. Debtor cannot recover unpaid balance of consideration in respect of bond executed by him in favour of creditor and such right cannot be assigned. 1930 L. 100. When a debt is assigned, interest payable on it goes with it. 1939 M.W.N. 1054=1939 Comp.C. 262=1940 M. 258. Mortgage failing as such can be treated as transfer. 31 C.W.N. 179=1926 P.C. 129 (P.C.). On a sale of property a contract to re-sell it to vendor at a particular time is assignable. 32 C.W.N. 850=1928 P.C. 174=55 M.L.J. 198 (P.C.). Whether the definition of " transfer of property " applies to S. 130 is doubtful. 1926 N. 469=96 I. C. 1004. As to the meaning of the word " transfer " in this section, *see* 37 B. 198=17 I.C. 627 ; 21 I.C. 316 ; 14 I.C. 144. Section refers not merely to the transfer of absolute rights but also to the creation of a mere charge. 57 C. 328=34 C.W.N. 605=

Provided that every dealing with the debt or other actionable claim by the debtor or other person, from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce suchdebt or other actionable claim, shall (save where the debtor or other person s a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings, and without making him a party thereto.

Exception.—Nothing in this section applies to the transfer of a marine or fire policy of insurance [or affects the provisions of section 38 of the Insurance Act, 1938][1].

LEG. REF.

[1] Added by Act IV of 1938.

NOTES.

1930 C. 536. Where the transfer is made of a contract, and the transaction amounts to a novatio under S. 62, Contract Act, no written instrument is required, 31 N.L.R. (Supp.) 154=161 I.C. 787=1936 N. 37. The transfer under this section must be of the whole debt and not of a portion only. 48 M.L.J. 432=1925 M. 753; 62 C. 510=39 C.W.N. 606. Where a debt is a joint debt, an assignment by one of the joint creditors would not enable the assignee to enforce the payment of the whole debt. 174 I.C. 220=1937 C. 532. *A right to recover goods lent or damages on* failure to return them is a mere right to sue and not an actionable claim. 1923 N. 67 (2). A claim for money due on a settlement of accounts regarding some cross transactions between the parties is an actionable claim, and can be assigned. 32 Bom.L.R. 894=1930 B. 409. The position and rights and obligations of one partner in a partnership in relation to the other partners is clearly not a chose in action and cannot be assigned. But the share of a partner in a partnership is property and the right to recover it is a chose in action assignable under the T. P. Act. 194 I.C. 380=1941 S. 73. *See also* 1938 S. 288. The section is not exhaustive of the modes by which the interest of one person may be transferred to another. 90 I.C. 111. Assignment must be in writing. 9 I.C. 287=9 M.L.T. 102; 1923 P. 163. *See also* 38 I.C. 248. Transfer of bales of cotton held as security from one creditor to another—Substitution of liability —Necessity for writing. *See* 34 Bom.L.R. 837. Oral assignment is not valid. 15 I.C. 380=11 M.L.T. 246. *See also* 17 M.L.J. 393; 22 I.C. 510; 18 C.W.N. 494; 37 B. 47. But an oral assignment is valid in the Punjab since the Act is not in force there. 134 I.C. 121 (Lah.). *See also* 1941 L. 337=43 P.L.R. 439. The writing effecting the transfer may be on a separate deed and need not necessarily be on the document transferred. 12 M.L.J. 351. Transfer may also be effected by way of a separate and independent letter: 16 I.C. 708; 7 R. 365=1929 R. 318; 37 B. 198; or entry in an account book: 47 I. C. 749; or recitals in a partition deed: 8 I.C. 83. An assignment of the right under an instalment bond, by the person in whose favour it was executed by means of a letter of assignment, accompanied by delivery of the bond to the assignee, is a valid assignment of debt. (30 M. 75, R.); 13 M.L.T. 77=16 I.C. 708. A document authorising a person to recover the amount of a promissory note from a person, with whom it was deposited by the owner, operates as an assignment of the promissory note, and an attachment of it after assignment is void as against the assignee. 1912 M.W.N. 524=14 I.C. 279. Power given by a submission clause in a contract, being a personal covenant, cannot be validly transferred. 26 S.L.R. 368. When the amount deposited by a person as security for the due performance of the office is assigned to a third person, the attachment by a creditor of the assignor, after the assignment, is not valid, as under S. 130 the assignee's right was complete against the assignor on the date of the assignment. Though S. 130 does not apply the principle therein applies. 1912 M.W.N. 461=14 I.C. 144. The right to recover the insurance money payable under a policy of life assurance on the death of the assured person in an actionable claim as defined by S. 3 and S. 130 governs the assignment of such a policy. 31 S.L.R. 98=1937 S. 181. *See also* 52 L.W. 822=1941 M. 147. Life Insurance policy—Assignment to wife of assured—Provision for reverter to assured in certain contingencies—If absolute assignment. (1939) 1 M.L.J. 261. S. 130 applies not only to absolute assignments of actionable claims but also to assignments by way of charge, and a deposit of a policy of insurance by way of security can, therefore, be effected only by an instrument in writing, showing that the deposit is being made with the intention of creating a title in the person with whom the deposit is made. 44 C.W.N. 593. *See also* 1941 M. 147=(1941) 2 M.L.J. 891. Mere *deposit of an insurance policy* with the payee of a property by way of a security does not operate as a transfer or assignment of the same and no security is created thereon. 30 I.C. 602=8 Bur.L.T. 157; 1941 M. 147=(1940) 2 M.L.J. 891; 37 B. 198=40 I.A. 24=24 M.L.J. 60 (P.C.) Nor does mere *delivery of documents of title* constitute a transfer. 51 C. 972=28 C.W.N. 894. But where clear words are used mentioning the sale of a bond, the transfer is complete. 1924 L. 684. A decree constitutes an actionable claim. The words "duly authorised agent" in S. 130 must be taken to mean "lawfully authorised" agent. When the law requires a person to be lawfully authorised, ratification has retrospective effect and cures a defect in the authority. Where an

Illustrations.

(*i*) *A* owes money to *B*, who transfers the debt to *C*. *B* then demands the debt from *A*, who, not having received notice of the transfer as prescribed in section 131, pays *B*. The payment is valid, and *C* cannot sue *A* for the debt.

(*ii*) *A* effects a policy on his own life with an Insurance Company and assigns it to a Bank for securing the payment of an existing or future debt. If *A* dies, the Bank is entitled to receive the amount of the policy, and to sue on it without the concurrence of *A's* executor, subject to the proviso in sub-section (1) of section 130 and to the provisions of section 132.

NOTES.

agent holding a power-of-attorney which does not give him power to assign a decree obtained by his principals, assigns that decree to a third person purporting to act under the power, the assignment would not be valid so as to entitle the assignee to obtain execution; but if the decree-holders (principals) ratify the action of the agent, expressly recognising the assignment and receiving consideration, that validates the assignment retrospectively. 188 I.C. 878=49 L.W. 375=1939 M. 543. Assignment of money lying in Court—Form or words necessary—Attachment of amount before judgment followed by decree on admission—Court requisitioning amount from custody Court in pursuance of admission of defendant—Effect of. 1937 A.L.J. 348=1937 A. 424. The *hypothecation of an actionable claim operates as a deed of assignment* under S. 130. 19 P. 715=1940 P. 683. A mere "hypothecation" or "charge" is a "transfer" for the purpose of S. 130 (1). 175 I.C. 786=1938 R. 1. A *promissory note* executed in the name of a particular person which is allotted to another on a partition is not transferred to the allottee by operation of law; and the allottee of the note cannot therefore maintain a suit on it without an indorsement by the payee. 36 Bom.L.R. 807=1934 B. 356. The *Negotiable Instruments Act* has not affected the transferability of a promissory note by assignment as a chose in action apart from endorsement. 61 C. 425=38 C.W.N. 465=1934 C. 549. The endorsee of a negotiable instrument for value, which was secured by a mortgage, cannot have the benefit of the mortgage security, in the absence of a registered assignment of that also. 44 M. 965=41 M.L.J. 297. *See also* 1928 M.W.N. 690. A *deposit receipt* is not a negotiable instrument. But, where the money is immediately payable, an endorsement or the receipt, together with an order to pay a given individual, will entitle that individual to receive the money. 38 B. 618=28 I.C. 114=16 Bom.L.R. 534. *See also* 16 I.C. 708 (1)=13 M.L.T. 77. The mere fact of deposit of an insurance policy by way of pledge creates no lien in favour of the creditor. A letter setting out the policy as an article pledged is merely evidence of the deposit and does not amount to a valid assignment of the policy and confers no rights on the creditor. 52 L.W. 822=(1940) 2 M.L.J. 891=1941 M. 147=I.L.R. (1941) M. 378. A fixed deposit receipt held by a depositor of moneys in a Bank is not a negotiable instrument and an endorsement on the back thereof by the holder does not have the same effect as an endorsement of a bill of exchange or promissory note. To pass title, there must be an assignment in writing as required by S. 130. An endorsement on the back and a letter by the depositor to the Bank informing the Bank that he had assigned the amount to the endorsee would not amount to an assignment in writing within the meaning of S. 130. 50 L.W. 759=1939 Comp.C. 285=1940 M. 157. *See also* 1938 Sind 24. Where it is agreed between the parties to a document that one portion of certain money lying in deposit in a bank in the name of one of those parties should thenceforward belong to one of them and the other portion to the other, the document can be viewed as an assignment of an actionable claim within the meaning of S. 130. If the intention is fairly clear that the money in deposit in the bank should be split up into two parts, one of which is to go to one of the parties and the other to the other party, that operates as an assignment of the entire debt in two separate portions to two separate individuals. 1938 M. 236=(1938) 1 M.L.J. 56. Where a subscriber to a chit fund conducted by a company deposits money in a Bank and authorizes the Bank to pay the future instalments of subscriptions in respect of the chit to the company as and when they fall due from and out of the deposit in the Bank, it operates as an assignment of the moneys in favour of the company under S. 130 of the T. P. Act. 1939 M.W.N. 1054=1939 M. 258. *See also* 1933 L. 102. Executing a document authorising a person to collect the amount due under a pronote is an assignment of it. 14 I.C. 279=1912 M.W.N. 524. Mere recital of receipt of the amount due under a pro-note without express words of transfer does not effect a transfer. 59 I.C. 943=39 M.L.J. 273. But no technical language in any particular form is necessary. Only the intention to transfer must be made out; consent of debtor is unnecessary. 42 C. 684; 89 I.C. 735=42 C.L.J. 43; 87 I.C. 382=48 M.L.J. 462. S. 130 applies to Mahomedans and a Mahomedan woman wishing to release her husband from his liability to pay her dower, must, if the release is to be valid and binding, do so by means of an instrument in writing. Such a transaction cannot be effected orally. 20 P. 798=23 P.L.T. 72=1942 P. 210. Where one coparcener retires from the membership of a joint Hindu Mitakshara family business and renounces his share therein, no assignment is necessary by him in favour of the other coparceners in respect of the actionable claims belonging to the family. The legal representative of the retiring member is not a necessary party to suit by the surviving coparcener or coparceners on the basis of the debt due to the family. 63 C. 194=40 C.W.N. 808.

EQUITABLE ASSIGNMENT.—*See* (1937) 2 M.L.J. 871. An agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order directing such person to pay such funds to the creditor, operates as an equitable assignment of that part of the debt or funds to which the agreement or order refers. 14 L. 325=1933 L. 102. *See also* 1940 M. 258.

131. Every notice of transfer of an actionable claim shall be in writing, signed by the transferor or his agent duly authorized in this behalf, or, in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee.

Notice to be in writing signed.

132. The transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer.

Liability of transferee of actionable claim.

Illustrations.

(*i*) *A* transfers to *C* a debt due to him by *B*, *A* being then indebted to *B*. *C* sues *B* for the debt due by *B* to *A*. In such suit *B* is entitled to set off the debt due by *A* to him although *C* was unaware of it at the date of such transfer.

(*ii*) *A* executed a bond in favour of *B* under circumstances entitling the former to have it delivered up and cancelled. *B* assigns the bond to *C* for value and without notice of such circumstances. *C* cannot enforce the bond against *A*.

NOTES.

Equitable chose in action—Amount left with mortgagee to pay off creditor of mortgagor—Less sum required than amount left —Assignment by mortgagor of right to recover balance left with mortgagee—Validity of—If mere right to sue. 1937 A.L.J. 518=1937 A.W. R. 444. The right of a vendee, where it is found that the vendor had no title, to recover the purchase price from the vendor is an actionable claim which can be validly assigned. 54 L.W. 491=(1941) 2 M.L.J. 695. Liability to arise in future —Relationship not yet arisen. *See* 1938 R. 1.

RIGHT OF SUIT.—As to who can sue after transfer of an actionable claim, *see* 1927 M. 817. The express right of the assignee to sue a debtor in his own name conferred by S. 130 (1); and the "possession, order or disposition" giving rise to a condition of "reputed ownership" under S. 52 (2) (*c*), Presidency Towns Insolvency Act, are two entirely separate and distinct things. It may very well be that so far as the assignee's right to sue is concerned it is complete, and yet there may be left with the assignor such an appearance of continued or reputed ownership as to invoke the order and disposition clause. 175 I.C. 786 =1938 R. 1. The hypothecation of a promote is a transfer of an actionable claim and the transferee is entitled to sue on it. 38 M. 297=25 M.L.J. 356. Lease by mortgagor—Covenant by lessee to pay Government dues—Default—Assignment of mortgagor's rights to mortgagee—Suit by mortgagee—Maintainbility. 59 I.A. 41=11 P. 266=36 C.W.N. 280=62 M.L.J. 287 (P.C.). When debts are transferred by way of sale and the vendor, in spite of the sale, realises one of such debts, it is only just and equitable that the vendee should be allowed credit for the amount so realized out of the consideration. 128 I.C. 763=1930 A. 875. Partnership—Dissolution—Partners taking payment and giving up interest in assets in favour of others—Document in writing is necessary. I.L.R. (1939) Kar. 344=1939 S. 288. *See also* 1941 S. 73. The effect of S. 130 (1) is, in the cases which it covers, to confer without notice to the debtor, a legal title on the transferee as opposed to an equitable title only. 175 I.C. 786 =1938 R. 1. *See also* 1938 P. 265. A *pahunch* is an ordinary receipt. At best it evidences acknowledgment of a debt, and is a chose in action or an actionable claim. Under S. 130 it is only transferable by an instrument in writing, such transfer being subject under S. 132, to the equities provided therein. 32 S.L.R. 640=1938 S. 24.

Sec. 131.—[*See* notes under S. 130 *also*.] *See* 27 C.W.N. 733=1923 C. 719 (722); 13 Bom. L.R. 590=11 I.C. 964; 33 M. 123. To attract the operation of the exception in S. 130, there must be a strict compliance with the requirements of S. 131. 27 C.W.N. 733=1923 C. 719. The notice must give the address of the transferee. Mere giving of the address of the solicitors of the assignee is insufficient. 27 C.W.N. 233=1923 C. 719; 30 I.C. 278=8 Bur.L.T. 266. The validity of an assignment must be tested with reference to the law as it stood at the time of the assignment. The provisions of S. 131 as it originally stood did not invalidate an assignment for want of a notice to the debtor, but it only suspended the operation of the assignment until notice was given. 13 C.L.J. 641=10 I.C. 510. The debtor cannot refuse to recognise the transfer, provided he has notice of it. Payment to the assignor, after notice of assignment, will not absolve the debtor from liability to the transferee. Notice of assignment may have conditions or qualifications attached to it, and such notice is perfectly valid. If the transferor gives an invalid notice, the transferee is entitled to give a legal notice, so as to prevent the original debtor from defeating the assignment. 33 M. 123=4 I.C. 420. *See also* 12 C. 505; 10 M. 289; 10 A. 20.

Sec. 132.—Principle of this section is also applied to transfers of mortgage rights carrying with it all the rights and obligations attached to it. 109 I.C. 195=1928 N. 223. *See also* 34 I.C. 859 =40 M. 683=30 M.L.J. 615; 10 M.L.J. 211. Set-off can be claimed against the creditor's assignee, though the assignee bought the debt in a Court-auction. 16 I.C. 686=1912 M.W.N. 1235; 3 L. 414=69 I.C. 720=1923 L. 261; 30 M. 235; 1912 M.W.N. 1235; 3 L. 414; 16 C. 619. [But *see also* 40 M. 686 a case of an assignment of mortgage.] But if the debtor assents to pay the money due as per assignment, he cannot afterwards claim any equity as against the assignee. 31 I.C. 152=1915 M.W.N. 822. Where the assignee of a co-sharer's right to profits sued the lambardar in the Revenue Court and the defendant claimed a set-off in respect of a decree for revenue he had obtained against the assignor: *Held*, that the defendant could not

Warranty of solvency of debtor.

133. Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount or value of such consideration.

Mortgaged debt.

134. Where a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if received by the transferor or recovered by the transferee, is applicable, first in payment of the cost of such recovery : secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue, if any, belongs to the transferor or other person entitled to receive the same.

Assignment of rights under marine or fire policy of insurance.

135. Every assignee, by endorsement or other writing, of a policy of marine insurance or of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself.

Incapacity of officers connected with Courts of Justice.

136. No Judge, legal practitioner or officer connected with any Court of Justice shall buy or traffic in, or stipulate for, or agree to receive any share of, or interest in, any actionable claim, and no Court of Justice shall enforce, at his instance, or at the instance of any person claiming by or through him, any actionable claims, so dealt with by him as aforesaid.

NOTES.

plead set-off or claim the benefit of S. 132. 1934 A. 155=56 A. 624 (F.B.). A right to recover arrears of profits assigned in a conveyance of a village share is not an actionable claim but a benefit arising out of land and therefore immovable property. Hence S. 132 is not applicable. 165 I.C. 414=1936 N. 217.

Sec. 134.—Section applies to a charge-holder also. 23 M. 35 ; 34 M. 53. (The holder of a charge on a debt due to his debtor is a transferee of an actionable claim and is entitled to recover the debt from the transferor's debtor. *See also* 48 L.W. 766.) As to whether an hypothecation of a pronote amounts to an assignment without express words to the effect, *see* 16 I.C. 601=23 M.L.J. 430. If the transferee by the hypothecation of a pronote allows it to be barred, he will be liable to the transferor to that amount. 38 M. 297=25 M.L.J. 356. The right of the transferee by mortgage of a chose-in-action to sue on the claim arises on the date when the money becomes payable and not date of mortgage. 56 I.C. 146 =11 L.W. 258. Where a debenture creates a charge on secured debts but the charge is not enforceable against the security on account of its not being registered under the Registration Act, the debts, though secured upon immovable property, are movable assets, which the debenture holder has the right to realise. 35 C.W.N. 1034 =1931 P.C. 245 (P.C.). On this section. *see also* 33 M. 123=4 I.C. 420 ; 1938 P. 265.

Sec. 135.—This section has no application to sales in execution by virtue of S. 2 (*d*) of the Act. 9 I.C. 729=9 M.L.T. 319.

Sec. 136.—Persons mentioned in this section should not be placed in a position in which they may be tempted to use the influence or information which they get by virtue of their office unduly to the prejudice of other persons. 11 M. 56 - 17 I. C. 544. ***Right*** *to arrears of rent* in respect of property purchased by a pleader along with the property is an actionable claim and it is not enforceable. 40 C. 657=17 C.W.N. 649 ; 19 I.C. 129 ; 8 P.L.T. 201=1927 P. 2 ; 4 P. 43=1925 P. 310. But a mere sale of arrears of rent by a legal practitioner is not invalid. 97 I.C. 373=1927 P. 2. Attachment of provident fund in execution —Fund assigned to legal practitioner prior to suit —Right of parties—Suit by assignee—Maintainability. 1935 C. 756. A decree does not come within the category of actionable claims, but the principle involved is the same. I.L.R. (1938) M. 399=47 L.W. 192=1938 M. 276 (F.B.) A decree is not an actionable claim and transfer of it in favour of a pleader is not invalid. 62 I.C. 255=40 M.L.J. 124. A pleader's purchasing an actionable claim from his own client is unprofessional conduct. 37 M. 238=23 M.L.J. 447. A transfer of an *unpaid dower debt* relates to an actionable claim and is hit at by S. 136 where the transferee is a legal practitioner. 54 A. 499=1932 A. 345. The words " trafficking in " may in certain circumstances include the transaction of sale, but it connotes something more than a mere sale. But whether a mere sale would amount to " trafficking" in any particular circumstances is a question of fact. 97 I.C. 373=1927 P. 2=8 P.L.T. 201. As to whether section applies to *sales in execution*, see 23 C. 805 ; 1927 C. 619 ; 15 M. 389. In any event the Courts will look with suspicion on such transactions even in Court sales. *See* 15 M. 389 ; 46 C.L.J. 225 ; 1927 C. 691. An assignment of a bond in favour of a Special Magistrate and an Honorary Assistant Collector, is void under S. 136. The result of it is that no rights pass from the transferor to the transferee, and the owner of the bond has a right to maintain a suit on the basis of it. 162 I.C. 229=1936 O. 275.

137. Nothing in the foregoing sections of this Chapter applies to stocks, shares or debentures, or to instruments which are for the time being, by law or custom, negotiable, or to any mercantile document of title to goods.

Saving of negotiable instruments, etc.

Explanation.—The expression "mercantile document of title to goods" includes a bill of lading, dock-warrant, warehouse-keeper's certificate, railway-receipt, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.]

THE SCHEDULE.

Year and Chapter.	Subject.	Extent of repeal.
	(*a*) STATUTES.	
27 Hen. VIII, c. 10 ...	Uses ...	The whole.
13 Eliz., c. 5 ...	Fraudulent conveyances ...	The whole.
27 Eliz., c. 4 ...	Fraudulent conveyances ...	The whole.
4 Wm. and Mary, c. 16 ...	Clandestine mortgages ...	The whole.
	(*b*) ACTS OF THE GOVERNOR-GENERAL IN COUNCIL.	
IX of 1842 ...	Lease and release ...	The whole.
XXXI of 1854 ...	Modes of conveying land ...	Section 17.
XI of 1855 ...	Mesne profits and improvements ...	Section I; in the title, the words "to mesne profits and" and in the preamble "to limit the liability for mesne profits and."
XXVII of 1866 ...	Indian Trustee Act ...	Section 31.
IV of 1872 ...	Punjab Laws Act ...	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XX of 1875 ...	Central Provinces Laws Act ...	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XVIII of 1876 ...	Oudh Laws Act ...	So far as it relates to Bengal Regulation XVII of 1806.
I of 1877 ...	Specific Relief Act ...	In sections 35 and 36, the words "in writing."
	(*c*) REGULATIONS.	
Bengal Regulation I of 1798.	Conditional sales ...	The whole Regulation.
Bengal Regulation XVII of 1806.	Redemption ...	The whole Regulation.
Bombay Regulation V of 1827.	Acknowledgment of debts; Interest; Mortgagees in possession.	Section 15.

NOTES.

Sec. 137.—Section only deals with the method of transfer, and not with effect or result of transfer. 1923 R. 1. A *promissory note* can be transferred under the general law by an assignment in writing even in places to which the Act has not been extended, and apart from the Act, such assignment gives to the assignee a right of suit on the note; but it would not render the transferee "a holder in due course". 66 I.C. 401=11 L.B.R. 174. *See also* 15 I.C. 380=11 M.L.T. 246; 1926 C. 447: 1912 M.W.N. 1011=17 I.C. 417; 16 P. 74=17 P.L.T. 919=1937 P. 100 (F.B.). Section 137 is no bar to the transfer of a negotiable instrument otherwise than by endorsement. The T. P. Act not being in force in the Punjab, an oral assignment is valid in that province. I.L.R. (1940) L. 84=1939 L. 501. *See also* 17 P.L.T. 919=1937 P. 100. Section gives an extended privilege to mercantile documents and is in no way restrictive. There is nothing to prevent the transfer of a promissory note by deed without endorsement. 138 I.C. 262=35 L.W. 755. As to *assignment of negotiable instruments*, see 21 M.L.J. 80=8 I.C. 33: 28 I.C. 114. (*See also* under S. 130.) Negotiable instruments can be enforced by an assignee only when the assignment has been effected in accordance with the provisions of the Act, and transfer of the rights of a party under a note to order to some one else, unless effected by operation of law, must be effected by indorsement and delivery and not otherwise. 13 P. 655=1934 P. 382. *See also* 1939 L. 501; 1937 P. 100. Where therefore a pronote is assigned by the real owner and the benamidar executes an acknowledgment admit-

TRANSFER OF PROPERTY (AMENDMENT) ACT (XX OF 1929).

Saving clause.

63. Nothing in any of the following provisions of this Act, namely, sections[1] 3, 4, 9, 10, 15, 18, 19, 27, 30, clause (*c*) of section 31, sections 32, 33, 34, 35, 46, 52, 55, 57, 58, 59, 61 and 62 shall be deemed in any way to affect—

(*a*) the terms or incidents of any transfer of property made or effected before the first day of April, 1930,

(*b*) the validity, invalidity, effect or consequences of anything already done or suffered before the aforesaid date,

(*c*) any right, title, obligation or liability already acquired, accrued or incurred before such date, or

(*d*) any remedy or proceeding in respect of such right, title, obligation or liability; and nothing in any other provision of this Act shall render invalid or in any way affect anything already done before the first day of April, 1930, in any proceeding pending in a Court on that date, and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued, as the case may be, as if this Act had not been passed.

THE INDIAN TREASURE-TROVE ACT (VI OF 1878).

HISTORICAL MEMOIR.

Year.	No.	Short title.	Amendments.
1878	VI	The Treasure-Trove Act ..	Rep. in part, Act XII of 1891. ,, ,, X of 1914.

[13*th February*, 1878.

An Act to amend the law relating to treasure-trove.

Preamble.

WHEREAS it is expedient to amend the law relating to treasure-trove; It is hereby enacted as follows:—

LEG. REF.

[1] Corresponding sections of Act IV of 1882 as amended by Ss. 2, 3, 15, 16, 17 and 18, 53, 56, 58, 63-A, 65-A, 67 (*a*); 67-A, 68, 69, 69-A, 91, 102, 107, 111, 114-A, 119, 129 and 130.

NOTES.

ting that he was merely a benamidar and the assignor was real beneficiary, the assignee is not entitled to sue on the pronote, specially when the payee of the note has expressly released the maker. No consideration is required for such a release and the fact that it was collusive is immaterial. *Assignment of railway receipts* passes title to goods only when they are proved to be negotiable. 11 L.B.R. 341=1923 R. 1. *See also* 40 B. 630=31 M.L.J. 541=43 I.A. 164 (P.C.); 38 B. 255; 14 Bom.L.R. 532. *See also* (1938) 1 M.L.J. 268=I.L.R. 1938 M. 360=65 I. A. 75 (P.C.). *Delivery order* is a document of title. 38 C. 127. *See also* 9 L.B.R. 143. As to *Mate's receipt*, see 22 I.C. 311. As to *debentures*, see 57 C. 328. [On this point *see also* the Sales of Goods Act, 1930.]

Sec. 63.—*See* 1940 All. 65=1939 A.L.J. 1099. So far as the provisions of S. 63 of the amending Act are concerned, all the sections of the main Act which have not been specifically mentioned stand on the same footing. So far as the sections specified in S. 63 of the amending Act are concerned, Cls. (*a*), (*b*), (*c*) and the first part of Cl. (*d*) show that the provisions contained in those sections have no retrospective effect. 13 Luck. 761=1938 O.W.N. 401=1938 Oudh 127 (F.B.). *See also* 1936 A. 750; 42 C.W.N. 38; 1936 Nag. 209.

Sec. 63 (d).—Construction and scope—"Proceedings, etc., pending on 1—4—1930" —Insolvency proceedings started before 1—4—1930—Claim to priority by secured creditor raised subsequently—If pending on 1—4—1930. *See* 40 Bom.L.R. 517.

Preliminary.

Short title. 1. This Act may be called THE INDIAN TREASURE-TROVE ACT, 1878.

Extent. It extends to the whole of British India.

[1][* * * *].

2. [*Repeal of enactments.*] *Repealed by the Amending Act,* 1891 (*XII of* 1891).

Interpretation clause. 3. In this Act—

"Treasure." "treasure" means anything of any value hidden in the soil, or in anything affixed thereto;

"Collector." "Collector" means (1) any Revenue-officer in independent charge of a district, and (2) any officer appointed by the Provincial Government to perform the functions of a Collector under this Act.

"Owner." When any person is entitled, under any reservation in an instrument of transfer of any land or thing affixed thereto, to treasure in such land or thing, he shall, for the purposes of this Act, be deemed to be the owner of such land or thing.

Procedure on finding Treasure.

Notice by finder of treasure. 4. Whenever any treasure exceeding in amount or value ten rupees is found, the finder shall, as soon as practicable, give to the Collector notice in writing—

(*a*) of the nature and amount or approximate value of such treasure;

(*b*) of the place in which it was found;

(*c*) of the date of the finding;

and either deposit the treasure in the nearest Government treasury, or give the Collector such security as the Collector thinks fit, to produce the treasure at such time and place as he may from time to time require.

Notification requiring claimants to appear. 5. On receiving a notice under section 4, the Collector shall, after making such enquiry (if any) as he thinks fit, take the following steps (namely):—

(*a*) he shall publish a notification in such manner as the Provincial Government from time to time prescribes in this behalf, to the effect that on a certain date (*mentioning it*) certain treasure (*mentioning its nature, amount and approximate value*) was found in a certain place (*mentioning it*); and requiring all persons claiming the treasure, or any part thereof, to appear personally or by agent before the Collector on a day and at a place therein mentioned, such day not being earlier than four months, or later than six months, after the date of the publication of such notification;

(*b*) when the place in which the treasure appears to the Collector to have been found was at the date of the finding in the possession of some person other than the finder, the Collector shall also serve on such person a special notice in writing to the same effect.

LEG. REF.

[1] The words "And it shall come into force at once" were repealed by Act X of 1914.

NOTES.

Sec. 1.—The Act applies only to things which have been hidden. 133 I.C. 564=1931 C. 430=59 C. 21 (following 31 M. 397), Applicability of Act and respective rights of owner of places and finder. 3 M. 397=4 M.L.T. 219.

Sec. 3.—Property not hidden is not treasure trove and belongs to owner of land on which it is found. 31 M. 397=1931 C. 430.

Sec. 4.—'Finder'—Coolies finding in their employer's presence treasure in the course of felling trees. 27 M.L.J. 477=25 I.C. 640. A person who was not present at the finding of a treasure and who has had no sort of connection with the matter up to the time when the actual finder decides not to report to the Collector about the finding cannot be found guilty of the offence of abetment of an offence under S. 4 of the Act, though they may have subsequently shared the treasure illegally with the finder. 175 I.C. 502=47 L.W. 320=1938 M.W.N. 350=1938 Mad. 508. *See also* (1938) 1 M.L.J. 767, cited under S. 20, *infra*.

Sec. 5.—In the absence of notice, Act does not apply. 19 B. 668; *see* 7 M. 150.

Forfeiture of right on failure to appear.

6. Any person having any right to such treasure or any part thereof, as owner of the place in which it was found or otherwise, and not appearing as required by the notification issued under section 5, shall forfeit such right.

Matters to be enquired into and determined by the Collector.

7. On the day notified under section 5, the Collector shall cause the treasure to be produced before him, and shall enquire as to and determine—

(*a*) the person by whom, the place in which, and the circumstances under which, such treasure was found; and

(*b*) as far as is possible, the person by whom, and the circumstances under which, such treasure was hidden.

Time to be allowed for suit by person claiming the treasure.

8. If, upon an enquiry made under section 7, the Collector sees reason to believe that the treasure was hidden within one hundred years before the date of the finding, by a person appearing as required by the said notification and claiming such treasure, or by some other person under whom such person claims, the Collector shall make an order adjourning the hearing of the case for such period as he deems sufficient, to allow of a suit being instituted in the Civil Court by the claimant, to establish his right.

When treasure may be declared ownerless.

9. If upon such enquiry the Collector sees no reason to believe that the treasure was so hidden; or

if, where a period is fixed under section 8, no suit is instituted as aforesaid within such period to the knowledge of the Collector; or

if such suit is instituted within such period, and the plaintiff's claim is finally rejected;

the Collector may declare the treasure to be ownerless.

Appeal against such declaration.

Any person aggrieved by a declaration made under this section may appeal against the same within two months from the date thereof to the Chief Controlling Revenue authority.

Subject to such appeal, every such declaration shall be final and conclusive.

Proceedings subsequent to declaration.

10. When a declaration has been made in respect of any treasure under section 9, such treasure shall, in accordance with the provisions hereinafter contained, either be delivered to the finder thereof, or be divided between him and the owner of the place in which it has been found in manner hereinafter provided.

When no other person claims as owner of place, treasure to be given to finder.

11. When a declaration has been made in respect of any treasure as aforesaid, and no person other than the finder of such treasure has appeared as required by the notification published under section 5 and claimed a share of the treasure as owner of the place in which it has been found, the Collector shall deliver such treasure to the finder thereof.

When only one such person claims and his claim is not disputed, treasure to be divided.

12. When a declaration has been made as aforesaid in respect of any treasure, and only one person other than the finder of such treasure has so appeared and claimed, and the claim of such person is not disputed by the finder, the Collector shall proceed to divide the treasure between the finder and the person so claiming according to the following rule (namely):—

If the finder and the person so claiming have not entered into any agreement then in force as to the disposal of the treasure, three-fourths of the treasure

shall be allotted to such finder and the residue to such person. If such finder and such person have entered into any such agreement, the treasure shall be disposed of in accordance therewith:

Provided that the Collector may, in any case, if he thinks fit, instead of dividing any treasure as directed by this section,—

(*a*) allot to either party the whole or more than his share of such treasure, on such party paying to the Collector for the other party such sum of money as the Collector may fix as the equivalent of the share of such other party, or of the excess so allotted, as the case may be; or

(*b*) sell such treasure or any portion thereof by public auction, and divide the sale-proceeds between the parties according to the rule hereinbefore prescribed:

Provided also that, when the Collector has by his declaration under section 9 rejected any claim made under this Act by any person other than the said finder or person claiming as owner of the place in which the treasure was found, such division shall not be made until after the expiration of two months without an appeal having been presented under section 9 by the person whose claim has been so rejected, or when an appeal has been so presented, after such appeal has been dismissed.

When the Collector has made a division under this section, he shall deliver to the parties the portions of such treasure, or the money in lieu thereof, to which they are respectively entitled under such division.

and shares to be delivered to parties.

13. When a declaration has been made as aforesaid in respect of any treasure, and two or more persons have appeared as aforesaid and each of them claimed as owner of the place where such treasure was found, or the right of any person who has so appeared and claimed is disputed by the finder of such treasure, the Collector shall retain such treasure and shall make an order staying his proceedings with a view to the matter being enquired into and determined by a Civil Court.

In case of dispute as to ownership of place, proceedings to be stayed.

14. Any person who has so appeared and claimed may, within one month from the date of such order, institute a suit in the Civil Court to obtain a decree declaring his right; and in every such suit the finder of the treasure and all persons disputing such claim before the Collector shall be made defendants.

Settlement of such dispute,

15. If any such suit is instituted and the plaintiff's claim is finally established therein, the Collector shall, subject to the provisions of section 12, divide the treasure between him and the finder.

and division thereupon.

If no such suit is instituted as aforesaid, or if the claims of the plaintiffs in all such suits are finally rejected, the Collector shall deliver the treasure to the finder.

16. The Collector may, at any time after making a declaration under section 9, and before delivering or dividing the treasure as hereinbefore provided, declare by writing under his hand his intention to acquire on behalf of the Government the treasure, or any specified portion thereof, by payment to the persons entitled thereto of a sum equal to the value of the materials of such treasure or portion, together with one-fifth of such value, and may place such sum in deposit in his treasury to the credit of such persons; and thereupon such treasure or portion shall be deemed to be the property of Government, and the money so deposited shall be dealt with, as far as may be, as if it were such treasure or portion.

Power to acquire the treasure on behalf of Government.

Decision of Collector final, and no suit to lie against him for acts done *bona fide*.

17. No decision passed or act done by the Collector under this Act shall be called in question by any Civil Court, and no suit or other proceeding shall lie against him for anything done in good faith in exercise of the powers hereby conferred.

Collector to exercise powers of Civil Court.

18. A Collector making any enquiry under this Act may exercise any power conferred by the Code of Civil Procedure on a Civil Court for the trial of suits.

Power to make rules.

19. The Provincial Government may, from time to time, make rules consistent with this Act to regulate proceedings hereunder.

Such rules shall, on being published in the Official Gazette, have the force of law.

Penalties.

Penalty on finder failing to give notice, etc.

20. If the finder of any treasure fails to give the notice, or does not either make the deposit or give the security, required by section 4, or alters or attempts to alter such treasure so as to conceal its identity, the share of such treasure, or the money in lieu thereof to which he would otherwise be entitled, shall vest in Her Majesty,

and he shall, on conviction before a Magistrate, be punished with imprisonment for a term which may extend to one year, or with fine, or with both.

Penalty on owner abetting offence under section 20.

21. If the owner of the place in which any treasure is found abets, within the meaning of the Indian Penal Code, any offence under section 20, the share of such treasure, or the money in lieu thereof to which he would otherwise be entitled, shall vest in Her Majesty,

and he shall, on conviction before a Magistrate, be punished with imprisonment which may extend to six months, or with fine, or with both.

SCHEDULE.

[*Repealed by the Amending Act,* 1891 (*XII of* 1891).]

THE INDIAN TRUSTEES ACT (XXVII OF 1866).

Rep. in pt., Act XIV of 1870;
Rep. in pt., Act XVI of 1874;
S. 2, rep. in pt., Act X of 1914;
Rep. in pt. (locally), Act IV of 1882;
Am. (in Lower Burma), Act VI of 1900, S. 47;
S. 35 ext., Act III of 1906, S. 119 (from 1st January, 1910);
Am., Acts VIII of 1919, XI of 1923.

NOTES.

Sec. 20.—Where the person who failed to give notice is neither the finder nor employed or instructed by the finder to give notice on his behalf, he is not guilty. 15 A.L.J. 796 =42 I.C. 995=19 Cr.L.J. 35. A person found a bangle, sold it for Rs. 1,000 and deposited portions of that sum in three banks. The Crown sought to recover the sums of money deposited in the banks. *Held*, that though the proceeds of the sale of the bangle was Government money it ceased to be so when it changed hands, and the Crown could not in criminal proceedings claim the refund of the moneys deposited in the banks out of the proceeds of the sale of the bangle. (1938) 1 M.L.J. 767=47 L.W. 813=1938 Mad. 710.

Secs. 20 and 21.—A usufructuary mortgagee is owner; the forbidding of a person who was not the finder or a person employed or instructed by the finder to give notice on his behalf is no offence. 15 A.L.J. 796=42 I.C. 995; 19 C.L.J. 35; *see also* 27 M.L.J. 477. Coolies finding treasure in their employer's presence while felling trees; *see* 25 I.C. 640.

Sec. 21.—Persons other than owner of the place who abet an offence under S. 20 of the Act are punishable under the Penal Code. 1 Weir 919.

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THE INDIAN TRUSTEES ACT (XXVII OF 1866).[1]

[24*th October*, 1866.

An Act to consolidate and amend the law relating to the conveyance and transfer of property in British India vested in Mortgagees and Trustees, in cases to which English law is applicable.

WHEREAS it is expedient to consolidate and amend the laws relating to the conveyance and transfer of movable and immovable property in British India vested in mortgagees and trustees, in cases to which English law is applicable: It is hereby enacted as follows:—

Preamble.

1. [*Repeal of Act.*] *Repealed by the Repealing Act* (*XIV of* 1870).

Interpretation-clause.

2. In this Act, unless there be something repugnant in the subject or context,—

"Immovable property."

"immovable property" shall extend to and include messuages, tenements, hereditaments, corporeal and incorporeal, of every tenure or description, whatever may be the estate or interest therein:

"Stock."

"stock" shall mean any fund, annuity or security transferable in books kept by any company or society established or to be established, or transferable by deed alone, or by deed accompanied by other formalities, and any share or interest therein. It shall also include shares in ships registered under the Merchant Shipping Act, 1854, or at any port in British India:

"Hold" and "holding."

"hold" and "holding" shall be applicable to any vested estate, whether for life or of a greater or less description, in possession, futurity or expectancy in any immovable property:

"Contingent right."

"contingent right" as applied to immovable property shall mean a contingent or executory interest, or possibility coupled with an interest, whether the object of the gift or limitation of such interest or possibility be or be not ascertained; also a right of entry, whether immediate or future, and whether vested or contingent:

"Convey" and "conveyance."

"convey" and "conveyance," applied to any person, shall mean the execution by such person of every necessary or suitable assurance for conveying or disposing to another immovable property which such person holds, or in which he is entitled to a contingent right, either for the whole estate of the person conveying or disposing, or for any less estate, together with the performance

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LEG. REF.

[1] The Statement of Objects and Reasons for the Bill which was passed into law as Act XXVII of 1866 is not published; for discussions on the Bill, *see* Gazette of India, 1866, Supplement, pp. 416, 417, 494 and 531. This Act is mainly founded on "The Trustee Act, 1850" (13 and 14 Vict., c. 60), and "The Trustee Act, 1852" (15 & 16 Vict., c. 55). In the North-West Frontier Province, the Chief Court of the Punjab is the High Court in respect of proceedings under this Act: *see* S. 6 (*c*) of the North-West Frontier Province Law and Justice Regulation (VII of 1901), Punj. & N.W. Code.

NOTES.

CASE-LAW.—Application of Act to Hindus: *see* 32 C. 143=9 C.W.N. 179.

Sec. 2.—*Cf.* 13 & 14 Vict., c. 60, S. 2.

STOCK.—*Cf.* "The Merchant Shipping (Amendment) Act, 1855" (18 & 19 Vict., c. 91), S. 10. This Act has been since repealed by the Merchant Shipping Act, 1894 (57 & 58 Vict., c. 60), S. 745. Coll. Stats., Ind., Vol. II.

HIGH COURT.—*See* "The Indian High Courts Act, 1861" (24 and 25 Vict., c. 104), Coll. Stats., Ind., Vol. II.

Cf. definition of High Court in General Clauses Act (X of 1897), S. 3 (24), General Acts, Vol. IV.

of all formalities required by law to the validity of such conveyance, including the acts to be performed by married women and tenants in tail in accordance with the provisions of Act XXXI of 1854 (*to abolish real actions and also fines and common recoveries, and to simplify the modes of conveying land in cases to which the English Law is applicable*):

"Transfer."

"transfer" shall mean the execution and performance of every deed and act by which a person entitled to stock or Government securities can transfer such stock or Government securities from himself to another:

"High Court."

"High Court" [1][means a court which is a High Court for the purposes of the Government of India Act 1935]:

"Trust" and "Trustee."

"trust" shall not mean the duties incident to an estate conveyed by way of mortgage; but with this exception, the words "trust" and "trustee" shall extend to and include implied and constructive trusts, and shall extend to and include cases where the trustee has some beneficial estate or interest in the subject of the trust, and shall extend to and include the duties incident to the office of executor or administrator of a deceased person:

"Lunatic."

"lunatic" shall mean any person who shall have been found by due course of law to be of unsound mind and incapable of managing his affairs:

"Person of unsound mind."

"person of unsound mind" shall mean any person not a minor who, not having been found to be a lunatic, shall be incapable from infirmity of mind to manage his own affairs:

"Heir" and "devisee."

in the case of a will made or an intestacy occurring before the first day of January, 1866,[2] "heir" shall mean the person claiming an interest in the immovable property of a deceased person under the laws concerning descent applicable to such property: and "devisee" shall, in addition to its ordinary signification, mean the heir of a devisee and the devisee of an heir, and generally any person claiming an interest in the immovable property of a deceased person, not as heir of such deceased person, but by a title dependent solely upon the operation of the laws concerning devise and descent:

in the case of a will made or an intestacy occurring on or after the first day of January, 1866[2] "heir" shall mean any person claiming an interest in the immovable property, of a deceased person, under the rules for the distribution of an intestate's estate; and "devisee" shall mean any person taking immovable property under a bequest, and any person other than an executor or administrator, claiming an interest in immovable property, not as entitled thereto under the said rules, but by a title dependent solely upon the operation of the laws concerning intestate and testamentary succession:

"Mortgage."

"mortgage" shall be applicable to every estate or interest in immovable or movable property which would in the High Court be deemed merely a security for money:

"Person."

"person" shall include any company or association, or body of persons whether incorporated or not:

[3][* * * * *]

3. The powers and authorities given by this Act to the High Court shall

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LEG. REF.

[1] Substituted by A.O., 1937.

[2] The day on which the Indian Succession Act (X of 1865) came into force.

[3] "Number and Gender".—The last para. in S. 2 was repealed by Act X of 1914, Sch. II.

NOTES.

Sec. 3.—*See* 5 B. 154; 21 Bom.L.R. 1111.

High Court to have jurisdiction in what cases.

and may be exercised only in cases to which English law is applicable, and may be exercised with respect to property within the local limits of the extraordinary original civil jurisdiction of the said Courts respectively.

High Court may convey estates of lunatic trustees and mortgagees;

4. When any lunatic or person of unsound mind shall hold any immovable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order that such property be vested in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a conveyance of the property in the same manner for the same estate.

and may convey contingent rights.

5. When any lunatic or person of unsound mind shall be entitled to any contingent right in any immovable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order wholly releasing such property from such contingent right, or disposing of the same to such person or persons as the said High Court shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a deed so releasing or disposing of the contingent right.

High Court may transfer stock or Government securities of lunatic trustees and mortgagees.

6. When any lunatic or person of unsound mind shall be solely entitled to any stock or Government securities, or to anything in action upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order vesting in any person or persons the right to transfer such stock or Government securities, or to receive the dividends, interest or income thereof, or to sue for and recover such thing in action or any interest in respect thereof:

and when any person or persons shall be entitled jointly with any lunatic or person of unsound mind to any stock or Government securities or thing in action, upon any trust or by way of mortgage, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest or income thereof, or to sue for and recover such thing in action or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons together with any other person or persons the said High Court may appoint.

Power to transfer stock or Government securities of deceased persons.

7. When any stock or Government securities shall be standing in the name of any deceased person whose executor or administrator is a lunatic or person of unsound mind, or when anything in action shall be vested in any lunatic or person of unsound mind as the executor or administrator of a deceased person, it shall be lawful for the High Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest or income thereof, or to sue for and recover such thing in action, or any interest in respect thereof, in any person or persons the said Court may appoint.

NOTES.

Sec. 4.—*Cf.* The Trustee Act, 1850 (13 & 14, Vict., c. 60), S. 3.

Sec. 5.—*Cf. Ibid.*, S. 4.

Sec. 6.—*Cf.* Trustee Act, 1850 (13 and 14 Vict., c. 60), S. 5.

Sec. 7.—*Cf. Ibid.*, S. 6.

8. Whenever any minor[1] shall hold any immovable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order vesting such property in such person or persons in such manner and for such estate as the said Court shall direct, and the order shall have the same effect as if the minor trustee or mortgagee had attained his majority, and had duly executed a conveyance of the property in the same manner for the same estate.

High Court may convey estates of minor trustees and mortgagees.

9. Where any minor shall be entitled to any contingent right in any immovable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order wholly releasing such property from such contingent right, or disposing of the same to such person or persons as the said Court shall direct; and the order shall have the same effect as if the minor had attained his majority, and had duly executed a deed so releasing or disposing of the contingent right.

Contingent rights of minor trustees and mortgagees.

10. When any person solely holding any immovable property upon any trust shall be out of the jurisdiction of the High Court, or cannot be found, it shall be lawful for the said Court to make an order vesting such property in such person or persons, in such manner and for such estate as the said Court shall direct, and the order shall have the same effect as if the trustee had duly executed a conveyance of the property in the same manner and for the same estate.

High Court may convey estate of trustee out of jurisdiction of Court.

11. When any person or persons shall hold any immovable property in trust jointly with a person not within the jurisdiction of the High Court, or who cannot be found, it shall be lawful for the said Court to make an order vesting the property in the person or persons so jointly holding, or in such last-mentioned person or persons together with any other person or persons, in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance of the property in the same manner for the same estate.

High Court may make order where persons hold immovable property in trust jointly with persons out of jurisdiction.

12. When any person solely entitled to a contingent right in any immovable property upon any trust shall be out of the jurisdiction of the High Court, or cannot be found, it shall be lawful for the said Court to make an order wholly releasing such property from such contingent right, or disposing of the same to such person or persons as the said Court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance so releasing or disposing of the contingent right.

Contingent rights of trustees.

13. When any person jointly entitled with any other person or persons to a contingent right in any immovable property upon any trust shall be out of the jurisdiction of the High Court, or cannot be found, it shall be lawful for the said Court to make an order disposing of the contingent right of the person out of the jurisdiction, or who cannot be found, to the person or persons so jointly entitled as aforesaid, or to such last-mentioned

High Court may make order where persons jointly entitled with others out of jurisdiction to contingent right in immovable property.

LEG. REF.

[1] For definition of minor, *see* the Indian Majority Act (IX of 1875).

NOTES.

Sec. 8.—*Cf. Ibid.*, S. 7.

Sec. 9.—*Cf. Ibid.*, S. 8.

Sec. 10.—*Cf. Ibid.*, S. 9.

Sec. 11.—*Cf.* The Trustee Act, 1850 (13 & 14 Vict., c. 60), S. 10.

Sec. 12.—*Cf. Ibid.*, S. 11.

Sec. 13.—*Cf. Ibid.*, S. 12.

person or persons together with any other person or persons; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance so releasing or disposing of the contingent right.

When uncertain which of several trustees survived.

14. Where there shall have been two or more persons jointly holding any immovable property upon any trust, and it shall be uncertain which of such trustees was the survivor, it shall be lawful for the High Court to make an order vesting such property in such person or persons, in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the survivor of such trustees had duly executed a conveyance of the property in the same manner for the same estate.

When uncertain whether last trustee living or dead.

15. Where any one or more person or persons shall have held any immovable property upon any trust, and it shall not be known as to the trustee last known to have held such property, whether he be living or dead, it shall be lawful for the High Court to make an order vesting such property in such person or persons, in such manner and for such estate, as the said Court shall direct; and the order shall have the same effect as if the last trustee had duly executed a conveyance of the property in the same manner for the same estate.

When trustee dies without heir.

16. When any person holding any immovable property upon any trust shall have died intestate as to such property without an heir, or shall have died, and it shall not be known who is his heir or devisee, it shall be lawful for the High Court to make an order vesting such property in such person or persons, in such manner and for such estate, as the said Court shall direct; and the order shall have the same effect as if the heir or devisee of such trustee had duly executed a conveyance of the property in the same manner for the same estate.

Contingent right of unborn trustee.

17. When any immovable property is subject to a contingent right in an unborn person, or class of unborn persons, who, upon coming into existence, would in respect thereof hold such property upon any trust, it shall be lawful for the High Court to make an order which shall wholly release and discharge such property from such contingent right in such unborn person or class of unborn persons, or to make an order which shall vest in any person or persons the estate or estates which such unborn person or class of unborn persons would, upon coming into existence, hold in such property.

Power to make order for vesting estate on refusal or neglect of trust to convey or release.

18. In every case where any person holds or shall hold jointly or solely any immovable property, or is or shall be entitled to a contingent right therein upon any trust, and a demand shall have been made upon such trustee by a person entitled to require a conveyance of such property, or a duly authorized agent of such last-mentioned person, requiring such trustee to convey the same, or to release such contingent right, it shall be lawful for the High Court, if the said Court shall be satisfied that such trustee has wilfully refused or neglected to convey the said property for the space of twenty-eight days after such demand, to make an order vesting such property in such person or persons, in such manner and for

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Sec. 14.—*Cf. Ibid.*, S. 13.

Sec. 15.—*Cf. Ibid.*, S. 14.

Sec. 16.—*Cf.* The Trustee Act, 1850 (13 & 14 Vict., c. 60), S. 15.

Sec. 17.—*Cf. Ibid.*, S. 16.

Sec. 18.—*Cf.* The Trustee Act, 1852 (15 & 16 Vict., c. 55), S. 2. [Sections 1 to 5 and Ss. 8 and 9 of this Act, together with the residue, have been repealed, except as to lunacy jurisdiction in Ireland, by 56 & 57 Vict., c. 53, S. 51.]

such estate, as the Court shall direct, or releasing such contingent right in such manner as the Court shall direct; and the said order shall have the same effect as if the trustee had duly executed a conveyance of the property, or a release of such right, in the same manner and for the same estate.

Power to convey in place of mortgagee.

19. When any person to whom any immovable property has been conveyed by way of mortgage shall have died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of such mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the re-conveyance or vesting of such property, then in any of the following cases it shall be lawful for the High Court to make an order vesting such property in such person or persons, in such manner and for such estate as the said Court shall direct, that is to say,—

when an heir or devisee of such mortgagee shall be out of the jurisdiction of the High Court, or cannot be found:

when an heir or devisee of such mortgagee shall, upon a demand by a person entitled to require a conveyance of such property, or a duly authorised agent of such last-mentioned person, have stated in writing that he will not convey the same, or shall not convey the same for the space of twenty-eight days next after a proper deed for conveying such property shall have been tendered to him by a person entitled as aforesaid, or a duly authorised agent of such last-mentioned person:

when it shall be uncertain which of several devisees of such mortgagee was the survivor:

when it shall be uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee, whether he be living or dead:

when such mortgagee shall have died intestate as to such property and without an heir, or shall have died and it shall not be known who is his heir or devisee:

And the order of the said High Court made in any one of the foregoing cases shall have the same effect as if the heir or devisee, or surviving devisee, as the case may be, had duly executed a conveyance of the property in the same manner and for the same estate.

Power to appoint person to convey in certain cases.

20. In every case where the High Court shall, under the provisions of this Act, be enabled to make an order having the effect of a conveyance of any immovable property, or having the effect of a release or disposition of the contingent right of any person or persons, born or unborn, it shall also be lawful for the High Court, should it be deemed more convenient, to make an order appointing a person to convey such property, or release or dispose of such contingent right;

and the conveyance, or release or disposition of the person so appointed shall, when in conformity with the terms of the order by which he is appointed, have the same effect, in conveying the property, or releasing or disposing of the contingent right, as an order of the High Court would, in the particular case, have had under the provisions of this Act.

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Sec. 19.—*Cf.* The Trustee Act, 1850 (13 & 14 Vict., c. 60), S. 19.

Sec. 20.—*Cf.* The Trustee Act, 1850 (13 & 14 Vict., c. 60), S. 20. Case-law. *See* 7 C. 33.

Secs. 20 and 22.—Under the Act, by virtue of S. 8, the High Court may make a vesting order having the effect of a conveyance with regard to properties held by a minor trustee of mortgagee and Ss. 20 and 22 may be used in the same way as similar sections in the English Act. 43 C. 124=30 I.C. 406=19 C.W.N. 817.

In every case where the High Court shall, under the provisions of this Act, be enabled to make an order vesting in any person or persons the right to transfer any stock transferable in the books of any company or society established or to be established, it shall also be lawful for the High Court, if it be deemed more convenient, to make an order directing the secretary or any officer of such company or society at once to transfer or join in transferring the stock to the person or persons to be named in the order;

and this Act shall be a full and complete indemnity and discharge to all companies or societies and their officers and servants for all acts done or permitted to be done pursuant thereto.

When trustees of stock or Government securities joined with trustees out of jurisdiction.

21. When any person or persons shall be jointly entitled with any person out of the jurisdiction of the High Court, or who cannot be found, or concerning whom it shall be uncertain whether he be living or dead, to any stock or Government securities or thing in action upon any trust, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest or income thereof, or to sue for or recover such thing in action or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons together with any person or persons the said Court may appoint.

When any sole trustee of any stock, Government securities or thing in action shall be out of the jurisdiction of the said Court, or cannot be found, or it shall be uncertain whether he be living or dead, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest or income thereof, or to sue for and recover such thing in action, or any interest in respect thereof, in any person or persons the said Court may appoint.

When trustee of stock, etc., refuses to transfer.

22. Where any sole trustee of any stock, Government securities or thing in action shall neglect or refuse to transfer such stock or Government securities, or to receive the dividends, interest or income thereof, or to sue for or recover such thing in action, or any interest in respect thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person absolutely entitled thereto, it shall be lawful for the High Court to make an order vesting the sole right to transfer such stock or Government securities, or to receive the dividends, interest or income thereof, or to sue for and recover such thing in action, or any interest in respect thereof, in such person or persons as the said Court may appoint.

When one of several trustees of stock, etc., refuses to transfer or receive and pay over dividends.

23. Where any one of the trustees of any stock, Government securities or thing in action shall neglect or refuse to transfer such stock or Government securities, or to receive the dividends, interest or income thereof, or to sue for or recover such thing in action according to the direction of the person, absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by such person, it shall be lawful for the High Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest or income thereof, or to sue for and recover

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Sec. 21.—*Cf.* The Trustee Act, 1850 (13 & 14 Vict., c. 60), S. 22.

Sec. 22.—The Trustee Act, 1850 (13 & 14, Vict., c. 60), S. 23.

Sec. 23.—*Cf. Ibid.*, S. 24.

such thing in action, in the other trustee or trustees of the said stock, Government securities or thing in action, or in any person or persons whom the said Court may appoint jointly with such other trustee or trustees.

When stock, etc., standing in name of deceased person.

24. When any stock or Government securities shall be standing in the sole name of a deceased person, and his executor or administrator shall be out of the jurisdiction of the High Court, or cannot be found, or it shall be uncertain whether such executor or administrator be living or dead, or such executor or administrator shall neglect or refuse to transfer such stock or Government securities, or receive the dividends, interest or income thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person entitled as aforesaid, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest or income thereof, in any person or persons whom the said Court may appoint.

Effect of order vesting legal right to transfer stock, etc.

25. Where any order shall have been made under this Act vesting the right to any stock or Government securities in any person or persons appointed by the High Court, such legal right shall vest accordingly, and thereupon the person or persons so appointed are hereby authorized and empowered to execute all deeds and powers-of-attorney, and to perform all acts relating to the transfer of such stock and Government securities into his or their own name or names or otherwise, or relating to the receipt of the dividends, interest or income thereof, to the extent and in conformity with the terms of such order.

Obligation to comply with requisitions of person invested.

Indemnity.

All companies and associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order, as such companies, associations or persons would have been bound and compellable to comply with the requisitions of the persons in whose place such appointment shall have been made, and shall be equally indemnified in complying with the requisition of such person or persons so appointed as they would have been indemnified in complying with the requisition of the person in whose place such appointment shall have been made.

Termination of powers of person replaced.

After notice in writing of any such order of the High Court concerning any stock or Government securities shall have been given, it shall not be lawful for any company or association, or any person having received such notice, to act upon the requisition of the person in whose place an appointment shall have been made, in any matter relating to the transfer of such stock or Government securities, or the payment of the dividends, interest or income thereof.

Effect of order vesting legal right in thing in action.

26. Where any order shall have been made under this Act by the High Court vesting the legal right to sue for or recover anything in action, or any interest in respect thereof, in any person or persons, such legal right shall vest accordingly; and thereupon it shall be lawful for the person or persons so appointed, to carry on, commence and prosecute, in his or their own name or names, any suit or other proceeding for the recovery of such thing in action, in

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Sec. 24.—*Cf.* The Trustee Act, 1850 (13 & 14, Vict., c. 60), S. 25.

Sec. 25.—*Cf. Ibid.*, S. 26.

Sec. 26.—*Cf.* The Trustee Act, 1850 (13 & 14, Vict., c. 60), S. 27.

the same manner in all respects as the person in whose place an appointment shall have been made could have sued for or recovered such thing in action.

On neglect to transfer stock, etc., for twenty-eight days, order made vesting right to transfer in such person as Court appoints.

27. Where any person shall neglect or refuse to transfer any stock or Government securities, or to receive the dividends, interest or income thereof or to sue for or recover anything in action, or any interest in respect thereof, for the space of twenty-eight days next after an order of the High Court for that purpose shall have been served upon him, it shall be lawful for the said Court to make an order vesting all the right of such person to transfer such stock or Government securities, or to receive the dividends, interest or income thereof, or to sue for and recover such thing in action, or any interest in respect thereof, in such person or persons as the said Court may appoint.

Similar order on like neglect by executor.

28. When any stock or Government securities shall be standing in the sole name of a deceased person, and his executor or administrator shall refuse or neglect to transfer such stock or Government securities, or receive the dividends, interest or income thereof for the space of twenty-eight days next after an order of the High Court for that purpose shall have been served upon him, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest or income thereof, in any person or persons whom the said Court may appoint.

Legal right to transfer stock to vest in person appointed by High Court.

29. When any order being or purporting to be under this Act shall be made by the High Court, vesting the right to any stock or Government securities, or vesting the right to transfer any stock or Government securities, or vesting the right to call for the transfer of any stock or Government securities in any person or persons, in every such case the legal right to transfer such stock or Government securities shall vest accordingly;

Powers of person appointed.

and the person or persons so appointed shall be authorized and empowered to execute all deeds and powers-of-attorney, and to perform all acts relating to the transfer of such stock or Government securities into his or their own name or names or otherwise, to the extent and in conformity with the terms of the order.

Obligation to comply with his requisitions.

All companies and associations, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order, as such companies, associations or persons would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made.

Power to make order for transfer, or receipt of dividends, or stock, etc., in name of minor trustee.

30. When any minor shall be solely entitled to any stock or Government securities upon any trust it shall be lawful for the High Court to make an order vesting in any person or persons the right to transfer such stock or Government securities, or to receive the dividends, interest or income thereof.

When any minor shall be entitled jointly with any other person or persons to any stock or Government securities, upon any trust, it shall be lawful

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Sec. 27.—*Cf.* The Trustee Act, 1852 (15 & 16, Vict., c. 55), S. 4.

Sec. 28.—*Cf. Ibid.*, S. 5.

Sec. 29.—*Cf. Ibid.*, S. 6.

Sec. 30.—*Cf.* The Trustee Act, 1852 (15 & 16, Vict., c. 55), S. 3.

for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest or income thereof, either in the person or persons jointly entitled with the minor, or in him or them together with any other person or persons the said Court may appoint.

When decree made for sale of immovable property for payment of debts.

31. When a decree or order shall have been made by the High Court directing the sale of any immovable property for the payment of the debts of a deceased person, every person holding such property, or entitled to a contingent right therein as heir, or under the will of such deceased debtor, shall be deemed so to hold or be entitled (as the case may be) upon a trust within the meaning of this Act;

and the High Court is hereby empowered to make an order wholly discharging the contingent right, under the will of such deceased debtor, of any unborn person.

Holding immovable property the sale of which has been ordered by High Court.

32. When any decree or order shall have been made by the High Court whether before or after the passing of this Act, directing the sale of any immovable property for any purpose whatever, every person holding such property, or entitled to a contingent right therein, being a party to the suit or proceeding in which such decree or order shall have been made, and bound thereby, or being otherwise bound by such decree or order, shall be deemed so to hold or be entitled (as the case may be) upon a trust within the meaning of this Act.

Order for vesting estate in lieu of conveyance by party to suit in order to carry out sale.

In every such case it shall be lawful for the High Court, if the said Court shall think it expedient for the purpose of carrying such sale into effect, to make an order vesting such property or any part thereof, for such estate as the Court shall think fit, either in any purchaser or in such other person as the Court shall direct.

Effect of order.

Every such order shall have the same effect as if the person so holding or entitled had been free from all disability, and had duly executed all proper conveyances and assignments of such property for such estate.

Court to declare what parties are trustees of immovable property comprised in suit, and as to interests of persons unborn.

33. Where any decree or order shall be made by the High Court for the specific performance of a contract concerning any immovable propetry, or for the partition or exchange of any immovable property, or generally when any decree shall be made for the conveyance of any immovable property, either in cases arising out of the doctrine of election or otherwise, it shall be lawful for the said Court to declare that any of the parties to the said suit wherein such decree is made are trustees of such property, or any part thereof, within the meaning of this Act, or to declare concerning the interests of unborn persons who might claim under any party to the said suit, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons are the interests of persons who, upon coming into existence, would be trustees within the meaning of this Act.

Thereupon it shall be lawful for the High Court to make such order or orders as to the estates, rights and interests of such persons, born or unborn,

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Sec. 31.—*Cf.* The Trustee Act, 1850 (13 & 14, Vict., c. 60), S. 29. S. 31 is repealed in places to which the Transfer of Property Act, (IV of 1882) extends or is extended—*See* S. 2 of latter Act.

Sec. 32.—*Cf.* The Trustee Act, 1852 (15 & 16, Vict., c. 55), S. 1.

Sec. 33.—*Cf.* The Trustee Act, 1850 (13 & 14, Vict., c. 60), S. 30.

as the said Court might, under the provisions of this Act, make concerning the estates, rights and interests of trustees born or unborn.

Power to direct how right to transfer stock shall be exercised.

34. It shall be lawful for the High Court to make declarations and give directions concerning the manner in which the right to any stock, Government securities or thing in action vested under the provisions of this Act shall be exercised, and thereupon the person or persons in whom such right shall be vested shall be compellable to obey such directions and declarations by the same process as that by which other orders under this Act are enforced.

Power to Court to make order appointing new trustees.

35. In all cases in which it shall be expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult or impracticable so to do without the assistance of the High Court, it shall be lawful for the said Court to make an order appointing a new trustee or new trustees, whether there be any existing trustee or trustees or not at the time of making such order, and, if there be such trustee or trustees, either in substitution for or in addition to him or them.

Powers of new trustees.

The person or persons who upon the making of such order shall be trustee or trustees shall have the same rights and powers as he or they would have had if appointed by decree in a suit duly instituted.

Power to Court to vest immovable property in new trustee.

36. It shall be lawful for the High Court, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order, to direct that any immovable property subject to the trust shall vest in the person or persons who upon the appointment shall be the trustee or trustees, for such estate as the Court shall direct.

Such order shall have the same effect as if the person or persons who, before such order, was or were the trustee or trustees (if any) had duly executed all proper conveyances of such property for such estate.

Power to Court to vest right to sue in new trustee.

37. It shall be lawful for the High Court, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order, to vest the right to call for a transfer of any stock or Government securities subject to the trust, or to receive the dividends, interest or income thereof, or to sue for or recover anything in action subject to the trust, or any interest in respect thereof, in the person or persons who upon the appointment shall be the trustee or trustees.

Old trustees not discharged from liability.

38. Any such appointment by the High Court of new trustees, and any such conveyance or transfer as aforesaid, shall operate no further or otherwise as a discharge to any former or continuing trustee, than an appointment of new trustees under any power for that purpose contained in any instrument would have done.

Who may apply.

39. An order under any of the hereinbefore contained provisions, for the appointment of a new trustee or new trustees, or concerning any immoveable property, stock or Govern-

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Sec. 34.—*Cf.* The Trustee Act, 1850 (13 & 14, Vict., c. 60), S. 31.

Sec. 35.—*Cf. Ibid.*, S. 32. Case-law. *see* 6 N.W.P. 54: 21 Bom.L.R. 1111.

Sec. 35 (last para.).—*Cf.* The Trustee Act, 1850 (13 & 14, Vict., c. 60), S. 33.

Sec. 36.—*Cf. Ibid.*, S. 34.

Secs. 37 to 39.—*Cf.* The Trustee Act, 1850 (13 & 14, Vict., c. 60), Ss. 34, 36 and 37, respectively.

ment securities, or thing in action subject to a trust, may be made upon the application of any person beneficially interested in such immovable property, stock, Government securities or thing in action, whether under disability or not, or upon the application of any person duly appointed as a trustee thereof, and an order under any of the provisions herinbefore contained, concerning any immovable property, stock, Government securities or thing in action subject to a mortgage, may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any persou interested in the moneys secured by such mortgage.

Application may be by petition.

40. When any person shall deem himself entitled to an order under any of the provisions hereinbefore contained, it shall be lawful for him to present a petition to the High Court for such order as he may deem himself entitled to, and he may give evidence by affidavit or otherwise in support of such petition before the said Court; and may serve such person or persons with notice of such petition as he may deem entitled to service thereof.

What may be done upon petition.

41. Upon the hearing of any such petition, it shall be lawful for the said High Court, should it be deemed necessary, to direct a reference to one of the Judges of the Court to inquire into any facts which require such an investigation, or it shall be lawful for the said Court to direct such petition to stand over, to enable the petitioner to adduce evidence or further evidence before the Court, or to enable notice or any further notice of such petition to be served upon any person or persons.

Court may dismiss petition with or without costs.

42. Upon the hearing of any such petition, it shall be lawful for the High Court to dismiss such petition with or without costs, or to make an order thereupon in conformity with the provisions of this Act.

Power to make order in cause.

43. Whensoever in any cause or matter, either by the evidence adduced therein, or by the admissions of the parties, or by report of one of the Judges of the Court, the facts necessary for an order under this Act shall appear to the High Court to be sufficiently proved, it shall be lawful for the said Court, either upon the hearing of the said cause or of any petition or application in the said cause or matter, to make such order under this Act.

Orders by High Court founded on certain allegations conclusive evidence of matter contained therein.

44. Whenever any order shall be made under this Act by the High Court, for the purpose of conveying any immoveable property, or for the purpose of releasing or disposing of any contingent right, and such order shall be founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or devisee of a mortgagee is out of the jurisdiction of the High Court, or cannot be found, or that it is uncertain which of several trustees, or which of several devisees of a mortgagee, was the survivor, or whether the last trustee, or the heir or last surviving devisee of a mortgagee, be living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died and it is not known who is his heir or devisee, then in any of such cases the fact that the High Court has made an order upon such an allegation shall be conclusive evidence of the matter so alleged in any Court of Civil Judicature upon any question as to the legal validity of the order:

Provided always that nothing herein contained shall prevent the High

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Secs. 40 to 44.—*Cf.* The Trustee Act, 1850 (13 & 14, Vict., c. 60), Ss. 40, 41, 42, 43 and 44, respectively.

Powers as to re-conveyance of immovable property, etc.

Court directing a re-conveyance of any immovable property conveyed or assigned by any order under this Act, or a re-disposition of any contingent right conveyed or disposed of by such order; and it shall be lawful for the said Court, to direct any of the parties to any suit concerning such property or contingent right to pay any costs occasioned by the order under this Act when the same shall appear to have been improperly obtained.

Trustee of charity.

45. It shall be lawful for the High Court to exercise the powers herein conferred for the purpose of vesting any immovable property, stock, Government securities or thing in action in the trustee or trustees of any charity or society, over which charity or society the High Court would have jurisdiction upon suit duly instituted, whether such trustee or trustees shall have been duly appointed by any power contained in any deed or instrument, or by the decree of the said Court, or by order made upon a petition to the said Court.

Money of minors and persons of unsound mind to be paid into Court.

46. Where any minor or person of unsound mind shall be entitled to any money payable in discharge of any immovable property, stock, Government securities or thing in action conveyed or transferred under this Act, it shall be lawful for the person by whom such money is payable to pay the same into the High Court, in trust in any cause then depending concerning such money, or, if there shall be no such cause, to the credit of such minor or person of unsound mind, subject to the order or disposition of the said Court;

and it shall be lawful for the said Court, upon petition in a summary way, to order any money so paid to be invested in Government securities, and to order payment or distribution thereof, or payment of the dividends or interest thereof as to the said Court shall seem reasonable.

Court may make decree in absence of trustee.

47. Where in any suit commenced or to be commenced in the High Court it shall be made to appear to the Court that diligent search and enquiry have been made after any person made a defendant, who is only a trustee, to serve him with the process of the Court, and that he cannot be found, it shall be lawful for the said Court to hear and determine such cause, and to make such absolute decree therein against every person who shall appear to it to be only a trustee, and not otherwise concerned in interest in the matter in question, in such and the same manner as if such trustee had been duly served with the process of the Court, and had appeared at the hearing of such cause:

Decree not effective without service of process.

Provided always that no such decree shall bind, affect or in any wise prejudice any person against whom the same shall be made without service of process upon him as aforesaid, his heirs, executors or administrators, for or in

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NOTES.

Secs. 45 to 47.—*Cf.* The Trustee Act, 1850 (13 & 14, Vict., c. 60), Ss. 45, 48 and 49, respectively.

Sec. 46.—In the case of a charity the general practice is that the Advocate-General represents the charity. If there is an application by the trustees of a charity under the Trustees Act for leave to take a particular course, it is sufficient to serve that application on the Advocate-General, who represents all the beneficiaries; and the Courts should be very slow to allow any of the beneficiaries to come before it and argue the case themselves, and even more slow to allow their costs to be paid out of the charitable estate. But sometimes that course may be necessary, where, for instance, there is a conflict between various beneficiaries and the Advocate-General feels that he cannot represent all parties. In the absence of any such conflict, the Court would be acting wrongly in allowing the beneficiaries to appeal; and it would also be wrong for the Court to encourage appeals by beneficiaries of charitable funds, when the Advocate-General is before the Court and can appeal if he thinks proper. 166 I.C. 940=38 Bom.L.R. 1283=1937 B. 63.

respect of any estate, right or interest which such person shall have at the time of making such decree for his own use or benefit, or otherwise than as a trustee as aforesaid.

Orders under Act chargeable with same stamp-duty as deeds of conveyance.

48. Every order to be made under this Act, which shall have the effect of a conveyance of any immovable property, or a transfer of any such stock, Government securities or thing in action as can only be transferred by stamped deed, or for the transfer of which a stamp is necessary, shall be chargeable with the like amount of stamp duty as it would have been chargeable with if it had been a deed executed or a transfer made by the person or persons holding such property or entitled to such stock, Government securities or thing in action.

Every such order shall be duly stamped for denoting the payment of the said duty.

Costs may be paid out of estate.

49. The High Court may order the costs and expenses of and relating to the petitions, orders, directions, conveyances and transfers to be made in pursuance of this Act, or any of them, to be paid and raised out of or from the immovable or movable property or the rents or produce thereof, in respect of which the same respectively shall be made, or in such manner as the sad Court shall think proper.

Power to order enquiry concerning person of unsound mind.

50. Upon any petition being presented under this Act to the High Court, concerning a person of unsound mind, it shall be lawful for the said Court to make an order directing an enquiry whether such person is or is not of unsound mind, and incapable of managing himself and his affairs.

Effect of order.

Such order shall have the same effect as the like order made under section 1 of Act XXXIV of 1858 (*to regulate proceedings in Lunacy in the Courts of Judicature established by Royal Charter*), and the enquiry directed to be made shall be made in all respects in the manner declared and prescribed for making an enquiry under the last-mentioned Act.

Postponement of order pending enquiry.

The High Court may postpone making any order upon the petition presented as aforesaid, until any enquiry so directed to be made shall have been finally concluded.

Suit may be directed.

51. Upon any petition under this Act being presented to the High Court, it shall be lawful for the said Court to postpone making any order upon such petition until the right of the petitioner shall have been declared in a suit duly instituted for that purpose.

Indemnity to persons obeying orders under Act.

52. Every order made or purporting to be made under this Act by the High Court shall be a complete indemnity to all persons whatsoever for any Act done pursuant thereto; and it shall not be necessary for such persons to enquiry concerning the propriety of such order, or whether the High Court has jurisdiction to make the same.

Execution and effect of orders.

53. Any order made by the High Court under this Act shall have the same effect and be executed in the same manner as a decree.

NOTES.

Sec. 48.—*Cf.* The Trustee Act, 1852 (15 & 16, Vict., c. 55), S. 13 which has since been repealed by the Statute Law Revision Act, 1892.

Secs. 49 to 51.—*Cf.* The Trustee Act, 1850 (13 & 14, Vict., c. 60), Ss. 51, 52 and 53, respectively.

Sec. 52.—*Cf.* The Trustee Act, 1852 (15 & 16, Vict., c. 55), S. 7.

Short title.

54. This Act may be cited as THE INDIAN TRUSTEE ACT, 1866.

55. [*Application of Act to Straits Settlements.*] *Rep. by the Repealing Act (XVI of* 1874).

THE TRUSTEES' AND MORTGAGEES' POWERS ACT (XXVIII OF 1866).

Declared in force throughout British India except as regards the Scheduled Districts Act (XV of 1874), section 3.

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THE TRUSTEES' AND MORTGAGEES' POWERS ACT (XXVIII OF 1866).[1]

Year.	No.	Short title.	Amendment.
1866	XXV	The Trustees' and Mortgagees' Powers Act.	Repealed in part. XVI of 1874; VII of 1882, S. 6: XVIII of 1919; XI of 1923: XXXII of 1925 Repealed in part (locally) II of 1882. Amended VI of 1900, S. 47.

[*24th October*, 1866.

An Act to give to Trustees, Mortgagees and others, in cases to which English Law is applicable, certain powers now commonly inserted in Settlements, Mortgages and Wills, and to amend the Law of Property and relieve Trustees.

Preamble.

WHEREAS it is expedient that in cases to which English law is applicable certain powers and provisions usually inserted in settlements, mortgages, wills and other instruments should be made incident to the estates of the persons interested, so as to dispense with the necessity of inserting the same in terms in every such instrument, and that in such cases trustees should be relieved; It is enacted as follows:—

Interpretation-clause.

1. In the construction of this Act, unless there be something repugnant in the subject or context,—

"Immovable property."

"Immovable property" shall include land, any benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth:

"Mortgage."

"mortgage" shall be taken to include every instrument by virtue whereof immovable property is in any manner conveyed, pledged or charged as security for the repayment of money or money's worth lent, and to be reconveyed or released on satisfaction of the debt:

"Mortgagor."

"mortgagor" shall be taken to include every person by whom any such conveyance, pledge or charge as aforesaid shall be made:

"Mortgagee."

"mortgagee" shall be taken to include every person to whom or in whose favour any such conveyance, pledge or charge as aforesaid is made or transferred; and

"High Court."

"High Court" means [2][a Court which is a High Court for the purposes of the Government of India Act, 1935.]

Power of Trustees for Sale, etc., and Trustees of renewable Leaseholds.

Trustees empowered to sell, may sell in lots, and either by public auction or private contract.

2. In all cases where, by any will, deed or other instrument of settlement, it is expressly declared that trustees or other persons therein named or indicated shall have a power of sale, either generally or in any particular event, over any immovable property named or referred to in, or from time to time subject to, the uses or trusts of

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LEG. REF.

[1] The Statement of Objects and Reasons of the Bill which was passed into law as Act XXVIII of 1866 has not been published; for Proceedings in Council relating to the Bill, see *Gazette of India*, 1866, Supplement, pp. 416, 417, 494 and 531. This Act is based on "the Law of Property Amendment Act, 1859" (22 & 23 Vict., c. 35), and 23 & 24 Vict., c. 145. This Act has since been repealed by 44 & 45 Vict., c. 41, S. 71, and 45 and 46 Vict., c. 38, S. 64.

[2] Substituted by A.O., 1937.

NOTES.

Sec. 2.—*Cf.* 23 & 24 Vict., c. 145, S. 1, S. 2 is repealed in places to which the Indian Trusts Act (II of 1882) extends or is extended. *See* S. 2.

such will, deed or other instrument, it shall be lawful for such trustees or other persons, whether such property be vested in them or not, to exercise such power of sale by selling such property either together or in lots, and either by public auction or private contract, and either at one time or at several times.

Sale may be made under special conditions, and trustees may buy in, etc.

3. It shall be lawful for the persons making any such sale to insert any such special or other stipulations either as to title or evidence of title, or otherwise, in any conditions of sale, or contract for sale, as they shall think fit; and also to buy in the property or any part thereof at any sale by auction and to rescind or vary any contract for sale, and to re-sell the property which shall be so brought in, or as to which the contract shall be so rescinded, without being responsible for any loss which may be occasioned thereby;

and no purchaser under any such sale shall be bound to enquire whether the persons making the same may or may not have in contemplation any particular re-investment of the purchase-money in the purchase of any other property or otherwise.

Trustees exercising power of sale, etc., empowered to convey.

4. For the purpose of completing any such sale as aforesaid, the persons empowered to sell as aforesaid shall have full power to convey or otherwise dispose of the property in question, in such manner as may be necessary.

Money arising from sales to be laid out in manner indicated in will, etc.

5. The money so received upon any such sale as aforesaid shall be laid out in the manner indicated in that behalf in the will, deed or instrument containing the power of sale;

Until so laid out, money to be invested in Government securities.

and until the money to be received upon any sale as aforesaid shall be so disposed of, the same shall be invested at interest in Government securities for the benefit of such persons as would be entitled to the benefit of the money, and the interest and profits thereof, in case such money were then actually laid out as aforesaid:

Provided that if the will, deed or instrument shall contain no such indication, the persons empowered to sell as aforesaid shall invest the money so received upon any such sale in their names upon Government securities in India, and the interest of such securities shall be paid and applied to such person or persons for such purposes and in such manner as the rents and profits of the property sold as aforesaid would have been payable or applicable in case such sale had not been made.

Powers of Mortgagees.[1]

Powers incident to mortgages.

6. Where any principal money is secured or charged by deed on any immovable property, or on any interest therein, the person to whom such money shall, for the time being be payable, his executors, administrators and assigns, shall, at any time after the expiration of one year from the time when such principal money shall have become payable, according to the terms of the deed,

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LEG. REF.

[1] As to the application of Ss. 6 to 19 to certain English mortgages, *see* the Transfer of Property Act (IV of 1882), S. 69, as amended by Act III of 1885, S. 5.

NOTES.

Sec. 3.—*Cf.* 23 & 24 Vict., c. 145, Secs. 1 & 2. S. 2 and S. 3 are repealed in places to which the Indian Trusts Act (II of 1882) extends or is extended. *See* S. 2.

Secs. 4 and 5.—Ss. 4 and 5 are repealed in places to which the Indian Trusts Act (II of 1882) extends or is extended. *See* S. 2.

Sec. 4.—*Cf.* the Trustee Act, 1860 (23 & 24 Vict., c. 145), S. 3. This Act is now repealed by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., c. 41), and the Settled Land Act, 1882 (45 & 46 Vict., c. 38).

Sec. 5.—*Cf.* the Trustee Act, 1860 (23 & 24 Vict., c. 145), S. 4.

or after any interest on such principal-money shall have been in arrear for six months, or after any omission to pay any premium on any insurance which by the terms of the deed ought to be paid by the person entitled to the property subject to the charge, have the following powers to the same extent (but no more) as if they had been in terms conferred by the person creating the charge, namely:—

1*st*, a power to sell or concur with any other person in selling the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, or buy in and re-sell the property, from time to time, in like manner:

2*nd*, a power to appoint or obtain the appointment of a receiver of the rents and profits of the whole or any part of the property in manner hereinafter mentioned.

Receipts for purchase-money sufficient discharges.

7. Receipts for purchase-money given by the person or persons exercising the power of sale hereby conferred shall be sufficient discharges to the purchasers, who shall not be bound to see to the application of such purchase-money.

Notice to be given before sale;

8. No such sale as last aforesaid shall be made until after six months' notice in writing given to the person or one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of such property;

but when a sale has been effected in professed exercise of the powers hereby conferred, the title of the purchaser shall not be liable to be impeached on the ground that no case had arisen to authorize the exercise of such power, or that no such notice as aforesaid had been given;

but purchaser relieved from inquiry as to circumstances of sale.

but any person damnified by any such unauthorised exercise of such power shall have his remedy in damages against the person or persons selling.

Application of purchase-money.

9. The money arising by any sale effected as aforesaid shall be applied by the person receiving the same as follows:—

first, in payment of all the expenses incident to the sale or incurred in any attempted sale;

secondly, in discharge of all interests and costs then due in respect of the charge in consequence whereof the sale was made; and

thirdly, in discharge of all the principal moneys then due in respect of such charge;

and the residue of such money shall be paid to the person entitled to the property subject to the charge, his executors, administrators or assigns, as the case may be.

Conveyance to purchaser.

10. The person exercising the power of sale hereby conferred shall have power by deed to convey or assign to and vest in the purchaser the property sold for all the estate and interest therein which the person who created the charge had power to dispose of:

Provided that nothing herein contained shall be construed to authorize the mortgagee of a term of years to sell and convey the fee-simple of the property comprised therein in cases where the mortgagor could have disposed of such fee-simple at the date of the mortgage.

NOTES.

Sec. 6.—*Cf.* the Trustee Act, 1860 (23 & 24 Vict., c. 145), S. 11.

Sec. 7.—*Cf. ibid.*, S. 12. This Act is now repealed by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., c. 41), and the Settled Land Act, 1882 (45 & 46 Vict., c. 38).

Sec. 8.—*Cf. ibid.*, S. 13.

Sec. 9.—*Cf.* the Trustee Act, 1860 (23 & 24 Vict., c. 145), S. 14.

Sec. 10.—*Cf. ibid.*, S. 15.

11. At any time after the power of sale hereby conferred shall have become exerciseable, the person entitled to exercise the same shall be entitled to demand and recover from the person entitled to the property subject to the charge all the deeds and documents in his possession or power relating to the same property, or to the title thereto, which he would have been entitled to demand and recover if the same property had been conveyed, appointed or surrendered to and were then vested in him for all the estate and interest which the person creating the charge had power to dispose of;

Owner of charge may call for title-deeds and conveyance of legal estate.

and, where the legal estate shall be outstanding in a trustee, the person entitled to a charge created by a person equitably entitled, or any purchaser from such person, shall be entitled to call for a conveyance of the legal estate to the same extent as the person creating the charge could have called for such a conveyance if the charge had not been made.

12. Any person entitled to appoint or obtain the appointment of a receiver as aforesaid may, from time to time, if any person or persons has or have been named in the deed of charge for that purpose, appoint such person or any one of such persons to be receiver, or if no person be so named, then may, by writing delivered to the person or any one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of the property, require such last-mentioned person or persons to appoint a fit and proper person as receiver, and if no such appointment be made within ten days after such requisition, then may in writing appoint any person he may think fit.

Appointment of receiver.

No person shall be ineligible for the office of receiver merely because he is an officer of the High Court.

13. Every receiver appointed as aforesaid shall be deemed to be the agent of the person entitled to the property subject to the charge, who shall be solely responsible for his acts or defaults, unless otherwise provided for in the charge.

Receiver deemed to be the agent of the mortgagor.

14. Every receiver appointed as aforesaid shall have power to demand and recover and give effectual receipts for all the rents, issues and profits of the property of which he is ap-

Powers of receiver.

NOTES.

Sec. 11.—*Cf.* the Trustee Act 1860 (23 & 24 Vict., c. 145), S. 16. This Act is now repealed by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., c. 41), and the Settled Land Act, 1882 (45 & 46 Vict., c. 38).

Sec. 12.—*Cf.* the Trustee Act, 1860 (23 & 24 Vict., c. 145), S. 17. Where a mortgage-deed contains a provision that the power of sale, etc., conferred by Ss. 3 to 19 of the Act shall apply and shall be deemed to be incorporated in the deed, "but without the restriction of that Act, contained as to giving notice," the mortgagor is not entitled to the ten days' time as provided for in S. 12: 40 C.W.N. 1270=1936 C. 646 =I.L.R. (1937) 1 Cal. 359. The period of ten days given to the mortgagor is to be counted from the date of delivery of the notice to the mortgagor and not from the date of the notice itself. 1936 Cal. 646. The general rule that an agent is accountable to his principal is not applicable to the peculiar relationship which is created where a receiver is appointed according to S. 12, under the power contained in an English mortgage. In view of the peculiar position of the receiver in such cases, no analogy can be drawn from the law of principal and agent. It is the mortgagee who appoints the receiver and without reference to the mortgagor, if so provided by the deed. It is to the mortgagee that the receiver must look for his authority and it is to him that he is accountable and not to the mortgagor. It is possible that in special circumstances when the receiver has made sufficient collections to satisfy the mortgagee's interest and holds a balance which belongs to the mortgagor, that the mortgagor can call upon him to account to the limited extent of such balance but where such is not the case and the mortgagee's interest has not been paid in full, the receiver is not accountable to the mortgagor. So also it is only after the mortgagee's dues are satisfied that any available balance may be used for the mortgagor and it is only such balance that the mortgagor may use for the execution of repairs of the mortgaged property. 177 I.C. 327=1938 Cal. 507.

Sec. 13.—*Cf.* the Trustee Act, 1860 (23 & 24 Vict., c. 145), S. 18.

Sec. 14.—*Cf. ibid.*, S. 19.

pointed receiver, by suit, distress or otherwise in the name either of the person entitled to the property subject to the charge, or of the person entitled to the money secured by the charge, to the full extent of the estate or interest which the person who created the charge had power to dispose of.

Receiver may be removed and new receivers appointed.

15. Every receiver appointed as aforesaid may be removed by the like authority, or on the like requisition as before provided with respect to the original appointment of a receiver, and new receivers may be appointed from time to time.

Receiver to receive commission not exceeding five per cent.

16. Every receiver appointed as aforesaid shall be entitled to retain out of any money received by him, in lieu of all costs, charges and expenses whatsoever, such a commission, not exceeding five per centum on the gross amount of all money received, as shall be specified in his appointment, and if no amount shall be so specified, then five per centum on such gross amount.

Receiver to insure if required.

17. Every receiver appointed as aforesaid shall, if so directed in writing by the person entitled to the money secured by the charge, insure and keep insured from loss or damage by fire, out of the money received by him, the whole or any part of the property included in the charge which is in its nature insurable.

Application of moneys received by him.

18. Every receiver appointed as aforesaid shall pay and apply all the money received by him in the first place in discharge of Government revenue and of all taxes, rates and assessments whatsoever, and in payment of his commission as aforesaid, and of the premiums on the insurances, if any; and in the next place in payment of all interest accruing due in respect of any principal money then charged on the property over which he is receiver, or on any part thereof; and, subject as aforesaid, shall pay all the residue of such money to the person for the time being entitled to the property subject to the charge, his executors, administrators or assigns.

This part to relate to charges by way of mortgage only.

19. The powers and provisions contained in sections 6 to 18 of this Act, both inclusive, relate only to mortgages or charges made to secure money advanced or to be advanced by way of loan, or to secure an existing or future debt.

Leases.

Restriction on effect of licence to alien.

20. Where any licence to do any act which without such licence would create a forfeiture, or give a right to re-enter, under a condition or power reserved in any lease heretofore granted, or to be hereafter granted, shall at any time after this Act comes into operation be given to any lessee or his assigns, every such licence shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment, under-lease or other matter thereby specifically authorized to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such licence);

and all rights under covenants and powers of forfeiture and re-entry in the lease contained shall remain in full force and shall be available as against any subsequent breach of covenant or condition, assignment, under-lease or other

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NOTES.

Sec. 15.—*Cf.* the Trustee Act, 1860 (23 & 24 Vict., c. 145), S. 20.

Sec. 16.—*Cf. ibid.*, S. 21.

Sec. 17.—*Cf. ibid.*, S. 22.

Sec. 18.—*Cf.*, *ibid.*, S. 23. This Act is now repealed by the Conveyancing and Law of Property Act, 1881 (45 & 46 Vict., c. 41), and the Settled Land Act, 1882 (45 & 46 Vict., c. 38).

Sec. 18.—*Cf. ibid.*, S. 24.

Sec. 20.—*Cf.* the Law of Property Amendment Act, 1859 (22 & 23 Vict., c. 35), S. 1.

matter not specifically authorized or made dispunishable by such licence, in the same manner as if no such licence had been given; and the condition or right of re-entry shall be and remain in all respects as if such licence had not been given, except in respect of the particular matter authorized to be done.

Restricted operation of partial licences.

21. Where in any lease heretofore granted or to be hereafter granted there is or shall be a power or condition of re-entry on assigning or under-letting, or doing any other specified act without licence, and a licence at any time after the passing of this Act shall be given to one of several lessees or co-owners to assign or under-let his share or interest, or to do any other act prohibited to be done without licence, or shall be given to any lessee or owner, or any one of several lessees or owners, to assign or under-let part only of the property, or to do any other such act as aforesaid in respect of part only of such property, such licence shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees, or owner or owners of the other shares or interest in the property, or by the lessee or owner of the rest of the property (as the case may be) over or in respect of such shares or interests or remaining property, but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such licence.

Apportionment of conditions of re-entry in certain cases.

22. Where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him.

Rent-charges.

Release of part of land charged, not to be an extinguishment.

23. The release from a rent-charge of part of the immovable property charged therewith shall not extinguish the whole rent charge, but shall operate only to bar the right to recover any part of the rent-charge out of the property released, without prejudice nevertheless to the rights of all persons interested in the property remaining unreleased, and not concurring in or confirming the release.

Powers.

Mode of execution of powers.

24. A deed hereafter executed in the presence of and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execution or attestation or solemnity:

Provided always that this provision shall not operate to defeat any direction in the instrument creating the power, that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed

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NOTES.

Sec. 21.—*Cf.* the Trustee Act, 1860 (23 & 24 Vict., c. 145), S. 2.

Sec. 22.—*Cf.* the Law of Property Amendment Act, 1859 (22 & 23 Vict., c. 35), S. 3.

Sec. 23.—*Cf. ibid.*, S. 10.

Sec. 24.—*Cf. ibid.*, S. 12.

in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument:

and nothing herein contained shall prevent the donee of a power from executing it conformably to the power by writing or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend.

Legatee in trust may raise money by sale, notwithstanding want of express power in will.

25. Where, by any will which shall come into operation after the passing of this Act, the testator shall have charged his immovable property or any specific portion thereof with the payment of his debts, or with the payment of any legacy or other specific sum of money, and shall have bequeathed the property so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy or sum of money out of such property, it shall be lawful for the said legatee or legatees in trust, notwithstanding any trust actually declared by the testator, to raise such debts, legacy or money as aforesaid by sale and absolute disposition by public auction or private contract, of the said property or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other;

and any deed or deeds of mortgage so executed may reserve such rate of interest and fix such period or periods of repayment as the person or persons executing the same shall think proper.

Powers given by last section extended to survivors, legatees, etc.

26. The powers conferred by the last preceding section shall extend to all and every person or persons in whom the property bequeathed in trust shall for the time being be vested by survivorship, or under the laws relating to intestate or testamentary succession, or to any person or persons who may be appointed under any power in the will, or by the High Court, to succeed to the trusteeship vested in such legatee or legatees in trust as aforesaid.

Executors to have power of raising money, etc., where there is no sufficient bequest.

27. If any testator who shall have created such a charge as is described in section 25 of this Act shall not have bequeathed the property charged as aforesaid in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors (if any) for the time being named in such will shall have the same or the like power of raising the said moneys as is hereinbefore vested in the legatee or legatees in trust of the said property, and such power shall from time to time devolve on and become vested in the person or persons (if any) in whom the executorship shall for the time being be vested.

Purchasers, etc., not bound to enquire as to powers.

28. Purchasers or mortgagees shall not be bound to enquire whether the powers conferred by sections 25, 26 and 27 of this Act, or any of them shall have been duly and correctly exercised by the person or persons acting in virtue thereof.

Inheritance.

Descent how traced.

29. In cases of intestacies occurring before the first day of January, 1866, where there shall be a total failure of heirs of the purchaser, or where any immovable property shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor, then and in every such case the

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NOTES.

Sec. 25.—*Cf.* the Law of Property Amendment Act, 1859 (22 & 23 Vict., c. 35), S. 14.

Sec. 26.—*Cf. ibid.*, S. 15.
Sec. 27.—*Cf. ibid.*, S. 16.
Sec. 28.—*Cf. ibid.*, S. 17.
Sec. 29.—*Cf. ibid.*, S. 19.

property shall descend, and the descent shall thenceforth be traced, from the person last entitled to the property as if he had been the purchaser thereof.

This section shall be read as part of Act No. XXX of 1839[1] (*for the amendment of the Law of Inheritance*).

Assignment of Movables and Terms for Years.

Assignment to self and others.

30. Any person shall have power to assign movable property now by law assignable, terms for years of immovable property, and estates by *elegit* directly to himself and another person or other persons or corporation, by the like means as he might assign the same to another.

Purchasers.

Not to be bound to see to the application of purchase-money, etc.

31. The *bona fide* payment to and the receipt of any person to whom any purchase or mortgage-money shall be payable upon any express or implied trust shall effectually discharge the person paying the same from seeing to the application, or being answerable for the misapplication thereof.

Investment of Trust-funds.

On what securities trust-funds may be invested.

32. Trustees having trust money in their hands which it is their duty to invest at interest shall be at liberty, at their discretion, to invest the same in any Government securities, and such trustees shall also be at liberty, at their discretion, to call in any trust-funds invested in any other securities than as aforesaid, and to invest the same on any such securities as aforesaid, and also from time to time, at their discretion, to vary any such investments as aforesaid for others of the same nature:

Provided always that no such original investment as aforesaid, and no such change of investment as aforesaid, shall be made where there is a person under no disability entitled in possession to receive the income of the trust-fund for his life, or for a term of years determinable with his life, or for any greater estate, without the consent in writing of such person.

Trustees and Executors.

Trustees may apply income of property of minors, etc., for their maintenance.

33. In all cases where any property is held by trustees in trust for a minor, either absolutely or contingently on his attaining majority, or on the occurrence of any event previously to his attaining majority, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such minor, or otherwise to apply for or towards the maintenance or education of such minor, the whole or any part of the income to which such minor may be entitled in respect of such property, whether there

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LEG. REF.

[1]The Inheritance Act, 1839 (XXX of 1839). It is repealed, except as to descents before 1866 by the Repealing Act, 1868 (VIII of 1868).

NOTES.

Sec. 29 (2nd para.).—*Cf.* the Law of Property Amendment Act, 1859 (22 & 23 Vict., c. 35), S. 20.

Sec. 30.—*Cf. ibid.*, S. 21.

Sec. 31.—*Cf. ibid.*, S. 23. (The limiting clause "unless the contrary shall be expressly declared by the instrument creating the trust or security" has not been reproduced).

Sec. 32.—*Cf.* the Trustee Act, 1860 (23 & 24 Vict., c. 145), S. 25. This Act is now repealed by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., c. 41), and the Settled Land Act, 1882 (45 & 46 Vict., c. 38), S. 32, is repealed in places to which the Indian Trusts Act, 1882 (II of 1882) extends or is extended, *see* S. 2 of that Act.

Secs. 33 and 34.—*Cf.* the Trustee Act, 1860 (23 & 24 Vict., c. 147), Ss. 26 and 27. This Act is now repealed by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., c. 41), and the Settled Land Act, 1882 (45 & 46 Vict., c. 38), Ss. 33 and 34 are repealed in places to which the Indian Trusts Act, 1882 (II of 1882), extends or is extended, *see* S. 2 of that Act,

be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education, or not;

and such trustees shall accumulate all the residue of such income by way of compound interest, by investing the same and the resulting income thereof from time to time in proper securities, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations shall have arisen:

Provided always, that it shall be lawful for such trustees at any time, if it shall appear to them expedient, to apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year.

Provisions for appointment of new trustees on death, etc.

34. Whenever any trustee, either original or substituted, and whether appointed by any High Court or otherwise, shall die, or be six months absent from British India, or desire to be discharged from, or refuse, or become unfit or incapable, to act in the trusts or powers in him reposed, before the same shall have been fully discharged and performed, it shall be lawful for the person or persons nominated for that purpose by the deed, will or other instrument creating the trust (if any), or if there be no such person, or no such person able and willing to act, then for the surviving or continuing trustees or trustee for the time being, or the acting executors or executor or administrators or administrator, of the last surviving and continuing trustee, or for the retiring trustees, if they shall all retire simultaneously, or for the last retiring trustee, or where there are two or more classes of trustees of the instrument creating the trust, then for the surviving or continuing trustees or trustee of the class in which any such vacancy or disqualification shall occur (and for this purpose any refusing or retiring trustee shall, if willing to act in the execution of the power, be considered a continuing trustee), by writing to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or being absent from British India, or desiring to be discharged, or refusing or becoming unfit or incapable to act as aforesaid.

Transfer of trust-property to new trustees.

So often as any new trustee or trustees shall be so appointed as aforesaid, all the trust-property (if any) which for the time being shall be vested in the surviving or continuing trustees or trustee, or in the heirs, executors or administrators of any trustee, shall with all convenient speed be conveyed and transfereed so that the same may be legally and effectually vested in such new trustee or trustees, either solely or jointly with the surviving or continuing trustees or trustee, as the case may require.

Powers, etc., of new trustees.

Every new trustee to be appointed as aforesaid, as well before as after such conveyance or transfer as aforesaid, and also every trustee appointed by any High Court, either before or after the passing of this Act, shall have the same powers, authorities and discretions, and shall in all respects act as if he had been originally nominated a trustee by the deed, will or other instrument (if any) creating the trust.

Appointment of Official Trustee to be a trustee.

The Official Trustee may with his consent, and by the order of the High Court, be appointed under this section in any case in which only one trustee is to be appointed and such trustee is to be the sole trustee.

Appointment in place of trustee predeceasing testator.

35. The power of appointing new trustees hereinbefore contained may be exercised in cases where a trustee nominated in a will has died in the lifetime of the testator.

NOTES.

Secs. 35 and 36.—*Cf.* the Trustee Act, 1860.

Sec. 34.—*See* 33 B. 507=11 Bom.L.R. 85=2 I.C. 701.

Trustees' receipts to be discharges.

36. The receipts in writing of any trustees or trustee for any money payable to them or him by reason, or in the exercise, of any trusts or powers reposed or vested in them or him, shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the persons paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof.

Every trust-instrument deemed to contain clauses for indemnity and reimbursement of trustees.

37. Every deed, will or other instrument creating a trust, either expressly or by implication, shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words or to the effect following, that is to say,—

"that the trustees or trustee for the time being of the said deed, will or other instrument shall be respectively chargeable only for such moneys, stocks, funds and securities as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable and accountable only for their own acts, receipts, neglects or defaults, and not for those of each other, nor for any banker, broker or other person with whom any trust-moneys or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds or securities, nor for any other loss, unless the same shall happen through their own wilful default respectively; and also that it shall be lawful for the trustees or trustee for the time being of the said deed, will or other instrument, to reimburse themselves or himself, or pay or discharge out of the trust-premises all expenses incurred in or about the execution of the trusts or powers of the said deed, will or other instrument."

Executors may compound, etc.

38. It shall be lawful for any executors to pay any debts or claims upon any evidence that they may think sufficient, and to accept any composition, or any security for any debts due to the deceased, and to allow any time for payment of any such debts as they shall think fit, and also to compromise, compound or submit to arbitration all debts, accounts, claims and things whatsoever relating to the estate of the deceased, and for any of the purposes aforesaid to enter into, give and execute such agreements, instruments of composition releases and other things as they shall think expedient, without being responsible for any loss to be occasioned thereby.

39. [*Trustee, etc., making payment under power-of-attorney, not liable by reason of death of party giving power.*] *Repealed by the Powers-of-Attorney Act (VII of* 1882), *S.* 6.

As to liability of executor or administrator in respect of rents, covenants or agreements.

40. Where an executor or administrator liable as such to the rents, covenants or agreements contained in any lease or agreement for a lease granted or assigned, whether before or after the passing of this Act, to the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease, or agreement for a lease, as may have accrued due and been claimed up to the time of the assignment hereinafter mentioned, and shall have set apart a suffici-

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NOTES.

(23 & 24 Vict., c. 145), Ss. 28 and 29. This Act is now repealed by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., c. 41), and the Settled Land Act, 1882 (45 & 46 Vict., c. 38), Ss. 35 and 36 are repealed in places to which the Indian Trusts Act, 1882 (II of 1882), extends or is extended, *see* S. 2 of that Act.

Sec. 37.—S. 37 is repealed in places to which the Indian Trusts Act, 1882 (II of 1882), extends or is extended, *see* S. 2 of that Act.

Secs. 37 and 38.—*Cf.* the Trustee Act, 1860 (23 & 24 Vict., c. 145), Ss. 30 and 31. This Act is now repealed by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., c. 41), and the Settled Land Act, 1882 (45 & 46 Vict., c. 38).

Sec. 40.—*Cf.* the Law of Property Act, 1859 (22 & 23 Vict., c. 35), S. 27.

ent fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease or agreement for a lease to a purchaser thereof, he shall be at liberty to distribute the residuary estate of the deceased to and amongst the parties entitled thereto, respectively, without appropriating any part, or any further part (as the case may be), of the estate of the deceased to meet any future liability under the said lease or agreement for a lease.

The executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease.

Nothing herein contained shall prejudice the right of the lessor or those claiming under him to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed.

As to liability of executor, etc., in respect of rents, etc., in conveyance on rent-charge.

41. In like manner, where an executor or administrator liable as such to the rent, covenants or agreements contained in any conveyance on chief rent or rent-charge (whether any such rent be by limitation of use, grant or reservation), or agreement for such conveyance, granted or assigned to or made and entered into with the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said conveyance or agreement for a conveyance, as may have accrued due and been claimed up to the time of the conveyance hereinafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property conveyed, or agreed to be conveyed, although the period for laying out the same may not have arrived, and shall have conveyed such property, or assigned the said agreement for such conveyance as aforesaid, to a purchaser thereof, he shall be at liberty to distribute the residuary estate of the deceased to and amongst the parties entitled thereto, respectively without appropriating any part or any further part (as the case may be) of such estate to meet any future liability under the said conveyance or agreement for a conveyance.

The executor or administrator so distributing the residuary estate shall not, after having made or executed such conveyance or assignment, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said conveyance or agreement for conveyance.

Nothing herein contained shall prejudice the right of the grantor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or among whom the said assets may have been distributed.

As to distribution of assets of testator or intestate after notice given by executor and administrator.

42. Where an executor or administrator shall have given such or the like notices as in the opinion of the Court in which such executor or administrator is sought to be charged would have been given by the High Court in an administration suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices, or the last of the said notices,

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NOTES.

Sec. 41.—*Cf.* the Law of Property Act, 1859 (22 & 23 Vict., c. 351), S. 28.

Secs. 42 and 43.—*Cf.* the Law of Property Act, 1859 (22 & 23 Vict., c. 35), Ss. 29 and 30.

for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets, or a part thereof, as the case may be.

Nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, into the hands of the person or persons who may have received the same respectively.

Trustee, executor, etc., may apply by petition to Judge of High Court for opinion, advice, etc., in management, etc., of trust-property.

43. Any [1][trustee], executor or administrator shall be at liberty, without the institution of a suit, to apply by petition to any Judge of the High Court for the opinion, advice or direction of such Judge on any question respecting the [1][management or] administration of the [1][trust property or] the assets of any testator or intestate.

Such application shall be served upon, or the hearing thereof shall be attended by, all persons interested in such application, or such of them as the said Judge shall think expedient.

The [1][trustee], executor or administrator acting upon the opinion, advice or direction given by the said Judge shall be deemed, so far as regards his own responsibility, to have discharged his duty as such [1][trustee], executor or administrator in the subject-matter of the said application:

Provided nevertheless, that this Act shall not extend to indemnify any [1][trustee], executor or administrator, in respect of any act done in accordance with such opinion, advice or direction as aforesaid, if such [1][trustee], executor or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice or direction; and the costs of such application as aforesaid shall be in the discretion of the Judge to whom the said application shall be made.

General Provisions.

Tenants for life, etc., may execute powers, notwithstanding incumbrances.

44. For the purposes of this Act a person shall be deemed to be entitled to the possession or to the receipt of the rents and income of immovable or movable property, although his estate may be charged or incumbered, either by himself or by any former owner, or otherwise howsoever to any extent: but the estates or interests of the parties to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and income as aforesaid, unless they shall concur therein.

Operation of Act.

45. The provisions contained in this Act shall, except as hereinbefore otherwise provided, extend only to persons entitled or acting under a deed, will, codicil, or other instrument executed after this Act comes into operation or under a will or codicil confirmed

LEG. REF.

[1] These words are repealed in places to which the Indian Trusts Act (II of 1882) extends or is extended. *See* S. 2 of that Act.

NOTES.

Sec. 43.—The provision for the appointment of new trustees contained in the compromise in case the continuing trustees do not agree (as required by the will) is clearly an addition to the will of the testator and no such provision can be validly added, nor can the trustees delegate the powers conferred on them by the will. It was therefore held necessary in view of the deadlock which had arisen, to resort to the powers of the Court. 154 I.C. 364=1934 L. 331. On this section, *see also* 7 B. 381; 12 B. 638; 12 Bom.L. R. 1040.

Sec. 44.—*Cf.* the Law of Property Act, 1859 (22 & 23 Vict., c. 35), S. 31.

Sec. 45.—*Cf.* the Trustee Act, 1860 (23 & 24 Vict., c. 145), S. 34. This Act is now repealed by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., c. 41), and the Settled Land Act, 1882 (45 & 46 Vict., c. 38).

or revived by a codicil executed after that date, and only to property in British India and to cases to which English law is applicable.

Short title.

46. This Act may be called THE TRUSTEES' AND MORTGAGEES' POWERS ACT, 1866.

47. [*Application of Act to Straits Settlements.*] *Repealed by the Repealing Act*, 1874 (*XVI of* 1874).

THE INDIAN TRUSTS ACT (II OF 1882).

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THE SCHEDULE.

THE INDIAN TRUSTS ACT (II OF 1882).[1]

Year.	No.	Short title.	Amendments.
1882	II	The Indian Trusts Act, 1882.	Repealed in part, XII of 1891; Amended, III of 1908; I of 1916; XXI of 1917; XXI of 1920; XXXVII of 1925; XXIII of 1934.

[13*th January*, 1882.

An Act to define and amend the law relating to private Trusts and Trustees.

Preamble.

WHEREAS it is expedient to define and amend the law relating to private trusts and trustees; It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Short-title. Commencement. Local extent.

1. This Act may be called THE INDIAN TRUSTS ACT, 1882; and it shall come into force on the first day of March, 1882.

LEG. REF.

[1] For Report of the Indian Law Commission, *see* Gazette of India, 1880, Supplement,

NOTES.

Sec. 1: SCOPE.—Many of the provisions of the Act reproduce the general law of

It extends in the first instance to the territories respectively administered by the Provincial Governments of Madras, North-Western Provinces, the Punjab, Oudh, Central Provinces, Coorg and Assam; and the Provincial Government may from time to time, by notification[1] in the Official Gazette, extend it to any other part of

Savings.

LEG. REF.

p. 104 and for the Statement of Objects and Reasons, *see* Gazette of India, 1880, Pt. V, p. 476; for Report of the Select Committee, see *ibid.*, Supplement, 1881, p. 766 and 1882 Supplement, p. 67.

[1] The Act has, under this section, been extended—(*a*) to the whole of the Bombay Presidency, including the Scheduled Districts—*see Bombay Gazette,* 1891, Pt. I, p. 743; (*b*) to the area included within the limits of Rangoon Town as from time to time defined for the purposes of the Lower Burma Courts Act, *Burma Gazette,* 1904, Pt. I, p. 628.

NOTES.

trusts as administered in Equity Courts in England, but that does not mean that the Trusts Act should be applied by analogy to religious or charitable endowments. 39 Bom. L.R. 633=1937 B. 374=I.L.R. (1937) Bom. 843. The Act does not apply to public trusts and consequently no formalities are required by law to create them. 42 M.L.J. 258 =1922 M. 83. *See also* 13 P. 356=1934 P. 612; 4 Rang. 538=1927 R. 95 (F.B.). The *"raddimazalim"* fund is an endowment partly public and partly private for religious and charitable purposes and hence the Act will not apply to it. (3 L. 521, Rel. on.) 150 I.C. 193=1934 O. 118 (2). The criterion for deciding whether a particular trust is or is not of a private nature is whether the said trust is or is not for the benefit of individuals. Where the intention of the founder, as shown by the recitals in his will, was that the property was to be dedicated for the benefit of idols, the trust is undoubtedly of a public nature and not for the benefit of the individual members of the family. 1935 A. 139. Trust property divided among members of family, by award of arbitrators, if private or public trust. 1933 A. 622. Where by a deed of endowment the executant dedicated certain properties to the *sheba* of certain family idols and for feeding the poor and carrying out certain charitable objects such as feeding students, etc., it is a private and not a public trust. 37 C.W.N. 181. As to public and private trusts, *see also* I.L.R. (1942) 1 Cal. 211=1942 Cal. 343; 60 C. 538. It is the extensiveness of object which affords some indication of the public nature of a trust. Appeals for funds and enthusiasm for the *utsaba* performed are hardly of a nature commensurate with private religious or charitable institutions. Inference of dedication of an institution to the public can be drawn if it is found that the founder held out and represented to the public that it was open to public for worship. I.L.R. (1937) 1 C. 515=64 C.L.J. 341=1937 C. 67. The essential difference between a private and a public trust is that in the former the beneficiaries are definite and ascertained individuals or who within a definite time can be definitely ascertained but in the latter the beneficial interest must be vested in an uncertain and fluctuating body of persons—either the public at large or some considerable portion of it answering a particular description. The fact that an uncertain and fluctuating body of persons is a section of the public following a particular religious faith or is only a sect of persons of a certain religious persuasion (*e.g.*) Shias or even a sub-sect of Shias, would not make any difference in the matter and would not make the wakf a trust of a private character. 46 C.W.N. 59. Where a Hindu acquires land with the object of building a temple to perpetuate the name of his family and to benefit the public and creates a trust by building it and endowing properties and provides for regular payment of ground rent by means of a permanent arrangement and makes a provision for the appointment of any Hindu as Mutwalli in certain contingency and reserves to the public the right and liberty to examine the accounts, the circumstances are such as to indicate that the trust created a pubiic trust. 1938 O.W.N. 660. In the case of a private trust where there are more trustees than one, all must join in the execution of the trust (as) election of shebait. 60 C. 538=37 C.W.N. 181=144 I.C. 894 =1933 C. 539. A Court is entitled to remove the trustee of a private religious charity from the control of the trust property on the ground of waste and neglect. There is an equitable jurisdiction inherent in the Court to deal with trusts and to assure that they are properly managed apart from legislation. 39 Bom.L.R. 867=1938 Bom. 23. Although the Act does not in terms apply to Bihar, the principles contained therein will apply being rules of justice, equity and good conscience. 4 P.L.T. 731. The Act applies only to Rangoon and does not apply to the districts; but still the principles enunciated therein can be applied to cases coming from the districts. 1935 R. 44. On this section, *see also* 33 B. 509=11 Bom. L.R. 85. A transfer of the office of the trustee is invalid. 19 L.W. 567=1924 M. 749. In the absence of a custom to the contrary, succession to a trusteeship follows the ordinary methods of devolution and a Hindu widow can succeed as the heir of her husband. 79 I.C. 891=1925 M. 218. As to creation of trust in favour of creditors, *see* 55 M. 436=1932 M. 457=62 M.L.J. 533; 47 L.W. 66=1938 Mad. 199; 1938 Cal. 818=

British India. But nothing herein contained affects the rules of Muhammadan law as to *waqf*, or the mutual relations of the members of an undivided family as determined by any customary or personal law, or applies to public or private religious or charitable endowments, or to trusts to distribute prizes taken in war among the captors; and nothing in the second Chapter of this Act applies to trusts created before the said day.

Repeal of enactments.

2. The Statute and Acts mentioned in the Schedule hereto annexed shall, to the extent mentioned in the said Schedule, be repealed, in the territories to which this Act for the time being extends.

Interpretation clause—"trust";

3. A "trust" is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner:

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42 C.W.N. 1131; 134 I.C. 110=32 P.L.R. 876. If a debtor conveys property in trust for the benefit of his creditors, who are not parties to the conveyance and to whom the fact of its execution is not communicated, the conveyance merely operates as a power to the trustees to apply the property in satisfying their claims and inasmuch as the debtor himself is in fact the only *cestui que trust*, it is revocable by him before the property is so applied, and cannot be enforced by the creditors. A trust in favour of creditors is not however, revocable if the creditors are parties to, or assent to the conveyance or if the fact of its execution is communicated to them. Where therefore a trust is created in favour of some of the creditors who sign the composition deed and a notice of the trust is given by the debtor before it is executed and by the trustees after its execution to the other creditors, the latter also would be *cestui que trust* under the deed. 38 P.L.R. 776=1936 Lah. 10. Where a legal transfer of property has been made to trustees for payment of the debts of the owner transferor, the creditors being neither parties nor privies thereto do not thereby become *cestui que trust*, and the trustees are mere mandatories, *see* 48 L.W. 564=1939 Mad. 42=(1938) 2 M.L.J. 1054; *see also* 1939 M.W.N. 105. As to enforcement of trust in favour of third party (vendee directed to pay creditors of vendor), *see* 134 I.C. 1011=8 O.W.N. 1191.

TRUST AND CONTRACT—DISTINCTION.—There is always a fiduciary relationship between trustee and beneficiary, but none between the parties to a contract. The beneficiary is clothed with title to the property—not indeed a legal title because that resides in the trustee, but an equitable one. He is possessed of what is called an equitable estate. No trustee can use trust property for his own benefit. He is bound to hold it for the benefit of the beneficiary and is liable to account to him for it. Where before the Debt Conciliation Board *A* and *B* two debtors of *C* agree that *A* should pay *B* the debt due by *C* to *B* in consideration of *C's* transfer of his property to *A* the transaction represents a contract between the parties and no question of trust arises. 1941 N.L.J. 324=1941 Nag. 261. *See also* 42 Bom.L.R. 1044.

CERTAINTY OF TRUST.—Indefiniteness or uncertainty in relation to the objects of a trust may render the entire trust void. Where the Court is not in a position to administer the trust by reason of the vagueness of the objects of the trust, the trust is void. But a trust was for national education and for the establishment and maintenance of a school where national education was to be imparted and for a boarding house and for giving scholarships for foreign studies could not be attacked on the ground either that it was vague or non-charitable or opposed to public policy. I.L.R. (1941) All. 377=1941 All. 225. *See also* 1941 A.L.J. 269. Provision in family arrangement for setting *apart* property for charitable or religious objects—If a precatory trust—Enforceability. *See* 1937 M.W.N. 162. An endowment for feeding the poor on a specified day is for a definite charitable object and is valid. 88 I.C. 375 =1925 M. 689. Where the original instrument of dedication is indefinite, the trust must be construed in the light of long continued usage. 1934 P. 443. A trustee acting under a trust which he knows or subsequently discovers to be void or invalid is not bound to surrender possession of the trust property before he can be allowed to repudiate the trust. 20 N.L.R. 63=1924 N. 129. If a trust is to be valid and enforceable, it is material to ascertain the author of the trust. Next the intention to create a trust, the purpose of the trust, the trust property and the beneficiaries must be indicated and in such a way that the trust could be administered by the Court if the occasion arose. 155 I.C. 409=1935 P.C. 97=69 M.L.J. 1 (P.C.).

Sec. 3.—The appointment of a person as a "trustee" does not by itself constitute his title until the vesting and the transfer of trust property. "Trustee" is a compendious word which covers a very large number of relationships. The manager of properties attached to a temple is in the position of a

the person who reposes or declares the confidence is called the "author of the trust": the person who accepts the confidence is called the "trustee": the person for whose benefit the confidence is accepted is called the "beneficiary": the subject-matter of the trust is called "trust-property" or "trust-money": the "beneficial interest" or "interest" of the beneficiary is his right against the trustee as owner of the trust-property; and the instrument, if any, by which the trust is declared is called the instrument of trust":

"author of the trust": "trustee": "beneficiary": "trust-property": "beneficial interest": "instrument of trust":

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trustee, but he is not a "trustee" in the restricted and technical sense known to the law. So also an administrator of the estate of an intestate has to manage it, but he is not a "trustee" within the definition of this section. A trust is not complete until the trust property is vested in the trustee for the benefit of the *cestui que trust*. 39 Bom. L.R. 633=1937 B. 374=I.L.R. (1937) Bom. 843. Office of administrator, how far in the nature of trust. *See* 5 I.C. 633=11 Bom.L.R. 53; 24 C.W.N. 769=58 I.C. 13 (P.C.). Fiduciary relationship may be established without the use of the word "trust", and a person may become a trustee by his acts and conduct so as to deprive himself of all beneficial ownership of a property and declare that he will hold the same in trust for another. Merely because the owner retains a certain interest in the property, it would not necessarily go against the foundation of a trust. 164 I.C. 328=38 Bom.L. R. 541=1936 B. 296. Farm entrusted with money to invest by a person—Relationship with regard to that person's minor grandsons—Acquiescence by the person in unauthorized dealings.—Firm's insolvency—Effect. 42 C.W.N. 918=1937 (P.C.) 296. *See also* I.L.R. (1941) Bom. 42=1941 Bom. 41. Creation of trust—Owner also being beneficially interested in the property does not take away from the property dedicated the nature of trust. 1924 M. 434. Trust deed providing for charitable objects and for private benevolence towards certain relatives—Provision giving profits to relations held invalid—Trust not wholly void. 64 I.A. 5=41 C.W.N. 262=1937 P.C. 4 =(1937) 1 M.L.J. 166 (P.C.). In the case of a private trust where there are more trustees than one, majority cannot appoint a sole shebait. 37 C.W.N. 181. Provision in a partition-deed that property allotted to sharer should be liable for the amount due from him to another creates a charge in the nature of trust. 100 I.C. 506=26 L.W. 51. As to relationship of trustee and *cestui que trust*, see 60 C. 262=1933 C. 366. A person coming into possession as trustee cannot subsequently take up the position that they are his private properties. 11 P. 288=136 I.C. 417=1932 P. 33. Stranger directing third person to pay amount on behalf of mortgagor—Trust created. 53 M.L.J. 679. Deed by father relinquishing his rights in property—Deed by son agreeing to pay father's illegitimate son—Trust is created in favour of latter. 43 C.W.N. 71=68 C.L. J. 478=48 L.W. 371=1938 P.C. 245 (P. C.); 165 I.C. 113=1937 O. 99. Where a trustee for the time being is authorized by the trust deed to grant reduction and remission of rent, such reduction or remission allowed by the trustee is binding on the trust estate. 1933 C. 393; 61 C. 711. Where a certain amount is a trust in the hands of the trustees to be invested in their business and is so invested, it must be taken to have remained a part of the assets of that business and to have been there at the date of their insolvency, the beneficiaries being entitled at all time to a charge upon such assets in the hands of the firm. Upon the insolvency of the trustees the assets no doubt pass to the O.A. but they pass subject to the charge. 143 I.C. 162=1933 P.C. 148=65 M.L.J. 1 (P. C.). Where a trust is created and an amount of money is handed over to the trustees, he must be deemed to be holding the amount as a trustee, even though it is agreed that the trustee is entitled to invest the trust fund in any security that he liked and pay interest to the beneficiary. The agreement to pay interest has not the effect of engrafting a contract upon the trusteeship, which continues even after the "deposit" with the trustee. He does not cease to be a trustee or become an ordinary debtor. The beneficiary, *i.e.*, the person on whose behalf the money is deposited is entitled to priority in respect of the amount over other creditors of the trustee on his insolvency. 42 Bom.L.R. 1044=1941 Bom. 41=I.L.R. (1941) Bom. 42. *See also* 42 C.W.N. 918 =1937 P.C. 296. A vendor delivered possession to the vendee making the vendee a trustee for 'the goods sold or their sale proceeds' for unpaid purchase-money, and allowed the vendee to obtain false credit. On the vendee becoming insolvent, the vendor claimed lien for unpaid purchase-money on the movable assets of the debtor before other creditors were paid: *Held*, that the goods in trust having been sold became so amalgamated with the insolvent's general property that they could not be identified, and the goods converted could not be traced to any particular investment when the vendor claimed their value. The vendor could not therefore claim any lien upon the movable assets of the vendee. 167 I.C. 505 (2)=1937 Sind 37. Money standing to credit of member in Employees' Provident Fund in a company is not trust money and is liable to attachment in execution of decree against member.

"breach of trust": a breach of any duty imposed on a trustee, as such, by any law for the time being in force, is called a "breach of trust":

"registered": and in this Act, unless there be something repugnant in the subject or context, "registered" means registered under the law for the registration of documents for the time being in force:

"notice." a person is said to have "notice" of a fact either when he actually knows that fact, or when, but for wilful abstention from inquiry or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent, under the circumstances mentioned in the Indian Contract Act, 1872, section 229;

Expressions defined in Act IX of 1872. and all expressions used herein and defined in the Indian Contract Act, 1872, shall be deemed to have the meanings respectively attributed to them by that Act.

CHAPTER II.

OF THE CREATION OF TRUSTS.

Lawful purpose. 4. A trust may be created for any lawful purpose. The purpose of a trust is lawful unless it is (*a*) forbidden by law, or (*b*) is of such a nature that, if permitted, it would defeat the provisions of any law, or (*c*) is fraudulent, or (*d*) involves or implies injury to the person or property of another, or (*e*) the Court regards it as immoral or opposed to public policy. .

Every trust of which the purpose is unlawful is void, and where a trust is created for two purposes, of which one is lawful and the other unlawful, and the two purposes cannot be separated, the whole trust is void.

Explanation.—In this section the expression "law" includes, where the trust-property is immovable and situate in a foreign country, the law of such country.

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I.L.R. 1941 Kar. 401. Money deposited with the employer by the employee as security for the due performance of his duties cannot be held to be trust money. Accordingly on the insolvency of the employer, the employee is not entitled to the amount deposited by him in preference to the claims of the creditors of the insolvent. 39 P.L.R. 107=1937 Lah. 444. *See also* 1938 M.W.N. 7; I.L.R. (1937) 2 Cal. 305=1937 Cal. 221; 1938 A.L.J. 820. Company—Provident fund founded for benefit of employees—Is trust fund—Company, is trustee—Right of employees to rank as preferential creditors in winding up proceedings. 38 Bom. L.R. 541=1936 Bom. 296. Deposit as security by selling agents—No trust created and they are not entitled to any preferential payment. *See* 1938 A.L.J. 820.

SPECIAL TRUSTEE—KATTALAI.—It is only in a case where there are other persons in management who can be regarded as general trustees and there are other funds out of which the general upkeep of the trust can be carried on that there will be any sense in distinguishing any endowment as a special trust or kattalai intended for a particular purpose. Where in a gift of certain properties to a temple the person to whom the properties are conveyed is described by the donor as a trustee and there are no other persons in management as general trustees and the object of the gift is connected with ordinary worship in the temple, such person cannot be regarded as a special trustee and whether he is a trustee *de facto* or *de jure*, having taken the property under such a gift deed, he cannot claim to have held the properties in any character except that of the trustee of the temple. 182 I.C. 761=1938 Mad. 314. *See also* (1941) 2 M.L.J. 636. Feeding of devotees in temples is a well-known charitable purpose, and when there is such a trust performable in a temple, the general trustee of the temple is entitled to perform it if the persons who are primarily to do it do not do so, and recover the cost from the properties charged in their hands. 1941 M.W.N. 881=54 L.W. 408=(1941) 2 M.L.J. 636. Where the rights of executants of a deed become extinguished and get completely vested in an idol, the idol cannot be regarded as a trustee in respect of the property in which by the terms of the instrument complete right has vested in the said idol. The property becomes the idol's property although the idol holds the property in an ideal sense. 62 Cal. 1098=40 C.W.N. 1320=1936 Cal. 556.

Sec. 4.—In order to create a valid trust there are three requisites: (1) the words must be such that on the whole they ought to be construed as imperative; (2) the subject-matter of the trust must be certain; (3) the objects of the trust or the persons in-

Illustrations.

(*a*) *A* conveys property to *B* in trust to apply the profits to the nurture of female foundlings to be trained up as prostitutes. The trust is void.

(*b*) *A* bequeaths property to *B* in trust to employ it in carrying on a smuggling business, and out of the profits thereof to support *A's* children. The trust is void.

(*c*) *A*, while in insolvent circumstances, transfers property to *B* in trust for *A* during his life, and after his death to *B*. *A* is declared an insolvent. The trust for *A* is invalid as against his creditors.

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tended to be benefited must be certain. 45 L.W. 316=1937 Mad. 368=(1937) 1 M.L. J. 10. A beneficiary should not be made a trustee unless there are clear words indicating that he was intended to be made a trustee. Before a trust can be found there must be an intention to create a trustee. Where the evidence discloses nothing more than an absolute gift of certain moneys by a disciple to his guru, accompanied by an expression of a wish as to the mode of employing it, namely to carry on the charity which he was doing (feeding of Brahmins on the occasion of an utsavam) no trust can be held to be created. The disappointment of a wish or expectation cannot be a reason for raising a trust. 46 L.W. 413=1937 M.W.N. 758=1937 Mad. 789. *See also* 21 Pat. 488 (F.B.). The general rule is that a trust to be effective must be communicated to the *cestui que trust* or that he should at least know about it. The question as to whether there has been an irrevocable trust or not, must be a question of fact in almost every case. Where a certain fund was set apart in the books for the purpose of charity and it was so continued for over 60 years but there was no evidence that the owners of the fund intended to part with the ownership or control of it and its existence was not communicated to the general trustees of the temple and there was no document creating the trust except the entry in the account book and this fund was treated as an asset in partition. *Held*, that no irrevocable trust fund was created. 155 I.C. 772=1935 M. 60. A mere unexpressed intention to dedicate certain property to a trust cannot operate as a formal dedication. There may be a dedication without an instrument in writing; but the dedication must be real, that is, the property must be completely given away and the owner must completely divest himself of his ownership. 13 P. 356=1934 P. 612. *See* also 1937 Sind 37. Creation of—Conditions of valid trust—Company—Memorandum of association mentioned trust as one of the primary objects—Condition that 30 per cent. of moneys received from certificate-holders to be allocated to specific trust—Condition endorsed in certificate—Subscriber accepting certificate and remitting moneys—Effect—Trust—If validly created. (1937) 1 M.L. J. 10. Creation of—Life insurance policy making money payable to persons legally entitled thereto—Policy effected for maintenance of family—No trust created in favour of wife and children. *See* 71 M.L.J. 39. Where one of the objects of a trust is lawful and the expenses on it are fixed, and that object is not dependent upon and is separate from the other objects, the trust to that extent will be valid, although the lawfulness of the other objects is doubtful. 46 C.W.N. 865. Trust deed providing for charitable objects and for private benevolence towards certain relatives—Provision giving profits to relations *held* invalid—Trust, not wholly void. 64 I.A. 5=I.L.R. (1937) All. 3=41 C.W.N. 262=1937 P.C. 4=(1937) 1 M. L.J. 166 (P.C.). Verbal assignment by attorney to himself of property known to be his principal's—Vesting of property in trust —Purpose, if specific. 1935 P.C. 28=155 I.C. 855 (P.C.). Discharge of dower debt to wife is not unlawful purpose. 13 I.C. 882=14 O.C. 356. The mere non-performance does not negative the existence of a charitable trust if otherwise the trust is proved. In the absence of a deed of endowment, however, the Court has to draw an inference as to the existence of the trust only from a course of conduct; the character of the enjoyment by the so-called trustees will be a material factor and the Court cannot start with the presumption that they were throughout guilty of breach of trust. The mere fact that a certain property is allowed to a person, with a condition that he should carry out annadanam cannot amount to such a complete dedication as to impress the whole property with the character of a charitable trust rendering it inalienable or unsaleable in execution. The alience getting the property, however takes it with the condition attached to it. 1936 Mad. 138 =70 M.L.J. 407. Vendor of immovable property leaving portion of sale consideration in hands of vendee directing him to pay to vendor's son on attaining majority with interest—If trust is created it is only a loan. *See* 1939 M.W.N. 437=1939 Mad. 722=(1939) 1 M.L.J. 820. Dedication absolute —Subsequent misapplication of income by settlor or his heir does not invalidate trust. *See* (1940) 2 M.L.J. 409. Company promising to pay deserving employees lump sum on retirement—Company crediting sums allotted in "pass books" of respective employees—Trust in favour of employees is created. 64 I.A. 323=I.L.R. (1938) Mad. 1=39 Bom.L.R. 1050=66 C.L.J. 36 41 C.W.N. 1157=46 L.W. 214=1937 P. C. 261=(1938) 1 M.L.J. 503 (P.C.).

Secs. 4-6.—Trust deed, what constitutes. *See* 50 M. 815=1927 M. 869=53 M.L.J. 742. Where one of two political pensioners died instead of paying the whole of the pension to the survivor, the Government took half of it, and after paying a portion of it

Trust of immovable property.

5. No trust in relation to immovable property is valid, unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee.

Trust of movable property.

No trust in relation to movable property is valid unless declared as aforesaid, or unless the ownership of the property is transferred to the trustee.

These rules do not apply where they would operate so as to effectuate a fraud.

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to some of the descendants of the deceased directed that the balance of the accumulated fund should be "paid into a trust fund and, invested as a uncleus of Provident Fund for the benefit of the children on lapse of the pension." The fund was held by the Accountant-General, no trustees being appointed. In a suit for administration and distribution of the fund in question: *Held,* that the fund was not constituted a "trust fund," and that the use of the words "trust" and "trust fund" did not have the effect of creating a trust by declaration or giving it a technical jural character; and that the Accountant-General who held the fund was not a "trustee" but the agent or cashier of the Government under whose orders he acted. 37 Bom.L.R. 763.

Sec. 5.—The objects of the trust should not be of a nebulous character, but of such a nature that a Court can administer it. 78 I.C. 320=1925 Oudh 202. Trust of movables requires no writing or registration. 49 M.L.J. 468=1925 M. 109. Gift to the Almighty, whether requires registration. 25 L.W. 806. For the foundation of a charitable endowment by a Hindu in the Punjab, no writing is required. What is necessary is that the purpose be clearly specified and that the property intended for the endowment should be set apart as dedicated to that purpose. It is necessary that the donor should divest himself of the property. The evidence of divestiture may be contemporaneous. In such a case the subsequent acts and conduct of the donor are irrelevant and cannot re-invest him. 65 I.A. 106=I.L.R. (1938) Lah. 63=1938 A.L.J. 194=1938 P. C. 73=(1938) 1 M.L.J. 359 (P.C.). A person who was the absolute owner of immovable property in a written application to the Collector stated that he had set apart the property as a perpetual gift to a specified deity and asked that a certificate should be issued showing that the title to the property was in the deity. This application was granted and a deed was drawn up and executed by him as the trustee of the property vested in the deity, by which he covenanted for himself, his heirs, administrators, personal representatives and assigns to pay the land tax to the Secretary of State for India. *Held,* that the documents clearly showed that the owner had divested himself of all personal interest in the property and obtained from the Secretary of State recognition that the title was in the deity, and there was therefore a completed dedication. The fact that it was not known whether the settlor utilized the income for the trust purposes did not matter as there was a complete divestiture. 1940 Mad. 920=(1940) 2 M.L.J. 409. Section must be read along with T.P. Act; *See* 35 B. 403=11 I.C. 546, Gift in trust to an idol to be in writing registered. *See* 1926 N. 86. Trust of immovable property can be created by an instrument in writing and registered, signed by the author of the trust or by will 1925 Oudh 202. *See also* 38 B. 576=24 I.C. 730; 28 I.C. 205=28 M.L.J. 251. But 12 years' enjoyment by the beneficiary will in general confer a prescriptive right. 4 A.W.R. 676=1934 A. 990. Where a deed of gift is executed in favour of a person and registered and on the same day the donee executes a declaration of trust specifying the objects of the trust and reserving a power of revocation with the donor, the declaration of trust is admissible in evidence even though not registered, because the terms of this section are not applicable where they would operate so as to effectuate a fraud. 137 I.C. 580=34 Bom.L.R. 218=1932 B. 188. Where it would be an act of fraud if a person, though a trustee in fact is still to escape his just liabilities as such merely from the non-existence of an instrument in writing, the case would be covered by the last paragraph of the section provided of course the facts and circumstances really establish a trust. I.L.R. (1938) 1 Cal. 652=1938 Cal. 673. Where a settlor asks another to acquire a certain property for benefit of the settlor and allots a sum of money for the purpose, but reserves to himself the power of revoking the trust after the amount is spent, the trust is valid and his refusal after the amount is spent to further finance the work is a valid revocation of the trust; and where, without any lack of good faith, the trustee relying on the abandonment by the beneficiary acquires the property for his own benefit no trust attaches to it. 5 Pat.L.T. (Supp.) 1=1925 P. 68. Employee's Death Benefit Fund vested in trustees for the benefit of and payable to children on death is not attachable for the employees' debts. *See* I.L.R. (1941) Kar. 401 (Provident fund of employees of company standing to the credit of a member is not trust money. 33 Bom. L.R. 720=1931 B. 300.

Secs. 5 and 6. Under S, 6 read with S. 5 in order to create a valid trust in relation to immovable property the author of

6. Subject to the provisions of section 5, a trust is created when the author of the trust indicates with reasonable certainty by any words or acts (*a*) an intention on his part to create thereby a trust, (*b*) the purpose of the trust, (*c*) the beneficiary, and (*d*) the trust-property, and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfers the trust-property to the trustee.

Creation of trust.

Illustrations.

(*a*) *A* bequeaths certain property to *B*, "having the fullest confidence that he will dispose of it for the benefit of *C*". This creates a trust so far as regards *A* and *C*.

(*b*) *A* bequeaths certain property to *B*, "hoping he will continue it in the family." This does not create a trust, as the beneficiary is not indicated with reasonable certainty.

(*c*) *A* bequeaths certain property to *B*, requesting him to distribute it amongst such members of *C's* family as *B* should think most deserving. This does not create a trust, for the beneficiaries are not indicated with reasonable certainty.

(*d*) *A* bequeaths certain property to *B*, desiring him to divide the bulk of it among *C's* children. This does not create a trust, for the trust-property, is not indicated with sufficient certainty.

(*e*) *A* bequeaths a shop and stock-in-trade to *B*, on condition that he pays *A's* debts and a legacy to *C*. This is a condition, not a trust for *A's* creditors and *C*.

7. A trust may be created—

Who may create trusts.

(*a*) by every person competent to contract, and,

(*b*) with the permission of a principal Civil Court of original jurisdiction, by or on behalf of a minor;

but subject in each case to the law for the time being in force as to the circumstances and extent in and to which the author of the trust may dispose of the trust-property.

NOTES.

the trust should transfer the trust property to the trustee. The word 'transfer' has been used in a wider sense. It includes not only sales, mortgages, leases, gifts, but it also includes vesting declarations. In the case of immovable property, only a declaration is necessary to vest the property in the trustee. 42 C.W.N. 1131=1938 Cal. 818. Where a person sets apart a certain sum for charity and invests it with a merchant and the interest paid by the merchant is spent on charity, the merchant is not a trustee in respect of the amount. 1925 Sind 239. Trust—Specific property necessary—Document purporting to be a will—Not signed by testator—Joint Hindu family—Proof of assent—Oral will. 49 M.L.J. 734. Evidence necessary to prove trust. *See* 33 B. 403=13 Bom. L.R. 564. *See also* 92 I.C. 1016; 91 I.C. 914; 1926 M. 284.

Sec. 6: SCOPE OF SECTION.—Trust must be created with reasonable certainty. 1925 S.195. Before there can be a trust of movable property, the author of the trust must indicate with reasonable certainty by words or acts (*a*) an intention on his part to create a trust, (*b*) the purpose of the trust, (*c*) the beneficiary and (*d*) the trust property, and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfer the trust property to the trustee. (1940) 2 M.L.J. 66=1941 Mad. 256. *See also* 52 L.W. 724=I.L.R. (1941) Mad. 232 =1941 Mad. 154=(1941) 2 M.L.J. 963. Though it is true that no particular words of transfer are required, the document must aim at effecting a transfer. Where far from being a transfer in favour of the trustees, there was every indication that the author of the trust had no intention of parting with the ownership of property, that no valid trust is created. 1941 O.W.N. 906=1941 Oudh 529. Amounts credited in account in favour of relatives by owner of property—Effect. *See* 52 L.W. 726. Company—Memorandum of Association mentioning trust as one of the primary objects—Condition that 30 per cent. of moneys received from certificate-holders to be allocated to specific trust—Conditions endorsed in certificate—Subscriber accepting certificate and remitting moneys—Trust is validly created. 1937 M. 368=(1937) 1 M.L.J. 10.

ILLUSTRATIVE CASES.—Vanabhojana Dharmam is not too vague an object of a charitable trust. 88 I.C. 375=1925 M. 689. Where a trust deed provides that the beneficiary should get a certain village named therein or any other village having the same amount of profits and being of similar quality, there is no uncertainty about the trust property, and the trust is valid. 165 I.C. 113=1937 O. 99. A trust to be valid need not be created *in praesenti*, the word "thereby" in S. 6 refers to "words or acts" and only means that an intention on the part of the author of the trust must appear with reasonable certainty *by any words or acts*. 1937 Oudh 99. A person who collects money for a charity, whether or not the person from whom the money is collected pays it willingly or with any sympathy or interest in the charity in question, becomes a trustee of such money for the charity; it is entirely immaterial that the charity or society for which the money is collected has made any arrangement with the collector of the money authorising him to collect, because the trust is constituted by the payment by the member of the public on

Subject of trust.

8. The subject-matter of a trust must be property transferable to the beneficiary.

It must not be merely beneficial interest under a subsisting trust.

Who may be beneficiary.

9. Every person capable of holding property may be a beneficiary.

A proposed beneficiary may renounce his interest under the trust by disclaimer addressed to the trustee, or by setting up, with notice of the trust, a claim inconsistent therewith.

Disclaimer by beneficiary.

Who may be trustee.

10. Every person capable of holding property may be a trustee; but, where the trust involves the exercise of discretion, he cannot execute it unless he is competent to contract.

No one bound to accept trust.

No one is bound to accept a trust.

Acceptance of trust.

A trust is accepted by any words or acts of the trustee indicating with reasonable certainty such acceptance.

Disclaimer of trust.

Instead of accepting a trust, the intended trustee may, within a reasonable period, disclaim it, and such disclaimer shall prevent the trust-property from vesting in him.

A disclaimer by one of two or more co-trustees vests the trust-property in the other or others, and makes him or them sole trustee or trustees from the date of the creation of the trust.

Illustrations.

(*a*) *A* bequeaths certain property to *B* and *C*, his executors, as trustees for *D*. *B* and *C* prove *A's* will. This is in itself an acceptance of the trust, and *B* and *C* hold the property in trust for *D*.

NOTES.

the representation by the collector that the money is for a specific charitable purpose. 18 Pat.L.T. 286=1937 P. 358. Where a trader collects from his customers a small sum proportionate to every sale of goods made and the percentage, which is known as *biti* is intended for the charity and credited in his accounts to the charity, the charity is entitled to an account from the trader of all the moneys had to its use from the customers. 1937 P. 358. Gift subject to condition that donee should maintain certain person, was held to create an implied trust and such a person, though not a party to the deed, can enforce the charge. 80 I.C. 495=1925 N. 29. Wish expressed by testator in will that successors taking his estate shall maintain and preserve religious institutions maintained by him and spend same amount of income from estate as he was spending—If creates trust. 21 Pat. 488 (F.B.); *see also* 46 L.W.413=1937 Mad. 789.

DELIVERY.—To create a valid trust under this section, it is not necessary that there should be physical delivery of the property. 14 O.C. 356=13 I.C. 882. As to words that are necessary to create a trust, *see* 24 M.L.T. 267; 51 I.C. 253; 37 Bom.L.R. 763; 17 B.L.R. 783; 150 I.C. 989=1934 L. 307.

Secs. 6 and 8.—*See* 12 R. 589=1934 R. 209.

Secs. 7 and 8.—*See* 33 B. 509=11 Bom. L.R. 85.

Sec. 8.—All transferable property can be saddled with a trust by deed *inter vivos* or by will if objects of trust are lawful. 1925 Sind 159. What S. 8 forbids is a trust of a mere right of the beneficiary to proceed against the trustee. *K* by his will directed his trustees to appropriate the proceeds of certain shares to each of his five children (one of whom was named *B*) to pay the income during his or her life and after the decease of such child, to hold the share appropriated to him or her in trust and equally divide the same among the issue of such child. *G*, daughter of *B*, who died during lifetime of *B* made a will by which she made a trust of the property which she would have received under *K's* trust deed. *Held*, that the trust was not a trust of a mere beneficial interest, but a trust of the actual property given by the will of *K* to *G* receivable by her on the death of her mother and the trust was a valid one: 150 I.C. 474=36 Bom.L.R. 42=1924 B. 64.

Sec. 9.—The latter portion of S. 9 is an enabling and not a disabling provision. It recognizes the possibility of a beneficiary desiring to renounce his interest under the trust and suggests two modes by which this can be done. It does not mean that in every case in which a beneficiary sets up a claim which can be regarded as inconsistent with the trust, he loses thereby *all his rights under the trust*. 14 Luck. 548=1939 Oudh 161.

Sec. 10.—Minor not competent to be trustee of public trust. *See* 27 I.C. 389=18 O. C. 38. The appointment of himself as trustee by a person having the right of appointment is not *per se* illegal. 42 C.W. N. 201.

(*b*) *A* transfers certain property to *B* in trust to sell it and to pay out of the proceeds *A's* debts. *B* accepts the trust and sells the property. So far as regards *B*, a trust of the proceeds is created for *A's* creditors,

(*c*) *A* bequeaths a lakh of rupees to *B* upon certain trusts and appoints him his executor. *B* servers the lakh from the general assets and appropriates it to the specific purpose. This is an acceptance of the trust.

CHAPTER III.

OF THE DUTIES AND LIABILITIES OF TRUSTEES.

Trustee to execute trust.

11. The trustee is bound to fulfil the purpose of the trust, and to obey the directions of the author of the trust given at the time of its creation, except as modified by the consent of all the beneficiaries being competent to contract.

Where the beneficiary is incompetent to contract, his consent, may, for the purposes of this section, be given by a principal Civil Court of original jurisdiction.

Nothing in this section shall be deemed to requir a trustee to obey any direction when to do so would be impracticable, illegal or manifestly injurious to the beneficiaries.

Explanation.—Unless a contrary intention be expressed, the purpose of a trust for the payment of debts shall be deemed to be (*a*) to pay only the debts of the author of the trust existing and recoverable at the date of the instrument of trust, or, when such instrument is a will, at the date of his death, and (*b*) in the case of debts not bearing interest, to make such payment without interest.

Illustrations.

(*a*) *A*, a trustee, is simply authorized to sell certain land by public auction. He cannot sell the land by private contract.

(*b*) *A*, a trustee of certain land for *X*, *Y* and *Z*, is authorised to sell the land to *B* for a specified sum. *X*, *Y* and *Z*, being competent to contract, consent that *A* may sell the land to *C* for a less sum. *A* may sell the land accordingly.

(*c*) *A*, a trustee for *B* and her children, is directed by the author of the trust to lend, on *B's* request, trust-property to *B's* husband, *C*, on the security of his bond. *C* becomes insolvent and *B* requests *A* to make the loan. *A* may refuse to make it.

Trustee to inform himself of state of trust property.

12. A trustee is bound to acquaint himself, as soon as possible, with the nature and circumstances of the trust-property; to obtain, where necessary, a transfer of the trust-property to himself; and (subject to the provisions of the instrument of trust) to get in trust-moneys invested on insufficient or hazardous security.

NOTES.

Sec. 11.—Where the trustees' discretion is restricted to the manner in which the trust is to be executed it is impossible to hold that the trustees can make any payments beyond those specified in the deed of trust. Where the trust was for the payment of certain specified debts, it would be clearly a breach of trust on their part if they went out of their way to make payments not specified in the deed of trust. 14 Luck. 548=1939 Oudh 161. Where any particular contingency has not been anticipated or provided for by the testator and the consent of the beneficiaries cannot be obtained by reason of their being minors, it is open to the Court to ascertain the paramount intention expressed in the will and to consider if the act to be done by the trustees can properly be read as subordinate to such intention and sanction, on behalf of all the parties interested, and if beneficial to them, order the act being done by the trustees. So where a deed of trust executed by the testator disclosed a paramount intention to benefit his grand-daughter who had a contingent interest in it, the Court may allow the trustee to expend a reasonable amount for the expenses of her consummation ceremony, though the deed made no provision for any intermediate payment except by way of maintenance. But expenses of litigation incurred by the widow, who had only a life-interest under the will, cannot be allowed. 142 I.C. 108=1933 M. 242=64 M.L.J. 235=56 M. 508.

Sec. 11, Expl.—The explanation to S. 11 no doubt implies that interest can be paid on debts which bear interest, but it cannot be inferred from the language used that it is incumbent on the trustees in every case to pay interest on interest bearing debts. The explanation is subject to the terms of the deed of trust and when it does not make a provision for payment of interest on the debts specified, the explanation cannot be invoked for purposes of claiming any interest on the debts. 14 Luck. 548=1939 Oudh 161.

Illustrations.

(*a*) The trust-property is a debt outstanding on personal security. The instrument of trust gives the trustee no discretionary power to leave the debt so outstanding. The trustee's duty is to recover the debt without unnecessary delay.

(*b*) The trust-property is money in the hands of one of two co-trustees. No discretionary power is given by the instrument of trust. The other co-trustees must not allow the former to retain the money for a longer period than the circumstances of the case required.

Trustee to protect title to trust-property.

13. A trustee is bound to maintain and defend all such suits and (subject to the provisions of the instrument of trust) to take such other steps as, regard being had to the nature and amount or value of the trust-property, may be reasonably requisite for the preservation of the trust property and the assertion or protection of the title hereto.

Illustration.

The trust-property is immovable property which has been given to the author of the trust by an unregistered instrument. Subject to the provisions of the Indian Registration Act, 1877, the trustee's duty is to cause the instrument to be registered.

Trustee not to set up title adverse to beneficiary.

14. The trustee must not for himself or another set up or aid any title to the trust-property adverse to the interest of the beneficiary.

Care required from trustee.

15. A trustee is bound to deal with the trust-property as carefully as a man of ordinary prudence would deal with such property if it were his own; and, in the absence of a contract to the contrary, a trustee so dealing is not responsible for the loss, destruction or deterioration of the trust-property.

Illustrations.

(*a*) *A*, living in Calcutta, is a trustee for *B*, living in Bombay. *A* remits trust-funds to *B* by bills drawn by a person of undoubted credit in favour of the trustee as such, and payable at Bombay. The bills are dishonoured. *A* is not bound to make good the loss.

(*b*) *A*, a trustee of leasehold property, directs the tenant to pay the rents on account of the trust to a banker, *B*, then in credit. The rents are accordingly paid to *B*, and *A* leaves the money with *B* only till wanted. Before the money is drawn out, *B* becomes insolvent, *A*, having had no reason to believe that *B* was in insolvent circumstances, is not bound to make good the loss.

(*c*) *A*, trustee of two debts for *B*, releases one and compounds the other, in good faith, and reasonably believing that it is for *B's* interest to do so. *A* is not bound to make good any loss caused thereby to *B*.

(*d*) *A*, a trustee directed to sell the trust-property by auction, sells the same, but does not advertise the sale and otherwise fails in reasonable diligence in inviting compensation. *A* is bound to make good the loss caused thereby to the beneficiary.

(*e*) *A*, a trustee for *B*, in execution of his trust, sells the trust-property, but from want of due diligence on his part fails to receive part of the purchase-money. *A* is bound to make good the loss thereby caused to *B*.

(*f*) *A*, a trustee for *B* of a policy of insurance, has funds in hand for payment of the premiums. *A* neglects to pay the premiums, and the policy is consequently forfeited. *A* is bound to make good the loss to *B*.

(*g*) *A* bequeaths certain moneys to *B* and *C* as trustees, and authorises them to continue trust-moneys upon the personal security of a certain firm in which *A* had himself

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Sec. 14.—No person who has accepted the position of trustee or of *quasi*-trustee and has acquired property in that capacity can be permitted to assert an adverse title on his own behalf until he has obtained a proper discharge from the trust with which he has clothed himself. I.L.R. (1939) Nag. 1=1938 Nag. 335 (F.B.).

Sec. 15.—*See* 38 M. 71=23 M.L.J. 599. A temple is not a money-lending concern, and therefore for a trustee of the temple to divert its funds out of the usual course of business into such channels is not the kind of act which can be protected under S. 15. This is especially so when the money is loaned to the trustee's relative. I.L.R. (1940) Nag. 94=1938 Nag. 30.

Secs. 15 and 20.—The care to be applied to a temporary investment of capital can be no less than that which the Trusts Act requires for an investment of current expenditure not immediately wanted, and so an omission to apply the same standard of care would amount to the kind of neglect contemplated by S. 15. I.L.R. (1940) Nag. 94=1938 Nag. 30.

invested them. *A* dies, and a change takes place in the firm. *B* and *C* must not permit the moneys to remain upon the personal security of the new firm.

(*h*) *A*, a trustee for *B*, allows the trust to be executed solely by his co-trustee, *C*. *C* misapplies the trust-property. *A* is personally answerable for the loss resulting to *B*.

Conversion of perishable property.

16. Where the trust is created for the benefit of several persons in succession, and the trust-property is of a wasting nature or a future or reversionary interest, the trustee is bound, unless an intention to the contrary may be inferred from the instrument of trust, to convert the property into property of a permanent and immediately profitable character.

Illustrations.

(*a*) *A* bequeaths to *B* all his property in trust for *C* during his life, and on his death for *D*, and on *D's* death for *E*. *A's* property consists of three leasehold houses, and there is nothing in *A's* will to show that he intended the houses to be enjoyed *in specie*. *B* should sell the houses, and invest the proceeds in accordance with section 20.

(*b*) *A* bequeaths to *B* his three leasehold houses in Calcutta and all the furniture therein in trust for *C* during his life, and on his death for *D*, and on *D's* death for *E*. Here an intention that the houses and furniture should be enjoyed *in specie* appears clearly, and *B* should not sell them.

Trustee to be impartial.

17. Where there are more beneficiaries than one, the trustee is bound to be impartial, and must not execute the trust for the advantage of one at the expense of another.

Where, the trustee has a discretionary power, nothing in this section shall be deemed to authorize the Court to control the exercise reasonably and in good faith of such discretion.

Illustration.

A, a trustee for *B*, *C* and *D*, is empowered to choose between several specified modes of investing the trust-property. *A* in good faith chooses one of these modes. The Court will not interfere, although the result of the choice may be to vary the relative rights of *B*, *C* and *D*.

Trustee to prevent waste.

18. Where the trust is created for the benefit of several persons in succession and one of them is in possession of the trust-property, if he commits, or threatens to commit, any act which is destructive or permanently injurious thereto, the trustee is bound to take measures to prevent such Act.

Accounts and information.

19. A trustee is bound (*a*) to keep clear and accurate accounts of the trust-property, and (*b*) at all reasonable times, at the request of the beneficiary to furnish him with full and accurate information as to the amount and state of the trust-property.

NOTES.

Sec. 19: *Phillips, Offg. C.J.*—In a suit for accounts against trustee, the expenses of litigation conducted by the trustee, practically to save himself from a charge of negligence which did not benefit the estate, cannot be allowed. *Srinivasa Iyengar, J.*—As far as possible the Court should allow in favour of a trustee expenses which he had incurred in respect of the estate provided they are incurred in good faith and even though such expenses might have been avoided if the trustee had exercised due care and attention. 51 M. 291=109 I.C. 153=1928 M. 180=54 M.L.J. 703. *See also* 67 M. L.J. 787; 151 I.C. 952=1934 A. 793. In a suit for breach of trust against the trustees where the plea is that the trustees have not maintained proper accounts or furnished them to the beneficiaries, it is not sufficient to show that the account was not regularly and correctly kept from day to day, but was mostly written up for the purpose of being produced in Court. What is more important is the question whether the account, as far as it goes, can be shown to be untrue in the sense that the actual receipts are not entered or the expenditure entered is fictitious or excessive. Thus, the faults in the mode of account keeping are to be distinguished from the faults involving dishonesty or misconduct. 40 L.W. 122=1934 M. 448 =67 M.L.J. 223. In order to be relieved from personal liability for any breach of trust, the trustee must establish that he acted honestly and reasonably. Where a trustee never considered the question of his dealings with the trust funds in the light of his duty as a trustee, nor paused to consider whether it was prudent for him as a trustee to lend on the personal security of the borrowers, he is not entitled to any relief from

Investment of trust money.

20. Where the trust-property consists of money and cannot be applied immediately or at an early date to the purposes of the trust, the trustee is bound (subject to any direction contained in the instrument of trust) to invest the money on the following securities, and on no others:—

(*a*) in promissory notes, debentures, stock or other securities [1][of any Provincial Government or] of the Central Government, or of the United Kingdom of Great Britain and Ireland:

[2][Provided that securities, both the principal whereof and the interest whereon shall have been fully and unconditionally guaranteed by any such Government, shall be deemed, for the purposes of this clause, to be securities of such Government;]

(*b*) in bonds, debentures and annuities [1][charged or secured by the Imperial Parliament on the revenues of India or of the Federation or of any Province]:

[3][Provided that, after the fifteenth day of February, 1916, no money shall be invested in any such annuity being a terminable annuity unless a sinking fund has been established in connection with such annuity; but nothing in this proviso shall apply to investments made before the date aforesaid;]

[3][(*bb*) in India three and a half per cent. stock, India three per cent. stock, India two and a half per cent. stock or any other capital stock which may at any time hereafter be issued by the Secretary of State for India in Council under the authority of an Act of Parliament and charged on the revenues of India [1](or which may be issued by the Secretary of State on behalf of the Governor-General in Council under the provisions of Part XIII of the Government of India Act, 1935)]:

(*c*) in stock or debentures of, or shares in, Railway or other Companies the interest whereon shall have been guaranteed by the Secretary of State for India in Council [3][or by the Central Government] [4][or in debentures of the Bombay ([4]Provincial Co-operative Bank, Limited, the interest whereon shall have been guaranteed by the Secretary of State of India in Council [1](or the Provincial Government of Bombay)];

LEG. REF.

[1] Inserted by A.O., 1937.
[2] Inserted by Act XVIII of 1934.
[3] Added by Act I of 1916.
[4] Inserted by Act XXI of 1917 and the word "Provincial" was substituted for "Central" by Act XXXVII of 1925.

NOTES.

personal liability for the loss occasioned to the estate by such loans. 1934 A.L.J. 1001 =1934 P.C. 243 (P.C.). A minor may elect to sue a fraudulent trustee either for damages or for an account. Where the trustee is assisted in his fraudulent acts by his agents, the *cestui que trust* can call on the trustee as well as his agents to render an account. 57 M. 1031=1934 M. 367=66 M. L.J. 451.

Sec. 19 (b).—Every member of a caste is at all reasonable times and on proper demand entitled to full and free inspection of all account books, papers and vouchers relating to the management of the trust properties in the defendants' possession. 56 B. 242=137 I.C. 461=34 Bom.L.R. 343=1932 B. 122 (F.B.).

Sec. 20.—*See* 38 M. 71. It is the duty of a trustee to confine himself to the class of investments which are permitted by the trust and likewise to avoid all investments of that class which are attended with hazard. A person making an advance upon his own account upon the security of immovable property may no doubt be influenced to do so by the value of the security itself and partly by his estimate of the solvency and character of the borrower. These two factors may blend in his mind, as it were, in helping him to arrive at a conclusion. But a trustee may not blend these considerations together. He must not allow the character or solvency of the borrower to weigh with him so as to make his advance, in effect, an advance not upon the security offered, but upon a consideration of other matters which seem to make it safe not to rely upon the security alone. 1940 Rang.L.R. 273=1940 Rang. 207. The money invested in the purchase of a house is not an investment authorised by S. 20. 38 L.W. 119=144 I.C. 479 =1933 M. 628=65 M.L.J. 471. *See also* I.L.R. (1940) Nag. 94=1938 Nag. 30.

(*d*) [4][in debentures or other securities for money issued, under the authority of any Act of a Legislature established in British India, by or on behalf of any municipal body, port trust or city improvement trust in any Presidency-town, or in Rangoon Town, or by or on behalf of the trustees of the port of Karachi;]

(*e*) on a first mortgage of immovable property situate in British India: Provided that the property is not a leasehold for a term of years and that the value of the property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the mortgage-money; or

(*f*) on any other security expressly authorized by the instrument of trust, or by any rule[2] which the High Court may from time to time prescribe in this behalf:

Provided that, where there is a person competent to contract and entitled in possession to receive the income of the trust-property for his life, or for any greater estate, no investment on any security mentioned or referred to in clauses (*d*), (*e*) and (*f*) shall be made without his consent in writing.

Power to purchase redeemable stock at a premium.

[3][20-A. (1) A trustee may invest in any of the securities mentioned or referred to in section 20, notwithstanding that the same may be redeemable and that the price exceeds the redemption value:

Provided that a trustee may not purchase at a price exceeding its redemption value any security mentioned or referred to in clauses (*c*) and (*d*) of section 20 which is liable to be redeemed within fifteen years, of the date of purchase at par or at some other fixed rate, or purchase any such security as is mentioned or referred to in the said clauses which is liable to be redeemed at par or at some other fixed rate at a price exceeding fifteen per centum above par or such other fixed rate.

(2) A trustee may retain until redemption any redeemable stock, fund or security which may have been purchased in accordance with this section.]

Mortgage of land pledged to Government under Act XXVI of 1871. Deposit in Government Savings Bank.

21. Nothing in section 20 shall apply to investments made before this Act comes into force, or shall be deemed to preclude an investment on a mortgage of immovable property already pledged as security for an advance under the Land Improvement Act, 1871[4] or, in case the trust-money does not exceed three thousand rupees, a deposit thereof in a Government Savings Bank.

Sale by trustee directed to sell within specified time.

22. Where a trustee directed to sell within a specified time extends such time, the burden of proving, as between himself and the beneficiary, that the latter is not prejudiced by the extension lies upon the trustee, unless the extension has been authorized by a principal Civil Court of original jurisdiction.

Illustration.

A bequeaths property to *B*, directing him with all convenient speed and within five years to sell it, and apply the proceeds for the benefit of *C*. In the exercise of reasonable discretion, *B* postpones the sale for six years. The sale is not thereby rendered invalid,

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LEG. REF.

[1] Substituted by S. 2 of Trust (Amendment) Act (III of 1908) for:—"In debentures or other securities for money issued by, or on behalf of any municipal body under the authority of any Act of a Legislature established in British India."

[2] For rules made by the Chief Court of Punjab, see *Punjab Gazette*, 1906, Pt. III. p. 388; and by the Chief Court of Lower Burma, see *Burma Gazette*, 1903, Pt. IV, p. 172; *ibid.*, 1905, Pt. IV, p. 515.

[3] Added by Act I of 1916.

[4] *See* now the Land Improvement Loans Act, 1883 (XIX of 1883).

NOTES.

Sec. 20 (e).—For the purpose of S. 20 (*e*) the value of the property does not mean what would be obtained at a forced sale of the property. 1940 Rang.L.R. 273=1940 Rang. 207.

but *C*, alleging that he has been injured by the postponement, institutes a suit against *B* to obtain compensation. In such suit the burden of proving that *C* has not been injured lies on *E*.

Liability for breach of trust.

23. Where the trustee commits a breach of trust, he is liable to make good the loss which the trust-property or the beneficiary has thereby sustained, unless the beneficiary has by fraud induced the trustee to commit the breach, or the beneficiary, being competent to contract, has himself, without coercion or undue influence having been brought to bear on him, concurred in the breach, or subsequently acquiesced therein, with full knowledge of the facts of the case and of his rights as against the trustee.

A trustee committing a breach of trust is not liable to pay interest except in the following cases:—

(*a*) where he has actually received interest:

(*b*) where the breach consists in unreasonable delay in paying trust-money to the beneficiary:

(*c*) where the trustee ought to have received interest, but has not done so:

(*d*) where he may be fairly presumed to have received interest.

He is liable, in case (*a*), to account for the interest actually received, and, in cases (*b*), (*c*) and (*d*), to account for simple interest at the rate of six per cent. per annum, unless the Court otherwise directs.

(*e*) Where the breach consists in failure to invest trust-money and to accumulate the interest or dividends thereon, he is liable to account for compound interest (with half-yearly rests) at the same rate.

(*f*) Where the breach consists in the employment of trust-property or the proceeds thereof in trade or business, he is liable to account, at the option of the

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NOTES.

Sec. 23.—*See* 40 I.C. 779; 1918 M.W.N. 555; 38 M. 71. In a suit for breach of trust the account to be taken must be a common account which will give the beneficiaries liberty to surcharge and falsify, but not on the footing of wilful default. 40 L.W. 122 =1934 M. 448=67 M.L.J. 222. An accounting party not rendering accounts properly, but retaining trust moneys (such as the unpaid purchase-moneys due by the trustees on the several benami purchases) in his hands must pay interest, even if the debt by its nature does not carry interest. 40 L.W. 122=67 M.L.J. 222; 11 Mys.L.J. 480. The object of a marriage settlement by way of trust is to protect the beneficiary against herself; and merely because the beneficiary happens to know that the trust fund or any part thereof is to be invested in a particular manner and consents thereto, the trustees are not absolved from liability under S. 23, unless she concurred or acquiesced in the breach with full knowledge of the facts of the case and of her rights as against the trustee. The onus of proving this is on the trustees, when it is established that a breach of trust has been committed. 1935 R. 146 =156 I.C. 578.

Sec. 23 (b).—Muhammadan family—Ancestral trade—Liability of managing member. *See* 54 M. 543=1931 M. 553=61 M. L.J. 139. In a suit by a beneficiary under a deed of wakf against the mutawalli for the payment to her of her share of profits, the payment of which had been unreasonably delayed, the plaintiff is entitled to interest on the amount of the claim on "equitable" ground. The mutawalli stands, in the position of a *quasi-trustee*. 1933 A.L.J. 21=1933 A. 186=55 A. 164=146 I.C. 733. Persons who are not the present trustees are not entitled to maintain in that capacity a suit on behalf of the trust for possession of immovable properties of the trust or for mesne profits. Where under a will executed by a Hindu a trust is created in respect of certain charities, and the testator appoints his son as trustee for life and after the latter's death his son (*i.e.*, the testator's grandsons) as trustees, the grandsons cannot during their father's lifetime maintain a suit for possession of trust properties. The fact that their father has been guilty of misconduct and breach of trust and has alienated the trust properties or that he has totally failed to perform the trust and has left British India would not be sufficient for holding that the father *ipso facto* ceased to be a trustee and that the plaintiffs directly became trustees entitling them to maintain the suit. The father's misconduct or breach of trust might justify his removal from office, but for such reliefs there must be the necessary allegations and the prayer; further if the trusts are public charitable trusts, a suit for removal will have to be in compliance with S. 92, C.P. Code, or if they are religious trusts, S. 53 or S. 73 of the Madras Hindu Religious Endowments Act will govern the case. 1939 Mad. 154=(1938) 2 M. L.J. 982.

Sec. 23 (f).—*See* 61 M.L.J. 139. Trust property employed in trade—Liability to ac-

beneficiary, either for compound interest (with half-yearly rests) at the same rate, or for the nett profits made by such employment.

Illustrations.

(*a*) A trustee improperly leaves trust-property outstanding, and it is consequently lost; he is liable to make good the property lost, but he is not liable to pay interest thereon.

(*b*) *A* bequeaths a house to *B* in trust to sell it and pay the proceeds to *C*. *B* neglects to sell the house for a great length of time, whereby the house is deteriorated and its market price falls. *B* is answerable to *C* for the loss.

(*c*) A trustee is guilty of unreasonable delay in investing trust-money in accordance with section 20, or in paying it to the beneficiary. The trustee is liable to pay interest thereon for the period of the delay.

(*d*) The duty of the trustee is to invest trust-money in any of the securities mentioned in section 20, clause (*a*), (*b*) (*c*), or (*d*). Instead of so doing, he retains the money in his hands. He is liable, at the option of the beneficiary, to be charged either with the amount of the principal money and interest, or with the amount of such securities as he might have purchased with the trust-money when the investment should have been made, and the intermediate dividends and interest thereon.

(*e*) The instrument of trust directs the trustee to invest trust-money either in any such securities or on mortgage of immovable property. The trustee does neither. He is liable for the principal money and interest.

(*f*) The instrument of trust directs the trustee to invest trust-money in any of such securities and to accumulate the dividends thereon. The trustee disregards the direction. He is liable, at the option of the beneficiary, to be charged either with the amount of the principal money and compound interest, or with the amount of such securities as he might have purchased with the trust-money when the investment should have been made, together with the amount of the accumulation which would have arisen from a proper investment of the intermediate dividends.

(*g*) Trust-property is invested in one of the securities mentioned in section 20, clause (*a*), (*b*), (*c*) or (*d*). The trustee sells such security for some purpose not authorized by the terms of the instrument of trust. He is liable, at the option of the beneficiary, either to replace the security with the intermediate dividends and interest thereon, or to account for the proceeds of the sale with interest thereon.

(*h*) The trust-property consists of land. The trustee sells the land to a purchaser for a consideration without notice of the trust. The trustee is liable, at the option of the beneficiary, to purchase other land of equal value to be settled upon the like trust, or to be charged with the proceeds of the sale with interest.

No set-off allowed to trustee.

24. A trustee who is liable for a loss occasioned by a breach of trust in respect of one portion of the trust-property cannot set-off against his liability a gain which has accrued to another portion of the trust-property through another and distinct breach of trust.

Non-liability for predecessor's default.

25. Where a trustee succeeds another, he is not, as such, liable for the acts or defaults of his predecessor.

NOTES.

count—Rate of interest. *See* 11 M.L.J. 480. *Cestui que trust*—Decree against trustee—Binding character. 1935 O.W.N. 674 =1935 O. 394. Where, a guardian debits his ward's account with the moneys as and when received and credits them in his family account treating the sums so credited practically as loans advanced by the minor to his family and after so crediting and mixing the said moneys with his moneys, he spends the joint funds both for his common family expenses and also for money-lending business, and a large extent of those moneys is utilized by him in the money-lending business, but it is not possible to predicate which portion of the money and how much was lent out in the course of the said business, it cannot be said that the moneys of the minor were invested in the money-lending business within the meaning of Cl. (*f*). Under such circumstances the guardian is liable only to account for interest actually received by him. 1937 M.W.N. 358=1937 M. 675=173 I.C. 33 The trustees of a charity would not be justified in changing the name of the charity without the permission of the Court. But the trustees, by merely changing the name of a charity without such permission cannot be held to be guilty of such a serious breach of trust as to justify their removal. 44 Bom. L.R. 466.

Sec. 25.—The legal representative of an agent or trustee or co-trustee is not liable to render account of the estate which was in charge of his predecessor. A suit for account is accordingly not maintainable against such a person. But a suit for recovery of money misappropriated by a trustee or co-trustee or an agent will lie against his legal representative. In such a suit the decree will be against the assets of the deceased. A

Non-liability for co-trustee's default.

26. Subject to the provisions of sections 13 and 15, one trustee is not, as such, liable for a breach of trust committed by his co-trustee:

Provided that, in the absence of an express declaration to the contrary in the instrument of trust, a trustee is so liable—

(*a*) where he has delivered trust-property to his co-trustee without seeing to its proper application;

(*b*) where he allows his co-trustee to receive trust-property and fails to make due enquiry as to the co-trustee's dealings therewith or allows him to retain it longer than the circumstances of the case reasonably require;

(*c*) where he becomes aware of a breach of trust committed or intended by his co-trustee, and either actively conceals it or does not within a reasonable time take proper steps to protect the beneficiary's interest.

Joining in receipt for conformity.

A co-trustee who joins in signing a receipt for trust-property and proves that he has not received the same is not answerable, by reason of such signature only, for loss or misapplication of the property by his co-trustee.

Illustration.

A bequeaths certain property to *B* and *C*, and directs them to sell it and invest the proceeds for the benefit of *D*. *B* and *C* accordingly sell the property, and the purchase-money is received by *B* and retained in his hands. *C* pays no attention to the matter for two years, and then calls on *B* to make the investment. *B* is unable to do so, becomes insolvent, and the purchase-money is lost. *C* may be compelled to make good the amount.

Several liability of co-trustees.

27. Where co-trustees jointly commit a breach of trust, or where one of them by his neglect enables the other to commit a breach of trust, each is liable to the beneficiary for the whole of the loss occasioned by such breach.

Contribution as between co-trustees.

But as between the trustees themselves, if one be less guilty than another and has had to refund the loss, the former may compel the latter, or his legal representative to the extent of the assets he has received, to make good such loss; and, if all be equally guilty, any one or more of the trustees who has had to refund the loss may compel the others to contribute.

Nothing in this section shall be deemed to authorize a trustee who has been guilty of fraud to institute a suit to compel contribution.

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suit for recovery of a specific sum of money does not assume the character of a suit for account merely because in the determination of the questions in controversy accounts may have to be examined. In such a suit the defendant will be under no obligation to explain any item that may appear in the account papers, and the onus will be entirely upon the plaintiff to substantiate each and every item in the account papers on which he may rely or which he may challenge. 46 C.W.N. 865.

Sec. 26.—Where a co-trustee, who was the nephew of the author of the trust, took a leading part in administering the trust, it is only in exceptional cases that a co-trustee can be made liable for the breach of trust committed by such a co-trustee. 154 I.C. 366=1934 L. 47. Trustees are liable not only to account for the moneys that have actually come into their hands but also for moneys which might have come into their hands if they had acted with due diligence and without gross negligence and in all cases they would be liable for the result of their gross negligence. But where there are a number of trustees and there is such disunion among them that, however much a trustee or trustees are honest, diligent and willing to discharge their duty, it is practically impossible to carry on the management properly, the diligent trustee should not under such circumstances be made liable as for gross negligence or wilful default; and he cannot be made jointly and severally liable for the loss occasioned by the gross negligence of the other trustees. 57 M. 315.

Sec. 26 (b).—One co-trustee only realizing the assets—Liability of the other co-trustees for loss. 28 Bom.L.R. 1481=99 I.C. 763=1927 B. 75.

28. When any beneficiary's interest becomes vested in another person, and the trustee, not having notice of the vesting, pays or delivers trust-property to the person who would have been entitled thereto in the absence of such vesting, the trustee is not liable for the property so paid or delivered.

Non-liability of trustee paying without notice of transfer by beneficiary.

29. When the beneficiary's interest is forfeited or awarded by legal adjudication [1][to the Crown], the trustee is bound to hold the trust-property to the extent of such interest for the benefit of such person in such manner as [2][the Provincial Government] may direct in this behalf.

Liability of trustee where beneficiary's interest is forfeited to Government.

30. Subject to the provisions of the instrument of trust and of sections 23 and 26, trustees shall be respectively chargeable only for such moneys, stocks, funds and securities as they respectively actually receive and shall not be answerable the one for the other of them, nor for any banker, broker or other person in whose hands any trust-property may be placed, nor for the insufficiency or deficiency of any stocks, funds or securities, nor otherwise for involuntary losses.

Indemnity of trustees.

CHAPTER IV.

OF THE RIGHTS AND POWERS OF TRUSTEES.

31. A trustee is entitled to have in his possession the instrument of trust and all the documents of title (if any) relating solely to the trust property.

Right to title-deed.

32. Every trustee may reimburse himself, or pay or discharge out of the trust-property, all expenses properly incurred in or about the execution of the trust, or the realization, preservation or benefit of the trust-property, or the protection or support of the beneficiary.

Right to reimbursement of expenses.

If he pays such expenses out of his own pocket, he has a first charge upon the trust-property for such expenses and interest thereon; but such charge (unless the expenses have been incurred with the sanction of a principal Civil Court of original jurisdiction) shall be enforced only by prohibiting any disposition of the trust property without previous payment of such expenses and interest.

If the trust-property fail, the trustee is entitled to recover from the beneficiary personally on whose behalf he acted, and at whose request, expressed or implied, he made the payment, the amount of such expenses.

LEG. REF.

[1] Substituted for 'to Government' by A.O., 1937.

[2] Substituted for "the Government" by A.O., 1937.

NOTES.

Sec. 32.—*See* 38 M. 260; 28 M.L.J. 571=39 M. 456. In order that a creditor may obtain relief of subrobation to trustee's right of indemnity (1) the plaintiff should sue the trustee as a trustee; (2) under O. 31, R. 2, C.P. Code, all the trustees should be represented; (3) the parties beneficially interested should be represented; and (4) indemnity and subrogation to that right should be claimed. The right of subrogation can be determined in the suit but not in execution. 60 C. 801 =1933 C. 668. *Quaere*: Whether a Court enforcing the right of indemnity against any trustee will allow actual sale of the trust property in execution. 60 C. 801=1933 C. 668. Where a debt is incurred by a trustee for the benefit of the estate, and the creditor sues such trustee personally and obtains a decree and in execution attaches the trust-property and obtains an order for sale of the property, only the beneficial interest of such trustee in the trust-property can be sold, and the question of indemnity and subrogation cannot be gone into in execution, but such relief must be sought in independent proceedings. 60 C. 801=1933 C. 668. In proceedings in which a *shebait* or trustee claims indemnity against the trust or debutter estate, the *Thakur* is a necessary party. It is contrary to equitable notions that a trustee, except in minor matters, can be allowed to make a substantial claim against the estate without the *Thakur* or the beneficiaries being represented. 63 Cal. 454. *See also* 1937 Bom. 63.

Where a trustee has by mistake made an over-payment to the beneficiary, he may reimburse the trust-property out of the beneficiary's interest. If such interest fail, the trustee is entitled to recover from the beneficiary personally the amount of such over-payment.

Right to be recouped for erroneous over-payment.

33. A person other than a trustee who has gained an advantage from a breach of trust must indemnify the trustee to the extent of the amount actually received by such person under the breach; and where he is a beneficiary the trustee has a charge on his interest for such amount.

Right to indemnity from gainer by breach of trust.

Nothing in this section shall be deemed to entitle a trustee to be indemnified who has, in committing the breach of trust, been guilty of fraud.

34. Any trustee may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for its opinion, advice or direction on any present questions respecting the management or administration of the trust-property other than questions of detail, difficulty or importance, not proper in the opinion of the Court for summary disposal.

Right to apply to Court for opinion in management of trust-property.

A copy of such petition shall be served upon, and the hearing thereof may be attended by, such of the persons interested in the application as the Court thinks fit.

The trustee stating in good faith the facts in such petition and acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee in the subject-matter of the application.

The costs of every application under this section shall be in the discretion of the Court to which it is made.

NOTES.

Sec. 34.—The allegation that a person is entitled to the office of the trustee of a fund brings the reliefs to that declaration within the purview of S. 92 (1), C.P. Code, and the proper remedy is a suit properly instituted under that section and not an application under S. 34 or 74, Trusts Act. 150 I.C. 193=11 O.W.N. 323=1934 O. 118. Whenever there is a trust to make annual payments out of the income of property and the income is larger than is required for the purpose, the Court will sanction the setting aside and retention of so much of the corpus of the property as will be sufficient by its income to meet the annual payments in every contingency that is reasonably possible, and will permit the distribution of the rest of the corpus among the persons who, subject to the payment of the annual sums, are absolutely entitled to it. But this, of course, can only be done, when the total amount of the sums payable out of the income is known, or the maximum amount that can ever be so payable can be ascertained with some degree of certainty. 55 L.W. 334=1942 P.C. 28. Charity—Right of representation—Application by trustees to Court for directions—Beneficiaries—Right to notice of and audience. 38 Bom.L.R. 1283=1937 Bom. 63. *See also* 63 Cal. 454. Application under S. 34—Order dismissing—No appeal lies. *See* 11 O.W.N. 1533=1935 O. 72; 163 I.C. 204 =1936 O. 337=1936 O.W.N. 1134. If in order to avoid disputes a number of interested parties come before the Court so that the trustees should obtain direction and guidance as to what in the circumstances is the best course for them to pursue, in giving that direction and guidance the Courts cannot in any way go behind the testator's will, nor direct that the trustees should follow any hard and fast rule in deciding within their discretion who should be the immediate objects and beneficiaries from time to time of the wakf created, but what the Court will do is to give general directions to ensure, so far as possible, that the trust fund is administered properly. 1939 Rang. 347. Proceedings in an application under S. 34 are intended to be summary and the Court would not be exercising a proper discretion if it disposed of matters of such vital importance as involving the conversion of the entire trust property, especially when there is no question of emergency. 177 I.C. 907=1938 Sind 182. Where subscriptions were paid to a committee for the purpose of carrying out a specific charitable scheme, it is not within the power of the committee as trustees to abandon that scheme on the ground that it has become impracticable, nor can they without recourse to the Court make a *cypres* application of the funds in their hands on the ground that there is a general charitable intent, even if that view is correct. Before it can be determined that a charitable scheme has become impracticable, there should be an

35. When the duties of a trustee, as such, are completed, he is entitled to have the accounts of his administration of the trust-property examined and settled; and, where nothing is due to the beneficiary under the trust, to an acknowledgment in writing to that effect.

Right to settlement of accounts.

NOTES.

enquiry by Court with proper parties representing both the interests of the charity and the subscribers. Impracticable means impracticable from a reasonable point of view. It includes not only the question of present lack of subscriptions and the virtual impossibility of getting sufficient subscriptions in the future to carry out the original charitable object as defined, but also any other reason which may contribute to make the scheme impracticable. 46 L.W. 225=41 C.W.N. 1072=1937 P.C. 240 (P.C.).

Secs. 34 and 35.—*See* 33 B. 429; 33 M. 79=19 M.L.J. 737; 27 C.L.J. 605.

Secs. 34 and 36.—A majority of the trustees have no right to elect one of them as the managing trustee so as to oust the minority trustees from taking part in the management of the trust. Each trustee is entitled to take part in the management of the trust estate. If he voluntarily agrees to an arrangement by which each of the co-trustees is to manage either by turns or for a particular period, it may be that he is bound by the result of his act. 55 L.W. 98=(1942) 1 M.L.J. 272.

Secs. 35 and 36.—An executor, administrator or trustee, who desires to avoid liability for a debt released by him, must show that he has acted honestly and reasonably. 61 C. 711; 1933 C. 393. The trustees cannot be expected to devote more care and attention to the business of the trust than an ordinary man would use in dealing with his own affairs. Where therefore the trustees recover large sums of money from the debtors of the trust, but allow some items aggregating to Rs. 770 to become barred by time, the trustees cannot be made personally liable for this sum. 1934 L. 47. Apart from authority conferred by the deed of endowment, scheme or sanction of Court, the trustees have, under certain circumstances, the power to sell property in their possession for "provident administration" of a particular charity, but the purchaser takes the property subject to the obligation of showing that the sale was beneficial to the charity and justified by the circumstances. 150 I.C. 389=58 C.L.J. 513=1934 C. 372. Where the manager of a temple borrows money for the expenses of some festival in the temple on a promissory note which contains only a personal covenant to pay without any stipulation that the creditor should look to the temple properties for repayment of his money, a suit on the promissory note against the temple is not maintainable, and no decree can validly be passed against the temple. 1942 M. 198=54 L.W. 470=(1941) 2 M.L.J. 568. Trustee—Loan by—Scheme prohibiting lending and borrowing—Person managing trust as agent of trustee advancing moneys for necessaries of trust—Promissory note by trustee—Enforceability against trust. *See* 194 I.C. 105=(1940) 1 M.L.J. 547=1940 Mad. 719=51 L.W. 708. Where the committee of management of a school leaves certain moneys in charge of its secretary for the purpose of carrying out certain alterations and additions to the school buildings, the secretary is entitled and empowered to apply them, as in his discretion is proper, for any of the purposes named by him and accepted by the committee. As to the resulting balances, it is his duty to keep the moneys standing to the credit of one or other of the accounts authorised and sanctioned by the committee, until they are required for any of the purposes aforesaid. With reference to these balances, he is under no further obligation, unless and until their application is otherwise directed by the committee. Accordingly, if, and to the extent to which he withdraws these moneys and applies them to his own purposes, he is guilty, as from the moment of withdrawal of a criminal breach of trust. 61 I.A. 350=1934 P.C. 238=68 M.L.J. 1 (P.C.). Where subscriptions were paid to a committee for the purpose of fulfilling a specific and well-defined charitable purpose and with no general charitable intent, and the charitable object has become impracticable, the subscribers have a clear right to the return of their subscriptions *pro rata*, subject only to the rights of the trustees. The members of the committee are trustees, in either event; in the event of impracticability being shown, they are trustees for the subscribers; if, on the other hand, impracticability is not shown, they still have to carry out the trust. In either event, they are entitled to their proper costs, charges and expenses as trustees. 46 L.W. 225=41 C.W.N. 1072=1937 P.C. 240 (P.C.). It is not within the power of the committee as trustees to abandon that scheme on the ground that it has become impracticable, nor can they without recourse to the Court make a *cypres* application of the funds in their hands. *See* 41 C.W.N. 1072=1937 P.C. 240 (P.C.). A trustee is bound to account to his *cestui que trust*, and if a suit for account is brought by the *cestui que trust* against the trustee, the latter can ask for a decree to be passed in his favour in that very suit if he is in surplusage. But the position of the heir or legal representative of the trustee is different. He is under no liability to account to the *cestui que trust* because of want of privity, and a suit to have an account against him is in essence a suit for recovery of the trust fund. Such being the character of the suit,

General authority of trustee.

36. In addition to the powers expressly conferred by this Act and by the instrument of trust, and subject to the restrictions, if any, contained in such instrument, and to the provisions of section 17, a trustee may do all acts which are reasonable and proper for the realization, protection or benefit of the trust property, and for the protection or support of a beneficiary who is not competent to contract.

[1][* * * * * *].

Except with the permission of a principal Civil Court of original jurisdiction, no trustee shall lease trust-property for a term exceeding twenty-one years from the date of executing the lease, nor without reserving the best yearly rent that can be reasonably obtained.

Power to sell in lots, and either by public auction or private contract.

37. Where the trustee is empowered to sell any trust-property, he may sell the same subject to prior charges or not, and either together or in lots, by public auction or private contract, and either at one time or at several times, unless the instrument of trust otherwise directs.

LEG. REF.

1. Repealed by Act XII of 1891. The repealed paragraph ran as follows:—"Every trustee in the actual possession or receipt of the rents and profits of land, as defined in the Land Improvement Act, 1871, shall, for the purposes of that Act, be deemed to be a landlord in possession."

NOTES.

he is not entitled to get a decree in the suit, if on taking accounts the balance turns in his favour. I.L.R. (1940) 1 Cal. 372=44 C. W.N. 304=1940 Cal. 337. If a deceased trustee had been guilty of negligent acts or omissions or wilful defaults, the loss occasioned must be made good from his assets in the hands of his legal representative. The cause of action survives, as the loss would be the result not of a mere tort committed by the late trustee but of the breach of a fiduciary relation, on a failure to perform a duty. I.L.R. (1940) 1 Cal. 372=44 C.W.N. 304 =1940 Cal. 337.

COSTS—PERSONAL LIABILITY OF TRUSTEE.—When a trustee incurs a liability as to costs, it is a personal liability, unless he obtains an order from the Court that the costs are to come out of the estate. Where a trustee has recovered costs and is afterwards ordered to refund the same in restitution, he is personally liable, and the same can be recovered in restitution, by his arrest and attachment of his property. 40 L.W. 805=67 M.L.J. 787. *See also* 151 I.C. 952=1934 A.L.J. 225=1934 A. 793. It is not customary to make a trustee personally liable unless he has done something that is not merely technically wrong but unreasonable or unrighteous. But where a trustee utterly fails to carry out the direction in a trust and takes up an obstructing attitude during the course of litigation, the Court will be justified in awarding costs against the trustee. 165 I.C. 63=1936 Mad. 495. Arrangements between trustees to carry out duties of a trust, if they are conducive to the interests of smooth administration of the affairs of the trust, are really in the nature of schemes framed for the management of the trust and will be binding upon the parties thereto and their representatives till modified either by common consent or in some manner known to law. 1936 Mad. 14=70 M.L.J. 262. Arrangements among trustees for management of trust are not in any sense alienation of the office or delegation of the duties of the office, because *ex hypothesi* the arrangement is made between persons who are jointly entitled to act as trustees. 1936 Mad. 14=70 M.L.J. 262. Courts have a discretion in drawing presumptions as to the propriety of transactions which took place many years ago, even when that transaction is a permanent lease by a trustee of waste lands belonging to the trust. The presumption has to be applied not with reference to the number of years which have elapsed before the action is brought but with reference to the death of persons who could have given useful information as to the circumstances under which the transaction took place. In a case where there is nobody who could give such evidence, the Courts may presume that a transaction was in all probability entered into for a justifiable cause, especially when that appears to be in the interests of the trust. Further it is not an absolute rule of law that a permanent lease of waste lands belonging to a trust can in no circumstances be granted. 1937 M.W.N. 1188. Trustee exceeding budget allotment in respect of festival—If guilty of breach of trust or negligence—Liability to make good excess expenditure. *See* (1937) 2 M.L.J. 660. When none of the trusts, created by the testator is in existence, the trustees become merely bare trustees and have no right of suit with regard to the trust property. 190 I.C. 405= 1940 Cal. 228. A *de facto* trustee is really no other than a trustee *de son tort*. He has no right to maintain suit on behalf of the trust even if the suit is taken to have been instituted for the

38. The trustee making any such sale may insert such reasonable stipulations either as to title, or evidence of title, or otherwise, in any conditions of sale or contract for sale, as he thinks fit; and may also buy in the property or any part thereof at any sale by auction, and rescind or vary any contract for sale, and re-sell the property so bought in, or as to which the contract is so rescinded, without being responsible to the beneficiary for any loss occasioned thereby.

Power to sell under special conditions. Power to buy in and re-sell.

Where a trustee is directed to sell trust-property or to invest trust-money in the purchase of property, he may exercise a reasonable discretion as to the time of effecting the sale or purchase.

Time allowed for selling trust-property.

Illustrations.

(*a*) *A* bequeaths property to *B*, directing him to sell it with all convenient speed and pay the proceeds to *C*. This does not render an immediate sale imperative.

(*b*) *A* bequeaths property to *B* directing him to sell it at such time and in such manner as he shall think fit and invest the proceeds for the benefit of *C*. This does not authorize *B*, as between him and *C*, to postpone the sale to an indefinite period.

39. For the purpose of completing any such sale, the trustee shall have power to convey or otherwise dispose of the property sold in such manner as may be necessary.

Power to convey.

40. A trustee may, at his discretion, call in any trust-property invested in any security and invest the same on any of the securities mentioned or referred to in section 20, and from time to time vary any such investment for others of the same nature:

Power to vary investments.

Provided that, where there is a person competent to contract and entitled at the time to receive the income of the trust property for his life or for any greater estate, no such change of investment shall be made without his consent in writing.

41. Where any property is held by a trustee in trust for a minor, such trustee may, at his discretion, pay to the guardians (if any) of such minor, or otherwise apply for or towards his maintenance or education or advancement in life, or the reasonable expenses of his religious worship, marriage or funeral, the whole or any part of the income to which he may be entitled in respect of such property; and such trustee shall accumulate all the residue of such income by way of compound interest by investing the same and the resulting income thereof from time to time in any of the securities mentioned or referred to in section 20, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations have arisen:

Power to apply property of minors, etc., for their maintenance, etc.

Provided that such trustee may, at any time, if he thinks fit, apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year.

NOTES.

benefit of the trust. 1938 Mad. 982=(1938) 2 M.L.J. 663. Worshippers—Right to sue on behalf of mosque—Nature of reliefs claimable or awardable—Trustee not always a necessary party—Powers of Court. 1937 Mad. 819=(1937) 2 M.L.J. 301. Fund in the hands of persons for purpose of payment to or use of temple—Suit for accounts by managers of temple against persons in possession of fund—Maintainability—Cause of action—Liability of trustee and agent of the trustee—Limitation. *See* 38 Bom.L.R. 808 =1936 Bom. 412.

Sec. 412.—Trustees are not authorised to give possession of property comprised in a trust for sale before receiving the purchase-money. 40 L.W. 122=1934 M. 448.

Secs. 40 and 41.—*See* 21 Bom.L.R. 41; 49 I.C. 277.

Where the income of the trust-property is insufficient for the minor's maintenance or education or advancement in life, or the reasonable expenses of his religious worship, marriage or funeral, the trustee may, with the permission of a principal Civil Court of original jurisdiction, but not otherwise, apply the whole or any part of such property for or towards such maintenance, education, advancement or expenses.

Nothing in this section shall be deemed to affect the provisions of any local law for the time being in force relating to the persons and property of minors.

Power to give receipts.

42. Any trustees or trustee may give a receipt in writing for any money, securities or other movable property payable, transferable or deliverable to them or by reason, or in the exercise, of any trust or power; and, in the absence of fraud, such receipt shall discharge the person paying, transferring or delivering the same therefrom, and from seeing to the application thereof, or being accountable for any loss or misapplication thereof.

Power to compound, etc.

43. Two or more trustees acting together may, if and as they think fit,—

(*a*) accept any composition or any security for any debt or for any property claimed;

(*b*) allow any time for payment of any debt;

(*c*) compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing whatever relating to the trust; and

(*d*) for any of those purposes, enter into, give, execute and do such agreements, instruments of composition or arrangement, releases and other things as to them seem expedient, without being responsible for any loss occasioned by any act or thing so done by them in good faith.

The powers conferred by this section on two or more trustees acting together may be exercised by a sole acting trustee when by the instrument of trust, if any, a sole trustee is authorized to execute the trusts and powers thereof.

This section applies only if and as far as a contrary intention is not expressed in the instrument of trust, if any, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

This section applies only to trusts created after this Act comes into force.

Power to several trustees of whom one disclaims or dies.

44. When an authority to deal with the trust-property is given to several trustees and one of them disclaims or dies, the authority may be exercised by the continuing trustees, unless from the terms of the instrument of trust it is apparent that the authority is to be exercised by a number in excess of the number of the remaining trustees.

Suspension of trustee's powers by decree.

45. Where a decree has been made in a suit for the execution of a trust, the trustee must not exercise any of his powers except in conformity with such decree, or with the sanction of the Court by which the decree has been made, or, where an appeal against the decree is pending, of the Appellate Court.

NOTES.

Secs. 42.—*See* 29 M.L.J. 291, as to when payment to one of several joint trustees is good payment.

Sec. 44.—Private trust—Surviving trustees—All need not join in proceedings under the deed unless expressly directed to the contrary. 1926 N. 86. Where two persons were appointed trustees and the deed further provided that the trustees shall conduct all proceedings jointly and that if any difference arose between them they should settle it in a particular manner. On the death of one of the trustees, the surviving trustee has the power to continue to administer the estate. 1932 M.W.N. 297.

CHAPTER V.

OF THE DISABILITIES OF TRUSTEES.

Trustee cannot renounce after acceptance.

46. A trustee who has accepted the trust cannot afterwards renounce it except (*a*) with the permission of a principal Civil Court of original jurisdiction, or, (*b*) if the beneficiary is competent to contract, with his consent, or (*c*) by virtue of a special power in the instrument of trust.

Trustee cannot delegate.

47. A trustee cannot delegate his office or any of his duties either to a co-trustee or to a stranger, unless (*a*) the instrument of trust so provides, or (*b*) the delegation is in the regular course of business, or (*c*) the delegation is necessary, or (*d*) the beneficiary, being competent to contract, consents to the delegation.

Explanation.—The appointment of an attorney or proxy to do an act merely ministerial and involving no independent discretion is not a delegation within the meaning of this section.

Illustrations.

(*a*) *A* bequeaths certain property to *B* and *C* on certain trusts to be executed by them or the survivor of them or the assigns of such survivor. *B* dies. *C* may bequeath the trust property to *D* and *E* upon the trusts of *A's* will.

(*b*) *A* is a trustee of certain property with power to sell the same. *A* may employ an auctioneer to effect the sale.

(*c*) *A* bequeaths to *B* fifty houses let at monthly rents in trust to collect the rents and pay them to *C*. *B* may employ a proper person to collect these rents.

Co-trustees cannot act singly.

48. When there are more trustees than one, all must join in the execution of the trust, except where the instrument of trust otherwise provides.

NOTES.

Sec. 46.—Renunciation of trust, when permissible. 28 Bom.L.R. 1481=99 I.C. 763 =1927 B. 75.

Sec. 47.—Some of the fundamental duties of a trustee are to get in the trust property and to manage the trust as a prudent man of business. He must exercise his powers also like a prudent man of business. Where he has a discretion he must exercise it in a *bona fide* and intelligent manner. It is doubtful whether those duties can be abrogated or minimised by an agreement between the creator of the trust and the trustee. I.L.R. (1940) 1 Cal. 372=44 C.W.N. 304=1940 Cal. 337. The appointment of a managing trustee does not involve any legal question of the trustees delegating their powers to others. 140 I.C. 443=36 L.W. 669=1932 M. 658. The mere act of registration of the document of alienation requires no further exercise of discretion on the part of the trustee and, therefore, he is entitled to delegate the power to register to an agent. 1928 P. 304.

INVESTMENT IN HOUSE PROPERTY.—Where the directors of an insurance company are authorised to invest the policy-holders trust fund in the purchase of house property, they are not entitled to invest money in construction of a building and a resolution, even if passed unanimously, by the directors to invest in constructing a building is *ultra vires*. Where the rules authorise the directors to purchase house property if there is an unanimity of opinion among them, such unanimity is necessary not only as regards the amount to be spent but also as regards the property to be purchased. And the duty of deciding which property is to be purchased cannot be delegated to a committee but must be decided unanimously by the directors. 39 L.W. 779=1934 M. 411=67 M.L.J. 336.

Sec. 48.—There is no rule of law which requires all the trustees of an institution actually to sign a promissory note under which money is borrowed for the trust. It would be enough if those trustees who do not sign have authorised the transaction. 1942 M. 92=54 L.W. 472=(1941) 2 M.L.J. 587. *See also* 1926 M. 1199. The office of trustee, irrespective of the number of trustees, is a joint one and co-trustees are as it were, one trustee and must therefore execute the duties of their office jointly. No suit in regard to trust properties would be maintainable by one or some of the trustees only, if the remaining trustees are not before the Court either as plaintiffs or as defendants. 48 L.W. 829=1938 Mad. 982=(1938) 2 M.L.J. 663. *See also* 46 C.W.N. 865; 1924 N. 335. Co-trustee not consulting others—Exclusive management *bona fide*—No corrupt motive—He should not be removed, but opportunity should be offered to correct himself. 103 I.C. 710=1927 N. 323. A suit by a trustee against a co-trustee for accounts is maintainable, if the co-trustee is guilty of breach of trust. 44 C.W.N. 688=1940 Cal. 416; or when one trustee is not given custody or control of the trust property. I.L.R. (1941) 2 Cal. 128=73 C.

Control of discretionary power.

49. Where a discretionary power conferred on a trustee is not exercised reasonably and in good faith, such power may be controlled by a principal Civil Court of original jurisdiction.

Trustee may not charge for services.

50. In the absence of express directions to the contrary contained in the instrument of trust or of a contract to the contrary entered into with the beneficiary or the Court at the time of accepting the trust, a trustee has no right to remuneration for his trouble, skill and loss of time in executing the trust.

Nothing in this section applies to any Official Trustee, Administrator-General, Public Curator or person holding a certificate of administration.

Trustee may not use trust-property for his own profit.

51. A trustee may not use or deal with the trust-property for his own profit or for any other purpose unconnected with the trust.

Trustee for sale or his agent may not buy.

52. No trustee whose duty it is to sell trust-property, and no agent employed by such trustee for the purpose of the sale, may, directly or indirectly, buy the same or any interest therein, on his own account or as agent for a third person.

53. No trustee, and no person who has recently ceased to be a trustee,

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L.J. 453=45 C.W.N. 709=1941 Cal. 562. S. 48 only controls the conduct of the trustees so long as they are both alive and not what should ensue upon the death of either. The surviving trustee can administer the trust, even though the trust deed contains provisions regarding joint management during their lives. 1932 M.W.N. 297. The right of a trustee or hukdar of a chatram to conduct the charity or manage the endowed property cannot be transferred for consideration, as it is against public policy although the alience may be co-trustees or a member of the same family as the transferor. 48 L.W. 829=1938 Mad. 982=(1938) 2 M.L.J. 663. Melkanom—Temple property by one of several trustees with consultation with others—Validity—Powers of H.R.E. Board to authorise alienation. *See* 46 L.W. 326=1937 Mad. 842=(1937) 2 M.L.J. 358.

Secs. 49 and 61.—A District Judge has no power to interfere with the discretion of a trustee in the matter of the investment of trust funds on a petition under S. 49 or S. 61 of the Act. It can be done only in a properly instituted suit. 106 I.C. 672=1928 L. 237 (2).

Sec. 50.—The prohibition to receive remuneration for his work also applies to a solicitor-trustee not only personally, but also to his firm who act as his solicitors. But this is so only when the solicitor-trustee is acting for himself. A solicitor-trustee is not, however, bound to act professionally also for his co-trustees. The circumstance that a solicitor is a trustee will not prevent him from receiving his usual costs, where he acts as solicitor in a suit for any of his beneficiaries, or where he acts for himself and his co-trustees jointly, provided the costs are not increased by his being one of the parties for which such joint appearance is made. This rule of English law is not inconsistent with any law or practice of the Courts in India. S. 50 is applicable only to express private trusts. Where a solicitor-trustee is a defendant as trustee and is held entitled to his costs, the Court directs them to be taxed as between attorney and client. 39 Bom.L.R. 633=1937 B. 374.

Sec. 51.—*See* 1931 M. 251=60 M.L.J. 355. Where a trustee incurred debts, the creditor cannot recover against the trust property unless the trustee incurring the debts, if he had paid the debt, could have claimed indemnity out of the trust property. 15 Pat. 88=17 Pat.L.T. 393=1936 Pat. 390. In a suit on a contract by the manager of a Dharamsala in respect of the supply of an article to the Dharamsala, the decree could be passed against the manager personally. An addition in the decree that the manager would be entitled to reimburse himself from the trust property is both unnecessary and improper. 1941 A.L.W. 1027=1942 A. 73=1941 O.A. (Sup.) 885 (1). Trustee—Loan by—Scheme prohibiting lending and borrowing—Person managing trust as agent of trustee advancing moneys for necessaries of trust—Promissory note by trustee—Enforceability against trust—Contract Act, S. 65. (1941) 1 M.L.J. 547=1940 Mad. 718=51 L.W. 708.

Secs. 51 and 54.—Trustee using trust-fund for his own benefit—Author of the trust consenting to the same—Trustee becoming insolvent—*Cestui que trust* entitled to follow trust property and sale proceeds of the same. 24 L.W. 869=99 I.C. 713=1927 M. 249.

Sec. 53.—*See* 15 Bom.L.R. 343=19 I.C. 841.

Trustee may not buy beneficiary's interest without permission.

may, without the permission of a principal Civil Court of original jurisdiction, buy or become mortgagee or lessee of the trust-property or any part thereof; and such permission shall not be given unless the proposed purchase, mortgage or lease is manifestly for the advantage of the beneficiary.

Trustee for purchase.

And no trustee whose duty it is to buy or to obtain a mortgage or lease of particular property for the beneficiary may buy it, or any part thereof, or obtain a mortgage or lease of it, or any part thereof, for himself.

Co-trustees may not lend to one of themselves.

54. A trustee or co-trustee whose duty it is to invest trust-money on mortgage or personal security must not invest it on mortgage by, or on the personal security of, himself or one of his co-trustees.

CHAPTER VI.

OF THE RIGHTS AND LIABILITIES OF THE BENEFICIARY.

Rights to rents and profits.

55. The beneficiary has, subject to the provisions of the instrument of trust, a right to the rents and profits of the trust-property.

Right to specific execution.

56. The beneficiary is entitled to have the intention of the author of the trust specifically executed to the extent of the beneficiary's interest;

Right to transfer of possession.

and, where there is only one beneficiary and he is competent to contract, or where there are several beneficiaries and they are competent to contract and all of one mind, he or they may require the trustee to transfer the trust-property to him or them, or to such person as he or they may direct.

When property has been transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in the second clause of this section applies to such property during her marriage.

Illustrations.

(*a*) Certain Government securities are given to trustees upon trust to accumulate the interest until *A* attains the age of 24, and then to transfer the gross amount to him. *A* on attaining majority may, as the person exclusively interested in the trust-property, require the trustees to transfer it immediately to him.

(*b*) *A* bequeaths Rs. 10,000 to trustees upon trust to purchase an annuity for *B*, who has attained his majority and is otherwise competent to contract. *B* may claim the Rs. 10,000.

(*c*) *A* transfers certain property to *B* and directs him to sell or invest it for the benefit of *C* who is competent to contract. *C* may elect to take the property in its original character.

Right to inspect and take copies of instrument of trust, accounts, etc.

57. The beneficiary has a right, as against the trustee and all persons claiming under him with notice of the trust, to inspect and take copies of the instrument of trust, the documents of title relating solely to the trust-property the accounts of the trust-property and the vouchers (if any) by which they are supported and the cases submitted and opinions taken by the trustee for his guidance in the discharge of his duty.

Right to transfer beneficial inerest.

58. The beneficiary, if competent to contract, may transfer his interest but subject to the law for the time being in force as to the circumstances and extent in and to which he may dispose of such interest:

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Secs. 53 and 54.—*See* 60 M.L.J. 355.

Sec. 56.—*See* 21 Bom.L.R. 41.

Provided that when property is transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in this section shall authorize her to transfer such interest during her marriage.

Right to sue for execution of trust.

59. Where no trustees are appointed or all the trustees die, disclaim, or are discharged, or where for any other reason the execution of a trust by the trustee is or becomes impracticable, the beneficiary may institute a suit for the execution of the trust, and the trust shall, so far as may be possible, be executed by the Court until the appointment of a trustee or new trustee.

Right to proper trustees.

60. The beneficiary has a right (subject to the provisions of the instrument of trust) that the trust-property shall be properly protected and held and administered by proper persons and by a proper number of such persons.

Explanation I.—The following are not proper persons within the meaning of this section:—

A person domiciled abroad: an alien enemy: a person having an interest inconsistent with that of the beneficiary: a person in insolvent circumstances; and, unless the personal law of the beneficiary allows otherwise, a married woman and a minor.

Explanation II.—When the administration of the trust involves the receipt and custody of money, the number of trustees should be two at least.

Illustrations.

(*a*) *A*, one of several beneficiaries, proves that *B*, the trustee, has improperly disposed of part of the trust-property or that the property is in danger from *B's* being in insolvent circumstances, or that he is incapacitated from acting as trustee. *A* may obtain a receiver of the trust property.

(*b*) *A* bequeaths certain jewels to *B* in trust for *C*. *B* dies during *A's* lifetime; then *A* dies. *C* is entitled to have the property conveyed to a trustee for him.

(*c*) *A* conveys certain property to four trustees in trust for *B*. Three of the trustees die. *B* may institute a suit to have three new trustees appointed in the place of the deceased trustees.

(*d*) *A* conveys certain property to three trustees in trust for *B*. All the trustees disclaim. *B* may institute a suit to have three trustees appointed in place of the trustees so disclaiming.

(*e*) *A*, a trustee for *B*, refuses to act, or goes to reside permanently out of British India, or is declared an insolvent, or compounds with his creditors or suffers a co-trustee to commit a breach of trust. *B* may institute a suit to have *A* removed and a new trustee appointed in his room.

61. The beneficiary has a right that his trustee shall be compelled to per-

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Sec. 59.—The plaintiff's husband had insured his life for her benefit with a certain Company at Calcutta. The business of the Company was taken over by the defendant company. The insured subsequently obtained a loan from the defendants and he later on surrendered his policy on receipt of a certain amount. After her husband's death the plaintiff sued in Madras to recover the insurance amount on the ground that a trust had been created in her favour. *Held*, that the contract having been completed in Calcutta the proper person to sue was the Official Trustee of Bengal. *Held, further*, S. 59 of the Trusts Act had no application because it was not shown that the execution of the trust had become impracticable or that the Official Trustee had disclaimed trusteeship. 57 M. 536=151 I.C. 112=39 L. W. 379=1934 M. 264=66 M.L.J. 667.

Chit-fund—Security bond to stake-holder by successful bidders—Insolvency of stake-holder—Sale of his properties in auction—Purchaser in auction—Right to sue on security bonds for money due thereunder. *Held*, that the position of the stake-holder while taking the security bonds from the successful bidders was that of a trustee, and he having ceased to perform and rendered himself incapable of performing the duties devolved upon him as trustee, the case fell under S. 59, Trusts Act and conferred a right of suit on the beneficiaries, and the suit was therefore maintainable. 177 I.C. 461=1938 Mad. 668.

Sec. 61.—The highest bidder in a *kuri* cannot enforce a security executed in favour of the manager by a defaulting subscriber but must see the manager for enforcement of the trust. 1928 M. 356.

Right to compel to any act of duty.

form any particular act of his duty as such, and restrained from committing any contemplated or probable breach of trust.

Illustrations.

(*a*) *A* contracts with *B* to pay him monthly Rs. 100 for the benefit of *C*. *B* writes and signs a letter declaring that he will hold in trust for *C* the money so to be paid. *A* fails to pay the money in accordance with his contract. *C* may compel *B* on a proper indemnity to allow *C* to sue on the contract in *B's* name.

(*b*) *A* is trustee of certain land, with a power to sell the same and pay the proceeds to *B* and *C* equally. *A* is about to make an improvident sale of the land. *B* may sue on behalf of himself and *C* for an injunction to restrain *A* from making the sale.

Wrongful purchase by trustee.

62. Where a trustee has wrongfully bought trust-property, the beneficiary has a right to have the property declared subject to the trust or re-transferred by the trustee, if it remains in his hands unsold, or, if it has been bought from him by any person with notice of the trust, by such person. But in such case the beneficiary must re-pay the purchase-money paid by the trustee, with interest, and such other expenses (if any) as he has properly incurred in the preservation of the property; and the trustee or purchaser must (*a*) account for the nett profits of the property, (*b*) be charged with an occupation rent, if he has been in actual possession of the property, and (*c*) allow the beneficiary to deduct a proportionate part of the purchase-money if the property has been deteriorated by the acts or omissions of the trustee or purchaser.

Nothing in this section—

(*a*) impairs the rights of lessees and others who, before the institution of a suit to have the property declared subject to the trust or re-transferred, have contracted in good faith with the trustee or purchaser; or

(*b*) entitles the beneficiary to have the property declared subject to the trust or re-transferred where he, being competent to contract, has himself, without coercion or undue influence having been brought to bear on him, ratified the sale to the trustee with full knowledge of the facts of the case and of his rights as against the trustee.

Following trust-property —into the hands of third persons;

63. Where trust-property comes into the hands of a third person inconsistently with the trust, the beneficiary may require him to admit formally, or may institute a suit for a declaration, that the property is comprised in the trust.

NOTES.

Sec. 62.—Under S. 62 the Court has no power to make an order directing a resale, conditional on such sale producing a higher price than that for which the trustees themselves bought. 40 L.W. 122=1934 M. 448 =67 M.L.J. 222. The principle in S. 62 are applicable to public religious trusts as an equitable one. Where the trustee of a public charitable trust sells trust property and for the purchase price conveys his own property to the trust, if the sale of such property is subsequently set aside on the ground of absence of valid necessity, the trustee or his alienee would be entitled to call upon the trust to surrender the benefit which the trust had by virtue of the sale. A sale of trust property without valid necessity is only a voidable transaction and not void. 55 L. W. 183=(1942) 1 M.L.J. 353.

Secs. 63 to 66.—Secs. 63 to 66 are not exhaustive of the law as to the tracings. It clearly does not refer to the tracing of trust funds in the hands of the trustee when he has allowed it to mingle with his own funds following the directions of the settlor. Where a trustee mixes trust money with his own money the *cestui que trust* has a claim to have it restored out of the fixed fund in priority to any right of the trustee; and though there is no specific provision in the Act the doctrine of tracing will apply. There is also no distinction between a rightful and wrongful disposition of property so far as the right of the beneficiary to follow the proceeds is concerned. 1937 M.W.N. 493. *See also* 1940 Rang. 225.

Sec. 63.—Where a trustee is authorised by the terms of the trust to invest the trust moneys in his own business and directed to pay interest thereon and the moneys are so utilised, the trust is not entitled to follow up the money into the assets of the trustee

Where the trustee has disposed of trust-property and the money or other property which he has received therefor can be traced in his hands, or the hands of his legal representative or legatee, the beneficiary has, in respect thereof, rights as nearly as may be the same as his rights in respect of the original trust-property.

Into that into which it has been converted.

Illustrations.

(*a*) *A*, a trustee for *B* of Rs. 10,000, wrongfully invests the Rs. 10,000 in the purchase of certain land. *B* is entitled to the land.

(*b*) *A*, a trustee, wrongfully purchases land in his own name, partly with his own money, partly with money subject to a trust for *B*. *B* is entitled to a charge on the land for the amount of the trust money so misemployed.

Saving of rights of certain transferees.

64. Nothing in section 63 entitles the beneficiary to any right in respect of property in the hands of—

(*a*) a transferee in good faith for consideration without having notice of the trust, either when the purchase-money was paid, or when the conveyance was executed, or—

(*b*) a transferee for consideration from such a transferee.

A judgment-creditor of the trustee attaching and purchasing trust property is not a transferee for consideration within the meaning of this section.

Nothing in section 63 applies to money, currency notes, and negotiable instruments in the hands of a *bona fide* holder to whom they have passed in

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after he becomes an insolvent. The consequence of the liberty so conferred upon the trustee is to convert the object of the trust—from a particular sum of money into a personal obligation to pay on the part of the trustee. But the claim of the trust on the trustee rests on his personal obligation and can stand on no higher footing than that of the other ordinary creditors. 1931 M. 251 =60 M.L.J. 355. A Chairman of a Bank took certain money from the Bank in a way which amounted to the taking of the money wholly illegally and without any authority. He converted this money for his own use by purchasing property in his own name. When the Bank went into liquidation receiver is entitled to claim the property by virtue of S. 63. 163 I.C. 378=38 P.L.R. 1103= 1936 L. 408. As to test whether transaction was mere book adjustment; *see* 59 M.L.J. 718; 60 M.L.J. 355=1931 M. 251. On this section, *see* 84 I.C. 490=1925 C. 239; 28 I.C. 865; 15 I.C. 845=101 P.R. 1912. Trustee depositing trust moneys in Bank—Knowledge of Bank as to trust—Effect. *See* 1939 M.W.N. 1066=1924 M. 174. Where a receiver is appointed in execution of a decree with authority to collect rent due to the estate, but the lessee pays the rent to a mortgagee of the judgment-debtor, the receiver is entitled to follow it in the hands of the mortgagee either on the footing that it is money had and received to the use of the receiver of the estate or as being held by the mortgagee in trust for the estate. 149 I.C. 1042=1934 R. 84. Where a father executed a settlement deed by which the son who was given the properties was directed to pay a certain amount to the settlor's daughters: *Held*, that there was a trust in favour of the daughters and a suit to enforce the same was not governed by any rule of limitation. 148 I.C. 685=39 L.W. 496=1934 M. 273. Where a trustee of several trusts mixes the funds with his own by crediting in a common banking account. Unless and until there is shown to have been a breach of trust, unless and until the mixed fund has been so depleted that trust moneys must have been misapplied, no question of following trust moneys can really arise. 190 I.C. 865=1940 Rang. 225. *See also* 1937 M.W.N. 493.

Secs. 63 and 64.—A suit for a declaration that a person is only in the position of a trustee towards the plaintiff will lie even in the case of negotiable instruments. 153 I.C. 944=41 L.W. 15=1935 M. 181=68 M.L.J. 81 (F.B.).

Secs. 63 and 66.—Where a certain amount is a trust in the hands of the trustees to be invested in their business and is so invested, it must be taken to have remained a part of the assets of that business and to have been there at the date of their insolvency, the beneficiaries being entitled at all times to a charge upon such assets, in the hands of the firm. Upon the insolvency of the trustees the assets no doubt pass to the O.A., but they pass subject to the charge. 60 I.A. 203=143 I.C. 162=65 M.L.J. 1= 1933 P.C. 148 (P.C.), affirming 59 M.L.J. 718.

Sec. 64.—Pledge of goods—Pawnor being in possession—Third party's legal rights not known—Right of pledgee. 60 C. 262=1933 C. 366.

circulation, or shall be deemed to affect the Indian Contract Act, 1872, section 108, or the liability of a person to whom a debt or charge is transferred.

Acquisition by trustee of trust-property wrongfully converted.

65. Where a trustee wrongfully sells or otherwise transfers trust-property and afterwards himself becomes the owner of the property, the property again becomes subject to the trust, notwithstanding any want of notice on the part of intervening transferees in good faith for consideration.

Right in case of blended property.

66. Where the trustee wrongfully mingles the trust-property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him.

Wrongful employment by partner-trustee of trust-property for partnership purposes.

67. If a partner, being a trustee, wrongfully employs trust-property in the business, or on the account of the partnership, no other partner is liable therefor in his personal capacity to the beneficiaries, unless he had notice of the breach of trust.

The partners having such notice are jointly and severally liable for the breach of trust.

Illustrations.

(*a*) *A* and *B* are partners. *A* dies, having bequeathed all his property to *B* in trust for *Z*, and appointed *B* his sole executor. *B*, instead of winding up the affairs of the partnership, retains all the assets in the business. *Z* may compel him, as partner, to account for so much of the profits as are derived from *A's* share of the capital. *B* is also answerable to *Z* for the improper employment of *A's* assets.

(*b*) *A*, a trader, bequeaths his property to *B* in trust for *C*, appoints *B* his sole executor, and dies. *B* enters into partnership with *X* and *Y* in the same trade, and employs *A's* assets in the partnership business. *B* gives an indemnity to *X* and *Y* against the claims of *C*. Here *X* and *Y* are jointly liable with *B* to *C* as having knowingly become parties to the breach of trust committed by *B*.

Liability of beneficiary joining in breach of trust.

68. Where one of several beneficiaries—

(*a*) joins in committing breach of trust, or

(*b*) knowingly obtains any advantage therefrom, without the consent of the other beneficiaries, or

(*c*) becomes aware of a breach of trust committed or intended to be committed, and either actually conceals it, or does not within a reasonable time take proper steps to protect the interests of the other beneficiaries, or

(*d*) has deceived the trustee and thereby induced him to commit a breach of trust,

the other beneficiaries are entitled to have all his beneficial interest impounded as against him and all who claim under him (otherwise than as transferees for consideration without notice of the breach) until the loss caused by the breach has been compensated.

When property has been transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in this section applies to such property during her marriage.

NOTES.

Sec. 65.—If a trustee or an agent mixes or confuses the property which he holds in a fiduciary character with his own property, the onus lies heavily on him to prove the extent of his property. If he fails to do so, and the two properties cannot be distinguished or separated with perfect accuracy, the whole must be considered as belonging to the other property. 10 M.L.T. 313=10 I.C. 57; 60 I.A. 203=65 M.L.J. 1 (P.C.).

Sec. 66.—*See* under S. 63, *supra*. Money advanced for a specific purpose—Frustration of object—Insolvency—Right to follow trust money—Election to pursue remedy as creditor—Effect of. *See* 35 Bom.L.R. 946=146 I.C. 984=1933 B. 437.

Rights and liabilities of beneficiary's transferee.

69. Every person to whom a beneficiary transfers his interest has the rights, and is subject to the liabilities, of the beneficiary in respect of such interest at the date of the transfer.

CHAPTER VII.

OF VACATING THE OFFICE OF TRUSTEE.

Office how vacated.

70. The office of a trustee is vacated by his death or by his discharge from his office.

Discharge of trustee.

71. The trustee may be discharged from his office only as follows:—

(*a*) by the extinction of the trust;

(*b*) by the completion of his duties under the trust;

(*c*) by such means as may be prescribed by the instrument of trust;

(*d*) by appointment under this Act of a new trustee in his place;

(*e*) by consent of himself and the beneficiary, or, where there are more beneficiaries than one, all the beneficiaries being competent to contract, or

(*f*) by the Court to which a petition for his discharge is presented under this Act.

Petition to be discharged from trust.

72. Notwithstanding the provisions of section 11, every trustee may apply by petition to a principal Civil Court of original jurisdiction to be discharged from his office; and, if the Court finds that there is sufficient reason for such discharge, it may discharge him accordingly, and direct his costs to be paid out of the trust-property. But, where there is no such reason, the Court shall not discharge him, unless a proper person can be found to take his place.

Appointment of new trustees on death, etc.

73. Whenever any person appointed a trustee disclaims, or any trustee, either original or substituted, dies, or is for a continuous period of six months absent from British India, or leaves British India for the purpose of residing abroad, or is declared an insolvent, or desires to be discharged from the trust, or refuses or becomes, in the opinion of a principal Civil Court of original jurisdiction, unfit or personally incapable to act in the trust or accepts an inconsistent trust, a new trustee may be appointed in his place by—

(*a*) the person nominated for that purpose by the instrument of trust (if any); or

(*b*) if there be no such person, or no such person able and willing to act, the author of the trust, if he be alive and competent to contract, or the surviving or continuing trustees, or trustee for the time being, or legal representative of the last surviving and continuing trustee, or (with the consent of

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Sec. 73.—The appointment of a new trustee need not be by a registered document as the office of trustee is not immovable property within the meaning of the Registration Act, and the trust-properties vest by the operation of S. 75, and not by the instrument of appointment. 6 M.L.T. 240=3 I.C. 435. An order allowing application by a new trustee to be brought on the record is appealable. 6 M.L.T. 240=3 I.C. 435. Procedure in case of application for removal of trustee. *See* 29 Bom.L.R. 1577=52 B. 32=107 I.C. 49=1928 B. 20. *Obiter.*—The word "unfit" may be interpreted not merely as physically incapable, for instance, partially blind or partially paralysed, but also as covering a case wherein the applicant contends that there has been a breach of trust on the part of the trustee. *See also* under S. 74. 121 I.C. 875=1930 S. 41; 13 R. 27 =1935 R. 112. The provision for the appointment of new trustees contained in the compromise in case the continuing trustees do not agree (as required by the will) is clearly an addition to the will of the testator and no such provision can be validly added, nor can the trustees delegate the powers conferred on them by the will. In view of the deadlock resort to the powers of the Court is necessary. 159 I.C. 369=1934 L. 331.

the Court), the retiring trustees, if they all retire simultaneously, or (with the like consent) the last retiring trustee.

Every such appointment shall be by writing under the hand of the person making it.

On an appointment of a new trustee the number of trustees may be increased.

The official trustee may, with his consent and by the order of the Court, be appointed under this section, in any case in which only one trustee is to be appointed, and such trustee is to be the sole trustee.

The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee if willing to act in the execution of the power.

Appointment by Court.

74. Whenever any such vacancy or disqualification occurs and it is found impracticable to appoint a new trustee under section 73, the beneficiary may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for the appointment of a trustee or a new trustee, and the Court may appoint a trustee or a new trustee accordingly.

Rules for selecting new trustees.

In appointing new trustees, the Court shall have regard (*a*) to the wishes of the author of the trust as expressed in or to be inferred from the instrument of trust; (*b*) to the wishes of the person, if any, empowered to appoint new trustees; (*c*) to the question whether the appointment will promote or impede the execution of the trust; and (*d*) where there are more beneficiaries than one, to the interests of all such beneficiaries.

Vesting of trust-property in new trustees.

75. Whenever any new trustee is appointed under section 73 or section 74, all the trust-property for the time being vested in the surviving or continuing trustees or trustee, or in the legal representative of any trustee, shall become vested in such new trustee either solely or jointly with the surviving or continuing trustees or trustee, as the case may require.

Power of new trustees.

Every new trustee so appointed, and every trustee appointed by a Court, either before or after the passing of this Act, shall have the same powers, authorities and discretions and shall in all respects act, as if he had been originally nominated a trustee by the author of the trust.

NOTES.

Sec. 74.—As to whether a receiver can be appointed in proceeding under S. 74, *see* 103 I.C. 816. Where one of the trustees is excluded from the administration of trust estate in consequence of which the trustee renounces the trust, the trustee, thereby either disclaims or refuses within the meaning of S. 73, and an application for removal and appointment of trustee, under S. 74, is competent. 121 I.C. 875=1930 S. 41. *See also* under this section, 150 I.C. 193=1934 O. 118.

Sec. 75.—In a suit for a general account by the trustee of a temple against the former trustees in respect of their management of the temple many years ago, it was found that the temple was controlled by a number of households situated round the temple, that trustees were appointed from time to time and that the community exercised control over the temple affairs without any deed or other written instrument prescribing the way in which the control was to be exercised. No specific charges of malversation were made out. It was also found that certain accounts had been put before the community from time to time at annual meetings and scrutinised by the members of the community and passed or allowed by them. *Held*, in the circumstances, it would be unjust and inequitable to call on the late trustees to account for the moneys received by them many years ago, and the prayer for general account should therefore be refused. 70 M. L.J. 318 (P.C.).

Sec. 76.—Where a will founding a trust directs that the succession is to pass to the descendants of the original trustees, the direction cannot be extended to include their

Survival of trust.

76. On the death or discharge of one of several co-trustees, the trust survives and the trust-property passes to the others unless the instrument of trust expressly declares otherwise.

CHAPTER VIII.

OF THE EXTINCTION OF TRUSTS.

Trust how extinguished.

77. A trust is extinguished—

(*a*) when its purpose is completely fulfilled; or

(*b*) when its purpose becomes unlawful; or

(*c*) when the fulfilment of its purpose becomes impossible by destruction of the trust-property or otherwise; or

(*d*) when the trust, being revocable, is expressly revoked.

Revocation of trust.

78. A trust created by will may be revoked at the pleasure of the testator.

A trust otherwise created can be revoked only—

(*a*) where all the beneficiaries are competent to contract—by their consent;

(*b*) where the trust has been declared by a non-testamentary instrument or by word of mouth—in exercise of a power of revocation expressly reserved to the author of the trust; or

(*c*) where the trust is for the payment of the debts of the author of the trust, and has not been communicated to the creditors—at the pleasure of the author of the trust.

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collaterals. 160 I.C. 283=1936 Lah. 300. Once the founder prescribes a line of devolution as regards the trusteeship he has no right thereafter to alter the line of devolution unless he had reserved such a power in the original document itself. 51 L.W. 381 =1940 Mad. 633. Where a clause in a will founding a trust provides that none of the relatives are to have any right of interfering with the bequest and that any claim put forward by them is to be rejected the clause is intended to apply to any claim of the relatives to succeed to the property in their personal capacity or to claim any right of interfering with the management of the property during the lifetime of the trustees appointed by the founder or in the presence of any of their descendants. It is not the intention of the founder to provide that the management of the trust should not revert to his own family, according to the ordinary rule in case the line of succession, which he had prescribed should die out. 160 I.C. 283= 1936 Lah. 300. A document which purports to create a trust must create a genuine trust, and not create a provision for relatives under the guise of a trust, and the test is the proportion of the funds to be allotted to the trust or charity. The question whether a charity or an idol should be considered the true beneficiary under the deed or will subject to a charge in favour of the heirs for their upkeep, or the heirs should be considered the true beneficiaries of the properties subject to a charge for the upkeep of the worship and the expenses of the idol, is a question which can only be settled "by a conspectus of the entire provisions of the instrument." 39 Bom.L. R. 867=1938 Bom. 23. Where in a will four persons were named as trustees but the power was given to them not as *persona designata* but as holders of the office of trustees, the survivor of those trustees could exercise the power conferred. I.L.R. (1941) All. 711=1941 A.L.J. 660=1941 All. 387. Powers of trustee—Provision for co-option in case of vacancy—Directory or mandatory —Surviving trustee, if can carry on trust. 1941 All. 387.

Sec. 77.—A trust cannot be cancelled at the instance of one trustee applying for the cancellation on the ground of his dissatisfaction with the management of other co-trustees. 23 A.L.J. 28=47 A. 313.

Secs. 77 and 78.—The deposit of money for the good conduct of an employee in a Bank, constitutes a trust and it cannot be extinguished until the purpose of the trust is fulfilled by the return of the trust property to the person who deposited it, subject, of course, to the lawful claims of the Bank against the property. The demand for its return by the beneficiary far from operating as a revocation of the trust, is a demand for the performance of the trust. 1940 O. A. 991=1940 O.W.N. 1022=16 Luck. 241 =1941 Oudh 126.

Sec. 78.—*See* 1 I.C. 347.

Sec. 78 (c).—Where a vendor directs his vendee to pay off his creditors out of the price due to him and get him receipts, a trust for creditors is not created, and so long as it was not communicated to the creditors, the trust, if any, could be revoked. 134 I.C. 100=32 P.L.R. 876.

Illustration.

A conveys property to *B* in trust to sell the same and pay out of the proceeds the claims of *A's* creditors. *A* reserves no power of revocation. If no communication has been made to the creditors, *A* may revoke the trust. But if the creditors are parties to the arrangement, the trust cannot be revoked without their consent.

Revocation not to defeat what trustees have duly done.

79. No trust can be revoked by the author of the trust so as to defeat or prejudice what the trustees may have duly done in execution of the trust.

CHAPTER IX.

OF CERTAIN OBLIGATIONS IN THE NATURE OF TRUSTS.

Where obligation in nature of trust is created.

80. An obligation in the nature of a trust is created in the following cases.

Where it does not appear that transferor intended to dispose of beneficial interest.

81. Where the owner of property transfers or bequeaths it and it cannot be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative.

Illustrations.

(*a*) *A* conveys land to *B* without consideration and declares no trust of any part. It cannot, consistently with the circumstances under which the transfer is made, be inferred that *A* intended *to* transfer the beneficial interest in the land. *B* holds the land for the benefit of *A*.

(*b*) *A* conveys to *B* two fields, *Y* and *Z*, and declares a trust of *Y*, but says nothing about *Z*. It cannot, consistently with the circumstances under which the transfer is made, be inferred that *A* intended to transfer the beneficial interest in *Z*. *B* holds *Z* for the benefit of *A*.

(*c*) *A* transfers certain stock belonging to him into the joint names of himself and *B*. It cannot, consistently with the circumstances under which the transfer is made, be inferred that *A* intended to transfer the beneficial interest in the stock during his life. *A* and *B* hold the stock for the benefit of *A* during his life.

(*d*) *A* makes a gift of certain land to his wife *B*. She takes the beneficial interest in the land free from any trust in favour of *A*, for it may be inferred from the circumstances that the gift was for *B's* benefit.

Transfer to one for consideration paid by another.

82. Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.

Nothing in this section shall be deemed to affect the Code of Civil Procedure, section 317, or Act No. XI of 1859 (*to improve the law relating to sales of land for arrears of revenue in the lower Provinces under the Bengal Presidency*), section 36.

NOTES.

Sec. 81.—*See* 38 B. 618; 10 M.L.T. 42; 32 M. 443; 47 I.C. 376; 93 I.C. 161=28 Bom. L.R. 11. Among Anglo-Indians, there is a presumption of an intended advancement in the case of money deposited in the bank in the joint names of husband and wife and the general rule of a resulting trust does not apply. 146 I.C. 1034=1933 N. 337. In the case of Indian Christians the doctrine of advancement is not applicable. (1942) M.L.J. 528. There is no presumption of advancement in Burma. Consequently where a mortgage is taken in the name of *A*, the money advanced on the mortgage being admittedly the money of *B*, there is resulting trust in favour of *B*. 1936 Rang. 447; 1936 R. 256 (F.B.).

Sec 82.—S. 82 has made it much clearer than it was before that the burden of proof of establishing all the facts necessary to lead to the inference that a transfer was benami lies upon the person asserting it to be so. 16 Luck. 341=1941 Oudh 288. *See* 82 I.C. 832=1 C.W.N. 710; 12 Bur.L.T. 45. The first defendant paid the sale price and purchased certain property in the name of his son-in-law *N*. His object in so doing was to defeat the possible claims of a third person against himself. He had custody of all the title deeds as also possession, and *N* had neither possession nor custody of title-deeds.

Trust incapable of execution or executed without exhausting trust-property.

83. Where a trust is incapable of being executed, or where the trust is completely executed without exhausting the trust-property, the trustee, in the absence of a direction to the contrary, must hold the trust-property, or so much thereof as is unexhausted, for the benefit of the author of the trust or his legal representative.

Illustrations.

(*a*) *A* conveys certain land to *B*—
"upon trust," and no trust is declared; or
"upon trust to be thereafter declared," and no such declaration is ever made; or
upon trusts that are too vague to be executed; or
upon trusts that become incapable of taking effect; or
"in trust for *C*," and *C* renounces his interest under the trust.

In each of these cases *B* holds the land for the benefit of *A*.

(*b*) *A* transfers Rs. 10,000 in the four per cents. to *B* in trust to pay the interest annually accruing due to *C* for her life. *A* dies. Then *C* dies. *B* holds the fund for the benefit of *A's* legal representative.

(*c*) *A* conveys land to *B* upon trust to sell it and apply one moiety of the proceeds for certain charitable purposes, and the other for the maintenance of the worship of an idol. *B* sells the land, but the charitable purposes wholly fail, and the maintenance of the worship does not exhaust the second moiety of the proceeds. *B* holds the first moiety and the part unapplied of the second moiety for the benefit of *A* or his legal representative.

(*d*) *A* bequeaths Rs. 10,000 to *B*, to be laid out in buying land to be conveyed for purposes which either wholly or partially fail to take effect. *B* holds for the benefit of *A's* legal representative the undisposed of interest in the money or land if purchased.

Transfer for illegal purpose.

84. Where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution, or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor.

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He had not even inspected the deeds or taken any steps to secure them. *N* sold the property to the plaintiff in fraud of the rights of the first defendant. In a suit by the plaintiff for possession, the 1st defendant raised the plea that the sale in favour of *N* was *benami* for himself. *Held*, that the case fell under S. 82, that *N* held the property for the benefit of the 1st defendant, who was not precluded from pleading the *benami* character of the transaction, that it was not necessary for him to rely on any of the ingredients referred to in S. 84 and that S. 84 did not apply to the case. *Held further* that the principle of *pari delicto* would operate as a bar only when it was necessary for the party to plead his own fraud before he could make out his case. 1936 M. 165=160 I.C. 753=43 L.W. 116. *See also* 1942 A.W.R. 197.

Sec. 83.—*See* 43 B. 173; 4 I.C. 233; 17 Bom.L.R. 938. Defendant alleging possession as mutawalli—No wakf proved—Right of owner to recover property. *See* 1935 A.W.R. 493=1935 A. 458.

Sec. 84.—Where an agreement is void to the knowledge of both parties, but is not carried out into execution, money paid under the agreement can be recovered. 89 I.C. 644; 1926 L. 159. If the fraudulent object is accomplished or is accomplished even substantially though not in its entirety, the general rule of equity is that the transferee would not be disturbed. But if the fraud contemplated is in the nature of a continuous act, it is open to the party perpetrating fraud to retract from his fraudulent purpose and revoke the authority he had given to his confederates for carrying on the fraud. 53 B. 321=31 Bom.L.R. 109=1929 B. 147. *See also* 29 M. 72=15 M.L.J. 478. Property transferred for an illegal purpose can be recovered when the purpose has not been carried out and the persons who transfer repudiate the contract. But money paid to the trustee of a public trust for the purpose of inducing him to defraud the trust under an arrangement cannot be recovered. I.L.R. (1939) Mad. 30=48 L.W. 588=1939 Mad. 31=(1938) 2 M.L.J. 817. Trade founded by a deceased Mahomedan continued as a family trade by his adult heirs—Relationship of adult heirs to the other members if of fiduciary character. *See* 91 I.C. 618=1925 M.W.N. 543=1925 M. 1149=49 M.L.J. 675. *Benami* purchase to defeat possible claims of third party—Subsequent sale by benamidar in fraud of real owner—Suit for possession on basis of—Plea of *benami* by real owner not barred. 43 L.W. 116=1936 M. 165. Chit fund—Provi-

Bequest for illegal purpose.

85. Where a testator bequeaths certain property upon trust and the purpose of the trust appears on the face of the will to be unlawful, or during the testator's lifetime the legatee agrees with him to apply the property for an unlawful purpose, the legatee must hold the property for the benefit of the testator's legal representative.

Bequest of which revocation is prevented by coercion.

Where property is bequeathed and the revocation of the bequest is prevented by coercion, the legatee must hold the property for the benefit of the testator's legal representative.

Transfer pursuant to rescindable contract.

86. Where property is transferred in pursuance of a contract which is liable to rescission or induced by fraud or mistake, the transferee must, on receiving notice to that effect, hold the property for the benefit of the transferor, subject to repayment by the latter of the consideration actually paid.

Debtor becoming creditor's representative.

87. Where a debtor becomes the executor or other legal representative of his creditor, he must hold the debt for the benefit of the persons interested therein.

Advantage gained by fiduciary.

88. Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained.

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sion for payment of prize by lot to some only of many subscribers—Arrangement that non-winners should be paid amounts actually subscribed by them—Suit by non-winner for moneys subscribed—Maintainability. 43 L. W. 77=1936 M.W.N. 89 (2)=70 M.L.J. 36 (F.B.).

Sec. 86.—Rescission of a voidable lease without decree of Court. Lessee not a trustee. *See* 38 M. 321=19 I.C. 596.

Sec. 87.—11 Bom.L.R. 1187.

Sec. 88.—Applicability. 1925 P. 68; 23 L. W. 16=92 I.C. 124=1926 M. 367. There is no fiduciary relation between co-owners. 91 I.C. 618=1925 M. 1149=49 M.L.J. 675; 1931 M. 553=54 M. 543=61 M.L.J. 139. A trustee who relies on abandonment of the trust by the beneficiary and acquires property by his own exertions need not hold it as a trustee but may hold it for his own benefit. 5 P.L.T. (Supp.) 1=1925 P. 68. A trustee is not debarred from purchasing property which had originally belonged to the trust but had become lost to the trust before he became trustee and had gone into the hands of third persons who had acquired a title to the same by adverse possession. (1942) 1 M.L.J. 99. If an *attorney or an agent* can show he is entitled to purchase yet instead of openly purchasing he purchases in the name of a trustee or agent without disclosing the facts, no such purchase as that can stand for a single moment and the advantage he has acquired by concealing the name of the real purchaser must be given up. Even where the Trusts Act does not apply, the above principles hold good. 51 C. 299=1924 P.C. 34=51 I.A. 24=46 M.L.J. 532 (P.C.). The Superintendent of the State of a disqualified Ruling Chief is in a fiduciary position towards the Political Agent who represents the Chief. If, therefore, he gains any property for himself by representations to the Political Agent concealing the fact that he is gaining it for himself he will be affected by the provisions of S. 88. 125 I.C. 145=1930 P. 357. Where one of two partners dies and the surviving partner retains the partnership capital in his hands and employs it in trade, he is bound to render an account of the profits of the partnership to the deceased partner's son from the time of death up to the date when the final decree is made. In taking account, a fair allowance should be made for the surviving partner's management and for his investment of funds. 130 I.C. 704=1931 A. 327=1931 A.L.J. 81. A guardian stands in a fiduciary relation to his ward. Where a father transfers certain property to his son by a deed of gift, it is his duty, if not at once to register the deed of gift, at least to prevent the registration of any instrument

Illustrations.

(*a*) *A*, an executor, buys at an undervalue from *B*, a legatee, his claim under the will. *B* is ignorant of the value of the bequest. *A* must hold for the benefit of *B* the difference between the price and value.

(*b*) *A*, a trustee, uses the trust-property for the purpose of his own business. *A* holds for the benefit of his beneficiary the profits arising from such user.

(*c*) *A*, a trustee, retires from his trust in consideration of his successor paying him a sum of money. *A* holds such money for the benefit of his beneficiary.

(*d*) *A*, a partner, buys land in his own name with funds belonging to the partnership. *A* holds such land for the benefit of the partnership.

(*e*) *A*, a partner, employed on behalf of himself and his co-partners in negotiating the terms of a lease, clandestinely stipulates with the lessor for payment to himself of a lakh of rupees. *A* holds the lakh for the benefit of the partnership.

(*f*) *A* and *B* are partners. *A* dies. *B* instead of winding up the affairs of the partnership retains all the assets in the business. *B* must account to *A's* legal representative for the profit arising from *A's* share of the capital.

(*g*) *A*, an agent, employed to obtain a lease for *B*, obtains the lease for himself. *A* holds the lease for the benefit of *B*.

(*h*) *A*, a guardian, buys up for himself incumbrances on his ward *B's* estate at an undervalue. *A* holds for the benefit of *B* the incumbrances so bought, and can only charge him with what he has actually paid.

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by which a third party could destroy the interest of the son. Where therefore the father himself transfers to another person the property, given by the deed of gift to his son, and gets the deed of transfer registered and the transferee takes the transfer with full knowledge of the facts, he becomes a constructive trustee of the property. 165 I. C. 417=1936 P.C. 259 (P.C.). Where a person, whether a father or a stranger, enters upon the estate of an infant and continues in possession, the Court would consider such a person as a guardian of the infant. Mother acting as minor's guardian *ad litem* and purchasing property in execution—Son cannot recover the property unless he refunds the benefit going to the estate. 51 M. 291=109 I.C. 153=1928 M. 180=54 M.L.J. 703. Plaintiff's father and defendant were divided cousins. In execution of a decree against plaintiff's father, the land belonging to plaintiff which along with defendant's land formed one holding was purchased by defendant who was under no obligation to satisfy the decree nor was responsible for the discharge of the decree. Defendant was not in fiduciary position. 1929 P. 585. Person taking management of estate of deceased contractor—New contract obtained from Government—Addition to estate. 1935 R. 44. Liability of person standing in fiduciary relation to account for advantage gained by him. 28 Bom.L.R. 1481=99 I.C. 763 =1927 B. 75. Heirs of person deceived can bring suit to set aside transaction brought about by undue influence of fiduciary. 51 B. 133=29 Bom.L.R. 115=1927 B. 384. A co-sharer tenant who is impleaded in the landlord's suit for rent does not come within the language of S. 88 as a "person bound in a fiduciary character" to protect the interest of the other tenants who have not been impleaded in he suit. Consequently, if the tenure is put up for sale in execution of the decree obtained against him and is purchased *benami* for him, the purchase does not inure to the benefit of the non-impleaded tenants. I.L.R. (1938) 2 Cal. 266=42 C.W.N. 701 =1938 Cal. 500. Where a pleader has not obtained an advantage over his clients by using his confidential position, he does not become a trustee within the meaning of S. 88. 52 C.L.J. 492=130 I.C. 897=1931 C. 144. Pleader and client—Pleader purchasing client's property in execution sale in his wife's name after his ceasing to be client's pleader—Sale, if vitiated. 29 C.W.N. 491 =1924 P.C. 34. Where the defendant, by taking advantage of the fiduciary position he occupied towards the plaintiff, got a contract in his favour and possession of the property in pursuance thereof, he is bound, when the contract is set aside at the instance of the plaintiff, to account for mesne profits—not merely from the date when the contract was avoided—but from the date he got possession. 59 I.A. 147=7 Luck. 64=136 I.C. 108=36 C.W.N. 461=1932 A.L.J. 297= 1932 P.C. 89=62 M.L.J. 451 (P.C.). On this section, *see* 11 Bom.L.R. 1187; 47 I.C. 883; 34 A. 306; 29 M.L.J. 551.

Secs. 88 and 90.—Ss. 88 and 90 are not exhaustive in the sense that if a person cannot be brought within these sections, and held liable as a trustee, he must be found to fall under the residuary S. 94. A person cannot be held to be a constructive trustee unless his position is such that he owed some duty to the persons interested. When a person did not owe any duty to another or not holding the property for the benefit of another, S. 94 cannot apply. 1940 M.W.N. 76=1940 Mad. 779. There is no warrant for holding that in no case can a partner during continuance of a partnership contract for a new lease to be granted to himself, of property which is in lease to the partnership without the new lease being held to be subject to trusts for the benefit of the partnership. Except in cases otherwise specially provided for by statute, a constructive trust

89. Where, by the exercise of undue influence, any advantage is gained in derogation of the interests of another, the person gaining such advantage without consideration, or with notice that such influence has been exercised, must hold the advantage for the benefit of the person whose interests have been so prejudiced.

Advantage gained by exercise of undue influence.

90. Where a tenant for life, co-owner, mortgagee, or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted in gaining such advantage.

Advantage gained by qualified owner.

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can be held to arise only if the conditions of Ss. 88 and 90 of the Trusts Act are satisfied. A general presumption that in obtaining the renewal the partner availed himself of the advantage of the old lease cannot be justified in cases where the lease is not renewable by contract or custom. Except in case of trustees, there is no irrebuttable presumption in support of the equity. For such equity to apply it must be shown that the transaction was within the scope of the partnership or part of the business of the partnership or an undertaking in rivalry with the partnership or indeed connected with it in any proper sense. 48 L.W. 334=1938 Mad. 929=(1938) 2 M.L.J. 790. Members of a Hindu joint family were not allowed to compete with the receivers who had been appointed to wind up the joint family business in getting an abkari contract which had been held by the joint family and for a renewal of which the receiver had thought fit, in the interests of the family, to apply. 1925 M. 137. Application for darkhast grant—Payment of price of survey stones and tree—Death of applicant before grant—Fresh application by widow for grant—Grant to widow is not in trust for or for benefit of husband's estate. 1940 Mad. 779.

Sec. 89.—If it is shown that two parties stood in such a situation as to give rise to confidence between them, and the third party who derives the benefit was aware of the existence of this relation, the third party is not entitled to retain the benefit unless he shows that the party conferring the benefit was a free agent and had independent and disinterested advice. It is not necessary for the party impeaching the transaction to prove that he was deceived by the person who put himself in *loco parentis* towards him; nor is it necessary for him to make out that the third party connived at any actual fraud. If it is shown that the third party was aware of the existence of the confidential or fiduciary relation, he is under the same disability as the party who occupied the position of confidence. 1939 M.W.N, 976=1940 Mad. 285. Co-debtors—Exercise of undue influence by one over another—Latter undertaking former's liability to creditor—Creditor having notice of fiduciary relationship—Right to enforce liability. *See* 69 M.L.J. 104=58 M. 454.

Sec. 90.—[*See also* notes under S. 88 *supra*]. Section not exhaustive. 137 I.C. 355=34 Bom.L.R. 357=1932 B. 240. Where there is a statutory provision to the contrary. 37 B. 692=21 I.C. 311. *"Properly incurred"* means reasonably and suitably incurred. 22 N.L.R. 86=94 I.C. 941 =9 N.L.J. 90=1926 N. 345. A person who is a limited owner by reason of his position must not utilise that position to obtain an advantage to the detriment of his co-owners. It is not necessary that the other persons should make out that the advantage was obtained fraudulently or by misrepresentation or by suppression of the true facts. All that the section says is that if there is a person in a fiduciary relation to another, he cannot take advantage of that position so as to gain something exclusively for himself which he otherwise would not have obtained but for the position which he held. 40 Bom.L.R. 118=1938 B. 250. Where in the case of a sale under the Revenue Sale Law, there is default on the part of two co-sharers, both the one who questions the same and the one who is the purchaser, S. 90 would apply only when the latter co-sharer takes advantage of his position as such and enters into the transaction to the detriment of the interest of the former. 40 C.W.N. 1054. But if a co-sharer in an estate brings about the sale of the estate by not paying his own proportion of Government revenue and purchases the estate himself in the ensuing sale, he is under a duty to hold it in trust for the benefit of his co-sharer and reconvey his share to him. 59 C. 180=137 I.C. 875=1932 C. 434. *See also* 151 I.C. 1056=36 Bom.L.R. 339=1934 B. 219. Land held by plaintiff and defendant under a joint patta—Default in paying

Illustrations.

(*a*) *A*, the tenant for life of lease-hold property, renews the lease in his own name and for his own benefit. *A* holds the renewed lease for the benefit of all those interested in the old lease.

(*b*) A village belongs to a Hindu family. *A*, one of its members, pays nazrana to Government and thereby procures his name to be entered as the inamdar of the village. *A* holds the village for the benefit of himself and the other members.

(*c*) *A* mortgages land to *B*, who enters into possession. *B* allows the Government revenue to fall into arrear with a view to the land being put up for sale and his becoming himself the purchaser of it. The land is accordingly sold to *B*. Subject to the repayment of the amount due on the mortgage and of his expenses properly incurred as mortgagee, *B* holds the land for the benefit of *A*.

Property acquired with notice of existing contract.

91. Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract.

NOTES.

Government revenue—Plaintiff's land sold and purchased by defendant in auction—Plaintiff cannot claim benefit under the section. 85 I.C. 212=1925 M. 288=47 M.L.J. 755. *See also* 44 C. 573=32 M.L.J. 206 =44 I.A. 30 (P.C.); 15 C.W.N. 776=7 I.C. 772; 1 L.W. 874=26 I.C. 55; 20 I.C. 510=17 C.W.N. 1233. Mortgagee purchasing holding of tenants in the estate mortgaged in rent sale—Trustee for mortgagor. *See* 7 M.L.T. 148=4 I.C. 357. Mortgagee purchasing equity of redemption in Court sale—If fraud and misconduct. *See* 15 I.C. 589. Sale by Government and purchase by mortgagee benami—Effect. *See* 40 B. 483=18 Bom.L.R. 438. Purchase of equity of redemption by mortgagee in execution of money decree without leave under O. 21, R. 72, C.P. Code—Mortgagee purchaser not a trustee for mortgagor. 19 Bom.L.R. 75. Mortgagee with possession of property subject to mortgage in favour of another—Purchase at revenue sale by him in breach of his duty—Position and liability of such mortgagee-purchaser. 1927 M. 349=52 M.L.J. 135. In certain respects and for certain purposes the mortgagee in possession is a trustee for mortgagor and cannot take advantage of that position to the detriment of the mortgagor. 15 C.W.N. 776=7 I.C. 772. Suit for enhancement of rent—Co-sharer tenant compromising suit and obtaining intermediate tenure—Such tenure is not joint tenure of all co-sharers. 64 C.L.J. 547=1937 Cal. 455. Where the head lessee obtains a renewal of the lease from the lessor without claiming to represent the sub-lessee and at a time when the rights both of the lessee and the sub-lessee had become extinguished, the sub-lessees are not entitled to the benefit of the renewed lease. 35 M.L.J. 370=40 I.C. 581. Accretion to the estate during the lifetime of Hindu widow—Whether partakes of the widow's estate. *See* 92 I.C. 637=1926 O. 277. Co-sharer—Two in possession as sharers of 2 anna extent and as mortgagees of 14 anna share—Ejectment of tenants followed by taking of possession of holdings and bringing same under own cultivation—Benefits if enure to all the co-sharers. 1937 A. 321. It is a common practice for one of the co-sharers to be in separate possession of part of common land, without objection by other co-sharer, the other co-sharers being left to their remedy by partition and obtaining compensation by award of the land of a similar quality. And his possession cannot be considered to be "in derogation" of the rights of the other co-sharers within the meaning of S. 90. 1934 A.L.J. 544=1934 A. 193. On this section, *see also* 1934 M. 686=67 M.L.J. 563. (Elder brother assuming management of younger brother's property held liable to account with 9 per cent. compound interest). *See also* 38 L.W. 539=1933 M. 806=65 M.L.J. 548.

Sec. 90, Ill. (b).—Grant of Sheri land by Government to member of Hindu joint family—Grantee named in patta individually —Subsequent enlargement of tenure by grant of full occupancy rights to heirs—Benefit of grant—Right of joint family to claim. *See* 40 Bom.L.R. 118=1938 Bom. 250.

Sec. 91.—Principle of section applicabe to auction-purchaser. *See* 5 L.W. 234. By reason of S. 91, the purchaser holds the property for the benefit of the prior contractee to the extent necessary to give effect to the contract. For all other purposes and as between the purchaser and his vendor, the purchaser is the owner and that is the reason why in such circumstances the decree in a suit for specific performance must direct the first purchaser to join in execution of the conveyance. 41 L.W. 645=1935 M. 333. Unregistered contract of sale—Vendee in possession under—Vendor trustee for vendee and not entitled to eject him. 19 Bom.L.R. 100 (F.B.). *See also* 36 B. 446 =16 I.C. 680. Where specific performance of a contract in respect of property which has subsequently passed into the hands of a third party with notice of the contract is enforced, the property in question shall pass

Purchase by person contracting to buy property to be held on trust.

92. Where a person contracts to buy property to be held on trust for certain beneficiaries and buys the property accordingly, he must hold the property for their benefit to the extent necessary to give effect to the contract.

Advantage secretly gained by one of several compounding creditors.

93. Where creditors compound the debts due to them, and, one of such creditors, by a secret arrangement with the debtor, gains an undue advantage over his co-creditors, he must hold for the benefit of such creditors the advantage so gained.

Constructive trusts in cases not expressly provided for.

94. In any case not coming within the scope of any of the preceding sections, where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands.

NOTES.

to the person entitled thereto and existing at the time of contract. To such a case the principles of S. 91 will apply. 138 I.C. 188 =1932 N. 93. *See also* 1940 M.W.N. 76 (who is constructive trustee).

Secs. 91 and 92.—Deed of arrangement or composition between debtors, creditors and trustees for deferred payment of debts out of debtor's property—Non-registration —Absence of words of conveyance—Constructive trust if created—Subsequent mortgage by debtor of same property to creditor —Latter party to prior deed—*Held,* that Ss. 91 and 92 of the Act applied to the case, and the defendant must be declared to hold the property mortgaged to him upon the trusts mentioned in the prior deed of arrangement or composition, free of encumbrances created in his favour and of any decrees or orders obtained by him on the basis of such encumbrances, and that a decree for administration of the trusts in question should be made. 63 C. 784=1937 Cal. 180.

Sec. 92.—Where *A* purchased a village in her own name with the intention of settling the property on *B* whom she had maintained and brought up as a daughter but no perfected gift was made and the income of the village was not given to *B*. *B* has no beneficial interest in the village and the village is not purchased *benami* in trust for *B*. 19 M.L.J. 106=2 I.C. 316.

Sec. 94.—Where an undivided coparcener has mortgaged his share and on partition the property is allotted to a non-mortgaging coparcener who undertakes to pay off the mortgage he is saddled with an obligation in the nature of a trust and is bound to hold the property for the benefit of the mortgagees to the extent necessary to satisfy their demands. 1940 N.L.J. 365=1940 Nag. 149 =I.L.R. (1941) Nag. 677. Relatives assuming management of minor's estate on the death of his father—Constructive trust created—Liability to account as trustees. 28 Bom.L.R. 1481=99 I.C. 763=1927 B. 75. The vendee of property free of encumbrances with whom a portion of the consideration money is reserved to clear the encumbrances is not a trustee, or in position analogous to that of a trustee to the encumbrancer, in respect of the money so reserved. 52 C. 100=88 I.C. 49=1925 C. 599. Constructive trust is created where a person endorses and hands over to another Government promissory notes for obtaining interest thereon. 84 I.C. 490=1925 C. 239. *See also* 36 I.C. 968 (974). A trustee, who, without being guilty of negligence, gives to his servant the custody of trust property, is not liable for loss occasioned to the trust estate, by the felonious acts of the servant. Certain stolen property recovered from the accused person was kept with the person in charge of Malkhana who absconded with the property. *Held,* that S. 94, did not apply and no implied trust was created between the owner and the Secretary of State for India. 18 L. 380=1937 L. 572.

Secs. 94 and 95.—Where a co-sharer who has separated from the other joint owners and who is a constructive trustee of the latter's share of the property held in co-ownership and of the income thereof chooses to mix up his separate property with the property held in co-ownership and deliberately mingles the funds of both, the burden lies heavily on him to prove that acquisitions made by him after the separation have been acquired from his own separate funds and not out of the income of the property held by him in co-ownership with the other co-owner. Ss. 94 and 95 of the Trusts Act apply to such a case, and the other co-sharer can therefore claim a partition of all the properties including those purchased after the separation and of the entire income thereof, in the absence of clear proof that the subsequent acquisitions have been made out of the separate funds of the co-owner in possession. I.L.R. (1940) Kar. 534=1941 Sind 50. *See also* 1937 Mad. 675.

Illustrations.

(*a*) *A*, an executor, distributes the assets of his testator *B* to the legatees without having paid the whole of *B's* debts. The legatees hold for the benefit of *B's* creditors, to the extent necessary to satisfy their just demands, the assets so distributed.

(*b*) *A* by mistake assumes the character of a trustee for *B*, and under colour of the trust receives certain money. *B* may compel him to account for such moneys.

(*c*) *A* makes a gift of a lakh of rupees to *B*, reserving to himself, with *B's* assent, power to revoke at pleasure the gift as to Rs. 10,000. The gift is void as to Rs. 10,000 and *B* holds that sum for the benefit of *A*.

Obligor's duties, liabilities and disabilities.

95. The person holding property in accordance with any of the preceding sections of this Chapter must, so far as may be, perform the same duties, and if subject, so far as may be, to the same liabilities and disabilities, as if he were a trustee of the property for the person for whose benefit he holds it:

Provided that (*a*) where he rightfully cultivates the property or employs it in trade or business, he is entitled to reasonable remuneration for his trouble, skill and loss of time in such cultivation or employment; and (*b*) where he holds the property by virtue of a contract with a person for whose benefit he holds it, or with any one through whom such person claims, he may, without the permission of the Court, buy or become lessee or mortgagee of the property or any part thereof.

Saving of rights of *bona fide* purchasers.

96. Nothing contained in this Chapter shall impair the rights of transferees in good faith for consideration, or create an obligation in evasion of any law for the time being in force.

THE SCHEDULE.

STATUTE.

Year and Chapter.	Short title.	Extent of repeal.
29 Car. II, c. 3.	The Statute of Frauds.	Sections 7, 8, 9, 10 and 11.

ACTS OF THE GOVERNOR-GENERAL IN COUNCIL.

Number and Year.	Short title.	Extent of repeal
XXVIII of 1866.	The Trustees' and Mortgagees' Powers Act, 1866.	Sections 2, 3, 4, 5, 32, 33, 34, 35, 36 and 37 In section [1][* *] 43 the word "trustee" wherever it occurs; and in section 43 the words "management or" and "the trust property or".
I of 1877.	The Specific Relief Act, 1877.	In section 12 the first illustration.

THE UNCLAIMED DEPOSITS ACT (XXV OF 1866).

No.	Short title.	Amendments.
XXV	The Unclaimed Deposits Act, 1866.	Repealed in part, [Y]XIV of 1867; XVI of 1874; XII of 1876; XII of 1891. Supplemented, V of 1870.

LEG. REF.

[1] The figure "39" and by implication the word "and" also were repealed by the Repealing and Amending Act, 1891 (XII of 1891). *See* the First Schedule.

NOTES.

Sec. 95.—*See* 19 Bom.L.R. 100; (1939) 1 M.L.J. 745 (guardian of minor, is trustee.)

Sec. 96.—*See* 10 L.W. 544.

[11*th July*, 1866.

An Act to transfer to the Government of India certain securities and moneys deposited in the High Courts of Judicature at Fort William, Madras and Bombay [1][* * *].

WHEREAS it is expedient that certain securities and sums of money deposited in the High Courts of Judicature at Fort William, Madras and Bombay [1][* * *], in the course of suits in the said Courts or in the late Supreme Courts at Calcutta, Madras and Bombay, respectively, and now or hereafter appearing to have been in such deposit for a period of twenty years or upwards, without any claim thereto having been made and allowed during that period, should be transferred and paid to the Government of [the Province in which the [2]Court has its principal seat] : [1][* * *] ; It is hereby enacted as follows:—

Preamble.

Money deposited in High Courts and unclaimed for twenty years transferred to Government.

1. All securities and sums of money deposited in the said High Courts [1][* *] or any of them, in the course of suits in any of the said Courts or of the late Supreme Courts of Calcutta, Madras and Bombay, and now or hereafter appearing to have been in such deposit for a period of twenty years or upwards, without any claim thereto having been made and allowed during that period, shall be transferred and paid to [1][the Government of the province in which the [2]Court has its principal seat].

2. [*Repealed by Acts XXIV of* 1867 *and XVI of* 1874.]

Transfer not made pending suits.

3. Nothing in this Act shall authorize any transfer or payment of any such securities, sums of money or proceeds as aforesaid, pending any suit already instituted or which shall hereafter be instituted in respect thereof.

Re-payment on subsequent establishment of claim.

4. If any claim shall hereafter be made to any part of the securities, money or proceeds which shall be transferred and [2][paid to any Government] under the provisions of this Act, and if such claim shall, in the case of securities and money transferred and paid under section 1 of this Act, be established to the satisfaction of the High Court [1][* * * *] from which the transfer shall have been made, [1][* * * * *], the Government of [2][the Province in which that Court has its principal seat shall pay] to the claimant the amount of the principal so transferred and paid as aforesaid, or so much thereof as shall appear to be due to the claimant [1][* * * *].

THE UNCLAIMED DEPOSITS ACT (V OF 1870).

Year.	No	Short title.	Amendments.
1870	V	The Unclaimed Deposits Act, 1870.	Repealed in part, II of 1874; XVI of 1874.

LEG. REF.

[1] Repealed by Acts XXIV of 1867; XVI of 1874 and XII of 1876.

[2] Substituted by A.O., 1937.

[*4th February*, 1870.

An Act to enable the High Courts at the Presidency-towns to deal with cost of petitions for certain moneys transferred to Government.

Preamble.

WHEREAS the High Courts of Judicature at Fort William, Madras and Bombay have no power to deal with the costs of petitions under section 4 of Act No. XXV of 1866 (to transfer to the Government of India certain securities and moneys deposited in the High Courts of Judicature at Fort William, Madras and Bombay [1][* * * *] [2][* * *] for payment of certain securities, moneys, or proceeds transferred to Government:

AND WHEREAS it is expedient to confer such power upon the said High Courts;

It is hereby enacted as follows:—

Power to direct by whom costs are to be paid.

1. Whenever any of the said Courts shall make an order on any such petition, the Court may direct by whom the whole or any part of the costs of each party are to be paid.

THE USURIOUS LOANS ACT (X OF 1918).

Year.	No.	Short title.	Amendment.
1918	X	The Usurious Loans Act, 1918	Amended, XXVIII of 1926. and Madras Act VIII of 1937 and other Provincial Acts.

[22*nd March*, 1918.

An Act to give additional powers to Courts to deal in certain cases with usurious loans of money or in kind.

WHEREAS it is expedient to give additional powers to Courts to deal in certain cases with usurious loans of money or in kind; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE USURIOUS LOANS ACT, 1918.

(2) It extends to the whole of British India, including British Baluchistan.

LEG. REF.

1 Repealed by Act XVI of 1874.

2 Omitted. "So far as it related to the Administrator-General" were repealed by Act II of 1874.

NOTES.

SEC. 1.—Act can be applied also in favour of a defendant who confesses judgment. 1 R. 580=1924 R. 144. Act is not retrospective. 104 I.C. 191=1927 N. 338. Act not retrospective and inapplicable to mortgage bond executed before date of Act. 1929 A. 59. *See also* 106 I.C. 38=1928 N. 120; 96 I.C. 382=1926 N. 473. Where a mortgage executed in 1923 was sought to be redeemed after Act XXXVIII of 1926, held, it was open to the Court to reduce the rate of interest payable to the mortgagee. 35 C. W. N. 654; 1937 N. 101; 20 N.L.J. 63. The Usurious Loans Act can have no application to a case in which there is no loan; nor would the mere fact that the rate of interest is somewhat high be itself a ground for interference in the absence of anything to suggest that the transaction was unconscionable or unduly hard. 22 Pat. L. T. 12=1941 Pat. 233.

APPLICABILITY OF ACT TO BERAR.—The Act was made applicable to Berar by virtue of Government Notification, in so far as it might be applicable and subject to any amendments to which the enactment might be subject in the Central Provinces. The Act was amended by C.P. Act (XI of 1934) since 15th June, 1934, and therefore the Usurious Loans Act as applied to Berar is subject to the same modification in Berar and the Amending Act therefore applies to Berar since that date. 1937 N. 101. Where a suit

(3) The Provincial Government may, by notification in the [Official Gazette], direct that it shall not apply to any area, class of persons, or class of transactions which it may specify in its notification.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "Interest" means rate of interest and includes the return to be made over and above what was actually lent, whether the same is charged or sought to be recovered specifically by way of interest or otherwise.

(2) "Loan" means a loan whether of money or in kind, and includes any transaction which is, in the opinion of the Court, in substance a loan.

(3) "Suit to which this Act applies" means any suit—

(*a*) for the recovery of a loan made after the commencement of this Act; or

(*b*) for the enforcement of any security taken or any agreement, whether by way of settlement of account or otherwise, made, after the commencement of this Act, in respect of any loan made either before or after the commencement of this Act; [1][or

(*c*) for the redemption of any security given after the commencement of this Act in respect of any loan made either before or after the commencement of this Act.]

LEG. REF.

1 Cl. (*c*) to sub-S. (3) of S. 2 was added by Act XXVIII of 1926, S. 2.

NOTES.

for the recovery of a loan advanced in 1930 and renewed in 1933, is filed long after C.P. Usurious Loans Amendment Act of 1934 had come into force. the Act as amended does apply to such a suit and the Court is bound to reopen the transactions if it finds that interest alone is excessive as defined in the amendment. I.L.R. (1940) Nag. 689=1940 N.L.J. 325=1940 Nag. 363. See also 1938 Nag. 112. Act as amended by U.P. Amendment Act (XXIII of 1934), S. 1 (2)—Applicability. The U.P. Amending Act XXIII of 1934 must be held to come into operation only since the 27th April, 1935, when it was published in the U.P. Gazette after having received the assent of the Governor-General. It is inapplicable to a suit which was instituted not only before that date but also before the Bill had received the assent of the Governor, although such suit was instituted after the bill was passed by the legislature. The Act cannot be said to be passed within the meaning of S. 1 (2) of the Amending Act until the final step necessary to make the Act has been taken. 13 Luck. 317=1937 O.W.N. 382 =1937 Oudh 241. (C. P. Amending) Act (XI of 1934), S. 2 (a).—Scope—If retrospective. S. 2 (*a*) of the C. P. Usurious Loans Amending Act (XI of 1934) is not retrospective in operation so as to enable the Court to exercise wider powers to re-open loan transactions made before 15th June, 1934, at any rate when the amount due under such a loan has become the subject matter of a litigation instituted before that date. I.L.R. (1938) Nag. 91=20 N. L. J. 285=1938 Nag. 112. *See also* 1940 N.L.J. 325=1940 Nag. 363.

SEC. 2, CL. (3).—Act is not retrospective. 104 I.C. 191=1927 N. 338. *See also* 106 I. C. 38=1928 N. 120; 35 C. W. N. 654 (as to effect of amending Act XXVIII of 1926). Act applies to Ajmeer Merwara. 2 A.M.L.J. 5. As to effect of Bengal Money-Lenders' Act on onus of proof under this Act; *see* 63 C.L.J. 117. Act does not apply to suits in respect of a loan made or security taken or an agreement made before its commencement. 96 I.C. 382=1926 N. 473. Act applies to all suits for the recovery of loans advanced after the commencement of the Act. S. 2 (3) is quite general and includes not only suits based on bonds but also on negotiable instruments. 1931 A.L.J 662=1931 A. 662. A suit for redemption of jewels pledged is not one to which the Act can apply, for under S. 2, cl. (3), the applicability of the Act is confined to a suit for the enforcement of the security kept. 27 Bom.L.R. 1162. S. 2 (3) (*b*) of the Act applies irrespective of the fact whether the person sought to be made liable executed the document as principal debtor or as surety only. An undertaking to pay 75 per cent. interest as surety was relieved against. 23 A. L. J. 438= 47 A. 745=88 I.C. 78=1925 A. 400. Suit by debtor for redemption of credit—Applicability of the Act. *See* 50 B. 107=92 I. C. 368=1926 B. 65. Act (as amended by U.P. Amendment Act 1934), S. 2 (3) (ii)—Scope of.—By reason of the provisions of S. 2 (3) (*ii*) of the Usurious Loans Act as amended in U.P. proceedings under the U.P. Encumbered Estates Act, it is competent to a Court to reduce the interest even though the loan was incurred prior to the passing of the Usurious Loans Act. I.L.R. (1941) All. 567 =1941 A.L.J. 366=1941 O.W.N. 701=1941 All. 293. Act as amended by C.P. Usurious Loans (Amendment) Act, 1934, Ss. 2 (3) and 3—The C.P. Usurious Loans (Amendment) Act operates in respect of all suits for the enforcement of agreements made after the

3. (1) Notwithstanding anything in the Usury Laws Repeal Act, 1855, where, in any suit to which this Act applies, whether heard *ex parte* or otherwise, the Court has reason to believe,—

Re-opening of transactions.

NOTES.

commencement of the Act in respect of loans made either before or after its commencement. The Act makes no distinction between the types of Court to which it is to apply. It is applied to all suits which fulfil the conditions necessary irrespective of the kind of the Court in which they are instituted. Hence a Court of Small Causes is entitled to exercise the powers conferred by S. 3 (1) (*b*) of the Act. S. 3 is mandatory and the Court is bound to exercise the powers conferred the moment the facts bring the claim within the ambit of the Act. A refund can be ordered by the Court of Small Causes, if the calculations justify it. 1941 N. L. J. 456=1941 Nag. 294=I.L.R. (1942) Nag. 177=I. L. R. (1937) Nag. 119.

SEC. 3: APPLICATION OF SECTION—ESSENTIALS.—The amendment in 1926 conferring on the Courts the enhanced powers of reopening accounts up to 12 years back has a retrospective effect and can be applied to suits governed by the Act, although instituted prior to the date of the amendment. 1936 N. 259. The Court has no jurisdiction to reduce the rate of interest as set forth in a decree of Court. 163 I.C. 537=1936 A.W.R. 478=1936 R.D. 217=1936 A.L.J. 510=1936 A. 450. The language of S. 3 of the Usurious Loans Act clearly shows that the Court has power to act *suo motu* even though the plea is not raised by way of defence. 1941 N. L. J. 194=1941 Nag. 177=I. L. R (1942) Nag. 456; 1941 N. L. J. 456=1941 Nag. 294. Where it is not possible for the High Court to reduce the interest in a case without affecting a decree previously passed by a Court of competent jurisdiction, it cannot exercise the powers given by S. 3. The Court in exercise of its powers under S. 3 must not do anything which affects any decree, whether such decree be *inter partes* or not. 164 I.C. 325=1936 A.L.J. 919=1936 A. 611. In order to permit of the application of S. 3, two facts are to be proved. The first is that the interest is excessive and the second is that the transaction was as between the parties thereto substantially unfair. 153 I.C. 943=1935 Pesh. 4. *See also* 130 I.C. 254 =1930 C. 776; 19 Pat. 974=21 P.L.T. 740 =1940 P. W. N. 719=1941 Pat. 99. Under the section the following points are clear: (1) the duty is cast upon the Court in cases to which the statute is applicable to apply its mind to its provisions even in a suit heard *ex parte;* (2) the words "whether *ex parte* or not" and "the Court has reason to believe" indicate that the intention of the legislature was to enable the Court to take up the question of its own motion whether it has been raised by the defence or not; (3) the words "has reason to believe" have a significance; they mean something more than mere suspicion, namely, that the person has sufficient cause to believe that thing. (4) Excessive interest cannot be defined but the considerations that should govern the matter are the financial conditions of the debtor, the nature of the security, the risk incurred, the period of rests and lastly the total advantage to the parties. (5) The word "substantially fair" should be understood in the light of practical tests laid down in cl. (*d*) of sub-S. (2). *Interest at 25 per cent. compound,* per annum with yearly rests is not excessive by itself so as to be described as being "substantially unfair." Relief not granted in a case between landlord and tenant. 52 C.L.J. 73=1930 C. 776. The provisions of sub-cl. (*a*), cl. (2), S. 3, impose upon the Court the duty of coming to a conclusion as to what will be a reasonable rate of interest, having regard to the risk incurred. 1935 M. W. N. 408=1935 M. 468. For a transaction to be regarded as "unfair" it is not necessary that Court should be able to ascribe some moral blame-worthiness to the creditor. It is open to the Court to come to the conclusion that the transaction is substantially unfair by taking into account the circumstances materially affecting the parties at the time of the loan. 1935 M. W. N. 408=1935 M. 468. Where the interest on a bond was fixed as Rs. 2 per cent. per mensem and in case of default the same was payable from the date of the execution of the bond and not from the date of the default, the transaction, is substantially unfair within the meaning of S. 3. 192 I.C. 118=1941 Lah. 23. When the rate of interest is not excessive, and the transaction is not substantially unfair, the fact that interest is capitalised once in three years and that, as a result of accounts lasting for about 30 years, the amount of Rs. 23 originally advanced has amounted to Rs. 5,250 is no ground for disallowing the claim, though the case is a hard one. The Act does not apply to the transaction and the Court cannot reopen the account. 152 I.C. 522=1935 L. 38. Apart from any circumstance vitiating the contract and even if the contract is quite valid and operative, the Court has powers under S. 3 to reduce the rate of interest, if it finds on facts that the interest is excessive. 1 P. 263; 3 P. 279 and 7 P. 294 (P.C.), Dist.; 1931 N. 25=130 I.C. 103. A bargain which is fair in its inception cannot become unfair by the happening of subsequent events, nor can interest which was reasonable in the beginning become excessive at a later date. The Court is limited to a consideration of circumstances which existed "at the date of the loan". [23 C. 15 (P.C.) and 1918 P.C. 249, Ref.] 144 I.C. 218=1933 N. 224. Under S. 3 as amended by the Punjab Relief of Indebtedness Act, the proper test to determine whether a transaction is fair or unfair is to take into consideration the circumstances as they existed at the time it was made. 42 P.L.R.

NOTES.

372=1940 Lah. 275. From the mere fact that the mortgagor was indebted and in urgent need of money, it cannot be inferred that the mortgagees were in a position to dominate his will, and interest at Rs. 2-8-0 per cent. per mensem compoundable quarterly was not held unconsionable. 27 A. L. J. 1091=1929 A. 680. A high rate of interest is not necessarily to be regarded as excessive or substantially unfair. It is open to the creditor to adduce evidence that the prevailing rate of interest in the locality from where the parties come is the same or nearly the same as it has been agreed to or, that the high rate of interest was justified in view of the risk to which the creditor was exposed, making the transaction a substantially fair one. 27 A.L.J. 1174=118 I.C. 375. Even if it is proved that it is the custom in the locality to charge interest at 75 per cent. per annum and 150 per cent. per annum in case of default, the rate of interest can still be held to be excessive and Court has under S. 3 (1), power to re-open transaction and order repayment in respect of excessive interest and no claim for such relief is necessary. 1929 N. 348. It is a common thing in India for rates of interest to be charged upon secured loans amounting to one per cent. per mensem and in some circumstances even going as high as 2 per cent. per month. What rate of interest is charged depends on the circumstances, the security offered and so on, and no fixed rate of interest can be specified as being reasonable or fair in all cases. The burden is on the borrower to show that the rate of interest is excessive, and it is somewhat difficult to hold that as between 12 per cent. and 15 per cent. the rate of interest alone can indicate that it was excessive. 10 P.L.T. 430=119 I.C. 410=1929 P. 383. See also 1939 Pat. 360. A rate of interest of 75 per cent. in respect of a loan of Rs. 300 to a Government servant in excessive, and the transaction is also substantially unfair. The Court re-opened the transaction and allowed 33 per cent. from the very beginning. 1939 A. M .L. J. 163. Where the contract rate of interest was 15 per cent. per annum with half-yearly rests, on one transaction, and Rs. 1-10-0 per cent. per mensem with half-yearly rests on another transaction of loan entered into by a guardian of a minor, and the High Court reduced the interest to 15 per cent. per annum simple interest. *Held*, that the reduction of the rates of interest under the Usurious Loans Act to 15 per cent. simple interest was eminently reasonable. 43 C.W.N. 1093=70 C.L.J. 373=1939 P.C. 200 (P.C.). Where a loan has been incurred for interest, and this interest is added to the amount agreed to be due when a new transaction is agreed upon between the parties which includes the payment of interest as an acknowledged debt, this is not in principle open to any sound objection on the ground of its being unfair under the Usurious Loans Act. 24 per cent. interest was held unreasonable and excessive, and was therefore reduced to 15 per cent. 51 L. W. 702 =1940 P.C. 60=(1940) 1 M.L.J. 68 (P.C.). In the absence of undue influence the Court cannot reduce the date of interest fixed by the parties with open eyes, unless the case falls within the provisions of this Act. The rate of interest provided in a handnote was only Re. 1 per centum. per month. There was nothing to show that this rate of interest was unreasonable. [(1906) A.C. 461, Ref.] 10 P.L.T. 322=116 I.C. 43=1929 P. 340. To bring a case within the Act, it is necessary to establish (*a*) that interest charged was "excessive" and (*b*) that the transaction as between the parties thereto was "substantially unfair''. Both these elements must be proved to co-exist. 120 I.C. 417=1930 L. 65. *See also* 20 Pat. L. T. 825=1939 Pat. 323; 20 P.L.T. 543=1939 Pat. 360. "Excessive" is explained to mean, excess of that which the Court deems reasonable having regard to the risk at the date of the loan. It was held that in Bihar there was nothing to entitle a Court to hold that interest at twelve per cent. compound interest per annum is substantially unfair. 174 I.C. 197= 1938 Pat. 324. The expression "reason to believe" in S. 3 (1) does not require that there should be evidence on the point before the Court. It is enough if the Court has reason to believe that the rate is excessive by taking judicial notice according to the Evidence Act. 1939 A. L. J. 40=1939 All. 323. Where a mortgage bond contained a stipulation for payment of interest at 12 per cent. per annum with yearly rests, and there was no evidence either that the rate of interest prevailing at the time was lower than that provided in the bond or that the transaction was substantially unfair: *Held*, that S. 3 was not a bar to the enforceability of the claim for interest. 56 C. 960=33 C. W. N. 388. Tarnsferee of debtor—Power of Court to relieve—Meaning of the words 'debtor' and 'creditor'; 4 L. 1=115 I.C. 841. A Court is authorised to consider the merits of a transaction in a case of recovery on a bond in which the defendant does not appear. If Court finds the payment of interest substantially unfair, it is a fit case to reopen the transaction between the parties and give relief in respect of the excessive interest. Where even after the progressive discharge of the principal the fixed rate of interest continues on the whole sum borrowed, the provision as to interest is unconscionable and unfair and will not be enforced. 44 B. 775=58 I.C. 433=21 Bom.L.R. 1126. Principal amount made at settlement of previous accounts—High rate of interest—Power of Court to reduce principal amount and interest—General principles applicable. *See* 3 O. W.N. (Supp.) 222. Where an ignorant and illiterate mortgagor agrees to pay interest at 2 per cent. per mensem compoundable with monthly rests, the stipulation is hard and unconscionable and a Court of equity can grant relief. 75 I.C. 784 (2)=1925 A. 31. No relief as to rate of interest can be granted merely because of hardship, in absence of proof of undue advantage being taken by the creditor of the debtor's position. 11 S.L.

(*a*) that the interest is excessive; and

(*b*) that the transaction was, as between the parties thereto, substantially unfair;

the Court may exercise all or any of the following powers, namely, may,—

(i) re-open the transaction, take an account between the parties, and relieve the debtor of all liability in respect of any excessive interest;

(ii) notwithstanding any agreement, purporting to close previous dealings and to create a new obligation, re-open any account already taken between them and relieve the debtor of all liability in respect of any excessive interest, and if anything has been paid or allowed in account in respect of such liability, order the creditor to repay any sum which it considers to be repayable in respect thereof;

(iii) set aside either wholly or in part or revise or alter any security given or agreement made in respect of any loan, and if the creditor has parted with the security, order him to indemnify the debtor in such manner and to such extent as it may deem just:

Provided that, in the exercise of these powers, the Court shall not—

(i) re-open any agreement purporting to close previous dealings and to create a new obligation which has been entered into by the parties or any persons from whom they claim at a date more than [1][twelve] years from the date of the transaction;

(ii) do anything which affects any decree of a Court.

Explanation.—In the case of a suit brought on a series of transactions the expression "the transaction" means, for the purposes of proviso (i), the first of such transactions.

(2) (*a*) In this section "excessive" means in excess of that which the Court deems to be reasonable having regard to the risk incurred as it appeared, or must be taken to have appeared, to the creditor at the date of the loan.

(*b*) In considering whether interest is excessive under this section, the Court shall take into account any amounts charged or paid whether in money or in kind, for expenses, inquiries, fines, bonuses, premia, renewals or any other charges, and if compound interest is charged, the periods at which it is calculated and the total advantage which may reasonably be taken to have been expected from the transaction.

(*c*) In considering the question of risk, the Court shall take into account the presence or absence of security and the value thereof, the financial condition of the debtor and the result of any previous transactions of the debtor, by way of loan, so far as the same were known, or must be taken to have been known, to the creditor.

(*d*) In considering whether a transaction was substantially unfair, the Court shall take into account all circumstances materially affecting the relations of the parties at the time of the loan or tending to show that the transaction was unfair, including the necessities or supposed necessities of the debtor at the time of the loan so far as the same were known, or must be taken to have been known, to the creditor.

Explanation.—Interest may of itself be sufficient evidence that the transaction was substantially unfair.

LEG. REF.

[1] Substituted for "six" by Act XXXVIII of 1926, S. 3.

NOTES.

R. 39=1925 S. 136. *See also* 107 I.C. 742. As the effect of S. 3 as amended by Punjab Act VII of 1934, S. 5, *see* 1938 Lah. 729.

SEC. 3 (1) (i) AND (ii): APPLICABILITY AND SCOPE.—There is redundancy overlapping in cls. (*i*) and (*ii*) of S. 3 (1) and the operation of Cl. (*ii*) cannot on that ground be restricted to cases where the parties have entered into a subsequent agreement purporting to close previous dealings and to create a new obligation. 55 L.W. 479=(1942) 2 M.L.J. 170.

SEC. 3 (2) (d) EXPL.—The mere fact that parties are money-lenders and that the interest is 2 per cent. per mensem simple and in default 3 per cent. does no' bring the case within the explanation to S. 3 (2) (*d*). "Excessive" is a relative term and what is 'excessive' in one case will not necessarily be so

(3) This section shall apply to any suit, whatever its form may be, if such suit is substantially one for the recovery of a loan or for the enforcement of any agreement or security in respect of a loan [1][or for the redemption of any such security.]

(4) Nothing in this section shall affect the rights of any transferee for value who satisfies the Court that the transfer to him was *bona fide*, and that he had at the time of such transfer no notice of any fact which would have entitled the debtor as against the lender to relief under this section.

For the purposes of this sub-section, the word "notice" shall have the same meaning as is ascribed to it in section 4 of the Transfer of Property Act, 1882.

LEG. REF.

[1] Inserted by Act XXVIII of 1926, S. 3.

NOTES.

in another. It depends upon the surrounding circumstances. Courts, however, cannot assume their existence; they must be found on proper evidence. [1930 C. 207; 1918 P. C. 249 and 1928 O. 396 (F.B.)), Rel. on.] 144 I.C. 218=1933 N. 224. Under the usurious Loans Act, loan means *a loan whether of money or in kind.* An agreement to pay fifty per cent. of the principal as profit or interest for each year, in the case of a loan of paddy, is substantially unfair, and the Court has power to reduce the interest. 41 C.W.N. 181. Reopening of transaction—Ground—High rate of interest. The Court when it is of opinion that the interest charged is high considering the ample security available, is entitled to re-open the entire transaction. In the particular case, the Court reduced the rate of interest from 1 per cent. compound interest to 1 per cent. simple interest in view of the long delay in filing of the suit and the ample security for the loan. I.L. R. (1941) Nag. 607=1940 N.L.J. 179=1940 Nag. 156. Under S. 3 it is compulsory for the Court on coming to a finding that the interest is usurious to reopen the transactions and to find out what is really due at the proper rate of interest from the defendant to the plaintiff. The section does not provide for any compensation by way of lessening future interest and such a procedure is not a proper one for the Court to adopt. 1942 O. W.N. 63. The words "Notwithstanding any agreement, purporting to close previous dealings and to create a new obligation" in S. 3 (1) (*ii*) merely have the effect of extending the power conferred upon the Court to re-open accounts already taken even to cases in which some agreement exists which purports to close previous dealings. These words do not restrict the operation of this sub-section only to cases in which such an agreement is forthcoming. 42 C.W.N. 665. Order for refund by creditor-Powers of Court. The power of the Court to order repayment by the creditor to the debtor under S. 3 (1) (*b*) (ii) of the Act is limited a case in which there is an agreement purporting to close previous dealings and to create a new obligation. The provision has no application to a case in which there is no such agreement and the transaction is merely an ordinary mortgage. 44 C.W.N. 253=1940 Cal. 211. *See also* 1941 Nag. 294.

SEC. 3 AS AMENDED IN U. P.—The effect of the amendment of S. 3 of the original Act in U.P. is that the Court can now relieve the debtor of liability in respect of excessive interest not only when the interest is excessive and the transaction was substantially unfair but also where either the interest is excessive or the transaction was substantially unfair. 14 Luck. 49=1938 Oudh 156. *See also* 14 Luck. 464=1939 Oudh 223. It is clear from the Expl. to proviso 1 to S. 3(1) that the Act permits a suit to be brought on a series of transactions. Hence where there was a series of mortgages, each being in renewal of an earlier one, it is open to the Count to re-open and to give relief in respect of, the entire transaction comprising the various mortgages, under the Agriculturists Relief Act and the Usurious Loans Act. 15 Luck. 145=1939 O.W.N. 977 =1939 Oudh 287. A decree obtained by a creditor prior to the institution of proceedings under the Encumbered Estates Act ceases to be operative as a decree when the debt which merged in the decree becomes the subject of adjudication by the special Judge. Hence there is no decree in existence and S. 3 can be allied to reduce the interest. I.L.R. (1941) A. 567=1941 A.L.J. 366=1941 All. 293. *See also* 1939 O.W.N. 385=1939 O. 184.

C. P. AMENDMENT ACT.—There is nothing unfair in the charging of future interest. When the primary interest is *savai* in the case of an instalment mortgage bond but the actual interest worked out would not exceed 12 per cent. the rate is not excessive. The word "interest" used in S. 3 (1) (*a*) refers to the primary rate secured. Any other clause referring to interest payable on default etc., would have to be examined under S. 3 (1) (*b*). 1941 N.L.J. 669.

SEC. 3, EXPL. 1: "AGRICULTURAL", MEANING OF.—The word "agriculturist" in the Madras Amendment to Explanation I of S. 3 of the Usurious Loans Act is used in its ordinary sense of a person following the call of agriculture. 52 L.W. 636=(1942) 2 M.L.J. 486.

SECS. 3 AND 4.—Where the rate of interest is high, the Court may proceed to give relief under S. 3 (1) (*a*) and (*b*) read with the explanation to the proviso in clause (*d*), where it is stated that interest may by itself be sufficient evidence that the transaction was substantially unfair. In such a case it is unnecessary to consider whether the lender was in a position to dominate the will of the borrower. 107 I.C. 742. *See also* 168 I. C. 382=39 P.L.R. 495.

(5) Nothing in this section shall be construed as derogating from the existing powers or jurisdiction of any Court.

Insolvency proceedings.

4. On any application relating to the admission or amount of a proof of a loan in any insolvency proceedings, the Court may exercise the like powers as may be exercised under section 3 by a Court in a suit to which this Act applies.

THE USURY LAWS REPEAL ACT (XXVIII OF 1855).

Year.	No.	Short title.	Amendment.
1855	XXVIII	The Usury Laws Repeal Act, 1855.	Repealed in part XIV of 1870.

[19*th September*, 1855.

An Act for the repeal of the Usury Laws.

Preamble.

WHEREAS it is expedient to repeal the laws now in force relating to usury; It is enacted as follows:—

1. [*Repeal of enactments.*] *Rep. by the Repealing Act (XIV) of* 1870.)

Rate of interest to be decreed by Courts.

2. In any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties; and if no rate shall have been agreed upon, at such rate as the Court shall deem reasonable.

NOTES.

SECS. 2 TO 4; SCOPE AND EFFECT.—The Act XXVIII prescribes rules for determining the rate at which interest, where recoverable, shall be calculated and does not deal with the right to recover interest. 36 P.R. 1894. The Act abolishes all usury laws, and any rate of interest which the parties may stipulate is now legal. 6 B.H.C. (A.C.) 7. (N.B. —But the Usurious Loans Act now gives the Court power to allow or not such a rate). Ever since the Act was passed, it has been the uniform practice of the Courts to treat all restrictions on the rate of interest, as removed. 20 W.R. 317=12 B.L.R. 451. This Act is conclusive proof that the intention of the legislature is that the parties shall be left to make, and be compelled to stand by their own bargains. 2 M.H.C.R. 451. The effect of the above Act was not to take away the equitable jurisdiction of the Court to relieve against penalties. 17 B. 106 (F.B.). *See also* 2 C.W.N. 333; 10 B.H.C.R. 382 and 19 W.R. 271=11 B.L.R. 135. Courts in this country should take not to enforce oppressive transactions to which the parties have not given free consent. But a contract, which is deliberately consented to, cannot be set aside merely because a very heavy risk is provided for by a very high rate of interest. An agreement to pay an increased rate of interest on default, may be enforced at law; but equity will not recognize it. 6 B.H. C.R. (A.C.) 7. The provisions of this Act do not override the general law of the country. The Court is not compelled to enforce every agreement for interest. 99 P.R. 1894. (*See* Contract Act, Ss. 73 and 274.) The equity jurisdiction of Indian Courts is not taken away by the Act. 4 B.H.C.R. (A.C.) 202. In a case in which there is nothing to show that there was any fraud or undue influence, no discretion is left to the Courts under the sections of the Usury Laws Repeal Act referred to above, for modifying the terms as to interest made by the parties. 125 I.C. 629=1930 L. 733. Delay in suing is no sufficient reason for refusing plaintiff the full interest agreed upon between the parties. (50 P.R. 1912; 66 P.R. 1917 and 36 M. 533, Rel. on.) 125 I.C. 629=1930 L. 733. Interest at 25 per cent. per annum—No proof of undue influence—Transaction cannot be relieved against. 5 R. 619=1928 R. 7. Where Usurious Loans Act applies, interests at 40 per cent. may be relieved against. 2 A.M.L.J. 5.

EFFECT OF THE ACT.—This Act does not affect contracts entered into previous to it as to interest. 7 B.H.C.R. (O.C.), 19; 3 R. L.R. (O.C.) 30=12 W.R. (O.C.) 9. *See also* 6 B.H.C. (A.C.) 23. Neither this Act nor S. 10 of the Contract Act prevents the application of the Hindu rule of damdupat where the parties are Hindus living in a presidency-town. 7 C.L.R. 204. The Act does not affect constracts entered into previous to its passing. 3 B.H.C.R. (A.C.) 11.

IMPLIED CONTRACTS FOR INTEREST.—A contract to pay interest implied from the dealing of the parties is governed by the Act. Interest Act (XXXII) of 1839) has no application to such a case. 36 P.R. 1894.

Rate of interest upon a judgment or decree.

3. Whenever a Court shall direct that a judgment or decree shall bear interest, or shall award interest upon a judgment or decree, it may order the interest to be calculated at the rate allowed in the judgment or decree upon the principal sum adjudged, or at such other rate as the Court shall think fit.

Contracts for usufruct of property in lieu of interest.

4. A mortgage or other contract for the loan of money, by which it is agreed that the use or usufruct of any property shall be allowed in lieu of interest, shall be binding upon the parties.

Amount of interest to be deposited in certain cases of conditional sales under Bengal Regulations.

5. Whenever, under the Regulation of the Bengal Code,[1] a deposit may be made of the principal sum and interest due upon any mortgage or conditional sale of land hereafter to be entered into, the amount of interest to be deposited shall be at the rate stipulated in the contract, or, if no rate has been stipulated and interest be payable under the terms of the contract, at the rate of 12 per cent. per annum:

Proviso.

Provided that, in the latter case, the amount deposited shall be subject to the decision of the Court as to the rate at which interest shall be calculated.

Rate of interest on future adjustments of accounts.

6. In any case in which an adjustment of accounts may become necessary between the lender and the borrower of money upon any mortgage, conditional sale of landed property, or other contract whatsoever, which may be entered into after the passing of this Act, interest shall be calculated at the rate stipulated therein; or, if no rate of interest shall have been stipulated and interest be payable under the terms of the contract, at such rate as the Court shall deem reasonable.

[2][* * *]

THE WAR DONATIONS AND INVESTMENTS (COMPANIES) ACT (XXXVII OF 1940).

[*27th November*, 1940.

An Act to enable companies in British India to make donations to public funds formed, and to make investments in Government loans floated, for the purpose of assisting the prosecution of the present war.

WHEREAS it is expedient to enable companies in British India to make donations to public funds formed, and to make investments in Government loans floated, for the purpose of assisting the prosecution of the present war;

LEG. REF.

1 *See* Ben. Reg. I of 1798, S. 2. This Reg. is, however, now in force only in the Sonthal Parganas, and possibly in the Chota Nagpur Division; and with the exception of the parts which relate to interest, the Regulation is also in force in the Punjab. *See* the P.&N.W. Code.

2 Ss. 7 and 8 repealed by Act XIV of 1870.

NOTES.

SCOPE AND EFFECT.—It is the intention of the legislature that the parties shall be left to make and be compelled to stand by their own bargains. 2 M.H.C.R. 451. The section is applicable to suits on contracts, and interest at the agreed rate is recoverable irrespective of the creed of the contracting parties. 6 N.W.P. 358.

COURT'S POWER TO GRANT RELIEF.—This section does not affect the question of penalty or no penalty, and the Court has the power to decide upon that point and to grant relief against penalty. 19 W.R. 271=11 B. L.R. 135. It is open to the Court to decide whether a stipulation as to the enhanced rate was agreed upon between the parties as interest properly so called or as penalty. 3 C. W.N. 175=26 C. 300. In a country like India where there is much borrowing by the ignorant lower classes who as much require to be protected against themselves as against money-lenders, a too literal application of the above provision could only be productive of oppression and injustice of the most grevious kind. 3 A. 260 (F.B.). This enactment in no way prevents a Civil Court in India, which administers law and equity, from examining into the character of the agreements and from declining to enforce such agreements, unless they are shown to be fair and reasonable. 4 B.H.C.R. (A.C.) 202.

MERE EXORBITANT RATE OF INTEREST.—The fact that the rate of interest on the amount due under a promissory note is exorbitant, is not sufficient to disentitle the plaintiff to the interest stipulated. 29 C.

AND WHEREAS it is also expedient to remove doubts as to the legality of such donations and investments where already made;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE WAR DONATIONS AND INVESTMENTS (COMPANIES) ACT, 1940.

Interpretation.

2. In this Act "Government loan" includes a loan floated by the Government of the United Kingdom.

Power of companies to make donations and investments.

3. Any company formed and registered under the Indian Companies Act, 1913, or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act or Acts repealed thereby may, notwithstanding anything contained in the Indian Companies Act, 1913, and notwithstanding that the memorandum of association or the articles of association of the company do not enable it so to do, by special resolution authorise the making of a donation from the company's assets to a public fund formed, or the making of an investment of the company's assets in a Government loan floated, for the purpose of assisting the prosecution of the present war.

Validation of donations and investments already made.

4. Any donation to a public fund formed, and any investment in a Government loan floated, for the purpose of assisting the prosecution of the present war made by any company to which this Act applies between the 3rd day of September 1939, and the commencement of this Act shall be as valid in all respects as if it had been made in accordance with the provisions of section 3, and after the commencement of this Act.

Decision of doubts.

5. If any question arises whether for the purposes of this Act a loan is a Government loan floated for the purpose of assisting the prosecution of the present war or whether a fund is a public fund formed for the purpose of assisting the prosecution of the present war, the question shall be decided by the Central Government whose decision shall be final.

THE WASTE LANDS CLAIMS ACT (XXIII OF 1863).[2]

Year.	No.	Short title.	Amendments.
1863	XXIII.	Waste Lands Claims Act.	Rep. in part, IX of 1871; X of 1914 and Amended, IV of 1914.

LEG. REF.

1 Short title. "The Waste Lands (Claims) Act, 1853," *see* the Indian Short Titles Act, 1897 (XIV of 1897), Genl. Acts. Vol. IV. For Proceedings relating to the Bill, *see Calcutta Gazette*, 1863, Supplement, p. 109.

NOTES.

823. *See also* 31 C. 233=7 C.W.N. 876. Where a bond does not provide for two rates of interest, one lower and the other higher, the latter being payable under certain circumstances, but provides for only one rate of interest, payable on breach of the contract to pay at the stipulated time, S. 2 is applicable to such a bond, notwithstanding that the interest stipulated is payable from the date of the demand. 13 C. 200. Where under an agreement to re-pay a loan on a certain date, the debtor incurred no obligation to pay interest at all on the money which he owed, and his liability to pay interest only on default, *held*, that such a stipulation was not governed by the Contract Act of 1872 or the Contract (Amendment) Act, 1899. Interest at the stipulated rate could be recovered under Act 28 of 1855, S. 2; 25 M. 343=11 M.L.J. 421.

COURT'S DISCRETION.—By S. 2 of this Act the Court must allow the contract rate of interest upto the date of the decree. 3 M. 125.

NEGOTIABLE INSTRUMENTS ACT.—S. 80 of Neg. Ins. Act does not deprive a plaintiff

Note.—Throughout this Act for "Government" the words "Provincial Government" have been substituted by Government of India (Adaptation of Indian Laws) Order, 1937.

[10*th March*, 1863.

An Act to provide for the adjudication of claims to waste lands.

Preamble.

WHEREAS it is expedient to make special provision for the speedy adjudication of claims which may be preferred to waste lands proposed to be sold, or otherwise dealt with, on account of [the Provincial Government], and of objections taken to the sale or other disposition of such lands; It is enacted as follows:—

Provision for enquiry in claims to land, or objections to sale of same.

1. When any claim shall be preferred to any waste-land proposed to be sold, or otherwise dealt with, on account of [the Provincial Government], or when any objection shall be taken to the sale or other disposition of such land, the Collector of the district in which such land is situate, or other officer performing the duties of a Collector of Land Revenue in such district by whatever name his office is designated, shall, if the claim or objection be preferred within the period mentioned in the advertisement to be issued for the sale or other disposition of such land, which period shall not be less than three months, proceed to make an enquiry into the claim or objections.

Procedure in such cases.

2. The Collector or other officer as aforesaid shall call upon the claimant or objector to produce any evidence, or documents, upon which he may rely in proof of his claim or objection; and after considering the same, and making any further enquiry that may appear proper, shall dispose of the case by an order for the admission or rejection of the claim or objection; and if the land is proposed to be sold, for the sale of the same subject to any condition or reservation which, to such Collector or other officer as aforesaid, shall appear to be proper.

Notification of conditions.

If the land is ordered to be sold subject to any condition or reservation, such condition or reservation shall be notified to intending purchasers at the time of sale.

Postponement of sale pending enquiry.

3. Pending an enquiry into any claim or objection under the last preceding section, the Collector or other officer as aforesaid shall postpone the sale or other disposition of the land;

to allow claimant to contest rejection of claim.

and, if he shall order that such claim or objection be rejected, he shall further postpone the sale or other disposition of the land, to allow the claimant or objector to contest the order of rejection in the manner hereinafter provided.

Sale to be stopped if claim appear to be established, but may afterwards be proceeded with.

4. If the Collector or other officer as aforesaid shall consider the claim or objection to be established, and that the sale or other disposition of the land should not take place, he shall stop the sale or other disposition of the land;

NOTES.

of his contractual right to interest. 29 A. 33 =34 I.A. 6=11 C.W.N. 105=17 M.L.J, 35 (P.C.).

SECS. 1 AND 18.—The procedure prescribed by the Act is not confined to waste lands held by the Government and applies to the sale or dealing with lands to which the Government could not show any title. 44 C. 328 =43 I.A. 303=21 C.W.N. 291 (P.C.). S, 18 which prescribes a special period of limitaton for the making of claims is applicable only to proceedings before the special Court to be constituted under the Act. 44 C. 328.

CONSTRUCTION OF ACT.—The Act makes a great invasion on private rights, and those pleading it in bar of a claim must bring the matter strictly within its provisions. 44 C. 328, *supra*. An advertisement of a proposed sale incorrectly stating the name of the *pargana* in which the lands are situate is misleading and insufficient. 44 C. 328. A suit for recovery of possession of the property so sold might be brought in the ordinary Courts within the ordinary period of limitation. 44 C. 328. Suit for declaration of possession —Land Revenue assessment not conclusive evidence of possession—Rights of trespasser

but such sale or other disposition of the land may afterwards be proceeded with, if, on an order issued [1][* * *] to try the claim or objection, as provided in section 6 of this Act, the claimant or objector shall fail to establish the same.

Delivery to claimant of copy of order of rejection or of sale.

5. If the Collector or other officer as aforesaid shall order that the claim or objection be rejected, or that the land be sold subject to any condition or reservation, or that it be otherwise dealt with, he shall cause a copy of such order to be delivered to the claimant or objector;

Order when final.

and if such claimant or objector shall not, within one week from the delivery of such copy, or within such further time as the Collector or other officer as aforesaid, for any special reason to be recorded, shall see fit to grant, give notice in writing to such Collector or other officer as aforesaid, that he intends to contest such order, the order shall be final.

Report to Board.

If the claimant or objector shall, within the time allowed, gives such notice, the Collector or other officer as aforesaid shall immediately make a report to the [2][* * *] superior revenue authority [3][to which he is immediately subordinate] and shall forward with such report a copy of his order, stating fully all the circumstances of the case, and the evidence adduced in support, or otherwise, of the claim or objection;

Decision of Board.

and such [4][[* * *] authority, on the receipt of such report, and after calling for any further information which it may consider necessary, may confirm, modify or reverse the order of the Collector or other officer as aforesaid.

Certification to Court.

If the [4][* * *] authority as aforesaid confirm the order of the Collector or other officer as aforesaid, or modify such order in such manner as to leave any part of such order in force adverse to the claimant or objector, the Collector or other officer as aforesaid shall certify such order to the Court constituted as hereinafter provided;

Notice to claimant.

and such Court shall forthwith give notice to the claimant or objector;

Decision when final.

and if such claimant or objector shall not [5][* * *] institute a suit in such Court to establish his claim or objection, the order of the [4][* * *] authority aforesaid shall be final.

Power to order suit to try claim admitted by Collector.

6. The Provincial Government may, with twelve months after the date on which the claim of any claimant of waste land, or the objection of any objector, as aforesaid, shall have been admitted under this Act by the Collector or other officer as aforesaid, direct a suit to be brought to try the claim or objection of the claimant or objector, in a Court constituted as hereinafter provided.

Special Court for trying claims.

7. For the investigation and trial of claims under this Act, the Provincial Government shall constitute, in every district in which there may be any waste lands capable of being sold, or otherwise dealt with, on account of [the

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NOTES.

to produce. 2 R. 488=1925 R. 87. On this Act, *see also* 5 W.R. (Waste Lands Ref.) 1; 2 Agra 258; 7 W.R. 474; 12 C. 279.

LEG. REF.

1 The words "by the Local Government" were repealed by Act IV of 1941, Sch., part I.

2 The words "Board of Revenue or other" was repealed by Act IV of 1914.

3 The words "to which he is immediately subordinate" were added by Act IV of 1914.

4 The words "Board or other" were repealed by Act IV of 1914.

5 The words "within thirty days from the delivery of such notice from the Court" were repealed by the Indian Limitation Act, IX of 1871. For limitation, *see* now the Indian Limitation Act, IX of 1908.

Provincial Government] a Court consisting of an uneven number of persons, not less than three, of whom the Judge of the district, or the officer presiding in the principal Civil Court of original jurisdiction in the district by whatever name his office may be designated, shall be one.

Any one or more of the members of which such Court shall consist shall have power to make all such orders in the case as may be necessary prior to the hearing of the suit:

Power of members.

Provided that whenever the Collector, or other officer, by whom the original enquiry was held, is the officer presiding in the principal Civil Court of original jurisdiction in the district, such officer shall not be a member of such Court.

Exclusion of officer making original enquiry.

8. Whenever any Court is constituted under this Act, notice thereof shall be given by a written proclamation, copies of which shall be affixed in the several Courts, and in the offices of the several Collectors and Magistrates of the district:

Notice of constitution of Special Courts.

and from the date of the issue of such proclamation no other Court shall be competent to entertain any claim or objection belonging to the class of claims or objections for the trial and determination of which such Court is constituted.

Claims not cognizable in other Courts.

9. The Courts constituted under this Act shall be held at such place or places, within the limits of their respective jurisdictions, as shall be considered most convenient.

Special Courts where held.

10. In every-suit instituted under section 5 of this Act, the claimant of the waste land, or objector to the sale or other disposition of such land, shall appear as plaintiff; and the Collector, or other officer aforesaid, shall appear as defendant on the part of [the Provincial Government].

Plaintiff and defendant in suit under section 5.

Appearance.

Either party may appear by pleader or by agent:

Provided that, if such other officer as aforesaid be the presiding officer of the principal Civil Court of original jurisdiction in the district, the Provincial Government shall appoint some other officer to appear as defendant in the case on its behalf..

Proviso.

In any suit ordered to be instituted [1][* * *] under section 6 of this Act the [Provincial Government], by any officer, to be appointed for the purpose, shall appear as plaintiff; and the claimant or objector as aforesaid shall appear as defendant.

Plaintiff and defendant in suits under section 6.

11. In suits instituted under this Act, except as hereinafter provided, the proceedings shall be regulated, so far as they can be, by the Code of Civil Procedure.

Regulation of proceedings.

12. The Court shall fix a day for the appearance of the parties, and for the hearing of the suit, of which due notice shall be given to the parties or their agents; and on the day so fixed the parties or their agents shall bring their witnesses into Court, together with any documents on which they may intend to rely in support of their respective statements.

Procedure before hearing.

If either party require the assistance of the Court to procure the attendance of a witness on such day, he shall apply to the Court in sufficient time before the day fixed for the hearing of the suit; and the Court shall issue a subpoena requiring such witness to attend the Court on that day.

Procuring attendance of witnesses.

LEG. REF.

1 The words "by the Local Government" were repealed by Act IV of 1914.

Power to require attendance of claimant.

It shall be competent to the Court to require the personal attendance of the claimant of the waste land, or objector, as aforesaid, on the day fixed for the hearing, or at any subsequent stage of the suit.

Procedure on hearing.

13. On the day fixed for the hearing of the suit, or as soon after as may be practicable, the Court shall proceed to examine the claimant of the waste land, or the objector, or his agent (when his personal attendance is not required), and the witnesses of the parties;

and upon such examination, and after inspecting the documents of the parties, and making any further enquiry that may appear necessary, shall proceed to pass such order in the case as it may consider just and proper.

No appeal or revision.

14. No appeal shall lie from any decision or order passed under this Act, nor shall any such decision or order be open to revision.

Reference of question of law, etc., to High Court, etc.

15. If, on the trial of any suit under this Act, any question of law or of usage having the force of law, or the construction of a document affecting the merits of the case, shall arise, on which the Court shall entertain reasonable doubts, the Court may, either of its own motion, or on the application of any of the parties to the suit, draw up a statement of the case and submit it with its own opinion, for the opinion of the High Court of Judicature, or of the highest Civil Court of Appeal and Revision in the territory in which the land is situate:

When reference obligatory.

Provided that it shall be the duty of every Court held under this Act to make such reference to such High Court, or Court of Appeal, if, in any suit under this Act, any question shall arise involving any principle of general importance, or the rights of a class.

Court may proceed notwithstanding reference.

16. The Court may proceed in the case notwithstanding a reference to the High Court, or other highest Civil Court of Appeal as aforesaid; and may pass an order contingent upon the opinion of the High Court, or other Court as aforesaid, on the point referred;

but not make final order.

but no final order for the sale or other disposition of the land in question in the suit, or for the admission or rejection of any claim or objection which shall be before the Court in such suit, shall be passed, until the receipt of the order of the said High Court, or highest Civil Court of Appeal.

Records of cases where to be deposited.

17. The record of cases disposed of by Courts constituted under this Act shall be deposited amongst the records of the principal Civil Court of original jurisdiction in the district in which the property in dispute is situate.

Limitation as to claims to land sold or dealt with.

18. No claim to any land, or to compensation or damages in respect of any land, sold or otherwise dealt with on account of [the Provincial Government] as waste land, shall be received after the expiration of three years from the date on which such land shall have been delivered by the [Provincial Government] to the purchaser, or otherwise dealt with.

Provision for such claims if preferred within time.

If within three years after any lands have been delivered by the [Provincial Government] to the purchaser, or otherwise dealt with, any claimant or objector shall prefer a claim to the land so delivered, or otherwise dealt

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NOTES.

Sec. 18.—See 44 C. 328 cited under S. 1.

with, or an objection to such sale, or to compensation or damages in respect thereof, in the Court constituted under this Act for the district in which the land is situate; and shall show good and sufficient reason for not having preferred his claim or objection to the Collector or other officer as aforesaid, within the period limited under section 1 of this Act; such Court shall file the claim or objection, making the claimant or objector plaintiff, and the Collector of the district or other officer as aforesaid (with the like provisions as aforesaid if such other officer be the presiding officer of the principal Civil Court of original jurisdiction in the district), the defendant in the suit;

and the foregoing provisions of this Act shall be applicable to the trial and determination of the suit.

The report of the officer employed to give delivery, or to take possession, on the part of [the Provincial Government], of the land sold or otherwise dealt with, shall be conclusive evidence as to the date on which such delivery was made, or possession was taken.

If claim established, possession not to be given but compensation.

19. In any case in which the land has been sold, if the Court shall be of opinion that the claim of the claimant is established, the Court shall not award the claimant possession of the land in dispute; but shall order him to receive from [the Provincial Government] Treasury, by way of compensation, a sum equal to the price at which the land was sold, in addition to the costs of suit.

When land sold not absolutely, or not sold, but otherwise dealt with.

20. If the land shall have been sold subject to any condition or reservation, or shall not have been sold, but shall have been otherwise dealt with on account of [the Provincial Government], and the Court shall be of opinion that the claim to such land, or the objection of an objector, is established, the Court shall award the claimant or objector to receive such sum, in respect of his interest in such land, as shall be awarded in that behalf under the provisions of Act VI of 1857[1] (*for the acquisition of land for public purposes*),

and thereupon the Provincial Government shall proceed under the said Act to obtain an award of the value of such interest.

Award under two last sections to be in full satisfaction.

21. An award under any of the provisions of the two last preceding sections shall be in full satisfaction of the claim of the claimant or objector; and shall bar any future claim on his part, in respect to the land in suit resting on the same cause of action, or on a cause of action which existed prior to the date of the sale or other disposition of the land on account of the [Provincial Government].

Government not barred from awarding compensation for land absolutely sold, though claim be not preferred in time.

22. Nothing in this Act shall be held to prevent the Provincial Government from awarding, to any claimant of waste land sold on account of [the Provincial Government], on proof to the satisfaction of the Provincial Government of the claim of such claimant (notwithstanding that he may not have preferred his claim either to the Collector or other officer as aforesaid, or to the proper Court constituted under this Act, within the period prescribed by this Act), such amount as compensation for the said land, within the limit as to amount mentioned in section 19 of this Act, if the land have been sold not subject to any condition or reservation, as to such Provincial Government may seem proper.

LEG. REF.

[1] *See* now the Land Acquisition Act (I of 1893), S. 2.

23. If the land have been sold subject to any condition or reservation, or have been otherwise disposed of, on account of [the Provincial Government], and any claim to such land, or objection to the sale or other disposition of the land, shall be proved to the satisfaction of the Provincial Government, although not preferred to the Collector or other officer as aforesaid, or to the Court constituted under this Act, within the period prescribed by this Act, the Provincial Government may award to such claimant or objector such amount as to such Provincial Government may appear to be the value of the interest of such claimant or objector in such land.

Compenstaion for land sold subject to condition, if claim proved, though not preferred in time.

[1][23-A. In a province for which there is a Board of Revenue or a Financial Commissioner, the powers and duties of the Provincial Government under sections 6, 10, 22 and 23 may be exercised by such Board or Financial Commissioner, as the case may be.]

Exercise of power of the Provincial Government by the Board of Revenue or the Financial Commissioner.

[2][* * *]

WEEKLY HOLIDAYS ACT (XVIII OF 1942).

[3rd *April*, 1942.

An Act to provide for the grant of weekly holidays to persons employed in shops, restaurants and theatres.

WHEREAS it is expedient to provide for the grant of weekly holidays to persons employed in shops, restaurants and theatres; It is hereby enacted as follows :-

Short title, extent and commencement.

1. (1) This Act may be called THE WEEKLY HOLIDAYS ACT, 1942.

(2) It extends to the whole of British India.

(3) It shall come into force in a Province or in a specified area within a Province only if the Provincial Government by notification in the Official Gazette so directs.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*)" "establishment" means a shop, restaurant or theatre;

(*b*) "day" means a period of twenty-four hours beginning at midnight;

(*c*) "restaurant" means any premises in which is carried on principally or wholly the business of supplying meals or refreshments to the public or a class of the public for consumption on the premises but does not include a restaurant attached to a theatre;

(*d*) "shop" includes any premises where any retail trade or business is carried on, including the business of a barber or hair dresser, and retail sales by auction, but excluding the sale of programmes, catalogues and other similar sales at theatres;

(*e*) "theatre" includes any premises intended principally or wholly for the presentation of moving pictures, dramatic performances or stage entertainments;

(*f*) "week" means a period of seven days beginning at midnight on Saturday.

Closing of shops.

3. (1) Every shop shall remain entirely closed on one day of the week, which day shall be specified by the shopkeeper in a notice permanently exhibited in a conspicuous place in the shop.

(2) The day so specified shall not be altered by the shopkeeper more often than once in three months.

LEG. REF.

1 Added by Act IV of 1914, Sch. I.

2 Repealed by Act X of 1914, Sch. II,

Weekly holidays in shops, restaurants and theatres.

4. Every person employed otherwise than in a confidential capacity or in a position of management in any shop, restaurant or theatre shall be allowed in each week a holiday of one whole day:

Provided that nothing in this section shall apply to any person whose total period of employment in the week including any days spent on authorized leave is less than six days or entitle to an additional holiday a person employed in a shop who has been allowed a whole holiday on the day on which the shop has remained closed in pursuance of section 3.

Additional half-day closing or holiday.

5. (1) The Provincial Government may, by notification in the Official Gazette, require in respect of shops or any specified class of shops that they shall be closed at such hour in the afternoon of one-week-day in every week in addition to the day provided for by section 3 as may be fixed by the Provincial Government, and, in respect of theatres and restaurants or any specified class of either or both, that every person employed therein otherwise than in a confidential capacity or in a position of management shall be allowed in each week an additional holiday of one-half-day commencing at such hour in the afternoon as may be fixed by the Provincial Government.

(2) The Provincial Government may, for the purposes of this section, fix different hours for different shops or different classes of shops or for different areas or for different times of the year.

(3) The weekly day on which a shop is closed in pursuance of a requirement under sub-section (1) shall be specified by the shopkeeper in a notice permanently exhibited in a conspicuous place in the shop and shall not be altered by the shopkeeper more often than once in three months.

No deduction or abatement to be made from wages.

6. No deduction or abatement of the wages of any person employed in an establishment to which this Act applies shall be made on account of any day or part of a day on which the establishment has remained closed or a holiday has been allowed in accordance with sections 3, 4 and 5, and if such person is employed on the basis that he would not ordinarily receive wages for such day or part of a day he shall none the less be paid for such day or part of a day the wages he would have drawn had the establishment not remained closed or the holiday not been allowed on that day or part of a day.

Inspectors.

7. (1) The Provincial Government may, by notification in the Official Gazette, appoint persons to be inspectors for the purposes of this Act within such local limits as it may assign to each such person.

(2) Every inspector appointed under this section shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code.

Powers of Insptctors.

8. (1) Subject to any rules made in this behalf by the Provincial Government, an inspector may, within the local limits for which he is appointed,—

(*a*) enter and remain in any establishment to which this Act applies with such assistants, if any, being servants of the Crown, as he thinks fit;

(*b*) make such examination of any such establishment and of any record, register or notice maintained therein in pursuance of rules made under clause (*c*) of sub-section (2) of section 10, and take on the spot or otherwise such evidence of any person as he may deem necessary for carrying out the purposes of this Act;

(*c*) exercise such other powers as may be necessary for carrying out the purposes of this Act.

(2) Any person having the custody of any record, register or notice maintained in pursuance of rules made under clause (*c*) of sub-section (2) of section 10 shall be bound to produce it when so required by the inspector,

but no person shall be compellable to answer any question if the answer may tend directly or indirectly to criminate himself.

Penalties.

9. In the event of any contravention of the provisions of section 3, of section 4, of a requirement imposed by notification under sub-section (1) of section 5, of section 6, or of the rules made under clause (*c*) of sub-section (2) of section 10, the proprietor or other person responsible for the management of the establishment in which such contravention takes place shall be punishable with fine which may extend, in the case of the first offence, to twenty-five rupees, and, in the case of a second or subsequent offence, to two hundred and fifty rupees.

Rules.

10. (1) The Provincial Government may, subject to the condition of previous publication by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(*a*) define the persons who shall be deemed to be employed in a confidential capacity or in a position of management for the purpose of sections 4 and 5;

(*b*) regulate the exercise of their powers and the discharge of their duties by inspectors;

(*c*) require registers and records to be maintained and notices to be displayed in establishments to which this Act applies and prescribe the form and contents thereof.

Power of exemption and suspension.

11. The Central Government in respect of establishments under its control, and the Provincial Government in respect of all other establishments within the Province may, subject to such conditions, if any, as it thinks fit to impose, exempt any establishment to which this Act applies from all or any specified provisions of this Act, and may, on any special occasion in connexion with a fair or festival or succession of public holidays, suspend for a specified period the operation of this Act.

THE INDIAN WEIGHTS AND MEASURES OF CAPACITY ACT (XXXI OF 1871).[1]

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[Rep. in part by Standard of Weights Act (IX of 1939).]

N.B.—(1) Throughout this Act, save as expressly provided, for 'Governor-

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LEG. REF.

[1] For the Statement of Objects and Reasons, see *Gazette of India*, 1871, Pt. V, p. 398; for proceedings in Council, see *ibid.* 1871, Supplement, pp. 1181, 1290, 1424, 1575.

General in Council' and 'Local Government' the words 'appropriate Government' are substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

(2) "The Indian Weights and Measures of Capacity Act, 1871, in so far as it relates to the establishment of standards of weight, is hereby repealed." (Act IX of 1939, section 6.)

[30*th October*, 1871.

An Act to regulate the Weights and Measures of Capacity of British India.

Preamble.

WHEREAS it is expedient to provide for the ultimate adoption of a uniform system of Weights and Measures of Capacity throughout British India; It is hereby enacted as follows :—

I.—Preliminary.

Short title. Local extent.

1. This Act may be called THE INDIAN WEIGHTS AND MEASURES OF CAPACITY ACT, 1871, and extends to the whole of British India.

II.—Standards.

Standard of weight.

2. The primary standard of weight shall be called a ser, and shall be a weight of metal in the possession of the [1][Central Government], equal when weighed in a vacuum, to the weight known in France as the Kilogramme de Archives.

Units of weights and measures of capacity.

3. The units for weight and of measures of capacity shall be—

for weights, the said ser;

for measures of capacity, a measure containing one such ser of water at its maximum density weighed in a vacuum.

Special weights and measures of capacity may be authorized.

4. The appropriate Government may, from time to time, by notification in the Official Gazette, declare the magnitude and denominations of the weights and measures of capacity, other than the said units, to be authorized under this Act:

Provided that every such weight or measure of capacity shall be an integral multiple or integral sub-multiple of one of the units aforesaid.

The appropriate Government may, in like manner, revoke such notification.

Unless it be otherwise ordered in any such notification, the sub-divisions of all such weights and measures of capacity shall be expressed in decimal parts.

Districts how defined.

5. The appropriate Government may, from time to time, by notification in the Official Gazette, define the limits of districts for the purposes of this Act.

Sub-districts how defined.

The appropriate Government may, from time to time,, by notification in the Official Gazette, define the limits of sub-districts for the purposes of this Act.

Primary standards to be provided.

6. The appropriate Government may provide, for such districts as [2][it] thinks fit, proper primary standards and sets of the said authorized weights and measures of capacity.

Such standards shall, for the purposes of this Act, be deemed the standards for such districts.

LEG. REF.

1 Substituted by A.O., 1937, for "Government of India."

2 Substituted by A.O., 1937, for "he".

NOTES.

SEC. 1.—*See* 23 I.C. 535.

SECS. 1 AND 2: CASE LAW.—*See* 56 P.L. R. 1914; 23 I.C. 535; 40 A. 84=19 Cr. L. J. 146=43 I.C. 433=15 A. L. J 897; 20 P.R. (Cr.) 1913; 15 Cr. L. J. 11; 36 P. L. R. 1914.

SEC. 4.—*See* 22 I. C. 115=15 Cr. L. J. 11 and also cases cited *supra* under ss. 1 and 2.

Local standards to be provided.

7. The appropriate Government may provide, for such sub-districts as it thinks fit, copies of such of the said authorized weights and measures of capacity as shall be necessary to serve as local standards in such sub-districts.

Such local standards shall be deemed correct, until they are proved to be otherwise.

III.—Use of new Weights and Measures of Capacity.

Use of new weights and measures of capacity in Government offices, etc.

8. Whenever the appropriate Government considers that proper standard weights and measures of capacity have been made available for the verification of the weights and measures of capacity to be used by any Government office or municipal body or railway company, the appropriate Government may by notification in the Official Gazette, direct that, after a date to be fixed therein, all or any of the weights and measures of capacity authorized as aforesaid shall be used in dealings and contracts by such office, body or company, and may, in like manner, from time to time, alter or revoke such direction.

Contracts by weight or measure of capacity.

9. After the date fixed in any notification under section 8, all dealings and contracts had and made by the officers, bodies or companies, mentioned in such notification, for any work to be done or goods to be sold or delivered by weight or measure of capacity, shall, in the absence of a special agreement to the contrary, be deemed to be had and made according to the weights or measures of capacity directed in such notification to be used by such officers, bodies or companies.

IV.—Wardens.

Appointment of Wardens.

10. The appropriate Government shall appoint Wardens for the custody of the primary and local standards and sets of authorized weights and measures of capacity hereinbefore mentioned.

The appropriate Government may, at any time, suspend or remove any such Warden and appoint another.

Power to make rules.

11. The appropriate Government may, from time to time, make rules consistent with this Act for regulating the following matters:—

(*a*) the appointment of Wardens;

(*b*) the guidance of Wardens in all matters connected with the performance of their duties;

(*c*) the provision, replacement, custody and use of the standards;

(*d*) the method of verifying local standards and weights, weighing machines and measures of capacity authorized under this Act, and balances, and of certifying such verification:

Provided that such verification shall not be required to be made oftener than once in two years;

(*e*) the errors which may be tolerated in weights, weighing machines and measures of capacity authorized under this Act, and in balances;

(*f*) the shapes, proportions and dimensions to be given to weights, weighing machines, and measures of capacity authorized under this Act, and to balances, and the materials of which they may be made;

(*g*) marking weights and measures of capacity authorized under this Act with their several denominations;

(*h*) the conditions under which Government offices, municipal bodies and railway companies shall be subject to inspection and verification of the weights, weighing machines and measures of capacity authorized under this Act, and of the balances used by them;

(*i*) the fees to be paid for verifying, correcting and certifying the verification of weights, weighing machines and measures of capacity authorized under this Act, and of balances.

Publication of rules.

12. Such rules shall be published in the Official Gazette.

Rules, when specially applied, to have force of law.

And the appropriate Government may, by notification in the Official Gazette, declare that, from and after a day to be named therein, all or any of the said rules shall come into force in respect of any Government office, municipal body or railway company: and thereupon, to the extent specified in such notification, such rules or rule shall have the force of law.

Officers of Government and others to comply with rules.

13. All officers of Government, municipal officers and officers and servants of railway companies shall comply with such rules so far as they concern them, and pay such fees as the said rules shall prescribe.

Warden may refuse to verify or correct things unfit.

14. The Warden may deface, or render incapable of use, or refuse to verify, correct or mark, anything brought to him for verification or correction, which appears to him unfit for verification or correction.

Exercise of any of Warden's powers.

15. Any of the powers and duties conferred and imposed by this Act on a Warden may be exercised and performed by any other officer whom the appropriate Government may, from time to time, appoint.

Counterfeiting Warden's marks.

16. Whoever knowingly counterfeits any mark used by a Warden under section 11 shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

Tables of equivalents.

17. The appropriate Government may, from time to time, prepare tables of the equivalents of weights and measures of capacity, other than those authorized under this Act, in terms of the weights and measures of capacity so authorized, and the equivalents so stated, after notification in the Official Gazette, shall be deemed the true equivalents.

Definition of appropriate Government.

[1][18. In this Act "the appropriate Government" means, in relation to standards of weight, the Central Government, and in relation to measures of capacity, the Provincial Government.]

THE WILLS ACT (XXV OF 1838).

[*N. B.*] Omitted as being practically spent.

THE WORKMEN'S COMPENSATION ACT (VIII OF 1923).

Year.	No.	Short title.	Amendment.
1923	VIII	The Workmen's Compensation Act, 1923.	Repealed in part and amended, VII of 1924; Amended, XXXVII of 1925: XXIX of 1926; V of 1929; XV of 1933; VII of 1937; IX of 1938; XIII of 1939; XLII of 1939; I of 1942.

LEG. REF.

[1] S. 18 inserted by A.C., 1937.

[*5th March*, 1923.

An Act to provide for the payment by certain classes of employers to their workmen of compensation for injury by accident.

WHEREAS it is expedient to provide for the payment by certain classes of employers to their workmen of compensation for injury by accident; It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called THE WORKMEN'S COMPENSATION ACT, 1923.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force on the first day of July, 1924.

Definitions.

2. (1) In this Act, unless there is anything repugnant in the subject or context,—

NOTES.

SEC. 1.—The Act is a quasi penal statute and must not be interpreted with sympathetic leniency but must be constructed strictly. 14 R. 753=1937 R. 45. Where a workman receives injuries, and negligence and a breach of duty are proved against the employer, there are other remedies than the one provided for in the Act, which may be found by a workman, and in pursuing them a decree of compensation may be reached which is more commensurate with the actual loss and injury involved. 172 I.C. 496 (2)=1937 Rang. 451. The Act prescribes compensation to be paid in certain circumstances. It is not open to the Commissioner to award any damages or any other compensation except that provided by the Act. Hence arrears of pay cannot be granted by him as compensation. I.L.R. (1939) A. 1=1939 A. 29. The Act may or may not apply to apprentices, the nature of the contract being the deciding factor. Contract of service is necessary to bring apprentices under the category of "workmen." The student of the B class of the Maclagan College is neither an apprentice nor a workman. 119 I.C. 722=1929 L. 573 (2). In proceedings for recovering compensation under the Act the employer is entitled to be a party and it is open to him if so advised to contest the status of the alleged dependant. 7 R. 660.

SEC. 2.—S. 2 (1) (*d*) as amended in 1933, includes in the term "dependent" without any further qualification, only the wife, minor legitimate son, unmarried legitimate daughter or widowed mother. For a father of a deceased workman to be adjudged a dependent, he must show under S. 2 (2) that he was wholly or in part dependent on the earnings of his son at the time of his death. 55 L.W. 206=(1942) 1 M.L.J. 406. Dependency under the Act means dependence at the time of the death of the deceased workman. The wife who was dependent at that time is entitled to compensation. The mere fact that she remarried after her husband's death could not have the effect of divesting her of that right which vested in her at the time of her husband's death. 42 C.W.N. 516 =68 C.L.J. 467. Where a son cannot be said to be "*minor*", the mere fact that on account of some infirmity he was maintained by his deceased father does not give him the right to be regarded as *dependent*. 1930 L. 657. Provided the personal law of the deceased workman permits an adoption, a minor adopted son will fall within the scope of the definition of "*dependent*". 32 P. L. R. 213=12 L. 50. The term *brother* in its primary sense means a brother of the whole-blood and it is only in a secondary and extended sense that the term is deemed to include a brother of the half-blood. Whether the term is to be taken in its primary or secondary sense depends in each case upon the context. 6 R. 46. The term "*minor brother*" in S. 2 (1) (*d*) does ot include a minor half-brother. 9 R. 46. But *see* 1931 L. 752 (2). The expression "unmarried daughter" includes widowed daughter. 37 C. W. N. 453=1933 C. 368=60 C. 820. The words "unmarried sister" include a widowed sister. 1934 L. 115 (1); 1932 L. 1=13 L. 228. The definition of the word "*dependent*" is exhaustive. An adopted daughter is not a dependent and is not entitled to receive compensation. 1931 L. 399=32 P. L. R. 341; 1932 L. 1=13 L. 228. The actual dependence on the deceased workman is not the criterion for judging whether compensation should be paid to the persons mentioned in the definition or to any of them. The mere proof of the specified relationship would entitle the person concerned to compensation. (Policy of the legislature stated). 13 L. 228. The question wheher the *father and the mother* were at the time of the deceased workman's death "in part dependent" on his earnings, is a question of fact in each case. Where the deceased and his father paid their wages or used their wages to maintain themselves and some of their relatives in one common establishment, each was to some extent dependent on the earnings of the father. Consequently the father and the mother are dependents and entitled to some portion of the compensation money payable under the Act. 42 C.W.N. 516=68 C.L.J. 467. The expression "widowed mother" in S. 2 (1) (*d*) (i) and the expression "parent other than a widowed mother" in S. 2 (1) (*d*) (ii) do not include a "widowed step-mother". 71 C.L.J.

(*a*) "adult" and "minor" mean respectively a person who is not and a person who under the age of 15 years;

(*b*) "Commissioner" means a Commissioner for Workmen's Compensation appointed under section 20;

(*c*) "compensation" means compensation as provided for by this Act;

[1][(*d*) "dependant" means any of the following relatives of a deceased workman, namely:—

(i) a [2][widow] minor legitimate son, and unmarried legitimate daughter, or a widowed mother; and

(ii) if wholly or in part dependent on the earnings of the workman at the time of his death, a [2][widower], a parent other than a widowed mother, a minor illegitimate son, an unmarried illegitimate daughter, a daughter legitimate or illegitimate if married and a minor or if widowed, a minor brother, an unmarried or widowed sister, a widowed daughter-in-law, a minor child of a deceased son, [2][a minor child of a deceased daughter where no parent of the child is alive], or where no parent of the workman is alive, a paternal grandparent];

(*e*) "employer" includes any body of persons whether incorporated or not and any managing agent of an employer and the legal representative of a deceased employer, and, when the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, means such other person while the workman is working for him;

(*f*) "managing agent" means any person appointed or acting as the representative of another person for the purpose of carrying on such other person's trade or business, but does not include an individual manager subordinate to an employer;

(*g*) "partial disablement" means, where the disablement is of a temporary nature, such disablement as reduces the earning capacity of a workman in any employment in which he was engaged at the time of the accident resulting in the disablement, and, where the disablement is of a permanent nature, such disablement as reduces his earning capacity in every employment which he was capable of undertaking at that time: provided that every injury specified in Schedule I shall be deemed to result in permanent partial disablement:

(*h*) "prescribed" means prescribed by rules made under this Act:

LEG. REF.

[1]Sec. 2 (1) (*d*) newly substituted by Act XI of 1933. The old sub-cl (*d*) stood as follows:—"(*d*) "dependent" means any of the following relatives of a deceased workman, namely, a wife, husband, parent, minor son, unmarried daughter, married daughter who is a minor, minor brother or unmarried sister, and includes the minor children of a deceased son of the workman and, where no parent of the workman is alive, a paternal grant-parent."

[2]Substituted and inserted by Act IX of 1938.

NOTES.

238=44 C. W. N. 471=1940 Cal. 285. A step-mother is not dependant within the meaning of S. 2 (1) (*d*). Neither the term "mother" nor the term "parent" would include a step-mother or step-parent and having regard to the language used by the legislature, it cannot be held that a step-mother is a "dependant". 22 P.L.T. 1023. The purpose of the statute in awarding compensation is not to give solatium to a relative of a person who is an employee and has been fatally injured, but something to replace the actual loss which he or she has suffered. The question of dependency is a question of fact which must be decided in relation to the particular circumstances of each given case. A person made an application for compensation for the death of his wife on the ground that she met her death in course of her employment. There was nothing more to suggest that he had suffered at all pecuniarily by reason of his wife's death that the fact of dependency had not been proved and hence the husband was not entitled to claim any compensation. 186 I.C. 93=1939 Rang. 369.

S. 2 (1) (*e*).—If a person who is responsible for the putting up of a building gets workmen supplied by a Sirdar and pays them through the Sirdar, he and not the Sirdar is the employer of the workmen for the purposes of the Workmen's Compensation Act. 42 C.W.N. 803.

SEC. 2 (1) (G).—As to test of partial disablement, *see* 1936 A. 493=163 I.C. 644 =1936 A.L.J. 701 (noted under S. 4, *infra*). Partial disablement — Injury to finger— Right to compensation. *See* 1931 L. 319 cited under S. 3 (1) (*c*).

(*i*) "qualified medical practitioner" means any person registered under the Medical Act, 1858, or any Act amending the same, or under any Act of any legislature in British India providing for the maintenance of a register of medical practitioners, or, in any area where no such last-mentioned Act is in force, any person declared by the Provincial Government, by notification in the Official Gazette, to be a qualified medical practitioner for the purposes of this Act;

[1](*j*) *Omitted by Act XV of* 1933;

(*k*) "seaman" means any person forming part of the crew of any [2][* * *] ship, but does not include the master of [3][the] ship;

(*l*) "total disablement" means such disablement, whether of a temporary or permanent nature, as incapacitates a workman for all work which he was capable of performing at the time of the accident resulting in such disablement: provided that permanent total disablement shall be deemed to result from the permanent total loss of the sight of both eyes or from any combination of injuries specified in Schedule I where the aggregate percentage of the loss of earning capacity, as specified in that Schedule against those injuries, amounts to one hundred per cent.;

(*m*) "wages" includes any privilege or benefit which is capable of being estimated in money, other than a travelling allowance or the value of any travelling concession or a contribution paid by the employer of a workman towards any pension or provident fund or a sum paid to a workman to cover any special expenses entailed on him by the nature of his employment;

(*n*) "workman" means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business) who is—

(i) a railway servant as defined in section 3 of the Indian Railways Act,

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LEG. REF.

1 Omitted by Act XV of 1933. It stood as follows:—"registered ship" means any sea-going ship registered under the Bombay Coasting Vessels Act, 1838, or the Indian Registration of Ships Act, 1841, or the Indian Registration of Ships Act (1841) Amendment Act, 1850, or any hometrade ship so registered of a registered tonnage of not less than three hundred tons, or any inland steam-vessel as defined in S. 2 of the Indian Steam Vessels Act, 1917, of a registered tonnage of not less than one hundred tons.

2 Omitted by Act XV of 1933.

3 Substituted by Act XV of 1933.

NOTES.

SEC. 2 (1) (M).—"Wages" implies contract of service solely for the benefit of employer. The term "wages" involves the notice of a contract of service or employment and that the manual labour which a person does must be solely for the benefit of his employer. In the case of student of B class in the Maclagan Engineering College the labour done in workshop is primarily, if not entirely, directed to the imparting of instruction for the benefit of the students: it is in fact a part of their practical training. The use of words "trade", "service", "pay", "wages" and so forth in the prospectus must be considered from the reasonable point of view. The whole curriculam is a course of instructions only, and though the students receive "wages" and are described as being in service they are not really servants of the College nor are they employed by the College. There is between the students and the College no relation of master and servant; the relation is that of master and pupil. 119 I. C. 722=1929 L. 573 (2).

SEC. 2 (1) (N).—The word "administrative" in S. 2 (1), (*n*) of the Act is not an adjective qualifying "district" and Sub-Divisional Office". 172 I.C. 705=1938 Nag. 91. The expression "monthly wages not exceeding three hundred rupees" in S. 2 (1) (*n*) means wages which do not exceed on an average Rs. 300 a month. The reference to employment on monthly wages in the clause means employment at wages which do not exceed the limit mentioned. It is not limited to workmen who are employed by the month only, so as to exclude workmen employed by the day or by the week or by the year. A workman employed on certain wages per day is a workman under the Act. I.L.R. (1938) Bom 44=39 Bom.L.R. 1230=1938 Bom. 110. The definition in S. 2 (1) (*n*) and Sch. II (*ii*) of the Act must be read together. The word "employed" in the definition in Cl. (*ii*) of Sch. II means, where it occurs, employed on a contract of service and not "engaged in;" and where the qualification of person as a workman under the Act is dependent on his employment with other workmen, those other workmen, like himself, must be employed on a contract of service. I.L.R. (1940) Kar. 370 =1940 Sind 185. A person engaged or employed in ginning and pressing cotton is a workman within the meaning of S. 2 (1) (n). I.L.R. (1937) N. 88. Coolv who is employed for manual labour for his employer is a "workman." 165 I.C. 760=1936 R. 493. construction—"Otherwise than for purposes of

1890, not permanently employed in an administrative, district or sub-divisional office of a railway and not employed in any such capacity as is specified in Schedule II, or

(ii) employed [1][* * *] on monthly wages not exceeding three hundred rupees, in any such capacity as is specified in Schedule II,

whether the contract of employment was made before or after the passing of this Act and whether such contract is expressed or implied, oral, or in writing; but does not include any person working in the capacity of a member of His Majesty's naval, military or air forces [2][* *] and any reference to a workman who has been injured shall, where the workman is dead, include a reference to his dependants or any of them.

LEG. REF.

1 Omitted by Act XV of 1933.

2 Words "or of the Royal Indian Marine service" omitted by A.O., 1937.

NOTES.

the employer's trade or business"—Hotelkeeper out of profits purchasing, and improving houses and letting them out for rent—Workman engaged in work of repairing falling down and sustaining fatal injuries—Liability to pay compensation to widow of workman. 1936 M. 946=71 M.L.J. 617. In order to be a *"workman"* he must be under a contract of service with some other person. Where the deceased is a member of a cooly gang who carry out work in collaboration and partnership under a sub-contract, he cannot be said to be employed by the other partners of the partnership and is not a "workman". 161 I.C. 992=1936 R. 89 (S.B.). Where a person is employed for purposes of employer's business otherwise than in a clerical capacity in the construction, working or repair of a pipe-line the mere fact that he was officiating in a leave vacancy would not take him out of the definition of a workman. 1936 A.L.J' 1271=1936 All. 690. A *conductor of a motor bus* is as much concerned with the operation of the mechanically propelled vehicle, as the driver is within the meaning of Cl. (*i*) of Sch. II to the Act. As such he is a workman within the meaning of the definition in S. 2 (1) (*n*). I.L.R. (1938) Mad. 636=1938 Mad. 485=(1938) 1 M.L.J. 864. A mere licensee upon the mine who is paid by piece work rates for the work which he did and over whom there is no control by the mine authorities is not a "workman" within the meaning of the Act. 192 I.C. 728=1941 Rang. 61 (S.B.). Before a person can be excluded from the definition of "workman" in S. 2 (*n*) he must not only be one "whose employment is of a casual nature," but also one who is employed otherwise than for the purpose of the employer's trade or business. Both these qualifications must be present together. The mere fact that a person is employed only for a few days at a time will not of itself remove him from the category of "workman". 45 L.W. 805; 1933 R. 208=146 I.C. 1027. *See also* 42 C.W.N. 516=68 C.L.J. 467. The question whether an employment is of a casual nature is one of evidence. The onus in such cases would be on the employer to prove the condition which is necessary for the purpose of excluding a person from category of a workman. 35 Bom. L. R. 410=1933 B. 270. Where the Commissioner comes to the conclusion that the employment of a workman is not casual, there being evidence to support that finding it must be treated as a finding of fact not subject to appeal under S. 30. The High Court is bound by that finding. 60 B. 701=38 Bom.L.R. 280=1936 B. 199. If a man be employed for the purposes of the trade or business the employer is liable to him even though the employment be of a casual nature. 1933 R. 244=11 R. 433. Person employed in works where sand was dredged from a creek and sifted is a workman. 58 Bom. 128=35 Bom.L.R. 1142=1934 Bom. 28. The joint effect of S. 2, cl. (1) (*n*) read with Schedule II, item No 5 is that the workman must be employed for the purpose of loading, unloading or coaling any ship. Where the workman was injured while staking certain bales in a shed alongside the wharf in the Victoria docks, Bombay, *held*, that the workman was not entitled to compensation. Protection under the Act is meant for the workmen who are actually engaged in the process of handling the bales so as to transfer them from the wharf to the hold of a ship, which is actually being loaded. 31 Bom.L.R. 1304. Per *Murphy, J.*—The expression "for the purpose" of loading means the same thing as "in" loading in the section. (*Ibid.*) The respondent was employed in a warehouse which was about a quarter of a mile away from the wharf alongside which steamers were moored. In that godown were stored various goods awaiting shipment to Europe. The injuries to the respondent were caused by a bale of cotton being lowered from the upper floor of the godown by a crane to the lower floor in which he was waiting to receive it. In the ordinary course the respondent on receiving that bale would have taken it out of the slings of the crane, handed it over to cartmen who would have put it on their hand cart, taken it to the quayside quarter of a mile away, and then have handed it over to a gang of stevedores on the quay whose duty it was to put it into the slings of the ship's crane to be slung aboard the ship and stored in the hold. *Held*, that the respondent was not a workman within the meaning of S. 2 (1) (*n*) read with second Schedule. 52 M. 747=57 M.L.J. 88 (F.B.). The expression *"not permanently employed . . . in any office of a railway"* in S. 2 (1) (*n*) contemplates such servants as are not required to perform their duties con-

(2) The exercise and performance of the powers and duties of a local authority or of any department [1][acting on behalf of the Crown] shall, for the purposes of this Act unless a contrary intention appears, be deemed to be the trade or business of such authority or department.

[2][(3) The [3][Provincial Government] after giving, by notification in the Official Gazette, not less than three months' notice of [its] intention so to do, may, by a like notification, add to Schedule II any class of persons employed in any occupation which [it] is satisfied is a hazardous occupation, and the provisions of this Act shall thereupon apply [4][within the province] to such classes of persons:

Provided that in making such addition the [3][Provincial Government] may direct that the provisions of this Act shall apply to such classes of persons in respect of specified injuries only.]

CHAPTER II.

WORKMEN'S COMPENSATION.

Employer's liability for compensation.

3. (1) If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter:

Provided that the employer shall not be so liable—

(*a*) in respect of any injury which does not result in the total or partial disablement of the workman for a period exceeding [5][seven days];

(*b*) in respect of any [4][injury not resulting in death, caused by] an accident which is directly attributable to—

LEG. REF.

1 Substituted by A.O., 1937.

5 Substituted for the original section by Act XV of 1933.

2 Substituted for "Governor-General in Council" by A.O., 1937.

4 Inserted by *ibid*.

5 Substituted by Act XV of 1933.

NOTES.

tinuously or habitually in the office, that is to say, indoors, but occasionally have to do out-door work in the course of their employment. The word "permanent" denotes continuity and the expression in its concrete application will mean "not continuously working in any office." The expression "permanently employed" does not mean a railway servant who is "permanently engaged" as opposed to one who is "temporarily engaged." Accordingly a railway servant who has, in the course of his employment, to do outdoor work of going round on his bicycle to deliver the office post is a servant who is not continuously or habitually working in the office, and therefore he falls within the ambit of the definition of workman in S. 2 (1) (*a*) of the Act, although he is permanently employed in the office. 172 I.C. 705=1938 Nag. 91. Workman and tributor—Distinction. There is distinction between a workman under the Act and a tributor. A tributor is a person who is engaged upon his own business and not upon the business of his master. A workman is a person who is engaged on the business of his master and not on his own business. If persons are allowed to do work of their own in their own time and are not subject to the orders of any master as to the way in which, or the time at which, they shall do it, they do not fall within the scope of the Act. The fact that a person is not paid daily wages but according to the amount of work done is not a circumstance which is to be taken into account at all to decide whether a man is tributor or a workman, because it is quite possible for a workman to be paid by piece work and still remain under the orders of his employer. 190 I.C. 417=1940 Rang. 219. Tributors who work at dump-picking, or searching for overlooked one, and receive payment therefor are licensees merely and their written permit to enter the mine premises is a document which shows that they are not trespassers. They are not workmen within the meaning of the Act. 189 I.C. 30=1940 Rang. 125.

SEC. 2 (2).—State Railway forms department of Government. 53 B. 203=1929 B. 179 =31 Bom.L.R. 211.

SEC. 3.—It may be that an employer, in cases where neither the workman nor his dependants have any legal claim upon him, is sometimes prepared *ex gratia* to make a payment to the persons affected by way of compensation; but it is solely for the employer to decide whether in any particular case he will act in this way or not; and it is a matter with which the Court has no concern. Hence, where a Commissioner finds that neither the workman nor his dependants had any claim on the employer, he has no jurisdiction to order a small compensation to be paid by employer. 1935 R. 303.

"IN THE COURSE OF EMPLOYMENT".—Under S. 3 which gives a workman a right to compensation, accident alone cannot give a right to compensation. To entitle him to it at the hands of his employer, the accident must arise out of and in the course of the injured workman's employment. There is no difference in this respect between the Indian law and the English law, and a Court cannot

NOTES.

refuse to follow English cases merely on the ground that the Indian workman may be somewhat more ignorant, illiterate, than this English workman. The employment of a workman would include the use of a vehicle or a means of transport provided by the employer, when by the terms of service there is an express or implied obligation on the part of the employer to provide such means. If the workman is under no obligation to use the vehicle provided by his employer, but can use it or not as he feels inclined, he cannot be said to be acting in the course of his employment in respect of injuries caused to him in the course of the journey in the vehicle, although it may be the only reasonable and feasible means of transport available to the workman. 19 Pat. 514=1940 Pat. 599=22 Pat.L.T. 92. It does not follow that because a man is injured during the time of his employment, the accident arose out of or in the course of such employment. 21 Pat. 218. The question as to whether the accident arose out of the employment is dependent on the facts of each particular case. The one test which is always applicable is this. Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? And the question whether the workman did his duty negligently or not arises only where the workman was doing something which it was his duty to perform. 1933 C. 513=37 C.W.N. 186. In deciding the question as to whether the fatal accident has arisen out of and in the course of his employment, the tribunal of fact is the Commissioner for workmen's compensation and not the High Court. A person, who with the permission and to the knowledge of his employer lives at some distance from the place where he is called upon to work, must be allowed reasonable time in all the circumstances to proceed from his place of residence to the place of work, and if in the course of proceeding in a reasonable time and in a reasonable manner from his place to the place of work, he meets with a fatal accident, then, that fatal accident would be held to arise out of and in the course of his employment. 156 I.C. 377=1935 R. 173 (S.B.). There is a distinction between the cases where there has been negligence by the workman in the performance of his duty and where the workman has been doing some work which he was not employed to do and met with the accident in the course of such outside work. *Held*, that there was no justification for the workman who was a viceman to interfere with the moving machine in finding out a screw driver for his work and that the accident did not arise during the course of employment. 37 C.W.N. 186. *See also* 1933 C. 220=60 C. 421=37 C.W.N. 81: I.L.R. (1937) N. 88. A *bus driver who at the time of the accident* resulting in his death was *travelling in the bus as a passenger*, standing on the footboard, cannot be said to have been killed by an accident which arose out of and in the course of his employment, in the absence of evidence to show that he was going to or from his work or that he was going in the bus for the purpose of his employment. 50 L.W. 796 (2)=1940 Mad. 207=(1939) 2 M.L.J. 851. An *engine driver* was employed on a steam launch during the whole round voyage. In the course of the voyage a *temporary halt* was made. During that halt the engine driver met with an accident while doing certain repairs to the engine and the boiler as a result of which he died. *Held*, that because during the voyage a temporary halt was made, it could not be said that the engine driver's employment did not continue during that halt. The accident therefore arose out of and in the course of his employment. 178 I.C. 652=1938 Rang. 439. An *engine driver* at a cotton mill finding that a new water pump for his engine was leaking went to a workshop near the engine room to sharpen an iron peg on a grindstone, hoping, by means of the sharpened peg to nail down a piece of corrugated iron over the leak. The revolving belt of the grindstone fell off and caused him injury breaking his right arm. *Held*, that the accident arose out of and in the course of his employment as a workman. 1940 Rang.L.R. 759=1940 Rang. 250 (S.B.). Where the deceased who was employed as a *foundry maistry was killed by lightning while he was at his work* running metal from a furnace to the bottom of a metal chimney. *Held*, that the deceased was exposed to an extra risk of damage by lightning through the nature of his occupation and the accident must, therefore, be deemed to have arisen out of his employment. 42 C.W.N. 1093. The deceased was employed in an Electric Supply Company to put up and change the posts and to connect and disconnect wires. On the day of accident he was sent out to disconnect wires from a certain house. While returning, he saw on his way two other workmen employed in similar kind of work replacing a post. He stopped to help them as it was customary to do so and to which the employer did not object. The two workmen after digging a hole for the new post went away. While they were away, the deceased climbed the post to disconnect the wires and while coming down the pole fell and he came down striking the new pole that was going to be erected. As a result of the injuries he died. *Held*, that the accident arose out of and in the course of his employment. 178 I.C. 549=1938 Rang. 414. That a person is employed as a gin-fitter for the upkeep and repair of the gins and is required to perform such duties as the manager or engineer might allot to him, does not exclude his liability to perform such duties as might be allotted to him by any one else set over him and if an accident occurs while performing such duty the accident does occur in the course of the employment of such workman. 1933 N. 272=145 I.C. 402 (2). The deceased was a cooly. He had been working at unloading coal from a ship lying at anchor. At the end of his work he got into a sampan to go ashore with other coolies. When in the sampan owing to the falling on the occupants of some

(i) the workman having been at the time thereof under the influence of drink or drugs, or

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hot cinders thrown overboard and leaning on one side to avoid them the sampan capsized and all were thrown into the rievr. The deceased was drowned. *Held*, that as the deceased was on his way back to the wharf where his day's employment would end, in a recognized way for the coolies to travel without any added risk, the accident must be regarded as one arising out of as well as being in the course of his employment. 1933 R. 208 =146 I.C. 1027. Where a workman, whose duty is to attend as cooly upon the driver of an elephant, is ordered to go and find out the whereabouts of the elephant, let loose to graze in the jungle and is expressly warned not to attempt to catch the animal or unshackle or ride him, but he wifully disobeys the orders and unshackles and rides him and is thrown off and attacked by the elephant, as a result of which he dies, the employer is not liable to pay compensation even under the amended Act, as the injury caused to the workman is not due to an accident arising out of and in course of his employment. 14 R. 305=163 I.C. 708=1936 R. 250.

INJURY BY NATURAL FORCE.—Whether an accident arises out of the employment depends on the particular facts. If a workman is injured by some natural force such as lightning, the heat of the sun, or extreme cold which in itself has no kind of connexion with employment. he cannot recover compensation unless he can sufficiently associate such injury with his employment. This he can do if he can show that the employment exposed him in a special degree to suffering such an injury. But if he is injured by contact physically with some part of the place where he works, then, apart from questions of his own misconduct, he at once associates the accident with his employment and nothing further need be considered. So that if the roof or walls fall upon him, or he slips upon the prmeises, there is no need to make further inquiry as to why the accident happened. 66 M.L.J. 223=1933 A.L.J. 1308=1933 P.C. 225 (P.C.).

DEATH BY SNAKE-BITE ON HIS WAY TO WORK.—In order to come within the Act, an accident must not only occur "in the course of" but in addition, must arise "out of" the employment. An employer is liable to pay compensation only in respect of such injuries as are the result of risks incidental to his employment. Where the deceased workman was bitten by a snake while going by one of the routes to his place of employment from the quarters provided by the employer, which was about four miles away. *Held*, the fatal accident to the workman did not "arise out" of his employment. *Held also*, that the accident was not one arising "in the course" of the emplyment as it was not part of his contract that he should use the route that he chose. 13 R. 553=1935 R. 428. *"Arising out of employment"—Forbidden Act.* In determining whether the accident arose out of the employment, it is irrelevant to consider whether it was or was not forbidden by a regulation which formed no part of the contract of employment but was a safety measure provided by Government to secure the well being of the employed. I. L. R. (1938) Nag. 200=1937 Nag. 397; 1937 Sind 288. The question whether the act resulting in the accident arises out of employment or from an added risk is a question of fact. The general test is: was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yea, the accident arose out of his employment. If nay, it did not because what was not part of the employment to hazard, to suffer, or to do cannot well be the cause of an accident arising out of the employment. [(1917 A.C. 352, Rel. on.] I.L.R. (1938) Nag. 200=1937 Nag. 397. *See* also 43 C.W.N. 177: 1939 R. 428. *Disobedience of rules—Effect—English and Indian Law.* Where a workman meddles with machinery, which he is forbidden by specific rules to touch and attempts to effect repairs which are not part of his work, and sustains injuries during the process, he is not entitled to compensation. The English Law is radically different from the Indian Law in this respect. Under the English Law compensation is disallowed, if it is proved that the injury sustained is attributable to serious and wilful misconduct of that workman. But under the Act in force in Burma, the sole question is whether the wrokman wilfully disobeyed a rule devised for the purpose of securing the safety of workman, and not whether that disobedience amounted to misconduct, serious or otherwise.. 1938 Rang L.R. 299=1938 Rang. 289. In considering breaches of rules, the distiction is of importance between rules which define what work shall be done and rules which define how the work shall be done. The former, if employer's rules, would normally be regarded as delimiting the sphere of employment; the latter as not relating to the sphere of employment but the mode of working. The latter might let in a defence based on disobedience; the former can found the argument that the act was outside the employment. Even if the rule restricts the employment by forbidding the doing of certain acts a practice may include them. I.L.R. (1938) Nag. 200=1937 Nag. 397. *See also* 43 C.W.N. 177. Where the injury suffered arose out of an added peril to which the injured workman had voluntarily and unnecessarily exposed himself, it did not arise out of and in the course of his employment and he was not entitled to compensation. 32 S.L.R. 32=1937 Sind 288. Under S. 3 of the Act an employer is liable to pay compensation whenever personal injury is caused to a workman by accident arising out of and in the course of his employment. *Mere negligence or carelessness on the part of the workman* does not exempt the employer from liability provided the accident arises out of and in the course of the employment. There is a distinction between an act done in the course of the employment but in an improper way, and one

(ii) the wilful disobedience of the workman to an order expressly given, or, to a rule expressly framed, for the purpose of securing the safety of workmen, or

(iii) the wilful removal or disregard by the workman of any safety guard or other device which he knew to have been provided for the purpose of securing the safety of workmen;

[1][* * *]

(2) [2][If a workman employed in any employment specified in Part A of Schedule III contracts any disease specified therein as an occupational disease peculiar to that employment]

or if a workman, whilst in the service of an employer in whose service he has been employed for a continuous period of not less than six months in any employment specified in [3][Part B of] Schedule III, contracts any disease specified threin as an occupation disease peculiar to that employment, the contracting of the disease shall be deemed to be an injury by accident within the meaning of this section and, unless the employer proves the contrary, the accident shall be deemed to have arisen out of and in the course of the employment.

LEG. REF.

1 S. 3, cl. (*c*) of proviso, of sub-cl. (1) omitted by Act V of 1929. It ran as follows: "(*c*) except in the case of death or permanent total disablement in respect of any workman employed in the construction, repair or demolition of a building or bridge."

2 Substituted by Act IX of 1938.

3 Inserted by Act IX of 1938.

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done outside the course of the employment altogether. If it was part of the injured person's employment to hazard, to suffer, or to do that which caused his injury, the accident must be held to have arisen out of his employment. If not, it cannot be said to have so arisen. I.L.R. (1937) Nag. 88=1937 Nag. 311

SEC. 3 (1) (*b*) (ii).—Before S. 3 (1), proviso (*b*) (ii) can operate in an employer's favour, each of the following seven distinct conditions must be satisfied. First an order or rule must have been given or framed; a mere warning or disclaimer of responsibility is not enough. Secondly, its substantial purpose must have been that of securing the safety of workmen as such. Thirdly, the order or rule must contain words which on the face of them fairly and clearly indicate that its purpose is that of securing the safety of workmen: otherwise it is not "expressly" so given or framed. Fourthly, its terms must have been brought to the notice of the individual workman who is injured. Fifthly, it must have been disobeyed. Sixthly the disobedience must have been wilful, neither for example, merely negligent, nor due to a mistaken mode of doing a particular task, nor due to a wrong decision in an emergency, but deliberate. Seventhly, the accident must have been directly attributable to the disobedience. 1940 Rang.L.R. 759=1940 Rang. 250 (S.B.). *See also* 190 I.C. 690=1940 Rang. 220 Accident "directly attributable to wilful disobedience of rules"—Onus of proof—Workman killed while dashing across engine--General safety ules of Labour Department, R. 56—Effect—Special safety first caution of company whether rules—Accident proved to be also the result of engine being driven in excess of speed limit—Compensation. 8 P. 24. Under S. 3 although there may be *wiful disobedience on the part of the workman* concerned, the employer may be liable in respect of injury which results in death of the workman provided the accident arose out of and in course of his employment. In considering this question the ambit and scope of the man's employment must be looked at in relation to the contract which he made with the employer. The test applicable in such cases is whether it was or was not a part of the injured person's employment to hazard or suffer or do that which caused his death. If yes, the accident will be deemed to have arisen out of and in course of the employment. Where the workman when met with his death was doing the very thing which he was employed to do the mere fact that he had no right to be working in the place where he was when he met his death, does not mean that the accident did not arise out of and in course of the employment and the employer would in such case be liable to compensation under S. 3. 185 I.C. 847=1939 Rang. 428. *"Wilfully"*—Meaning. A man does a thing wilfully when he does it intentionally because he expects some benefit to himself, either some convenience or an easy way of doing a piece of work and so forth. 1930 Cr. C. 10=1930 C. 58. Mere negligence of the worker cannot be regarded as wiful disobedience by the workman to an order expressly given. Contributory negligence on the part of the employee does not exonerate the employer from liability to compensate the employee if the accident could have been avoided by the exercise of ordinary care and diligence. 1935 L. 670. Where a workman claims compensation on the ground of permanent partial disablement due to fracture caused by the falling of roof, negligence either on the part of the employer or the employed is not the criterion to be employed. The question is whether the workman at the time of the injury was working within the scope of the employment, and if so whethe the employer has proved that he is exempted from paying compensation because of the provisos to S. 3,

Explanation.—For the purposes of this sub-section a period of service shall be deemed to be continuous which has not included a period of service under any other employer, [1][in the same kind of employment].

(3) The [2][Provincial Government], after giving, by notification in the Official Gazette, not less than three months' notice of [its] intention so to do, may, by a like notification, add any description of employment to the employments specified in Schedule III, and shall specify in the case of the employments so added the diseases which [3][within the Province] shall be deemed for the purposes of this section to be occupational diseases peculiar to those employments repectively, and the provisions of sub-section (2) shall thereupon apply [3][within the Province] as if such diseases had been declared by this Act to be occupational diseases peculiar to those employments.

(4) Save as provided by sub-sections (2) and (3), no compensation shall be payable to a workman in respect of any disease unless the disease is[4][* *] directly attributable to a specific injury by accident arising out of and in the course of his employment.

(5) Nothing herein contained shall be deemed to confer any right to compensation on a workman in respect of any injury if he has instituted in a Civil Court a suit for damages in respect of the injury against the employer or any other person; and no suit for damages shall be maintainable by a workman in any Court of law in respect of any injury—

(*a*) if he has instituted a claim to compensation in respect of the injury before a Commissioner; or

(*b*) if an agreement has been come to between the workman and his employer providing for the payment of compensation in respect of the injury in accordance with the provisions of this Act.

Amount of compensation.

[5]4. (1) Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:—

A. Where death results from the injury—

(*i*) in the case of an adult in receipt of monthly wages falling within limits shown in the first column of Schedule IV—the amount shown against such limits in the second column thereof, and

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LEG. REF.

1 Added by Act IX of 1938.
2 Substituted for "Governor-General in Council" by A.O., 1937.
3 Inserted by *ibid.*
4 Omitted by Act XV of 1933.
5 Substituted by Act XV of 1933.

NOTES.

The employer will only escape liability if he can definitely satisfy the provisos in S. 3. If the workman is permanently partially disabled, which according to medical estimate is 20 per cent., compensation should be awarded at 20 per cent. of the total earning capacity. 152 I.C. 1024=1934 P. 630. *See also* 1931 L.319.

S. 3 (5) (*a*).—A claim for compensation which has been rejected *in limine* would be a claim instituted before the Commissioner so as to attract the operation of S. 3 (5) (*a*) and to bar a suit for damages in a Court of law. 1942 M. 116=(1941) 2 M.L.J. 665.

Accident arising out of employment—Burden of proof. In a case where compensation was claimed on the ground that the deceased met with his death at the hands of an elephant in the course of employment but there was no real evidence which might be considered as effecting the balance of probability one way or the other and where the whole subject was a matter of guesswork, and death from violence at the hands of the elephant, or death from epilepsy or death from some unexplained cause might afford a right answer. It was held that the applicant had failed to discharge the onus of proving his case. 178 I.C. 249=1938 Rang. 349. Where an application is made for compensation on the ground of the death of a workman, the burden is on the applicant to prove that the accident arose out of the employment as well as in the course of the employment. Where it is found on evidence that a workman was sleeping for the night on a barge which was tied up alongside a steamer in the dock in the course of his employment, is necessarily a risk inherent in the discharge of his duty in so sleeping that he may fall off the barge into water. If such workman there is found dead and his body floating in the dock, the most natural inference is that the accident occurred because for some reason or other in the middle of the night the workman fell off the barge either in his sleep or when half awake and struck his head in the process. When the evidence further establishes that there was a storm on that night and that he was a good swimmer, and when there is absolutely no evidence to suggest suicide or homicide, the most natural and necessary inference is that

(*ii*) in the case of a minor—two hundred rupees;

B. Where permanent total disablement results from the injury—

(*i*) in the case of an adult in receipt of monthly wages falling within limits shown in the first column of Schedule IV—the amount shown against such limits in the third column thereof, and

(*ii*) in the case of a minor—twelve hundred rupees;

C. Where permanent partial disablement results from the injury—

(*i*) in the case of an injury specified in Schedule I, such percentage of the compensation which would have been payable in the case of permanent total disablement as is specified therein as being the percentage of the loss of earning capacity caused by that injury, and

(*ii*) in the case of an injury not specified in Schedule I, such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity permanently caused by the injury.

Explanation,—Where more injuries than one are caused by the same accident, the amount of compensation payable under this head shall be aggregated but not so in any case as to exceed the amount which would have been payable if permanent total disablement had resulted from the injuries.

D. Where temporary disablement, whether total or partial, results from the injury, a half-monthly payment payable on the sixteenth day after the expiry of waiting period of seven days from the date of the disablement, and thereafter half-monthly during the disablement or during a period of five years, whichever period is shorter,—

(*i*) in the case of an adult in receipt of monthly wages falling within limits shown in the first column of Schedule IV—of the sum shown against such limits in the fourth column thereof, and

(*ii*) in the case of a minor—of one-half of his monthly wages, subject to a maximum of thirty rupees:

Provided that—

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he met with an accident which arose out of his duty in sleeping on the barge. 44 Bom. L.R. 285. In claims for compensation under the Act the onus lies on the applicant to prove that the accident arose out of employment, and if the evidence is not sufficient to establish this, the claim fails. An accident arises "out of" the employment where it results from a risk incidental to the employment, as distinguished from a risk common to all mankind. While the workman was going back to the camp in the mining area where he was working a dead tree fell on him and killed him. The workman was employed for cutting and clearing jungles or bushes, or even trees and the tree was at some distance from the place of work. *Held*, that the falling of the tree on the deceased could not be said to be inherent in the nature of the employment and the accident did not arise "out of" his employment and hence compensation to dependent of deceased could not be awarded. 187 I.C. 76=1940 Rang. 18. Where the Act provides that a workman is entitled to compensation from the employer in case he contracts a disease arising out of, and in due course of the employment, other than a disease caused by *silica dust* it is sufficient for a workman claiming compensation under the Act to prove that he has contracted a disease arising out of and in the course of his employment, having it to the employer to show, if he can, that the disease was due to *silica dust*, when there is special Act dealing with claim for compensation for diseases caused by silica dust. 163 I.C. 628=1936 P.C. 158 (P.C.).

SECS. 3 AND 10.—Conditions for claiming compensation—Door of railway carriage left open—Coolie in Railway service meeting with fatal accident—Claim for compensation—Maintainability — Warning notices—Effect—Notice under S. 10. 52 B. 45=106 I.C. 465=1928 B. 1.

SEC. 4 (1) (A) AND (D).—Payments made to an injured workman before his death under S. 4 (1) (*d*) cannot be deducted from the compensation payable under S. 4 (1) (*a*) after the death of the wormkan, as the right of the dependants to compensation upon the death of the workman is independent of the workman's right to compensation. 142 I.C. 825=1933 R. 33=11 R. 154 (F.B.).

SEC. 4 (1) (C).—Wnat the Court has to see in the case of a permanent partial disablement is the fact as to whether the earning capacity of the workman has been reduced in every employment which he was capable of underatking at the time of the accident and not merely the particular employment in which he was engaged at the time of the accident resulting in the disablement. Where a workman was disabled from performing his duties of a blacksmith fitter with hand because of the loss of the index and the middle finger, the Court cannot award him compensation on the footing that he had lost the use

(*a*) there shall be deducted from any lump sum or half-monthly payments to which the workman is entitled the amount of any payment or allowance which the workman has received from the employer by way of compensation during the period of disablement prior to the receipt of such lump sum or of the first half-monthly payment, as the case may be: and

(*b*) no half-monthly payment shall in any case exceed the amount, if any, by which half the amount of the monthly wages of the workman before the accident exceeds half the amount of such wages which he is earning, after the accident.]

(2) On the ceasing of the disablement before the date on which any half-monthly payment falls due, there shall be payable in respect of that half-month a sum proportionate to the duration of the disablement in that half-month.

Method of calculating wages.

5. [1][* * *] [2][In this Act and for the purposes thereof the expressions 'monthly wages' means the amount of wages deemed to be payable for a month's service (whether the wages are payable by the month or by whatever other period or at piece rates), and calculated] as follows namely:—

(*a*) where the workman has, during a continuous period of not less than twelve months immediately preceding the accident, been in the service of the employer who is liable to pay compensation, the monthly wages of the workman shall be one-twelfth of the total wages which have fallen due for payment to him by the employer in the last twelve months of that period;

[3][(*b*) where the whole of the continuous period of service immediately preceding the accident during which the workman was in the service of the employer who is liable to pay the compensation was less than one month, the monthly wages of the workman shall be deemed to be the average monthly amount which, during the twelve months immediately preceding the accident, was being earned by a workman employed on the same work by the same employer, or, if there was no workman so employed, by a workman employed on similar work in the same locality;]

LEG. REF.

1 Omitted by Act IX of 1938.
2 Substituted by Act XIII of 1939.
3 Inserted by Act XV of 1933.

NOTES.

of his hand, unless it finds that the thumb and the other fingers have also lost their use for the purpose of every employment which he was capable of undertaking at the time of the acident. 1936 A.L.J. 701=1936 A. 493. What has to be estimated under S. 4 (*c*) (ii) of the Workman's Compensation Act is the loss of earning capacity of the workman caused by the accident and not simply loss of his physical capacity. 41 C.W.N. 990 =1937 Cal. 526.

SECS. 4 AND 30.—The principle on which compensation under the Act is to be awarded has to be determined in accordance with the provisions of the Act and cannot be departed from on the grounds of sentiment. Where in the case of a loss of the index and middle fingers of a labourer, compensation is awarded as for loss of the arm below the elbow an appeal against such a decision involves a substantial question of law. I.L.R. (1939) All. 1 =1938 A.L.J. 1007=1939 All. 29.

SEC. 5.—Under the Act the Commissioner has a duty to see that the injured party, usually a cooly, ignorant of the law, gets fair play. The provisions of the Act so far as the calculation of compensation is concerned are mandatory. The Commissioner has no jurisdiction to give less compensation than that laid down in the Act, and the Commissioner is in no way fettered by what an ignorant cooly helped perhaps by advisers only less ignorant than himself may enter in his original application to the Commissioner. 140 I.C. 46=1932 R. 141.

SEC. 5 (1) (*b*).—S. 5 (1) (*b*) applies to all cases in which the employment has not been continuous for not less than one year. When a workman is casually employed he cannot be held to be in permanent service and when there are breaks in his service for various periods, though each period in itself is not more than 14 days, he cannot be held to be in continuous service. where the workman has worked during the intervals under another employer. 140 I.C. 46=1932 R. 141.

SEC. 5, Expl.—An applicant, a relative of the deceased workman, in a suit for compensation against a Dubashe firm, contended that there was no continuous service of the deceased workman. He alleged in the plaint that the deceased was a casual labourer employed by the Dubashe's firm for the purposes of their trade. But the firm asserted that the case fell under S. 5 (*a*) instead of meeting the allegations. *Held*, that it was for the firm to show that the service was continuous and that there was no break

[1][(c)] In other cases the monthly wages shall be thirty times the total wages earned in respect of the last continuous period of service immediately preceding the accident from the employer who is liable to pay compensation, divided by the number of days comprising such period.

[2][* *]

Explanation.—A period of service shall, for the purposes of [1][this section] be deemed to be continuous which has not been interrupted by a period of absnce from work exceeding fourteen days.

[4][* *]

Review.

6. (1) Any half-monthly payment payable under this Act, either under an agreement between the parties or under the order of a Commissioner, may be reviewed by the Commissioner on the application either of the employer or of the workman accompanied by the certificate of a qualified medical practitioner that there has been a change in the condition of the workman or, subject to rules made, under this this Act, on application made without such certificate.

(2) Any half-monthly payment may, on review under this section, subject to the provisions of this Act, be continued, increased, decreased or ended, or, if the accident is found to have resulted in permanent disablement, be converted to the lump sum to which the workman is entitled less any amount which he has already received by way of half-monthly payments.

Commutation of half-monthly payments.

7. Any right to receive half-monthly payments may, by agrcement between the parties or, if the parties cannot agree and the payments have been continued for not less than six months on the application of either party to the Commissioner, be redeemed by the payent of a lump sum of such amount as may be agreed to by the parties or determined by the Commissioner, as the case may be.

Distribution of compensation.

8. (1) No payment of compensation in respect of a workman whose injury has resulted in death, and no payment of lump sum as compensation to a woman or a person under a legal disability, shall be made otherwise than

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LEG. REF.

1 Relettered by Act XV of 1933.
2 Proviso repealed by Act XV of 1933.
3 Substituted by Act IX of 1938.
4 Sub-S. 2 repealed by Act XV of 1933.

NOTES.

therein of more than 14 days so as to bring the case under S. 5 (a). 120 I.C. 510=1930 S. 49.

SEC. 8.—"Dependant" in S. 8 includes the heirs or legal representatives of the dependant as defined by S. 2 where the dependant has died since the death of the workman. 41 C.W.N. 1048=1937 C. 495. Where, therefore, such dependant dies before any claim to such compensation is made or investigated by the Commissioner, the right passes on to his heirs or legal representatives subject to the conditions of the Succession Act being complied with. (*Ibid*). Under S. 8 the compensation is payable to the dependants of the deceased. A dependant means any of the near relation mentioned in S. 2 (*d*). Where no such near relation exists, the compensation cannot be paid to a more distinct relation but must be refunded to the employer. 118 I.C. 719 (1)=1929 A. 707 (1).

SEC. 8, cl. (8).—The dependants of a Muhamadan deceased, his mother, widow and a minor son were awarded compensation. The share allotted to the minor was deposited by the Commissioner in the Post Office. On the death of the mother and the minor son, the Commissioner ordered the minor's share to be allotted to the widow and directed the postal authorities to cancel the minor's account and open a fresh one in the widow's name. *Held*, that the order was perfectly valid as the alteration of the widow's circumstances by the deaths of the other dependants of the deceased was a variation of circumstances within the meaning of S. 8 (8) of tht Workmen's Compensation Act. The fact that the widow had remarried was immaterial. 1940 Cal. 580.

SECS 8 (4) AND 9.—It is clear that once an allotment f compensation to a dependant or a distribution of compensation money among several dependants is made, the compensation, so allotted or distributed becomes the property of the dependant and if the dependant dies, the said sum being his property will devolve on his or her heirs. The right of an employer to get a refund under Cl. (4) of S. 8 can only arise when a workman dies without any dependant. S. 9 has no application to a caes where money has been allotted to dependant on the death of an employee. I.L.R. (1938) Mad. 716=47 L.W. 159=1938 Mad. 402=1938 (1) M.L.J. 571.

by deposit with the Commissioner, and no such payment made directly by an employer shall be deemed to be a payment of compensation:

[1][Provided that, in the case of a deceased, workman, an employer may make to any dependant advances on account of compensation not exceeding an aggregate of one hundred rupees, and so much of such aggregate as does not exceed the compensation payable to that dependant shall be deducted by the Commissioner from such compensation and repaid to the employer.]

(2) Any other sum amounting to not less than ten rupees which is payable as compensation may be deposited with the Commissioner on behalf of the person entitled thereto.

(3) The receipt of the Commissioner shall be a sufficient discharge in respect of any compensation deposited with him.[2]

(4) On the deposit of any money under sub-section (1) [3][as compensation in respect of a deceased workman] the Commissioner [4][shall deduct] therefrom the actual cost of the workman's funeral expenses, to an amount not exceeding [4][twenty-five rupees] and pay the same to the person by whom such expenses were incurred, and shall, if he thinks necessary, cause notice to be published or to be served on each dependant in such manner as he thinks fit, calling upon the dependants to appear before him on such date as he may fix for determining the distribution of the compensation. If the Commissioner is satisfied, after any inquiry which he may deem necessary, that no dependant exists, he shall repay the balance of the money to the employer by whom it was paid. The Commissioner shall, on application by the employer, furnish a statement showing in detail all disbursements made.

[5](5) Compensation deposited in respect of a deceased workman shall, subject to any deduction made under sub-section (4), be apportioned among the dependants of the deceased workman or any of them in such proportion as the Commissioner thinks fit, or may, in the discretion of the Commissioner, be allotted to any one dependant.

[6](6) Where any compensation deposited with the Commissioner is payable to any person, the Commissioner shall, if the person to whom the compensation is payable is not a woman or a person under a legal disability and may in other cases, pay the money to the person entitled thereto.

(7) Where any lump sum deposited with the Commissioner is payable to a woman or a person under a legal disability, such sum may be invested, applied or otherwise dealt with for the benefit of the woman, or of such person during his disability, in such manner as the Commissioner may direct; and where a half-monthly payment is payable to any person under a legal disability the Commissioner may, of his own motion or on an application made to him in this behalf, order that the payment be made during the disability to any dependant of the workman or to any other person whom the Commissioner thinks best fitted to provide for the welfare of the workman.

LEG. REF.

1 Proviso to S. 8 newly substituted by Act XV of 1933.

2 In S. 8 for sub-Ss. (1) to (3) the new sub-Ss. (1) to (3) have been substituted by Act V of 1929.

3 In sub-S. (4), after the words "as compensation in respect of a deceased workman" have been inserted by Act V of 1929.

4 Substituted by Act XV of 1933.

5 For sub-S. (5) the new sub-Ss. (5) to (7) have been substituted by Act V of 1929.

6 Sub-S. (6) has been re-numbered as sub-S.(8) and after that sub-section the new sub-S. (9) has been added by Act V of 1929.

NOTES.

SECS. 8 AND 10.—If the employer pays the compensation, he is protected against the claims of all the dependants whether or not they have applied to be parties to the distribution. If he makes the distribution himself he lays himself open to the attack by persons who afterwards turn up and claim to be dependants. But if he pays the correct amount to the only person who is a dependant it is not open to that person to claim the amount over again and if he makes to him the payment of less than the correct amount, he can only be required to pay the difference. 7 R. 660.

(8) Where, on application made to him in this behalf or otherwise, the Commissioner is satisfied that, on account of neglect of children on the part of a parent or on account of the variation of the circumstances of any dependant or for any other sufficient cause, an order of the Commissioner as to the distribution of any sum paid as compensation or as to the manner in which any sum payable to any such dependant is to be invested, applied or otherwise dealt with, ought to be varied, the Commissioner may make such orders for the variation of the former order as he thinks just in the circumstances of the case:

Provided that no such order prejudicial to any person shall be made unless such person has been given an opportunity of showing cause why the order should not be made, or shall be made in any case in which it would involve the repayment by a dependant of any sum already paid to him.

(9) Where the Commissioner varies any order under sub-section (8) by reason of the fact that payment of compensation to any person has been obtained by fraud, impersonation or other improper means, any amount so paid to or on behalf of such person may be recovered in the manner hereinafter provided in section 31.

Compensation not to be assigned, attached or charged.

9. Save as provided by this Act, no lump sum or half-monthly payment payable under this Act shall in any way be capable of being assigned or charged or be liable to attachment or pass to any person other than the workman by operation of law, nor shall any claim be set off against the same.

Notice and claim.

10. (1) [1][No claim for compensation shall be entertained by a Commissioner unless notice of the accident has been given in the manner hereinafter provided as soon as practicable after the happening thereof and unless the claim is preferred before him within one year of the occurrence of the accident or, in case of death, within one year from the date of death.]

LEG. REF.

1 Substituted by Act IX of 1938.

NOTES.

SEC. 9.—As to allotment made to dependant on death of employee, *see* I.L.R. (1938) Mad. 716=47 L.W. 159=(1938) 1 M.L.J. 571.

SEC. 10.—S. 10 of the Act occurs in Ch. II which deals with matters relating to workmen's compensation and as such cannot be interpreted as laying down a period of limitation in respect of proceedings for the recovery of compensation before the Commissioner. The word "institute" in S. 10 (1) does not refer to the proceedings before the Commissioner but only to the workmen's claim for compensation against the employer. The words "claim for compensation" used in S. 10 of the Act do not relate to proceedings before the Commissioner but to the claim lodged with the employer. I.L.R. (1939) Nag. 460=1939 Nag. 106. Ignorance of the law cannot be any reasonable or sufficient cause within the meaning of the proviso to S. 10 (1). 17 Pat. 658=1939 P.W.N. 175=1939 Pat. 181. Ignorance of the existence of the Act and of the provision contained therein that the claim should be instituted within six months from the date of the accident is no *"sufficient cause"* within the meaning of proviso to S. 10. 9 R. 118=131 I.C. 60. The expression "claim for compensation" in S. 10 (1) means a claim made before the Commissioner. The claim for compensation is of the nature of a plaint without which no proceedings for recovery of compensation are maintainable; and unless there is a formal claim for compensation, the Commissioner cannot make any enquiries or conduct any proceedings. 1942 Mad. 116=(1941) 2 M.L.J. 665. Where during the period of six months immediately following the accident, the claimant was employed on light duties on the same pay by the employer, that is a sufficient reason for his not having made the claim within that period. And once a reasonable cause is established the bar to the maintenance of the proceedings under the Act is removed. 58 B. 128=35 B.L.R. 1142=1934 B. 28. A claim within the meaning of S. 10 is a communication by or on behalf of the workmen from which the employer can see that a demand is being made upon him to pay compensation in respect of an accident. In the case of a very large concern like a railway company, a demand by a workman to a foreman for compensation is not a claim within the meaning of section. I.L.R. (1938) 2 Cal. 52=42 C. W. N. 341=1938 Cal. 348. *See also* 1941 Bom. 296. The question whether the facts found by the Commissioner constitute reasonable cause for failure to give notice or to claim compensation within the statutory period is a question of law, and the Commissioner's decision on the question is open to review by the High Court, 35 Bom.

Provided that, where the accident is the contracting of a disease in respect of which the provisions of sub-section (2) of section 3 are applicable, the accident shall be deemed to have occurred on the first of the days during which the workman was continuously absent from work in consequence of the disablement caused by the disease:

[1][Provided, further, that the want of or any defect or irregularity in a notice shall not be a bar to the [2][entertainment of a claim]—

(*a*) if the claim is [2](preferred) in respect of the death of a workman resulting from an accident which occurred on the premises of the employer, or at any place where the workman at the time of the accident was working under the control of the employer or of any person employed by him, and the workman died on such premises or at such place, or on any premises belonging to the employer, or died without having left the vicinity of the premises or place where the accident occurred, or

(*b*) if the employer [2][or any one of several employers or any person responsible to the employer for the management of any branch of the trade or business in which the injured workman was employed] had knowledge of the accident from any other source at or about the time when it occurred:]

Provided, further, that the Commissioner may [2][entertain] and decide any claim to compensation in any case notwithstanding that the notice has not been given, or the claim has not been [2][preferred] in due time as provided in this sub-section, if he is satisfied that the failure so to give the notice or [2][prefer] the claim, as the case may be, was due to sufficient cause.

LEG. REF.

1 Added by Act XV of 1933.

2 Substituted and inserted by Act IX of 1938.

NOTES.

L.R. 293=1933 B. 197=144 I.C. 648. But *see* 16 N.L.J. 63; 1933 N. 272 (2). What amounts to sufficient cause for a workman not instituting a claim within six months of the accident can only be decided with reference to the facts and circumstances of the case. Where the workman on returning to work three months after the accident was re-employed by the same employer in the same workshop at the same rate of wages and he continued in that employment until long after the period of six months from the happening of the accident there was sufficient cause for his not bringing proceedings within six months of the accident. I.L.R. (1938) 2 Cal. 52=42 C. W. N. 341=1938 Cal. 348. *See also* 1940 Lah. 227. When once the workman had, for sufficient cause, not brought his proceedings for compensation within six months of the accident, there is nothing in the Workmen's Compensation Act, the Limitation Act or in any other statute imposing a further time limit for bringing his proceedings. I.L.R. (1938) 2 Cal. 152=42 C.W.N. 341=1938 Cal. 348. The Commissioner is the sole judge to determine whether or not the want of or a defect in a notice shall bar the proceedings, and his decision is one of fact which cannot be appealed against except on the ground that there is no evidence to support it. The fact that the workman did not realize until a certain day that he had permanently lost his eye-sight of one eye is sufficient cause for his not giving notice earlier, and the omission in the notice to state the cause of injury is not material when the manager or the employer is already aware of it. 145 I. C. 402=1933 N. 272 (2). *See also* 16 N.L.J. 63.

SEC. 10 (1) AND PROVISOS: APPLICATION TO COMMISSIONER — LIMITATION FOR.—The words "instituted within six months" in S. 10 (1) contemplate an act referable to the making or filing formally before the appropriate Court a claim for compensation. 17 Pat. 658 =1939 P.W.N. 175=1939 Pat. 181. Delay in making claim—Sufficient cause—Question as to—If one of law or fact. *See* 17 Pat.L. T. 33. The period of six months relates to the claim for compensation made by the workman against his employer and has no reference to the period within which an application for the settlement of the matter by the Commissioner can be made. If the claim has not been made within time, even then the Commissioner may, in the exercise of the discretion allowed by the second proviso to the section, admit the claim and decide it. 61 C. 508=38 C. W. N. 613=1934 C. 460 (S.B.).

SEC. 10 (1) proviso AND (3).—The notice should be given as soon as practicable after the happening of the accident and before the workman has voluntarily left the employment in which he was injured. Want of notice can however be excused under the proviso if there is sufficient cause. *Semble*: It is desirable that both the provisos to S. 14 (1) of the English Act should be reproduced in S. 10 of the Indian Act in order that want of notice may be expressly made liable to be condoned. 57 B. 150=142 I.C. 630=35 Bom. L.R. 83=1933 B. 109. Where a workman is re-employed after the accident by the same employers in the same workshop at the same rate of wages, this fact is in itself suffi-

(2) Every such notice shall give the name and address of the person injured and shall state in ordinary language the cause of the injury and the date on which the accident happened, and shall be served on the employer or upon [1][any one of] several employers, or upon any person [2][* *] responsible to the employer for the management of any branch of the trade or business in which the injured workman was employed.

(3) [3][The Provincial Government may require that any prescribed class of employers shall maintain at their premises at which workman are employed a notice book, in the prescribed form, which shall be readily accessible at all reasonable times to any injured workman employed on the premises and to any person acting *bona fide* on his behalf.]

[3][(4) A notice under this section may be served by delivering it at, or sending it by registered post addressed to, the residence or any office or place of business of the person on whom it is to be served, or, where a notice book is maintained, by entry in the notice book.]

Power to require from employers statements regarding fatal accidents.

[4][10-A. (1) Where a Commissioner receives information from any source that a workman has died as a result of an accident arising out of and in the course of his employment, he may send by registered post a notice to the workman's employer requiring him to submit, within thirty days of the service of the notice, a statement, in the prescribed form, giving the circumstances attending the death of the workman, and indicating whether, in the opinion of the employer, he is or is not liable to deposit compensation on account of the death.

(2) If the employer is of opinion that he is liable to deposit compensation, he shall make the deposit within thirty days of the service of the notice.

LEG. REF.

1 Substituted for "any one or" by Act VII of 1924.

2 Omitted by Act IX of 1938.

3 Substituted by Act XV of 1933.

4 Added by Act XV of 1933.

NOTES.

cient cause for not making an application under the Act within the period of limitation. 190 I.C. 629=1940 Lah. 227. *See also* 1938 Cal. 348. Under S. 10 is not necessary for a workman to give notice of every trivial accident to which he may be subject. But a workman is bound to give notice of any accident which is not merely trivial and it is not open to him to decide whether it is likely to give rise to a claim for compensation. If an accident, too trivial in the first instance to require notice, subsequently develops serious consequences, the obligation to give notice as soon as practicable would be met by giving notice when the consequences ensue. Until then there has not really been an accident. 43 Bom.L.R. 611=1941 Bom. 296. A workman employed as a cooly in a factory met with an accident on the 23rd February, 1927. On the 28th March, 1927, while he was admitted in a hospital as an indoor patient, he sent a notice addressed to the proprietors of the factory. It subsequently came back with the endorsement "left" on it. On the same date, he also sent a notice addressed to the Solicitors of the proprietors and the same was received by the addressee on the 21st April, 1927. The notices constituted sufficient compliance with S. 10 (3); and having regard to the ignorance of and serious nature of the injury received, the notice must be taken to have been given as soon as practicable within the meaning of S. 10 (1). In any case the case was covered by proviso 2 to S. 10 (1). The proviso would apply even where no notice has been given. 31 Bom.L.R. 1059=1929 B. 400. *See also* 35 Bom.L.R. 293=1933 B. 197. Where in the opinion of the deceased the injury was trivial and was such that he was not entitled to compensation under the Act, the failure to give notice by the deceased workman is due to sufficient cause within the meaning of S. 10. 35 Bom. L. R. 293=1933 B. 197.

SEC. 10 (2).—Requires a notice in writing and it is necessary that it should state in ordinary language the cause of the injury; but that does not mean that the notice should state in language to the same effect as the subsequent application before the Commissioner. 37 C.W.N. 225=1933 C. 130. Notice of accident to a fellow workman or co-employee is not a sufficient compliance with S. 10 (2). 43 Bom.L.R. 611=1941 Bom. 296. *See also* 1938 Cal. 348. Where a claim for compensation was made by the dependants of a deceased labourer in a Railway company's employment for accidental death of deceased and claim was made against the contractor employing the deceased and not against Railway company, but the Commissioner served notice on the company. *Held*, that notice ought to have been served on the contractor and not on the company. 1935 C. 683.

(3) If the employer is of opinion that he is not liable to deposit compensation, he shall in his statement indicate the grounds on which he disclaims liability.

(4) Where the employer has so disclaimed liability, the Commissioner, after such inquiry as he may think fit, may inform any of the dependants of the deceased workman that it is open to the dependants to prefer a claim for compensation, and may give them such other further information as he may think fit.]

Reports of fatal accidents.

[1][10-B. (1) Where, by any law for the time being in force, notice is required to be given to any authority, by or on behalf of an employer, of any accident occurring on his premises which results in death, the person required to give the notice shall, within seven days of the death, send a report to the Commissioner giving the circumstances attending the death:

Provided that where the Provincial Government has so prescribed, the person required to give the notice may instead of sending such report to the Commissioner send it to the authority to whom he is required to give the notice.

(2) The Provincial Government may, by notification in the Official Gazette, extend the provisions of sub-section (1) to any class of premises other than those coming within the scope of that sub-section, and may, by such notification, specify the persons who shall send the report to the Commissioner.]

Medical examination.

11. (1) Where a workman has given notice of an accident, he shall, if the employer, before the expiry of three days from the time at which service of the notice has been effected, offers to have him examined free of charge by a qualified medical practitioner, submit himself for such examination, and any workman who is in receipt of a half-monthly payment under this Act shall, if so required, submit himself for such examination from time to time:

Provided that a workman shall not be required to submit himself for examination by a medical practitioner otherwise than in accordance with rules made under this Act, or at more frequent intervals than may be prescribed.

(2) If a workman, on being required to do so by the employer under sub-section (1) or by the Commissioner at any time, refuses to submit himself for examination by a qualified medical practitioner or in any way obstructs the same, his right to compensation shall be suspended during the continuance of such refusal or obstruction unless, in the case of refusal, he was prevented by any sufficient cause from so submitting himself.

(3) If a workman, before the expiry of the period within which he is liable under sub-section (1) to be required to submit himself for medical examination, voluntarily leaves without having been so examined the vicinity of the place in which he was employed, his right to compensation shall be suspended until he returns and offers himself for such examination.

(4) Where a workman, whose right to compensation has been suspended under sub-section (2) or sub-section (3), dies without having submitted himself for medical examination as required by either of those sub-sections, the Commissioner may, if he thinks fit, direct the payment of compensation to the dependants of the deceased workman.

(5) Where under sub-section (2) or sub-section (3) a right to compensation is suspended, no compensation shall be payable in respect of the period of suspension, and if the period of suspension commences before the expiry of the waiting period referred to in clause (*d*) of sub-section (1) of section 4, the waiting period shall be increased by the period during which the suspension continues.

LEG. REF.

[1] Added by Act XV of 1933.

(6) Where an injured workman has refused to be attended by a qualified medical practitioner whose services have been offered to him by the employer free of charge or having accepted such offer has deliberately disregarded the instructions of such medical practitioner, then [1][if it is proved that the workman has not thereafter been regularly attended by a qualified medical practitioner or having been so attended has deliberately failed to follow his instructions, and that such refusal, disregard or failure was unreasonable] in the circumstances of the case and that the injury has been aggravated thereby, the injury and resulting disablement shall be deemed to be of the same nature and duration as they might reasonably have been expected to be if the workman had been regularly attended by a qualified medical practitioner [1][whose instructions he had followed], and compensation, if any, shall be payable accordingly.

Contracting.

12. (1) Where any person (hereinafter in this section referred to as the principal) in the course of or for the purposes of his trade or business contracts with any other person (hereinafter in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work which is ordinarily part of the trade or business of the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from the principal, this Act shall apply as if references to the principal were substituted for references to the employer except that the amount of compensation shall be calculated with reference to the wages of the workman under the employer by whom he is immediately employed.

LEG. REF.

1 Substituted and inserted by Act IX of 1938.

NOTES.

SEC. 11 (6).—Where a workman's hand was scalded while at work and the injuries had been aggravated because of his disregard of the medical officer's instructions who however continued to attend on him. S. 11 (6) applied and the workman's claim for compensation must be assessed upon the basis of an injury of the same nature and duration as might reasonably have been expected if the workman had been regularly attended by a qualified medical practitioner. *Quaere*: what should happen if the workman had refused to be attended by the employer's doctor acting as such but had engaged the same doctor on his own account. 32 C.W.N. 535. *See also* 115 I.C. 93.

SEC. 12.—It is not part of the ordinary business of a Bank to build houses. The fact that one of its objects is stated in its Memorandum to be "to build offices, buildings, etc.," is not by itself sufficient to entitle the Bank to build houses in the sense of building them itself as distinct from getting them built in the ordinary way. There must be some evidence to show that the Bank is "building" as part of its ordinary business before it is rendered liable under S. 12 for injuries sustained in the course of the building. 36 C.W.N. 841. A principal who employs a contractor shall be liable to compensation to workman employed by the contractor. But it must be shown that the contractor was entitled to expect such workmen to do his work at his orders and that he was entitled to dismiss such workmen. Where there is only an agreement by which certain selected persons could come when they chose and do work on their own account which would get for them remuneration from the contractor, the principal is not liable to compensate such persons. 185 I.C. 847=1939 Rang. 428. A person who does not contract to do the whole or any part of the work but merely supplies lobour at so much per head, is not a contractor and the employer has, therefore, no right to indemnity against him. 42 C.W.N. 803. Selling agent agreeing to take delivery of goods from manufacturer's godowns—Employment of contractor for such work--Workmen employed by contractor in such work—Accident resulting in death—Liability of selling agent for compensation. 1942 Bom. 18=43 Bom.L. R. 985. Contract subject to series of persons—Workman dying while under service of last contractor—Liability of original contractor —Rights *inter se* of employers. 32 C.W.N. 45=1928 C. 399 (2)=113 I.C. 18. A tindal was receiving Rs. 10 a month from the Dubashes and also received pay at the rate of Rs. 2-8-0 per day, when he was employed in supervising the coolies working for the Dubashes; that is to say, he kept Rs. 2 for himself out of Rs. 25 paid to him daily for the payment of his gang, one of whom was the deceased workman. The tindal was not a contractor. 120 I.C. 510=1930 S. 49. The G.I.P. Railway in connection with the electrification of their line were building a power-station near Kalyan and erecting a transmission line to carry electric power to vari-

(2) Where the principal is liable to pay compensation under this section, he shall be entitled to be indemnified by the contractor, [1][or any other person from whom the workman could have recovered compensation and where a contractor who is himself a principal is liable to pay compensation or to indemnify a principal under this section he shall be entitled to be indemnified by any person standing to him in the relation of a contractor from whom the workman could have recovered compensation] and all questions as to the right to and the amount of any such indemnity shall, in default of agreement, be settled by the Commissioner.

(3) Nothing in this section shall be construed as preventing a workman from recovering compensation from the contractor instead of the principal.

(4) This section shall not apply in any case where the accident occurred elsewhere than on, in or about the premises on which the principal has undertaken or usually undertakes, as the case may be, to execute the work or which are otherwise under his control or management.

Remedies of employer against stranger.

13. Where a workman has recovered compensation in respect of any injury caused under circumstances creating a legal liability of some person other than the person by whom the compensation was paid to pay damages in respect thereof, the person by whom the compensation was paid and any person who has been called on to pay an indemnity under section 12 shall be entitled to be indemnified by the person so liable to pay damages as aforesaid.

LEG. REF.

1 Inserted by Act XV of 1933.

NOTES.

ous sub-stations on the railway. The work of constructing the transmission line had been entrusted on a contract to H. Co. and the deceased was employed by the company as a fitter. His work was to assist in the erection of the steel towers which would carry the overhead cable. These towers were not erected on the railway tract but on land adjacent thereto, the distance from the railway lines varying from 400 to 700 feet. While carrying materials from the store near Kalyan station to the site of the work he was knocked down by a train and killed. In an action to recover compensation, *held*, (1) that the work of constructing the overhead cable was not *ordinarily* part of the business of the railway. The word "ordinarily" in S. 12 applies just as much to a Government department as it does to any other principal, (2) that in constructing the electric cable the railway company was exercising the powers and duties conferred on them by statute, (3) that a state railway is a department of the Government within the meaning of S. 2 (2) and (4) that the claim for compensation was not maintainable against the Railway Co. 53 B. 203=31 Bom. L. R. 211=117 I.C. 431=1929 B. 179. The business of keeping the line in order is as normal and as essential a feature of the running of a Railway as the issue of tickets or the handling of goods. 41 L.W. 805.

SEC. 12 (2).—The contractor referred to in S. 12 (2) is the contractor who contracts directly with the principal as defined in S. 12 (1). If there is any further sub-letting of the contract, an indemnity cannot be obtained under the contract and must be sought by recourse to the Civil Court. The words "any such" indemnity are restricted to the indemnity between the principal and the original contractor. 35 B.L.R. 694=1933 B. 338=146 I.C. 616. Where a labourer in the employ of a Railway Company died of an accident his dependants cannot claim compensation from the contractor who had employed the deceased but the company is directly liable as if it was the employer. 1935 C. 683. In a claim for compensation, as sub-S. (2), S. 12 puts the contractor under the liability to indemnify the Railway company, he is entitled to notice of the claim and can certainly dispute the claim of the dependants of the deceased labourer. 1935 C. 683. Where the employers who are contractors engage workmen through a sub-contractor under them, for the execution of work which was ordinarily part of their own trade or business, the employers and not the sub-contractor is liable. 146 I. C. 1027=1933 R. 208. *See* 35 Bom.L.R. 694=1933 B. 338, where the distinction between independant and sub-contractor is pointed out.

SEC. 13.—*An independent contractor* generally speaking is one who undertakes to do a certain work without being controlled by the person for whom he does the work. He is not the servant of the person who engages his services and he does not make such person liable for any torts he or his servants have committed, nor is a sub-contractor, the servant of the contractor, who has employed him. Even when there is a sub-contractor, if the injury was caused while the workman acted under the principal and owing to the latter's negligence, the liability fastens to the principal and not to the sub-contractor. 146 I.C. 616=35 Bom.L.R. 694=1933 B. 338,

Insolvency of employer.

14. (1) Where any employer has entered into a contract with any insurers in respect of any liability under this Act to any workman, then in the event of the employer becoming insolvent or making a composition or scheme of arrangement with his creditors or, if the employer is a company, in the event of the company having commenced to be wound up, the rights of the employer against the insurers as respects that liability shall, notwithstanding anything in any law for the time being in force relating to insolvency or the winding up of companies, be transferred to and vest in the workman, and upon any such transfer the insurers shall have the same rights and remedies and be subject to the same liabilities as if they were the employer, so, however, that the insurers shall not be under any greater liability to the workman than they would have been under to the employer.

(2) If the liability of the insurers to the workman is less than the liability of the employer to the workman, the workman may prove for the balance in the insolvency proceedings or liquidation.

(3) Where in any case such as is referred to in sub-section (1) the contract of the employer with the insurers is void or voidable by reason of non-compliance on the part of the employer with any terms or conditions of the contract (other than a stipulation for the payment of premia), the provisions of that sub-section shall apply as if the contract were not void or voidable, and the insurers shall be entitled to prove in the insolvency proceedings or liquidation for the amount paid to the workman:

Provided that the provisions of this sub-section shall not apply in any case in which the workman fails to give notice to the insurers of the happening of the accident and of any resulting disablement as soon as practicable after he becomes aware of the institution of the insolvency or liquidation proceedings.

(4) There shall be deemed to be included among the debts which under section 49 of the Presidency-towns Insolvency Act, 1909, or under section 61 of the Provincial Insolvency Act, 1920, or under section 230 of the Indian Companies Act, 1913, are in the distribution of the property of an insolvent or in the distribution of the assets of a company being wound up to be paid in priority to all other debts, the amount due in respect of any compensation the liability wherefor accrued before the date of the order of adjudication of the insolvent or the date of the commencement of the winding up, as the case may be, and those Acts shall have effect accordingly.

(5) Where the compensation is a half-monthly payment, the amount due in respect thereof shall, for the purposes of this section, be taken to be the amount of the lump sum for which the half-monthly payment could, if redeemable, be redeemed if application were made for that purpose under section 7, and a certificate of the Commissioner as to the amount of such sum shall be conclusive proof thereof.

(6) The provisions of sub-section (4) shall apply in the case of any amount for which an insurer is entitled to prove under sub-section (3), but otherwise those provisions shall not apply where the insolvent or the company being wound up has entered into such a contract with insurers as is referred to in sub-section (1).

(7) This section shall not apply where a company is wound up voluntarily merely for the purposes of re-construction or of amalgamation with another company.

Special provisions relating to masters and seamen.

15. This Act shall apply in the case of workmen who are masters of [1][*] ships or seamen subject to the following modifications, namely:—

LEG. REF. XV of 1933.

1 The word "registered" omitted by Act

(1) The notice of the accident and the claim for compensation may, except where the person injured is the master of the ship, be served on the master of the ship as if he were the employer, but where the accident happened and the disablement commenced on board the ship, it shall not be necessary for any seaman to give any notice of the accident.

(2) In the case of the death of a master or seaman, the claim for compensation shall be made within six months after the news of the death has been received by the claimant or, where the ship has been or is deemed to have been lost with all hands, within eighteen months of the date on which the ship was, or is deemed to have been, so lost.

(3) Where an injured master or seaman is discharged or left behind in any part of His Majesty's dominions or in a foreign country, any depositions taken by any Judge or Magistrate in that part or by any Consular Officer in the foreign country and transmitted by the person by whom they are taken to the [Central Government] or any [Provincial Government] shall, in any proceedings for enforcing the claim, be admissible in evidence—

(*a*) if the deposition is authenticated by the signature of the Judge, Magistrate or Consular Officer before whom it is made;

(*b*) if the defendant or the person accused, as the case may be, had an opportunity by himself or his agent to cross-examine the witness; and

(*c*) if the deposition was made in the course of a criminal proceeding, on proof that the deposition was made in the presence of the person accused;

and it shall not be necessary in any case to prove the signature or official character of the person appearing to have signed any such deposition and a certificate by such person that the defendant or the person accused had an opportunity of cross-examining the witness and that the deposition if made in a criminal proceeding was made in the presence of the person accused shall, unless the contrary is proved, be sufficient evidence that he had that opportunity and that it was so made.

[1][* * *]

[1][(4)] No [2][half-monthly payment] shall be payable in respect of the period during which the owner of the ship is, under any law in force for the time being in British India relating to merchant shipping, liable to defray the expenses of maintenance of the injured master or seaman.

[2][(5) No compensation shall be payable under this Act in respect of any injury in respect of which provision is made for payment of a gratuity, allowance or pension under the War Pensions and Detention Allowances (Mercantile Marine, etc.) Scheme, 1939, or the War Pensions and Detention Allowances (Indian Seaman, etc.) Scheme, 1941, made under the Pensions (Navy, Army, Air Force and Mercantile Marine) Act, 1939, or under the War Pensions and Detention Allowances (Indian Seaman) Scheme, 1942, made by the Central Government.

(6) Failure to give a notice or make a claim or commence proceedings within the time required by this Act shall not be a bar to the maintenance of proceedings under this Act in respect of any personal injury, if—

(*a*) an application has been made for payment in respect of that injury under any of the schemes referred to in the preceding clause, and

(*b*) the Provincial Government certifies that the said application was made in the reasonable belief that the injury was one in respect of which the scheme under which the application was made makes provision for payments, and that the application was rejected or that payments made in pursuance of the application were discontinued on the ground that the injury was not such an injury, and

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LEG. REF.

1 Old sub-S. (4) ommitted and old sub-S. (5) re-numbered as sub-S. (4) by Act IX of 1938.

2 Substituted for "monthly payment" by Act VII of 1924.

3 Sec. 15, new cls. (5) & (6) inserted by Act I of 1942.

(*c*) the proceedings under this Act are commenced within one month from the date on which the said certificate of the Provincial Government was furnished to the person commencing the proceedings.]

Returns as to compensation.

16. The [1][Provincial Government] may, by notification in the [Official Gazette], direct that every person employing workmen, or that any specified class of such persons, shall send at such time and in such form and to such authority, as may be specified in the notification, a correct return specifying the number of injuries in respect of which compensation had been paid by the employer during the previous year and the amount of such compensation, together with such other particulars as to the compensation as the [1][Provincial Government] may direct.

Contracting out.

17. Any contract or agreement whether made before or after the commencement of this Act, whereby a workman relinquishes any right of compensation from the employer for personal injury arising out of or in the course of the employment, shall be null and void in so far as it purports to remove or reduce the liability of any person to pay compensation under this Act.

Proof of age.

18. Where any question arises as to the age of a person injured by accident arising out of and in the course of his employment in a factory, [2][a valid certificate granted in respect of such person under section 12 or section 52 of the Factories Act, 1934,] before the occurrence of the injury shall be conclusive proof of the age of such person.

Penalties.

[3][18-A. (1) Whoever—

(*a*) fails to maintain a notice-book which he is required to maintain under sub-section (3) of section 10, or

(*b*) fails to send to the Commissioner a statement which he is required to send under sub-section (1) of section 10-A, or,

(*c*) fails to send a report which he is required to send under section 10-B, or

(*d*) fails to make a return which he is required to make under section 16,

shall be punishable with fine which may extend to one hundred rupees.

(2) No prosecution under this section shall be instituted except by or with the previous sanction of a Commissioner, and no Court shall take cognizance of any offence under this section, unless complaint thereof is made within six months of the date on which the offence is alleged to have been committed.]

CHAPTER III.

COMMISSIONERS.

Reference to Commissioners.

19. (1) If any question arises in any proceedings under this Act as to the liability of any person to pay compensation, (including any question as to whether a person injured is or is not a workman) or as to the amount or duration of compensation (including any question as to the nature or extent of disablement), the question shall, in default of agreement, be settled by [4][a Commissioner].

LEG. REF.

1 Substituted for "Governor-General in Council" by A.O., 1937.

2 Substituted by Act IX of 1938.

3 S. 18-A was added by Act XV of 1933.

4 Substituted by Act XV of 1933.

NOTES.

SEC. 19.—Commissioner has no power to set aside a previous order for compensation made by him under a mistake. 1930 Cr.C. 801=1930 L 657. Where a question is referred to Commissioner and a claim for compensation is made and notice to employer is issued, the Commissioner cannot summarily reject the application merely on the strengh of the medical report. He has to record issues and in a judgment under R. 30 to state concisely his finding on each of the issues. 14 Pat.L.T. 625=1933 Cr.C. 1165=1933 P. 532. Application for compensation on behalf of applicant and other members—Rejection of claims of applicant—Application

(2) No Civil Court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by a Commissioner or to enforce any liability incurred under this Act.

Appointment of Commissioners.

20. (1) The [Provincial Government] may, by notification in the [Official Gazette], appoint any person to be a Commissioner for workmen's compensation for such local area as may be specified in the notification.

[1][(2) Where more than one Commissioner has been appointed for any local area, the [Provincial Government] may, by general or special order, regulate the distribution of business between them.]

[1][(3)] Any Commissioner may, for the purpose of deciding any matter referred to him for decision under this Act, choose one or more persons possessing special knowledge of any matter relevant to the matter under inquiry to assist him in holding the inquiry.

[1][(4)] Every Commissioner shall be deemed to be a public servant within the meaning of the Indian Penal Code.

Venue of proceedings and transfer.

21. (1) Where any matter is under this Act to be done by or before a Commissioner, the same shall, subject to the provisions of this Act and to any rules made hereunder, be done by or before [2][a Commissioner] for the local area in which the accident took place which resulted in the injury:

Provided that, where the workman is the master of a [3][*] ship or a seaman, any such matter may be done by or before [2][a Commissioner] for the local area in which the owner or agent of the ship resides or carries on business.

(2) If a Commissioner is satisfied [4][that any matter arising out of any proceedings pending before him] can be more conveniently dealt with by any other Commissioner, whether in the same province or not, he may, subject to rules made under this Act, order such matter to be transferred to such other Commissioner either for report or for disposal, and, if he does so, shall forthwith transmit to such other Commissioner all documents relevant for the decision of such matter and, where the matter is transferred for disposal, shall also transmit in the prescribed manner any money remaining in his hands or invested by him for the benefit of any party to the proceedings:

[4][Provided that the Commissioner shall not where any party to the proproceedings has appeared before him, make any order of transfer relating to

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LEG. REF.

1 Sub-S. (2) newly added and sub-Ss. (3) and (4) re-numbered by Act XV of 1933.

2 Substituted for "the Commissioner" by Act XV of 1933.

3 The word "registered"' omitted by Act XV of 1933.

4 Substituted and inserted by Act IX of 1938.

NOTES.

for review—Order in favour of other members—Legality. 154 I.C. 808=1935 A. 408=1935 A. L. J. 349=1935 A. W. R. 233.

SECS. 19 (2) AND 8 (8).—A Civil Court has no jurisdiction to entertain a suit to obtain distribution of the money which had been allotted by the Commissioner under S. 8 (5). Under S. 8 (8) the Commissioner is the proper authority to make a re-distribution. Consequently a decree (though by consent) of the Civil Court as far as the Commissioner is concerned is of no effect and cannot be executed. 1940 Cal. 580.

SECS. 19 AND 23.—The matters set out in S. 19 of the Act are to be decided by the Commissioner judicially and the Commisioner acts as a Court and is a Court, and not a *persona designata*. 20 Pat. 373=1941 Pat. 65 (F.B.).

Quare.—Whether the Commissioner is a Court subordinate to the High Court within the meaning of S. 115, C.P. Code. 20 Pat. 373=21 Pat.L.T. 1067=1941 Pat. 65 (F.B.).

SECS. 19 AND 30.—The Act allows appeals to the High Court from certain orders only. There is no authority conferred by the Act or by the rules framed thereunder on the Financial Commmissioner or any other officer of Government to direct the Commissioner to reverse any decision at which he may have arrived. In so far as the Financial Commissioner purports to direct the Commissioner, to reopen such proceedings, his action is *ultra vires*. It is open, of course, to any one to

the distribution among dependants of a lump sum without giving such party an opportunity of being heard] :

Provided [1][further] that no matter other than a matter relating to the actual payment to a workman or the distribution among dependants of a lump sum shall be transferred for disposal under this sub-section to a Commissioner in the same province save with the previous sanction of the [Provincial Government] or to a Commissioner in another province save with the previous sanction of the [2][Provincial Government of that Province], unless all the parties to the proceedings agree to the transfer.

(3) The Commissioner to whom any matter is so transferred shall, subject to rules made under this Act, inquire thereinto and, if the matter was transferred for report, return his report thereon or, if the matter was transferred for disposal, continue the proceedings as if they had originally commenced before him.

(4) On receipt of a report from a Commissioner to whom any matter has been transferred for report under sub-section (2), the Commissioner by whom it was referred shall decide the matter referred in conformity with such report.

[3][(5) The [Provincial Government] may transfer any matter from any Commissioner appointed by it to any other Commissioner appointed by it.]

Form of application.

22. (1) No application for the settlement of any matter by a Commissioner [4][other than an application by a dependant or dependants for compensation] shall be made unless and until some question has arisen between the parties in connection therewith which they have been unable to settle by agreement.

(2) [5][An application to a Commissioner] may be made in such form and shall be accompanied by such fee, if any, as may be prescribed, and shall contain, in addition to any particulars which may be prescribed, the following particulars, namely :—

(*a*) a concise statement of the circumstances in which the application is made and the relief or order which the applicant claims;

(*b*) in the case of a claim for compensation against an employer, the date of service of notice of the accident on the employer and, if such notice has not been served or has not been served in due time, the reason for such omission;

(*c*) the names and addresses of the parties; and

(*d*) [4][except in the case of an application by dependants for compensation] a concise statement of the matters on which agreement has and [6][of] those on which agreement has not been come to.

(3) If the applicant is illiterate or for any other reason is unable to furnish the required information in writing, the application shall, if the applicant so desires, be prepared under the direction of the Commissioner.

Power of Commissioner to require further deposit in cases of fatal accident.

[7][22-A. (1) Where any sum has been deposited by an employer as compensation payable in respect of a workman whose injury has resulted in death, and in the opinion of the Commissioner such sum is insufficient, the Commissioner may, by notice in writing stating his rea-

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LEG. REF.

1 Inserted by Act IX of 1938.
2 Substituted for "Governor-General in Council" A.O., 1937.
3 Added by Act XV of 1933.
4 Inserted by Act XV of 1933.
5 Substituted by Act XV of 1933.
6 Substituted for "on" by Act XXXVII of 1925.
7 Added by Act XX of 1933.

NOTES.

make such suggestions to the Commissioner, but if such suggestions are made by a superior officer of Government, it is desirable that they be not made in such a form as to be capable of interpretation as order. 7 R. 660.

SEC. 20 (3): Expert's services—Power to use in determining workmen's compensation

SCOPE.—*See* I.L.R. (1937) 2 Cal. 714=1937 Cal. 697.

sons, call upon the employer to show cause why he should not make a further deposit within such time as may be stated in the notice.

(2) If the employer fails to show cause to the satisfaction of the Commissioner, the Commissioner may make an award determining the total amount payable, and requiring the employer to deposit the deficiency.]

Powers and procedure of Commissioners.

23. The Commissioner shall have all the powers of a Civil Court under the Code of Civil Procedure, 1908, for the purpose of taking evidence on oath (which such Commissioner is hereby empowered to impose) and of enforcing the attendance of witnesses and compelling the production of documents and material objects [1][and the Commissioner shall be deemed to be a Civil Court for all th purposes of section 195 and of Chapter XXXV of the Code of Criminal Procedure, 1898].

Appearance of parties.

24. Any appearance, application or act required to be made or done by any person before or to a Commissioner (other than an appearance of a party which is required for the purpose of his examination as a witness) may be made or done on behalf of such person by a legal practitioner, or [2][by an official of an Insurance Company or registered Trade Union authorised in writing by such person or, with the permission of the Commissioner, by any other person so authorised].

Method of recording evidence.

25. The Commissioner shall make a brief memorandum of the substance of the evidence of every witness as the examination of the witness proceeds, and such memorandum shall be written and signed by the Commissioner with his own hand and shall form part of the record:

Provided that, if the Commissioner is prevented from making such memorandum, he shall record the reason of his inability to do so and shall cause such memorandum to be made in writing from his dictation and shall sign the same, and such memorandum shall form part of the record:

Provided, further, that the evidence of any medical witness shall be taken down as nearly as may be word for word.

LEG. REF.

1 Added by Act V of 1929.

2 Substituted by Act IX of 1938.

NOTES.

SEC. 23.—Under the Act the Commissioner can exercise the power of a Court only under certain provisions of the Code and S. 151, C. P. Code, not being one of them, the Commissioner does not possess any inherent power contemplated by the section. 1930 Cr.C. 801 =1930 L. 657.

REVISION.—A Commissiner under the Act is a "Court subordinate to the High Court" and revision lies against an order passed by him. 180 I.C. 313=1938 Lah. 855.

COMMISSIONER — POWERS OF REVIEW.—There is nothing in the Act conferring any power of review on a Commissioner. 154 I. C. 308=1935 A.L.J. 349=1935 A.W.R. 233= 1935 A. 408. *See also* 20 Pat. 373=1941 Pat. 65.

SECS. 23 AND 32.—There is nothing in the Act which empowers or authorises the Commissioner to have evidence taken on commission. 1938 Rang.L.R. 641=1939 Rang. 70; 1930 Sind 221.

SEC. 24.—The words "other person" in S. 24 indicate formal appearances on behalf of the persons claiming. A managing member of a joint Hindu family can apply to the Commissioner for compensation on behalf of the widow and the minor members of the family and no authorisation in writing by them is necessary. 154 I.C. 308=1935 A.L.J. 349= 1935 A. 408.

SEC. 25.—S. 25 is mandatory and the Commissioner must hear evidence adduced by the parties and decide the dispute, upon such evidence. He alone can decide the matters referred to in the Act, and he cannot delegate his powers and order one of his subordinates to do the work for him or to make reports so as to make his work lighter and easier. 21 Pat. 218.

SEC. 25 and Rules (1924), R. 20.—The joint effect of R. 20 and S. 25 is that before proceeding with the matter of an application, the Commissioner must first of all either by himself or by some officer authorized by the Local Government, take evidence from the applicant in order to ascertain whether there really is a *prima facie* case and so whether there is in fact any case for the employers to answer. I.L.R. (1937) 2 Cal. 714=1937 Cal. 637.

Costs.

26. All costs incidental to any proceedings before a Commissioner shall subject to rules made under this Act, be in the discretion of the Commissioner.

Power to submit cases.

27. A Commissioner may, if he thinks fit, submit any question of law for the decision of the High Court and, if he does so, shall decide the question in conformity with such decision.

Registration of agreements.

28. (1) Where the amount of any lump sum payable as compensation has been settled by agreement, whether by way of redemption of a half-monthly payment or otherwise, or where any compensation has been so settled as being payable [1][to a woman or a person under a legal disability] [2][* * *] a memorandum thereof shall be sent by the employer to the Commissioner, who shall, on being satisfied as to its genuineness, record the memorandum in a register in the prescribed manner:

Provided that—

(*a*) no such memorandum shall be recorded before seven days after communication by the Commissioner of notice to the parties concerned;

(*b*)[3] [*Omitted*]

(*c*) the Commissioner may at any time rectify the register;

(*d*) where it appears to the Commissioner that an agreement as to the payment of a lump sum whether by way of redemption of a half-monthly payment or otherwise, or an agreement as to the amount of compensation payable [4][to a woman or a person under a legal disability [5][* * *] ought not to be registered by reason of the inadequacy of the sum or amount or by reason of the agreement having been obtained by fraud or undue influence or other improper means, he may refuse to record the memorandum of the agreement [6][and may make such order] including an order as to any sum already paid under the agreement, as he thinks just in the circumstances.

(2) An agreement for the payment of compensation which has been registered under sub-section (1) shall be enforceable under this Act, notwithstanding anything contained in the Indian Contract Act, 1872,or in any other law for the time being in force.

Effect of failure to register agreement.

29. Where a memorandum of any agreement, the registration of which is required by section 28, is not sent to the Commissioner as required by that section, the employer shall be liable to pay the full amount of compensation

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LEG. REF.

1 Substituted for the words "to a person under a legal disability" by Act V of 1929.

2 The "words or to any dependant" omitted by Act VII of 1924.

3 Omitted cl. ran as follows:—(*b*) where a workman seeks to record a memorandum of agreement between his employer and himself for the payment of compensation and the employer proves that the workman has, in fact, returned to work and is earning the same wages as he did before the accident and objects to the recording of such memorandum, the memorandum shall only be recorded, if at all, on such terms as the Commissioner thinks just in the circumstances.

4 Substituted by Act V of 1929, for the words "to a person under any legal disability."

5 The words "or to any dependant" were omitted by Act VII of 1924.

6 Substituted for "or may make such order" by Act VII of 1924.

NOTES.

SECS. 26 AND 30 (*a*).—The failure of the Commissioner to comply with the rules mentioned in S. 26 is not by itself sufficient ground for ordering a retrial. Retrial cannot be ordered unless, there has been a failure of justice and unless there are not sufficient materials on the record to enable the High Court to deal with the case. 1933 S. 273=146 I.C. 696.

SEC. 27.—The High Court can interfere on points of law as well as on points of fact. It is duty of the Commissioner to state as to what the applicant's employment or duties were, what he was engaged to do and then go on to state his findings as to how the accident happened in fact. 60 C. 421=37 C. W.N. 81=1933 C. 220.

SEC. 28.—S. 28 real with the rules contemplates an agreement prior to any hearing by the Commissioner. 30 Bom.L.R. 1610=1929 B. 68.

which he is liable to pay under the provisions of this Act, and notwithstanding anything contained in the proviso to sub-section (1) of section 4, shall not, unless the Commissioner otherwise directs, be entitled to deduct more than half of any amount paid to the workman by way of compensation whether under the agreement or otherwise.

Appeals.

30. (1) An appeal shall lie to the High Court from the following orders of a Commissioner namely:—

(*a*) an order awarding as compensation a lump sum whether by way of redemption of a half-monthly payment or otherwise or disallowing a claim in full or in part for a lump sum;

(*b*) an order refusing to allow redemption of a half-monthly payment;

(*c*) an order providing for the distribution of compensation among the dependants of a deceased workman, or disallowing any claim of a person alleging himself to be such dependant;

(*d*) an order allowing or disallowing any claim for the amount of an indemnity under the provisions of sub-section (2) of section 12; or

(*e*) an order refusing to register a memorandum of agreement or registering the same or providing for the registration of the same subject to conditions:

Provided that no appeal shall lie against any order unless a substantial question of law is involved in the appeal, and, in the case of an order other

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NOTES.

SEC. 30.—In an appeal High Court can consider the case as a whole on points of facts as well as on points of law. 32 S.L.R. 32=1937 Sind 288. It is open to the Judicial Commissioner's Court either to remand the case to the Commissioner to pass his order on the record of admissible evidence or to form its own opinion on the facts. 1937 S. 126=31 S.L.R 71. The High Court will interfere only if the statement of law or its application to the facts by the Commissioner is obviously wrong. 35 Bom.L.R. 410=1933 B. 270=145 I.C. 273. Where finding is based on no evidence, an appeal lies. 1929 C. 774. Where in a contested matter the Commissioner passed an order by consent of parties the validity of the order cannot be impugned in appeal on the ground that the Commissioner had no jurisdiction. 30 Bom. L.R. 1610=114 I.C. 372=1929 B. 68. If a substantial question of law arises, the High Court can interfere on points of law as well as fact. It is the duty of the Commissioner to state what the applicant's employment or duties were, and state his finding as to how the accident happened. 60 C. 421=37 C.W.N. 81 =1933 C. 220. A finding as to wilful disobedience is a finding of fact which might be arrived at on evidence and hence it cannot be interfered with in appeal by the High Court. 1930 Cr.C. 10=1930 C. 58. The question as to whether a workman has become subject to a disability or permanent disability is one of fact, but where the legality of the procedure followed by the Commissioner is challenged, an appeal can be maintained. I.L.R. (1937) 2 Cal. 714=1937 Cal. 697. The question whether there was any evidence justifying a finding of sufficient cause for not giving the notice required by S. 10. 43 Bom. L.R. 611=1941 Bom. 296. Where the Commissioner rejects a claim for compensation on the ground of limitation under S. 10 (1) after condoning the delay in making the claim, without giving any decision on the merits, the order is illegal. But the remedy is by appeal to the High Court and not by suit for damages and compensation. 1942 Mad. 116=(1941) 2 M.L.J. 665. Where the claim for compensation has been disallowed in full as barred by limitation, the claimant is entitled to appeal against it. I.L.R. (1939) Nag. 460=1939 Nag. 106. A finding that a workman was scraping the cylinder of the gas engine in the employer's factory and that a particle of rust entered his eye, which eventually caused complete loss of sight in that eye, is a finding of fact that cannot be challenged. 1933 N. 272=145 I.C. 402. There is no question of law in a finding that deceased worked for a certain number of days only 120 I.C. 510=1930 S. 49. Question of law —Inference as to whether plea under S. 3 (1) (*b*) (ii) of the Act is made out—Qestion of law found—Appeal whether can be argued on questions of law and fact. *See* 8 P. 24. The question whether the facts found constitutes reasonable cause for failure to give notice of the accident or to claim compensation within the statutory period is a question of law and is open to review by the High Court. 35 Bom. L.R. 293=1933 B. 197; 17 Pat.L.T. 33=162 I.C. 817=1936 P. 307. *See* 1940 Lah. 227.

SEC. 30, prov. (1): *Obiter.*—The effect of the proviso to S. 30 is to limit the power of the Court to interfere only with such findings of fact of the Commissioner as depend upon questions of law. 1933 S. 273=146 I.C. 693. The words of the proviso to S. 30 cannot

than an order such as is referred to in clause (*b*), unless the amount in dispute in the appeal is not less than three hundred rupees:

Provided, further, that no appeal shall lie in any case in which the parties have agreed to abide by the decision of the Commissioner, or in which the order of the Commissioner gives effect to an agreement come to by the parties;

[1][Provided further that no appeal by an employer under clause (*a*) shall lie unless the memorandum of appeal is accompanied by a certificate by the Commissioner to the effect that the appellant has deposited with him the amount payable under the order appeal against.]

(2) The period of limitation for an appeal under this section shall be sixty days.

(3) The provisions of section 5 of the Indian Limitation Act, 1908, shall be applicable to appeals under this section.

Withholding of certain payments pending decision of appeal.

[1][30-A. Where an employer makes an appeal under clause (*a*) of sub-section (1) of section 30, the Commissioner may, and if so directed by the High Court shall, pending the decision of the appeal, withhold payment of any sum in deposit with him.]

Recovery.

31. The Commissioner may recover as an arrear of land-revenue any amount payable by any person under this Act, whether under an agreement for the payment of compensation or otherwise, and the Commissioner shall be deemed to be a public officer within the meaning of section 5 of the Revenue Recovery Act, 1890.

CHAPTER IV.

RULES.

Power of the Provincial Government to make rules.

32. (1) The [2][Provincial Government] may make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(*a*) for prescribing the intervals at which and the conditions subject to which an application for review may be made under section 6 when not accompanied by a medical certificate;

(*b*) for prescribing the intervals at which and the conditions subject to which a workman may be required to submit himself for medical examination under sub-section (1) of section 11;

(*c*) for prescribing the procedure to be followed by the Commissioners in the disposal of cases under this Act and by the parties in such cases;

LEG. REF.

1 Added by Act XV of 1933.

2 Substituted for "Governor-General in Council" by A.O., 1937.

NOTES.

be construed as entitling an employer to appeal where the total amount in the appeal awarded to several workmen involves a sum of more than Rs. 300, if the amount involved to each individual employee is less than Rs. 300. 17 Pat. 658=1939 P. W. N. 175=1939 Pat. 181.

SEC. 30, prov. (2).—The Act is self-contained and provision is made under S. 30 for appeals to the High Court from the orders of a Commissioner in certain cases, but no appeal will lie where the order of the Commissioner gives effect to an agreement come to by the parties. 166 I.C. 986=1937 S. 6.

A Commissioner is himself empowered to recover arrears under the Act and it is not obligatory on him to recover them through the Collector. For that purpose he is to be deemed a public officer within the meaning of S. 5, Revenue Recovery Act, 1890. 30 S.L.R. 351 =1937 Sind 6.

SEC. 32.—*See* 1930 S. 221 cited under S. 23, *supra.*

RR. 20 TO 23.—The medical certificates are not of themselves admissible in evidence. If the workman on his side and the employers on their side desire to put medical testimony before the Court, they must do so by calling medical witnesses. I.L.R. (1937) 2 Cal. 714 =1937 Cal. 697.

(*d*) for regulating the transfer of matters and cases from one Commissioner to another and the transfer of money in such cases;

(*e*) for prescribing the manner in which money in the hands of a Commissioner may be invested for the benefit of dependants of a deceased workman and for the transfer of money so invested from one Commissioner to another;

(*f*) for the representation in proceedings before Commissioners of parties who are minors or are unable to make an appearance;

(*g*) for prescribing the form and manner in which memoranda of agreements shall be presented and registered;

(*h*) for the withholding by Commissioners, whether in whole or in part, of half-monthly payments pending decision on applications for review of the same; [1][* * *]

[1][(*i*) for regulating the scales of costs which may be allowed in proceedings under this Act;

(*j*) for prescribing and determining the amount of the fees payable in respect of any proceedings before a Commissioner under this Act;

(*k*) for the maintenance by Commissioners of registers and records of proceedings before them;

(*l*) for prescribing the classes of employers who shall maintain notice-books under sub-section (3) of section 10, and the form of such notice-books;

(*m*) for prescribing the form of statement to be submitted by employers under section 10-A; and

(*n*) for prescribing the cases in which the report referred to in section 10-B may be sent to an authority other than the Commissioner].

33. [1][*Omitted.*]

34. (1) The power to make rules conferred by section 32 [2][* * *] shall be subject to the condition of the rules being made after previous publication.

Publication of rules.

(2) The date to be specified in accordance with clause (3) of section 23 of the General Clauses Act, 1897, as that after which a draft of rules proposed to be made under section 32 [2][* *] will be taken into consideration, shall not be less than three months from the date on which the draft of the proposed rules was published for general information.

(3) Rules so made shall be published in the [3][* * *] Official Gazette [3][* *] and on such publication, shall have effect as if enacted in this Act.

[4][35.] The Central Government may, by notification in the Official Gazette, make rules for the transfer to any part of His Majesty's Dominions or to any other country of money [5][deposited with] a commissioner under this Act [6][which has been awarded to, or may be due to,] any person residing or about to reside in such part or country and for the receipt [7][, distribution] and administration in British India of any money [8][deposited] under the law relating to workmen's compensation in any part of His Majesty's Dominions or in any other country, [9][which has been awarded to or may be due] to any person residing or about to reside in British India.

Rules to give effect to arrangements with other countries for the transfer of money paid as compensation.

[10][Provided that no sum deposited under this Act in respect of fatal accidents shall be so transferred without the consent of the employer concerned until the Commissioner receiving the sum has passed orders determining its

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LEG. REF.

1 In sub-S. (2) of S. 32, word "and" was omitted at end of cl. (*h*); the previous cl. (*i*) was omitted; and the former cls. (*a*) to (*f*) of S. 33 were inserted as the present clauses (*i*) to (*n*) of S. 32 (2); and the other portions in S. 33 were omitted by A.O., 1937.

2 Omitted A.O., 1937.

3 Words "Gazette of India, etc." and "as the case may be" omitted by *ibid.*

4 S. 35 added by Act XV of 1933.

5 Substituted for words "paid to" by Act VII of 1937.

6 Substituted "for the benefit of" by *ibid.*

7 Inserted by *ibid.*

8 Substituted for "awarded" by *ibid.*

9 Substituted for "and applicable for the benefit of" by *ibid.*

10 Old S. 35 was renumbered as S. 35 (1); and the proviso to sub-S. (1) and the sub-S. (2) have been added by Act VII of 1937.

distribution and apportionment under the provisions of sub-sections (4) and (5) of section 8.]

[(2) Where money deposited with a Commissioner has been so transferred in accordance with the rules made under this section, the provisions elsewhere contained in this Act regarding distribution by the Commissioner of compensation deposited with him shall cease to apply in respect of any such money.]

SCHEDULE I.

See Sections 2 (1) and 4).]

List of injuries deemed to result in permanent partial disablement.

Injury.	Percentage of loss of earning capacity.
Loss of right arm above or at the elbow ..	70
Loss of left arm above or at the elbow ..	60
Loss of right arm below the elbow ..	60
Loss of leg at or above the knee ..	60
Loss of left arm below the elbow ..	50
Loss of leg below the knee ..	50
Permanent total loss of hearing ..	50
Loss of one eye ..	30
Loss of thumb ..	25
Loss of all toes of one foot ..	20
Loss of one phalanx of thumb ..	10
Loss of index finger ..	10
Loss of great toe ..	10
Loss of any finger other than index finger ..	5

Note.—Complete and permanent loss of the use of any limb or member referred to in this Schedule shall be deemed to be the equivalent of the loss of that limb or member.

SCHEDULE II.

[*See* Section 2 (1) (*n*).]

List of persons who, subject to the provisions of section 2 (1) (n) *are included in the definition of workmen.*

The following persons are workmen within the meaning of section (2) (1) (*n*) and subject to the provisions of that section, that is to say, any person who is—

[1][(*i*) employed, otherwise than in a clerical capacity or on a railway, in connection with the operation or maintenance of [2][a lift or a vehicle propelled by steam or other mechanical power or by electricity]; or

(*ii*) employed, otherwise than in a clerical capacity, in any premises wherein, or within the precincts whereof, on any one day of the preceding twelve months, ten or more persons have been employed in any manufacturing process, as defined in [2][clause (4) of section 2 of the Factories Act, 1934], or in any kind of work whatsoever incidental to or connected with any such manufacturing process or with the article made, and steam, water or other mechanical power or electrical power is used; or

(*iii*) employed for the purpose of making, altering, repairing, ornamenting, finishing or otherwise adapting for use, transport or sale any article or part of an article in any premises wherein or within the precincts whereof on any one day of the preceding twelve months, fifty or more persons have been so employed; or

(*iv*) employed in the manufacture or handling of explosives any premises wherein, or within the precincts whereof, on any one day of the proceeding twelve months, ten or more persons have been so employed; or

(*v*) employed, in any mine as defined in clause (*f*) of section 3 of the Indian Mines Act, 1923, in any mining operation, or in any kind of work, other than clerical work; incidental to or connected with any mining operation or with the mineral obtained, or in any kind of work whatsoever below ground:

LEG. REF.

[1] Substituted by Act XV of 1933.

NOTES.

SCH. I.—In order that a workman may claim 70 per cent. of loss of earning capacity as compensation, he should bring his case within the words "complete and permanent loss of the use of any limb or member". 1933 Cr. C. 947=1933 S. 273=146 I.C. 696. *See* also 1941 N.L.J. 532.

Sch. II (i).—A conductor of a motor omnibus, though not employed in operating is employed "in connection with" the operating of the motor omnibus, and is, therefore, a workman within the meaning of the Act. 42 C.W.N. 123.

Sch. II (ii).—"Employed" Meaning of. *See* I.L.R. (1940) Kar. 370=1940 Sind 185.

Sch. II (iii).—The purpose of making, altering, repairing, ornamenting and finish-

Provided that any excavation in which on no day of the preceding twelve months more than fifty persons have been employed or explosives have been used, and whose depth from its highest to its lowest point does not exceed twenty feet shall be deemed not to be a mine for the purpose of this clause; or

(*vi*) employed as the master or as a seaman of—

(*a*) any ship which is propelled wholly or in part by steam or other mechanical power or by electricity or which is towed or intended to be towed by a ship so propelled; or

(*b*) any ship not included in sub-clause (*a*) of fifty tons net tonnage or over; or

(*vii*) employed for the purpose of loading, unloading, fuelling, constructing, repairing, demolishing, cleaning or painting any ship of which he is not the master or a member of the crew, or in the handling or transport within the limits of any port subject to the Indian Ports Act, 1908, of goods which have been discharged from or are to be loaded into any vessel; or

(*viii*) employed in the construction, repair or demolition of—

(*a*) any building which is designed to be or is or has been more than one storey in height above the ground or twenty feet or more from the ground level to the apex of the roof; or

(*b*) any dam or embankment which is twenty feet or more in height from its lowest to its highest point; or

(*c*) any road, bridge, or tunnel; or

(*d*) any wharf, quay, sea-wall or other marine work including any moorings of ships; or

(*ix*) employed in setting up, repairing, maintaining, or taking down any telegraph or telephone line or post or any over-head electric line or cable or post or standard for the same; or

(*x*) employed, otherwise than in a clerical capacity, in the construction, working, repair or demolition of any aerial ropeway, canal, pipe-line, or sewer; or

(*xi*) employed in the service of any fire brigade; or

(*xii*) employed upon a railway as defined in clause '(4)' of section 3, and sub-section (1) of section 148 of the Indian Railways Act, 1890, either directly or through a sub-contractor, by a person fulfilling a contract with the railway administration; or

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NOTES.

ing articles for use, transport, or sale denotes some work actually upon the article, and the words *or otherwise adapting* can in the context in which they appear only cover some physical act performed upon the article or part of the article required for the purpose of adapting it for use, transport or sale. A person employed as a labourer in a cotton godown and who helps to unstack cotton bales or remove them from the godown is a workman falling within Cl. (*iii*) of Sch. II. I.L.R. (1938) Bom. 145=40 Bom.L.R. 106=1938 Bom. 171. Before a person can claim compensation, it is not necessary for him to show that the number of persons employed is fifty or more; what is necessary is that this number should be employed in the 'premises' or within the 'precincts'. Where the employer carried on business in two factories, in one of which 40 persons were employed and in the other 11, and were really branches of one and the same business, it is insufficient to bring the case within S. 2 (1), (*n*), Sch. II, Cl. (*iii*) and the real question is whether the two buildings were in one and the same premises. 180 I.C. 313=1938 Lah. 855.

Sch. II (vii).—*See* 52 M. 747=57 M. L.J. 88 (F.B.); 31 Bom.L.R. 1304. A man employed as a carpenter to mend or repair boxes containing goods which have been unloaded from a ship within the limits of a port is a person employed in the handling of goods within the limits of the port within the meaning of Sch. II (*vii*) and is therefore a workman. I.L.R. (1938) Bom. 44=39 Bom.L.R. 1230=1938 Bom. 110.

Sch. II (viii).—"Repair" includes the renewal of the paint of a building in which repainting is necessary. 60 B. 701=163 I.C. 79=38 Bom.L.R. 280=1936 B. 199. A Hogla shed is a building, although it is erected for a temporary purpose and is some sort of a flimsy pavilion. 42 C.W.N. 803.

Sch. II (x).—The expression, *"working a pipe line,"* in Cl. (*x*) of Sch. II covers all work necessary in the view of the employers for the efficient working of the pipe-line. The Court ought rather to give a wider than a narrower interpretation to the expression. The test is really whether when a man meets with an accident arising out of and in the course of his employment, he was in the position in which he was when the accident occurred because of the work specified in the schedule. His particular share in the work whether active or passive, skilled or unskilled, is irrelevant. 1938 Bom. 155. A Municipality in charge of the water supply, in order to test the efficiency of the system and to test the pressure in the water mains fixed to the stand pipe a recording instrument which had to be kept working for 24 consecutive hours. Two coolies who were employed in the Water Department of the Municipality were placed on guard to watch the instrument during night. The instrument was in the road and raised above the level of the road. An accident occurred during the night and one of the coolies was run over and killed by a motor vehicle. The coolies must be held to be employed in the working of the pipe-line and were workmen as defined by the Act, and the widow of the deceased was entitled to compensation. I.L.R. (1938) Bom. 164=173 I.C. 673=40 Bom. L.R. 12=1938 Bom. 155 (S.B.).

(*xiii*) employed as an inspector, mail guard, sorter or van peon in the Railway Mail Service, or employed in any occupation ordinarily involving out-door work in the Indian Posts and Telegraphs Department; or

(*xiv*) employed, otherwise than in a clerical capacity, in connection with operations for winning natural petroleum or natural gas; or

(*xv*) employed in any occupation involving blasting operations; or

(*xvi*) employed in the making of any excavation in which on any one day of the preceding twelve months more than fifty persons have been employed or explosives have been used, or whose depth from its highest to its lowest point exceeds twenty feet; or

(*xvii*) employed in the operation of any ferry boat capable of carrying more than ten persons; or

(*xviii*) employed, otherwise than in a clerical capacity, on any estate which is maintained for the purpose of growing cinchona, coffee, rubber or tea, and on which on any one day in the preceding twelve months twenty-five or more persons have been so employed; or

(*xix*) employed, otherwise than in a clerical capacity, in the generating, transforming or supplying of electrical energy or in the generating or supplying of gas; or

(*xx*) employed in a light-house as defined in clause (*d*) of section 2 of the Indian Light-House Act, 1927; or

(*xxi*) employed in producing cinematograph pictures intended for public exhibition or exhibiting such pictures; or

(*xxii*) employed in the training, keeping or working of elephants or wild animals; or

[1][(*xxiii*) employed in the tapping of palm-trees or the felling or logging of trees, or the transport of timber by inland waters, or the control or extinguishing of forest fires; or

(*xxiv*) employed in operations for the catching or hunting of elephants or other wild animals; or];

(*xxv*) employed as a diver; or

[1][(*xxvi*) employed in the handling or transport of goods in, or within the precincts of,—

(*a*) any warehouse or other place in which goods are stored, and in which on any one day of the preceding twelve months ten or more persons have been so employed; or

(*b*) any market in which on any one day of the preceding twelve months one hundred or more persons have been so employed; or

(*xxvii*) employed in any occupation involving the handling and manipulation of radium or X-rays apparatus, or contact with radioactive substances.]

Explanation.—In this Schedule, "the preceding twelve months" relates in any particular case to the twelve months ending with the day on which the accident in such case occurred.]

SCHEDULE III.

(*See* Section 3.)

List of occupational diseases.

Occupational disease.	Employment.
Anthrax ..	Any employment— (*a*) involving the handling of wool, hair, bristles or animal carcases or parts of such carcases, including hides, hoofs and horns; or (*b*) in connection with animals infected with arthrax; or (*c*) involving the loading, unloading or transport of any merchandise.
Compressed air illness or its sequelae ..	Any process carried on in compressed air.
Poisoning by lead tetra-ethyl ..	Any process involving the use of lead tetra-ethyl.

[2][PART A.]

LEG. REF.

[1] Old clause (*xxiii*) renumbered as clause (*xxv*) and new clause (*xxiii*), (*xxiv*), (*xxvi*) and (*xxvii*) inserted by Act IX of 1935.

[2] Amendments in Schedule III. Portion in square brackets inserted and substituted by Act IX of 1938.

NOTES.

Sch. II (x and xvi).—Where a person is employed for purposes of employer's business otherwise than in a clerical capacity in the construction, working or repair of a pipe line, the mere fact that he was officiating in a leave vacancy would not take him out of the definition of a workman. 165 I.C. 189 =1936 A. 690; 1936 A.L.J. 1271=1936 A. W.R. 770.

Sch. II (xii).—Applies to a workman engaged as a well-digger. 146 I.C. 1009 (1) =11 R. 404=1933 R. 418.

Sch. II (xxii).—A person, employed as an elephant rider, is a workman, but when such person at the time of his death is employed as a mere messenger and not as an elephant rider, he ceases to be a workman and his dependants are not entitled to any compensation. 14 R. 753=168 I.C. 166= 1937 R. 45.

Occupational disease.	Employments.
Poisoning by nitrous fumes ..	Any process involving exposure to nitrous fumes.
[PART B.]	
Lead poisoning or its sequeale [ex-cluding poisoning by lead tetraethyl] ..	Any process involving the use of lead [or any of its preparations or compounds except lead tetrayethl.]
Phosphorous poisoning or its sequelae ..	Any process involving the use of phosphorous or its preparations or compounds.
[1][Mercury poisoning or its sequelae ..	Any process involving the use of mercury or its preparations or compounds.
Poisoning by benzene and its homologues, or the sequelae of such poisoning ..	Handling benzene or any of its homologues; and any process in the manufacture or involving the use of benzene or any of its homologues.
Chrome ulceration or its sequelae ..	Any process involving the use of chronic acid or bichromate of ammonium, potassium or sodium or other preparations.]
[2][Arsenical poisoning or its sequelae ..	Any process involving the production, liberation or utilisation of arsenic or its compounds.
Pathological manifestations due to— (*a*) radium and other radio-active substances; (*b*) X-rays.	Any process involving exposure to the action of radium, radio-active substances, or X-rays.
Primary epithe liomatous cancer of the skin ..	Any process involving the handling or use of tar, pitch, bitumen, mineral oil, paraffin, or the compounds, products or residues of these substances.

[3][SCHEDULE IV.

(*See* Section 4.)

Compensation payable in certain cases.

Monthly wages of the workman injured.		Amount of compensation for—		Half-monthly payment as compensation for temporary disablement of adult.
		Death of adult.	Permanent total disablement of adult.	
(1)		(2)	(3)	(4)
More than Rs.	But not more than Rs.	Rs.	Rs.	Rs. A.
0	10	500	770	Half his monthly wages.
10	15	550	770	5 0
15	18	600	840	6 0
18	21	630	882	7 0
21	24	720	1008	8 0
24	27	810	1134	8 8
27	30	900	1260	9 0
30	35	1050	1470	9 8
35	40	1200	1680	10 0
40	45	1350	1890	11 4
45	50	1500	2100	12 8
50	60	1800	2520	15 0
60	70	2100	2940	17 8
70	80	2400	3360	20 0
80	100	3000	4200	25 0
100	200	3500	4900	30 0
200	..	4000	5600	30 0]

LEG. REF.

[1] Inserted by Act XV of 1933.

[2] Inserted by Act IX of 1938.

[3] Newly substituted by Act XV of 1933.

NOTES.

Sch. IV.—Where there is total disable-

THE WORKMEN'S COMPENSATION (AMENDMENT) ACT (XIII OF 1939).

(EXTRACTS).

An Act further to amend the Workmen's Compensation Act, 1923, for a certain purpose.

* * * *

Restoration of proceedings.

3. Where in any proceedings under the Workmen's Compensation Act, 1923, concluded after the 1st of July, 1934, any person has been found by a Court not to be a workman within the meaning of that Act only by reason of the fact that his wages were payable otherwise than by the month or on monthly basis, such finding shall be void and of no effect; and the Court shall, notwithstanding anything to the contrary in the Indian Limitation Act, 1908, or any other law for the time being in force, on application made within six months from the commencement of this Act by any person prejudicially affected by such finding, restore the proceedings at, and continue the proceedings from, the stage reached immediately before the order embodying or based on such finding was made.

NOTES.

ment compensation as laid down in Sch. IV has to be paid and in the case of partial disablement as laid down in Sch. I, Sch. I contains a list of injuries deemed to result in permanent partial disablement, but it does not mean that the injuries therein described cannot amount to total disablement. Where the Medical Board reported a turner 'to be completely and permanently incapacitated for further service of any kind in consequence of multiple fractures of tarsus and metatarsus bones of left foot', the injury must be taken to have resulted in total disablement. 1941 N.L.J. 532.

APPENDIX A.

THE APPELLATE JURISDICTION ACT, 1929.

[*5th February*, 1929.

An Act to make further provision with respect to the constitution of the Judicial Committee of the Privy Council and to authorise the appointment of an additional Lord of Appeal in Ordinary.

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Power to appoint Indian Judges, etc., as additional members of the Judicial Committee.

1. (1) His Majesty may by Letters Patent appoint two persons qualified as provided in this section to be members of the Judicial Committee of the Privy Council, and may from time to time fill any vacancies caused by death or otherwise in the offices of the persons so appointed.

[1][(2) A person shall be qualified under this section if he is a Privy Councillor, and

(*a*) is or has been a judge of the Federal Court in India, a High Court in British India or the High Court at Rangoon; or

(*b*) is a barrister, advocate or pleader of not less than fourteen years standing who practises, or has practised, in British India or British Burma.

In this sub-section the expression 'High Court in British India' means a Court which is a High Court for the purposes of the Government of India Act, 1935, and, as respects any period before the commencement of Part III of that Act, a court which was a High Court within the meaning of clause (24) of section three of an Act of the Indian Legislature known as the General Clauses Act, 1897.]

(3) A person appointed a member of Judicial Committee under this section shall hold his office during good behaviour subject to a power of removal by His Majesty on an address presented to His Majesty by both Houses of Parliament, but shall retire therefrom on attaining the age of seventy-two years.

(4) There shall be paid to each person appointed a member of the Judicial Committee under this section a yearly salary of two thousand pounds, and the said salary shall be charged on and paid out of the Consolidated Fund or the growing produce thereof.

(5) If provision is made for the payment to any such person out of [2][the revenues of the Federation of India, the revenues of the Governor-General of India in Council or the revenues of Burma, as the case may be] of any sum, not exceeding two thousand pounds, by way of increase of salary, that sum may be received by that person, and his salary shall be treated as being increased accordingly.

(6) His Majesty may, by Letters Patent, grant to any person appointed a member of the Judicial Committee under this section who having served as such member for a period of five years or upwards—

(*a*) retires on attaining the age of seventy-two; or

(*b*) is, before attaining such age as aforesaid, disabled by permanent infirmity from discharging the duties of his office, a pension by way of annuity to be continued during his life of one thousand pounds a year, and any such pension shall be charged on and paid out of the Consolidated Fund or the growing produce thereof.

(7) Section 30 of the Judicial Committee Act, 1833, and section 4 of the Appellate Jurisdiction Act, 1877, shall be repealed, but nothing in this repeal shall, in the case of any person who at the passing of this Act is entitled under those sections to attend the sittings of the Judicial Committee, affect his right so to attend, or the payment to him of the allowance which at the passing of this Act he is receiving under those sections.

3 & 4 Will. 4, c. 41; 50 & 51 Vict. c. 70.

LEG. REF.

[1] Sub-S. (2) substituted by A.O., 1937.

[2] Substituted for words "the revenues of India" by *ibid.*

2. His Majesty may appoint one Lord of Appeal in Ordinary in addition to the six Lords of Appeal in Ordinary whom He may appoint by virtue of the Appellate Jurisdiction Act, 1876, as amended by the Appellate Jurisdiction Act, 1913, and the provisions of section 6 of the Appellate Jurisdiction, 1876 (as amended by any subsequent enactment) with respect to the appointment of Lords of Appeal in Ordinary and their duties, tenure of office, rank, position, salary and pension shall apply to the making of appointments and to persons appointed under this section.

Additional Lord of appeal 39 & 40, Vict. c. 59; 3 & 4, Geo. 5, c. 21.

3. This Act may be cited as THE APPELLATE JURISDICTION ACT, 1929.

Short title.

APPENDIX B.

AGRICULTURAL PRODUCE (GRADING AND MARKING) ACT I OF 1937 is amended by Act XIII of 1942.

CANTONMENTS ACT II OF 1924 is amended by Act XV of 1942.

REPEALING AND AMENDING ACT XXV OF 1942 repeals certain enactments and amends certain other enactments.

INDIAN COMPANIES (AMENDMENT) ACT (XVII OF 1942).

An Act further to amend the Indian Companies Act, 1913.

WHEREAS it is expedient further to amend the Indian Companies Act, 1913, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN COMPANIES (AMENDMENT) ACT, 1942.

Omission of section 54, Act VII of 1913.

2. Section 54 of the Indian Companies Act, 1913 (hereinafter referred to as the said Act), shall be omitted.

Amendment of section 153, Act VII of 1913.

3. In section 153 of the said Act, for sub-section (6) the following sub-section shall be substituted, namely:—

"(6) In this section the expression 'company' means any company liable to be wound up under this Act and the expression 'arrangement' includes a re-organization of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both those methods, and for the purposes of this section unsecured creditors who may have filed suits or obtained decrees shall be deemed to be of the same class as other unsecured creditors."

INDIAN COMPANIES (SECOND AMENDMENT) ACT (XXI OF 1942).

An Act further to amend the Indian Companies Act, 1913.

WHEREAS it is expedient further to amend the Indian Companies Act, 1913, for the purpose hereinafter appearing; It is hereby enacted as follows:—

Short tltle and commencement.

1. (1) This Act may be called THE INDIAN COMPANIES (SECOND AMENDMENT) ACT, 1942.

(2) It shall come into force on such date (not earlier than one year from the date of its publication in the Official Gazette after having received the assent of the Governor-General) as the Central Government may, by notification in the Official Gazette, appoint in this behalf.

Amendment of section 277-F, Act VII of 1913.

2. To section 277-F of the Indian Companies Act, 1913, the following proviso shall be added, namely:—

"Provided that any company which uses as part of the name under which it carries on business the word "bank", "banker" or "banking" shall be deemed to be a banking company notwithstanding that the accepting of deposits of money on current account or otherwise, subject to withdrawal by cheque, draft or order, is not, or is not shown to be, the principal business of the company."

CODE OF CIVIL PROCEDURE (AMENDMENT) ACT (XXIII OF 1942).

An Act further to amend the Code of Civil Procedure, 1908.

WHEREAS it is expedient further to amend the Code of Civil Procedure, 1908, for the purposes hereinafer appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE CODE OF CIVIL PROCEDURE (AMENDMENT) ACT, 1942.

Amendment of First Schedule, Act V of 1908.

2. In the First Schedule to the Code of Civil Procedure, 1908, after Order XXVII, the following Order shall be inserted, namely:—

"ORDER XXVII-A.

Suits involving a substantial question of law as to the interpretation of the Government of India Act, 1935, or any Order-in-Council made thereunder.

Notice to the Advocate-General.

1. In any suit in which it appears to the Court that a substantial question of law as to the interpretation of the Government of India Act, 1935, or any Order-in-Council made thereunder is involved, the Court shall not proceed to determine that question until after notice has been given to the Advocate-General of India if the question of law concerns the Central Government and to the Advocate-General of the Province if the question of law concerns a Provincial Government.

Court may add Government as party.

2. The Court may at any stage of the proceedings order that the Central Government or a Provincial Government shall be added as a defendant in any suit involving a substantial question of law as to the interpretation of the Government of India Act, 1935, or any Order-in-Council made thereunder if the Advocate-General of India or the Advocate-General of the Province as the case may be, whether upon receipt of notice under rule 1, or otherwise, applies for such addition and the Court is satisfied that such addition is necessary or desirable for the satisfactory determination of the question of law involved.

Costs.

3. Where under rule 2 Government is added as a defendant in a suit, the Advocate-General or the Government shall not be entitled to or liable for costs in the Court which ordered the addition unless the Court having regard to all circumstances of the case for any special reason otherwise orders.

Application of Order to appeals.

4. In the application of this Order to appeals the word 'defendant' shall be held to include a respondent and the word 'suit' an appeal."

THE CODE OF CIVIL PROCEDURE (SECOND AMENDMENT) ACT (XXIV OF 1942).

An Act further to amend the Code of Civil Procedure, 1908.

WHEREAS it is expedient further to amend the Code of Civil Procedure, 1908, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE CODE OF CIVIL PROCEDURE (SECOND AMENDMENT) ACT, 1942.

Amendment of Order XXXIII, Act V of 1908.

2. In Order XXXIII in the First Schedule to the Code of Civil Procedure, 1908,—

(*a*) after rule 11, the following rule shall be inserted, namely:—

Procedure where pauper suit abates.

"11-A. Where the suit abates by reason of the death of the plaintiff or of any person added as a co-plaintiff the Court shall order that the amount of Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper shall be recoverable by the Provincial Government from the estate of the deceased plaintiff.";

(*b*) in rule 12, for the words and figure "or rule 11" the words, figures and letter "rule 11 or rule 11-A" shall be substituted;

(*c*) in rule 13, after the word and figure "rule 11" the word, figure and letter "rule 11-A" shall be inserted;

(*d*) for rule 14, the following rule shall be substituted, namely:—

Recovery of amount of court-fees.

"14. Where an order is made under rule 10, rule 11 or rule 11-A the Court shall forthwith cause a copy of the decree or order to be forwarded to the Collector, who may, without prejudice to any other mode of recovery, recover the amount of Court-fees specified therein from the person or property liable for the payment as if it were an arrear of land revenue."

THE FEDERAL COURT (SUPPLEMENTAL POWERS) ACT (XXVI OF 1942).

An Act to confer supplemental powers on the Federal Court.

WHEREAS it is expedient to confer certain supplemental powers on the Federal Court: It is hereby enacted as follows:—

Short title.

1. This Act may be called THE FEDERAL COURT (SUPPLEMENTAL POWERS) ACT, 1942.

Power to delegate duties.

2. The Federal Court shall have power to delegate to the Registrar of the Court or any other official of the Court, by name or generally by designation, any judicial, quasi-judicial and non-judicial duties and the Registrar or such official in the discharge of any such delegated duties shall have power to administer oaths.

APPENDIX C.

PROVINCIAL STAMP (AMENDMENT) ACTS.

Note.—The Stamp Act has been amended locally in the various provinces with a view to increase the revenue. These enhanced duties vary in different provinces and there is also a provision that, where an instrument duly stamped in one province in brought into another province where it becomes liable to a higher rate of duty, the instrument shall be chargeable with the excess duty only. (*Vide* amendment of S. 19.) As some of those Acts have expired, only the Acts which are now in force are given below. The following note about the operation of the various Acts would be useful:

Assam.—Assam Acts were temporary and have now expired. *See* Assam Act III of 1922, which was enacted for three years and was renewed for a further period of three years by Assam Act II of 1925. So this Act expired on 30th April, 1928. *See* now Assam Act XV of 1936.

Bengal, Madras and the Punjab.—There are permanent local Acts for these provinces, *viz.*, Bengal Act III of 1922, Madras Act VI of 1922 amended by Madras Act VI of 1923 and Punjab Act VIII of 1922 amended by Punjab Act I of 1933. In Punjab, Act I of 1924 makes a further increase in the duty on conveyances of property within certain limits in the Punjab. In Bengal also, stamp duties on certain documents have been temporarily raised by Bengal Act XII of 1935, which has been continued in force by the Bengal expiring Laws Act, 1938 (Bengal Act IV of 1938).

Bombay.—The amending Acts for this province have been temporary in operation. The Act now in force is the Bombay Finance Act II of 1932, which has been extended from time to time, the last of them being by Act IV of 1941 by which it is to remain in force up to 31st March, 1943. Act I of 1935 also introduces a further amendment of Art. 62 of the Stamp Act. Act II of 1932 as modified by Act VI of 1932 also provides for certain enhanced duties in the cities of Bombay, Ahmedabad, Poona and Karachi. Act IV of 1941 increases also the stamp duty on gifts and settlements even with a revocation clause, as if the revocation clause did not exist.

Central Provinces.—The Central Provinces Act (Central Provinces Act II of 1923) expired on the 31st March, 1926. Central Provinces and Berar Act VI of 1939 was extended for two years by Central Provinces and Berar Acts VII of 1940.

Sind.—Amendments made by Bombay Act II of 1932 (with the exception of amendment Art. 14) has been continued in force by Sind Act XII of 1938.

The United Provinces.—The first Amendment Act for this Province (Act V of 1923) was in force till the 30th April, 1925. The second Amendment Act (Act IV of 1932) was in force till the 30th June, 1934, when it was allowed to lapse. As this is not now in force the Act has not been set out below.

Burma.—*(Omitted.)*

The various amending Acts which are at present in force are given below. One consolidated schedule is appended to them showing the duties current in the various Provinces where they vary. Central Provinces and Berar amendments follow mostly the amendments made by the Berar Amendment Act.

THE BENGAL STAMP (AMENDMENT) ACT (III OF 1922).

[PUBLISHED IN THE *Calcutta Gazette Extraordinary* OF THE 29TH MARCH, 1922.]

An Act to amend the Indian Stamp Act, 1899, in its application to Bengal.

Preamble.

WHEREAS it is expedient to increase the revenues of Bengal and for that purpose to amend the Indian Stamp Act, 1899, in its application to Bengal, in the manner hereinafter appearing;

AND WHEREAS the previous sanction of the Governor-General has been obtained, under section 80-A, sub-section (3) of the Government of India Act, to the passing of this Act;

It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE BENGAL STAMP (AMENDMENT) ACT, 1922.

(2) It extends to the whole of Bengal.

(3) It shall come into force on the first day of April, 1922.

Application of Act.

2. The Indian Stamp Act, 1899, hereinafter referred to as the said Act, shall, in its application to Bengal, be amended in the manner hereinafter provided.

Amendment of clause (10) of section 2 of Act II of 1899.

3. To clause (10) of section 2 of the said Act the following shall be added, namely:—

"or by Schedule I-A, as the case may be."

Amendment of section 3.

4. In section 3 of the said Act,—

(1) after clause (*c*) the following shall be inserted, namely:—

"Provided that, except as otherwise expressly provided in this Act, and notwithstanding anything contained in clause (*a*), (*b*) or (*c*) of this section or in Schedule I, the amount indicated in Schedule I-A to this Act shall, subject to the exemptions contained in that Schedule, be the duty chargeable under this Act on the following instruments, mentioned in clauses (*aa*) and (*bb*) of this proviso, as the proper duty there for respectively,—

(*aa*) every instrument, mentioned in Schedule I-A as chargeable with duty under that Schedule, which, not having been previously executed by any person, is executed in Bengal on or after the first day of April, 1922; and

(*bb*) every instrument mentioned in Schedule I-A as chargeable with duty under that Schedule, which, not having been previously executed by any person, is executed out of Bengal on or after the first day of April, 1922, and relates to any property situated, or to any matter or thing done or to be done in Bengal, and is received in Bengal;"

(2) after the word "Provided" the word "also" shall be inserted.

Amendment of section 4 (1).

5. In sub-section (1) of section 4 of the said Act—

(*a*) after the words and figure "in Schedule I" the following shall be inserted namely:—

"or in Schedule I-A, as the case may be;"

(*b*) for the words and brackets "instead of the duty (if any) prescribed for it in that Schedule" the following shall be substituted, namely:—

"if the principal instrument be chargeable with the duty prescribed in Schedule I, or with a duty of one rupee eight annas, if the principal instrument be chargeable with the duty prescribed in Schedule I-A, instead of the duty (if any) prescribed for such other instrument in Schedule I or Schedule I-A, as the case may be."

Amendment of section 6.

6. In section 6 of the said Act,—

(1) in the first paragraph, after the words and figure "in Schedule I" the following shall be inserted, namely:—

"or in Schedule I-A, as the case may be;"

(2) in the proviso, after the words "one rupee" the words "eight annas" shall be inserted, and after the words "has been paid" the following shall be added, namely:—

"unless it falls within the provisions of section 6-A."

New section 6-A.

Payment of Bengal stamp duty on copies, counterparts or duplicates when that duty has not been paid on the principal or original instrument.

7. After section 6 of the said Act the following shall be inserted, namely:—

"6-A. (1) Notwithstanding anything contained in section 4 or 6 or in any other law, unless it is proved that the duty chargeable under the Bengal Stamp (Amendment) Act, 1922, has been paid—

(*a*) on the principal or original instrument as the case may be, or

(*b*) in accordance with the provisions of this section,

the duty chargeable on an instrument of sale, mortgage or settlement other than a principal instrument or on a counterpart, duplicate or copy of any instrument shall, if the principal or original instrument would when, received in Bengal, have been chargeable, under the Bengal Stamp (Amendment) Act, 1922, with a higher rate of duty be the duty with which the principal or original instrument would have been chargeable under section 19-A.

(2) Notwithstanding anything contained in any law, no instrument, counterpart, duplicate or copy chargeable with duty under this section shall be received in evidence as properly stamped unless the duty chargeable under this section has been paid thereon:

Provided that a Court before which any such instrument, counterpart, duplicate, or copy is produced, may, in its discretion, permit the duty chargeable under this section to be paid thereon, and may then receive it in evidence.

New section 19-A.

Payment of duty on certain instruments liable to increased duty in Bengal under clause (*bb*) of section 3.

8. After section 19 of the said Act the following shall be inserted, namely:—

19-A. Where any instrument has become chargeable in any part of British India other than Bengal with duty under this Act or under any other law for the time being in force in any part of British India and thereafter becomes chargeable with a higher rate of duty in Bengal under clause (*bb*) of the first proviso to section 3—

(*i*) notwithstanding anything contained in the first proviso to section 3, the amount of duty chargeable on such instrument shall be the amount chargeable on it under Schedule I-A less the amount of duty, if any, already paid on it in British India;

(*ii*) in addition to the stamps, if any, already affixed thereto, such instrument shall be stamped with the stamps necessary for the payment of the amount of duty chargeable on it under clause (*i*) in the same manner and at the same time and by the same persons as though such instrument were an instrument received in British India for the first time at the time when it became chargeable with the higher duty.

New section 29-A.

9. After section 29 of the said Act the following shall be inserted, namely:—

Application of Sections 23-A, 24 and 29 to instruments chargeable with duty under Schedule I-A.

"29-A. In applying sections 23-A, 24 or 29 to any instrument chargeable with a higher rate of duty under the Bengal Stamp (Amendment) Act, 1922, the references in those sections to the several articles in Schedule I shall be deemed to be references to the corresponding articles in Schedule I-A."

Amendment of section 32.

10. In section 32 of the said Act—

(1) in clause (*a*) of the proviso, after the words "any instrument" the words "other than an instrument chargeable with a duty under clause (*bb*) of the first proviso to section 3" shall be inserted;

(2) the word "or" at the end of clause (*b*) of the proviso shall be omitted;

(3) after clause (*c*) of the proviso the following shall be inserted, namely:—

"or

"(*d*) any instrument chargeable with duty under clause (*bb*) of the first proviso to section 3 and brought to him, after the expiration of three months from the date on which it is first received in Bengal."

New section 48-A.

11. After section 48 of the said Act the following shall be inserted, namely:—

"48-A. Notwithstanding anything contained in this Act, no certificate or endorsement under this Act in respect of an instrument chargeable in Bengal with a higher rate of duty under the Bengal Stamp (Amendment) Act, 1922, shall be received in evidence or be in any way valid in respect of the payment of duty on such instrument or in respect of the chargeability of such instrument with duty unless the duty chargeable under the Bengal Stamp (Amendment) Act, 1922, has been paid on such instrument."

Validity of certificate or endorsement in respect of instruments for which higher rate of duty payable in Bengal.

Amendment of section 77.

12. At the beginning of section 77 of the said Act the following shall be inserted, namely:—

"Except for the provisions as to copies contained in section 6-A".

New Schedule-A.

13. After Schedule I to the said Act the following shall be inserted, namely:—

SCHEDULE I-A.[1]

BENGAL ACT XII OF 1935.

INDIAN STAMP BENGAL AMENDMENT) ACT OF 1935.

(*Assented to by the Governor-General on the 3rd May* 1935.)

An Act further to amend the Indian Stamp Act, 1899.

WHEREAS it is expedient to increase the revenues of Bengal and for the purpose further to amend the Indian Stamp Act, 1899, in its application to Bengal, in the manner hereinafter appearing;

AND WHEREAS the previous sanction of the Governor-General has been obtained under sub-section (3) of section 80-A of the Government of India Act to the passing of this Act:

It is hereby enacted as follows:—

Short title and extent, commencement and duration.

1. (1) This Act may be called THE INDIAN STAMP (BENGAL AMENDMENT) ACT, 1935.

(2) It extends to the whole of Bengal.

(3) It shall come into force on such date as the Provincial Government may, by notification in the Official Gazette, appoint.

(4) Sections 3, 4, 6 and 7 [except clause (1) thereof] shall remain in force for three years only and thereafter the Indian Stamp Act, 1899, shall have force as if it had not been amended by the said sections.

Application of Act.

2. The Indian Stamp Act 1899, hereinafter referred to as the said Act, shall, in its application to Bengal, be amended in the manner hereinafter provided.

Amendment of section 4.

3. In sub-section (1) of section 4 of the said Act, for the words "one rupee eight annas" the words "two rupees" shall be substituted.

[1]The amendments of Sch. 1-A have been incorporated in the main Sch., *infra*.

Amendment of section 6.

4. In the proviso to section 6 of the said Act for the words "one rupee eight annas" the words "two rupees" shall be substituted.

Amendment of sections 6-A, 29-A. 48-A, and the heading of Schedule I-A inserted.

5. In sections 6-A, 29-A, 48-A and the heading of Schedule I-A of the said Act, after the figures "1922", wherever they occur, the words, brackets and figures "or the Indian Stamp (Bengal Amendment) Act, 1935" shall be inserted.

Amendment of section 28 be substituted.

6. In the proviso to sub-section 4 of Section 28 of the said Act, for the words "one rupee" the words "two rupees" shall

Amendment of Schedule I-A.

7. (Omitted as the amendments are incorporated in the consolidated Schedule set out below.

This Act was extended permanently by Act IV of 1938 except clause (7) of section 7 of it which was repealed. That clause ran thus:—"(7) in Article 14, for the entry "six annas" in the second column, the entry 'eight annas' shall be substituted.

THE INDIAN STAMP (BENGAL AMENDMENT) ACT (VII OF 1939).

The amendments are incorporated in Articles 57 and 62 (*c*) in Schedule.

THE BIHAR STAMP (AMENDMENT) ACT (VI OF 1937).

[22*nd December*, 1937.

An Act to amend the Indian Stamp Act, 1899, *in its application to Bihar.*

WHEREAS it is expedient to increase the revenues of Bihar and for that purpose to amend the Indian Stamp Act, 1899, in its application to Bihar in the manner hereinafter appearing;

It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE BIHAR STAMP (AMENDMENT) ACT, 1937.

(2) It extends to the whole of Bihar.

(3) It shall come into force on the first day of January, 1938.

Application of Indian Stamp Act, 1899, to Bihar.

2. The Indian Stamp Act, 1899 (hereinafter referred to as the said Act, shall, in its application to Bihar, be amended in the manner hereinafter provided.

Amendment of clause (10) of section 2 of Act II of 1899.

3. To clause (10) of section 2 of the said Act the following shall be added, namely:—

"or by Schedule I-A, as the case may be".

Amendment of section 3 of Act II of 1899.

4. In section 3 of the said Act—

(1) after clause (*c*) the following shall be inserted, namely:—

"Provided that, except as otherwise expressly provided in this Act, and notwithstanding anything contained in clause (*a*), (*b*) or (*c*) of this section or in Schedule I the amount indicated in Schedule I-A shall, subject to the exemptions contained in that Schedule, be the duty chargeable on the following instruments, mentioned in clause (*aa*) and (*bb*) of this proviso, as the proper duty therefor respectively:—

(*aa*) every instrument, mentioned in Schedule I-A as chargeable with duty under that Schedule, which, not having been previously executed by any person, is executed in Bihar on or after the first day of January, 1938; and

(*bb*) every instrument mentioned in Schedule I-A as chargeable with duty under that Schedule, which, not having been previously executed by any person, is executed out of Bihar on or after the first day of Januaay, 1938 and relates to any property situated, or to any matter or thing done or to be done, in Bihar and is received in Bihar";

(2) after the word "Provided" the word "also" shall be inserted.

Amendment of section 4 (1) of Act II of 1899.

5. In sub-section (1) of section 4 of the said Act—

(*a*) after the words and figure "in Schedule I' the following shall be inserted namely:—

"or in Schedule I-A, as the case may be,";

(*b*) for the words and brackets "instead of the duty (if any) prescribed for it in that Schedule" the following shall be substituted, namely:—

"if the principal instrument be chargeable with the duty prescribed in Schedule I, or with a duty of one rupee and eight annas if the principal instrument be chargeable with the duty prescribed in Schedule I-A, instead of the duty (if any) prescribed for such other instruments in Schedule I or Schedule I-A, as the case may be".

Amendment of section 6 of Act II of 1899.

6. In section 6 of the said Act—

(1) in the first paragraph, after the words and figure "in Schedule I" the following shall be inserted, namely :—

"or in Schedule I-A, as the case may be," ;

(2) in the proviso, after the words "one rupee" the words "and eight annas" shall be inserted, and after the words "has been paid" the following shall be added, namely :—

"unless it falls within the provisions of section 6-A".

Insertion of new section 6-A in Act II of 1899.

7. After section 6 of the said Act, the following section shall be inserted namely :—

Payment of Bihar stamp duty on copies, counterparts or duplicates when that duty has not been paid on the principal or original instrument.

"6-A. (1) Notwithstanding anything contained in section 4 or 6 or in any other law, unless it is proved that the duty chargeable under the Bihar Stamp (Amendment) Act, 1937, has been paid—

(*a*) on the principal or original instrument, as the case may be, or

(*b*) in accordance with the provisions of this section, the duty chargeable on an instrument of sale, mortgage or settlement other than a principal instrument or on a counterpart, duplicate or copy of any instrument shall, if the principal or original instrument would, when received in Bihar, have been chargeable under the Bihar Stamp (Amendment) Act, 1937, with a higher rate of duty, be the duty with which the principal or original instrument would have been chargeable under section 19-A.

(2) Notwithstanding anything contained in any law, no instrument, counterpart, duplicate or any chargeable with duty under this section shall be received in evidence as properly stamped unless the duty chargeable under this section has been paid thereon :

Provided that a Court before which any such instrument, counterpart, duplicate or copy is produced may, in its discretion, permit the duty chargeable under this section to be paid thereon, and may then receive it in evidence."

Insertion of new section 19-A in Act II of 1899.

8. After section 19 of the said Act the following section shall be inserted, namely :—

Payment of duty on certain instruments liable to increased duty in Bihar under clause (*bb*) of section 3.

"19-A. Where any instrnment has become chargeable in any part of British India other than Bihar with duty under this Act or under any other law for the time being in force in any part of British India and thereafter becomes chargeable with a higher rate of duty in Bihar under clause (*bb*) of the first proviso to section 3—

(*i*) notwithstanding anything contained in the first proviso to section 3, the amount of the duty chargeable on such instrument shall be the amount chargeable on it under Schedule I-A less the amount of duty, if any, already paid on it in British India ;

(*ii*) in addition to the stamps, if any, already affixed thereto, such instrument shall be stamped with the stamps necessary for the payment of the amount of duty chargeable on it under clause (*i*) in the same manner and at the same time and by the same person as though such instrument were an instrument received in British India for the first time at the time when it became chargeable with the higher duty."

Application of sections 23-A, 24 and 29 to instrument chargeable with duty under Schedule I-A.

9. In applying section 23-A, 24 or 29 to any instrument chargeable with a higher rate of duty under the Bihar Stamp (Amendment) Act, 1937, the references in those sections to the several articles in Schedule I shall be deemed to be references to the corresponding articles in Schedule I-A.

Amendment of section 32 of Act II of 1899,

10. In section 32 of the said Act—

(1) in clause (*a*) of the proviso, after the words "any instrument" the words "other than an instrument chargeable with a duty under clause (*bb*) of the first proviso to section 3" shall be inserted ;

(2) the word "or" at the end of clause (*b*) of the proviso shall be omitted ; and

(3) after clause (*c*) of the proviso tbe following shall be inserted, namely :—

"or

(*d*) any instrument chargeable with duty under clause (*bb*) of the first proviso to section 3 and brought to him after the expiration of three months from the date on which it is first received in Bihar."

Insertion of new section 48-A in Act II of 1899.

11. After section 48 of the said Act, the following section shall be inserted, namely :—

Validity of certificate or endorsement in respect of instruments for which higher rate of duty is payable in Bihar.

"48-A. Notwithstanding anything contained in this Act, no certificate or endorsement under this Act in respect of an instrument chargeable in Bihar with a higher rate of duty under the Bihar Stamp (Amendment) Act, 1937, shall be received in evidence or be in any way valid in respect of the payment of duty on such instrument or in respect of the chargeability of such instrument with duty unless the duty chargeable under the Bihar Stamp (Amendment) Act, 1937, has been paid on such instrument."

Amendment of section 77 of Act II of 1899.

12. At the beginning of section 77 of the said Act the following shall be inserted, namely :—

"Except for the provisions as to copies contained in section 6-A."

Insertion of new Schedule IA in Act 11 of 1899.

13. After Schedule I to the said Act the following shall be inserted, namely :—

[Amedments in corporated in the Schedule.]

THE BOMBAY FINANCE ACT (STAMP AMENDMENT) (II OF 1932).

First published, after having received the assent of the Governer-General in the "Bombay Government Gazette" on the 30th March, 1932.

An Act to provide for the levy of a duty on consumption of electrical energy for the purpose of lights and fans in the Presidency of Bombay and to amend the Court-Fees Act, 1870, and the *Indian Stamp Act*, 1899, in their application to the said Presidency.

WHEREAS it is expedient to provide for the levy of a duty on consumption of electrical energy for the purpose of lights and fans in the Presidency of Bombay and to amend the Court-Fees Act, 1870, and the *Indian Stamp Act*, 1899, in their application to the said Presidency for the purposes hereinafter appearing; and whereas the previous sanction of the Governor-General required by sub-section (3) of section 80-A of the Government of India Act and the previous sanction of the Governor required by S. 80-C of the said Act has been obtained;

It is hereby enacted as follows :—

Part I.—Preliminary.

Short title.

1. This Act may be called THE BOMBAY FINANCE ACT, 1932.

Extent, commencement and duration.

2. (1) Except where it is otherwise provided in this Act' this Act extends to the whole of the Presidency of Bombay.

(2) It shall come into Force on the 1st day of April, 1932.

(3) This section and sections 3 to 15 containing Parts II, III and IV shall remain in operation for [1][four years] from the date on which this Act comes into force.

Part IV.—Stamp duties.

Amendment of II of 1899.

15. In the Indian Stamp Act, 1899, in is application to the Presidency of Bombay, the following amendments shall be made, namely :—

Amendment of Ss. 4 and 6 of II of 1899.

(1) In sub-section (1) of section 4, and in the proviso to section 6, for the words "one rupee" the words "two rupees" shall be substituted.

Amendment of Ss. 11, 32, 35, 40, 41, 69 and 74 of II of 1899.

(2) In clause (*a*) of section 11, proviso (*c*) to section 32, proviso (*a*) to section 35, sub-section (1) of section 40, section 41, clause (*b*) of section 69 and the proviso to section 74 before the words "one anna" the words "two annas" shall be inserted.

New S. 19-A of II of 1899.

(3) After section 19, the following section shall be inserted, namely :—

Payment of duty on certain instruments liable to increased duty in Bombay Presidency.

19-A. Where any instrument of the nature described in any acticle in Schedule I and relating to any property situate or to any matter or thing done or to be done in the Presidency of Bombay is executed out of the said Presidency and subsequently received in the said Presidency—

(*a*) the amount of duty chargeable on such instrument shall be the amount of duty chargeable under Schedule I on a document of the like description executed in the Presidency of Bombay less the amount of duty, if any, already paid on such instrument in British India;

(*b*) and in addition to the stamps, if any, already fixed thereto, such instrument shall be stamped with the stamps necessary for the payment of the duty chargeable on it under clause (*a*) of this section, in the same manner and at the same time and by the same persons as though such instrument were an instrument received in British India for the first time at the time when it became chargeable with the higher duty, and

(*c*) the provisions contained in clause (*b*) of the proviso to sub-section (3) of section 32, shall apply to such instrument as if such were an instrument executed or first executed out of British India and first received in British India when it became chargeable to the higher duty as aforesaid, but the provisions contained in clause (*a*) of the said proviso shall not apply thereto.

Amendment of S. 28 of II of 1899

(4) For the provisio to sub-section 28 the following shall be substituted, namely :—

LEG. REF.

[1] The Bombay Finauce Act (II of 1932) originally was in operation for one year. From time to time the period was extended by subsequent Bombay enactments and ultimately by Act IV of 1941, it has been extended up to 31st March, 1943.

"Provided that notwithstanding anything contained in Article 23 of Schedule I the duty on such last mentioned conveyance shall in no case be less than two rupees.

(5) In Schedule I—

Amendment of Schedule I of II of 1899.

(*a*) in column 1 of Article 12, clauses (*a*) and (*b*) shall be repealed;

(*b*) for the entries in column 2 of the said Schedule relating to Articles 2 (*b*), 3, 4, 8 (*b*), 9, 12, 14. 15, 18, 20, 22, 23, 24, 25 (*b*), 26 (*b*), 29, 30 (*b*), 39, 40 (*c*), 41, 42, 44, 46, 48, 50, 51, 54 (*a*), 55 (*b*), 57 (*b*), [62 (*a*), (*b*) [1]and (*c*)] and 65 and shown in column 2 of the Schedule to this Part, the entries shown in column 3 of the later Schedule shall be substituted;

(*c*) for articles 5 and 43, the following shall respectively be substituted, namely:

(*See* Schedule below with all local amendments incorporated.)

(*d*) for Articles 7 and 10 the following shall, respectively, be substituted, namely:—

(*See* Schedule below with all local amendments incorporated.)

(*e*) in clauae (*e*) in column (1) of Article 25 for the words "one rupee" the words "two rupees" shall be substituted; and

(*f*) in proviso (*a*) and (*c*) in column 2 of Article 45, for the words "eight annas" the words "one rupee" shall be substituted.

SCHEDULE.[2]

Part V.—Stamp duties on certain instruments in certain cities.

Extent of Part V.

16. This part extends to the cities of Bombay, Ahmedabad, Poona and Karachi only.

Definitions.

17. In this Part, unless three is anything repugnant in the subject or context.

(*a*) "City of Ahmedabad" means the municipal district of Ahmedabad the cantonment of Ahmedabad, and the notified areas of Kankaria Asarva, Ellis Bridge and Sabarmati

(*b*) 'City of Poona" means the municipal district of Poona, the suburban municipal district of Poona, and the cantonment of Poona, and

(*c*) "City of Karachi" means the municipal district of Karachi, the cantonments of Karachi and Manora and the limits of the Karachi Port-Trust.

Amendment of Schedule I to II of 1899.

18. Notwithstanding anything contained in Part IV, in Schedule I to the Indian Stamp Act, 1899, in its application to the cities of Bombay, Ahmedabad, Poona and Karachi, for the entries in columns 1 and 2 relating to Articles 23, 58 and 63, the following entries shall, respectively, be substituted, namely:—

23. Conveyance as defined by section 2 (10) not being a Transfer charged or exempted under No. 62.

For the City of Bombay.

	Rs.	A.	P.
Where the amount or value of the consideration for such conveyance as set forth therein exceeds Rs. 200 but does not exceed Rs. 300	8	8	0
Where it exceeds Rs. 300 but does not exceed Rs. 400	12	0	0
Where it exceeds Rs. 400 but does not exceed Rs. 500	15	8	0
Where it exceeds Rs. 500 but does not exceed Rs. 600	19	0	0
Where it exceeds Rs. 600 but does not exceed Rs. 700	22	8	0
Where it exceeds Rs. 700 but does not exceed Rs. 800	26	0	0
Where it exceeds Rs. 800 but does not exceed Rs. 900	29	8	0
Where it exceeds Rs. 900 but does not exceed Rs. 1,000	33	0	0
and for every Rs. 500 or part thereof in excess of Rs. 1,000	17	0	0

For the Cities of Ahmedabad, Poona and Karachi.

Where the amount or value of the consideration for such conveyance as set forth therein, exceeds Rs. 200 but does not exceed Rs. 300	6	8	0
exceeds Rs. 300 but does not exceed Rs. 400	9	0	0
exceeds Rs. 400 but does not exceed Rs. 500	11	8	0
exceeds Rs. 500 but does not exceed Rs. 600	14	0	0
exceeds Rs. 600 but does not exceed Rs. 700	16	8	0
exceeds Rs. 700 but does not exceed Rs. 800	19	0	0
exceeds Rs. 800 but does not exceed Rs. 900	21	8	0
exceeds Rs. 900 but does not exceed Rs. 1,000	24	0	0
and for every 500 or part thereof in excess of Rs. 1,000	12	8	0

58. Settlement A—Instrument of (including a deed of dower).

The same duty as a Conveyance (No. 23) for a consideration equal to the amount or value of the property settled as set forth in such settlement: Provided that, where an

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LEG. REF.

[1] Substituted by Bombay Act I of 1935.

[2] All the amendments have been incorporated in the main Schedule, *infra*.

agreement to settle is stamped with the stamp required for an instrument of settlement and an instrument of settlement in pursuance of such agreement is subsequently executed, the duty on such instrument shall not exceed eight annas.

Exemptions.

(*a*) Deed of dower executed on the occasion of a marriage between Muhammadans.

(*b*) Hludassa, that is to say any settlement of immovable property executed by a Buddhist in Burma for a religious purpose in which no value has been specified and on which a duty of Rs. 10 has been paid.

B.—Revocation of—

See also Trust. (No. 64).

The same duty as a Conveyance (No. 23 for a consideration equal to the amount or value of the property concerned as set forth in the instrument of revocation but not exceeding ten rupees.

63. Transfer of lease by way of assignment and not by way of under-lease.

The same duty as a conveyance (No. 23) for a consideration equal to the amount of the consideration for the transfer.

Exemption.

Transfer of any lease exempt from duty.

[19. The Indian Stamp (Bombay Amendment Act, 1926, is hereby repealed.]

Repeal of Bom. Act II of 1926.

THE MADRAS STAMP (AMENDMENT) ACT (VI OF 1922).

An Act to amend the Indian Stamp Act, 1899, in its application to the Presidency of Madras.

Preamble.

WHEREAS it is expedient to amend the Indian Stamp Act, 1899, in its application to the Presidency of Madras;

AND WHEREAS the previous sanction of the Governor-General has been obtained under section 80-A, sub-section (3) of the Government of India Act to the passing of the Act;

It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE MADRAS STAMP (AMENDMENT) ACT, 1922.

(2) It extends to the whole of the Presidency of Madras.

Interpretation clause.

2. In this Act the words "the principal Act" shall mean the Indian Stamp Act, 1899.

Amendment of clause (10) of section 2 of Act II of 1899.

3. To clause (10) of section 2 of the principal Act the following shall be added, namely:—"or by Schedule I-A, as the case may be."

Amendment of S. 3.

4. In section 3 of the principal Act.

(1) after clause (*c*) the following shall be inserted, namely:—

"Provided that, except as otherwise expressly provided in this Act, and notwithstanding anything contained in clause (*a*) or (*c*) of this section or in Schedule I, the amount indicated in Schedule I-A shall, subject to the exceptions contained in that schedule, be the duty chargeable on the following instruments:

(*aa*) every instrument, mentioned in Schedule I-A as chargeable with duty under that schedule, which, not having been previously executed by any person, is executed in the Presidency of Madras on or after the first of April, 1922:

(*bb*) every instrument, mentioned in Schedule I-A as chargeable with duty under that Schedule, which, not having been previously executed by any person, is executed out of the Presidency of Madras on or after the first day of April, 1922, and relates to any property situated or to any matter or thing done or to be done in the said Presidency and is received in the said Presidency."

(2) after the word "Provided" the word "also" shall be inserted.

Amendment of S. 4.

5. In sub-section (1) of section 4 of the principal Act—

(*a*) after the words and figure "in Schedule I," the words, figure and letter "or in Schedule I-A as the case may be" shall be inserted;

(*b*) after the words "one rupee" the words "or one rupee eight annas" shall be inserted;

(*c*) for the words "in that Schedule I" the words figures and letter "in Schedule I or in Schedule I-A as the case may be" shall be substituted.

6. In section 6 of of the principal Act, after the words and figure "Schedule I" the words, figure and letter or in Schedule I-A as the case may be" and after the words "one rupee" the words "or one rupee eight annas as the case may be" shall be inserted.

Amendment of S. 6.

Addition of a new section 19-A.

7. After section 19 the following shall be inserted namely:—

"19-A. Where any instrument has become chargeable in any part of British India other than the Presidency of Madras with duty under the Stamp law in force in that part of British India and thereafter becomes chargeable with a higher rate of duty in the said Presidency under clause (*bb*) of the first proviso to section 3—

Payment of duty on certain instruments liable to increased duty under clause (*bb*) of section 3.

(*i*) Notwithstanding anything contained in the first proviso to section 3, the amount of duty chargeable on such instrument shall be the amount chargeable on it under Schedule I-A less the amount of duty, if any, already paid on it in British India;

(*ii*) in addition to the stamps, if any, already affixed thereto, such instrument shall be stamped with the stamps necessary for the payment of the amount of duty chargeable on it under clause (*i*) in the same manner and at the same time and by the same persons as though such instrument were an instrument received in British India for the first time at the time when it became chargeable with the higher duty; and

(*iii*) the provisions contained in clause (*b*) or clause (*c*), as the case may be of the proviso to sub-section (3) of section 32 shall, with the necessary modifications, apply to such instrument, but the provisions contained in clause (*a*) of the said proviso shall not apply thereto."

8. In sub-section (1) [1][*] of section 23-A after the word and figure "Schedule I" the words, figures and letters "or article No. 4 (*c*) of Schedule I-A as the case may be" shall be inserted.

Amendment of section 23-A.

9. In section 24 after the word and figure "Schedule I" the words, figures and letter "or article 16 of Schedule I-A as the case may be" shall be inserted.

Amendment of section 24.

10. In clause (*a*) of section 29 after the word and figure "Schedule I" the words, figure and letter "or the corresponding articles of Schedule I-A as the case may be" shall be inserted.

Amendment of section 29.

11. In clause (*c*) of the proviso to sub-section (3) of section 32 after the words "half an anna," the following shall be inserted, namely:—

Amendment of section 32.

"or a mortgage of crop [article 34 (*a*) of Schedule 1-A] chargeable under clause (*aa*) or (*bb*) of section 3 with a duty of two annas."

12. In clause (*a*) of the proviso to section 35, in sub-section (1) of section 40 and in section 41, after the words "half-an-anna only" the following shall be inserted, namely:—

Amendment of sections 35, 40 and 41.

"or a mortgage of crop [article 34 (*a*) of Schedule I-A] chargeable under clause (*aa*) or (*bb*) of section 3 with a duty of two annas."

13. After Schedule I of the principal Act, the following shall be inserted, namely:—

Addition of a new Schedule I-A.

SCHEDULE I-A.[2]

THE PUNJAB STAMP (AMENDMENT) ACT (VIII OF 1922).

An Act to provide for the amendment of the Indian Stamp Act, 1899, in its application to the Punjab.

WHEREAS it is expedient to increase the revenues of the Punjab and for that purpose to amend the Indian Stamp Act, 1899. in its application to the Punjab, in the manner hereinafter appearing;

Preamble.

AND WHEREAS the previous sanction of the Governor-General under sub-section (3) of section 80-A, of the Government of India Act, has been obtained; It is hereby enacted as follows :—

1, This Act may be called THE INDIAN STAMP (PUNJAB AMENDMENT) ACT, 1922.

Short title, extent and commencement.

(2) It extends to the Punjab.

(3) It shall come into force on such date as the [Provincial Government] may by notification appoint in this behalf.

2. The Indian Stamp Act, 1899, shall, in its application to the Punjab, be amended in the manner hereinafter provided.

Application of Act.

LEG. REF.

[1]Omitted by Madras Act VI of 1923, S. 2.

[2]All the amendments made in Sch. I-A have been incorporated in Sch. I *infra*.

Meaning of sections.

3. The section hereinafter referred to by number means the section so numbered in the Indian Stamp Act, 1899, unless it shall appear to the contrary.

Amendment of section 2.

4. In clause (10) of section 2 for the colon shall be substituted a comma followed by the words "or by Schedule I-A as the case may be."

Amendment of section 3.

5. In section 3—

(1) After clause (*c*) the following proviso shall be inserted, namely:—

"Provided that, notwithstanding anything contained in clause (*a*), (*b*) or (*c*) of this section or in Schedule I. and subject to the exemptions contained in Schedule I-A the following instruments shall be chargeable with duty of the amount indicated in Schedule I-A, as the proper duty therefor, respectively, that is to say,—

(*aa*) every instrument mentioned in Schedule I-A as chargeable with duty under that schedule, which. not having been previously executed by any person, is executed in the Punjab on or after the date of commencement of this Act;

(*bb*) every instrument mentioned in Schedule I-A as chargeable with duty under that schedule, which, not having been previously executed by any person, is executed out of the Punjab on or after the date of the commencement of this Act and relates to any property situated, or to any matter or thing done or to be done in the Punjab, and is received in the Punjab.

(2) Between the word "provided" and the words "that no duty" the word "also" shall be inserted.

Amendment of section 4.

6. In sub-section (1) of section 4—

(*a*) for a figure "I" after the words "in schedule" shall be substituted the figure and letter "I-A."

(*b*) between the word "rupee" and the word "instead" shall be inserted the words "and eight annas."

Amendment of section 6.

7. In section 6—

(1) between the word "descriptions" and the word "in" shall be inserted the word "given" and after the word and figure "Schedule I" shall be inserted the words, figure and letter "and Schedule I-A";

(2) in the proviso, after the words "one rupee" the words "and eight annas," shall be inserted, and after the words "has been paid" the following shall be added, namely:—

"unless it falls within the provisions of section 6-A."

New section.

8. After section 6 the following new section shall be inserted, namely:—

Payment of the Punjab Stamp duty on copies, counterparts or duplicates when the duty has not been paid on the principal or original instrument.

"6-A. (1) Notwithstanding anything contained in section 4 or 6 or in any other law, unless it is proved that the duty chargeable under the Indian Stamp (Punjab Amendment) Act, 1922, has been paid—

(*a*) on the principal or original instrument as the case may be, or

(*b*) in accordance with the provisions of this section,

the duty chargeable on an instrument of sale, mortgage, or settlement other than a principal instrument or on a counterpart, duplicate of copy of any instrument shall, if the principal or original instrument would, when received in the Punjab, have been chargeable, under the Indian Stamp (Punjab Amendment) Act, 1922, with a higher rate of duty, be the duty with which the principal or original instrument would have been chargeable under section 19-A;

(2) Notwithstanding anything contained in section 35 or in any other law, no instrument, counterpart, duplicate or copy chargeable with duty under this section shall be received in evidence as properly stamped unless the duty chargeable under this section has been paid thereon;

Provided that a Court before which any such instrument, counterpart, duplicate or copy is produced, shall permit the duty chargeable under this section to be paid thereon, and shall then receive it in evidence."

Amendment of section 9.

9. In clause (*a*) of section 9 between the words "chargeable" and the word "and" shall be inserted the following proviso, namely:—

"Provided that with respect to instruments which are chargeable with duty under Schedule I-A, such reduction or remission may, by notification, be granted by the Governor in Council."

New section.

10. After section 19, the following new section shall be inserted, namely:—

Payment of duty on certain instruments liable to increased duty in the Punjab under clause (*bb*) of section 3.

"19-A. Where any instrument has become chargeable in any part of British India other than the Punjab with duty under this Act or under any other law for the time being in force in any part of British India and thereafter becomes chargeable with a higher rate of duty in the Punjab under clause (*bb*) of the first proviso to section 3 as amended by the Indian Stamp (Punjab Amendment) Act, 1922—

(*i*) notwithstanding anything contained in the said proviso, the amount of duty chargeable on such instrument shall be the amount chargeable on it under Schedule I-A less the amount of duty, if any, already paid on it in British India.

(*ii*) in addition to the stamps, if any, already affixed thereto, such instrument shall be stamped with the stamps necessary for the payment of the amount of duty chargeable on it under clause (*i*) in the same manner and at the same time and by the same persons as though such instrument were an instrument received in British India for the first time at the time when it became chargeable with the higher duty."

Amendment of section 23-A.

11. In sub-section (1) of section 23-A the letter "A" shall be added after the figure "1".

Amendment of section 24.

12. In the proviso to section 24 for the full stop shall be substituted a comma followed by the words, figure and letter "or Schedule I-A ,as the case may be."

Amendment of section 29.

13. In clause (*a*) of section 29 the letter "A" shall be inserted between figure "I" and the word "namely".

Amendment of section 32.

14. In section 32—

(1) In clause (*a*) of the proviso after the words "any instrument" the words "other than an instrument chargeable with a duty under clause (*bb*) of the first proviso to section 3 as amended by the Indian Stamp (Punjab Amendment) Act, 1922," shall be inserted;

(2) the word "or" at the end of clause (*b*) of the proviso shall be omitted;

(3) after clause (*c*) of the proviso the word "or" shall be added followed by a new clause (*d*) as follows:—

"(*d*) any instrument chargeable with duty under clause (*bb*) of the first proviso to section 3 as amended by the Indian Stamp (Punjab Amendment) Act, 1922, and brought to him after the expiration of three months from the date on which it is first received in the Punjab."

Amendment of section 77.

15. At the beginning of section 77, the following words shall be inserted, namely:—

"Except for the provisions as to copies contained in section 6-A".

New Schedule.

16. After Schedule I the new Schedule I-A hereinafter annexed shall be deemed to have been added.

Substitution of entries in Schedule I-A for entries in Schedule I.

17. Wherever the words "as in Schedule I" appear in Schedule I-A opposite the name of any instrument, the duty payable on such instrument shall be as specified in Schedule I, and wherever the entries in the second column of Schedule I-A differ from the corresponding entries in Schedule I, the duty payable shall be the amount specified, as payable in Schedule I-A instead of the amount so specified in Schedule I.

SCHEDULE I-A.[1]

SCHEDULE I.

STAMP-DUTY ON INSTRUMENTS.

(See Section 3).

N.B.—The stamp duty in Central Provinces and Berar follows mostly the Bihar amendments and that in Sind follows the Bombay amendments. The deviations from above are indicated in the Schedule.

Description of Instrument.	Proper stamp-duty.
1. **Acknowledgment** of a debt exceeding twenty rupees in amount or value, written or signed by, or on behalf of, a debtor in order to supply evidence of such debt in any book (other than a banker's pass book) or on a separate piece of paper when such book or paper is left in the creditor's possession: provided that such acknowledgment does not contain any promise to pay the debt, or any stipulation to pay interest or to deliver any goods or other property.	One anna (No change by Local Acts except in Bihar). Bihar—Two annas.

LEG. REF.

[1] All amendments have been incorporated in Sch. I, *infra*.

Description of Instrument.	Proper Stamp-duty.
2. Administration-bond, including a bond given under section 256 of the Indian Succession Act, 1865, section 6 of the Government Savings Banks Act, 1873, section 78 of the Probate and Administration Act, 1881, or section 9 or section 10 of the Succession Certificate Act, 1889 (under section 6 of the Government Savings Banks Act, 1873, or section 291 or section 375 or section 376 of the Indian Succession Act, 1925—*Vide* Bengal Act XII of 1935)--(under sections 291, 375 and section 376 of the Indian Succession Act, 1925 or section 6 of the Government Savings Banks Act, 1873—Bihar)—	
(*a*) where the amount does not exceed Rs. 1,000 ..	India, Bombay, Bengal, Madras and Punjab—The same duty as a bond (No. 15) for such amount. India—Five rupees. Bombay, Bengal. Madras, Uuited Provinces and Punjab—Rupees ten.
(*b*) in any other case ..	One Rupee.
Bihar. (*a*) where the amount does not exceed Rs. 1,000 for every Rs. 100 or part thereof.	The duty payable under clause (*a*) for the first Rs. 1,000 and in addition, the same duty as on a bond (No. 15) for the portion in excess of Rs. 1,000.
(*b*) in any other case	India—Ten Rupees. Bengal, Bihar, Bombay and Punjab—Rupees Twenty. Madras—Rupees Fifteen.
3. Adoption-deed, that is to say, any instrument (other then a will), recording an adoption or conferring or purporting to confer an authority to adopt.	India—One Rupee. Bengal Bihar, Bombay, Madras and Punjab—Two Rupees.
Advocate. *See* ENTRY AS AN ADVOCATE (No. 30) ..	
4. Affidavit, including an affirmation or declaration in the case of persons by law allowed to affirm or declare instead of swearing.	
Exemptions.	
Affidavit or declaration in writing when made—	
[1][(*a*) as a condition of enrolment under the Indian Army Act, 1911 [or the Indian Air Force Act, 1932][2];]	
(*b*) for the immediate purpose of being filed or used in any Court or before the officer of any Court; or	
(*c*) for the sole purpose of enabling any person to receive any pension or charitable allowance.	
5. Agreement or memorandum of an agreement—	
(*a*) [3][if relating to the sale of a bill of exchange]; ..	India—Two annas. Punjab—Annas Four. Bengal—Four annas (Act XII of 1935). Bihar and Madras—Three annas.
(*b*) if relating to the sale of a Government security or share in an incorporated Company or other body Corporate:	India—Subject to a maximum of ten rupees, one anna for every Rs. 10,000 or part thereof of the value of the security or share. Bihar and Madras—Subject to a maximum of fifteen rupees, one and

LEG. REF.

[1] Cl. (*a*) substituted by Act XVIII of 1928.
[2] Added by Act XIV of 1932
[3] Substituted for "if relating to the sale of Government security or share in an incorporated company or other body corporate or a bill of exchange" by Act VI of 1901, S. 3 (1).

Description of Instrument.	Proper Stamp-duty.
Agreement or memorandum of an agreement—(*Contd.*)	half anna for every Rs. 10.000 or part thereof of the value of the security or share. Punjab—Subject to a maximum of Rs. 15, two annas for every Rs 10,000 or part thereof of the value of the security or share.
In Bengal read cl. (*b*) as follows:— (*i*) if relating to the sale of a Government security ..	Subject to a maximum of twenty rupees, two annas for every Rs. 1.0000 or part thereof, of the value of the security.
(*ii*) if relating to the sale of a share in an incorporated Company or other body corporate;	Two annas for every Rs. 5,000 or part thereof, of the value of the share.
(*c*) if not otherwise provided for ..	India—Eight annas. Bengal and Punjab—Rupee one. Bihar and Madras—Twelve annas.
In Bombay read as follows:— (*a*) if relating to the sale of a bill of exchange .. (*aa*) if relating to the sale of a Government security ..	Four annas. Subject to a maximum of twenty rupees, two annas for every Rs. 10,000 or part thereof of the value of the security.
(*b*) if relating to the sale of a share in an incorporated Company or other body corporate.	Two annas for every Rs. 5,000 or part thereof of the value of the share.
(*c*) if not otherwise provided for	One rupee.
Exemptions. Agreement or memorandum of an agreement— (*a*) for or relating to the sale of goods or merchandise exclusively, not being a NOTE OR MEMORANDUM chargeable under No. 43; (*b*) made in the form of tenders to the Government of India for or relating to any loan: (*c*) made under the European Vagrancy Act, 1874, section 17. **5-A. Agreement to lease.** *See* LEASE (No. 35). [1][**6. Agreement relating to deposit of title-deeds, pawn or pledge,** that is to say, any instrument evidencing an agreement relating to— (1) the deposit of title-deeds or instruments constituting or being evidence of the title to any property whatever (other than a marketable security), or (2) the pawn or pledge of movable property, where such deposit, pawn or pledge has been made by way of security for the repayment of money advanced or to be advanced by way of loan or an existing or future debt— (*a*) if such loan or debt is repayable on demand or more than three months from the date of the instrument evidencing the agreement;	India—The same duty as a Bill of Exchange [No. 13 (*b*)] for the amount secured Half the duty payable on a Bill of Excaonge [No. 13 (*b*)] for the amount secured.
(*b*) if such loan or debt is repayable not more than three months from the date of such instrument. *Exemption.* Instrument or pawn or pledge of goods if unattested.]	

LEG. REF.

[1]Art. 6 substituted for the original article by S. 8 (1) of the Indian Stamp (Amendment) Act (XV of 1904).

Description of instrument.	Proper stamp-duty.		
	If drawn singly.	If drawn in sets of two for each part of the set.	If drawn in sets of three for each part of the set.
	Rs. A. P.	Rs. A. P.	Rs. A. P.
[1]16. **Agreement relating to Deposit of Title-Deeds, Pawn or Pledge,** that is to say, any instrument evidencing an agreement relating to—			
(1) the deposit of title deeds, instruments constituting or being evidence of the title to any property whatever (other than a marketable security), or			
(2) the pawn or pledge of movable property, where such deposit, pawn or pledge has been made by way of security for the repayment of money advanced or to be advanced by way of loan or an existing or future debt—			
(*a*) if such loan or debt is repayable on demand or more than three months from the date of the instrument evidencing the agreement—			
[2](*i*) when the amount of the loan or debt does not exceed Rs. 200	0 4 6	0 3 0	0 1 6
(*ii*) when it exceeds Rs. 200 but does not exceed 400	0 9 0	0 4 6	0 3 0
Do. 400 Do. 600	0 13 6	0 7 6	0 4 6
Do. 600 Do. 800	1 2 0	0 9 0	0 6 0
Do. 800 Do. 1,000	1 6 6	0 12 0	0 7 6
Do. 1,000 Do. 1,200	1 11 0	0 13 6	0 9 0
Do. 1,200 Do. 1,600	2 4 0	1 2 0	0 12 0
Do. 1,600 Do. 2,500	3 6 0	1 11 0	1 2 0
Do. 2,500 Do. 5,000	6 12 0	3 6 0	2 4 0
Do. 5,000 Do. 7,500	[3]10 0 0	5 1 0	3 6 0
Do. 7,500 Do. 10,000	13 8 0	6 12 0	4 8 0
Do. 10,000 Do. 15,000	20 4 0	10 2 0	6 12 0
Do. 15,000 Do. 20,000	27 0 0	13 8 0	9 0 0
Do. 20,000 Do. 25,000	33 12 0	16 14 0	11 4 0
Do. 25,000 Do. 30,000	40 8 0	20 4 0	13 8 0
and for every additional Rs. 10,000 or part thereof in excess of Rs. 30,000.	13 8 0	6 12 0	4 8 0
(*b*) if such loan or debt is repayable not more than three months from the date of such instrument.	Half the duty payable on a loan or debt under clause (*a*) (*i*) or clause (*a*) (*ii*) for the amount secured.[4]		
Exemptions. Same as India,			
7. Appointment in execution of a power, whether of trustees or of property, movable or immovable, where made by any writing not being a will.	India—Fifteen rupees. Bengal, Bihar, Madras and Punjab—Twenty-five Rupees.		
In Bombay read thus— Appointment in execution of a power, where made by any writing not being a will—			
(*a*) of trustees ..	Fifteen rupees.		
(*b*) of any property movable or immovable ..	Thirty rupees.		
8. Appraisement or valuation made otherwise than under an order of the Court in the course of a suit—			
(*a*) where the amount does not exceed Rs. 1,000 ..	India, Bihar, and Bombay—The same duty as a Bond (No. 15) for such amount. Bengal, Madras and Punjab—The same duty as a Bottomry Bond (No. 16) for such amount.		

LEG. REF,

[1]This new article has been substituted in Bengal, Bihar, Madras and Punjab.

[2]In Bihar there is a separate entry before this. *viz.*, (1) when the amount of the loan or debt does not exceed Rs 100—0-3-0, 0-2-0 0-1-6 respectively.

[3]In Punjab and Madras read Rs. 10-2 as.

[4]The words "stamp duty of a quarter anna.

Description of Instrument.	Proper Stamp-duty.
Appraisement or valuation—(*Contd.*) (*b*) in any other case ..	India—Five rupees. Bihar and Madras—Seven rupees eight annas. Bengal, Bombay and Punjab—Rupees ten.
Exemptions. (*a*) Appraisement or valuation made for the information of one party only, and not being in any manner obligatory between parties either by agreement or operation of law. (*b*) Appraisement of crops for the purpose of ascertaining the amount to be given to a landlord as rent.	
9. Apprenticeship-deed, including every writing relating to the service of tuition or any apprentice clerk or servant placed with any master to learn any profession, trade or employment, not being ARTICLES OF CLERKSHIP (No. 11).	India—Five rupees. Bihar and Madras—Rupees seven and annas eight.
Exemption. Instruments of apprenticeship executed by a Magistrate under the Apprentices Act, 1850, or by which a person is apprenticed by or at the charge of any public charity.	Bengal and Bombay—Rupees Ten.
10. Articles of Association of a Company ..	India — Twenty-five rupees. Bihar and Madras—Fifty rupees.
Exemption. Articles of any Association not formed for profit and registered under S. 26 of the Indian Companies Act, 1882.[1] *See also* MEMORANDUM OF ASSOCIATION OF A COMPANY (No. 39).	
In **Bengal**, the Article is amended as follows:— **Articles of Association of a Company**— (*a*) where the nominal share capital does not exceed one lakh of rupees.	Fifty rupees.
(*b*) where the nominal share capital exceeds one lakh of rupees.	One hundred rupees.
The article is amended in **Bombay** as follows:— (*a*) where the company has no share capital or the nominal share capital does not exceed Rs. 2,500.	Twenty-five rupees.
(*b*) Where the nominal share capital exceeds Rs. 2,500, but does not exceed Rs. 1,00,000.	Fifty rupees.
(*c*) Where the nominal share capital exceeds Rs. 1,00,000 ..	One hundred rupees.
The article is amended in the **Punjab** as follows:— (*a*) Where the authorised share capital does not exceed Rs. 1,00,000.	Twenty-five rupees.
(*b*) In other cases.	Fifty rupees.
11. Articles of clerkship or contract whereby any person first becomes bound to serve as a clerk in order to his admission as an attorney in any High Court.	India and Bihar — Two hundred and fifty rupees. Madras—Two hundred and seventy-five rupees.
Assignment. *See* CONVEYANCE (No. 23), TRANSFER (No. 62) and TRANSFER OF LEASE (No. 63), as the case may be. **Attorney.** *See* ENTRY AS AN ATTORNEY (No. 30) and POWER OF ATTORNEY (No. 48), **Authority to adopt.** *See* ADOPTION DEED (No. 3).	
12. Award, that is to say, any decision in writing by an arbitrator or umpire, not being an award directing a partition, on a reference made otherwise than by an order of the Court in the course of a suit— (*a*) where the amount or value of the property to which the award relates as set forth in such award does not exceed Rs. 1,000;	India, Bihar, Bengal and Punjab—The same duty as a Bond (No. 15) for such amount. Madras—The same duty as a Bottomry Bond (No. 16) for such amount.

LEG. REF.

shall be reckoned as half anna and three quarter anna as one anna" are added by Madras Act VI of 1923.

[1] *See* now Act VII of 1913.

Description of Instrument.	Proper Stamp-duty.
Award—(*Contd.*) (*b*) in any other case ..	Five rupees.
Exemption. Award under the Bombay District Municipal Act, 1873,[1] section 81, or the Bombay Hereditary Offices Act, 1874, section 18.	
In Bengal, Bihar and Punjab, clause (*b*) is amended as follows:— (*b*) If it exceeds Rs. 1,000 but does not exceed Rs. 5,000 ..	Seven rupees eight annas (Ten rupees in Bengal according to Act XII of 1935).
and for every additional Rs. 1,000 or part thereof in excess of Rs. 5 000.	Eight annas subject to a maximum of fifty rupees.
In Madras, cl. (*b*) is amended as follows:— (*b*) if it exceeds Rs. 1,000 but does not exceed Rs. 5,000 ..	Ten rupees.
and for every additional Rs. 1,000 or part thereof in excess of Rs. 5,000.	Eight annas subject to a maximum of fifty rupees.
In Bombay the duty payable is the same as on a bond subject to a maximum of Rs. 20.	
Exemption. Award under the Bombay District Municipal Act, 1901, section 160 or Bombay Hereditary Offices Act, 1874, section 18, or the United Provinces Municipalities Act II of 1916, section 324 (1) or the United Provinces District Boards Act, 1922, section 190 (1).	
13. Bill of Exchange [as defined by section 2 (2)[2]] not being a Bond, Bank-note or currency-note—	
(*a*) [3][* * * * * * *]	

	If drawn singly.			If drawn in sets of two, for each part of the set.			If drawn in sets of 3, for each part of the set.		
	Rs.	A.	P.	Rs.	A.	P.	Rs.	A.	P.
[4][(*b*) where payable otherwise than on demand, but not more than one year after date or sight—									
if the amount of the bill or note does not exceed	200	0	3 0	0	2	0	0	1	0
if it exceeds Rs. 200 and does not exceed	400	0	6 0	0	3	0	0	2	0
Ditto 400 ditto	600	0	9 0	0	5	0	0	3	0
Ditto 600 ditto	800	0	12 0	0	6	0	0	4	0
Ditto 800 ditto	1,000	0	15 0	0	8	0	0	5	0
Ditto 1,000 ditto	1,200	1	2 0	0	9	0	0	6	0
Ditto 1,200 ditto	1,600	1	8 0	0	12	0	0	8	0
Ditto 1,600 ditto	2,500	2	4 0	1	2	0	0	12	0
Ditto 2,500 ditto	5,000	4	8 0	2	4	0	1	8	0
Ditto 5,000 ditto	7,500	6	12 0	3	6	0	2	4	0
Ditto 7,500 ditto	10,000	9	0 0	4	8	0	3	0	0
Ditto 10,000 ditto	15,000	13	8 0	6	12	0	4	8	0
Ditto 15,000 ditto	20,000	18	0 0	9	0	0	6	0	0
Ditto 20,000 ditto	25,000	22	8 0	11	4	0	7	8	0
Ditto 25,000 ditto	30,000	27	0 0	13	8	0	9	0	0
and for every additional Rs. 10,000 or part thereof in excess of Rs. 30,000.		9	0 0	4	8	0	3	0	0]
(*c*) where payable at more than one year after date or sight.	The same duty as a Bond (No. 15) for the same amount.								
14. Bill of Lading (including a through bill of lading) ..	India—Four annas. Bengal and Madras—Six anaas.								

LEG. REF.

[1] *See* now the Bombay District Municipal Act (Bom. Act III of 1901). A decree of Court in terms of an award is not an instrument chargeable with stamp duty. 11 L.L.T. 147.

[2] The words "and (3)" have been omitted by Act V of 1927.

[3] Clause (*a*) which stood as follows:—[(*a*) where payable on demand. One anna] has been omitted by Act V of 1927.

[4] Substituted by Act I of 1912.

Description of Instrument.	Proper Stamp-duty.
Bill of Lading—(*Contd.*)	Bombay and Punjab—Eight annas. *N.B.*—If a bill of lading is drawn in parts, the proper stamp therefor must be borne by each one of the set.
Exemptions. (*a*) Bill of lading when the goods therein described are received at a place within the limits of any port as defined under the Indian Ports Act, 1889, and are to be delivered at another place within the limits of the same port. (*b*) Bill of lading when executed out of British India and relating to property to be delivered in British India.	
15. **Bond** [as defined by section 2 (5)] not being a DEBENTURE (No. 27) and not being otherwise provided for by this Act, or by the Court-Fees Act, 1870,—	
where the amount or value secured does not exceed Rs. 10	Two annas.
where it exceeds Rs. 10 and does not exceed Rs. 50	Four annas.
Ditto 50 ditto 100	Eight annas.
Ditto 100 ditto 200	One rupee.
Ditto 200 ditto 300	One rupee eight annas.
Ditto 300 ditto 400	Two rupees.
Ditto 400 ditto 500	Two rupees eight annas.
Ditto 500 ditto 600	Three rupees.
Ditto 600 ditto 700	Three rupees eight annas.
Ditto 700 ditto 800	Four rupees.
Ditto 800 ditto 900	Four rupees eight annas.
Ditto 900 ditto 1,000	Five rupees.
and for every Rs. 500 or part thereof in excess of Rs. 1,000 ..	Two rupees eight annas.
See ADMINISTRATION BOND (No. 2), BOTTOMRY BOND (No. 16), CUSTOMS BOND (No 26), INDEMNITY BOND (No. 34), RESPONDENTIA BOND (No. 56), SECURITY BOND (No. 57). *Exemptions.* Bond, when executed by— (*a*) headmen nominated under rules framed in accordance with the Bengal Irrigation Act, 1876 section 99, for the due performance of their duties under that Act; (*b*) any person for the purpose of guaranteeing that the local income derived from private subscriptions to a charitable dispensary or hospital. or any other object of public utility, shall not be less than a specified sum per mensem.	

Local Amendments.	Bengal.	Bihar.	C. P. & Berar.	Punjab.	Bombay.	Madras.
Where the amount or value secured does not exceed Rs. 10.	Rs. A. 0 2	Rs. A 0 2	Rs. A. 0 2	Rs. A. 0 2	Rs. A. 0 2	Rs. A. 0 2
Where it exceeds Rs. 10 and does not exceed Rs. 50	0 4	0 4	0 4	0 4	0 4	0 4
,, Rs. 50 ,, Rs. 100	0 8	0 10	0 8	0 8	0 8	0 8
,, Rs. 100 ,, Rs. 200	1 0	1 4	1 0	1 0	1 0	1 4
,, Rs. 200 ,, Rs. 300	1 14	2 4	1 8	1 14	2 4	1 14
,, Rs. 300 ,, Rs. 400	3 0	3 0	2 8	2 8	3 0	2 8
,, Rs. 400 ,, Rs. 500	3 12	3 12	3 8	3 2	3 12	3 2
,, Rs. 500 ,, Rs. 600	4 8	4 8	4 8	4 8	4 8	4 8
,, Rs. 600 ,, Rs. 700	5 4	5 4	5 4	5 4	5 4	5 4
,, Rs. 700 ,, Rs. 800	6 0	6 0	6 0	6 0	6 0	6 0
,, Rs. 800 ,, Rs. 900	6 12	6 12	6 12	6 12	6 12	6 12
,, Rs. 900 ,, Rs. 1,000	7 8	7 8	7 8	7 8	7 8	7 8
and for every Rs. 500 or part thereof in excess of Rs. 1,000 ..	3 12	3 12	3 12	3 12	3 12	3 12

16. **Bottomry Bond**, that is to say, any instrument whereby the master of a sea-going ship borrows money on the security of the ship to enable him to preserve the ship or prosecute her voyage.	The same duty as a Bond (No. 15 for the same amount.

Description of Instrument.	Proper Stamp-duty.
Bottomry Bond—(*Contd.*) The following amendments are made in **Bengal, Madras** and the **Punjab**:—	
Where the amount or value secured does not exceed Rs. 10 ..	Three annas.
Where it exceeds Rs. 10 and does not exceed Rs. 50 ..	Six annas.
Where it exceeds Rs. 50 and does not exceed Rs. 100 ..	Twelve annas.
Where it exceeds Rs. 100 and does not exceed Rs. 200 ..	One rupee eight annas.
Where it exceeds Rs 200 and does not exceed Rs. 300 ..	Two rupees four annas.
Where it exceeds Rs. 300 and does not exceed Rs 400 ..	Three rupees.
Where it exceeds Rs. 400 and does not exceed Rs. 500 ..	Three rupees twelve annas.
Where it exceeds Rs. 500 and does not exceed Rs. 600 ..	Four rupees eight annas.
Where it exceeds Rs. 600 and does not exceed Rs. 700 ..	Five rupees four annas.
Where it exceeds Rs. 700 and does not exceed Rs. 800 ..	Six rupees.
Where it exceeds Rs. 800 and does not exceed Rs. 900 ..	Six rupees twelve annas.
Where it exceeds Rs. 900 and does not exceed Rs. 1,000 ..	Seven rupees eight annas.
and for every Rs. 500 or part thereof in excess of Rs. 1,000 ..	Three rupees twelve annas.
17. Cancellation—Instrument of (including any instrument by which any instrument previously executed is cancelled), if attested and not otherwise provided for. *See also* RELEASE (No. 55), REVOCATION OF SETTLEMENT (No. 58-B), SURRENDER OF LEASE (No. 61), REVOCATION OF TRUST (No. 64-B).	India—Five rupees. Bengal, Madras and Punjab —Seven rupes eight annas. Bihar—Ten rupees.
18. Certificate of sale (in respect of each property put up as a separate lot and sold) granted to the purchaser of any property sold by public auction by a Civil or Revenue Court, or Collector or other Revenue Officer—	
(*a*) where the purchase-money does not exceed Rs. 10 ..	India—Two annas. Bihar, Madras and Punjab—Three annas. Bengal and Bombay—Four annas.
(*b*) where the purchase-money exceeds Rs. 10 but does not exceed Rs. 25;	India—Four annas. Bihar, Madras and Punjab—Six annas. Bengal and Bombay—Eight annas.
(*c*) in any other case ..	The same duty as a Conveyance (No. 23) for a consideration equal to the amount of the purchase-money only.
19. Certificate or other document evidencing the right or title of the holder thereof, or any other person, either to any shares, scrip or stock in or of any incorporated company or other body corporate, or to become proprietor of shares, scrip or stock in or of any such company or body. *See also* LETTER OF ALLOTMENT OF SHARES (No. 36).	[1][Two annas].
20. Charter-party, that is to say, any instrument (except an agreement for the hire of a tug steamer) whereby a vessel or some specified principal part thereof is let for the specified purposes of the charterer, whether it includes a penalty clause or not.	India—One rupee. Bengal, Bihar, Bombay Madras and Punjab—Two rupees.
21. [2][* * * * * *]	
22. Composition deed, that is to say, any instrument executed by a debtor whereby he conveys his property for the benefit of his creditors, or whereby payment of a composition or dividend on their debts is secured to the creditors, or whereby provision is made for the continuance of the debtor's business, under the supervision of inspectors or under letters of licence for the benefit of his creditors.	India—Ten rupees. Punjab—Twelve rupees eight annas. Bengal and Bombay—Twenty rupees. Bihar and Madras—Fifteen rupees.
23. Conveyance [as defined by section 2 (10)] not being a TRANSFER charged or exempted under No. 62,—	

LEG. REF.

[1] The words "two annas" were substituted for "one anna" by Act XLIII of 1923.

[2] Omitted by Act V of 1927. The omitted Article 21 stood as follows:—Cheque [as defined by section 2 (7) one anna].

Description of Instrument.	Proper Stamp-duty.
Conveyance—(*Contd*) where the amount or value of the consideration for such conveyance as set forth therein does not exceed Rs. 50;	Eight annas.
where it exceeds Rs. 50 but does not exceed Rs. 100 ..	One rupee.
Ditto 100 ditto 200 ..	Two rupees.
Ditto 200 ditto 300 ..	Three rupees.
Ditto 300 ditto 400 ..	Four rupees.
Ditto 400 ditto 500 ..	Five rupees.
Ditto 500 ditto 600 ..	Six rupees.
Ditto 600 ditto 700 ..	Seven rupees.
Ditto 700 ditto 800 ..	Eight rupees.
Ditto 800 ditto 900 ..	Nine rupees.
Ditto 900 ditto 1,000 ..	Ten rupees.
and for every Rs. 500 or part thereof in excess of Rs. 1,000 ..	Five rupees.

Description of Instrument.	Bengal, Madras, Bihar and Punjab.			Bombay.		
	Rs.	A.	P.	Rs.	A.	P.
Where the amount or value of the consideration for such conveyance as set forth therein does not exceed Rs. 50	0	12	0	0	8	0
where it exceeds Rs. 50 but does not exceed Rs. 100	1	8	0	1	0	0
Ditto 100 ditto 200	3	0	0	2	0	0
Ditto 200 ditto 300	4	8	0	4	8	0
Ditto 300 ditto 400	6	0	0	6	0	0
Ditto 400 ditto 500	7	8	0	7	8	0
Ditto 500 ditto 600	9	0	0	9	0	0
Ditto 600 ditto 700	10	8	0	10	8	0
Ditto 700 ditto 800	12	0	0	12	0	0
Ditto 800 ditto 900	13	8	0	13	8	0
Ditto 900 ditto 1,000	15	0	0	15	0	0
and for every Rs. 500 or part thereof in excess of Rs. 1,000 ..	7	8	0	7	8	0

Exemptions.

Assignment of copyright by entry made under the Indian Copyright Act, 1847.[1] section 5.

For Punjab only—(Act I of 1924).

Provided that a conveyance of immovable property situated within a Municipality, Cantonment or Notified Area will be chargeable with a stamp-duty at double the rate hereinbefore provided.

Explanation.—For the purpose of this proviso "Notified Area" means an area in regard to which a notification has been issued or may hereafter be issued under S. 241 of the Punjab Municipal Act, 1911; and in which the total population is according to the latest census is more than five thousand in number.

Description of Instrument.	Bombay.			Ahmedabad, Poona and Karachi.		
	Rs.	A.	P.	Rs.	A.	P.
IN CERTAIN CITIES IN BOMBAY PRESIDENCY (Acts II and VI of 1932). Where the amount or value of the consideration for such conveyance as set forth therein exceeds Rs. 200 but does not exceed Rs. 300	8	8	0	6	8	0
Where it excesds Rs. 300 but does not exceed Rs. 400	12	0	0	9	0	0
Ditto 400 ditto 500	15	8	0	11	8	0
Ditto 500 ditto 600	19	0	0	14	0	0
Ditto 600 ditto 700	22	8	0	16	8	0
Ditto 700 ditto 800	26	0	0	19	0	0
Ditto 800 ditto 900	29	8	0	21	8	0
Ditto 900 ditto 1,000	33	0	0	24	0	0
and for every Rs. 500 or part thereof in excess of Rs. 1,000	17	8	0	12	8	0

LEG. REF.

[1] *See* now Act III of 1914.

Description of Instrument.	Proper Stamp-duty.
Co-partnership-deed. *See* PARTNERSHIP (No. 46).	
24. Copy of Extract certified to be a true copy or extract by or by order of any public officer and not chargeable under the law for the time being in force relating to Court-fees—	
(*i*) if the original was not chargeable with duty or if the duty with which it was chargeable does not exceed one rupee.	India—Eight annas. Bihar, Madras and Punjab—Twelve annas. Bengal and Bombay—One rupee.
(*ii*) in any other case ..	India—One rupee. Bihar, Madras and Punjab—One rupee eight annas. Bengal and Bombay—Two rupees.
Exemptions. (*a*) Copy of any paper which a public officer is expressly required by law to make or furnish for record in any public office or for any public purpose. [1](*b*) Copy of, or extract from, any register relating to births, baptisms, namings, dedications, marriages, [1][divorces], deaths or burials.	
25. Counterpart or duplicate of any instrument chargeable with duty and in respect of which the proper duty has been paid—	
(*a*) if the duty with which the original instrument is chargeable does not exceed one rupee eight annas.	The same duty as is payable on the original.
(*b*) in any other case ..	India—One rupee. Bengal, Bihar, Madras and Punjab—One rupee eight annas. Bombay—Two rupees.
Exemption. Counterpart of any lease granted to a cultivator when such lease is exempted from duty.	
26. Customs Bond—	
(*a*) Where the amount does not exceed Rs. 1,000 ..	India, Bihar, and Bombay—The same duty as a Bond (No. 15), for such amount. Bengal, Madras and Punjab—The same duty as a Bottomry Bond (No. 16) for the same amount.
(*b*) in any other case ..	India—Five rupees. Bengal, Bihar, Bombay, Madras and Punjab—Ten rupees.
[2][**27. Debenture** (whether a mortgage debenture or not) being a marketable security transferable—	
(*a*) by endorsement or by a separate instrument of transfer.	India, Bihar and Bombay—The same duty as a Bond (No. 15) for the same amount. Bengal, Madras and Punjab—The same duty as a Bottomry Bond (No. 16) for the same amount.
(*b*) by delivery ..	The same duty as a Conveyance (No. 23) for a consideration equ l to the face amount of the debenture.
Explanation.—The term "debenture" includes any interest coupons attached thereto, but the amount of such coupons shall not be included in estimating the duty.	

LEG. REF.

[1]This clause was substituted for cls. (*b*) and (*c*) by S. 7 (1) of the Indian Stamp (Amendment) Act (V of 1906). After the word "marriages" the word 'divorces" was inserted by Act X of 1914, Sch. I.

[2] Substituted by Act VI of 1910, S. 3 (ii).

Description of Instrument.	Proper Stamp-duty.
Debenture—(*Contd.*) *Exemption.* A debenture issued by an incorporated company or other body corporate in terms of registered mortgage-deed, duly stamped in respect of the full amount of debentures to be issued thereunder, whereby the company or body borrowing make over, in whole or in part, their property to trustees for the benefit of the debenture-holders: provided that the debentures so issued are expressed to be issued in terms of the said mortgage-deed. *See also* BOND (No. 15) and sections 8 and 55.]	
Declaration of any Trust *See* TRUST (No. 64).	
28. Delivery order in respect of Goods, that is to say, any instrument entitling any person therein named, or his assigns or the holder thereof, to the delivery of any goods lying in any dock or port, or in any warehouse in which goods are stored or deposited on rent or hire, or upon any wharf, such instrument being signed by or on behalf of the owner of such goods upon the sale or transfer of the property therein, which such goods exceed in value twenty rupees.	One anna.
Deposit of Title deeds [1][*See* AGREEMENT relating to DEPOSIT OF TITLE-DEEDS, PAWN OR PLEDGE (No. 6)].	
Dissolution of Partnership. *See* PARTNERSHIP (No. 46).	
29. Divorce—Instrument of, that is to say, any instrument by which any person effects the dissolution of his marriage.	India—One rupee. Madras—Two rupees Bengal, Bombay and Punjab—Five rupees. Bihar—Twenty rupees.
Dower—Instrument of. *See* SETTLEMENT (No. 58).	
Duplicate. *See* COUNTERPART (No 25).	
30. Entry as an Advocate, Vakil or Attorney on the Roll of any High Court [2][under the Bar Councils Act, 1926, or] in exercise of powers conferred on such Court by Letters Patent or by the Legal Practitioners Act, 1884—	
(*a*) in the case of an Advocate or Vakil ..	India and Bombay—Five hundred rupees. Bengal Bihar, and Punjab—Seven hundred and fifty rupees. Madras C. P. and Berar—Six hundred and twenty-five rupees.
(*b*) in the case of an Attorney ..	India—Two hundred and fifty rupees. Bengal, Bihar Bombay and Punjab—Five hundred rupees. Madras, C. P. and Berar—Three hundred and twelve rupees and annas eight only.
Exemption. Entry as an advocate, vakil or attorney on the roll of any High Court when he has previously been enrolled in a High Court.	
[3][* * * *]	
31. Exchange of Property—Instrument of ..	The same duty as a Conveyance (No. 23) for a consideration equal to the value of the property of greatest value as set forth in such instrument.
Extract. *See* COPY (No. 24).	
32. Further Charge—Instrument of, that is to say, any instrument imposing a further charge on mortgaged property—	

LEG. REF.

[1]Substituted for the words and figure "*See* Agreement by way of equitable mortgage (No. 6)" by S. 8 (2) of the Indian Stamp (Amendment) Act (XV of 1904).

[2]Inserted by Act XXXVIII of 1926.

[3]The entry "Equitable mortgage" was omitted by S. 3 of the Indian Stamp (Amendment) Act (XV of 1904); the entry was as follows:—

"EQUITABLE MORTGAGE.—*See* Agreement by way of Equitable Mortgage (No. 6)."

Description of Instrument.	Proper Stamp-duty.
Further Charge—(*Contd.*) (*a*) when the original mortgage is one of the description referred to in clause (*a*) of Article No. 40 (that is, with possession);	The same duty as a Conveyance (No. 23) for a consideration equal to the amount of the further charge secured by such instrument.
(*b*) When such mortgage is one of the description referred to in clause (*b*) of Article No. 40 (that is, without possession)— (i) if at the time of execution of the instrument of further charge possession of the property is given or agreed to be given under such instrument;	The same duty as a Conveyance (No. 23) for a consideration equal to the total amount of the charge (including the original mortgage and any further charge already made) less the duty already paid on such original mortgage and further charge.
(ii) if possession is not so given ..	India, Bengal, Bihar, Bombay and Punjab— The same duty as Bond (No. 15) for the amount of the further charge secured by such instrument. Madras—[The same duty as a Bottomry Bond (No. 16) for the amount of the further charge secured by such instrument.]
33. Gift—Instrument of, not being a SETTLEMENT (No. 58) OR WILL OR TRANSFER (No. 62).	The same duty as a Conveyance (No. 23) for a consideration equal to the value of the property as set forth in such instrument. Bombay—The same duty as a Conveyance (No. 23) for a consideration equal to the value of the property which is the subject-matter of the gift. (*See* Bombay Act IV of 1941,) There is a proviso by which a provision for revocation is to be disregarded.
In Bihar, the clause reads as follows:— **Gift**—Instrument of, not being a Settlement No. 58) or Will or Transfer (No. 62)—	
(*i*) When the value of the gift does not exceed Rs. 1,000..	The same duty as a Conveyance (No. 23) for a consideration equal to the value of the property as set forth in such instrument.
(*ii*) When it exceeds Rs. 1,000 but does not exceed Rs. 10,000;	Rs. 15 for the first thousand rupees and Rs. 10 for every Rs. 500 or part thereof by which the value of the gift exceeds Rs. 1,000.
(*iii*) When it exceeds Rs. 10,000 ..	The fee under clause (*ii*) and in addition Rs. 15 for every Rs. 500 or part thereof by which the value of the gift exceeds Rs. 10,000.
Hiring Agreement or agreement for service. *See* AGREEMENT (No. 5).	

Description of Instrument.	Proper Stamp-duty.
34. **Indemnity-Bond** ..	The same duty as a Security Bond (No. 57) for the same amount.
Inspectorship Deed. *See* COMPOSITION-DEED (No. 22).	
Insurance. *See* POLICY OF INSURANCE (No. 47).	
35. **Lease**, including an under-lease or sub-lease and any agreement to let or sub-let—	
(*a*) where by such lease, the rent is fixed and no premium is paid or delivered—	
(i) where the lease purports to be for a term of less than one year;	India and Bombay—The same duty as a Bond (No. 15) for the whole amount payable or deliverable under such lease.
(ii) where the lease purports to be for a term of not less than one year but not more than three years;	The same duty as a Bond (No. 15) for the amount or value of the average annual rent reserved.
(iii) where the lease purports to be for a term in excess of three years;	The same duty as a Conveyance (No. 23) for a consideration equal to the amount or value of the average annual rent reserved.
(iv) where the lease does not purport to be for any definite term;	The same duty as a Conveyance (No. 23) for a consideration equal to the amount or value of the average annual rent which would be paid or delivered for the first ten years if the lease continued so long.
(v) where the lease purports to be in perpetuity ..	The same duty as a Conveyance (No. 23) for a consideration equal to one-fifth of the whole amount of rents which would be paid or delivered in respect of the first fifty years of the lease.
(*b*) where the lease is granted for a fine or premium or for money advanced and where no rent is reserved;	The same duty as a Conveyance (No. 23) for a consideration equal to the amount or value of such fine or premium or advance as set forth in the lease.
(*c*) where the lease is granted for a fine or premium or for money advanced in addition to rent reserved;	The same duty as a Conveyance (No. 23) for a consideration equal to the amount or value of such fine or advance as set forth in the lease in addition to the duty which would have been payable on such lease if no fine or premium or advance had been paid or delivered: Provided that in any case when an agreement to lease is stamped with the *ad valorem* stamp required for a lease, and a lease in pursuance of such agreement is subsequently executed, the duty on such lease shall not exceed eight annas.
Exemptions.	
(*a*) Lease, executed in the case of a cultivator and for the purposes of cultivation (including a lease of trees for the pro-	

Description of Instrument.	Proper Stamp-duty.
Lease—(*Contd.*) duction of food or drink), without the payment or delivery of any fine or premium, when a definite term is expressed and such term does not exceed one year, or when the average annual rent reserved does not exceed one hundred rupees. [(*b*) Leases of fisheries granted under the Burma Fisheries Act, 1875,[1] or the Upper Burma Land and Revenue Regulation, 1889.][2]	
35. **Lease** including an under-lease or sub-lease and any agreement to let or sublet— (*a*) where by such lease the rent is fixed and no premium is paid or delivered— (*i*) where the lease purports to be for a term of less than one year;	Bengal, Madras and Punjab—The same duty as a Bottomry Bond (No. 16) for the whole amount payable or deliverable under such lease. Bihar—The same duty as a Bond (No. 15) for the amount payable or deliverable under such lease.
(*ii*) where the lease purports to be for a term of not less than one year, but not more than five years;	Bengal, Madras and Punjab—The same duty as a Bottomry Bond (No. 16) for the amount or value of the average annual rent reserved. Bihar—The same duty as a Bond (No. 15) for the amount or value of the average annual rent reserved.
(*iii*) where the lease purports to be for a term exceeding five years and not exceeding ten years;	Bengal, Bihar, Madras and Punjab—The same duty as a conveyance (No. 23) for a consideration equal to the amount or value of the average annual rent reserved.
(*iv*) where the lease purports to be for a term exceeding ten years but not exceeding twenty years;	Bengal, Bihar, Madras and Punjab— The same duty as a Convevance (No. 23) for a consideration equal to twice [three times *in Bihar*] the amount or value of the average annual rent reserved.
(*v*) where the lease purports to be for a term exceeding twenty years, but not exceeding thirty years;	Bengal, Bihar, Madras and Punjab— The same duty as a Conveyance (No. 23) for a consideration equal to three [five *in Bihar*] times the amount or value of the average annual rent reserved.
(*vi*) where the lease purports to be for a term exceeding thirty years, but not excceding one hundred years;	Bengal, Bihar, Madras and Punjab— The same duty as a Conveyance (No. 23) for a consideration equal to four [eight *in Bihar*] times the amount or value of the average annual rent reserved.

LEG. REF.

[1] *See* now Act III of 1906.

[2] Omitted in Madras by A.O., 1937.

Description of Instrument.	Proper Stamp-duty.
Lease—(*Contd.*) (*vii*) where the lease purports to be for a term exceeding one hundred years or in perpetuity;	Bengal and Punjab—The same duty as a Conveyance (No. 23) for a consideration equal in the case of a lease granted solely for agricultural purposes to one-tenth and in any other case to one-sixth of the whole amount of rents which would be paid or delivered in respect of the first fifty years of the lease. Bihar and Madras—The same duty as a Conveyance (No. 23) for a consideration equal to one-sixth [one fourth *in Bihar*] of the whole amount of the rents which would be paid or delivered in respect of the first fifty years of the lease. Bengal, Bihar, Madras, & Punjab—The same duty as a Conveyance (No. 23) for a consideration equal to three times the amount or value of the average annual rent which would be paid or delivered for the first ten years if the lease continued so long.
(*viii*) where the lease does not purport to be for any definite term;	
(*b*) where the lease is granted for a fine or premium, or for money advanced and where no rent is reserved;	The same duty as a Conveyance (No. 23) for a consideration equal to the amount or value of such fine or premium or advance as set forth in the lease.
(*c*) where the lease is granted for fine or premium, or for money advanced in addition to rent reserved.	The same duty as a Conveyance (No. 23) for a consideration equal to the amount or value of such fine or premium or advance as set forth in the lease in addition to the duty which would have been payable on such lease if no fine or premium or advance had been paid or delivered. Provided that, in any case when an agreement to lease is stamped with *ad valorem* stamp required for a lease, and a lease in pursuance of such agreement is subsequently executed, the duty on such lease shall not exceed twelve annas [one rupee *in Bihar*].
Exemptions. (*a*) Lease, executed in the case of a cultivator and for the purposes of cultivation (including a lease of trees for the production of food or drink), without the payment or delivery of any fine or premium when a definite term is expressed and such term does not exceed one year, or when the average annual rent reserved does not exceed one hundred rupees. In this exemption a lease for the purposes of cultivation shall include a lease of lands for cultivation together with a homestead or tank. (*b*) Leases of fisheries granted under the Burma Fisheries Act, 1905[1] or the Upper Burma Land and Revenue Regulation 1882.[2]	

LEG. REF.

[1] Burma Act III of 1905.

[2] Act III of 1889.

Description of instrument.	Proper stamp-duty.
Lease.—(*Contd.*) *Exemption.* When a lease undertakes to pay any recurring charge, such as Government revenue, the landlord's share of the cesses, or the owner's share of municipal rates or taxes which is by law recoverable from the lessor, the amount so agreed to be paid by the lessee shall be deemed to be part of the rent.	
36. Letter of Allotment of Shares in any company or proposed company, or in respect of any loan to be raised by any company or proposed company. *See also* CERTIFICATE OR OTHER DOCUMENT (No. 19).	[1][Two annas.]
37. Letter of Credit, that is to say, any instrument by which one person authorizes another to give credit to the person in whose favour it is drawn.	[1][Two annas.]
Letter of Guarantee. *See* AGREEMENT (No. 5.)	
38. Letter of Licence, that is to say, any agreement between a debtor and his creditors, that the letter shall, for a specified time, suspend their claims and allow the debtor to carry on business at his own discretion	
39. Memorandum of Association of a Company—	
(*a*) if accompanied by articles of association under section 37 of the Indian Companies Act, 1882;	India—Ten rupees. Punjab—Twelve rupees and annas eight only. Bengal, Bihar and Madras—Fifteen rupees.
(*b*) if not so accompanied.	India—Fifteen rupees. Bengal, Bihar, Bombay, Madras and Punjab-Thirty rupees. India—Forty rupees. Bombay, Bihar, Madras and Punjab--Eighty rupees.
Exemption. Memorandum of any association not formed for profit and registered under section 26 of the Indian Companies Act, 1882.	
40. Mortgage deed, not being [2][an AGREEMENT RELATING TO DEPOSIT OF TITLE-DEEES, PAWN OR PLEDGE (No. 6)], BOTTOMRY BOND (No. 16), MORTGAGE OF A CROP (No. 41), RESPONDENTIA BOND (No. 56), or SECURITY-BOND (No. 57).	
(*a*) when possession of the property or any part of the property comprised in such deed is given by the mortgagor or agreed to be given;	India, Bombay, Bengal, Bihar and Punjab—The same duty as a Conveyance (No. 23) for a consideration equal to the amount secured by such deed.
C. P. and Berar. When the amount secured by such deed does not exceed Rs. 50.	Eight annas.
Where it exceeds Rs. 50 but does not exceed Rs. 100 ..	One rupee.
Where it exceeds Rs. 100 but does not exceed Rs 200 ..	Two rupees.
Where it exceeds Rs. 200 but does not exceed Rs. 300 ..	Three rupees.
Where it exceeds Rs. 300 but does not exceed Rs. 400 ..	Four rupees.
Where it exceeds Rs. 4 0 but does not exceed Rs. 500 ..	Five rupees.
Where it exceeds Rs. 500 ..	The same duty as a Conveyance (No. 23) for a consideration equal to the amount secured by such deed.
(*b*) when [3][* * *] possession is not given or agreed to be given as aforesaid;	India, Bihar, Bombay, Bengal and Punjab.—The same duty as a Bond (No. 15) for the amount secured by such deed. Madras.—The same duty as a Bottomry Bond No. 16

LEG. REF.

[1]The words "two annas" were substituted for "one anna" by Act XLIII of 1923.

[2] These words were substituted for the words "AN AGREEMENT TO MORTGAGE (No. 6)" by S. 8 (4) (*a*) of the Indian Stamp (Amendment) Act, 1904 (XV of 1904).

[3] The words "at the time of execution" in cl. (*b*) of Art. 40 were repealed by S. (4) (*b*) of Act XV of 1904.

Description of instrument.	Proper stamp-duty.
Memorandum of Association (*Contd.*)	
C. P. and Berar. Where the amount secured does not exceed Rs 10 .. When it exceeds Rs. 10 but does not exceed Rs. 50 .. Where it exceeds Rs. 50 but does not exceed Rs. 100 .. Where it exceeds Rs. 100 but does not exceed Rs. 200 .. Where it exceeds Rs. 200 but does not exceed Rs. 300 .. Where it exceeds Rs. 300 but does not exceed Rs. 400 .. Where it exceeds Rs. 400 but does not exceed Rs. 500 .. Where it exceeds Rs. 500 ..	for the amount secured by such deed. Two annas. Four annas. Eight annas. One rupee. One rupee eight annas. Two rupees. Two rupees eight annas. The same duty as a Bond (No. 15) for the amount secured by such deed.
Explanation.—A mortgagor who gives to the mortgagee a power-of-attorney to collect rents or a lease of the property mortgaged or part thereof, is deemed to give possession within the meaning of this article.	
(*c*) when a collateral or auxiliary or additional or substituted security, or by way of further assurance for the above mentioned purpose where the principal or primary security is duly stamped—	
for every sum secured not exceeding Rs. 1,000;	India—Eight annas. Bengal, Bombay — One Rupee; Bihar, Madras and Punjab—Twelve annas.
and for every Rs. 1,000 or part thereof secured in excess of Rs. 1,000.	India—Eight annas. Bihar, Madras and Punjab—Twelve annas. Bengal and Bombay—One rupee.
Exemptions. (1) Instrument executed by persons taking advances under the Land Improvement Loans Act. 1883, or the Agriculturists' Loans Act, 1884, or by their sureties as security for the re-payment of such advances. (2) Letter of hypothecation accompanying a bill of exchange. (3) [1][* * * * * *]	
41. Mortgage of a crop, including any instrument evidencing an agreement to secure the re-payment of a loan made upon any mortgage of a crop, whether the crop is or is not in existence at the time of the mortgage—	
(*a*) when the loan is re-payable not more than three months from the date of the instrument—for every sum secured not exceeding Rs. 200;	India—One anna. Bengal, Bihar and Punjab—One a half-annas. Bombay and Madras—Two annas.
and for every Rs. 200 or part thereof secured in excees of Rs. 200;	India—One anna. Bengal, Bihar and Punjab—One and half-annas. Bombay and Madras—Two annas.
(*b*) when the loan is repayable more than three months, but not more than [2][eighteen months] from the date of the instrument—	
for every sum secured not exceeding Rs. 100;	India—[3][Two annas.] Bihar, Madras and Punjab—Three annas; Bengal and Bombay—Four annas.
and for every Rs. 100 or part thereof secured in excess of Rs. 100.	India—[3][Two annas.] Bihar, Punjab and Madras—Three annas. Bengal and Bombay—Four annas.

LEG. REF.

[1]The exemption "(3) Instrument of pledge or pawn of goods unattested" was repealed by S. 3 (4) (*c*) of the Indian Stamp (Amendment) Act (XV of 1904).

[2] These words were substituted for the words "one year" by S. 7 (2) of the Indian Stamp (Amendment) Act (V of 1906).

[3] The words "two annas" were substituted for "Four annas" by S. 8 (5) of the Act XV of 1904.

Description of Instrument.	Proper Stamp-duty.
Mortgage of a Crop—(*Contd.*) **42. Notarial Act**, that is to say, any instrument, endorsement, note, attestation, certificate or entry not being a PROTEST (No. 50) made or signed by a Notary Public in the execution of the duties of his office, or by any other person lawfully acting as a Notary Public. *See also* PROTEST OF BILL OR NOTE (No. 50).	India—One rupee. Bengal, Bombay and Punjab — Two rupees. Bihar and Madras—One rupee and eight annas.
[1][**43. Note or Memorandum** sent by a Broker or Agent to his principal intimating the purchase or sale on account of such principal— (*a*) of any goods exceeding in value twenty rupees;	Two annas. Bengal and Bombay—Annas four. Bihar, Madras and Punjab—Annas three.
(*b*) of any stock or marketable security exceeding in value twenty rupees[2] (not being a Government security).	India—subject to a maximum of ten rupees, one anna for every Rs. 10,000 or part thereof of the value of the stock or security. Bengal, Bihar, Madras and Punjab—subject to a maximum of rupees fifteen, two annas for every Rs. 10,000, or part thereof of the value of the stock or security.
In **Bengal**, for cl. (*b*), the following clauses are substituted, namely:— (*b*) of any stock or marketable security exceeding in value twenty rupees but not being a Government security;	Two annas for every Rs. 5,000 or part thereof of the value of the Stock or security.
(*c*) of a Government security.	Subject to maximum of twenty rupees, two annas for every Rs. 10,000, or part thereof of the value of the security;
In **Bombay** add:— "(*bb*) of a Government security.	Subject to a maximum of twenty rupees, two annas for every 10,000 rupees or part thereof of the value of the security.
44. Note of protest by the master of a ship. *See also* PROTEST BY THE MASTER OF A SHIP (No. 51).	India—Eight annas. Bengal, Bihar, Bombay and Madras—One rupee.
Order for the payment of money. *See* BILL OF EXCHANGE (No. 13).	
45. Partition—Instrument of [as defined by S. 2 (15)].	The same duty as Bond (No. 15)[3] for the amount of the value of the separated share or shares of the property.

N.B.—The largest share remaining after the property is partitioned (or if there are two or more shares of equal value and not smaller than any of the other shares, then one of such equal shares) shall be deemed to be that from which the other shares are separated:

LEG. REF.

[1] Art. 43 was substituted by Act VI of 910, S. 3 (iv).

[2] In Bombay the words within brackets have been inserted.

[3] Read Bottomry bond (No. 16) in Madras.

Description of Instrument.	Proper Stamp-duty.
Partition—(*Contd.*) Provided always that— (*a*) when an instrument of partition containing an agreement to divide property in severalty is executed and a partition is effected in pursuance of such agreement, the duty chargeable upon the instrument effecting such partition shall be reduced by the amount of duty paid in respect of the first instrument, but shall not be less than (eight annas).[1] (*b*) where land is held on Revenue settlement for a period not exceeding thirty years and paying the full assessment, the value for the purpose of duty shall be calculated at not more than five times the annual revenue; (*c*) where a final order for effecting a partition passed by any Revenue-authority or any Civil Court, or an award by an arbitrator directing a partition, is stamped with the stamp required for an instrument of partition, and an instrument of partition in pursuance of such order or award is subsequently executed, the duty on such instrument shall not exceed (eight annas).[1]	
46. Partnership—	
A.—INSTRUMENT OF—	
(*a*) where the capital of the partnership does not exceed Rs. 500;	Two rupees eight annas.[2]
(*b*) in any other case ..	Ten rupees.[3]
B.—DISSOLUTION OF ..	Five rupees.[4]
[**Pawn or Pledge**—*See* AGREEMENT RELATING TO DEPOSIT OF TITLE-DEEDS, PAWN OR PLEDGE (No. 6.)][5]	
47. Policy of Insurance—	If drawn singly. / If drawn in duplicate for each part.
[6]A. SEA INSURANCE (*See* section 7)—	
(1) for or upon any voyage—	
(i) where the premium or consideration does not exceed the rate of two annas or one-eight per centum of the amount insured by the policy;	One anna. / Half an anna.
(ii) in any other case, in respect of every full sum of [7][one thousand five hundred rupees] and also any fractional part of [7][one thousand five hundred rupees] insured by the policy;	[One anna.][7] / [Half an anna.][7]
(2) for time—	If drawn singly. / If drawn in duplicate for each part.
(iii) in respect of every full sum of one thousand rupees and also any fractional part of one thousand rupees insured by the policy—	
where the insurance shall be made for any time not exceeding six months;	Two annas. / One anna.
where the insurance shall be made for any time exceeding six months and not exceeding twelve months.]	Four annas. / Two annas.
[8][B. FIRE INSURANCE and other classes of insurance, not elsewhere included in this article, covering goods, merchandise, personal effects, crops and other property against loss or damage.]	
(1) in respect of an original policy—	
(i) when the sum insured does not exceed Rs. 5,000:	Eight annas.
(ii) in any other case:	One rupee.
and	

LEG. REF.

[1] Read 'twelve annas' in Madras and Punjab and Re. one in Bengal, Bihar and Bombay.

[2] In Bengal, Bihar, Bombay and Madras, read 'five rupees' for "two rupees eight annas."

[3] In Bengal, Bihar, Bombay and Madras read "twenty rupees" for "ten rupees."

[4] In Bombay, Bihar, Bengal, Madras, Rupees ten.

[5] This entry was inserted by S. 8 (6) of the Indian Stamp (Amendment) Act XV of 1904.

[6] These divisions A and B were substituted for the original divisions A and B by S. 7 (3) of the Indian Stamp (Amendment) Act (V of 1906).

[7] Inserted by Act XVIII of 1928.

[8] The words "Fire Insurance....damage" were substituted for "Fire Insurance" by Act XLIII of 1923.

Description of Instrument.	Proper stamp-duty.
Policy of Insurance—(*Contd.*) (2) in respect of each receipt for any payment of a premium on any renewal of an original policy.	One-half of the duty payable in respect of the original policy in addition to the amount, if any, chargeable under No. 23.
C.—ACCIDENT AND SICKNESS-INSURANCE— (*a*) against railway accident, valid for a single journey only. *Exemption.* When issued to a passenger travelling by the intermediate or the third class in any railway.	One anna.
(*b*) in any other case—for the maximum amount which may become payable in the case of any single accident or sickness where such amount does not exceed Rs. 1,000 and also where such amount exceeds Rs. 1,000, for every Rs. 1,000, or part thereof.	Two annas. [1][Provided that, in case of a policy of insurance against death, by accident when the annual premium payable does not exceed Rs 2-8-0 per Rs. 1,000, the duty on such instrument shall be one anna for every Rs. 1,000 or part thereof of the maximum amount which may become payable under it.]
[2][CC.—INSURANCE BY WAY OF INDEMNITY against liability to pay damages on account of accidents to workman employed by or under the insurer or against liability to pay compensation under the Workmen's Compensation Act, 1923, for every Rs. 100 or part thereof payable as premium.	One anna.]

	If draw singly.	If drawn in duplicate for each part.
[3][D.—LIFE INSURANCE OR OTHER INSURANCE NOT SPECIFICALLY PROVIDED FOR, except such a RE-INSURANCE as is described in Division E of this Article—		
(*i*) for every sum insured not exceeding Rs. 250 ..	Two annas.	One anna.
(*ii*) for every sum insured exceeding Rs. 250 but not exceeding Rs. 500.	Four annas.	Two annas
(*iii*) for every sum insured exceeding Rs. 500 but not exceeding Rs. 1,000 and also for every Rs. 1,000 or part thereof in excess of Rs. 1,000.	Six annas.	Three annas.

Exemption.

Policies of life-insurance granted by the Director-General of Post Offices in accordance with rules for Postal Life Insurance issued under the authority of the [Central Government].

E.—RE-INSURANCE BY AN INSURANCE COMPANY, which has granted a POLICY [4][of the nature specified in Division A or Division B of this Article] with another company by way of indemnity or gurantee against the payment on the original insurance of a certain part of the sum insured thereby.	One quarter of the duty payable in respect of the original insurance, but not less than one anna or more than one rupee.

General exemption.

Letter of cover or engagement to issue a policy of Insurance; Provided that unless such letter or engagement bears the stamp prescribed by this Act for such policy, nothing shall be claimable thereunder, nor shall it be available for any purpose, except to compel the delivery of the policy therein mentioned.

LEG. REF.

[1] Proviso added by Act XVIII of 1928.
[2] Inserted by Act XV of 1925, S. 2.
[3] Substituted by Act XVIII of 1928.
[4] The words "of the nature....Article" were substituted for "of sea insurance or a policy of fire insurance" by Act XLIII of 1923.

Description of Instrument.	Proper Stamp-duty.
48. **Power of attorney** [as defined by section 2 (21)], not being a PROXY (52)—	
(*a*) when executed for the sole purpose of procuring the registration of one or more documents in relation to a single transaction, or for admitting execution of one or more such documents;	India—Eight annas. Bihar and Madras—Twelve annas. Bengal, Bombay and Punjab—One rupee.
(*b*) when required in suits or proceedings under the Presidency Small Cause Courts Act, 1882;	India—Eight annas. Bengal, Bombay and Punjab—One rupee. Bihar and Madras—Twelve annas.
(*c*) when authorizing one person or more to act in a single transaction other than the case mentioned in clause (*a*);	India—One rupee. Bihar and Madras—One rupee eight annas Bengal, Bombay and Punjab—Two rupees.
(*d*) when authorizing not more than five persons to act jointly and severally in more than one transaction or generally;	India—Five rupees. Bihar and Madras—Seven rupees eight annas. Bengal, Bombay and Punjab—Ten rupees.
(*e*) when authorizing more than five but not more than ten persons to act jointly and severally in more than one transaction or generally;	India—Ten rupees. Bihar and Madras—Fifteen rupees. Bengal, Bombay and Punjab—Twenty rupees.
(*f*) when given for consideration, and authorizing the attorney to sell any immovable property;	The same duty as a Conveyance (No. 23) for the amount of the consideration.
(*g*) in any other case ..	India—One rupee for each person authorised. Bihar and Madras—One rupee eight annas for each person authorised. Bengal, Bombay and Punjab—Two rupees for each person authorised.
Explanation.—For the purposes of this Article more persons than one, when belonging to the same firm, shall be deemed to be one person.	*N.B.*—The term "registration" includes every operation incidental to registration under the Indian Registration Act, 1877.
[1]49 **Promissory Note** [as defined by section 2 (22)]—	
(*a*) when payable on demand—	
(*i*) when the amount or value does not exceed Rs. 250 ..	One anna.
(*ii*) when the amount or value exceeds Rs. 250 but does not exceed Rs. 1,000. ..	Two annas
(*iii*) in any other case	Four annas.
(*b*) when payable otherwise than on demand;	The same duty as a Bill of Exchange (No. 13) for the same amount payable otherwise than on demand.
50. **Protest of Bill or Note**, that is to say, any declaration in writing made by a Notary Public or other person lawfully acting as such, attesting the dishonour of a Bill of Exchange or promissory note.	India—One rupee Bengal, Bihar, Bombay, Madras and Punjab—Two rupees.
49. Promissory note [as defined by section 2 (22)].	The same duty as a Bill of Exchange (No. 13) according as it is payable on demand or payable otherwise than on demand, as the case may be.

LEG. REF.

[1]Substituted for the original Article by Act XLIII of 1923. The original article runs as follows :—

Description of instrument.	Proper stamp-duty.
51. Protest by the Master of a Ship, that is to say, any declaration of the particulars of her voyage drawn up by him with a view to the adjustment of losses or the calculation of averages, and every declaration in writing made by him against the charterers or the consignees for not loading or unloading the ship, when such declaration is attested or certified by a Notary Public or other person lawfully acting as such. *See also* NOTE OF PROTEST BY THE MASTER OF A SHIP (No. 44).	India—One rupee. Bengal, Bihar, Bombay and Madras—Two rupees.
52. Proxy empowering any person to vote at any one election of the member of a district or local board, or of a body of municipal commissioners or at any one meeting of (*a*) members of an incorporated company or other body corporate whose stock or funds is or are divided into shares and transferable, (*b*) a local authority, or (*c*) proprietors, members or contributors to the funds of any institution.	[1][Two annas.]
53. Receipt [as defined by section 2 (23)] for any money or other property, the amount or value of which exceeds twenty rupees. *Exemptions.* Receipt— (*a*) endorsed on, or contained in any instrument duly stamped, [2][or any instrument exempted] under the proviso to section 3 (instruments executed on behalf of the [3][Crown] [2][or any cheque or bill of exchange payable on demand] acknowledging the receipt of the consideration money therein expressed, or the receipt of any principal money, interest, or annuity, or other periodical payment thereby secured; (*b*) for any payment of money without consideration; (*c*) for any payment of rent by a cultivator on account of land assessed to Government revenue or (in the Presidencies of Fort St. George and Bombay) of Inam land; (*d*) for pay or allowances by non-commissioned [5][or petty] officers [4][soldier [6][sailor] or airmen] of [4][His Majesty's military [5][Naval] or air forces] when serving in such capacity, or by mounted police constable; (*e*) given by holders of family-certificates in cases where the person, from whose pay or allowances the sum comprised in the receipt has been assigned is a non-commissioned [5][or petty] officer [3][soldier [6][Sailor] or airmen] of [4][any of the said forces] and serving in such capacity; (*f*) for pensions or allowances by persons receiving such pensions or allowances in respect of their services as such non-commissioned [or petty] officers [4][soldiers, sailors or airmen] and not serving the [3][Crown] in any other capacity; (*g*) given by a headman or lambardar for land revenue or taxes collected by him; (*h*) given for money or securities for money deposited in the hands of any banker, to be accounted for: Provided that the same is not expressed to be received of, or by the hands of, any other than the person to whom the same is to be accounted for: Provi ed also that this exemption shall not extend to a receipt or acknowledgment for any sum paid or deposited for, or upon a letter of allotment of a share, or in respect of a call upon any scrip or share of, or in, any incorporated company or other body corporate or such proposed or intended company or body or in respect of a debenture being a marketable security. [6][*See also* POLICY OF INSURANCE No. 47-B (2)].	One anna.
54. Reconveyance of Mortgaged Property— (*a*) if the consideration for which the property was mortgaged does not exceed Rs. 1 000;	The same duty as a Conveyance (No. 23)[7] for the

LEG. REF.

[1]The words "Two annas" were substituted for "One anna" by Act XLIII of 1923.

[2]Substituted and inserted by Act XVIII of 1928.

[3]Substituted by A.O., 1937.

[4]Inserted by Act X of 1927, in cls. (*d*), (*e*) and (*f*).

[5]Inserted by Act XXXV of 1934.

[6]This note was added by S. 7 (4) of the Indian Stamp (Amendment) Act (V of 1906).

[7]In Bombay read 'Bond' for 'Conveyance.'

Description of Instrument.	Proper Stamp-duty.
Reconveyance of Mortgaged Property—(*Contd.*)	
(*b*) in ony other case ..	amount of such consideration as set forth in the Reconveyance. India and Bombay—Ten rupees. Bengal, Bihar, Madras and Punjab — Fifteen rupees.
55. Release, that is to say, any instrument [1][(not being such a release as is provided for by section 23-A)] whereby a person renounces a claim upon another person, or against any specified property—	
(*a*) if the amount or value of the claim does not exceed Rs. 1,000;	India, Bengal, Bihar and Bombay—The same duty as a Bond (No. 15) for such amount or value as set forth in the release, Madras and Punjab—The same duty as a Bottomry Bond (No. 16) for such amount or value as set forth in the Release.
(*b*) in any other case ..	India—Five rupees. Bihar, Madras and Punjab—Seven rupees and eight annas. Bengal and Bombay—Ten rupees,
56. Respondentia Bond, that is to say, any instrument securing a loan on the cargo laden or to be laden on board a ship and making repayment contingent on the arrival of the cargo at the port of destination.	India, Bihar, and Bombay—The same duty as a Bond (No. 15) for the amount of the loan secured. Bengal, Madras and Punjab—The same duty as a Bottomry Bond (No. 16) for the amount of the loan secured.
Revocotion of any trust or settlement. *See* SETTLEMENT (No. 58); TRUST (No 64).	
57. Security Bond or Mortgage-deed executed by way of security[" for the due discharge of liability or" *in Bengal—Bengal Act VII of 1939*] for the due execution of an office or to acconnt for money or other property received by virtue thereof, or executed by a surety to secure the due performance of a contract—	
(*a*) when the amount secured does not exceed Rs. 1,000; ..	India, Bengal, Bihar, Bombay and Punjab—The same duty as a Bond (No. 15) for the amount secured Madras—The same duty as a Bottomry Bond (No. 16) for the amount secured.
(*b*) in any other case ..	Ind a—Five rupees. Bihar, Madras and Punjab—Seven rupees and eight annas. Bengal and Bombay—Ten rupees.
Exemptions. Bond or other instrument, when executed—	
(*a*) by headman nominated under rules framed in accorddance with the Bengal Irrigation Act, 1876, section 99, for the due performance of their duties under that Act;	
(*b*) by any person for the purpose of guaranteeing that the local income derived from private subscriptions to a charitable dispensary or hospital or any other object of public utility shall not be less than a specified sum per mensem;	

LEG. REF.

[1]The parenthesis was inserted by S. 8 (7) of the Indian Stamp (Amendment) Act (XV. of 1904.)

Description of Instrument.	Proper Stamp-duty.
Security Bond or Mortgage deed—(*Contd.*) (*c*) under No. 3-A of rules made by the [Provincial Government of Bombay] under section 70 of the Bombay Irrigation Act, 1879; (*d*) executed by persons taking advances under the Land Improvement Loans Act, 1883, of the Agriculturists' Loans Act, 1884, or by their sureties as security for their payment of such advances; (*e*) executed by [1][Officers of Crown] or their sureties to secure the due execution of an office or the due accounting for money or other property received by virtue thereof.	
58. Settlement— A.—INSTRUMENT OF (including a deed of dower) ..	India Bihar, and Bombay —The same duty as a Bond (No. 15) for a sum equal to the amount or value of the property settled as set forth in such settlement; Bengal, Madras and Punjab—The same duty as a Bottomry Bond (No. 16) for a sum equal to the amount or value of the property settled as set forth in such settlement: Provided that, where an agreement to settle is stamped with the stamp required for an instrument of settlement, and an instrument of settlement, in pursuance of such agreement, is subsequently executed, the duty on such instrument shall not exceed eight annas.[2]
Exemptions. (*a*) Deed of dower executed on the occasion of a marriage between Muhammadans. [3][(*b*) Hludassa, that is to say, any settlement of immoveable property executed by a Buddhist in Burma for a religious purpose, in which no value has been specified and on which a duty of Rs. 10 has been paid.]	
B.—REVOCATION OF For immoveable property in certain **Bombay** cities— The duty on instruments of settlement of property situate in	India, Bihar and Bombay —The same duty as a Bond (No. 15) for a sum equal to the amount or value of the property concerned as set forth in the instrument of Revocation but not exceeding ten rupees (fifteen rupees *in Bihar*). Bengal, Madras and Punjab—The same duty as a Bottomry Bond (No. 16) for a sum equal to the amount or value of the property concerned as set forth in the instrument of Revocation but not exceeding fifteen rupees.

LEG. REF.

[1]In Bengal, substitute the words "servants of the Crown" [*Vide* A.O., 1937.]

[2]Bihar, Madras and Punjab read 'twelve annas' for 'eight annas' and Bengal and Bombay read 'one rupee' for 'eight annas'.

[3]Omitted in Madras by A.O., 1937.

Description of Instrument.	Proper Stamp-duty.
Settlement—(*Contd.*) the cities of Bombay, Ahmedabad, Poona and Karachi was enhanced by Bombay Act II of 1932 which was later amended by Bombay Act VI of 1932 so as to exempt from the enhanced duties the properties settled for a charitable or religious purpose. The entry as regards property situate in these cities is as follows:— A.—INSTRUMENT OF (including a deed of dower) (*i*) where the settlement is made for a religious or charitable purpose;	The same duty as a Bond (No, 15) for a sum equal to the amount or value of the property settled as set forth in such settlement.
(*ii*) in any other case ..	The same duty as is leviable on a Conveyance (No. 23) under the Bombay Finance (Amendment) Act, 1932, for a consideration equal to the amount or value of the property settled as set forth in such settlement: Provided that, where an agreement to settle is stamped with the stamp required for an instrument of settlement, and an instrument in pursuance of such agreement is subsequently executed, the duty on such instrument shall not exceed one rupee.
Exemptions. (Same as in the main Act)	
B—REVOCATION OF ..	The same duty as is leviable on a Conveyance (No. 23) under the Bombay Finance (Amendmeut) Act, 1932, for a consideration equal to the amount or value of the property concerned as set forth in the instrument of revocation but not exceeding ten rupees.
See also TRUST (No. 64.)	
59. Share Warrants to bearer issued under the Companies Act, 1882	[1][One and a half times] the duty payable on a Conveyance (No. 23) for a consideration equal to the nominal amount of the shares specified in the warrant.
Exemptions. Share warrant when issued by a company in pursuance of the Indian Companies Act, 1882, section 30, to have effect only upon payment as composition for that duty, to the Collector of Stamp revenue, or— (*a*) [1][one and a half times] per centum of the whole subscribed capital of the company, or (*b*) if any company which has paid the said duty or composition in full, subsequently issues an addition to its subscribed capital [1][one and a half times] per centum of the additional capital so issued.	

Leg Ref.

[1]In the second column for the words "three-quarters" the words "one and a half times" were substituted and in exemptions

Description of Instrument.	Proper Stamp-duty.
Scrip. *See* CERTIFICATE (No. 19).	
60. Shipping Order for or relating to the conveyance of goods on board of any vessel.	One anna.
61. Surrender of lease—	
(*a*) When the duty with which the lease is chargeable does not exceed five rupees seven rupees eight annas (*in Bengal, Bihar, Madras and Punjab*).	The duty with which such lease is chargeable.
(*b*) In any other case ..	India—Five rupees. Bengal, Bihar, Madras and Punjab—Seven rupees and eight annas.
Exemption. Surrender of lease, when such lease is exempted from duty.	
62. Transfer (whether with or without consideration)—	
(*a*) of shares in an incorporated company or other body corporate;	India, Bengal, Bihar Madras and Punjab—[1][One half] of the duty payable on a Conveyance (No. 23) for a consideration equal to the value of the share. Bombay—Twelve annas for every Rs. 100 or part thereof of the value of the share (Act I of 1935).
(*b*) of debentures being marketable securities, whether the debenture is liable to duty or not, except debentures provided for by section 8;	India, Bengal, Bihar, Madras and Punjab—[1][One half] of the duty payable on a Conveyance (No. 23) for a consideration equal to the face amount of the debenture. Bombay—Twelve annas for every Rs. 100 or part thereof of the face amount of the debenture (Act I of 1935).
(*c*) of any interest secured by a bond, mortgage-deed [in respect of which the duty has been paid under Article No. 40—*Inserted in Bengal by Act VII of* 1937.] or policy of insurance—	The duty with which such bond, mortgage-deed or policy of insurance is chargeable.
(*i*) if the duty on such bond, mortgage-deed or policy does not exceed five rupees; [seven rupees eight annas *in Madras*.]	India—Five rupees. Bihar, Madras and Punjab—Seven rupees eight annas.
(*ii*) in any other case ..	Bengal and Bombay—Ten rupees. India and Bombay—Ten rupees. Bengal, Madras and Punjab—Fifteen rupees. Bihar—Twenty rupees.
(*d*) of any property under the Administrator-General's Act, 1874, section 31;	India—Five rupees or such smaller amount as may be chargeable under clauses (*a*) to (*c*) of this article. Bengal, Bihar, Madras and Punjab—Seven rupees eight annas or such smaller amount as may be charge-
(*e*) of any trust property without consideration from one trustee to another trustee or from a trustee to a beneficiary.	

LEG. REF.

"one and a half times" were substituted for "three-quarters" by Act V of 1910, S. 3 (v).

[1]In the second column of (*a*) and (*b*) the words "one half" were substituted for "one quarter" by Act VI of 1910, S. 3 (*vi*).

Description of Instrument.	Proper Stamp-duty.
Transfer—(*Contd*) *Exemptions.* Transfers by endorsement— (*a*) of a bill of exchange, cheque or promissory note; (*b*) of a bill of lading, delivery order, warrant for goods, or other mercantitle document of title to goods; (*c*) of a policy of insurance; (*d*) of securities of the [Central Government] or [the Provincial Government]. See also *section* 8.	able under clauses (*a*) to (*c*) of this article.
63. Transfer of lease by way of assignment and not by way of under-lease.	The stamp duty as a Conveyance (No. 23) for a consideration equal to the amount of the consideration for the transfer.
Exemption. Transfer of any lease exempt from duty.	
64. Trust— A.—DECLARATION OF—of, or concerning, any property when made by any writing not being a WILL.	India, Bengal and Bombay—The same duty as a Bond (No. 15) for a sum equal to the amount or value of the property concerned as set forth in the instrument, but not exceeding fifteen rupees [twenty two rupees eight annas *in Bihar*.] Bengal, Madras and Punjab—The same duty as a Bottomry Bond (No. 16) for a sum equal to the amount or value of the property concerned as set forth in the instrument but not exceeding Rs. 22-8-0.
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